W A R N I N G

This is a case under the *Child, Youth and Family Services Act, 2017* and subject to subsections 87(8) and 87(9) of this legislation. These subsections and subsection 142(3) of the *Child, Youth and Services Act, 2017*, which deals with the consequences of failure to comply, read as follows:

87(8) *Prohibition re identifying child* — 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, or the child's parent or foster parent or a member of the child's family.

(9) *Prohibition re identifying person charged* — The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.

142(3) *Offences re: publication* — A person who contravenes subsection 87(8) or 134(11) (publication of identifying information) or an order prohibiting publication made under clause 87(7)(*c*) or subsection 87(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than three years, or to both.

COURT OF APPEAL FOR ONTARIO

CITATION: Catholic Children's Aid Society of Toronto v. S.K.S., 2022 ONCA 228
DATE: 20220321
DOCKET: C69908, C69910 & C69919

Huscroft, Sossin and Favreau JJ.A.

BETWEEN

DOCKET: C69908

Catholic Children's Aid Society of Toronto

Applicant (Respondent)

and

S.K.S.

Respondent (Respondent)

AND BETWEEN

DOCKET: C69910

Catholic Children's Aid Society of Toronto

Applicant (Respondent)

and

S.K.S.

Respondent (Appellant)

AND BETWEEN

DOCKET: C69919

Catholic Children's Aid Society of Toronto

Applicant (Appellant)

and

S.K.S.

Respondent (Respondent)

Jessica Gagne, for the appellant (C69910)/ respondent (C69908 & C69919) S.K.S.

Caterina Tempesta and Madeleine Sarick, for the appellant (C69908)/ respondent (C69910 & C69919) Office of the Children's Lawyer

Fatima Husain and Marshall Matias, for the appellant (C69919)/ respondent (C69908 & C69910) Catholic Children's Aid Society of Toronto

Jocelyn Espejo-Clarke and Alex Kam, for the respondent (C69908, C69910 & C69919) Minister of Public Safety and Emergency Preparedness

Cheryl Robinson and Aviva Basman, for the intervener (C69908, C69910 & C69919) Canadian Association of Refugee Lawyers

Vasu Naik, for the intervener (C69908, C69910 & C69919) Canadian Civil Liberties Association

Heard: February 3, 2022 by video conference

On appeal from the order of Justice Michael A. Penny of the Superior Court of Justice, dated September 9, 2013, with reasons at 2021 ONSC 5813, dismissing an appeal from the order of Justice Melanie Sager, dated April 1, 2021, with reasons at 2021 ONCJ 199.

Sossin J.A.:

OVERVIEW

[1] This appeal concerns the interaction between a provincial legislative scheme governing child protection and a federal legislative scheme for removing those without citizenship or immigration status from Canada.

[2] Specifically at issue is an order for disclosure by a judge of the Ontario Court of Justice ("OCJ") at a status hearing initiated by the Catholic Children's Aid Society of Toronto ("CCAS") pursuant to s. 113 of the *Child, Youth, and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 ("*CYFSA*").

[3] The purpose of the status hearing was to consider extending a supervision order governing the CCAS's involvement in a family where child protection concerns had been established. The disclosure was sought by the federal Minister of Public Safety and Emergency Preparedness (the "Minister"), pursuant to s. 50(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 ("*IRPA*"). That section provides that an opportunity for the Minister to make submissions in another judicial proceeding is a precondition to that proceeding having the effect of staying a removal order.

[4] The motion judge granted the disclosure order, subject to certain safeguards to protect the confidentiality of the record and prevent the disclosure from being used for any purpose outside the child protection proceedings.

[5] Both the CCAS and Office of the Children's Lawyer (OCL) appealed those orders to the Superior Court. The Canadian Civil Liberties Association ("CCLA") and Canadian Association of Refugee Lawyers ("CARL") were permitted to intervene.

[6] The Superior Court appeal judge dismissed the appeal from the motion judge's order. Ms. S, the CCAS and OCL, the appellants, now appeal to this court.

[7] For the reasons that follow, I would allow the appeal.

BACKGROUND

[8] In order to better understand the interaction between the Minister's role under the *IRPA* and child protection proceedings under the *CYFSA* in this case, some background on the family is needed.

[9] I turn first to the immigration and refugee context.

[10] Ms. S. arrived in Canada with her oldest daughter and her only son in December 2007. The son was just two years of age at the time. Ms. S. lost her immigration status in Canada in May 2008. She subsequently gave birth to her youngest daughter, who is a Canadian citizen.

[11] Ms. S. made a claim for refugee status in May 2009. That claim was refused in July 2011, and she and her two older children then became subject to an enforceable removal order. A subsequent appeal and an application to remain in Canada on the basis of humanitarian and compassionate grounds were refused. A further application made in June 2019 has not yet been determined. Ms. S. and her son remain under a valid removal order at this time.

[12] The child protection context began with the CCAS's involvement with Ms. S. and her children in December 2010, following an investigation into Ms. S.'s alleged

physical abuse of her son. The CCAS remains involved with the family at the present time.

[13] In 2013, Ms. S. was charged with assault and assault with a weapon against her eldest daughter. Her eldest daughter has since become an adult and no longer has a role in these proceedings. The terms of Ms. S.'s recognizance prohibited any unsupervised contact between Ms. S. and her children. The two younger children were removed from her care and the CCAS commenced protection proceedings. Ms. S. was ultimately convicted of the charges under the *Criminal Code*, R.S.C., 1985 c. C-46.

[14] At this point, the child protection proceedings and immigration proceedings intersected.

[15] The Minister was made aware of the charges and Ms. S.'s subsequent convictions, and determined that Ms. S. was "inadmissible" to Canada for "serious criminality" pursuant to s. 36(1)(a) of the *IRPA*. Ms. S. was then issued a deportation order with no right to appeal.

[16] In November 2014, the two younger children were returned to Ms. S.'s care, subject to an order of supervision by the CCAS on specified terms and conditions. A further supervision order was made on February 18, 2015, and subsequent orders relating to supervision have been made on November 9, 2015, August 17, 2016, June 5, 2017, March 26, 2018, January 9, 2019, and January 14, 2020. In

all, there have been at least eight supervision orders and seven status review applications made in this case since 2014. While the supervision orders varied, they all included a range of measures intended to provide support to the family, including a requirement that Ms. S. refrain from using physical discipline and attend counselling, as well as measures to implement recommendations arising from the psychological assessments of the children.

[17] At the hearing on March 26, 2018, counsel for the Minister advised the court that the Minister was not acting on the removal order, and would instead continue to monitor the child protection proceedings.

[18] The child protection and immigration proceedings came together again in September 2019, when the Minister notified Ms. S. that her removal date had been set for October 20, 2019. The CCAS brought a motion before the Ontario Court of Justice seeking a non-removal order with respect to Ms. S.'s two children. Ms. S.'s youngest daughter was represented by counsel at that hearing, which took place on November 27, 2019 before Spence J. The Minister was also served with the notice of motion, including all supporting evidence, and was present at the hearing as well.

[19] The Minister had previously sought to be added as a party to the child protection proceedings. The CCAS and OCL opposed the Minister being granted such status, though they did not oppose the Minister having the opportunity to

make submissions on the non-removal order being sought. On that basis, the Minister withdrew the motion. The motion judge issued a temporary non-removal order.

[20] In reasons dated December 19, 2019, Spence J. found that the supervision order dated January 9, 2019 did not operate as an automatic stay of a removal order under s. 50(a) of the *IRPA*, as the Minister had not been given an opportunity to make submissions: *Catholic Children's Aid Society of Toronto v. S.K.S.*, 2019 ONCJ 899, at para. 89. However, according to Spence J., the Minister was given an "unfettered" opportunity to make submissions at the hearing before him in November 2019.

[21] Spence J. did not accept the Minister's argument that his submissions were "made in a vacuum" and not "meaningful" because no disclosure was provided beforehand. Spence J. stated that the Minister had been privy to a range of details about the supervision orders by his appearances at status hearings since 2017, and that he could have sought to be added as a party or sought disclosure as a non-party. He concluded, at para. 159, that the Minister's argument was "disingenuous". Spence J. found as a fact that the Minister had been granted an "ample opportunity" to make "extensive submissions" and that the Minister had "fully embraced" this opportunity.

[22] The Minister's submissions were directed toward whether there was a genuine *lis* between the parties. Spence J. found, in the circumstances of this case, that a *lis* was created when the CCAS first sought a protection order, and continued through the various extensions and variations of supervision orders from that time forward.

[23] Spence J. made a new supervision order. He found a non-removal order was a "necessary incident of" the supervision order, as the terms of the supervision order could not be fulfilled if the family were deported to St. Lucia.

[24] The CCAS brought a further status review application, which was heard on January 14, 2020. The OCJ made another six-month supervision order on consent, placing the children with Ms. S. on specified terms and conditions. The Minister did not attend that status hearing.

[25] In June 2020, the CCAS served its status review application. In September 2020, the Minister requested a copy of the Agreed Statement of Facts in the status review proceeding as well as a copy of the parties' pleadings. In October 2020, the Minister indicated that he intended to bring a motion for disclosure under r. 20(5) of the *Family Law Rules*, O. Reg. 114/99 (*FLR*s).

[26] In December 2020, the parties attended the status hearing at the root of this appeal in order to settle a new supervision order. At that hearing, the Minister reiterated his intention to bring a motion for disclosure prior to making submissions

on the new supervision order. The hearing was adjourned until March 2021 to allow for this motion to be heard and decided.

[27] In March 2021, the motion judge heard the motion by the Minister for what was characterized as “nominal disclosure.”

[28] In her Order dated April 1, 2021, the motion judge granted the Minister’s motion and ordered the Society to provide the Minister with:

> (a) all status review applications and all agreed statements of fact filed with the court in this matter since 2015; and
>
> (b) all future status review applications and all statements of agreed fact in this matter upon which the parties intend to rely in seeking any further orders in the future.

[29] The motion judge also ordered that the Minister be permitted to have counsel attend in court and make submissions on the supervision order being requested by the parties insofar as it has an impact on the Minister's interests.

[30] The disclosure order was subject to certain restrictions, including that the Minister was precluded from using the documents for any purpose other than to decide if he intended to make submissions to the Court and to assist in preparing those submissions, and that the Minister was prohibited from copying or distributing or filing these documents in any other proceeding.

[31] The CCAS and OCL appealed the April 1, 2021 Order to a judge of the Superior Court (the “appeal judge”). That appeal was heard on July 19, 2021, with a decision released on September 13, 2021. The appeal judge found no error by the motion judge which would warrant intervention.

[32] The OCL, the CCAS, and Ms. S. filed their Notices of Appeal to this court in October 2021.

LEGISLATIVE CONTEXT

IRPA

[33] Section 50 of the *IRPA* provides:

> 50 A removal order is stayed
>
> > if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order;

[34] Section 36(1)(a) of the *IRPA* provides:

> 36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for
>
> > (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

CYFSA

[35] The preamble of the *CYFSA*, which governs child protection proceedings, states that children are individuals with rights to be respected and voices to be heard.

[36] Section 1(1) of the *CYFSA*, stipulates that "[t]he paramount purpose of this Act is to promote the best interests, protection and well-being of children."

[37] Section 1(2) sets out additional purposes of the Act, so long as they are consistent with the best interests, protection and well-being of children. These include recognition that, "[w]hile parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent": s. 1(2)(1).

[38] Section 79(1) of the *CYFSA* identifies the statutory parties to a proceeding under the Act, who have a right to participate in a hearing, and who are entitled to notice of a proceeding under the Act:

> Parties
>
> 79 (1) The following are parties to a proceeding under this Part:
>
> 1. The applicant.
> 2. The society having jurisdiction in the matter.
> 3. The child's parent.
> 4. In the case of a First Nations, Inuk or Métis child, the persons described in paragraphs 1, 2 and 3 and a

> representative chosen by each of the child's bands and First Nations, Inuit or Métis communities.
>
> …
>
> Right to participate
>
> (3) Any person, including a foster parent, who has cared for the child continuously during the six months immediately before the hearing,
>
> (a) is entitled to the same notice of the proceeding as a party;
>
> (b) may be present at the hearing;
>
> (c) may be represented by a lawyer; and
>
> (d) may make submissions to the court,
>
> but shall take no further part in the hearing without leave of the court.

[39] Section 87(4) of the *CYFSA* sets out that a hearing shall be held in the absence of the public, subject to subsection (5), unless the court orders that the hearing be held in public after considering both the wishes and interests of the parties; and whether the presence of the public would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding. Section 87(8) of the *CYFSA* sets out that 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, or the child's parent or foster parent or a member of the child's family.

Family Law Rules

[40] Rules 1 and 2 of the *FLR*s set out, in part, the proceedings to which the rules apply, the court's power to make certain procedural orders, and matters of interpretation.

[41] Most significantly, r. 2(2) establishes that the primary objective of the rules is to enable the court to deal with cases justly. Rule 2(4) requires the parties and their counsel to help the court to promote the primary objective of the rules.

[42] Rule 7 of the *FLRs* also clarifies who is a party to a case or a motion, including affected parties to a motion, and r. 7(5) provides for who may be added as a party to a case or motion.

[43] Rule 19(11) provides an avenue to obtain documents from a non-party on motion, with notice served on every party, and on the non-party by special service.

[44] Rule 20(3) states that in a child protection case, a party is entitled to obtain information from another party about any issue in the case by questioning the other party, by affidavit, or by another method, in which case the party shall serve the other party with a request for information.

[45] Under r. 20(5), in a child protection case, the court may order that a non-party be questioned by a party or disclose information to a party, if it would be unfair for the party who wants the questioning or disclosure to carry on the case

without it, the information is not easily available by another method, and the question or disclosure will not cause unacceptable delay or undue expense.

[46] Subrules 20(24-26) of the *FLR*s place limits on the use of any information obtained under rr. 13, 19, or 20. More specifically, r. 20(24) provides that, when a party obtains evidence under this rule, r. 13 (financial disclosure) or r. 19 (document disclosure), the party and the party's lawyer may use the evidence and any information obtained from it only for the purposes of the case in which the evidence was obtained, subject to the specific exceptions in r. 20(25), or if the court, on motion, gives a party permission, provided the interests of justice outweigh any harm that would result to the party who provided the evidence.

ANALYSIS

[47] The OCL's Notice of Appeal of October 13, 2021 raises 14 specific grounds of appeal. In its factum, the OCL groups these issues into four categories:

(1) The appeal judge erred in affirming the motion judge's decision that she had jurisdiction to make a disclosure order to the Minister, a non-party to the child protection proceeding;

(2) The appeal judge erred in prioritizing the Minister's interest in disclosure over the interests of the children, contrary to the *CYFSA*, the *Charter*, the *Convention on the Rights of the Child*, and binding appellate authority;

(3) The appeal judge erred in interpreting s. 50(a) of the *IRPA* as conferring on the Minister a right to make submissions on the child protection *lis*; and

(4) The appeal judge erred in failing to find that the motion judge violated r. 17(24) of the *Family Law Rules* or that her comments on the interpretation of s. 50(a) of the *IRPA* gave rise to a reasonable apprehension of bias.

[48] These categories cover the issues on appeal raised by the other appellants, Ms. S. and the CCAS, as well.

[49] I will review each of these categories in turn.

The Standard of Review

[50] The appellate standard of review on appeal was set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Under *Housen*, the standard of review on a question of law is correctness. The standard of review on a question of fact is palpable and overriding error. For questions of mixed fact and law, the standard of review is also palpable and overriding error unless there is an extricable question of law, in which case the standard of review on that extricable question is correctness.

[51] Jurisdiction is a question of law. For the allegation of bias and a breach of the duty of fairness, the standard of review is also correctness.

(1) The motion judge had jurisdiction to make the disclosure order

[52] The first ground of appeal is that the motion judge had no jurisdiction to order the disclosure of confidential documents from the child protection proceeding to the Minister, and the appeal judge erred in upholding the motion judge's finding of jurisdiction.

[53] According to the CCAS, the jurisdiction of the motion judge to order a party to provide disclosure to a non-party must flow from a connection to the paramount purpose of the *CYFSA*. The CCAS argues that the Minister's purpose in seeking disclosure is not to further the best interests of the children, but to further the removal of Ms. S. and her son.

[54] The OCL echoes this argument, but also raises the limits of the OCJ as a statutory court lacking inherent jurisdiction. The OCL submits that neither the *Courts of Justice Act*, R.S.O. 1990, c. C.43, nor the *CYFSA* provides authority for the disclosure of confidential child protection documents to a non-party.

[55] The motion judge accepted that the *CYFSA* did not expressly envision disclosure to the Minister, but reiterated that it did not prohibit disclosure either. Accordingly, she relied on the broad authority conferred by the *FLR*s as affording the necessary discretion to make the disclosure order in this case, in addition to the necessity that a statutory court, such as the OCJ, be able to control its own process. The motion judge stated, at para. 116:

> The case before me demonstrates the importance of statutory courts being empowered to control its process as it involves managing the interests of the parties, promoting the best interests of the children and controlling the involvement of a third party with a legitimate interest who represents the Canadian government and answers to the public.

[56] The appeal judge reviewed the motion judge's reasons on the question of jurisdiction, and concluded, at para. 68:

> I can find no error in the motion judge's conclusion that, as a matter of law, she had jurisdiction to order production of relevant documentation to a third party in appropriate circumstances. The scope of the disclosure order, and its terms and conditions, fall within the exercise of discretion available to the motion judge in a case conference, particularly where she would be hearing the motion. Her order discloses no error of principle and the appellants have not convinced me that, in making this order, she was clearly wrong.

[57] The appeal judge also specifically upheld the motion judge's inclusion of future supervision applications in her disclosure order, observing that the application of the order to future applications was subject to future reconsideration as well.

[58] In my view, the appeal judge committed no error in this analysis. Absent a provision of the *CYFSA* precluding a judge of the OCJ from making such a disclosure order, the broad discretion afforded to the judge under the *FLR*s confers jurisdiction on the OCJ to make disclosure orders including, where warranted, to the Minister exercising his mandate under s. 50(a) of the *IRPA*.

[59] The appellants point to no provision of the *CYFSA* that constitutes an express bar to disclosure. However, they argue that s. 87(8) of the *CYFSA* implicitly bars disclosure of the kind sought by the Minister. This provision states, "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, or the child's parent or foster parent or a member of the child's family."

[60] While this provision speaks to the constraints that must accompany disclosure orders in a child protection proceeding, it does not remove a judge's jurisdiction to make such an order.

[61] The jurisdiction of the OCJ to make a disclosure order to a non-party in this context is also supported by the OCJ's case law. In *Children's Lawyer v. N.N.D.*, [2014] O.J. No. 6396 (Ont. C.J.), for example, a limited disclosure order was made to the Minister responsible for a removal order in a proceeding under the *FLR*s.

[62] I would therefore dismiss this ground of appeal.

(2) The motion judge did not prioritize the interests of the Minister over the interests of the family subject to the child protection proceedings

[63] The second ground of appeal is that, even in the face of jurisdiction to make a disclosure order, the appeal judge erred in upholding the motion judge's exercise of that jurisdiction. Specifically, the appellants submit that there were errors below

in prioritizing the interests of the Minister over the heightened privacy interests of the children subject to the supervision proceeding, contrary to the *CYFSA*, the *Charter*, international conventions and governing case law.

[64] I disagree that the motion judge improperly prioritized the interests of the Minister over the interests of the children.

[65] In my view, the task before the court in this case is to interpret the import of s. 50(a) of the *IRPA* harmoniously with the best interests of the child(ren) and the privacy constraints of the *CYFSA*.

[66] I do not agree with the appellants that the disclosure of any information to the Minister, in any child protection case, under any circumstances constitutes a breach of the protections inherent in the *CYFSA*.

[67] It is important to note that the effect of engaging the stay of removal provided for by s. 50(a) is potentially in the children's best interests. In this way, giving effect to the condition of the stay that requires the Minister to have "the opportunity to make submissions" should not be viewed as inherently at odds with the *CYFSA*. I agree with the motion judge when she said, at para. 58, that granting the Minister the opportunity to make informed and meaningful submissions ensures the protection of its order and therefore the best interests of the children governed by that order.

[68] Further, I do not agree that restricted disclosure to the Minister is tantamount to making that information public. The *CYFSA* explicitly provides that the presence of two media representatives at a hearing is still, "a hearing that is held in the absence of public": at s. 87(5). Similarly, the disclosure of certain information to a government agent subject to explicit privacy protections does not implicitly offend the prohibition on publishing or making public information that has the effect of identifying a child in s. 87(8).

[69] At the same time, as I will discuss in the next section, in my view a nuanced analysis is required to ensure that any disclosure order for the purpose of "meaningful" submissions by the Minister pursuant to s. 50(a) of the *IRPA* in the child protection context would be as minimally invasive of the children's privacy interests as possible.

(3) Proper approach for interpreting the intersection of s. 50(a) of the *IRPA* and the *CYFSA*

[70] The third ground of appeal is that the motion judge erred in interpreting s. 50(a) of the *IRPA* as permitting the Minister to make submissions on the child protection *lis*, and the appeal judge erred in upholding that interpretation.

[71] I will discuss this ground of appeal in two parts: first, the significance of the genuine *lis* test in the context of s. 50(a); and second, the appropriate scope of the Minister's submissions.

(i) Genuine *lis*

[72] With respect to s. 50(a) and the decision of the motion judge, the appeal judge held, at para. 57:

> I am unable to find any error of law in the motion judge's interpretation of s. 50(a) of the *IRPA* or her assessment of the Minister's ability to address matters falling within the scope of the Minister's legitimate interest. The appellants' attack on the motion judge's concern that the Minister be permitted to make "meaningful" submissions is particularly troubling. What do the appellants want — that the Minister be limited to making un-meaningful submissions? It seems that perhaps this is so.

[73] Section 50(a) of the *IRPA* provides,

> 50 A removal order is stayed
>
> (a) if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order[.]

[74] This provision has been interpreted and applied in the family law setting in a way that makes clear it is to function in concert with family law legislation to the extent possible.

[75] The Federal Court has exclusive jurisdiction to determine whether a removal order directly contravenes a decision made in a judicial proceeding: *M.W. v. E.B.* (2003), 38 R.F.L. (5th) 443 (ON SC). To do so, the court considers the factors outlined in *Alexander v. Canada (Solicitor General)*, 2005 FC 1147, [2006]

2 F.C.R. 681, aff'd 2006 FCA 386, 360 N.R. 167; see also *Perez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1317, at para. 16.

[76] This court considered the interaction between a family law *lis* and s. 50(a) in *J.H. v. F.A.*, 2009 ONCA 17, 265 O.A.C. 200. There, the appellant admitted that she applied for a custody order and a non-removal order to trigger s. 50(a): at para. 14. Weiler J.A. concluded that the motion judge should not have granted the non-removal order in this case because there was no genuine family law dispute between the parents. As such, the order was inappropriately aimed at the Minister, not the parents: at para. 24.

[77] This case law establishes that there are circumstances where a genuine *lis* is relevant and that the Minister may be entitled to make submissions on the issue. However, a distinction must be drawn between private family law disputes and child protection cases, where several of the parties are state actors and the proceedings are carefully supervised by the courts. I would make the point that, given those circumstances, concerns over a genuine *lis* will rarely arise. However, there may be circumstances where information available to the Minister through the immigration file or the length or nature of the child protection proceedings raises legitimate concerns about a genuine *lis*.

[78] This brings me to the ultimate issue in this case, the appropriate scope of the Minister's submissions and what, if any disclosure of the child protection file is appropriate to allow for those submissions.

(ii) Appropriate scope of disclosure and of Minister's submissions

[79] With these principles in mind, I agree with the appeal judge that the motion judge did not err in concluding that s. 50(a) provides for a meaningful opportunity to make submissions. This opportunity, however, is not without limits. There needs to be a framework within which such meaningful submissions are made, and within which any associated disclosure requests are managed.

[80] In this case, the motion judge took a responsive approach. She accepted the Minister's definition of the scope of submissions, and the disclosure needed to permit those submissions (referred to as "nominal disclosure" and including the agreed statement of facts). She held, at para. 59:

> Before any final order is made in a child protection proceeding in this court which may impact an existing deportation order, I find that the Minister ought to be permitted to make submissions to this court on all relevant issues, including whether there is a genuine *lis* between the parties that justifies the order being requested by the parties. [Emphasis added.]

[81] The appeal judge, in affirming the motion judge's decision, invoked an analogy to the framework for determining fairness obligations from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. That

framework sets out five factors to be considered on judicial review for determining the appropriate degree of fairness for a particular decision-making setting. With four of these factors in mind ((i) the nature of the decision being made and the process followed in making it; (ii) the nature of the statutory, institutional and social context; (iii) the importance of the decision to the parties and interests affected; and (iv) legitimate expectations), the appeal judge upheld the motion judge's determination that "[t]he court would fail in its duty of fairness and responsibility to the administration of justice if the Minister was limited in the manner requested by the parties": at para. 55.

[82] I agree that s. 50(a) of the *IRPA* gives rise to a discretion to be exercised by the motion judge, both in relation to the scope of submissions and in relation to the extent of disclosure.

[83] Spence J. referred to the Minister being granted an "unfettered" opportunity to make submissions in the status hearing dealing with the application for a supervision order in November 2019. At the status hearing giving rise to this appeal, the motion judge rejected an argument that the Minister's submissions should be limited, in effect, to advising the motion judge of the existence of a removal order. She did not address what, if any, limits would be appropriate or necessary on the Minister's submissions.

[84] The appeal judge held that the motion judge's exercise of her discretion demonstrated no error. He concluded, at para. 61:

> The motion judge was correct in her interpretation of s. 50(a) of the *IRPA*, to the extent that she found the nature of the Minister's legitimate interest is the basis for determining the content of the required "opportunity to make submissions". Determining the specific order or orders necessary to give rise to effective or "meaningful" submissions, however, involved the exercise of discretion. Subject to the next argument, addressed below, the motion judge committed no error of principle, and was not clearly wrong, in making the specific orders in this case that she did.

[85] I do not accept the argument advanced by the CCAS and OCL that the Minister's submission must be limited to facts about the removal proceedings. Nor do I accept, however, that the Minister's opportunity to make submissions is to be unfettered. Rather, I agree with the appellants that the Minister's submissions must be limited to his area of legitimate concern, in light of his duties under the *IRPA*.

[86] In my view, a blended analysis of this dual legislative context (*CYFSA* and *IRPA*) is necessary to determine both the scope of submissions and associated disclosure in the child protection setting.

[87] Moreover, I do not think this case can be resolved according to administrative law's procedural fairness analysis. The *Baker* framework appropriately highlights the need to tailor the decision on disclosure. However, it does little to address the competing concerns of other parties who may be affected

by a decision regarding disclosure, such as the privacy considerations at issue in this child protection proceeding. For this reason, I come to a different conclusion as to the appropriate framework to employ when determining disclosure in this statutory context.

[88] In my view, before a judge in a child protection proceeding can decide on the scope of a Minister's submissions or any accompanying question of disclosure, the Minister must provide a basis for the proposed scope of submissions. That basis must be derived from the record before the Minister, or from the Minister's field of knowledge and expertise. For example, if the Minister wishes to challenge the *bona fides* of the *lis* of a child protection proceeding, as in this case, the Minister must demonstrate a legitimate, *prima facie* concern based on material within the removal record or the Minister's field of knowledge. That concern may relate to material in the removal record that casts doubt on the *lis* of a child protection proceeding, or it may relate to the number and kind of supervision orders that have been granted. For example, in its factum, at para. 60, the Minister states that "The *CYFSA* is not meant to and cannot provide *de facto* immigration status." It may be appropriate, after multiple orders under the *CYFSA* purporting to affect a family's immigration status, for the Minister to raise such a concern. It will be for the motion judge to assess whether such a *prima facie* concern has been established, and to demarcate the scope of a Minister's submissions based on that concern.

[89] If, as in this case, disclosure is requested for the Minister's submission to be meaningful, the Minister must provide further justification for the specific, proposed disclosure. That justification must logically connect the proposed disclosure to the scope of submissions. For example, if the Minister seeks access to the agreed statement of facts, the Minister must first identify the kind of facts that need to be known to make meaningful submissions. In oral submissions, counsel for the Minister characterized the request for disclosure in this case as a mechanism "to connect the dots" so that the Minister's submissions could be meaningful. While it is open to the Minister to frame his request for disclosure in this way, it is for the Minister to set out the specific dots that need to be connected. For example, if the Minister seeks disclosure to address whether in this case the *CYFSA* is being used to provide *de facto* immigration status for the family, the Minister should be expected to summarize how the disclosure sought will enable such submissions to be meaningful.

[90] Once the Minister's position is set out, the judge can then consider the requested scope of submission/disclosure, together with the Minister's statutory obligation to pursue removal as soon as possible on the one hand, and the parties' duties under the *CYFSA* and the child's best interests on the other hand. This analysis will also inform the kind of restrictions that ought to be placed on disclosure, in terms of redacting documents, if necessary, protecting confidentiality

to the extent possible, and restricting the use of the disclosure outside the specific purpose of making submissions.

[91] Disclosure orders would be granted only where, and to the extent that the Minister's clearly defined need for disclosure is warranted, having regard to the competing interests and concerns of the affected parties. Ultimately, the decision requires the exercise of discretion; as long as the Minister first satisfies the motion judge that there is a *prima facie* basis for disclosure,absent an error in law or in principle, the motion judge's decision is entitled to deference.

[92] In this case, the motion judge did not require the Minister to establish a *prima facie* basis for the scope of submissions he wished to make, and did not assess whether the disclosure sought by the Minister was justified in light of material in the removal record, or within the field of knowledge of the Minister. As a result, I conclude that the motion judge's decision on disclosure cannot be upheld.

[93] I expressly refrain from commenting on whether, on the appeal record in this case, the Minister would have met the threshold for the scope of submissions proposed, or for the disclosure requested, as these threshold questions were not put to the Minister and therefore not addressed in the way contemplated above.

[94] As a result, I would allow the appeal, set aside the disclosure order and remit the matter to the motion judge if the Minister wishes to pursue same and attempt to meet the *prima facie* case for the specific disclosure requested.

(4) The motion judge's comments did not give rise to a reasonable apprehension of bias

[95] As a fourth ground of appeal, the OCL alleges that the motion judge failed to abide by r. 17(24) of the *FLR*s governing settlement conferences, that her comments on the potential settlement of the dispute gave rise to a reasonable apprehension of bias and that the appeal judge erred in failing to make this finding.

[96] This issue received very little attention in the oral hearing on this appeal.

[97] However, in its factum, the OCL states that, at the December 22, 2020 attendance, the motion judge presided over a conference in which the Minister and the parties participated, and during which settlement discussions took place. It asserts that the fact that settlement discussions occurred was specifically stated by the Minister in their motions to preclude the OCL's use of the conference transcript on appeal.

[98] The motion judge's Endorsement of December 22, 2020 indicates that the Court expressed a concern that a refusal to give the Minister any disclosure would make it impossible for their counsel to make meaningful submissions pursuant to s. 50(a) of the *IRPA* and that, if the Minister was denied the opportunity to make

meaningful submissions, the Minister could argue before the Federal Court that an order of the Family Court should not stay removal.

[99] I am persuaded that the exchange that took place between the motion judge and the parties was not a settlement conference under the *FLRs*. Further, the comments of the motion judge cannot reasonably be interpreted as a predetermination of the ultimate issue before her on the motion for disclosure giving rise to a reasonable apprehension of bias.

[100] The appeal judge did not err in finding that these comments did not reflect a predetermination, but rather reflected an attempt to focus counsel's minds on what the motion judge perceived as the central issue in dispute. It was nothing more.

DISPOSITION

[101] I would allow the appeal and remit the matter to the motion judge if the Minister chooses to pursue his request for disclosure in accordance with this decision.

[102] No costs are sought on this appeal and I would award none.

Released: March 21, 2022

L. Sossin J.A.

I agree L. Favreau J.A.