

December 2, 2024

To: Hon. Niki Sharma
Deputy Premier, Attorney General
PO Box 9044 Stn Prov Govt
Victoria, BC V8W 9E2
Via Email: AG.Minister@gov.bc.ca

Hon. Grace Lore
Ministry of Children and Family Development
PO Box 9057 Stn Prov. Govt.
Victoria, BC, V8W 9E2
Via Email: MCF.Minister@gov.bc.ca

CC: Katherine LeReverend
Legal Services Branch
PO Box 9280 Stn Prov Govt
Victoria BC, V8W-9J7
Via Email: Katherine.LeReverend@gov.bc.ca

Re: Improving pre-trial disclosure practices in CFCSA proceedings

Dear Attorney General Sharma and Minister Lore:

On behalf of the undersigned lawyers and legal organizations who represent and/or advocate for parents and caregivers in child protection matters in BC, we write to request a meeting with you to discuss our concerns and recommendations with respect to improving and standardizing disclosure practices in proceedings under the *Child, Family, and Community Service Act* (“CFCSA”). We share these concerns because of the importance of timely and complete disclosure to the full and effective participation of parents and caregivers throughout CFCSA proceedings, from collaborative processes through to trial.

In 2022-2023, West Coast LEAF convened a working group primarily made up of parents’ counsel to discuss issues arising in CFCSA proceedings and develop recommendations for systemic change. The working group was organized in response to many findings and reports on the overrepresentation of Indigenous children in BC’s child and family services system.¹ The working group identified and monitored procedural issues in CFCSA proceedings and developed recommendations to support and enhance procedural rights.

¹ “Indigenous resilience, connectedness and reunification from root causes to root solutions : A Report on Indigenous Child Welfare in British Columbia : Final Report of Special Advisor Grand Chief Ed John”, 2016, <<https://fns.bc.ca/wp-content/uploads/2017/01/Final-Report-of-Grand-Chief-Ed-John-re-Indig-Child-Welfare-in-BC-November-2016.pdf>>; West Coast LEAF, “Pathways in a Forest: Indigenous Guidance on Prevention-Based Child Welfare”, 2019, <<https://westcoastleaf.org/wp-content/uploads/2023/06/West-Coast-LEAF-Pathways-in-a-Forest-web-Sept-17-2019-002-Online-Version-2021-compressed4.pdf>>

The working group identified that access to timely and complete pre-trial disclosure was an area of concern impacting procedural rights for parents in collaborative processes as well as in contested proceedings. Without access to complete and timely disclosure, parents' counsel are hindered in their ability to provide effective legal advice and the parties are hindered in their ability to make informed decisions. Procedural fairness concerns arising from incomplete and delayed disclosure have also been addressed in the British Columbia Law Institute's (BCLI) report of April 2021 on Modernizing the *Child, Family and Community Service Act*, which recommended amendments to the *CFCSA* to enhance legislated disclosure requirements by incorporating case-law stipulations.² The BCLI Committee recommended amending the *CFCSA* to place an onus on Director's counsel to disclose all relevant materials or to prove that material should not be disclosed.³ The CBABC, in its submissions responding to the BCLI's consultation paper, recommended extending the duty to disclose to all out of court dispute resolution processes, in addition to case conferences and hearings, as this would recognize that effective advocacy is needed from the outset and cannot be achieved without adequate information.⁴ CBABC also recommended that Director's counsel provide a list of documents and disclose the nature of information it claims should be withheld and the grounds for those claims.⁵ CBABC further recommended that there be a presumption in favour of disclosure and that information received from policing agencies also be presumptively disclosed.⁶ In addition to police reports, we believe that all information obtained from public bodies pursuant to s. 96 of the *CFCSA* should be presumptively disclosed without delay.

In 2022-2023, the working group informally surveyed parents' counsel across BC to examine systemic experiences with disclosure practices across the province. The intention of the survey was to gather more information about parents' counsel's access to disclosure at all stages of *CFCSA*-related processes. Over 25 parents' counsel responded to the survey from regions of practice ranging from Vancouver Island, Vancouver and the Lower Mainland, the Sunshine Coast, Northern BC, Okanagan, West and East Kootenays, to other areas of BC. Survey respondents raised several issues with receiving disclosure, including for example that:

- Policies with respect to disclosure are not available to parents' counsel across BC.
- Disclosure practices and policies are not standardized across BC.
- Parents' counsel do not always receive timely disclosure in advance of collaborative hearings, mediations, case conferences or contested hearings.
- Parents' counsel do not always receive complete disclosure even in cases where express requests for disclosure have been made to Director's counsel, and particularly where

² British Columbia Law Institute, "Report on Modernizing the *Child, Family and Community Service Act*", April 2021, pp. 53-60. <https://www.bcli.org/wp-content/uploads/2021/05/2021-04-21_BCLI-Report-on-Modernizing-CFCSA-FINAL.pdf> [BCLI Report]

³ *Ibid.*

⁴ Canadian Bar Association, BC Branch, "Modernizing the *Child, Family and Community Service Act*: Submitted to the British Columbia Law Institute in response to its Consultation Paper", January 18, 2021, pp.19-20. <https://www.cbabc.org/CBAMediaLibrary/cba_bc/pdf/Advocacy/Submissions/CBABC_FLWG_BCLI_Submission_CFCSA_2021-01-18.pdf>

⁵ *Ibid.*

⁶ *Ibid.*

information related to MCFD employees' disciplinary histories and/or third party records are being sought.

- Parents' counsel do not always receive ongoing disclosure.
- Not all parents' counsel receive a list of documents which would enable them to assess the comprehensiveness of disclosure.
- Practices related to the redaction of disclosure or explanations for redactions are inconsistent across BC.

We bring these concerns to your attention with the objective of collaboratively discussing and addressing disclosure practices. Parents' counsel can certainly turn to the courts to address procedural unfairness related to disclosure. However, the significant nature of the issues in a proceeding, the urgency of matters, and the limited time available to parents' counsel on files supported through legal aid, impact parents' counsel's ability to seek adjournments to review late disclosure or to bring applications to seek judicial remedies for a lack of disclosure. The courts have also recognized that the remedy of excluding evidence where no reasonable effort has been made to disclose it is in effect a "hollow one" when the paramount consideration is the safety and well-being of children.⁷ Proactive clarity and consistency is therefore needed with respect to disclosure practices to ensure fairness and efficiency in *CFCSA* proceedings without requiring that counsel bring applications that expend judicial and counsel resources.

The working group recognizes that some Director's counsel are making an effort to meet their disclosure obligations. We understand that systemic and resource factors may impact the ability of Director's counsel to provide timely and complete disclosure, including the time required to vet disclosure and the need to safeguard the confidentiality of third parties.⁸ Nevertheless, such factors must not impede the *Charter* and procedural rights of parents and caregivers as well as fairness and efficiency in the conduct of *CFCSA* proceedings.⁹ In cases where there is significant delay in scheduling presentation hearings or interim hearings, it remains important that Director's counsel obtain relevant disclosure as soon as possible and provide it to parent's counsel without delay. Director's counsel should be working diligently to reunify children with their family wherever appropriate and early disclosure may reduce the trauma that arises for all involved particularly when forced separation is based on vexatious or tenuous allegations.

Clarity and transparency on disclosure matters assists practitioners on both sides of *CFCSA* proceedings. We are hopeful that parents' and Director's counsel share a common interest in improving and standardizing disclosure practices and safeguarding procedural fairness. In this spirit, we are seeking a meeting with your offices to discuss strategies to achieve this goal.

Please advise Humera Jabir, Staff Lawyer at West Coast LEAF (hjabir@westcoastleaf.org), of your earliest availability for a meeting. Thank you for your prompt attention to this matter.

Sincerely, the undersigned organizations and individuals:

⁷ *British Columbia (Director of Child and Family Service) v TLK*, [1996] BCJ No 2554, para. 10 [TLK].

⁸ BCLI Report, p. 55.

⁹ *New Brunswick (Minister of Health) v G(J)*, [1999] 3 SCR 46, para. 55, Lamer CJ; *TLK; Child, Family and Community Service Act*, RSBC 1996, c-46, s. 64; *Provincial Court (Child, Family and Community Service Act) Rules*, BC Reg 533/95.

Organizational signatories

West Coast LEAF

West Coast LEAF's office is located in Vancouver on traditional, ancestral, and unceded Coast Salish homelands, including the territories of the xwməθkwəy̓əm (Musqueam), Skwxwú7mesh (Squamish), and səł'lwətaʔ/Selilwitulh (Tsleil-Waututh) Nations.

South Asian Legal Clinic of British Columbia

SALCBC works on the unceded and unsurrendered lands belonging to the Coast Salish peoples, including the territories of the xwməθkwəy̓əm (Musqueam), Skwxwú7mesh (Squamish), Stó:lō and Səł'lwətaʔ/Selilwitulh (Tsleil-Waututh) Nations.

Vicky Law, Executive Director, Rise Women's Legal Centre

Rise works on the lands commonly known as British Columbia which includes nearly 200 Indigenous Nations, with diverse traditions and histories. Our main office is located on the ancestral and unceded land of the xwməθkwəy̓əm (Musqueam), Skwxwú7mesh (Squamish), and səł'lwətaʔ/Selilwitulh (Tsleil-Waututh) Nations.

Individual signatories

Frances Rosner

Barrister & Solicitor, Counsel for Indigenous parents and communities

Stephanie Hodgson

Lawyer & Counsel for Parents, Guardians & Youth in CFCSA matters, Vancouver Island

Robin Havelaar

Family Lawyer, Campbell River BC

Paul LeBlanc

Counsel for parents in CFCSA matters in Northern BC

Pamela Shields Law

#131, 8-6014 Vedder Rd. Chilliwack, BC V2A 5S5

Lisa Abbott, Staff Lawyer, BC First Nations Justice Council

Chilliwack Indigenous Justice Center

Meena Dhillon Law Corporation

2300-2850 Shaughnessy Street, Port Coquitlam, BC V3C-6K6

Agnes Huang, Saltwater Law

Philippa Newman, Newman Law

Counsel for parents in CFCSA matters in Northern BC

Nina Taghaddosi

Registered Social Worker, Pivot Legal Society