Court File No. FS-20-16365

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

CHILDREN'S AID SOCIETY OF TORONTO

Applicant/Respondent

and

O. O. & J. A. G. L.

Respondents/Appellants

FACTUM OF THE INTERVENOR, CANADIAN CIVIL LIBERTIES ASSOCIATION

Kate Kehoe LS#: 42275O
katekehoelegal@gmail.com
Tel: (613) 668-2416

Counsel for the Intervenor
Canadian Civil Liberties Association

TO: **Alex De Melo**
Justine Sherman
Children's Aid Society of Toronto
30 Isabella Street
Toronto, ON
M4Y 1N1
Tel: (416) 924-4640 x 2584
Fax: (416) 324-2550
ademo@torontocas.ca
jsherman@torontocas.ca

Counsel for the Respondent, Children's Aid Society of Toronto

AND TO: **Mira Pilch**
Gottlieb Law Firm
40 Sheppard Avenue West, Suite 200
Toronto, ON
M2N 6K9

Tel: (416) 227-1653
Fax: (416) 227-1678
mpilch@gottlieblawfirm.com

Counsel for the Appellant, O.O.

AND TO: **Tammy Law**
Tammy Law Professional Corporation
151 Bloor St. W., Suite 604
Toronto, ON
M5S 1S4

Tel: (416) 410-4808
Fax: (416) 691-7368
wingyun@tammylaw.ca

Counsel for the Appellant, J.A.G.L.

AND TO: **David Miller**
47 Sheppard Ave. E., Suite 410
Toronto, ON
M2N 5X5

Tel: (416) 465-9349
Fax: (416) 399-2419

millerdavid@rogers.com

Counsel for the Intervenor, Ontario Association of Child Protection Lawyers

TABLE OF CONTENTS

PAGE

PART I – OVERVIEW

> *"It is trite to say that COVID-19 has not suspended the CYFSA and the Charter….*
>
> *I believe that the true test of our law and the fair administration of the law will be measured in how the most vulnerable in our society are treated and the administration of justice is dealt with in difficult times such as these."*
>
> *Justice William Sullivan*[1]

1. Public emergencies present serious challenges to the preservation of civil liberties. Governments rightly concerned with protecting the public in a time of crisis may overreach, unduly restricting people's *Charter* rights in the name of safety. However, the Supreme Court of Canada has confirmed that even extreme threats to public safety, such as terrorism, do not permit the suspension of fundamental freedoms, and that the state's response must be proportionate to the risk in question.[2]

2. Across the province, children's aid societies have responded to the COVID-19 crisis by suspending face-to-face access between children and their parents.[3] The suspensions have affected families whose access was taking place at Society offices and access centres with supervision, which understandably could not continue in the same format. The suspensions have also been imposed where children are residing with family members, as in the case at bar.

---

[1] *Children's Aid Society of the Region of Peel v. M.G.*, 2020 ONCJ 167 at paras 7 – 12

[2] *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 3 – 4, 47

[3] To date, court decisions have identified blanket suspensions by children's aid societies in Toronto (*Children's Aid Society of Toronto v. T.F.*, 2020 ONCJ 169 at para 7); Durham (*DCAS v. Quinn*, 2020 ONSC 1761 at para 11); Halton (*Children's Aid Society of the Region of Halton v. T.B*, 2020 ONCJ 166 at para 17); Simcoe-Muskoka (*SMCYFS v. C.B.*, 2020 ONSC 2109 at para 28); Oxford County (*Children's Aid Society of Oxford County v. C.L.*, 2020 ONCJ 183 at para 9); Haldiman and Norfolk (*Children's Aid Society of Haldimand and Norfolk v. J.H. and M.H.*, 2020 ONSC 2208); Kawartha-Haliburton (*Kawartha-Haliburton Children's Aid Society v. A.R. and D.F.*, 2020 ONSC 2738); and by Dnaagdawenmag Binnoojiiyag Child and Family Services (*Dnaagdawenmag Binnoojiiyag Child and Family Services v. B.RP*, 2020 ONSC 1988 at para 4) and Native Child and Family Services (*Native Child and Family Services v. S.D.*, 2020 ONCJ 186 at para 24).

3. The rights of children and their parents to have direct, meaningful, and regular access to each other is protected by the *Charter*, the *Child, Youth and Family Services Act*, and international law. These rights may only be limited where such limits are justified, through a fair and transparent process. The Canadian Civil Liberties Association urges this Court to adopt a test for the suspension of face-to-face access between children and their parents which would start from the premise that that such access should only be limited by court order, on reliable and admissible evidence, where there is a demonstrated, exceptional risk to the child or caregivers which cannot be mitigated, and where the impact of suspension is proportionate to the risk involved in maintaining access.

PART II – ARGUMENT

The Statutory and Constitutional Framework for Child Protection Proceedings

4. The interests of parents to raise and care for their children "is an individual interest of fundamental importance to our society" and is protected under section 7 of the *Canadian Charter of Rights and Freedoms*.[4] Child protection cases involve the exercise of the State's authority to intervene in the private lives of families. They therefore affect the liberty and security of the person interests under s.7 of the *Charter* of both parents and their children. For this reason, these proceedings must accord with the principles of fundamental justice.[5]

5. The due process rights of parents will always be subject to the need to protect children from harm: "Given that children are highly vulnerable members of our society, and given society's

---

[4] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at p. 371 per Lamer C.J.

[5] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC) at para 67; *Kawartha-Haliburton Children's Aid Society v. M.W.*, 2019 ONCA 316 at para 65; *L.M. v. Peel Children's Aid Society*, 2019 ONCA 841 at para 48

interest in protecting them from harm, fair process in the child protection context must reflect the fact that children's lives and health may need to be given priority where the protection of these interests diverges from the protection of parents' rights to freedom from state intervention."[6]

6. The statutory scheme for child protection in Ontario recognizes the fundamental importance of preserving the parent-child relationship. While the primary purpose of the *Child, Youth and Family Services Act* (*CYFSA*) is to "promote the best interests, protection and well-being of children", the *CYFSA* specifies that its additional purposes, so long as they are consistent with the best interests, protection and well-being of children, recognize the need to support the autonomy and integrity of the family unit, to consider the least disruptive course of action that is available and appropriate in the circumstances, and to provide services so as to respect the child's need for stable relationships within a family or cultural environment.[7]

The Statutory and Constitutional Framework for Access Decisions

7. Access between parents and children involved in child protection proceedings is not merely an incidental term of a care and custody order. Regular, meaningful contact between parents and their children is an essential component of the parent-child relationship, and is protected by the *Charter*, the *United Nations Convention on the Rights of the Child*, and the *CYFSA*.

8. Chief Justice Lamer in *New Brunswick v. G.(J.)* identified the "obvious distress" caused by the loss of the companionship of their child as one of the consequences of state interference in the parent-child relationship which triggers s.7 protections.[8] In turn, the Newfoundland Court of Appeal held that s.7 protects the rights of children and parents to have access with each other when

[6] *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 (CanLII) at para 94 per L'Heureux-Dubé J.
[7] *Child, Youth and Family Services Act*, s.1(2)1, 2, & 3(i)
[8] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, *supra* at para 61

it is in the child's best interests, and noted that "the denial of access is the very thing that will bring about the serious interference with the psychological integrity that *G.(J.)* says that section 7 protects."[9] The Ontario Court of Justice has also recognized that the *Charter* rights of parents create a presumption in favour of access in temporary proceedings, despite the broad statutory discretion judges have to make access orders.[10]

9. Moreover, the *United Nations Convention on the Rights of the Child*, to which Canada is a signatory, requires parties to the convention to "respect the right of the child who is separated from one or both parents [through child protection proceedings] to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."[11] The preamble to the *CYFSA* acknowledges that its aim is to be consistent with and build upon the principles expressed in the *Convention*.[12]

10. In keeping with the *Convention*, the *CYFSA* put in place what the Ontario Court of Appeal has described as "a significant shift in the approach to access for children in extended care"[13] by removing the presumption against access for those children. Access will now be ordered where it is in the best interests of the child, even if that access could impede the prospects for the child's adoption.[14] Like its predecessor, the *Act* also contains a statutory presumption in favour of access for children who have been found in need of protection but not placed in the extended care of the society.[15]

---

[9] *J.T. v Newfoundland and Labrador (Child, Youth and Family Services)*, 2015 NLCA 55 at paras 9 per Green C.J.N.L. and at para 156 per Welsh J.A.
[10] *Children's Aid Society of Toronto v. S.G.*, 2012 ONCJ 585 at para 52
[11] *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Art. 9(3) This Convention has been referred to in numerous appellate cases involving the rights of children and parents as an aide to statutory interpretation. See the cases cited in paragraph 14 of *Bhajan v. Bhajan*, 2010 ONCA 714.
[12] *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sch 1, Preamble
[13] *Children's Aid Society of Toronto v. J.G.*, 2020 ONCA 415 at para 37 per Benotto J.A.
[14] *Child, Youth and Family Services Act, 2017*, s.105(5) &(6); *Children's Aid Society of Toronto v. J.G*, *supra* at paras 20, 37, 58
[15] *Child, Youth and Family Services Act, 2017*, s.105

11. The *CYFSA* also explicitly recognizes the right of children to have regular, direct contact with their family members. Part II of the *Act*, which sets out the rights of children and the duties of service providers, provides that a child in care has the right "to speak in private with, visit and receive visits from members of their family or extended family regularly." This right is subject only to court orders made for children in the extended care of the society.[16] The society having care of the child is required under the *CYFSA* to ensure that the child is afforded this right to visits from family members.[17]

12. Given this framework, the CCLA submits that courts considering child protection access motions arising from COVID-19 concerns should ensure that the *Charter* rights of parents and their children are respected and promoted, as follows:

1. The context of a public health emergency does not relieve the societies or courts from their obligations to base any decision to restrict access rights on independent, reliable evidence

13. The Ontario Court of Justice has recognized that section 7 of the *Charter* prohibits the admission of unreliable evidence in child protection proceedings, noting that "the principles of fundamental justice are clearly inconsistent with the admission of potentially unreliable, untestable evidence, when such important issues are being determined."[18]

14. In a public health emergency, authorities and courts may be tempted to relax the normal standards of evidence out of a concern that those standards will not be sufficient to guard against the risk in question. However, the standards in child protection proceedings, particularly interim

---

[16] *Child, Youth and Family Services Act, 2017*, s.10(1)(a) & (2)
[17] *Child, Youth and Family Services Act, 2017*, s.109(5)(a)
[18] *Catholic Children's Aid Society of Toronto v. L.(J.)*, 2003 CanLII 57514 (ON CJ) at para 33 per Jones J.; see also *Children's Aid Society of Halton Region v. J.O.*, 2013 ONCJ 191 (CanLII), at para 31, and *R. v. Hart*, 2014 SCC 52 at para 121 per Moldaver J.: "Without question, unreliable and prejudicial evidence implicate rights under the *Charter*, including the right to a fair trial…"

proceedings, are already significantly relaxed in comparison with the standards of evidence in other areas of state interference with *Charter* rights, such as criminal law. These lower standards exist because the need to protect children from harm is always recognized as an emergency. Relaxing these standards even further in the context of COVID-19 would render illusory the parents' *Charter*-protected right to a fair process, and effectively suspend the operation of the *Charter* in child protection proceedings.

15. The CCLA submits that the COVID-19 crisis should not allow courts or societies to alter the well-established standards for evidence and fact-finding in child protection cases. Specifically, the crisis does not justify basing decisions about access on speculation and unproved assertions, and it does not justify reliance upon expert evidence that has not been properly scrutinized.

(a) Speculation and unproven assertions are not permitted

16. Courts hearing emergency child protection proceedings such as temporary care motions following an apprehension must be satisfied, on credible and trustworthy evidence, that there are reasonable grounds to believe that the child is at risk of likely harm before permitting any interference with the parent/child relationship. The risk of harm "must be real and not just speculative."[19] This approach acknowledges that the society is not permitted to interfere in the parent-child relationship due to speculation that children might face a risk of harm, and is consistent with the common law rules prohibiting judges from finding facts on the basis of conjecture and speculation.[20]

---

[19] *Children's Aid Society of Ottawa-Carleton v. T.*, 2000 CanLII 21157 (ON SC) at para 8 per Blishen J. See also *N.V.C v. Catholic Children's Aid Society of Toronto*, 2017 ONSC 796 at para. 77; *Children's Aid Society of Rainy River v. B.(C.)*, 2006 ONCJ 458; see also *Children's Aid Society of the Niagara Region v. T. P.*, 2003 CanLII 2397 (ON SC) at para 62

[20] *R. v. Morrissey*, 1995 CanLII 3498 (ONCA) at para 52. See also *L.M. v. Peel Children's Aid Society*, *supra* at para 77

17. The fact that COVID-19 is a new and frightening phenomenon should not permit children's aid societies or courts to rely on unsourced speculation about how it may be transmitted or what effect it may have on a child. Nor does it justify making conclusions based on conjecture, rather than evidence, as to the parents' willingness or ability to comply with public health recommendations to mitigate the risk.

18. The CCLA is also troubled by the number of reported decisions in which Ontario courts have accepted societies' representations that they are not able or willing to provide any supervised access for children in their care.[21] Societies do have to manage access so as to minimize the risk of COVID-19 for their staff and other families. However, blanket suspensions are not the only mechanisms to achieve that goal. As the caregivers of the children, with statutory and constitutional obligations to ensure regular, direct contact between those children and their parents, societies should be required to demonstrate that there are no alternatives to the suspension of access for children in their care.[22] Where the health of the foster family is in issue, courts should demand medical evidence and should inquire as to whether another placement is possible.[23] While continuity of care is important in child protection proceedings, it should not be assumed that a suspension of direct contact with a parent is preferable to a change in placement, particularly for young children.

---

[21] See, for example, *Children's Aid Society of Toronto v. J.E.*, 2020 ONCJ 262 at para 114 – 117; *SMCYFS v. C.B*, *supra*; *Dnaagdawenmag Binnoojiiyag Child and Family Services v. B.RP*, *supra*

[22] Alternatives could include staggered, less frequent or shorter visits at supervised access centres; alternate locations, such as parks, parking lots, family members' homes or backyards; and alternate supervisors, such as family members or supervision by Skype. See *Children's Aid Society of the Region of Halton v. R.O.*, 2020 ONCJ 209 at paras 63 – 64

[23] See *C.A.S. v. E.B. and S.L.*, 2020 ONSC 3097 at paras. 76, 80, 81, and *Children's Aid Society of the Region of Halton v. R.O.*, *supra* at paras 54 – 62

(b) Opinion evidence tendered to support restrictions on access must be reliable and independent

19. The use of unreliable expert evidence has been recognized by appellate courts and numerous judicial commissions of inquiry as contributing to miscarriages of justice in both the criminal and child protection contexts.[24] The Motherisk Commission specifically identified the failure of the child protection system to engage in proper scrutiny of expert evidence, including at the temporary stage of proceedings, as contributing to the wrongful removal of dozens of children from their families in Ontario.[25] As Justice Stanley Sherr observed in *Catholic Children's Aid Society of Toronto v. R.M.*, the Motherisk scandal confirmed that "judges should be vigilant gatekeepers at all stages of a protection case – not just at the trial stage."[26] The *Family Law Rules* were subsequently amended to explicitly provide that the rules regarding the requirements for expert evidence apply to temporary motions in child protection proceedings unless specifically ordered by the court, and to require child protection judges to consider holding *voir dires*.[27]

20. While it may not be realistic to expect strict compliance with the *Rules* regarding expert reports at this time, and courts may be required to refer to information about transmission and risk provided by public health authorities and other credible sources, societies and courts should ensure that decisions about access are based as much as possible on reliable, qualified and independent expert evidence. In all cases, courts should comply with the *Family Law Rules* requiring them to consider whether adjourning the motion for a *voir dire* would be appropriate, with or without a temporary without prejudice order respecting face to face access.

---

[24] See, for example, The Honourable Stephen T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Toronto: Ministry of the Attorney General, 2008); *White Burgess Langille Ingram v. Abbott and Haliburton Co.*, 2015 SCC 23 at para 12; The Honourable Justice Judith Beaman, *Report of the Motherisk Commission* (2018: Ontario Ministry of the Attorney General); *Kawartha-Haliburton Children's Aid Society v. M.W.* , *supra* at para 69

[25] *Report of the Motherisk Commission*, *supra* at p. 64, 110 – 111

[26] *Catholic Children's Aid Society of Toronto v. R.M.*, 2017 ONCJ 661 at para 26

[27] *Family Law Rules*, O. Reg. 114/99, Rules 20.2(15), 33 (9)

2. Sections 7 and 15 of the *Charter* require heightened scrutiny of the grounds for interference in the parent-child relationship in the child protection context

21. The approach of the motion judge and many other child protection courts to determining whether access should be suspended due to COVID-19 stands in stark contrast to the approach taken in domestic cases, where face-to-face access has been ordered in almost every reported decision. There is no justification consistent with the *Charter* for applying a different standard to child protection families, particularly given that their rights to access, unlike parents in domestic proceedings, have constitutional status.

22. In the domestic context, Ontario courts have repeatedly held that there is a presumption that access arrangements for children whose parents live separately will continue, despite COVID-19.[28] That presumption is based on a recognition of the importance of maintaining meaningful contact between the child and both parents, particularly in a time of crisis.[29] It applies even where the child or caregiver has a demonstrated medical condition making them more vulnerable to COVID-19[30], and will only be displaced by specific evidence that the parent seeking access is refusing to abide by public health recommendations.[31]

23. Even where parents involved in domestic proceedings have been found to fail to follow social distancing or other public health protocols to minimize exposure to COVID19,[32] or they work in potentially dangerous environments,[33] or they engage in other risky behaviour such as

---

[28] *Ribeiro v. Wright*, 2020 ONSC 1829; *Chrisjohn v. Hillier*, 2020 ONSC 2240; *Berube v. Berube*, 2020 ONSC 2591
[29] *Ribeiro v. Wright*, *supra* at para 10 per Pazaratz J.
[30] *Chrisjohn v. Hillier*, *supra*; *Vasilodimitrakis v. Homme*, 2020 ONSC 2084; *Trudeau v. Auger*, 2020 ONCJ 197 (OCJ) at para 10-12, para 53 – 54, 58 – 59; *Jeyarajah v. Jeyamathan*, 2020 ONSC 2636; *Lyons v. Lawlor*, 2020 ONCJ 184; *Lovric v. Olson*, 2020 ONSC 2563; *Johnson v. Johnson*, 2020 ONSC 2896; *Grossman v. Kline*, 2020 ONSC 2714
[31] See, for example, *Ribeiro v. Wright*, *supra* at paras 14, 21 & 26; *Colasuonno v. Colasuonno*, 2020 ONSC 2061 at para 57; *Smith v. Smith*, 2020 ONCJ 180 at para 21; *Jeyarajah v. Jeyamathan*, *supra* at para 68
[32] *E.“M” B. v. M.F.B.*, 2020 ONSC 3200; *C.L.B. v. A.J.N.*, 2020 ONCJ 213; *Gillespie v. Jones*, 2020 ONSC 2558
[33] *A.A. v. R.R.*, 2020 ONSC 1887; see also *McMurray v. McMurray*, 2020 ONSC 2949

drinking and driving, courts have preferred to impose conditions on face to face access rather than suspend it altogether.[34] Where access had been taking place at a supervised access centre that is now closed, the Superior Court has expressed a clear preference for finding alternate arrangements rather than suspending access.[35]

24. Domestic courts have also made it clear that reliable and compelling medical evidence is required to justify limiting face to face access on the grounds that the child or custodial parent is at significant risk of COVID-19.[36]

25. Courts should not be permitted to distinguish the domestic approach on the basis that parents in child protection proceedings have already been found to be unable to meet the children's needs. Such an approach would impermissibly prejudge the outcome of cases in which there has been no trial and no finding that the child is in need of protection. Furthermore, even where there has been a finding that the child is in need of protection, that fact is irrelevant to the COVID-19 issue unless it demonstrates that the parent is unable to abide by safety precautions.

26. The imposition of a lower threshold for parents whose children are not in their primary care due to child welfare involvement than for parents whose children are not in their care due to parental separation also raises *Charter* equality concerns. Discrimination on the basis of family status is not permitted under section 15 of the *Charter*.[37] Moreover, parents in child protection cases are particularly vulnerable to discrimination and stereotyping, and already face

---

[34] *E."M" B. v. M.F.B.*, *supra*. See also *Guerin v. Guerin*, 2020 ONSC 2016 where the court suspended direct access to the father but permitted him to bring the matter back within 17 days to show compliance.
[35] *Thibert v. Thibert*, 2020 ONSC 3807
[36] See *C.L.B. v. A.J.N.*, *supra*, in which Justice Sherr summarized the jurisprudence to date on access where a child or caregiver had medical vulnerabilities to COVID-19.
[37] *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3 at paras 37 – 38; *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at paras 563 – 571; see also *Ontario Human Rights Code*, R. S.O. 1990, c. H-19, s.5

disadvantages due to poverty, racism, addiction, immigration status and disability.[38] Black and Indigenous families are also significantly overrepresented in child protection families.[39] Applying a lower threshold of tolerance for interference with access rights impermissibly "widens the gap" between these parents and other parents.[40]

3. Courts should require societies to justify <u>all</u> suspensions of access due to COVID-19

27. The CCLA agrees with the respondent father that "access at the discretion of the Society" orders do not permit the unilateral and indefinite suspension of that access.

28. Decisions which will significantly affect the *Charter*-protected relationship between children and their parents should not be left to societies without judicial oversight. Permitting societies to unilaterally and indefinitely suspend access places the onus on parents – many of whom are self-represented, or may not realize they have the right to contest societies' decisions about access – to bring motions to have access reinstated. As the Ontario Court of Appeal noted in 2019, parents in child protection cases will struggle to advance *Charter* claims due to their personal circumstances.[41] The Court went on to note,

> Poverty and other forms of marginalization form part of the experience of many parents involved in child protection proceedings. If we do not face up to this reality we risk forgetting the hard-learned lessons of the past by exacerbating pre-existing inequities and harms. The miscarriages of justice outlined in the *Report of the Motherisk Commission* speak, by way of example, to the significant imbalance between parents and Children's Aid Societies, noting that parents, even when represented by counsel, were "simply overpowered." Fairness in the child protection context demands recognition of these dynamics.[42]

---

[38] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, *supra* at paras 113 – 114; *Kawartha-Haliburton Children's Aid Society v. M.W.*, *supra* at para 68 – 69; *Motherisk Report*, *supra*, p. 55 – 56
[39] *Motherisk Report*, *supra*, p. 13
[40] See *Inglis v. British Columbia (Minister of Public Safety)*, *supra* at paras 611 – 615. See also the discussion of the intersection of s.15 and s.7 in the child protection context in Justice L'Heureux-Dubé's reasons in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, *supra* at paras 112 – 115
[41] *Kawartha-Haliburton Children's Aid Society v. M.W.*, *supra* at para 67
[42] *Kawartha-Haliburton Children's Aid Society v. M.W.*, *supra* at para 69

29. The Supreme Court of Canada and the Ontario Court of Appeal have emphasized the importance of "effective parental participation" in child protection court proceedings. Not only is effective parental participation a component of the *Charter* right to full answer and defence; it is also crucial to preventing miscarriages of justice.[43] Allowing societies with "access at discretion" orders to decide whether access should be suspended during the COVID-19 crisis deprives the parents, and their children, from having effective parental participation in this decision.

30. A number of child protection courts, including the motion judge in this case, have held that societies should not be imposing "blanket" suspensions of access due to the COVID-19 crisis.[44] However, in the absence of judicial oversight, societies are permitted to do exactly that for all families whose access is not specified in a court order.

31. Children's aid societies also derive a litigation benefit from reductions in parents' access to their children. Courts have repeatedly recognized that limiting or suspending access during child protection proceedings can adversely affect the parents' ability to regain custody of their children.[45] It would be inappropriate to give broad discretion to indefinitely suspend access to the party who could benefit from this suspension in future litigation.[46]

---

[43] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, *supra* at paras 73, 81; *Children's Aid Society Region of Halton v. K.L.A.*, 2006 CanLII 33538 (ON CA) at para 25

[44] *Children's Aid Society of Toronto v. O.O.*, 2020 ONCJ 179 at para 76; *Children's Aid Society of Toronto v. T.F.*, *supra* at para 10; *C.A.S. v. J.N.*, 2020 ONSC 2999

[45] *Catholic Children's Aid Society of Toronto v. R.M.*, 2017 ONCJ 784 at paras 74 – 79, *Children's Aid Society of Algoma v. S.P.*, 2011 ONCJ 93; *Children's Aid Society of Algoma v. K.S.*, 2019 ONCJ 716 at para 27; *Children's Aid Society of Toronto v. S.T.*, 2017 ONCJ 833 at para 93; *Children's Aid Society of Toronto v. K.M.*, 2018 ONCJ 361 at para 201

[46] The improper use of discretion with respect to access to create a litigation advantage was criticized by Justice Glen in *Children's Aid Society of Huron County v. R.G.*, 2003 CanLII 68691 (ON CJ) at para 61: "When the society, as a party-litigant, is entrusted to supervise the access of a parent, that does not give it the right to take unfair advantage of this position to gain the outcome from the court that it is pursuing."

32. The CCLA therefore requests that this Court confirm that "access at discretion" orders do not permit the sustained suspension of access between parents and the children who have been removed from their care, and that the onus to justify any such suspension should be on the society.

4. Parents have the right to seek face-to-face access without fear of criticism

33. Courts should not draw a negative inference from the fact that a parent seeks face-to-face contact with their children during this crisis. Such criticism has the potential to discourage litigants from exercising their s.7 rights to make full answer and defence,[47] and from exercising "effective parental participation" in court proceedings. There has been no similar criticism of parents seeking the reinstatement of access in the domestic context.

34. The motion judge's criticism of the parents for challenging the society's suspension of their access is particularly troubling in light of the findings made by the Motherisk Commission. Commissioner Beaman observed that courts and societies often criticized parents who raised *Charter* issues or challenged the reliability of Motherisk hair test results as "uncooperative," lacking good judgment, and focused on their own rights instead of the safety of the children. She found that this culture contributed to the dozens of miscarriages of justice she identified, and emphasized that "[i]t is the appropriate role of parents' counsel to raise every applicable argument to defend their clients."[48]

---

[47] *R. v. Valentini*, 1999 CanLII 1885 (ON CA); *College of Physicians and Surgeons of Ontario v. Gillen*, 1990 CanLII 6710 (ON SC) (Divisional Court); *R. v. Ellacott*, 2017 ONCA 681. See also *Children's Aid Society for Huron County v. B.(R.)*, 1999 CanLII 14315 (ON CJ)

[48] *Motherisk Report*, *supra* at pp. 62, 38

Recommended test for access

35. The CCLA suggests that this Honourable Court adopt the following test to determine questions of access in the child protection context arising from the COVID-19 pandemic:

(a) The burden in all cases must be on the society to justify access suspensions. Where the society seeks to suspend or restrict existing or planned access arrangements due to COVID-19, whether or not that access is specified in an order, the society must obtain the parents' written consent or bring a motion before the court.

(b) Courts should acknowledge that parents and the children who have been removed from their care have the statutory and constitutional right to direct, regular, meaningful contact with each other, unless there has been a statutory finding by a court that the child is in need of protection and that face-to-face access is not in the child's best interests.

(c) Access should only be suspended or limited where there is a real, non-speculative risk of serious medical complications to the child or caregiver from COVID-19, where direct contact with the parent would create a serious risk of contracting COVID-19, and where that risk cannot be adequately managed by court-imposed conditions. Courts may only draw inferences about the parents' willingness or ability to comply with appropriate precautions on the bases of proven facts.

(d) A real, non-speculative risk requires reliable expert evidence that the child or their caregiver currently suffers from a medical condition that is known to result in serious complications from COVID-19. That medical evidence must be reliable and independent. Where the society has failed to establish the reliability and/or independence of the medical evidence, the court should dismiss the society's motion or conduct a *voir dire* on the matter.

(e) Where sections (c) and (d) are met, the court must still consider whether there are any alternatives to the suspension of direct access, such as imposing conditions on the parent requiring compliance with public health recommendations, requiring access to take place outside, finding alternative supervisors, or, where the issue is the health of the foster parent, changing the child's placement.

(f) Finally, a decision to suspend face to face access should only be made where the demonstrated risk to the child of continued access outweighs the effect of the infringement on the parent's and child's *Charter* rights to access, including the potential for harm to the parent/child relationship and trauma to the child that would be caused by the suspension of that access. Where the child is very young or otherwise cannot have meaningful virtual access with the parent, the burden should be very high on the society to prove that the risk of serious harm from COVID-19 justifies the suspension.

(g) In all cases where access is suspended or restricted, the court should require the parties to come back before the court at regular intervals to ensure that the suspension or restriction continues to be required. Indefinite orders should not be permitted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th DAY OF JULY, 2020

Kate Kehoe, Counsel for the Intervenor,
Canadian Civil Liberties Association

SCHEDULE A: List of Authorities

Cases

1. *A.A. v. R.R.*, 2020 ONSC 1887
2. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315
3. *Berube v. Berube*, 2020 ONSC 2591
4. *C.A.S. v. E.B. and S.L.*, 2020 ONSC 3097
5. *C.A.S. v. J.N.*, 2020 ONSC 2999
6. *C.L.B. v. A.J.N.*, 2020 ONCJ 213
7. *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3
8. *Catholic Children's Aid Society of Toronto v. R.M.*, 2017 ONCJ 784
9. *Catholic Children's Aid Society of Toronto v. R.M.*, 2017 ONCJ 661
10. *Catholic Children's Aid Society of Toronto v. L.(J.)*, 2003 CanLII 57514 (ON CJ)
11. *Children's Aid Society of Algoma v. K.S.*, 2019 ONCJ 716
12. *Children's Aid Society of Algoma v. S.P.*, 2011 ONCJ 93
13. *Children's Aid Society of Halton Region v. J.O.*, 2013 ONCJ 191 (CanLII)
14. *Children's Aid Society of Huron County v. R.G.*, 2003 CanLII 68691 (ON CJ)
15. *Children's Aid Society of Oxford County v. C.L.*, 2020 ONCJ 183
16. *Children's Aid Society of the Region of Halton v. R.O.*, 2020 ONCJ 209
17. *Children's Aid Society of the Region of Halton v. T.B*, 2020 ONCJ 166
18. *Children's Aid Society of the Region of Peel v. M.G.*, 2020 ONCJ 167
19. *Children's Aid Society of Toronto v. J.E.*, 2020 ONCJ 262
20. *Children's Aid Society of Toronto v. K.M.*, 2018 ONCJ 361
21. *Children's Aid Society of Toronto v. O.O.*, 2020 ONCJ 179
22. *Children's Aid Society of Toronto v. S.G.*, 2012 ONCJ 585
23. *Children's Aid Society of Toronto v. S.T.*, 2017 ONCJ 833
24. *Children's Aid Society of Toronto v. T.F.*, 2020 ONCJ 169
25. *Children's Aid Society for Huron County v. B.(R.)*, 1999 CanLII 14315 (ON CJ)
26. *Children's Aid Society of Haldimand and Norfolk v. J.H. and M.H.*, 2020 ONSC 2208
27. *Children's Aid Society of Ottawa-Carleton v. T.*, 2000 CanLII 21157 (ON SC)
28. *Children's Aid Society of Rainy River v. B.(C.)*, 2006 ONCJ 458
29. *Children's Aid Society of the Niagara Region v. T. P.*, 2003 CanLII 2397 (ON SC)

30. *Children's Aid Society of Toronto v. J.G.*, 2020 ONCA 415
31. *Children's Aid Society Region of Halton v. K.L.A.*, 2006 CanLII 33538 (ON CA)
32. *Chrisjohn v. Hillier*, 2020 ONSC 2240
33. *Colasuonno v. Colasuonno*, 2020 ONSC 2061
34. *College of Physicians and Surgeons of Ontario v. Gillen*, 1990 CanLII 6710 (ONSC) (Divisional Court)
35. *DCAS v. Quinn*, 2020 ONSC 1761
36. *Dnaagdawenmag Binnoojiiyag Child and Family Services v. B.RP*, 2020 ONSC 1988
37. *E.“M” B. v. M.F.B.*, 2020 ONSC 3200
38. *Gillespie v. Jones*, 2020 ONSC 2558
39. *Grossman v. Kline*, 2020 ONSC 2714
40. *Guerin v. Guerin*, 2020 ONSC 2016
41. *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309
42. *J.T. v Newfoundland and Labrador (Child, Youth and Family Services)*, 2015 NLCA 55
43. *Jeyarajah v. Jeyamathan*, 2020 ONSC 2636
44. *Johnson v. Johnson*, 2020 ONSC 2896
45. *Kawartha-Haliburton Children’s Aid Society v. A.R. and D.F.*, 2020 ONSC 2738
46. *L.M. v. Peel Children's Aid Society*, 2019 ONCA 841
47. *Lovric v. Olson*, 2020 ONSC 2563
48. *Lyons v. Lawlor*, 2020 ONCJ 184
49. *McMurray v. McMurray*, 2020 ONSC 2949
50. *N.V.C v. Catholic Children’s Aid Society of Toronto*, 2017 ONSC 796
51. *Native Child and Family Services v. S.D.*, 2020 ONCJ 186
52. *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC)
53. *R. v. Ellacott*, 2017 ONCA 681
54. *R. v. Hart*, 2014 SCC 52
55. *R. v. Morrissey*, 1995 CanLII 3498 (ONCA)
56. *R. v. Valentini*, 1999 CanLII 1885 (ON CA)
57. *Ribeiro v. Wright*, 2020 ONSC 1829
58. *SMCYFS v. C.B.*, 2020 ONSC 2109
59. *Smith v. Smith*, 2020 ONCJ 180

60. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1
61. *Trudeau v. Auger*, 2020 ONCJ 197
62. *Vasilodimitrakis v. Homme*, 2020 ONSC 2084
63. *White Burgess Langille Ingram v. Abbott and Haliburton Co.*, 2015 SCC 23
64. *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 (CanLII)

Other authorities

1. The Honourable Stephen T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Toronto: Ministry of the Attorney General, 2008

2. The Honourable Justice Judith Beaman, *Report of the Motherisk Commission* (2018: Ontario Ministry of the Attorney General)

SCHEDULE B: Legislation

1. *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11
2. *Child, Youth and Family Services Act*, Preamble, s.1(2)1, 2, & 3(i); s.10(1)(a) & (2); s.105(5) & (6); s.109(5)(a)
3. *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Art. 9(3)
4. *Family Law Rules*, O. Reg. 114/99, Rules 20.2(15), 33 (9)
5. *Ontario Human Rights Code*, R. S.O. 1990, c. H-19, s.5