Court of Appeal File No. CA47901

COURT OF APPEAL

BETWEEN:

T.L.

APPELLANT
(Applicant)

AND:

Attorney General of British Columbia
and Jennifer Burns, Delegate of the Director
under the *Child, Family and Community Service Act*

RESPONDENTS
(Respondents)

AND:

West Coast LEAF
British Columbia Civil Liberties Association

INTERVENERS

INTERVENER'S FACTUM
British Columbia Civil Liberties Association

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TABLE OF CONTENTS

OPENING STATEMENT

Assessment of the reasonableness of the search and seizure of private medical information under s. 8 of the *Charter of Rights and Freedoms*[1] must consider the context in which the state action arises and the interests at stake. The impugned provisions of the *Child, Family and Community Service Act*[2] at issue in this appeal arise in the context of child protection proceedings, a context which the Supreme Court of Canada describes as "direct state interference with the parent-child relationship" and "a gross intrusion into a private and intimate sphere." Child protection proceedings engage fundamental interests in the well-being of children, parenting, and identity, which have been articulated by the Supreme Court of Canada as requiring heightened protections under the *Charter*.

The Supreme Court of Canada has emphasized the importance of the court's supervisory role throughout child protection proceedings, with its attendant checks and balances. The impugned provisions, which provide for a presumptively unreasonable state power of warrantless search and seizure, without notice or consent, do not accord with this principle. Moreover, they risk undermining the guiding principles and purposes of the *CFCSA.* The Intervener British Columbia Civil Liberties Association submits search and seizure of private medical information in the child protection context requires heightened, not diminished, protections.

Comparisons to other Canadian jurisdictions, and particularly Ontario, demonstrate that less intrusive measures are available, and would support rather than undermine the purposes of the Act.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 ("*Charter*")
[2] *Child, Family and Community Service Act*, RSBC 1996, c. 46 ("*CFCSA*" or the "Act")

PART 1 – STATEMENT OF FACTS

1. As an organization that advocates to defend, sustain and promote civil liberties and human rights, including the protection of privacy rights, the British Columbia Civil Liberties Association (BCCLA) has a strong interest in issues raised in this appeal, and specifically the constitutionality of the state's access to and use of private medical information in the context of interference in the parent-child relationship.[3]

2. The BCCLA relies on the facts as stated in the factum of the appellant.

PART 2 – ISSUES ON APPEAL

3. The appellant alleges that the court below erred in its analysis of the reasonableness of the search and seizure permitted by s. 96 of the *Child, Family and Community Service Act*, including by failing to account for the important privacy interests at stake and failing to analyze the (in)effectiveness of safeguards.

4. The BCCLA's submissions focus on these two alleged errors. Specifically, the BCCLA emphasizes the importance of the familial privacy interests at stake, and the lack of available safeguards that would minimize the intrusion into the privacy interests, with reference to child welfare legislative regimes in other provinces.

PART 3 - ARGUMENT

A. Fundamentally important and protected interests in the parent-child relationship must inform the s. 8 reasonableness analysis

5. The appellant's submissions address the importance of s. 8 protections for personal health information and privacy of medical records.

6. The BCCLA submits that assessment of the reasonableness of searches authorized by s. 96 of the *CFCSA* must consider not only the privacy of medical records, but also the *use* of those records by the state in the context of the significant

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[3] *T.L. v. British Columbia (Attorney General)*, 2022 BCCA 207, para. 10

interests in family and parenting relationships which are directly implicated and at stake. These interests have been articulated in s. 7 *Charter* jurisprudence.

7. The use of medical records obtained under ss. 96(1) and (2) of the *CFCSA*, not just the fact of their disclosure, implicates centrally important interests beyond the privacy of medical information itself. The Director and her delegates exercise their power to compel production of personal information in the context of making determinations that authorize state interference with the fundamentally "private and intimate sphere" of parenting and family.[4]

8. The Supreme Court of Canada has recognized the right to security of the person under s. 7 is engaged in child protection proceedings, as state interference in the parent-child relationship can have a "serious and profound effect on a person's psychological integrity."[5]

> The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.)*, *supra*, at para. 83, "an individual interest of fundamental importance in our society". Besides the obvious arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere.[6]

9. In *B.J.T. v. J.D.*, 2022 SCC 24, the Court confirmed the importance of the "supervisory function of the courts" in child protection proceedings in light of the important interests at stake:

> [65] Section 7 of the *Canadian Charter of Rights and Freedoms* "requires that this dramatic form of state intervention only take place in accordance with the principles of fundamental justice" (*Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, [2000] 2 S.C.R 519, at para. 15, per Arbour J., dissenting in the result). To ensure that child protection agencies exercise their jurisdiction only when warranted and with due fairness to children and parents, child protection statutes give courts the

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[4] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 ("*New Brunswick*"), paras. 58-62
[5] *New Brunswick*, paras. 58 and 61
[6] *New Brunswick*, para. 61; emphasis added

> authority to supervise the exercise of an agency's power (e.g., the *Child Protection Act*, ss. 27 and 29). This important role, with its attendant checks and balances, is exercised throughout the proceedings. Hence, even in the assessment of a child's best interests, an agency's decision-making process remains the proper subject of inquiry as part of the court's oversight role. Similarly, the jurisdiction under *parens patriae* to act in the best interests of a child gives ambit to a superior court to take due notice of an agency's conduct insofar as it impacts a child's best interests.[7]

10. Given the fundamental interests at stake in proceedings involving state interference in the parent-child relationship, the reasonableness of a warrantless search and seizure—presumptively unreasonable at law—must be evaluated with due consideration to the context in which the information is compelled and used, one which engages the security of the person.[8]

11. The structure of the *Charter* compels considering the protections afforded by s. 8 in the particular context in which they arise; here, in the face of state interference in the familial relationship. "Sections 8 to 14 [of the *Charter*]*…* are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7."[9]

12. In *R. v. Mills,* the SCC recognized the "importance of interpreting rights in a contextual manner—not because they are of intermittent importance but because they often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances."[10]

13. The overlap between the interests in privacy and in the security of the person in child protection proceedings are not incidental, but rather, are fundamental in the context of the "gross intrusion" of the state into the "private and intimate sphere" of the parent-child relationship.

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[7] *B.J.T. v. J.D.*, 2022 SCC 24 ("*BJT*"), paras. 65, 68; emphasis added
[8] *New Brunswick*, paras. 60-61
[9] *R. v. Mills*, [1999] 3 S.C.R. 668 ("*Mills"*), para. 87
[10] *Mills,* para. 61

14. In *Mills*, the SCC stated: “The values protected by privacy rights will be most directly at stake where the confidential information contained in a record concerns aspects of one's individual identity ...”[11] In the *New Brunswick* case, the SCC recognized that the parenting relationship is often “fundamental to personal identity.”[12]

15. The importance of the interests at risk in this context, therefore, demands a higher level of protection under s. 8 in order for a search to be reasonable.

16. The BCCLA submits that the impugned provisions in the case at bar do not accord with the important principles articulated by the SCC in *B.J.T.* Instead of facilitating the court’s “important role, with its attendant checks and balances… throughout the proceedings”, s. 96 of the *CFCSA* hinders and even prevents court supervision of the agency’s power over fundamentally important personal interests (privacy, personal medical information, and the parent-child relationship), avoiding the “attendant checks and balances” required to ensure the agency’s authority is exercised “only when warranted and with due fairness to children and parents.”[13]

17. A contextual analysis of the reasonableness of the search and seizure authorized under s. 96 requires recognition that the privacy interests and attendant security of the person are implicated, not only where the therapeutic relationship is threatened,[14] but also where there is state interference in the parent-child relationship.[15] As the Supreme Court of Canada has held: “the principles of fundamental justice in child protection proceedings are both substantive and procedural.”[16]

18. The Respondent British Columbia suggests that because the search and seizure arises in the context of child protection proceedings, what is otherwise a presumptively unreasonable search at law is reasonable.[17] This submission fails to account for the

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[11] *Mills*, para. 89
[12] *New Brunswick*, para. 61
[13] *BJT*, para. 65
[14] *Mills* para. 85
[15] *New Brunswick*, paras. 60-61
[16] *New Brunswick*, para. 70
[17] British Columbia’s Factum, paras. 77, 79, 96; and Reasons for Judgment, para. 70

Supreme Court of Canada's recognition that the security of the person, of both the child and the parent, is at stake in such proceedings. The BCCLA submits that this context requires heightened, not diminished protections.

B. Effects of s. 96 are disconnected from and even contrary to objective of protecting children

19. The interests at stake in the parent-child relationship are protected not only under provisions of the *Charter,* but are recognized by and underlie the guiding principles of the *CFCSA* itself, which include:

> 2 …(b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
>
> (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided [18]

20. The effect of the overbreadth of s. 96 not only violates the protections of the *Charter* as the appellant has argued, but also undermines these guiding principles of the *CFCSA* in several ways, impugning the reasonableness of s. 96.

21. First, as both parties recognize, the health and well-being of parents is of fundamental importance to their ability to parent. Where, as here, security of confidentiality and appropriate safeguards is lost, individuals may refrain from seeking medical treatment.[19] Instead of providing "available support services" as required under s. 2(c) of the *CFCSA*, the effect of s. 96 of the *CFCSA* paradoxically and unnecessarily risks effectively withdrawing supports, creating a barrier to parents accessing medically necessary services and treatments.

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[18] *CFCSA* s. 2(b) and (c); and see also *New Brunswick* para. 69, recounting this aspect of the classic statement of Canadian law "*prima facie* the natural parents are entitled to custody…The view of the child's welfare conceives it to lie first, within the warmth and security of the home provided by his parents."

[19] Appellant's Factum, paras. 59–60

22. Second, providing support for families is an important purpose of the *CFCSA*, and the Act includes provisions in furtherance of that purpose, including through voluntary engagement.[20] Yet, s. 96 empowers the director's delegates to demand documents even in the administration of those sections. In effect, voluntary becomes involuntary, when seeking support can result in probing of personal information and intrusions into privacy interests without consent.

23. Third, without prior notice and judicial oversight, there is no timely safeguard to ensure the relevance of the documents obtained and acted upon by the Director and her delegates. Social workers can cast a broad net, compelling and obtaining medical information that may or may not be relevant to whether a child is in need of protection,[21] but may be vulnerable to misinterpretation (such as counselling and psychiatric records). Without an opportunity to challenge the relevance and compulsion of the information, there is no early check on the social worker's interpretation of information in the medical record. As the Court stated in *Mills*: "it is important to note that several interveners before this Court stressed the importance of understanding the context in which therapeutic records are made and their potential unreliability as a factual account of an event."[22]

24. In a regime such as the *CFCSA* that authorizes removal of children without prior judicial oversight and authorization,[23] and with no notice provided for in the impugned provisions, misinterpretation of private medical information may not be challenged, corrected, or even known by the parent until the advent of the protection hearing, sometimes years later. Furthermore, the risk is unnecessary, given the statutory obligation (s. 14) upon medical professionals (and others) to report when a child is in need of protection, as well as the other procedurally safe means of the state obtaining relevant information. Contrary to the Respondent's position that the broad unfettered access to personal medical information allows social workers to make "better

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[20] *CFCSA*, ss. 5-8
[21] Including, in the case at bar, delegating the determination of relevance to the public body. Appellant's Factum, paras. 73-76
[22] *Mills,* para. 89
[23] *CFCSA* s. 30

decisions,"[24] the BCCLA submits that the absence of procedural safeguards in this context creates an unnecessary risk of unreasonable decisions, with serious consequences.

25. As the Court noted in *New Brunswick*, where fair process fails, "there is a risk that the parent will lose custody of the child when in actual fact it might have been in the child's best interests to remain in his or her care".[25] The impact of state interference in the familial and parenting relationship cannot be undone.

C. Broad unchecked power unnecessary

26. British Columbia suggests that social workers delegated the authority to routinely make unchecked demands for disclosure are acting as part of a non-adversarial and supportive system that is not well-suited to judicial oversight, saying: "Proceedings under the Act are not adversarial."[26] This is an overstatement. As the Supreme Court of Canada recognized in *New Brunswick*:

> Child protection proceedings do not admit of easy classification. As Professor Thompson argues, the "unique amalgam of elements — criminal, civil, family, administrative — makes child protection proceedings so hard to characterize"… Although perhaps more administrative in nature than criminal proceedings, child custody proceedings are effectively adversarial proceedings which occur in a court of law.[27]

27. And as the Court very recently stated in *B.J.T.*:

> [64]…The decision to place children in state care brings profound, life-altering consequences for children and families. "Few state actions can have a more profound effect on the lives of both parent and child" (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 76).[28]

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[24] British Columbia's Factum, paras. 65, 68 and 98
[25] *New Brunswick,* para. 73
[26] British Columbia's Factum, paras. 15 and 79-81
[27] *New Brunswick*, paras. 78-79
[28] *BJT*, para. 64

28. Moreover, a truly non-adversarial system would rely on and incorporate consent for, or at least notice of, disclosure of personal information. In its absence, there is a clear role for judicial authorization. The SCC affirmed in *B.J.T.* "the court's essential oversight role in child welfare matters" (para. 63). This oversight properly includes state compulsion of private information;[29] but, is starkly absent from the impugned provisions.

29. As the appellant describes, at paras. 103-106 of their factum, the *CFCSA* already provides mechanisms for disclosure that are either based on consent or judicial order. British Columbia has not demonstrated why the additional broad unchecked power under s. 96 is necessary to achieve the objectives of the Act.

30. Examples from other child welfare legislative regimes in Canada—in which the legislation shares the objective of protection of children—illustrate schemes that do not include providing unchecked disclosure powers to the bureaucracy, with no notice or oversight.

31. In Ontario, delegates may obtain documents either through prior judicial authorization[30] or by consent.[31] Only in very limited circumstances is consent not required.[32] New Brunswick permits a delegate to require documents from an agency only after seeking the consent of the person about whom the information is requested, when that consent is not provided.[33] In those circumstances, the requirement of seeking

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[29] See, eg. *Catholic Children's Aid Society of Hamilton v. L.K.*, 2016 CanLII 15148 (Ont. S.C.), in which the court, at paras. 11-13, noted the importance of protecting privacy interests when assessing a request for a document production order. In *Windsor-Essex Children's Aid Society v. A.R.,* 2017 ONCJ 778, paras. 25, 26, 30, 31, the Ontario Court of Justice found that the society's request for all hospital records of a parent for an eighteen-month period was too broad and amounted to a "fishing expedition". And, in *British Columbia (Director of Family and Child Services) v. S.*, 1996 BCPC 5, para. 14, on a s. 65 production order application, the court invoked measures similar to a Halliday order.

[30] *Child, Youth and Family Services Act*, SO 2017, c 4, Sch 1, s. 130.

[31] *Child, Youth and Family Services Act*, ss. 283, 286, 288

[32] *Child, Youth and Family Services Act*, 288(2)

[33] *Family Services Act*, SNB 1980, c. F-2.2, 11.1(1)-(3)

prior consent provides a check on disclosure, and importantly, notice to individuals, with the concomitant opportunity to challenge and seek judicial oversight of the disclosure.

32. In several jurisdictions, unless there is prior consent, the power to access documents is limited to circumstances where it is necessary to assess risk to, and need of protection for, a child.[34]

33. These circumstances are more limited than the ability under s. 96 of the *CFCSA* to search documents for any purpose under the Act, including in relation to the provision of voluntary and "support" services.[35]

34. These examples from other jurisdictions with child protection legislation with limitations that are all absent from s. 96 further suggest that the far-reaching and unchecked power to compel private records is not necessary to achieve the purposes of the *CFCSA*. A less intrusive regime with checks and balances, such as notice and prior judicial oversight, is not only possible, but, would support rather than undermine the purposes of the Act.

35. All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this 3rd day of October, 2022.

Lisa C. Glowacki Counsel for the Intervenor, BCCLA	Maegen M. Giltrow, K.C. Counsel for the Intervenor, BCCLA

[34] See eg. *Children and Family Services Act*, SNS 1990, c. 5 s. 26(1) (Nova Scotia), *Child Protection Act*, RSPEI 1988, c. C-5-1, s. 12(1) (Prince Edward Island), *Youth Protection Act*, CQLR c-34.1, s. 35.4; Bill 15 (2022, ch. 11 in force April 26, 2023, s. 35.4) (Quebec)

[35] *CFCSA*, Part 2 Voluntary Services or Support for Families; Part 2.1 Youth and Adult Support Services and Agreements

LIST OF AUTHORITIES

ENACTMENTS

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