

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

**CATHOLIC CHILDREN'S AID SOCIETY OF TORONTO**

(Appellant / Respondent in Appeals)

-and-

**S.K.S**

(Appellant / Respondent in Appeals)

-and-

**OFFICE OF THE CHILDREN'S LAWYER**

(Appellant / Respondent in Appeals)

-and-

**MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

(Respondent in Appeals)

-and-

**CANADIAN ASSOCIATION OF REFUGEE LAWYERS**

(Interveners)

-and-

**CANADIAN CIVIL LIBERTIES ASSOCIATION**

(Interveners)

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## **PART I – OVERVIEW**

1. This appeal arises from an Order of the Superior Court of Justice dealing with the interplay and tensions arising between a removal order pursuant to the *Immigration and Refugee Protection Act (IRPA)* and a Supervision Order made pursuant to the *Child Youth and Family Services Act (CYFSA)*. However, the questions that arise out of this context highlight the current procedural and jurisprudential vacuum with respect to the legal test to be met by third party state agencies when courts are confronted with disclosure requests in these types of proceedings.
2. The CCLA submits that a disclosure order in relation to child protection proceedings, made in favour of a third party state agency, has far reaching consequences as it infringes on the dignity and privacy rights of parents, caregivers and children under the *Charter of Rights and Freedoms (Charter)*. Many of the families who are involved with the child welfare system are amongst the most vulnerable members of our society.
3. The CCLA makes no submissions with respect to the facts of this case. The CCLA's submissions are confined to the applicable legal framework to address the gap noted above.

## **PART II – ISSUES**

4. In the absence of a governing framework, and in light of the *Charter* rights engaged in child protection proceedings, what factors should be included in a framework for disclosure to a third party state agency?

## PART III – ARGUMENT

### Strong Foundation of Privacy Rights under the *CYFSA*

5. The CCLA submits that the extensive and intensely personal nature of the information created and collected during the course of a child welfare agency's involvement with a family speaks directly to the biographical core of parents, caregivers and children in a way that engages *Charter*-protected privacy rights to a high degree.
  
6. The legal threshold that a child welfare agency must meet to obtain information/records about parents, caregivers and children with whom they are involved is quite low. The broad mandate of a child welfare agency pursuant to the *CYFSA* allows it to collect, store, manage and use information about parents, caregivers and children. Indeed, to justify collection of such information, the agency must simply demonstrate that the records sought in relation to these individuals may be relevant or have semblance of relevance (emphasis ours) to the child protection proceedings.<sup>1</sup> Courts have held that this by no means is an onerous burden to meet and that concerns about the impact of impinging on privacy interests will only form part of the analysis if there is an evidentiary basis to support those concerns.<sup>2</sup> Child welfare agencies, therefore, become repositories of deeply personal information about individuals and children with whom they are involved.

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<sup>1</sup> *CYFSA* Section 130 (2)

<sup>2</sup> *Children's Aid Society of Ottawa v. J.L.* 2021 ONSC 2103 (CanLII) at para 17

7. The agencies are required to document every single interaction with these individuals that include intimate details relating to their lives, details that strike the very foundation of fundamental human dignity, often over the course of years.
8. To balance these expansive powers for information collection and creation, the *CYFSA* acknowledges a heightened privacy right regarding this information in various parts of the Act. For instance, despite the well-established open court principle, child protection matters are presumptively held in the absence of the public; publishing or making public information that has the effect of identifying a child involved in proceedings under the Act is prohibited; and no person except a party or a party's lawyer shall be given a copy of a transcript of hearing unless the court orders otherwise.<sup>3</sup>
9. Further, on January 1, 2020, Part X of the *CYFSA* came into force. Part X contains extensive rules that lay down specific obligations, upon child welfare agencies (amongst other service providers) for collecting, using, disclosing, safeguarding, and managing personal information collected by them from individuals who receive services from these agencies.<sup>4</sup>
10. The CCLA submits that the legislature's acknowledgment and attempt to address the deep intrusion into the informational privacy and biographical core of individuals involved with child welfare, by including the above provisions into the *CYFSA*, is instructive and, it is in this context that one must examine the engagement of *Charter* protected privacy rights in child welfare matters.

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<sup>3</sup> *CYFSA* Section 87 (4), (8) & (10)

<sup>4</sup> *CYFSA* Part X

## Engagement of *Charter* rights

11. Child protection proceedings engage the parents' right to security of the person. The Supreme Court of Canada has recognized that child custody proceedings which might result in a loss of custody, or the separation of parent and child, engage a parent's security of the person interest by interfering with psychological integrity.<sup>5</sup>
12. The Supreme Court has acknowledged that s. 7 of the *Charter* contains a substantive right to privacy, associated with either the liberty or the security interest, or both.<sup>6</sup> The Court has also favoured an expansive rather than a narrow interpretation of s. 7.<sup>7</sup>
13. The Supreme Court has also indicated that the constitutional right to privacy is closely linked to the protection of fundamental human dignity. Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress.<sup>8</sup>
14. Individuals and children involved with child welfare agencies have been recognized as uniquely vulnerable. They are often poor, and may experience mental health and substance use problems, low education and literacy, and challenges due to racism. The Ontario Court of Appeal has recognized that they may also face significant challenges in advocating for their rights under the *Charter*.<sup>9</sup>

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<sup>5</sup> [New Brunswick \(Minister of Health and Community Services\) v G\(J\)](#) 1999 CanLII 653 (SCC) at paras 56-67; per Lamer CJ for the majority.

<sup>6</sup> [R v. Beare](#) 1988 CanLII 126 (SCC) at para 58

<sup>7</sup> [Reference re Motor Vehicle Act \(British Columbia\)](#) 1985 CanLII 81 (SCC) at paras 28 -29

<sup>8</sup> [Sherman Estate v. Donovan](#) 2021 SCC 25 (CanLII) at para 72; [Edmonton Journal v. Alberta \(Attorney General\)](#), 1989 CanLII 20 (SCC)

<sup>9</sup> [Kawartha-Haliburton Children's Aid Society v. M.W.](#), 2019 ONCA 316 at paras 67 – 69



15. This vulnerability is compounded for children involved with child welfare agencies. Through no fault of their own these children are at risk of being treated with less dignity and as less worthy of respect and consideration than other children whose lives have not been heavily documented by the state.<sup>10</sup>

### **Vacuum in Jurisprudence**

16. Where privacy rights may be outweighed by other societal claims, there must, at a minimum, be a clear framework setting forth the factors to be considered in order to determine the necessity of such a violation, and the conditions, if any, under which such violation is justifiable.

17. Even in the context of criminal proceedings where the accused has a right to make a full answer and defence, disclosures of third party records, including child welfare records to the accused, are carefully considered. The Supreme Court of Canada has focused on what would constitute the appropriate procedure to be followed when confronted by such disclosure requests. In reaching the current well-established O'Connor/Mills factors<sup>11</sup> to be assessed prior to disclosure of third party records in criminal matters, the court has undertaken a rigorous analysis of s.7 *Charter* rights.

18. In contrast, there is a vacuum both in procedure and jurisprudence around principled approaches that a court ought to follow when confronted with requests for disclosure of child welfare records by third party state agencies in non-criminal proceedings. While the Supreme Court has cautioned against the wholesale adoption of criminal law concepts of privacy under

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<sup>10</sup> [R. v. K.C.](#) 2021 ONCA 401 (CanLII) at paras 62 and 135 (both majority and dissent agreeing on this point)

<sup>11</sup> [R. v. O'Connor](#) 1995 CanLII 51 (SCC); [R. v. Mills](#) 1999 CanLII 637 (SCC)

s. 7 in the child protection context, the Court agreed that privacy interests are nonetheless protected under s. 7 in both contexts.<sup>12</sup>

### **Proposed Legal Test**

19. The CCLA submits that this appeal opens the door for the Court to craft a much-needed legal framework under s. 7 within the child protection context. A framework that is capable of being applied with the necessary particularized sensitivity, specifically when third party state agencies seek disclosure of child protection records, in the context of non-criminal proceedings.

20. The CCLA respectfully proposes the framework below for this Court's consideration:

### **Threshold Question**

21. Upon establishing that the court has jurisdiction, the critical threshold question is whether the third party state agency has a principled purpose in requesting disclosure. That purpose must itself accord with the *Charter's* guarantees.<sup>13</sup> If so, the moving party then has the onus of proving that the information is both relevant and necessary, and that the degree to which privacy will be infringed is proportionate to the advancement of that principled purpose.

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<sup>12</sup>[Winnipeg Child and Family Services v. K.L.W](#) 2000 SCC 48 (CanLII) at paras 95 - 98.

<sup>13</sup>[R. v. Big M Drug Mart Ltd.](#) 1985 CanLII 69 (SCC); Although this case stands for the proposition that the purpose of a legislation must accord with *Charter* guarantees, the CCLA submits that the underlying principle is equally applicable when applied to the purpose for which disclosure is sought.

### **Establishing Relevance and Necessity of the Requested Disclosure**

22. Once the threshold question of a principled purpose has been established, the party must then proceed to meet the test of demonstrating that the disclosure sought is relevant to the issue in question.
23. The third party state agency must demonstrate that there is, in fact, a direct and unequivocal connection between the principled purpose for which it seeks this disclosure and the way in which the information likely to be contained in the disclosure requested will meet that objective.
24. If the relevance of the proposed disclosure is established, the court should then assess whether the disclosure is, in fact, necessary to determine the issues being raised by the third party state agency in each specific proceeding. A necessity standard sets a high bar, precluding the disclosure of information that would be merely helpful. Such a high bar is justified in light of the intensely personal nature of child protection proceedings, described above, and the significant s.7 interests implicated.
25. If relevance and necessity are established to the court's satisfaction, the court proceeds to the next step of assessing proportionality. If relevance and necessity are not established, there should be no disclosure.

### Assessing the Proportionality of the Requested Disclosure

26. In order to weigh the proportionality of the requested disclosures with the infringement of privacy, the court may disclose the proposed documents sought to itself and review the records to determine the following, in light of party submissions as to the impact of disclosure:

- a. The probative value of the documents sought to be disclosed in addressing the issue(s) identified in that specific proceeding when compared to the deleterious effects arising from breach of information privacy of particularly vulnerable individuals<sup>14</sup>;
- b. The prejudice to the personal dignity of parents, caregivers and children that will occur, by providing information/documents in the possession of child welfare agencies to yet another state agency;
- c. Society's interest in ensuring that parents, caregivers and children involved with child welfare agencies are forthcoming with information during such involvement without the fear of their intimate and personal details being disclosed to other state agencies.

27. If the court is satisfied that the above factors are properly weighed with respect to each and every document sought in disclosure, the court may then exercise its discretion to make such an order. Specific parameters of such an order could include:

- a. How the disclosure will take place;

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<sup>14</sup> *Sherman Estate v. Donovan* 2021 SCC 25 (CanLII) “The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.” ... “In cases where the information is sufficiently sensitive to strike at an individual’s biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case.”; at paragraphs 77 and 79

- b. For what purpose(s) the disclosure can be used;
- c. An absolute bar on any further dissemination of the disclosure; and
- d. A requirement to destroy the disclosure (electronic or otherwise) once the purpose has been met.

28. If the court is satisfied that some but not all the disclosure is necessary, the court may provide a summary of the information or redacted disclosure at its discretion.

29. If, on the other hand, the court is not satisfied that disclosure requests can be appropriately balanced with each of these factors, the court must dismiss the disclosure request.

#### **PART IV – ORDER REQUESTED**

30. The CCLA respectfully requests that:

- a. This Court consider establishing a legal test to be met by state parties seeking disclosure orders, related to child protection documents, in the context of non-criminal proceeding.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of January, 2022.**



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Vasu Naik  
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## SCHEDULE “A”

### LIST OF AUTHORITIES

1. [\*Children’s Aid Society of Ottawa v. J.L.\*](#) 2021 ONSC 2103 (CanLII)
2. [\*New Brunswick \(Minister of Health and Community Services\) v G\(J\)\*](#) 1999 CanLII 653 (SCC)
3. [\*R v. Beare\*](#) 1988 CanLII 126 (SCC)
4. [\*R v. Mills\*](#) 1999 CanLII 637 (SCC)
5. [\*Reference re Motor Vehicle Act \(British Columbia\)\*](#) 1985 CanLII 81 (SCC)
6. [\*Edmonton Journal v. Alberta \(Attorney General\)\*](#) 1989 CanLII 20 (SCC)
7. [\*Sherman Estate v. Donovan\*](#) 2021 SCC 25 (CanLII)
8. [\*Kawartha-Haliburton Children’s Aid Society v. M.W.\*](#) 2019 ONCA 316
9. [\*R. v. K.C.\*](#), 2021 ONCA 401 (CanLII)
10. [\*R v. O’Connor\*](#) 1995 CanLII 51 (SCC)
11. [\*Winnipeg Child and Family Services v. K.L.W\*](#) 2000 SCC 48 (CanLII)
12. [\*R. v. Big M Drug Mart Ltd.\*](#) 1985 CanLII 69 (SCC)

## SCHEDULE “B”

### RELEVANT STATUTES

[Child, Youth and Family Services Act, 2017](#), S.O. 2017, c. 14, Sched. 1, preamble, s. 87 (4), (8) & (10) and Part X

#### Hearings and Orders

##### *Rules re hearings*

##### *Definition*

87 (1) In this section,

“media” means the press, radio and television media.

##### *Application*

(2) This section applies to hearings held under this Part, except hearings under section 134 (child abuse register).

##### *Hearings separate from criminal proceedings*

(3) A hearing shall be held separately from hearings in criminal proceedings.

##### *Hearings private unless court orders otherwise*

(4) 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,

- (a) the wishes and interests of the parties; and
- (b) 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.

##### *Media representatives may attend*

(5) Media representatives chosen in accordance with subsection (6) may be present at a hearing that is held in the absence of the public, unless the court makes an order excluding them under subsection (7).

##### *Selection of media representatives*

(6) The media representatives who may be present at a hearing that is held in the absence of the public shall be chosen as follows:

1. The media representatives in attendance shall choose not more than two persons from among themselves.
2. Where the media representatives in attendance are unable to agree on a choice of persons, the court may choose not more than two media representatives who may be present at the hearing.
3. The court may permit additional media representatives to be present at the hearing.

*Order excluding media representatives or prohibiting publication*

(7) Where the court is of the opinion that the presence of the media representative or representatives or the publication of the report, as the case may be, 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, the court may make an order,

- (a) excluding a particular media representative from all or part of a hearing;
- (b) excluding all media representatives from all or a part of a hearing; or
- (c) prohibiting the publication of a report of the hearing or a specified part of the hearing.

*Prohibition re identifying child*

(8) 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.

*Prohibition re identifying person charged*

(9) 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.

*Transcript*

(10) No person except a party or a party's lawyer shall be given a copy of a transcript of the hearing, unless the court orders otherwise.

[Part X - Personal Information](#)



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(Respondent / Appellant on Cross-Appeal)

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**Minister of Public Safety and Emergency Preparedness**  
(Respondent on Appeal)

**Canadian Association Of Refugee Lawyers**  
(Interveners)

**Canadian Civil Liberties Association**  
(Interveners)

**Court File No.: C69908  
C69910  
C69919**

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**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT TORONTO

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