A Call to Action

Proposed by lawyers from the Victoria Bar

A Call to Action to end systemic injustice suffered by children and families in child apprehension cases

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To the Bar: A request from some members of the Family Bar for assistance.

The Proposal: A Collaborative Litigation Support Plan to end systemic injustice suffered by children and families in child apprehension cases in Victoria.

In March 1992, on the occasion of the memorial service of former Bencher and much loved Victoria lawyer, Pamela Murray, Q.C., Mr. Justice Gow aptly referred to the event as "the gathering of the clan." It was a sad, but proud moment, recognizing the common bond of those dedicated to serving and improving the community that we are fortunate enough to call home.

With that unity in mind, the members below are calling upon their colleagues for support in an important initiative; to end the harm being done to children during the process of child apprehension. The time to address the recognized deficiencies in protecting the well-being of children and families is long overdue. We need help from the Victoria Bar now and even though this may not be your area of practice, please take a few minutes to read the balance of our submission. (A more detailed report will be posted on the website in the coming weeks.) We are appealing to the legal community to help coordinate a pilot project that will be designed for the needs of the Victoria area. The current system, conceived to protect children, far too often causes unnecessary trauma and irreparable damage to children and families. The objectives of this initiative: healthy children, united families and adherence to principles of fundamental justice, ultimately serve us all.

The Call to Action is simple: Access the Call to Action website at http://calltoaction-victoriabar.weebly.com/ and send an e-mail indicating your willingness to provide your support and engage in exchanges to arrive at solutions. The limited legal aid hours provided for these files is sorely inadequate and it is unreasonable for the members who take these cases – your colleagues – to continue unassisted. Much work goes unpaid and the inequality in resources can result in unacceptably poor outcomes in the Courtroom, often for those who are already some of the most disadvantaged in our community. If you have any doubts, please step into Provincial Family Court on Thursday afternoon to witness first-hand the pall of human misery that hangs there — the despair is palpable and overwhelming.

We are not simply talking about access to justice, we are proposing a plan for facilitating its delivery in the realm of child apprehension, by using your skills to help a family in our community. Students and administrative support staff can also make valuable contributions. We are asking all willing firms in the Victoria Bar to assist with only two or three cases per year or in ways detailed below. We feel we owe it to our community to act because there is no excuse for a flawed or ineffective process when intervening in the lives of families.

Summary

A number of members of the Victoria Family Bar ("VFB"), who practice in the specialized area of Child Protection and other interested lawyers have collaborated in developing a project to address the significant challenges and systemic deficiencies the VFB members have to contend with when they have been retained to represent a parent who has had their child(ren) apprehended by the Ministry of Children and Family Development ("Ministry"). The Child, Family and Community Service Act ("CFCSA") is the framework for Ministry employees who are provided the authority under this Act to apprehend children who reside in British Columbia.

Instead of supporting families, the system can operate unfairly and sometimes, when a child is removed, there is a risk that he or she may be placed with foster parents for years, or permanently, due to the incremental effect of Ministry demands which can create insurmountable hurdles for family reunification. Although the CFCSA is in need of a complete overhaul, parents' counsel requires immediate assistance in pushing to improve the Court process. We have all experienced the absence of consequences when the Ministry ignores disclosure and other deadlines, even in the face of Court orders. The inability to gain efficient and timely discovery of the case to be met, combined with the challenges of securing an early hearing date, can make reunification far more difficult than the administration of justice should tolerate.

We invite you to evaluate and assist with litigation in which some evidentiary rules are unrecognizable as belonging to the common law. The destruction of a family can occur on the basis of second, even third hand hearsay, often from unidentified sources, or sources which are never made available for parents' counsel to cross-examine or for the Court to weigh. Obtaining full and complete disclosure in a timely fashion is a constant battle, with delays almost invariably operating in favour of the Ministry position. In the course of discussions and case comparisons at parents' counsel meetings it has been determined that important documents are routinely left out of disclosure. Disclosure documents are also disorganized, late and sometimes so unreadable that parents' counsel are compelled to advance their client's cause without the complete picture or effective recourse against the Ministry for these practices.

Case conferences and mediation are encouraged, neither of which provide a satisfactory mechanism for the restraint of Ministry power when it is being wielded inappropriately. The immense strain caused by loss of custody, parental alienation, hostile foster parents, statements by potential witnesses whose economic interests are tied to towing the Ministry line, the need to strictly comply with Ministry demands and the debilitating impact of coming under Ministry and Court scrutiny all contribute to overwhelming odds for even the most resilient parents to overcome; many do not prevail.

There must be re-consideration of the operating proposition that when the Ministry apprehends children that the parents are not in an adversarial relationship with the State. That view was expressed in 1984, in the limited context of receiving hearsay evidence about the sexual assault of a child. Mr. Justice Hinkson stated in D.R.H. and A.H. v. Supt. Of Fam. & Child Service (1984), 58 B.C.L.R. 103 at 105:

> While the inquiry provided for by the Act is to be conducted upon the basis that it is a judicial proceeding, unlike some judicial proceedings it is not an adversary proceeding and there is no lis before the Court. It is an inquiry to determine whether a child is in need of protection and, as the statute directs, the safety and well-being of the child are the paramount considerations.

That principle is used as a rationale to shield the Ministry from challenge, even in situations where the stance taken by the Director is distinctly adversarial. In addition, the effect of being forcibly separated from ones child(ren), particularly for parents who have experienced other traumatic events, is an adversarial struggle and likely their most significant one. The ongoing investigations into child protection issues are stressful and sometimes conducted in a similar fashion to "tunnel vision investigations" now coming under scrutiny in criminal matters as a result of wrongful convictions. Institutional respect for the liberty of the child is absent in many circumstances and while there are vast differences in the circumstances in which an adult is taken into custody upon arrest or detention, the absence of similar protections for children or their parents, once the Ministry has decided to apprehend, is striking.

It is also undeniable that the Ministry capitalizes upon risk aversion, by alluding to its "concerns" as though Ministry expertise around child welfare is irrefutable and should stand on its own. The Ministry's statutory obligation is to ensure that the least disruptive measures have been pursued, but many times the Ministry is not called upon for a detailed account of what efforts have been made short of removal. Judicial deference to the simple phrase: "The Ministry has concerns", can mean weeks, months, years or perhaps permanent alienation of a child from his or her parents. All too often, the "concerns" alluded to in initial proceedings may never be substantiated, but the harm done is irreversible. The intervention itself can be such a destructive force that a family may never recover from it and parents and children are permanently damaged or alienated from one another. In addition, counsel have been involved in troubling cases where children are abused or mistreated in care and the responses range from denial, or ineffective intervention, to the manipulation of evidence, with little recourse available for such actions.

Many children who lose the attachment and bond with their families resulting from forced and prolonged separation develop chronic psychological issues. Children, once taken from their families, may be moved from one foster home to another – with all the implications for social and educational dislocation. Proper parenting can be compromised and children may not otherwise learn those skills. Research indicates that only 21% of children in care graduate from high school.[1] More than half of the boys and 30% of the girls in care have contact with the justice system.[2] Most disturbingly it was found that between the ages of 19 and 25 former children in care died at a rate 6.5 times higher than the rate for the general population.[3] Joseph Doyle, the Erwin H. Schell Associate Professor at MIT credited with much ground-breaking work in this area, found that placing children in care increases the likelihood that they will drop out of school and that they will be convicted of a crime as adults.[4] He found no evidence of benefits and when this study was replicated for 16 to 18 year old boys in BC there was again evidence of harm and no evidence of benefits.[5]

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[1] Page 25 of Health and Well-Being of Children in Care in British Columbia-Educational Experience and Outcomes A Joint Special Report by the RCY and PHO for BC Available online at: http://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/reports-publications/special-reports/joint_special_report.pdf

[2] Figure 8 of Kids, Crime and Care. Health and Well-Being of Children in Care: Youth Justice Experiences and Outcomes. A Joint Special Report by the RCY and PHO for BC. Available online at: http://cwrp.ca/sites/default/files/publications/en/BC-YouthJusticeReport.pdf

[3] Page 59 of Health and Well-Being of Children in Care in British Columbia-Educational Experience and Outcomes A Joint Special Report by the RCY and PHO for BC Available online at: http://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/reports-publications/special-reports/joint_special_report.pdf

[4] Doyle Jr. Joseph J. "Child protection and child outcomes: Measuring the effects of foster care." The American Economic Review 97.5 (2007): 1583-1610. And Doyle Jr. Joseph J. "Child protection and adult crime: Using investigator assignment to estimate causal effects of foster care." Journal of Political Economy 116.4 (2008): 746-770

[5] The Impact of Placing Adolescent Males into Foster Care on their Education, Income Assistance and Incarcerations by William P. Warburton, Rebecca N. Warburton, Arthur Sweetman, Clyde Hertzman. Available online at: http://www.iza.org/en/webcontent/publications/papers/viewAbstract?dp_id=5429

We believe that the Bar at large is unaware of the Ministry's seeming indifference, at times, to the basic fundamental human right to be treated fairly and in a manner consistent with the right to life, liberty and security of the person, as enumerated in section 7 of the Canadian Charter of Rights and Freedoms. The United Nations Convention on the Rights of the Child came into effect on September 2, 1990 and states that, "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding." The current system can operate to deprive families of a speedy and evidence based inquiry, which is clearly not in the best interests of any child. One young lawyer observed after her initial experience with CFCSA matters: "The Ministry has unfettered discretion – what is the point of showing up at a hearing?" It is incumbent on the Bar to assist with the frustrations of young counsel, to support those who are overburdened and to encourage those, who may not be engaged in the best practice possible to protect the vulnerable in our community, to do better.

Two very recent developments in Canada have implications for this call to action: the J.P. v. British Columbia decisions and the Truth and Reconciliation Commission final report (http://www.trc.ca/websites/trcinstitution/index.php?p=980). Each calls us to action in its own way. It should not be business as usual for child welfare cases. The full report to follow, after its final editing, provides our insights into the daily issues that confront counsel working under child protection law. Our goal is to prevent harm to one more child, starting now and to ensure that children grow up in a loving family home with support from the community and minimal disturbance in their family relations. We kindly ask that you read our full account in this light and contribute to our action by assisting in the development of an operative and effectual website and pilot project to provide litigation support.

Litigation Support Plan

A team approach that will enable a complete response to those who are at risk of having their children removed, or have had their children removed, can be accomplished with the support of the Victoria Bar. As with many societal problems, the way forward is through a coordinated community effort. The initial crucial help required is the development, management and expansion of the website that is being developed.

The following is a list of areas in which assistance is needed:

- Volunteers to assist with the website that links law firms and tracks support;
- Advocacy for parents both within and outside the Courtroom. A parent struggling with the bureaucracy in the effort to regain custody of their children can be overwhelming;
- Taking calls from parents at the moment of apprehension can be critical. This may mean initiating and maintaining a help-line;
- Helping to identify and connect clients to less disruptive measures (than removal) and to available services. (Bar members are knowledgeable and have many connections to community resources and services.);
- Supporting parents in accessing less disruptive measures on an ongoing basis;
- Senior litigation counsel taking on child apprehension cases on a pro-bono basis or as part of a team, including those involving criminal allegations;
- Undertaking meritorious appeals of decisions when parents' counsel have exhausted their time and resources;

- Preparation of various applications, including disclosure or increased access applications — an excellent opportunity for students and junior lawyers to obtain Courtroom experience;
- Bar initiated, multi-disciplinary training to address "Improved Practices", in addition to existing CLE courses largely designed and taught by Director's counsel;
- Training initiatives to educate volunteers;
- Letter-writing campaigns to press for improvements, including for social workers to be subject to professional bodies;
- Litigation support or multi-firm teams to review and advance cases where there is potential liability on the part of the Ministry and/or staff for breach of fiduciary duty, misfeasance, abuse of public office, or negligence, bad faith/malice;
- Volunteers to conduct "Independent Views of the Child Reports" so they are produced by independent, qualified individuals, rather than reports from partisan social workers
- Attending with clients to 'family case conferences' MCFD arranges out of Court, to prevent parents from being bullied into arrangements and in some cases preventing apprehension;
- Request to UVic law students to engage in litigation/client support;
- Rowbotham type applications for additional legal aid funding;
- Where possible and appropriate, reviewing disclosure, case preparation, witness interviews, carrying disbursements for necessary reports (currently funded or not by MCFD);

Index of Issues:

1) **Court Delays** – The Child, Family and Community Service Act (CFCSA) contains provisions meant to ensure that the legal process adheres to principles of procedural fairness and fundamental justice. These safeguards are rendered ineffectual due to Court delays.

2) **Disclosure** – Disclosure provided on behalf of the Director is often not timely or helpful, in that full disclosure does not occur at the outset of proceedings, nor does it always contain organized, adequate and all relevant information relating to the case to be met.

3) **Systemic Unfairness** – Lack of adherence by the Ministry to the principles of fundamental justice and due process can occur at various stages and can be particularly damaging at the Presentation Hearing. Perhaps the most flagrant example of systemic unfairness is the overrepresentation of Aboriginal children in the child protection system.

4) **Evidentiary Issues / Anonymity** – The removal of a child from its family requires only a prima facie case, which can be established on second, even third hand hearsay from a completely anonymous source, whose motivations are unknown and unverifiable.

5) **Independence Issues** – Economic control exerted by MCFD causes a perceived, or worse, lack of independence on part of psychologists, access supervisors, mediators and counsel.

6) **"Less Disruptive Measures"** – Ministry adherence to the requirement to investigate and provide less disruptive measures often appears superficial and proof of such efforts usually involves one line in a form: "There were no less disruptive measures available at the time of removal".

7) **The Impact of Trauma** – Clients who suffer the effects of trauma pose immense challenges for lawyers attempting to assist their cause. They often require services beyond those normally provided because if they are not healthy and engaged the efforts to obtain positive results — reunification of the family are thwarted, not because they are inadequate parents, but due to the strain of litigation, when children are at

stake. Attempting to instill trust when it has been repeatedly betrayed is an ongoing complication for counsel.

1. COURT DELAYS

a) Problem:

The Child, Family and Community Service Act (CFCSA) contains provisions meant to ensure that the legal process adheres to principles of procedural fairness and fundamental justice. These safeguards can be rendered ineffectual due to Court delays.

b) Background:

Under the CFCSA, there are three interventions in a family that bring the matter to Court. Each intervention has a prescribed notice period and time within which the Director's case must be presented to a judge in a summary manner:

i) supervision order – Under section 29.1 of the Act, a family must be given 7 days' notice of the application and the matter must be in Court within 10 days of making the application.
ii) removal of child – When a child is removed, a family must be notified promptly in writing of the removal and the notice must include the reasons therefore. The matter must be in Court within 7 days.
iii) protective intervention order — For a protective intervention order the director must give 2 days' notice to the family prior to the hearing.

The first date in Court for a supervision order or a removal, is a presentation hearing, when the Ministry must show that it has reasonable grounds for the intervention, present their plan of care for the child, and must show that "less disruptive measures" were considered and would not have been effective.

The Act prescribes a short time frame for conduct of a presentation hearing, to protect children from arbitrary and inappropriate state intervention, theoretically affording families an early opportunity for due process with, at the very least, input into how their child is cared for while the child protection matter proceeds through the court system.

The protection hearing must be commenced 45 days after the conclusion of the presentation hearing, with the obvious legislative goal being to ensure child protection matters are heard relatively quickly, (in an adult's time frame), after state intervention in family life. A protection hearing involves an inquiry into safety and protection issues, culminating with a judicial determination of whether the intervention was appropriate.

c) Discussion of the Harmful Effects of the Problem:

Unfortunately, in practice, the first day of a presentation hearing and protection hearings are considered to be "nominal commencement" only. The matter is called in Court, a court plan of care is filed, and if contested, the matter is adjourned to set a date for hearing. The backlog in the Court system means that depending on the local jurisdiction, presentation hearings may not be scheduled until 2 to 4 months after the nominal commencement date and sometimes as long as 6 months or more from the date of the nominal commencement.

Courts have accepted and endorsed the practice of a nominal commencement as an acceptable solution in order to manage Court resources which are finite: N.J.L. v. Child Family and Commmunity Services (Director), 2008 BCSC 218; B.B. v. British Columbia (Director of Child, Family and Community Services), 2005 BCCA 46 (CanLII), 36 B.C.L.R. (4th) 108; British Columbia (Director of Child, Family and Community Service) v. B.S. (1996), 1996 CanLII 2251 (BC CA), 31 B.C.L.R. (3d) 383 (C.A.); Walton v. Simpson et al, 2000 BCSC 31100)

To conduct a hearing "as soon as possible" as the Act mandates, the Courts have ruled, does not mean "without adjournment." The Courts have determined that delays and adjournments are necessary to manage Court resources and allow counsel to prepare.

The presentation hearing does not determine whether a child needs protection, but rather decides upon the best interim plan for the child until a full inquiry into the question of whether the child needs protection can be held. Presentation hearings are summary in nature and not intended for lengthy inquiries into credibility, with "a judicial preference" for resolving any discrepancies in fact in favour of the Director: British Columbia (Director of Family and Child Services) v. W. H. K., 2003 BCPC 307 para 16; B.R. v. K.K. & Director under the CFCSA, 2015 BCSC 1658; British Columbia (Superintendent of Family & Child Services) v. M. (B.), (1982) 37 B.C.L. R. 32 (B.C.S.C.) ; B. S., Re, 1998 CarswellBC 3075; S.M. (Re) [1998] B.C.J. No. 2204 para 26) At the presentation hearing, the Director presents a "plan of care" to the Court, which in practical terms is often made by social workers in haste based on the information they have at hand; often without consultation with the parents. Social workers therefore do not necessarily have available the best information about all the family or caregivers with whom the child is bonded or attached and who might be able to protect the child.

While families wait for their day in court, interim orders are put in place, which tend to be the same as the orders the Director will seek at the protection hearing. If the child is in foster care, this means that the child will be amongst strangers for months before a hearing to obtain a three, six, or twelve month temporary custody order. The Director's goals are accomplished, however inappropriate they may be, without the benefit of an inquiry on the merits.

Just as there are delays for presentation hearings, there are delays for access hearings. These may be commenced by a parent at any point in the process if they do not believe they are having enough access to their child. Access to children in care is usually reasonable access at the discretion of the Director. The Director's assessment of "reasonable access" tends to be what the Ministry can afford and arrange. In most communities, supervised access providers are strained and do not have the resources to provide the required services. Families are wait-listed for supervision services, sometimes with child protection workers themselves providing the supervision, which may be as infrequent as once a week or once every two weeks for a few hours.

Breach of fundamental human rights – Excessive delays are unconscionable and a breach of the fundamental rights of parents and children alike. In addition, the inability to accommodate a child's sense of time causes serious collateral damage; harm which is invisible by virtue of its lack of expression by those too young to convey that a week, no less a month — seems like an eternity. Deference to the position of the Director may prevent the risk of physical harm to the child, but determining the risk of psychological harm as a result of State intervention requires a more detailed inquiry. If such inquiry occurs, it is often too late, occasioning breaches and damages without remedies for many.

Trauma — As stated, a removal or intervention in home life through a supervision order can be destructive. In the case of a child that has been removed at birth or shortly thereafter, the damage with respect to attachment and bonding with the baby's mother may have occurred prior to the initial presentation hearing. Psychological and

psychiatric expertise firmly establishes the risk that such a child may be forever scarred by early childhood intervention, with such disruptions in attachment having serious consequences for a child's development. With respect to removals of newborns, it is not unusual to only allow a mother 1-2 hours a week of supervised parenting time; there are anecdotal reports of nursing babies being removed from impoverished mothers without a breast pump being provided by the Director, ultimately requiring the baby to stop nursing.

Unlike other areas of law where the factual basis of a case remains static until the Court has an opportunity to decide the legal issues such as liability; in family law, the situation evolves up until the matter is in Court. Damage and trauma can be caused to children and parents, by virtue of the intervention alone, while the family waits for the adjudication of their case on the merits, and such ensuing trauma may have the impact of weakening the parents' position. (for a more detailed discussion on trauma see item 7 below under: Impact of Trauma)

Adherence to Status Quo – More importantly, a status quo is established. If a child becomes settled in a current situation, the Court will be hesitant to disrupt that situation. Ultimately, this can mean that the outcome of a family law hearing is determined prior to it being heard by a judge, by virtue of the mere effluxion of time. This is most likely to be the case where one parent is preferred as a caregiver over another. It is not unusual for a parent who has not recently cared for the child in any capacity to be chosen by the Director to be the primary placement for the child. There is no accountability until the presentation hearing stage for this decision; no independent assessment of the parent's skills and ability to parent the child, but rather delay dictates a default position, regardless of its shortcomings.

Consent and the disempowering impact of Court delays – Ultimately, due to the prospect of delay, parents often consent at the presentation hearing stage and at the temporary custody order stage, even if they disagree with the removal, because to contest means their children could be in care for longer than if they simply consent. Delay operates to preclude an independent review of the case by the Court as families sometimes attempt to progress by complying with the demands imposed by the Director, in the vain hope they will be able to convince their child protection worker and his or her team that they should have the child back home. Counsel report that increased access is used as a bargaining tool to obtain consent on orders sought by the Ministry, on occasion with the increased access failing to be arranged.

Although CFCSA section 60 allows the parent to consent without admitting to the facts alleged against the them, the consent is placed on the record and signifies an open file with the Ministry, with numerous serious potential collateral and long term effects.

2. DISCLOSURE

a) Problem

In many instances, disclosure provided on behalf of the Director is neither timely nor meaningful. Full disclosure does not occur at the outset of proceedings, nor does it always contain all relevant information relating to the case to be met. Strikingly parents may have no information at all until 7 days after a removal, when a one-page form is provided. Ministry documents in their current form, and Ministry record keeping practices, do not serve as an adequate vehicle to lay the evidentiary foundation so that parents' counsel can understand the case they have to meet. Ministry forms are designed to guide the exercise of child welfare worker discretion. Information may be cryptically presented in a

formulaic way or documents may include untested opinions, potentially contaminating evidence as the case proceeds. (For a discussion of disclosure issues related to the Ministry's obligation to list less disruptive measures in the report to court, see under item 6 below: Less Disruptive Measures)

b) Background

Section 64 of the CFCSA requires that disclosure be full and timely. Nevertheless, a number of factors work against a strict disclosure process. These factors include: the intention that hearings be informal (CFCSA s. 66); the potential necessity for multiple applications; and the challenges in obtaining Court time. All of which is complicated by the characterization of the proceedings, as alluded to in the above Summary, as being non-adversarial.

In the realm of criminal law, or cases governed by the Supreme Court Civil Rules, full disclosure or complete discovery are clearly established as requirements to ensure justice is done. As outlined by Mr. Justice Sopinka in R. v. Stinchcombe [1991] 3 S.C.R. 326, in section 2 of the judgement:

> "Significantly, in civil proceedings this aspect [the element of surprise] of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of **the case to be met.** "[emphasis added]

In child protection cases, the Director's powers require justice system oversight to ensure they are exercised in a fair and transparent manner. Unfortunately, counsel report that matters have not changed significantly since His Honour Judge Stansfield's observation in British Columbia (Director of Family and Child Services) v. T.L.K. [1996] B.C.J. No. 2554, at page 3:

> "Regrettably, in protection proceedings frequently there is inadequate, untimely disclosure, causing unfairness to parents, and loss of valuable Court time. These directions will address disclosure in this case, and indirectly **will provide parameters for other cases**." [emphasis added]

In T.L.K. Judge Stansfield required the Director to file an affidavit deposing that all documents in his possession or control which could be relevant to the matters in issue be produced to counsel for the Director; counsel to file written certification that all relevant documents had been produced or made available to counsel for the parents and set out the timelines for the such disclosure. Such measures are essential in cases where child/parental alienation is the possible outcome of a Court hearing. The obligations of the Ministry are outlined in similar terms in the recent case of J.P. v. British Columbia (Children and Family Development) 2015 BCSC 1216. In that case, The Honourable Mr. Justice Walker found that: "The Director has demonstrated her lack of regard for directions from this Court and her legal obligation to make full and frank disclosure to the Provincial Court of British Columbia in apprehension proceedings." (at par 40.)

c) Discussion of the Harmful Effects of the Problem:

Bureaucratization of the legal process —Fundamental to counsel's ability to take instructions and prepare their case is the need for transparency and a comprehension of the case to be met. Disclosure provided by the Director, while outlining the process engaged in by Ministry agents, is often deficient for the purpose of effective litigation. In response to requests for the reasons and the evidentiary basis for interference with parental rights, counsel on behalf of the Ministry will attempt to meet their obligations by indicating that the Director has "concerns" about parenting issues. Such "concerns" may be poorly articulated or perhaps not articulated at all.

Child protection social workers are often young, overburdened and may have limited life experience. They may not be members of a professional organization governed by an ethical code. In the face of unmanageable caseloads and professional inexperience, Ministry social workers may be forced by circumstance to make quick decisions with little objective information. In these situations, there is a grave danger that untested assumptions will guide early decision making. It can become an insurmountable challenge for parents' counsel to discern the factual underpinnings for opinions contained in the required forms. Until the process comes to trial, the decisions of social workers, and the opinions on which these decisions are based, are not subject to meaningful outside scrutiny. The result is that untested or questionable information may serve as part of the foundation for later removal of the child from their home.[6]

In answer to disclosure requests, administrative forms, such as a 'Strengths and Needs Assessment' are forwarded to Director's counsel and then forwarded on to parents' counsel. In effect, Director's counsel are relegated to a perfunctory role, with disclosure provided on ministerial rather than strictly legal terms. As an officer of the Court, Director's counsel should play a more active role to ensure that ministerial disclosure materials are organized and complete; and that the disclosure process is timely and otherwise satisfies the requirements of procedural fairness and fundamental justice. Appropriate documentation and disclosure would include more detailed information on assessments and opinions on which a decision to apprehend is based.

Lack of timeliness — Given the delays outlined above, untested allegations can prevent reunification for months, or permanently. So limited is the Director's counsel's role, that on occasion parents' counsel may find themselves finally in receipt of helpful disclosure materials which pre-date the first of a series of requests, but are not received until well into proceedings.

Despite the dramatic interference with family rights at the outset of a case, very limited information may be available to assist counsel, leading to a capitulation in regard to the Director's position that can be injurious to a client's cause. Frequent use of case conferences under Rule 2 of the Provincial Court (Family, Child and Community Services Act) Rules, -- that mandates a judge to review the extent of disclosure -- are characterized by a desire to advance matters in a cooperative fashion. This is inconsistent with the authority required to compel full disclosure. Disclosure is often not fully provided until just prior to a Court hearing, rather than at the case conferencing stage, which means that parent's counsel is only operating on instructions from their client. They do not discover, until the last minute, the case they need to meet.

In a recent egregious case, approximately 90-130 pages of material was provided to counsel after over eight months of removal and when the matter was continuously and relentlessly pressed, over the ensuing nine months, ten 3 inch binders of materials were ultimately provided. Despite the volume of material, no concrete description of Ministry "concerns" were ascertainable.

[6] For a dramatic example of this see: J.P. v. British Columbia (Children and Family Development) 2015 BCSC 1216

Changes to Orders – A problem related to full and timely disclosure involves counsel's efforts to obtain changes to supervision, temporary custody and access orders, governed by s. 57 of the CFCSA. This section indicates that circumstances must have changed significantly in order for a party to apply for a change to a previous order. Section 57 presumes that the Director assessed and or conveyed the circumstances accurately in the first place, which may not be the case. Sometimes showing a "change" is tantamount to taking on a full blown hearing on the merits. This carries all of the implications previously outlined including difficulty obtaining Court time, disclosure issues etc. To avoid these issues, the Director's view of matters is often favoured, and the status quo preferred. Without timely disclosure, elucidating the inaccuracies in the Director's position can be an exercise in futility.

Unavailability of reasonable legal aid – The extremely limited hours available to a lawyer relying on legal aid also hampers effective pursuit of meaningful disclosure and case preparation. In effect, the Director prevails because the measures an advocate would ideally take are simply unaffordable. In terms of disclosure, counsel's limited capacity to comb through masses of irrelevant and unhelpful information to attempt to glean the kernel of the CFCSA case, is detrimental to the effort to obtain orders which alter the status quo.[7]

Confidentiality and redacted information – Section 74 of the CFCSA enables confidential sources to be protected, preventing an early effort to determine if information foundational to an apprehension is reliable. Protection of witness information may be justifiable in certain circumstances, such as where significant safety concerns arise if identifying information is released. Nevertheless, it must be acknowledged that there is also a need to be given the opportunity to challenge information which is not provided under oath. At the trial stage, when cross examination does take place, much damage to familial relations is already done.

Counsel may be hard pressed to differentiate between material that is redacted to protect a confidential source, privacy or true privilege, and information which is missing because it contradicts the Director's position. The removal of information from records and the use of anonymous sources that may have provided exceptionally critical and subjective information precipitating a removal, make counsel's task particularly difficult and raises question about the potential denial of procedural fairness and fundamental justice.

Disorganized / poor copies – Unlike civil proceedings in Supreme Court, in child protection proceedings there is no obligation on parties to list documents, both relevant and privileged. Such a requirement would have the effect of assisting both parties, but particularly aid parents' counsel to discover the case to be met. The informality in child protection cases, while of some benefit, ultimately works against a determination of the best interests of the child, as vital documents may be buried in hundreds of pages of material or may not be included in disclosure packages. It has also been observed by counsel and clients that materials are often poorly copied, with no index or tabbing to assist in organization.

Flawed information perpetuated – Ministry agents supply a significant amount of information to service providers and those responsible for assessing parenting skills, mental health issues, and parental capacity. If the basis of that information is not revealed and an opportunity to dispute it is not provided, the case which develops against parents

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[7] In its second white paper on justice reform released in response to the Cowper Report, the Ministry of Justice makes reference to the Legal Services Society (LSS) report recommendation for increased family and child protection duty counsel services but does not make a commitment to expand the child protection services it currently provides. White Paper on Justice Reform Part Two: A Timely, Balanced Justice System at p 30 www.ag.gov.bc.ca/public/WhitePaperTwo.pdf February 2013; According to LSS: "The main factor limiting lawyers' ability to provide effective representation identified by respondents was insufficient tariff hours available to counsel for providing CFCSA services to their clients." Legal Services Society of British Columbia CFCSA Services Evaluation—July 30, 2015 (at p 56) www.legalaid.bc.ca/about/CFCSAEvaluationAug2015.pdf

can seem overwhelming when in fact it is a perpetuation of misinformation or faulty perceptions inappropriately documented during the early stages of Ministry involvement. For example, one service provider described a client as "catatonic" in order to prompt the Ministry to respond with services. That intentionally exaggerated report was taken as an accurate observation of the father's state and found its way into a variety of reports about his capacity and mental health. In the recent case of J.P. v. British Columbia (Children and Family Development) 2015 BCSC 1216 the Honourable Mr. Justice Walker found that:

> "The Director's report to the Provincial Court, outlining the circumstances leading up to the Apprehension, contained significant omissions and inaccurate and misleading factual information. The report was prepared in a manner that was inconsistent with the Director's legal obligation to make full and frank disclosure, and it denied the plaintiffs procedural fairness and fundamental justice." [8] (At par 18)

Best evidence discouraged – Despite problems with the availability and accuracy of Ministry documentation during a child protection investigation, the recording of conversations and meetings is stated as being contrary to Ministry policy, allegedly in the interest of promoting cooperation. An accurate record of all Ministry dealings should be sought in CFCSA proceedings as a guarantee that no-one's position is misrepresented.

Credibility of evidence – The accuracy of Ministry note taking should also be investigated during the court process in the same fashion police are subjected to extreme scrutiny around veracity and contemporaneous notes. A case in point involves a social worker who took notes of the date and location of a meeting to determine if a child in care had been sexually abused while in foster care, but failed to write down what the child said. Such lapses, when the well-being of children is at stake, cannot be countenanced and must be effectively addressed by the Court to prevent greater harm than the harm sought to be avoided in the first place.

As is the case in criminal matters, when police are found not to be credible, there must be a mechanism utilized by the judiciary to enable rejection of the evidence of Ministry witnesses who display a bias through their willingness to contrive or pervert the evidence. Currently the "best interest" test militates in favour of a 'forgiving 'approach to social worker transgressions.

3. <u>SYSTEMIC UNFAIRNESS</u> (Presentation Hearing/ Safety Plans Denying Access/ Overrepresentation of First Nations Children in Care)

a) Problem:

Lack of adherence by the Ministry to the principles of fundamental justice and due process can occur at various stages and is particularly damaging at the Presentation Hearing. Unfairness also occurs in the course of the development of safety plans: these can be implemented without appropriate risk assessments being conducted and without sufficient judicial oversight, effectively denying access to one of the parents and in some situations potentially placing the other parent in danger of violence.

[8] The Ministry has since partnered with the Child Welfare League of Canada to examine the child protection policy, standards and practice and actions taken in the JP Case by Ministry staff, supervisors and legal counsel, contracted to represent the Director, under the Child, Family and Community Service Act. The review (the Plecas Review) will provide prospective recommendations regarding how many errors or omissions evident in the case can best be minimized or avoided in future child protection matters. The terms of reference for the Ministry review are outlined in: J.P. v. Plecas 2015 BCSC 1962 at par 18 The Minister made a commitment that the Review would be publicly released by October 21, 2015. (News.gov.bc.ca/releases/2015CFD0028-001162) As of Nov 21, 2015 the Plecas review has not been released.

Perhaps the most flagrant example of systemic unfairness is the overrepresentation of Aboriginal children in the child protection system.

b) Background

The legal test the Ministry must overcome at the presentation hearing stage is whether or not the Report to Court includes admissible evidence which could provide the basis for intervention (whether removal or imposition of supervision order). The Ministry need not prove at the initial stage that the child is actually in need of protection. The second step of the test when there is a removal, is whether or not there was a less disruptive course of action to take to protect the child.

At the nominal commencement date the Ministry will have already prepared their file supporting the Report to Court. Nevertheless, this file is not made available to counsel at the nominal commencement date. Often disclosure is not made until much closer to the hearing. In fact, it is not uncommon for counsel to receive this disclosure only the day prior to the hearing.

c) Discussion of the Harmful Effects of the Problem

Late disclosure in this circumstance leaves a family in the dark about what has been considered and used by the Ministry to support their intervention. Not having this information makes it impossible to challenge the Report to Court on a summary basis or even enter into fruitful discussions about planning for a child during that interim period.

Leaving families uninformed about the information the Ministry has, leads to very one-sided meetings with the Ministry, ultimately allowing the Ministry to use the unequal balance of power to overwhelm parents with information when useful for the Ministry's continuing investigation. The provision of disparaging information at the last minute tends to force parents off-kilter eliciting poor reactions; which are then used against them at the upcoming hearing, thereby bolstering the Ministry's initial assessment that protective interventions are necessary.

At a presentation hearing, the lead social worker will take the stand and provide the court with the Ministry evidence on which the decision to intervene in a family was based. In addition to the information in the Report to Court, the Ministry will also provide further evidence about what has occurred since the nominal commencement and other information, which may not have been included in the Report to Court.

The parents opposing the intervention have limited rights to challenge the evidence presented by the social worker. Disputes about the facts of a removal or intervention, are most often resolved in favour of the Ministry: Re B. S., [1998] B.C.J. No. 2553) (See also under item 1 Court Delays). Some cases have held that at a presentation hearing, there are generally no or limited rights of cross-examination (Re s. (R.A.), [1996] B.C.J. No. 2227, affirmed [1996] B.C.J. No. 2387(S.C.), leave to appeal refused (1996), 31 B.C.L.R.(3d) 383 (C.A.).

The most harmful effect of the late disclosure and limited right to challenge the Ministry's case is that it often does not make sense to challenge an intervention at the presentation stage. Without any meaningful rights of early disclosure, combined with Ministry ability to bolster its case after the presentation hearing with new information, and confronting a limited ability to challenge Ministry evidence at a presentation hearing through cross-examination, counsel may rightly or wrongly, advise parents to consent to the early intervention in order to more quickly advance

to a court process where the Ministry can be legitimately be challenged. For children, the result is Ministry power can be unabated for months or half a year of their lives and beyond.

Inappropriate use of safety plans – Recently, in the Victoria area, there has been a practice of instituting a "Safety Plan" to avoid bringing a matter before the court while the Ministry conducts its investigation. A Safety Plan is a contract with one or both parents, in which the parent or parents agree that they will engage in particular behaviour or not engage in particular behaviour.

In high risk situations, there may be a need to develop and implement an immediate plan to help keep the child safe. Such a plan, for example, would be appropriate to consider after a determination of high risk based on the use of a recognized risk assessment tool and only as part of an overall longer term safety strategy including judicially sanctioned protective measures such as an application for a Protective Intervention Order.[9] A safety plan is not meant to be used, however, as a way of privatizing the issue by pitting one parent against the other, in effect placing the responsibility on one parent to prohibit the children from having contact with the other parent. It has become increasingly common for the Ministry to use Safety Plans to coerce one parent to prevent the children from having contact with the other parent. In families which are divided by hostile divorce, one parent may very readily agree to this plan, interrupting current parenting time arrangement. In families where the mother is also subject to abuse, putting the onus on her to restrict contact may place her in more danger.

As a result of these Safety Plans, the parent who is not a party to the contract is left with limited ability to challenge them. The parent who is a party to contract is advised that if they do not follow it, the Ministry will remove their children, with the implication that the children will go into foster care. These Safety Plans are de facto removals from one parent without any court oversight.

Overrepresentation of First Nations children in care – As a direct result of residential schools in Canada and the practice from the 1960s through to the 1980s of removing Aboriginal children from their homes and families and placing them in Caucasian homes, Aboriginal children are over-represented in the child protection system. As of 2011, 52% of all children in care in BC were Aboriginal. (Wrapping Our Ways Around Them: Aboriginal Communities and the Child Family and Community Service Act (CFCSA) Guidebook www.nntc.ca/docs/aboriginalcommunitiesand the CFCSAguidebook.pdf at page 8).

In the words of Ardeth Walkem, an Indigenous legal scholar and practicing lawyer of the Nlaka'pamux Nation:

"Placing increasing numbers of Aboriginal children in care has only amplified the problem over generations, not solved it; more Aboriginal children are at risk now as a result of interventions through the child welfare system rather than less. Aboriginal children are: 4.4 times more likely to have a protection concern reported than a non Aboriginal child; 5.8 times more likely to be investigated; 7l7 times more likely to be found in need of protection; 7.1 times more likely to be admitted into care; and 12.5 times more likely to remain in care." (Wrapping Our Ways Around Them at page 10).

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[9] As an illustration of how this might work, the Violence Against Women in Relationships Policy, Protocol for Highest Risk Cases provision 37 states that: "The child welfare worker assesses to ensure the children's safety and well-being. If concerns about children's safety exist, it may be appropriate for the child welfare worker to provide services, make referrals or obtain a court order according to the Child, Family and Community Service Act." (At p. 67) This provision would apply in situations where domestic violence and child abuse are present.
http://www.pssg.gov.bc.ca/victimservices/shareddocs/pubs/vawir.pdf

Our system for children in care has been deficient in protecting First Nations children and providing them a good start in life. The recent Truth and Reconciliation Report states:

"Some of the damages done by residential schools to Aboriginal families, languages, education, and health may be perpetuated and even worsened as a result of current governmental policies. New policies can easily be based on a lack of understanding of Aboriginal people, similar to that which motivated the schools. For example, current child-welfare and health policies that fail to take into account the importance of community in raising children can result in inappropriate decision making." (Truth and Reconciliation Commission Final Report www.trc.ca/websites/trcinstitution/index.php?p=980) at page 137 – child welfare).

A critical way to address the systemic problems and unfairness in child protection systems is to ensure that there is a clear process for ensuring that Aboriginal communities are involved or leading the way from the outset of a child protection matter and that such process is adhered to in every single case.

The CFCSA does not take into account the importance of community in raising an Aboriginal child and can place the entire responsibility on the parents. A more culturally appropriate response would ensure that a child's band is involved from the start with regard to planning for a child that has entered the system. This means providing support and education to bands on how to become involved in the current child protection system. Involving a band in decisions for children in care is not the same as having the Delegated Agency on reserve involved.

Making every effort to ensure Aboriginal children are placed with Aboriginal families in their own community is critical. In some situations, connection with community might be as simple as sitting down for dinner with people from their own culture. Without making an effort to facilitate access to these simple every day activities, it cannot be claimed that every effort has been made to preserve the child's link to community and culture.

The Truth and Reconciliation Report also mandates that special care needs to be paid to neglect investigations involving Aboriginal families; many children end up in care as a result of neglect investigations, when the true basis is that the family the child was removed from was living in poverty. As lawyers, we must challenge child protection practices which are not informed by an awareness of the critical role of culture and community in the life of a child.

The current legislation and system is a profound disservice to Aboriginal children and families and must be either be re-designed to encompass the cultural perspective and unique needs of Aboriginal communities or wholly abandoned in favour of a model that is designed by First Nations and utilizes First Nations Court.

4. EVIDENTIARY ISSUES – ANONYMITY

a) Problem

To remove a child from its family requires only a prima facie case, which can be established on second, even third hand hearsay from a completely anonymous source, whose motivations are unknown and unverifiable.

b) Background

Children can be removed from their families on the basis of untested and unreliable evidence, the bulk of which is often hearsay from anonymous sources. CFCSA section 68 explicitly permits a Court to admit hearsay evidence that the Court considers reliable, but there is no mechanism by which the reliability of anonymous source evidence can be tested: counsel are barred from probing the identity of these anonymous sources or questioning their reliability and their motivation for making a report. It is fairly common that the anonymous source of a report is the child's other parent, who is locked in a custody dispute over the child. Situation dependent, this can cast doubt on the motivation of the parent for making the report. The Ministry aggressively protects the identity of their anonymous sources. Not even in criminal law proceedings, for very good reason, do anonymous sources enjoy such complete inviolability. In practice, the only person that can be cross-examined on anonymous source evidence in child protection cases is the social worker, who frequently, if not usually, is not the person who received the report. Thus, anonymous source hearsay evidence is admitted without testing its reliability to any significant degree.

Moreover, the Ministry is not required to disclose or produce at a hearing the authors of the many notes, reports or opinions that form the basis of the case against parents; the Ministry need only tender the reports for the truth of their contents. The question of their reliability is left as one to be resolved upon perusing the preponderance of the evidence as a whole. Even if each individual piece of evidence is faulty, so long as the big picture seems to add up, the evidence is accepted as reliable. The Ministry's accounts are therefore often preferred and any contrary evidence given by parents or collateral witnessess is simply rejected where it is inconsistent with that of the Ministry.

c) Discussion of the Harmful Effects of the Problem

In practice, at the initial stages, after a child has been removed, the Ministry social worker tenders a "Report to Court", with a one or two page, often inflammatory, narrative detailing the allegations made by the anonymous sources. The Report also generally sets out any history the parent(s) have had with the Ministry. This historical information is clearly offered so as to invite the trier of fact to make what the criminal defence bar calls "the forbidden inference", namely, that because a parent has attracted Ministry attention in the past, whether those reports were substantiated or not, the present allegations are more likely to be correct. This is a logical fallacy by which the trier of fact is encouraged to substitute emotion — in this case fear — in place of reason, and to reach a conclusion that does not flow from the premises, which are not facts, rather, only historical allegations. While drawing such inferences has been thoroughly rejected in criminal law: R. v. Rowton (1865), 169 ER 1467; R. v. Arp (1998) 129 CCC (3d) 321 (SCC) it is prevalent in child protection law and often operates to facilitate the removal of children from families.

Cursory nature of initial hearing – At a presentation hearing, rigorous cross-examination of social workers can be discouraged resulting in untried evidence. In one local case, a social worker was cross-examined as to whether the anonymous source of a child protection report was a drug user. The question went to the reliability of the source's evidence. Whether the person was under the influence of psychoactive substances when they saw what was reported? Ministry counsel objected to the question on the basis that the information tended to disclose the source's identity. Given the number of drug users in Victoria, this was an unfounded objection, which was upheld along with a denial of the whole line of questioning, and the removal ultimately sanctioned.

Vacillating case theories — As outlined previously, at the initial stages of a child protection proceeding, any inconsistencies in any evidence is — according to leading case law—resolved in favour of the Ministry. The result is

that there is very little that parents can say in the initial stages that a Court can accept which will result in anything other than a validation of the Ministry's actions. The parents cannot contest anything substantive at this hearing. Unfortunately for many families, by the time a CFCSA proceeding gets past the initial stages and into the phase where the reliability of evidence is somewhat more rigorously tested, for example at the protection hearing, the Ministry may have switched the evidentiary goal posts and advanced an entirely new set of "child protection concerns" from those that prompted the removal in the first place.

For example, a case may be initiated on the basis of drug use by a child's parent(s), but subsequently become focused on a mother's inability to secure child-appropriate housing after successfully completing drug rehabilitation. In such circumstances, the Ministry offers little or no resources to make needed housing available. Instead, children are removed and placed in paid foster care. The possible alternative of providing housing support to the parents may not be considered. Parents are also expected to quit their jobs to be available at any time to complete rigorous programming and for visits with their children, and if they refuse, they are labelled non-compliant or accused of failing to prioritize their children's needs. The parents who do comply then become unable to meet their own housing costs, which social assistance does not come close to covering. One recent case involved a parent who sought Ministry assistance, but the requested housing was not available. In consequence, the Ministry apprehended the children, resulting in a retrospective and detailed review of the parent's every parental deficiency, and an 18-month struggle for the return of the children. The true losers in such scenarios are the children.

Consent driven by strategic considerations – The dilemma of whether to consent to the apprehension for strategic purposes is exceptionally troubling, but is what occurs in many cases by perceived necessity. A case that illustrates this problem involved a social worker who removed a couple's newborn child at the hospital. Her rationale was that the couple's previous child had died as an infant, while co-sleeping in his parents' bed. At the time of the infant's death, black mold and a very small marijuana grow-op was discovered in the couple's bedroom; the same social worker, investigating, concluded on her own motion that the child had died from exposure to black mold and/or marijuana. A coroner, however, had ruled, after an autopsy, that the infant's death was caused by Sudden Unexplained Death Syndrome, which is Sudden Infant Death Syndrome (SIDS) where a known SIDS risk factor is present. In that case, it was co-sleeping, not marijuana, that was identified as the SIDS risk factor. No trace of mold or marijuana was found in the dead child's body, and the coroner could not conclude either played any part in the death. However, the social worker substituted her own conclusion for that of a coroner and took the most drastic action possible: removal of the newborn infant. As the Report to Court was inconsistent with any evidence the parents could bring — including the Coroner's report — a contested presentation hearing would only have prolonged the time the infant spent in foster care, and was therefore counter-productive to the child's interest. The parents were strategically forced to consent to an interim custody order. The couple did not get their infant daughter back for many months, although she was eventually returned.

Unreliable hearsay —The more relaxed evidentiary process contemplated by CFCSA s. 68 was arguably meant to assist lay litigants, often impoverished and overwhelmed. It is however the State in the form of the Ministry, that decidedly benefits from the relaxation of strict evidentiary rules. The State has resources at its disposal which far outstrip those of parents and must be put to stricter proof of damaging allegations, with no tolerance for speculative evidence, inflammatory, unfounded opinions or second-hand hearsay. For example, in one case a mother's children were removed because the Ministry alleged she had failed to prevent her former partner from physically assaulting the younger boy, following a history of physical assaults. The boy had been hospitalized for unconsciousness and seizures. The attending pediatrician phoned the Ministry because he heard "rumours" that the ex-partner had hit the

boy once again and had admitted the assault. Medical evidence from the expert virologist and the pediatrician, however, clearly indicated the boy's hospitalization was caused by an infection, not physical assault. The Ministry social worker testified that a police officer (unnamed and not produced as a witness at trial) had told her that the ex-partner had admitted an assault on the boy; this was taken as de facto proof the hospitalization was caused by assault, even though the evidence suggested the "admission" related to a long-past incident. Notwithstanding evidence to the contrary, the Ministry removed the child. The Court accepted the triple hearsay and sanctioned the removal. The mother's denial evidence was disregarded, in part because it was inconsistent with the Ministry's evidence. But the evidence was not internally "inconsistent". It was just inconsistent with the Ministry's theory of the case. Another significant issue in this case was that the onus for protecting the child was placed on the woman, although she was not the source of the risk. This is in contravention of Ministry policy.[10] (For further discussion of this point see under: item 6: Less Disruptive Measures below.)

5. INDEPENDENCE ISSUES

a) Problem:

Economic control exerted by MCFD causes a perceived, or actual, lack of independence on the part of access supervisors, psychologists, service providers, mediators and counsel.

b) Background:

i) FAMILY RESOURCES / PSYCHOLOGISTS / PARENTAL CAPACITY ASSESSMENTS – MCFD Social workers do not perform hands-on social work, rather much of this work is done by contracted agencies. Almost all contracted resources or services provided to families in the context of child protection, including access supervisors, family development workers and professional assessors are directly funded by the Ministry. In many cases, MCFD is the sole source of funding for these third party contractors. The result is a potential conflict of interest sometimes causing information to be presented or framed in such a way as to endorse the Director's position. This can have the effect of denying parents and their children appropriate, independent evidence for hearing purposes.

In the past there were multiple agencies contracted to provide family development workers and supervised access supervisors and these agencies were not wholly dependent upon MCFD for their funding stream. The Child and Family Counselling Association (CAFCA), for example, had contracts with more than just MCFD and was therefore in a position to exercise some professional autonomy. It appears that the Ministry's funding model may have changed. CAFCA's

[10] Best Practice Approaches: Child Protection and Violence Against Women Policy at http://www.mcf.gov.bc.ca/child_protection/pdf/best_practice_approaches_2014.pdf (updated May 2014) Goals of the Best Practice Approaches include the following:

- "Keeping children and their mothers safer by connecting the safety of the children with their mother's safety wherever possible
- Keeping children with their non-abusive parent and providing supportive services in order to enhance their ability to continue to care safely for the children
- Preventing further violence
- Building on the strengths of both women services and child welfare services
- Offering an integrated approach for meeting the safety needs of children, providing supportive services to mothers and keeping her safety a parallel consideration throughout child welfare involvement" at pp. 6-7

contract was not renewed and the agency that now provides the contracted services receives all of its funding from MCFD.

ii) INDEPENDENCE OF THE BAR / MEDIATION

The suggestion has been made that the presentation of CFCSA matters would benefit from the establishment of an office with a function similar to that of Crown Counsel. In effect, an independent process through which child apprehension matters are considered and presented. Directors' counsel is in the unenviable position of having to advance the Ministry view whether they subscribe to it or not, as it is the Director that has the ultimate authority in the current legislative scheme.

Despite advances that can be made through mediation, there are numerous situations where bargaining for children in the context of a dramatic power imbalance and severe distrust creates insurmountable barriers. For clients who are suffering from the impact of trauma, mediation is potentially destructive as 'moving forward without blame' – the mantra of mediation – is psychologically impossible.

c) Discussion of the Harmful Effects of the Problem:

Since the MCFD covers the cost of third party service providers, the Ministry is in a position to exercise undue influence on the contents of any opinions provided. Even where a psychologist is involved and takes a neutral view, the reporting of oral meetings by MCFD social workers of their meetings with psychologists, often conforms to the Ministry's case and does not always represent what the psychologist actually stated. Experiences of counsel have confirmed this evidentiary bias, which creates a significant burden for parents' counsel to refute.

There are also few psychologists that take on the work of preparing Parental Capacity Assessments, and, at least in Victoria, it appears that when a psychologist does not adhere to the wishes of MCFD in terms of assessments, they may not be invited to prepare further assessments. That has significantly narrowed the field of assessors. In addition, because MCFD is providing the funding, the Ministry exerts significant and inappropriate control over who is hired and the terms of their contract. Precious time elapses while debates occur over assessors. In many instances capable and fully qualified access supervisors are not agreeable to MCFD because their evidence will be too independent.

Equally problematic is the fact that MCFD policy is said to prohibit video or audio recording of their meetings. Third party providers have also instituted a "no recording" written policy that clients must sign before they are allowed to have supervised access of their children. Therefore, if the clients are not prepared to sign away any rights they have to reliable independent evidence, they do not receive access to their children, a totally unacceptable manifestation of State control.

6. "LESS DISRUPTIVE MEASURES"

a) Problem:

The CFCSA as well as MCFD practice standards direct Ministry personnel to investigate and consider less disruptive measures before removing a child if there is no immediate danger. [11]

Ministry adherence to this directive often appears superficial. Documentation offered as proof of such efforts may involve as little as one line in a form: "There were no less disruptive measures available at the time of removal".

b) Background:

Support services are explicitly included in the Ministry policy's list of less disruptive measures to be considered before removal. This policy directive is based on the assumption that such services are in fact available and that the social worker involved has made themselves aware of such services. Unfortunately, neither of these preconditions necessary for implementation of the policy directive can be assumed:

> "The problem is twofold: social workers often do not have time to do a proper assessment of the alternatives to apprehension for a family; and even when social workers have the time, the resources to which they would like to direct families do not actually exist." Broken Promises: Parents Speak about B.C.'s Child Welfare System PIVOT (2008) at p 31; www.pivotlegal.org/node/226
>
> "The lack of supportive and preventative services is not only a violation of the provisions of the CFCSA, it is indicative of a short-sighted, crisis driven style of child protection work that fails to support the integrity of families or the best interests of children." Broken Promises PIVOT (2008) at p 33;

In 2009 a follow-up report, Pivot interviewed Social Workers leaving the system. Most reported not considering less disruptive measures as required by the legislation. The most marked departure from the standard was when aboriginal children were involved. (Hands Tied: Child Protection Workers talk about working in, and leaving B.C.'s child protection system, May 2009 http://www.pivotlegal.org/pivot-points/publications/hands-tied)

The implication is that if social workers had fully considered less disruptive measures, some apprehensions would not have been made. Apprehensions and investigations are in themselves harmful to children, and each step needs to be balanced against the risks being addressed, and the risks associated with that step. There may not be time or resources to do this job properly, and little oversight is provided by the Courts at this time.

The recent case of JP v British Columbia (Children and Family Development) 2015 BCSC 1216 at paragraph 89 & 90 contains helpful comments about providing services and fairness.[12] Citing Catholic Children's Aid Society of Toronto v. A. U., Walker J. finds that the duty to provide services is an integral part of determining whether or not the risk to a child can be adequately addressed. Further, citing L.C. v. British Columbia (Ministry of Children and Families), 2005 BCSC 1668, Walker J. finds that there is a duty to treat parents fairly in the course of investigating reports of risk of harm to children. The victim-blaming and identified failure in the JP case to provide the simple service of guidance

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[11] "3.5(1) When, in order to be safe, the child/youth is not in immediate danger, explore less disruptive measures available to ensure the safety and wellbeing of the child/youth. Only consider removing the child/youth from the family home when less disruptive options are not available and adequate to protect the child." Child Protection Response Policies (rev. July 21, 2014) Standard 3.5(1) at p. 38 Less disruptive measures listed in this policy include for example: Informal and formal support services, supervision orders; protective intervention orders; and Court authorized necessary health care. (see p 39).

[12] Walker J. finds the following statement contained in Catholic Children's Aid Society of Toronto v. A. U., 2011 ONCJ 634 persuasive and applicable to the CFCSA:

"The duty to provide services is an integral part of determining whether or not the risk to a child can be adequately addressed if that child were to remain with or eventually be returned to her mother. Without having made efforts to provide such services, and availing parents of every reasonable opportunity to take advantage of those services, their ability to benefit from them cannot be addressed."

about how to handle sexual assault disclosures, caused problems for the children and their mother – perhaps preventable.

Documentation: Apart from the actual practices of Ministry social workers with respect to consideration of less disruptive measures, there is the issue of how these practices are documented and disclosed. At the presentation hearing, the Director is required to present a written report to Court which includes information about any less disruptive measures considered before removing the child. (CFCSA s. 35(1)(c)). Listing the less disruptive measures considered by the social worker is therefore required in the report to court. This should be more than just a pro forma entry. Consideration of less disruptive measures is also critical before a presentation hearing in situations where an early return of the child to the parent is being contemplated . (CFCSA s. 33(1)(d)).

Certain Provincial and Supreme Court rulings raise questions about whether current Ministry practices comply with CFCSA documentation and disclosure requirements. Mr Justice Lamperson in: In the matter of T. children, (unreported SCBC, Campbell River Registry, File 4204, Nov. 24, 2000) ruled that all the less disruptive measures considered need to be shown on the Presentation Report to Court. In JP v. British Columbia (Children and Family Development) 2015 BCSC 1216 the Court found that the report to Court included the inaccurate line "There were no less disruptive measures available at the time of the removal". In fact no measures had been offered or considered. In that decision Walker J. stated that: "This is a boiler plate sentence commonly used in reports to court, but not adequate to meet the standard for the Report to Court imposed on the Director." The Court went on to find that "...the Director fell afoul of her legal obligation and the standard of care to provide full and frank accurate disclosure in the Form 'A'. The Report to Court did not provide a proper and accurate context to the Provincial Court judges involved in the hearings and applications. The Director did not act in a fair and even-handed manner." (at par 443)

As the above cases and the Pivot reports suggest, Ministry social workers often attempt to cover off the critical question of the possibility of less disruptive measures with a one line entry. As contemplated by the disclosure requirements contained in the legislation, the provision of more detailed information is critical. It can assist parents, their supports, and their lawyers to formulate suggestions, possibilities and early solutions which might be less disruptive and indeed safer for the child.

Protective Measures Where Woman Abuse is Also Present: CFCSA protective intervention orders are also specifically referred to in the Ministry Child Protection Response Policies document as an example of a less disruptive measure. Yet in the context of cases where violence against the mother is present in addition to child protection concerns, it does not appear that these s. 28 orders[13] or supportive services are being considered as a possible protective measure which would avoid the necessity of removing the child. Rather than assessing and addressing the risk posed by the abuser, victim blaming continues to occur. Imposing conditions on, and supervision of, or even apprehension from the victim is still viewed as an appropriate intervention. These practices continue despite Ministry policy which emphasizes the importance of keeping children with their non-abusive parent and providing supportive services in order to enhance their ability to care safely for the children. (The Ministry Best Practice Approaches: Child Protection and Violence Against Women Policy.

[13] CFCSA s. 28 provides that if there are reasonable grounds to believe that contact between a child and another person would cause the child to need protection, that the Court may issue a protective order prohibiting contact between the child and that person.

(http://www.mcf.gov.bc.ca/child_protection_pdf/best_practice_approaches_2014.pdf. The Best Practice Approaches guide social work practice in violence against women cases where child protection concerns are also present.)

A review of cases all too often reveals 'the mother's choice in men' being considered the problem, rather than the predatory acts of the violent partner. The result is that controls and conditions are imposed upon the woman victim for failure to protect. In the JP case for example, the husband/father had been arrested for assaulting and threatening the wife/mother and assaulting their eldest daughter. The mother reported sexual and physical abuse concerns regarding their children to the Ministry. Rather than dispassionately investigating the reports of abuse, the Ministry social workers operated on the assumption that the mother had mental health problems and removed the children from her care. Social workers had no objective evidence to support their assumption. Based on unsubstantiated Ministry submissions[14] in the child protection proceedings, the Provincial Court made orders that permitted the Director to allow unsupervised access to the father contrary to a Supreme Court order issued in the family action permitting supervised access only. This Supreme Court supervised access order was issued in the wake of allegations of sexual and physical abuse. These allegations were later substantiated. The children remained in foster care for 2.5 years before the mother was ultimately granted sole guardianship and custody.

Jurisdictions such as New York have case law that places limits on apprehension from the domestic violence victim: Nicholson v. Scoppetta, Decided No. 113 Reporter: 3 N.Y. 3d 357; 820 N.E. 2d 840; 787 N. Y. S. 2d 196; 2004 N.Y. LEXIS 3490. There the family Court must weigh if reasonable efforts could keep the child safely in the home as well as balance the risk of harm that removal brings. Mothers and their children are eligible to receive compensation for wrongful removal.

In British Columbia there have been a number of tragedies involving children killed by their fathers in families where the mother also suffered violence or death. While important initiatives have been undertaken[15] to implement recommendations made by the Representative for Children and Youth in response to these tragedies, more work needs to be done to ensure less disruptive measures contemplated by existing laws and policies are being consistently followed by Ministry social workers.

Supervision Orders: The CFCSA provides that Courts may attach to supervision orders terms and conditions to implement the plan of care, including services for the child's parent, daycare, or respite care. (s.41.1(1)(a) & (b)). Despite this provision, these orders commonly contain controlling conditions recommended by the Director but rarely include terms ordering services. There may be services being provided, but the practice is against committing

[14] In his reasons for judgment at 2015 BCSC 1216, Walker J. found that the Director's report to the Provincial Court, outlining the circumstances leading up to the apprehension, contained significant omissions and was in accurate and contained misleading factual information and was prepared in a manner that was inconsistent with the Director's legal obligation to make full and frank disclosure, and it denied the plaintiffs procedural fairness and fundamental justice. (at par. 18)

[15] In 2000, a partnership of provincial organizations submitted a paper to MCFD titled: Developing a Dialogue: A Preliminary Discussion Paper on Child Protection Issues in Cases Involving Violence Against Women and Children. This paper ultimately led to the development of the 2004 Best Practice Approaches: Child Protection and Violence Against Women (Best Practice Approaches). In the Fall of 2009, MCFD's Chief Operating Officer and the Directors of Integrated Practice met with Pivot Legal Society and their colleagues to discuss the implementation of and training for the Best Practice Approaches. A commitment was made to provide training for staff. In September 2009, the Representative for Children and Youth (RCY) released her report: Honouring Christian Lee–No Private Matter: Protecting Children Living With Domestic Violence. In 2010 the Solicitor General announced a cross–Ministry domestic violence task force that would respond to RCY recommendations. The goal was for systemic change across ministries that would help police officers, social workers, the Courts and community agencies respond more effectively to domestic violence through joint training, standardized policy, and improved coordination and information sharing. In December 2010 and July 2014, the Best Practice Approaches policy was updated. In March 2010 the RCY released her report: Honouring Kaitlynne, Max and Cordon: Make Their Voices Heard Now. While the Ministry updated the Best Practices Approaches, the policy was not fully integrated or accompanied by province–wide training.

in orders to promised services. This can operate as another disincentive to a consideration of support services as a potential safety strategy.

Mobilizing Community Resources: No social worker or lawyer can be aware of all the government, community service and resources available in their community, and the criteria for allocation and coordinating services. Sometimes the client's relatives or friends or other community connections come forward and can work to fill in the gaps in services for specific cases to make less disruptive measures effective. Where community resources can be mobilized and coordinated it seems to make a significant difference for children and their families. Anecdotally, Professor Emeritus David Turner describes a 6-month stint at child welfare intake in the late 1980's in the Fernwood area of Victoria amounting to about 80 files. None leading to apprehension — but largely because he had familiarity and connections with community agencies and services which he could call upon for 'less disruptive measures' to be used. He also credited a social work supervisor and office that believed in community responses.

c) Discussion of the Harmful Effects of the Problem

The potential involvement of MCFD can prevent women victims from accessing critical emergency services. Counsel frequently encounter individuals who would rather deal with abuse on their own rather than call police for their protection when they anticipate that MCFD will also be called. In addition to the 2008 and 2009 Pivot reports, there have been other credible assessments. In 2012 the UN Committee of the Rights of the Child expressed to Canada its concern about the removal of children as a first resort.

The Truth and Reconciliation Report includes the following observation:

> Old Crow Chief Norma Kassi spoke a powerful truth when she told the TRC's Northern National Event in Inuvik in 2011, "The doors are closed at the residential schools but the foster homes are still existing and our children are still being taken away." ... As was the case 100 years ago, Aboriginal children are being separated from their families and communities and placed in the care of agencies. Like the schools, Aboriginal child-welfare agencies are underfunded, and placements are often culturally inappropriate and, tragically, simply unsafe. The child-welfare system is the residential school system of our day. (pages 104 & 105)

The Truth and Reconciliation Commission recommends monitoring and assessing neglect investigations and ensuring there are adequate resources. The 2006 Hughes' Report refers to the overrepresentation of children in poverty in the child welfare system where other services may have helped better than apprehension. (BC Children and Youth Review-April 7 2006 Ted Hughes.

(www.mcf.gov.bc.ca/about_us/pdf/BC_Children_and_Youth_Review_Report_Final_April_4.pdf)

7. THE IMPACT OF TRAUMA

a) Problem:

Clients who suffer the effects of trauma pose immense challenges for lawyers attempting to assist their cause. They often require services beyond those normally provided because if they are not healthy and engaged the efforts to obtain positive results — reunifications of the family are thwarted, not because they are inadequate parents, but due

to the strain of litigation, when children are at stake. Attempting to instill trust when it has been repeatedly betrayed is an ongoing complication for counsel.

b) Background:

A Final Word of Advice on the Impact of Trauma: Dr. Shabehram Lohrasbe, MBBS, FRCPC

The word 'trauma' traces its roots to Ancient Greek words for 'wounded' and 'damaged'. The traumatized person, in response to a major stressor inflicted on her is, at least temporarily, less than at her highest levels of functioning. The analogy between physical and psychological trauma, although not perfect, is adequate. Just as a person suffering a blood loss due to a stab wound is weakened, and just as a feverish person resulting from an infection is less able to deal with even routine stressors, so too the psychologically traumatized person is less able to cope with further psychic stressors.

The above is obviously a generalization. The devil is in the details.

Why are some events more traumatic in their consequences than others that are seemingly of equal or even greater import?

1) What the individual 'brings to' the predicate trauma is critical. We are all shaped by our prior experiences. Our personalities are not of our choosing, having been molded by 'incoming events' early in life. The resilience of any individual is dependent on a complex web of biological, psychological, and social factors, and no two people cope with a traumatic event exactly the same way.
2) Lack of preparation can be an important issue. For instance, talking well in advance, about being the victim of violence or any potentially traumatic circumstances, allows the individual to mentally rehearse and role play not just her initial reaction, but also her recovery. She is, in some important sense, prepared for the stressor to come. Conversely, the suddenness of unexpected traumatic events can exacerbate their impact.
3) A person's helplessness and loss of ability to influence/control outcomes vary greatly depending on the types of trauma she encounters. A mother who has input into the medical care of her stricken child is likely to be less traumatized by an unhappy outcome than one who feels helpless to assist.
4) Trauma can upend a person's sense of the reality of things. When events occur without apparent logic or justification, confusion and lack of clarity of what is happening and what could happen heighten fear-based reactions, exacerbating the impact of the event.
5) Related to the above is the person's perception of human agency behind the traumatic events. When perceived as unfair, the traumatic event is accompanied by a loss of trust in persons, institutions, and society, even humanity as a whole. The result is despair and a debilitating inability to respond appropriately.

Consider now the traumatic potential of being forcibly separated from ones' children. For most people in most circumstances, such an event has an extraordinarily high potential to inflict psychological trauma. At the instinctive and intuitive level, the psychological injury is great; strong emotions are typically aroused and the first impulse is to fight, and fight hard.

Assuming that the separation is enforced, secondary kinds of trauma ensue, challenging the person's self-image and identity. "I am an inadequate mother". In fact, worse, since there are many inadequate people around me, I must be judged to be a worthless mother. I am a terrible person.

Consider the impact of such expected reactions on someone who may have been a less-than-perfect, perhaps inadequate, mother. Most mothers who have to deal with their children being seized by the state have come from underprivileged backgrounds, and have often been traumatized previously, sometimes in abusive marital relationships; hence current trauma has been piled on to pre-existing trauma. In such circumstances, her personal sense of self (identity, esteem, efficacy, agency, confidence) is likely to be impaired, if not shattered. If she had been functioning 'below par' before, she is likely to be functioning at an even lower level now.

What does that mean in terms of your relationship with her, as an advocate and/or support person? Should you treat her with 'kid gloves'? Yes. Such a person requires validation; someone to listen respectfully and non-judgmentally. This can be hard to do if you, the advocate, come from a privileged background and if the socioeconomic and cultural gulf is very large ("You did what?"). A useful empathic exercise when dealing with such situations goes something like this. Ask yourself 'If the most reprehensible things I have ever done, said, thought, or felt, were put on the table for people to inspect, criticize, and mock, would the picture that arises be an accurate one of me, as a human being?'

Of course not. So it is with her; her failings are one part of the story. You need the full story and you can only get it from her if she trusts you enough to cough it up.

So far, fairly obvious. But there is a less obvious dimension to your task, the hidden link between trauma and self-regulation. 'Self-regulation' is psychologised for a number of overlapping terms such as self-control, willpower, discipline, organization, motivation, drive, etc. There is a reason that lack of self-regulation flourishes in conditions of deprivation and poverty; it is an exhaustible, albeit renewable, resource. A single-mom with three squabbling kids earning minimum wage at a job she hates and a boss who demeans her has to, day by day and minute by minute, exert self-regulation. She has to keep calm when she'd rather cry or scream, and stifle her urge to throttle her boss or her kid, all the while aware that her days of drudgery may see no end. Even for those of us who deal with 'normal' stressors, some days can stretch our capacities for self-regulation to the limit.

Importantly, decision making uses the same cognitive 'muscles' as self-regulation. Most lawyers and doctors know this, and hence the ubiquity of substance abuse in those (and other) decision-making professions. Self-regulate all day, and one can hardly wait to lose oneself in the evening and stop making decisions.

For the underprivileged, making decisions about petty things day in and day out is as exhausting of self-control as making 'big' decisions. You have to be her support as the traumatized person, who can struggle to 'think straight,' has to make life-changing decisions.

It is difficult, but rewarding. Helping a traumatized person through what can seem like a capricious process is honourable and meaningful work, one important step in one life, but the impact spreads beyond, most often to the children involved.

CONCLUSION

The work on this report was commenced in May 2015 by a small group of Victoria lawyers committed to shedding light on disturbing practices employed by the Ministry of Child and Families. We regret any areas of repetition resulting from a cooperative approach and the assignment of sections to each lawyer. We have collectively reviewed countless pages of Ministry records, which cannot be utilized as examples of deficient practice because of undertakings not to make use of such materials. Close examination of Ministry practises by outside bodies is therefore largely precluded.

It is acknowledged that there are many who conduct their roles diligently and effectively and credit must be given to them for their tireless efforts in attempting to advance the best interests of children within the current framework. There are others less committed and the system has significant failings, causing challenges for effective advocacy and judicial oversight. Our analysis stems from cases we have conducted and from an earnest desire to prompt immediate and effective systemic improvements. The social cost of placing children in care has been ignored and the time has come to address the cogent evidence on the damage being inflicted.

We have made our best efforts to raise these issues in an appeal to prevent suffering, particularly the suffering of First Nations children, for whom the time has long come for liberation from a flawed approach.

It should not be business as usual in the realm of child apprehension.

Prepared by: Elaine Davies, Laurel Dietz, Julie Donati, Jo McFetridge, Forrest Nelson, Declan Redman (website construction) and Diane Turner with input provided from Shannon Buchan, Jeff Johnston, Georgia Peters and from meetings of Victoria Parents Counsel, chaired by Daryl Parsons.

Appendices

Appendix A – Child Family and Community Service Act [RSBC 1996] Chapter 46 – http://www.bclaws.ca/Recon/document/ID/freeside/00_96046_01

Appendix B – J.P. v. British Columbia (Children and Family Development) 2015 BCSC 1216 (some related J.P. decisions and reasons: J.P. v. Eirikson 2015 BCSC 847 dismissing the claim against Dr. Eirikson (Master Harper); J.P.v.B.G. 2012 BCSC 938 first decision in joint CFCSA and family case in favor of J.P. ; J.P.v.B.G. 2012 BCSC 979 decision on some of the financial issues like interim child support ; J.P. v. British Columbia (Children and Family Development) 2013 BCSC 515 reasons for dismissing B.G.'s application to disqualify Judge Walker; J.P. v. British Columbia (Children and Family Development) 2013 BCSC 1403 reasons for ruling against Province wanting to relegate some findings from the earlier trial.

Appendix C – Regina v. M.N.J., 2002 YKTC 15

Appendix D – The Universal Declaration of Human Rights – http://www.un.org/en/universal-declaration-human-rights/

Appendix E – Convention on the Rights of the Child http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx; https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

Appendix F – International Covenant on Civil and Political Rights

https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf

Appendix G – Supporting Literature List (See: Call to Action website under construction at

http://calltoaction-victoriabar.weebly.com\ )

Appendix H – Child Advocacy in Child Protection (See: Call to Action website under construction)

[Any questions please view the website, make comments and sign up to support this initiative]