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September 22, 2023

Ministry of Children and Family Development
2814 Nanaimo St
Victoria, BC V8T 4W9

By email to Eric.Hallman@gov.bc.ca

Attention: Eric Hallman, A/Director, Operational Child Welfare Policy

Dear Mr. Hallman:

Re: Amendments to the *Child, Family, and Community Services Act* following the *TL* decision

Thank you for inviting the BC Civil Liberties Association (the "BCCLA") to participate in the consultation regarding the anticipated amendments to the *Child, Family, and Community Services Act* (the "Act"). These amendments are required to make the legislation constitutionally compliant and to address the pressing concerns discussed by the Court of Appeal in the recent decision in *TL v British Columbia (Attorney General)*[1] (the "Decision").

At this time, the BCCLA has been provided with a vague policy direction for the new s. 96 (the "Proposal"); no draft language for the successor legislation has been shared. The substantive Proposal, shared with the BCCLA on September 1, 2023, can be extracted as follows:

> Directors need clear authority to access personal health records controlled by a public body without an individual's consent if:
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> - This information is necessary to determine if a child needs protection; and,
> - Consent cannot be obtained, or obtaining consent would endanger a child's safety.
> - These requests also need to be open to administrative review and provincial court review.
>
> — and —
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> We are proposing that to fulfill the Court's requirement [for after-the-fact notice], this notice should include:
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> - a copy of the s. 96(1) demand;
> - a copy of the records received from the public body; and
> - information about how to request a review of the demand and associated timelines.

[1] 2023 BCCA 167.

British Columbia Civil Liberties Association
306 - 268 Keefer Street
Vancouver, BC, Canada V6A 1X5
Tel 604.687.2919
Fax 604.687.3045
Toll-free 866.731.7507
info@bccla.org
www.bccla.org

When asked what the review process would be during the oral consultation session on September 5, 2023, representatives for the Ministry of Children and Family Development (the "Ministry") were uncertain and unable to provide a confident answer. In particular, Ministry representatives advised BCCLA staff that they weren't sure yet whether reviews of the decision to compel disclosure from third-party public bodies would be an administrative or judicial review, but stated that it would likely make use of the administrative process which already exists under the Act and Regulations (the "Existing Director Review Process"). The Existing Director Review Process is set out at ss. 17-19 of the *Child, Family and Community Service Regulation.*[2]

Based on this minimalist Proposal, the BCCLA has numerous significant concerns which, in our view, must be addressed to ensure that the amended legislation is constitutionally sound and to prevent both future misuse of the provision and future litigation.

1. Safeguards and accountability required by the Decision

In the Decision, the BC Court of Appeal found that the existing s. 96 violated constitutional privacy rights under s. 8 of the *Charter*[3] due to a lack of safeguards to ensure accountability in use of the provision. The Court found:

> [215] The *CFCSA* does not require the Director to obtain consent, a court order or prior judicial authorization before making a s. 96(1) request. It does not require that the Director limit its request to a specific subject matter (such as child protection), or to a specific child, parent or time period. It does not require the Director to rationalize the request to the information-holder, or to ensure that the request is objectively reasonable with reference to a particular evidentiary threshold. There is no notice obligation in the absence of a subsequent court proceeding. It is unclear whether there is a mechanism for internal administrative review of a s. 96(1) decision (counsel for the AGBC did not suggest there is), or a requirement that a social worker report to anyone on their use of the provision, specific to individual cases or generally. Nor does there appear to be any sort of institutional reporting requirement, with a view to transparency on when and how often s. 96(1) is accessed by the Ministry.
>
> (…)
>
> [267] Section 96(1) does not include a reasonableness requirement, whether based on an evidentiary standard of reasonable suspicion or otherwise, which would allow the Director's subjective assessment of a case and their expertise to inform the use of the provision, but would also require that the beliefs formed by them are objectively reasonable: *Tse* at para. 33. I agree with TL and the interveners that incorporating a reasonableness requirement into s. 96(1) would also work to mitigate the potential for unfounded assumptions, stereotypes or discriminatory beliefs forming the basis for use of the provision.

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[2] BC Reg 527/95.

[3] *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.

> [268] It is unclear whether the CFCSA allows for administrative review of a decision to engage s. 96(1). On the face of it, the decision to request information from a public body does not appear to be included in the administrative review process established under s. 15 of the Child, Family and Community Service Regulation, B.C. Reg. 527/95. Before us, the AGBC did not point to the regulation as ensuring the availability of administrative review. As such, to seek a review and possible remedy for a breach of s. 96(1), the subject of the search and seizure likely has to either initiate judicial review proceedings or await the possibility of a protection hearing. Given the Supreme Court of Canada's acknowledgement in K.L.W. that child protection matters frequently involve already disadvantaged members of society (at para. 72), the inability to access a less burdensome, less expensive form of review is of concern. Unless it is clear that incorporating s. 96(1) requests in to an already-existing process for administrative review would place too high a burden on government, this is a procedural safeguard that warrants serious consideration.
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> [269] The CFCSA does not require that the subject of a s. 96(1) search and seizure be notified of the fact that personal health information has been obtained by the Ministry. The only apparent exception is when the Director initiates court-based proceedings.
>
> [270] I accept that notice at the front of a s. 96(1) request is not a reasonable option given the operational context of the CFCSA, the time pressures involved, and the paramount need to protect children from harm. However, the AGBC has not sufficiently rationalized the absence of notice after-the-fact, once the Director has had opportunity to assess the situation and has taken the response determined necessary to effectively address any existing or potential harm. In the absence of a court-based protection hearing, which imposes a statutory disclosure requirement on the Director, the individual impacted by the s. 96(1) request is in no position to seek a review of access to their personal health information, whether administratively or through judicial review, because they will not be aware of the search or seizure. Given the nature of the information at issue and the potential uses, it is untenable, in my view, for highly intrusive state interference with individual privacy interests to go unchecked, notwithstanding its compelling purpose.
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> [271] Finally, as I understand it, there is no reporting-out requirement specific to the gathering of personal health information, either in individual cases to a supervisor or generally, on an institutional level. As made clear at para. 84 of *Tse*, this type of a requirement can facilitate "additional transparency and [serve] as a further check that the extraordinary power is not being abused".
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> [272] In light of these various frailties, considered cumulatively, it is my view the petition judge erred in concluding that s. 96(1), specific to the obtaining of personal health information, "contains adequate procedural safeguards that minimize the risk that the Director might exercise the authority to seek information from public bodies in a manner that is abusive or otherwise improper": at para. 93.

In our view, the Decision imposes at a minimum the following requirements to be constitutionally adequate and prevent improper use of the power to compel personal information from third-party public bodies:

1. A sufficient threshold standard to justify the inquiry and its scope;
2. Consent or, where it cannot be obtained, notice; and
3. Some requirement to report out use of the power.

These submissions will now discuss our concerns regarding the sufficiency of the Proposal to address each of these requirements. Additional concerns raised by the Decision, which we submit are proper and efficient considerations for this process, will be subsequently discussed.

2. Sufficient threshold standard for the inquiry

The Proposal indicates that information should be obtainable from public bodies without consent where "[the] information is necessary to determine if a child needs protection; and, [c]onsent cannot be obtained, or obtaining consent would endanger a child's safety." These standards represent an improvement over the existing legislative provisions, but they are still, in our view, too broad for *Charter* compliance. This section will discuss the first part of the Proposal's standard, while the consent portion will be taken up in the next section.

The Proposal would narrow the purpose for which the information can be demanded from performing duties under the Act in general to just determining whether a child needs protection. This is an appropriate scope for the power in our view, as the initial determination of whether the child is in need of protection is the chief situation in which a child's safety could be compromised by the disclosure that the Ministry seeks information about the family or a parent. Once a child's need for protection has been investigated and the child has either been removed or the Ministry has determined that no removal is necessary, there is no longer a risk that disclosing the fact of the search to the parent would undermine the goal of child protection.

However, the necessity standard itself is the same as the existing legislation, and just as inadequate. The Decision contains a lengthy discussion of the proper interpretation of word "necessary" as it appears in the current s. 96(1).[4] At the conclusion of this discussion, the Court found that the standard created by this language is a broad, subjective one that allows child protection authorities to obtain any information that they believe may be useful.[5] The Court offered further guidance that a reasonableness requirement within the statutory text would be warranted and would mitigate the constitutional harm.[6]

It is our opinion that a reasonableness standard is constitutionally required to justify the state intrusion into the privacy of a parent in a child protection context. Accordingly, the BCCLA urges the province to include such a reasonableness requirement in the new provision, and suggests that it would be appropriate to require reasonable grounds to believe that the information is necessary to determine whether a child needs protection.

As a first line of defence against unconstitutional conduct, these reasonable grounds should be articulated by the social worker making the demand at the time that the demand is made. Ideally, this would be included in the demand to the third-party custodian of the records itself, but at minimum it must be

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[4] See the Decision at paras 100-144.
[5] *Ibid* at para 144.
[6] *Ibid* at para 267.

documented internally. This process would require the social worker to turn their mind to the propriety of their request before making it, enabling them to easily tailor the request appropriately in terms of time frame and subject matter and lessening the risk of an overbroad search. In cases where the request is not, upon reflection, reasonably necessary to evaluate a child's need for protection, an unconstitutional invasion of privacy would be avoided by this requirement. This is especially important when the body that receives the request does not have any discretion to deny the request, whether in whole or part.

We believe that it is appropriate to include this information in the demand for information itself to ensure that it is accessible to persons seeking review and to any adjudicator conducting such a review. The time period for which records are requested and an indication of the subject matter that the Ministry is seeking should also be included in the demand for the same reasons. This would both serve to prevent overbroad searches and ensure that the information needed for meaningful and fair review is documented and disclosed.

3. Consent, after-the-fact notice, and opportunity for review

When private information about an identifiable person is sought for the Ministry's purposes, consent should almost always be sought. We are encouraged that the Proposal seems to recognize this, indicating that the Ministry can proceed with a request only where "[c]onsent cannot be obtained, or obtaining consent would endanger a child's safety."

There is, however, no standard in the Proposal for assessing whether obtaining consent would endanger a child's safety, making it unclear what level of certainty or suspicion is sufficient to exempt the Ministry from seeking consent. As with the threshold requirement that the information be necessary, we believe that a reasonableness standard is here required. We would suggest that the appropriate standard is reasonable grounds to believe that seeking consent would endanger a child's safety.

There are many reasons why it may be impossible to obtain consent, ranging from emergency situations in which a parent cannot be contacted to cases where consent has been sought and refused. In our view, these cases require additional oversight: in the absence of reasonable grounds to believe that seeking consent would endanger a child, we submit that prior judicial authorization should be sought.

We note that s. 17 of the Act sets out a process where judicial authorization can be obtained for access to a child in order to determine whether the child needs protection. We also note that s. 19 provides that a judge or justice of the peace can grant such authorization by telecommunication, so even in an emergency it should be possible to make such an application.

If the province feels this process would be onerous to social workers in emergency situations, we submit that proceeding without consent for the simple reason that consent could not be obtained should be restricted to emergency situations. Further, there should be a mandatory post hoc hearing to review these cases within a short time of the request for information being made to ensure that this extraordinary warrantless search power is neither overused nor abused.

With respect to notice, we note that the Proposal indicates that the materials received from the third-party should be included. We agree that these materials should be provided to the person they relate to, but are concerned that notice may be delayed when the third-party is slow to respond, or be absent entirely if the third-party produces no records. We suggest that it would be appropriate to set a statutory

deadline for notice: for example, a requirement that notice be made within 7 days of a demand being sent. Any materials already received could be included, with any records received subsequently being provided in a follow-up communication or at the subject's request.

Finally, we turn to the review process. We recognize that making use of Existing Director Review Process has the facial advantage of being a less formal and costly process, but are concerned that it may in practice result in a bifurcated process in many circumstances. If there is an active CFCSA matter before the Provincial Court running parallel to administrative review, any cost savings would be more illusory than real. As with any parallel proceedings, this would create the risk that inconsistent decisions are made. We therefore suggest that the appropriate and economical venue for reviews of the power to demand disclosure from third-parties is the Provincial Court.

Reviews by the Provincial Court where there is an ongoing CFCSA matter would have the salutary effect of allowing all matters to be part of the same proceeding before the same decision-maker. This will, in turn, both reduce the possibility that duplicative evidence must be presented to two different decision-makers and allow the Court to easily take the status of the third-party disclosure matter into account when making case management decisions.

For cases where there is no existing CFCSA court matter, we believe that the Provincial Court would still be an appropriate forum for the following reasons:

1. The Provincial Court is a friendlier, less expensive forum for self-represented litigants than the Supreme Court, where judicial reviews would be heard;
2. There is no principled reason for reviews of the Ministry's demands for disclosure from a third-party to have a different process depending on whether or not there is an open court case. Such a bifurcated process runs the risk of inconsistency in decision-making; and
3. The Provincial Court has institutional expertise in evaluating the propriety of a search by government authority and balancing the privacy interests of a private citizen against the state's interest in investigating serious concerns, as it frequently hears s. 8 Charter applications in a criminal context. In comparison, this will be a new area for the Director's designee: their current review authority is with respect to intervention decisions and decisions about production of information from the Director.

4. **Reporting out requirements**

The BCCLA is disappointed that the Proposal contains no reporting out requirements regarding use of the power to compel disclosure. The salutary effect of such a requirement is discussed at paragraph 271 of the Decision, and in our view is extremely important for public accountability and transparency.

The regime under the current s. 96(1) is so lacking in oversight that the Attorney General was not even able to provide the court in *TL* with evidence of how many s. 96(1) requests are made each fiscal year. Instead, they relied on how many new files each year result in a formal investigation, which is not the only context in which these requests can be made.[7] In the absence of any oversight or reporting, even such

[7] See the Decision at para 234.

light oversight as reporting to the Ministry or supervising social workers, administrative over-reach is almost inevitable.

We recommend that every use of the power to request or compel personal information be internally reported by the social worker, that the Ministry conduct a regular quality assurance review of these requests to ensure that they are properly made, and that an annual report on the use of this power be published. We further recommend that this report contain information about how often the power has been used, in what contexts, and by which offices. This would allow the public to assess whether the power is being used consistently across the province.

5. **Private entities versus public bodies**

The current, unconstitutional disclosure regime creates a distinction between information held by public bodies, which is subject to mandatory production without notice, consent, or judicial pre-authorization, and those held by private entities, which can be requested under s. 96(2.1) and need not be produced until and unless the court issues a production order under s. 65. There does not seem to be any principled reason why the privacy of parents whose health care providers are private should be more protected than that of those who use public health care services. We urge the government to take this opportunity to harmonize the approach so that there is one process to request disclosure of personal information from a third party, regardless of whether that third party is a public body, public entity that is not a "public body" as defined in statute, or private entity.

If the legislature chooses to maintain the distinction between records held by a public body and those held by other entities, steps should be taken to ensure that mandatory requests for the personal information of parents are *only* made to public bodies. It is deeply concerning that one of the requests challenged by TL was to an entity that, it turned out, was not properly subject to s. 96(1) and (2) disclosure, and that that this error was not discovered until after the BC Supreme Court's decision in the case had already been rendered. This demonstrates that multiple lawyers for all parties, for a considerable amount of time, failed to realize that the social worker had exceeded the scope of their statutory authority. It is unlikely that this is an isolated error, given that social workers, rather than trained lawyers, are often the ones making these requests.

We would suggest that the Ministry maintain a list of public bodies for social workers to consult when preparing information demands, and that social workers not be authorized to make requests to entities that are not on the list without written authorization of a supervisor.

6. **Other personal information**

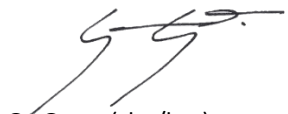
The Decision is limited in scope to health-related information, as that was the subject of the underlying case. It does not follow that only health information is constitutionally protected. The informational content of the records requested is critical to determining the intrusiveness of a search, so it would be natural for other personal subject matter that falls within the *Charter*-protected biographical core to require the same procedural protections as health care information. This could include, for example, information that might disclose marital status, sexual orientation, gender identity, stigmatized religious

practices or beliefs, and details of employment: anything that could reveal "something intimate and personal about the individual, their lifestyle or their experiences."[8]

To ensure constitutional compliance, especially given that the power to compel production of records is often exercised by decision-makers without the benefit of legal training in time-sensitive situations, it would be prudent for the legislature to take this opportunity to establish a uniform process for requesting information about identifiable individuals, even when that information appears less sensitive than health care information.

Thank you again for providing the BCCLA with the opportunity to make submissions on these issues of vital importance to British Columbians. We hope that our submissions will assist in creating legislation that protects both the children of the province and the rights of all, and would welcome the opportunity to comment on draft legislation.

Sincerely,



Ga Grant (she/her)
Litigation Staff Counsel
BC Civil Liberties Association

Aislin Jackson (she/they)
Policy Staff Counsel
BC Civil Liberties Association

[8] *Sherman Estate v Donovan*, 2021 SCC 25 at para 77. Note that, while this is not strictly speaking a s. 8 *Charter* case, this quote is from the Court's discussion of the s. 8 concept of the "biographical core".