IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *T.L. v. British Columbia (Attorney General)*, 2021 BCSC 2203

Date: 20211112
Docket: 2158960
Registry: Prince George

In the matter of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241

Between:

T.L.

Petitioner

And

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

Respondents

And

West Coast LEAF

Intervenor

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

Counsel for the Petitioner, via videoconference:	Paul D. Leblanc
Counsel for the Respondents, via videoconference:	Micah N. Weintraub Emily Lapper
Counsel for the Intervenor, via videoconference:	Sarah Runyon Kate Feeney
Place and Date of Hearing:	Prince George, B.C. June 22-24, 2021
Place and Date of Judgment:	Prince George, B.C. November 12, 2021

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INTRODUCTION

[1] The Petitioner, T.L., challenges the constitutionality of s. 96 of the *Child, Family and Community Service Act,* R.S.B.C. 1996, c.46 (the "*Act*"). This provision empowers the Director of Child Protection (the "Director") to obtain information from public bodies in order to perform statutory duties under the *Act.* That power was used to seek medical records about T.L. in the context of an investigation into whether measures are necessary to protect her children. T.L. asserts that s. 96 of the *Act* authorizes unreasonable searches and seizures of private personal information and that it is therefore contrary to s. 8 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "*Charter*"). T.L. seeks a declaration to this effect, as well as associated relief in relation to the information that was obtained by the Director in her case.

[2] The Respondents, the Attorney General of British Columbia and the delegate of the Director who sought information about T.L (collectively referenced as the "AGBC") oppose the petition. They argue that the search and seizure power authorized by s. 96 of the *Act* is a reasonable one that does not violate s. 8 of the *Charter.* In the alternative, the AGBC says that the law is justified under s. 1 of the *Charter.*

[3] The Intervenor, West Coast LEAF, urges the Court to ensure that adjudication of this petition considers the context in which information gathering is conducted under s. 96 of the *Act.* In particular, West Coast LEAF says that this power is a component of a regime that historically has perpetuated systemic discrimination against Indigenous and other marginalized families, and that there is a risk that stereotypes about parenting ability may inform the Director's requests for information.

[4] I acknowledge the tension that exists between the individual's interest in protecting private information disclosed to public bodies and the state's interest in accessing such information for the purpose of preventing children from being

harmed. On my review of the petition record in this proceeding, however, I conclude that s. 96 of the *Act* is reasonable legislation that strikes an acceptable balance between these interests. Accordingly, I find that s. 96 of the *Act* does not contravene s. 8 of the *Charter*. This petition will therefore be dismissed.

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BACKGROUND

Facts

[5] T.L. is the mother of three young children, born in 2017, 2020, and 2021, respectively. T.L. has been in a marriage-like relationship with Z.W. since 2017. Z.W. is the biological father of T.L.'s two youngest children, and he is the stepfather of T.L.'s eldest child.

[6] T.L. has schizophrenia. She takes medication which enables her to manage her condition much of the time.

[7] The Director designated by the Minister of Children and Family Development ("MCFD") first became involved with T.L.'s family in 2017. At that time, the Director received reports about T.L.'s mental health and her ability to care for her first child. A family services file was opened by the Director and an investigation was conducted. In September 2018, the Director concluded that T.L. and Z.W. had addressed the concerns raised by the 2017 reports, and the family services file was then closed.

[8] In April 2020, T.L.'s family came to the attention of the Director again further to an interprovincial request for information from Alberta Children's Services. The request noted that in August 2019, T.L. and Z.W. had moved their family from Prince George to Edmonton. Alberta Children's Services advised that it had become involved in response to possible neglect by the parents, notably in relation to their recently born second child who was failing to thrive. The Director then provided a report on T.L. to Alberta Children's Services.

[9] In May 2020, T.L.'s second child was hospitalized for three weeks because of concerns that she was underweight and suffering from a persistent cough. The child was diagnosed with a tracheoesophageal fistula. That is a condition whereby liquid

destined for the stomach enters the lungs, causing coughing and preventing the child from receiving nutrients. Emergency surgery was then successfully performed on the child to correct the fistula. Meanwhile, T.L. was experiencing symptoms of schizophrenia, such as hearing voices and feeling paranoia. T.L.'s medicine was adjusted, and her symptoms disappeared.

[10] On June 10, 2020, the Director received a second request from Alberta Children's Services. It asked that a safety check be completed on T.L. and Z.W.'s children who were now back in Prince George and in the care of Z.W.'s mother. A social worker delegate of the Director attended the home of Z.W.'s mother and noted no concerns with the home or the well-being of the children. However, the Director also determined that the children should not be in the care of T.L. and Z.W. until ongoing concerns about their drug and alcohol use, inadequate parenting skills, mental health, and poor household management were addressed.

[11] On August 1, 2020, the Director approved Z.W.'s mother as a caregiver and the parents entered into an Extended Family Program ("EFP") agreement under s. 8 of the *Act* that formally placed the children in her care by consent. Z.W.'s mother then cared for the children under the terms of the EFP agreement, which was renewed and extended several times over the following months.

[12] On January 8, 2021, counsel for T.L. wrote to counsel for the Director to say that T.L. would be taking her children home unless the Director were to issue a presentation form, thereby triggering Provincial Court child protection proceedings. Counsel for T.L. initially demanded that the presentation form be filed by January 14, 2021, but that deadline was subsequently extended by agreement between counsel to January 22, 2021.

[13] In order to assess whether the children continued to need protection, the Director then issued requests under s. 96 of the *Act* for medical and family psychiatric history reports in relation to T.L., her spouse Z.W., and their children. The requests in respect of T.L. were sent to the University Hospital for Northern British

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Columbia (“UHNBC”) on January 14, 2021, and to Carrier Sekani Family Services (“CSFS”) on January 18, 2021.

[14] The UHNBC responded to the Director’s s. 96 request pertaining to T.L. by providing records on February 2, 2021. As for the Director’s s. 96 request addressed to CSFS, it was received by a family nurse practitioner who is T.L.’s primary care provider. The nurse discussed with T.L. whether she would consent to disclosure of her health information. T.L. advised that she would agree to the nurse telling the Director’s social worker delegate about the current status of her mental health, but would not consent to providing her medical reports. Ultimately, CSFS did not send any of T.L.’s records to the Director. CSFS staff did, however, provide some verbal information to the Director pertaining to T.L.’s mental health.

[15] The specific records provided by the UHNBC to the Director were not entered into evidence for this proceeding. That said, the parties are agreed that the records indicate that T.L. has a history of issues with trauma, mental health, and substance use. In his written submissions, counsel for T.L. describes their content as follows:

> The records at issue here include T.L.’s psychiatric records. Those records will include T.L.’s statements about hearing voices, what those voices say, statements about feelings of paranoia. The documents will also contain T.L.’s discussion of the trauma she suffered as a youth, including sexual violence.

[16] On January 22, 2021, the Director decided to remove the two oldest children from the custody of T.L. and Z.W. pursuant to s. 30 of the *Act.*

[17] On February 12, 2021, a Provincial Court order was made by consent pursuant to s. 35(2)(d) of the *Act* that the two eldest children be placed in the interim custody of Z.W.’s mother under the supervision of the Director, pending the outcome of a protection hearing.

[18] Following the birth of T.L.’s third child in April 2021, another Provincial Court order was made by consent that the infant remain in the interim care of the parents, T.L. and Z.W., under the supervision of the Director, pending the conclusion of a protection hearing.

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[19] Counsel for T.L. has advised that the protection hearing in respect of the children will likely take place some time in February 2022. T.L. also deposed that on May 12, 2021, she and Z.W. entered into a mediated agreement with the Director. That agreement included a term whereby the Director would begin transitioning the two eldest children back into the parents' care within six weeks if there were no new child protection concerns. At the start of June 2021, the older children began spending three days per week with T.L. and Z.W., unsupervised.

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The Legislative Regime

The Act

[20] The *Act* constitutes the primary piece of child protection legislation in British Columbia. While the *Act* does not have a purpose clause, s. 2 prescribes the guiding principles for its interpretation. The most important of these is that "the safety and well-being of children are the paramount considerations" for administering and interpreting the *Act.* Other specific guiding and service delivery principles are set out at ss. 2 and 3 of the *Act*. They include the notion that "children are entitled to be protected from abuse, neglect and harm or threat of harm" (s. 2(a)), and that "a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents" (s. 2(b)). In addition, the *Act* lists at s. 4 a number of factors to be considered in determining a child's best interests, including safety, continuity of care, and heritage.

[21] The *Act* has also been described as a "complete code" that provides a comprehensive framework for the protection of children in the province: *Stadelmann v. Dmytruk,* 2010 BCSC 1615 at para. 24. However, this is no longer entirely accurate since the January 1, 2020 coming into force of *An Act respecting First Nations, Inuit and Métis children, youth and families,* SC 2019 c. 24. This new federal legislation sets out principles and minimum standards applicable to the provision of child and family services in relation to Indigenous children across Canada. The provincial *Act* also contains express provisions pertaining to Indigenous children, families, and communities. They require, among other things,

that Indigenous people be involved in the provision of services to Indigenous families and their children, that the impact of residential schools on Indigenous children be considered, and that Indigenous children's belonging to their communities be ensured. Both statutes now apply in British Columbia, subject to the doctrine of federal paramountcy.

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[22] In the case at bar, however, T.L. does not identify as Indigenous and there is no evidence that T.L.'s children are Indigenous. Accordingly, neither the federal legislation nor the provisions in the provincial *Act* that expressly address Indigenous child protection have a direct impact on the outcome of this particular petition.

[23] With respect to its salient features, the *Act* sets out a framework for the MCFD to investigate concerns raised in relation to the protection of children, and to act upon those concerns through a variety of mechanisms. These range from voluntary services and support for families, to more interventionist measures involving such steps as investigation, supervision, removal, and return of children. The framework also contemplates judicial oversight, particularly through child protection proceedings before the Provincial Court.

[24] Part 3 of the *Act* deals with the specifics of child protection. The statutory starting point for MCFD involvement is s. 16. It provides generally for the assessment by the Director of reports indicating that a child is in need for protection. These reports can come from various sources as s. 14 of the *Act* imposes a duty on all members of the public to inform the Director if they have reason to believe a child needs protection. In practice, such sources often include family, community members, schools, law enforcement, health professionals, and government agencies.

[25] The Director's assessment of these reports is made by reference to the factors set out at s. 13 of the *Act*. Section 16(2) of the *Act* sets out various permissible actions the Director may take after the assessment. As the AGBC explains through affidavit evidence, these include two types of child protection responses: (1) a "Family Development Response" under s. 16(2)(b.1); and (2) an

"Investigation Response" under s. 16(2)(c). The essential difference between the two is that the former response is intended to be a collaborative process in which the parents and family are involved in planning and addressing child welfare concerns, while the latter response is managed primarily by the Director.

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[26] As a matter of MCFD policy, recourse is made to a Family Development Response in cases where the reports do not show severe abuse or neglect, and where parents are being cooperative with the Director. In the less common situation where these criteria are not met, an Investigation Response may be initiated with a view to considering whether the Director ought to "remove" (i.e., assume care) of a child under s. 30(1) of the *Act.*

[27] According to the AGBC, such removal is a tool of last resort. Section 30(1) provides that removal can only be done if the Director has reasonable grounds to believe that the child needs protection and that the child's health or safety is in immediate danger, or that no other less disruptive measure (such as a supervision order under s. 29.1 or an EFP agreement under s. 8) would be adequate and available. A removal decision will generally trigger the judicial child protection procedure involving presentation hearings, protection hearings, and sometimes continuing custody hearings, all of which were explained by the Court of Appeal in *B.B. v. British Columbia (Director of Child, Family and Community Services),* 2005 BCCA 46 at paras. 9 to 20. These proceedings are intended to be essentially inquisitorial inquiries into the safety and well-being of children, and are minimally adversarial: *B.S.R. v. British Columbia (Child, Family and Community Sevice),* 2016 BCSC 1369 at para. 78.

The Impugned Provision: Section 96 of the Act

[28] While a general understanding of the legislative scheme is contextually important, the only portion of that scheme that has been directly challenged in this petition is that which bestows upon the Director the power to collect personal information from "public bodies", as defined by the *Freedom of Information and*

Protection of Privacy Act, RSBC 1996, c. 165 ("*FOIPPA*"). This power is set out at s. 96 of the *Act,* as follows:

> 96(1) A director has the right to any information that
>
> > (a) is in the custody or control of a public body as defined in the *Freedom of Information and Protection of Privacy Act,* and
> >
> > (b) is necessary to enable the director to exercise his or her powers or perform his or her duties or functions under this Act.
>
> (2) A public body that has custody or control of information to which a director is entitled under subsection (1) must disclose that information to the director.
>
> (2.1) A director may collect from a person any information that is necessary to enable the director to exercise his or her powers or perform his or her duties or functions under this Act.
>
> (3) This section applies despite the *Freedom of Information and Protection of Privacy Act* or any other enactment but is subject to a claim of privilege based on a solicitor-client relationship.

[29] Importantly, s. 96 makes a distinction between the Director's right to obtain information from a "public body" (s. 96(1) and (2)), and the Director's authority to request and collect information from other persons (s. 96(2.1)). While a public body "must" disclose information to the Director when requested, no such mandatory obligation is imposed on other persons. However, should a person refuse the Director's request for information, the Director may seek a production order from the Provincial Court under s. 65 of the *Act.* Only the constitutionality of the Director's power to compel information from public bodies is in issue in these proceedings.

[30] The term "public body" is defined in *FOIPPA* to include a number of British Columbia public sector entities, including provincial and municipal government ministries and agencies, as well as health care, social services, and educational bodies. There is no dispute that the UHNBC and CSFS are each a "health care body" that falls within the *FOIPPA's* definition of a "public body".

[31] According to the AGBC's evidence, information gathered by the Director under s. 96 of the *Act* is used for the purpose of making a variety of decisions under the *Act.* These decisions include whether a child needs protection, should be removed from their parents, should be kept in the Director's custody, should be

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returned to their parents, and whether a parent may have access to a child that has been removed.

[32] Information obtained by the Director pursuant to s. 96 is confidential and cannot be disclosed unless permitted by the *Act* and *FOIPPA.* One exception to this general prohibition is s. 64 of the *Act* which requires the Director to disclose to the parties to a child protection proceeding the evidence the Director intends to rely on, a requirement which has been expanded by the jurisprudence to include information adverse to the Director's interest: *British Columbia (Child, Family and Community Service) v. S.M.S.,* 2020 BCPC 87 at paras. 44 to 45. While child protection proceedings are presumptively open, in practice there are restrictions on public disclosure of such information under the *Act* and the *Provincial Court (Child, Family and Community Service Act) Rules*, BC Reg 533/95 ("*CFCSA Rules*"). For example, a party can apply to a Provincial Court judge at a protection hearing case conference for an order to withhold or redact records which would otherwise be disclosable: *CFCSA Rules,* R. 2(3)).

The Petition

[33] Counsel for T.L. wrote to counsel for the Director on January 28, 2021 to ask that all outstanding requests made under s. 96 of the *Act* be withdrawn and that all records received further to these requests be sealed pending further order or agreement. The Director's counsel communicated their refusal to accede to this demand the next day.

[34] On February 8, 2021, T.L. filed the present petition with the Court. It was subsequently amended by consent on April 20, 2021. The petition has been brought under the *Judicial Review Procedure Act,* RSBC 1996, c. 241. It indicates that four specific types of relief are being sought.

[35] First, T.L. seeks a declaration that s. 96 of the *Act* unjustifiably infringes ss. 7 and 8 of the *Charter*, and is of no force and effect to the extent that s. 96 authorizes the collection of information related to a person's health.

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[36] Second, T.L. seeks an order in the nature of *certiorari* quashing the Director's s. 96 requests for medical records made to the UHNBC and CSFS.

[37] Third, T.L. seeks an order that would seal all medical documents relating to T.L. obtained under s. 96 of the *Act.*

[38] Fourth, T.L. seeks an order to restrain and enjoin the AGBC from using, reproducing, or disclosing T.L.'s medical information obtained under s. 96 of the *Act.*

[39] At the hearing of this petition, however, counsel for T.L. provided two clarifications regarding the scope of his client's *Charter* challenge as set out in the pleadings.

[40] First, T.L.'s challenge is ultimately being advanced exclusively on the basis of s. 8 of the *Charter* (the right to be secure against unreasonable search or seizure), and not on the basis of s. 7 of the *Charter* (the right to life, liberty and security of the person).

[41] Second, T.L.'s assertion that the Director's requests violate s. 8 of the *Charter* is founded only upon the alleged unreasonableness of the legislative scheme that authorizes them, namely, s. 96 of the *Act.* T.L. is not alleging that the Director's requests were not authorized by law, nor is T.L. asserting that the particular manner in which the Director's specific requests were made in her case constitutes an unreasonable search or seizure.

[42] T.L.'s petition will therefore be adjudicated in accordance with these clarifications.

POSITIONS OF THE PARTIES AND THE INTERVENOR

The Position of the Petitioner (T.L.)

[43] Counsel for T.L. succinctly characterizes this case as a challenge to the constitutionality of s. 96 of the *Act* which allows the Director to collect records held by public bodies, including medical and psychiatric records, without any procedural safeguards such as prior authorization or notice.

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[44] T.L. says that s. 96 of the *Act* engages s. 8 of the *Charter* because it interferes with an individual's reasonable expectation of privacy. T.L. then says that s. 96 of the *Act* violates s. 8 of the *Charter* because the law itself is unreasonable. That unreasonableness is said to flow from the lack of a reasonable balance between an individual's right to be free from unreasonable searches or seizures and society's interest in preventing serious harm.

[45] T.L. submits that the unreasonableness analysis in relation to s. 96 of the *Act* ought to be done by reference to four factors: (1) the degree of intrusion and nature of the privacy interest; (2) the nature of the scheme; (3) the purpose of the scheme; and (4) the extent of procedural safeguards provided.

[46] With respect to the first factor, T.L. argues that there is a reasonable expectation of privacy concerning information disclosed to a health care provider. This privacy interest is of the highest order, particularly in relation to the deeply personal psychiatric records at issue which, as noted earlier, include T.L.'s statements about her medical condition and the trauma she has suffered. This information was provided to health professionals for the sole purpose of obtaining care, and with the expectation that it would remain private. As such, the Director's collection of records containing this information through the use of s. 96 of the *Act* engages and interferes with T.L.'s privacy interest.

[47] Turning to the second factor, T.L. asserts that the nature of the scheme provided for by s. 96 of the *Act* is more criminal than regulatory. This is because of the stigma associated with child protection, the high order of the interests at stake, and because the scheme is not designed to simply regulate social or business activity. As such, a higher expectation of privacy is present.

[48] As for the third factor, T.L. concedes that the child protection purpose of the scheme is an important one. However, she says that undue weight should not be given to this purpose, and that consideration should also be given to the harm a child can suffer by being separated from a parent and the impact of insufficient

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protection for medical information on a parent's ability to obtain treatment and resume care.

[49] The fourth factor discussed by T.L. relates to procedural safeguards, which she says are entirely absent in this regime. There are no requirements for notice under s. 96 of the *Act,* and a parent is not told of the existence of requests for medical records either before or after they are made. Further, the Director need not obtain prior authorization to seek medical records from an independent decision-maker. Also, s. 96 of the *Act* provides no express conditions or constraints on the use of these records once obtained. Finally, T.L. takes issue with the fact that the scheme does not differentiate between cases where the children are still in the care of the parent being investigated and there might be urgency to obtaining medical information, and those where there is no such urgency and a warrant requirement would not interfere with the Director's ability to investigate.

[50] Considering these factors, T.L. submits that s. 96 of the *Act* fails to strike a reasonable balance between the state's interests and a person's right to be free from unreasonable search and seizure. It therefore engages and violates s. 8 of the *Charter*.

[51] T.L. also argues that s. 96 of the *Act* is not saved by s. 1 of the *Charter* as it does not minimally impair the right to privacy protected by s. 8. T.L. says that the legislative scheme could contain procedural safeguards making the law significantly less intrusive without impairing its legislative objective.

[52] Lastly, T.L. submits that the ancillary relief she seeks to seal the medical records obtained by the Director and which would enjoin the AGBC from using them flows logically from a finding of unconstitutionality in relation to s. 96 of the *Act*, and is within the Court's jurisdiction to grant pursuant to s. 24(1) of the *Charter.*

The Position of the Respondents (AGBC)

[53] The AGBC says that T.L.'s s. 8 *Charter* challenge should be dismissed since in the unique context of a child protection regime, the state's interest in the

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protection of vulnerable children outweighs T.L.'s privacy interest. As such, s. 96 of the *Act* does afford the Director a reasonable search power that is necessary to ensure that the health, safety, and best interests of vulnerable children are not put at risk.

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[54] In support of this position, the AGBC presents argument in respect of three considerations for determining the reasonableness of a search power law that have been employed in prior jurisprudence: (1) the nature and purpose of the legislative scheme; (2) the mechanism employed and the degree of its potential intrusiveness; and (3) the availability of judicial supervision and other procedural safeguards.

[55] The AGBC asserts first that the nature and purpose of the Director's power to require the production of records from public bodies is a highly compelling one, namely, to protect children. While the state's power to obtain information for use in criminal prosecutions is directed at punishing past conduct, the Director's s. 96 power is designed to prevent future harm to children by being anticipatory and protective. It ensures that the Director is given rapid access to records so that child protection decisions are not made in an informational vacuum. The AGBC acknowledges that the context in which this power is exercised is not analogous to the economic regulatory regimes in respect of which courts have held that there is a low expectation of privacy. However, the AGBC submits that the Director's search power is even further removed from the criminal context which is characterized by its associated stigma, its adversarial nature, and its focus on imposing sanctions. Accordingly, the high level of privacy safeguards that is constitutionally required in the case of criminal search regimes that target suspects need not be applied to the Director's power to compel records for the purpose of protecting children.

[56] With respect to the mechanism employed by the Director to obtain information under s. 96, the AGBC argues that the degree of intrusiveness into an individual's privacy interest is constitutionally acceptable. The AGBC notes in particular that the regime only gives the Director the right to access pre-existing information that was already in the custody of public bodies. There is no intrusion upon the bodily integrity

of a person, no entry onto private premises, no surveillance, and no ability for the Director to question or requisition further information that is not already in the possession of the state.

[57] Finally, in terms of the procedural safeguards that apply to the information collected by the Director pursuant to s. 96 of the *Act*, the AGBC notes that the power is limited by the restriction in the provision itself that only information “necessary” to enable the Director to exercise powers and perform duties under the *Act* may be sought: *Act,* s. 96(1)(b). Furthermore, s. 32 of the *FOIPPA* limits the use the Director can make of the information to the purpose for which it was obtained, namely, to assist in making child protection decisions. The AGBC also provided evidence of the MCFD’s policies which favour recourse to Family Development Responses in the majority of child protection cases, and which limit the Director’s reliance on s. 96 of the *Act* to Investigation Responses only.

[58] Accordingly, the AGBC concludes that when all of these considerations are taken into account, s. 96 of the *Act* strikes the appropriate balance in achieving its purpose. It therefore does not authorize unreasonable searches contrary to s. 8 of the *Charter.*

[59] In the alternative, the AGBC submits that s. 96 of the *Act* would be saved by s. 1 of the *Charter* since it is prescribed by law, pursues the pressing and substantial objective of protecting children, and does so in a proportional manner. In particular, s. 96 is rationally connected to its objective, minimally impairs privacy rights because of its necessity requirement and direct tie to the Director’s limited statutory mandate, and is proportionate because the salutary child protection effects of the impugned law outweigh any deleterious effects on a parent’s privacy interests.

[60] With respect to remedies, the AGBC argues that in the event s. 96 is found to be unconstitutional, that finding should be limited to the extent that it authorizes the collection of health records only. The AGBC suggests that this could be done by reading down s. 96 so that “health bodies” and “health care providers” are exempt from the Director’s information gathering power. The AGBC also urges the Court to

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suspend any declaration of constitutional invalidity that it might issue for a period of 12 months to permit the Legislature to craft replacement legislation. Finally, in terms of personal remedies, the AGBC says that the Court should simply return the specific records obtained in respect of T.L. pursuant to the Director's exercise of authority under s. 96 of the *Act.* The AGBC opposes the issuance of a broader order that would seal all medical documents in the Director's possession containing information related to T.L. that may have been referenced in the material received pursuant to s. 96 of the *Act* because of the practical difficulties of doing so.

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The Position of the Intervenor (West Coast LEAF)

[61] West Coast LEAF takes no express position on the outcome of the petition, but does submit that s. 96 of the *Act* cannot be found to be constitutionally sound unless it has procedural safeguards and an evidentiary threshold to restrict the power of the state to arbitrarily intrude on the privacy and property of an individual's health records. In support of this submission, West Coast LEAF says first that the Court must be conscious and can take judicial notice of the fact that child welfare regimes in Canada have often perpetuated systemic discrimination against Indigenous and other marginalized families. Second, West Coast LEAF says that when considering whether s. 96 of the *Act* conforms with s. 8 of the *Charter,* the Court should recognize that biases and stereotypes about parenting ability are likely to inform requests for medical records. Finally, West Coast LEAF explains that having meaningful limits on the Director's ability to request medical information is desirable so as to not dissuade individuals from seeking medical care, to not contribute to arbitrary state interference with the parent-child relationship, and to encourage trust and confidence in the Director.

ANALYSIS

Section 8 of the *Charter:* Analytical Framework

[62] Section 8 of the *Charter* guarantees the right to be secure from unreasonable searches and seizures. The legislator is, however, permitted to authorize reasonable searches and seizures in furtherance of legitimate public concerns, with

reasonableness being assessed contextually by reference to objective notions of reasonable expectations of privacy. In other words, whether a search or seizure is reasonable will depend upon a consideration of what is sought, from whom, for what purpose, by whom, and in what circumstances: *Hunter v. Southam Inc.,* [1984] 2 SCR 145 at pp. 159-160 [*Hunter*]; *R. v. McKinlay Transport Ltd.,* [1990] 1 SCR 627 at 645-646 [*McKinlay*], and *British Columbia Securities Commission v. Branch,* [1995] 2 SCR 3, at para. 51 [*Branch*].

[63] The technical framework for analyzing a s. 8 *Charter* challenge involves two steps. First, there is an examination of whether s. 8 is engaged. It will be if a state actor conducts a search or seizure in circumstances where a person has a reasonable expectation of privacy: *R. v. Tessling,* 2004 SCC 67 at para. 18.

[64] If s. 8 of the *Charter* is engaged, then the analysis turns to the second step. It entails an examination of the reasonableness of the search or seizure. In order to be reasonable, three conditions must be satisfied: (1) the search or seizure must be authorized by law; (2) the law itself must be reasonable; and (3) the search or seizure must be carried out in a reasonable manner: *R. v. Collins,* [1987] 1 SCR 265 at para. 23.

[65] In the case at bar, there is no question that s. 8 of the *Charter* is engaged by the Director's exercise of the power to compel production of T.L.'s health records pursuant to s. 96 of the *Act.* This point is properly conceded by the AGBC. Indeed, the Director's demand for documents concerning T.L. constitutes a "search" in that the Director is asserting a right to inspect documents in the possession of both the UHNBC and CSFS: *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 SCR 406 at pp. 439-441. It also constitutes a "seizure" in respect of the documents that were provided by the UHNBC in that these documents were then taken into the Director's possession without T.L.'s consent: *R. v. Dyment,* [1988] 2 S.C.R. 417 at 431 [*Dyment*].

[66] Furthermore, T.L. clearly has a reasonable expectation of privacy in respect of the information contained in her personal health records that is sufficient to

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engage s. 8 of the *Charter*. T.L. confided to her health care providers highly personal and intimate information about her background, experiences, lifestyle, and condition with the understanding that it would be used to provide her with treatment and kept confidential. The significant privacy interest associated with such medical information has been recognized by the Supreme Court of Canada on several occasions, such as in the cases of *R. v. Dersch,* [1993] 3 SCR 768 at p. 778, *A.M. v. Ryan,* [1997] 1 SCR 157 at para. 28, and *R. v. Mills,* [1999] 3 SCR 668 at para. 82. The importance of this interest was also discussed in some detail by Mr. Justice La Forest in *Dyment* at para. 29:

> The Task Force on *Privacy and Computers, supra,* pp. 23 *et seq.,* like other similar studies, identified hospitals as one of the specific areas of concern in the protection of privacy. This is scarcely surprising. At one time, medical treatment generally took place in the home, or at the doctor's office, but even then, of course, the confidentiality of the doctor-patient relationship was fully accepted as an important value in our society. This goes back as far as the Hippocratic Oath. The *Code of Ethics* of the Canadian Medical Association sets forth, as item 6 of the ethical physician's responsibilities to his patient, that he "will keep in confidence information derived from his patient, or from a colleague, regarding a patient and divulge it only with the permission of the patient except when the law requires him to do so"; see T. D. Marshall, *The Physician and Canadian Law* (2nd ed. 1979), p. 14. This is obviously necessary if one considers the vulnerability of the individual in such circumstances. He is forced to reveal information of a most intimate character and to permit invasions of his body if he is to protect his life or health. … The Report of the Commission of Inquiry into the Confidentiality of Health Information (The Krever Commission), 1980, has drawn attention to the problem in the law enforcement context in the following passage, vol. 2, at p. 91:
>
> > ...the primary concern of physicians, hospitals, their employees and other health-care providers must be the care of their patients. It is not an unreasonable assumption to make that persons in need of health care might, in some circumstances, be deterred from seeking it if they believed that physicians, hospital employees and other health-care providers were obliged to disclose confidential health information to the police in those circumstances. A free exchange of information between physicians and hospitals and the police should not be encouraged or permitted. Certainly physicians, hospital employees and other health-care workers ought not to be made part of the law enforcement machinery of the state. [Emphasis added.]
>
> Under these circumstances, the demands for the protection of personal privacy become more insistent, a truth that has been recognized by governments. I look upon the *Hospitals Act* and its regulations not so much as justifying the need for privacy in this case but rather as a testimony that

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> such protection is required. Under these circumstances, the courts must be especially alert to prevent undue incursions into the private lives of individuals by loose arrangements between hospital personnel and law enforcement officers. The *Charter*, it will be remembered, guarantees the right to be secure against unreasonable searches and seizures.

[67] Therefore, the first step of the analysis has been met and I find that s. 8 of the *Charter* is engaged.

[68] Turning to the second step, two of the three elements of the reasonableness justification analysis are also not seriously in dispute. The first element is whether the Director's search and seizure of T.L.'s health records is authorized by law. This is undoubtedly the case given the clear terms of s. 96 of the *Act*, as is acknowledged by T.L. The third element is whether the manner in which the search and seizure were carried out is reasonable. As noted earlier, T.L. has expressly indicated that she is not asserting that the Director's specific actions in her case were factually unreasonable. There is also no suggestion in the affidavits filed that the Director or any other agent of the MCFD acted in a way that might suggest some particular impropriety in how T.L.'s records were sought and obtained in this case. As such, on my assessment of the legislation and the evidentiary record, both of T.L.'s concessions are wholly justified, and I find that these two elements of the second step of the s. 8 analysis have been met.

[69] Accordingly, the only real issue in dispute is the second element of the reasonableness justification analysis: is the law that authorized the search and seizure of T.L.'s records a reasonable one? That question is addressed below.

Is Section 96 of the *Act* a Reasonable Law?

[70] As a starting point, it must be noted that in the seminal s. 8 *Charter* decision of *Hunter* at 161, the Supreme Court of Canada held that any warrantless search or seizure is presumptively unreasonable. Section 96 of the *Act* does not require the Director to obtain a warrant or any other form of judicial pre-authorization prior to demanding information from public bodies. The burden therefore lies on the AGBC to rebut this presumption and show that the law is reasonable.

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[71] There is no "hard and fast" test for reasonableness under s. 8 of the *Charter*: *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission),* [1990] 1 SCR 425 at p. 495. Instead, it is a flexible one whose objective is to determine is whether the law strikes a reasonable balance between the interest being pursued by the state and the individual's privacy interest: *McKinlay* at p. 643. In *Goodwin v. British Columbia (Superintendent of Motor Vehicles),* 2015 SCC 46 at para. 57 [*Goodwin*], however, the Supreme Court of Canada nevertheless set out four considerations that may be helpful in the reasonableness analysis: (1) the purpose of the legislative scheme; (2) the nature of the legislative scheme; (3) the mechanism employed having regard for the degree of its potential intrusiveness; and (4) the availability of judicial supervision and other procedural safeguards. These are essentially the same factors that both T.L. and the AGBC urge the Court to examine, and I will employ them for the adjudication of the present petition.

The Purpose of the Legislative Scheme

[72] As has already been observed, the *Act* does not have a clause that expressly sets out its object. However, in *B.S. v. British Columbia,* 1998 CanLII 5958 (BCCA) at para. 23, the Court of Appeal said that the *Act's* general purpose "is to provide for the protection of <u>every</u> child who needs protection" (emphasis in original). This is a purpose that it shares with all provincial and territorial child protection statutes in the country, consistent with the *United Nations Convention on the Rights of the Child*, November 20, 1989, Can. T.S. 1992, No.3 to which Canada adheres: *Winnipeg Child and Family Services v. K.L.W.,* 2000 SCC 48 at paras. 15, 73, 75 [*K.L.W.*].

[73] With respect to s. 96 of the *Act,* I find from its plain wording that its specific purpose is to enable the Director to obtain the information necessary to perform statutory duties under the *Act* generally*,* and to make child protection decisions in particular. This is a compelling and important purpose as it is critical that these time-sensitive decisions not be made in an informational vacuum.

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[74] The Supreme Court of Canada noted in *Goodwin* at para. 59 that the existence of a compelling purpose for legislation that authorizes searches and seizures weighs heavily in favour of its reasonableness. This factor therefore militates towards a conclusion that s. 96 of the *Act* is constitutionally reasonable.

The Nature of the Legislative Scheme

[75] A significant contextual factor in the reasonableness analysis of a legislative scheme that authorizes a search or seizure is whether its nature is criminal or regulatory. If it is the latter, the scheme is more likely to pass constitutional muster even if it lacks the procedural safeguards that may be necessary for a criminal search and seizure power: *Goodwin* at para. 60.

[76] The Director's authority to compel information from public bodies in order to perform statutory duties under the *Act* is not readily classifiable. This was noted by the Supreme Court of Canada in in *New Brunswick v. G.(J.),* [1999] 3 S.C.R. 46 [*G.(J.)*] where the issue was whether s. 7 of the *Charter* affords a right to state-funded legal counsel for indigent parents who are participating in child protection proceedings. Chief Justice Lamer wrote at para. 78:

> There is some debate between the parties as to whether child custody proceedings under the *Family Services Act* are more properly classified as adversarial or administrative in nature. In my view, a formalistic classification of the nature of the proceedings is not helpful in resolving the issue at hand. Child protection proceedings do not admit of easy classification. As Professor Thompson argues, the "unique amalgam of elements – criminal, civil, family, administrative – makes child protection proceedings so hard to characterize."

[77] Just one year later, however, the Supreme Court of Canada in *K.L.W.* grappled again with a *Charter* challenge brought in the context of child protection proceedings. The appellant in this case attempted to argue that the provision in Manitoba's child protection legislation that allows for the removal of a child without prior judicial authorization in a non-emergency situation is contrary to s. 7 of the *Charter.* The Court did not allow the appellant to also advance a separate s. 8 *Charter* argument, reasoning that the privacy interests of the parents and the children in that case could be considered to form part of the s. 7 right to security of the person that was at stake. Madam Justice L'Heureux-Dubé nevertheless made

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the following observations about the nature of child protection legislation that are equally relevant to a s. 8 *Charter* challenge such as the one in the case at bar:

> [94] As in *G.(J.), supra,* the interests at stake in cases of apprehension are of the highest order, given the impact that state action involving the separation of parents and children may have on all of their lives, and particularly on their psychological and emotional well-being. From the child's perspective, state action in the form of apprehension seeks to ensure the protection, and indeed the very survival, of another interest of fundamental importance: the child's life and health. Given that children are highly vulnerable members of our society, and given society's 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.
>
> …
>
> [98] To summarize, the interests at stake in the child protection context dictate a somewhat different balancing analysis from that undertaken with respect to the accused's s. 7 and s. 8 rights in the criminal context. Moreover, the state's protective purpose in apprehending a child is clearly distinguishable from the state's punitive purpose in the criminal context, namely that of seeing that justice is done with respect to a criminal act. These distinctions should make courts reluctant to import procedural protections developed in the criminal context into the child protection context.

[78] Based on this jurisprudential guidance and my assessment of the *Act,* I conclude that the Director's s. 96 search and seizure power is not criminal in nature. In particular, it is not directed at obtaining information in respect of a suspect with a view to conducting an investigation that may culminate in prosecution and punishment. Rather, the power is designed to gather information for use in making administrative child protection decisions guided by what is in the best interest of the child. Those decisions will not necessarily involve removal of the child; to the contrary, the information gathered could also lead to decisions to not remove the child, to return the child, or to permit access to the child in the Director's custody. In other words, the s. 96 power is not bestowed upon the Director for the purpose of building an adversarial "case" against a parent in order to impose a punishment.

[79] While T.L. argues that that the *Act* and the collection of records under s. 96 have more in common with criminal investigation schemes because of the stigma associated with the loss of parental status and because the interests at stake in child protection proceedings are of the highest order as recognized in *G.(J.)* at paras. 61

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and 76, I do not agree. A demand for pre-existing medical records by the Director from public authorities under s. 96 of the *Act* does not in and of itself give rise to stigma akin to that of a criminal investigation, nor does it automatically trigger child protection proceedings. The analogy does not hold.

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[80] While not binding on me, this conclusion draws support from the decision of the Manitoba Court of Appeal in *R. v. R.M.J.T.,* 2014 MBCA 36, at paras. 106 to 125 [*R.M.J.T.*]. At issue in this case was whether a warrantless seizure of the accused's computer and files by a child abuse investigator was contrary to s. 8 of the *Charter* even though it was authorized by s. 18.4(1) of the Manitoba *Child and Family Services Act,* CCSM, c. C80 [*Man. CFSA*]. That provision allows child protection agencies to take steps necessary for the protection of a child when in receipt of information that causes the agency to suspect that a child is in need of protection. Applying the principles set out in *K.L.W.,* the Manitoba Court of Appeal nevertheless found the law authorizing the seizure to be reasonable as follows:

> [125] As I have explained, the concepts discussed in *K.L.W.* can be applied to warrantless seizures of child pornography by child protection workers to prevent further child abuse. Consequently, a more flexible constitutional standard should be applied in cases where a child protection worker seizes evidence in order to protect a child from the harm of child pornography. In particular, a warrantless search for, or seizure of, child pornography by child protection workers in the child protection context will not violate s. 8 of the *Charter*, assuming always, of course, that the child protection worker has reasonable grounds to believe that the items seized contain such images or recordings.

[81] In sum, while I accept that the Director's search and seizure authority pursuant to s. 96 of the *Act* is not entirely akin to the regulatory search and seizure authorities that were found to be compliant with s. 8 of the *Charter* in such cases as *McKinlay* and *Branch,* in my view, s. 96 lies much closer on the spectrum to these administrative law regimes than to the criminal or quasi-criminal ones at issue in cases such as *Hunter*. Accordingly, this factor also militates towards a finding that s. 96 of the *Act* is a constitutionally reasonable law.

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The Mechanism Employed and the Degree of Intrusiveness

[82] The mechanism employed by the Director to effect the search and seizure of information regarding T.L. pursuant to s. 96 of the *Act* was to send letters to public bodies demanding that information. As explained in the AGBC's affidavit evidence, these letters were written by the social worker responsible for T.L.'s file. They were sent to both the UHNBC and CFCS, and contained requests for T.L.'s medical history/reports and familial psychiatric history. The letters referenced the Director's right to information under s. 96 and enclosed a copy of the social worker's delegation pursuant to s. 92 of the *Act.* The UHNBC provided these records to the Director's delegate. CFCS declined to provide any records, but there was a meeting between the Director's delegate and the CFCS family nurse practitioner who is T.L.'s primary care provider, during which the nurse provided verbal information about T.L.'s mental health. The Director accepted these responses to the s. 96 requests and did not take any further steps to demand additional information from either the UHNBC or CFCS.

[83] The exchange of correspondence and verbal communication between the Director's delegate and the health agencies was apparently done confidentially and discretely. Indeed, T.L. only became contemporaneously aware of the Director's s. 96 requests because she was contacted by her family nurse at CFCS to ascertain whether T.L. would consent to disclosure of her health information. As noted previously, T.L agreed that a verbal summary of how she is doing currently could be provided to the Director, but would not consent to the transmission of any medical records. T.L. also testified in her affidavit that she found it distressing that the Director was attempting to access her medical records without her consent, that it made her anxious, and that she no longer feels safe speaking to health care providers in the way that she did before.

[84] Having reviewed the legislation and the evidentiary record, I find that the s. 96 mechanism used by the Director to obtain records and information from public bodies is minimally intrusive. It involves a confidential exchange between professional public servants who cannot further disclose or use this information

except in accordance with the restrictions imposed by the *Act* and the *FOIPPA.* The personal information in question is pre-existing and s. 96 of the *Act* does not allow the Director to requisition additional information not already in the possession of public bodies. Furthermore, it does not entail any physical intrusion upon the bodily integrity of a person, entry into private premises, or surveillance.

[85] I have reached this conclusion notwithstanding T.L.'s understandable concern that she experienced upon learning that the Director was seeking her medical information. While I accept that T.L. provided this highly personal and sensitive information to the health authorities with the subjective expectation that it would be kept confidential and only used for her care, the mechanism used by the Director to obtain it cannot objectively be described as "intrusive" for the purpose of considering this aspect of the s. 8 *Charter* analysis. This consideration further militates towards a conclusion that s. 96 of the *Act* is a constitutionally reasonable law.

The Availability of Judicial Supervision and Other Procedural Safeguards

[86] The final factor to be considered is whether the Director's power to obtain information pursuant to s. 96 of the *Act* is subject to sufficient procedural safeguards, such as judicial supervision, to ensure that the power is not being abused: *R. v. Tse,* 2012 SCC 16, at para. 84 [*Tse*].

[87] Section 96 of the *Act* does not require the Director to seek and obtain any judicial pre-authorization before exercising the authority to demand information from public bodies. However, that authority is subject to limits imposed by the *Act* and the *FOIPPA*, several of which are worth highlighting. First, s. 96(1) of the *Act* restricts the scope of information that can be sought to what is necessary to perform the Director's statutory duties and functions. Second, s. 96(2) of the *Act* limits the entities from which the Director may compel information to "public bodies". Should the Director seek information from anyone else who does not consent to providing it, the Director must apply to the Provincial Court for a production order pursuant to ss. 96(2.1) and 65 of the *Act.* Third, the *Act and* the *FOIPPA* impose limits on the use

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and further disclosure that can be made with respect to the information, backed by the possibility of criminal sanctions for unauthorized disclosure: *Act,* s. 102; *FOIPPA,* s. 74.1. Most importantly, if the information sought is used by the Director to make a decision to remove a child or otherwise limit child access rights, judicial recourse and mechanisms for protecting the private nature of such information are available.

[88] Therefore, in my view, the lack of a requirement for judicial pre-authorization is not fatal to the constitutional validity of s. 96 of the *Act* given the existence of these other procedural safeguards. In so concluding, I am fortified by both the Supreme Court of Canada's decision in *K.L.W.* and the Manitoba Court of Appeal's decision in *R.M.J.T.* As discussed above, these cases involved challenges to the provisions in the *Man. CFSA* that allow provincial child protection workers to: (1) remove a child from a parent in a non-emergency situation without prior judicial authorization, and (2) search for and seize a home computer and digital files without a warrant, respectively. In both cases, the impugned legislation was found to be *Charter* compliant notwithstanding the absence of judicial oversight for the exercise of these powers, which are considerably more invasive than the Director's authority to obtain information from public bodies pursuant to s. 96 of the *Act.*

[89] Accordingly, I do not agree with T.L.'s assertion that s. 96 of the *Act* contains "no procedural safeguards", or that it is constitutionally defective because there is no judicial pre-authorization requirement. However, T.L. also advances two further arguments under this rubric. First, she notes that s. 96 does not require the Director to give any notice to the person in respect of whom the information is being sought before compelling its production from a public body, either before or after the fact. Second, she observes that the regime does not distinguish between requests for information made when children are in the custody of a parent, and requests for information made when children are in the custody of the Director or a third party. T.L. argues that the absence of such provisions is indicative that s. 96 of the *Act* is an unreasonable law.

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[90] In support of her argument in respect to the absence of a notice provision, T.L relies on the Supreme Court of Canada's decision in *Tse* at paras. 181 to 186, where the absence of a notice provision was found to be a "fatal defect" in the emergency wiretap provision set out at s. 184.4 of the *Criminal Code,* RSC 1985, c. C-46. However, this legislation allowed for the "highly intrusive interception of private communications without prior judicial authorization" for criminal investigation purposes, and is therefore not reasonably comparable to s. 96 of the *Act.* Furthermore, the practical utility of requiring notice when the Director requests information from a public body under s. 96 of the *Act* is not self-evident. T.L.'s counsel suggested in oral argument that it could allow for a negotiation between the Director and the parent or other person whose information is being sought from a public body over the scope of disclosure. While that may or may not be desirable from a policy perspective, in my view such a notice requirement is not a constitutionally mandated procedural safeguard given the nature and purpose of the s. 96 power. To that end, it is worth paraphrasing Madam Justice L'Heureux-Dubé's caution in *K.L.W.* at para. 98 that courts should be reluctant to import procedural protections developed in the criminal context into the child protection context.

[91] I make the same finding in respect of T.L.'s assertion that the *Act* should restrict the Director's right to obtain records from public bodies without a hearing before an independent decision-maker to just those situations where the child is not yet in the care of the Director. While amending s. 96 so that it imposes additional requirements on the Director when seeking information after a removal decision is made is an option that the Legislature could also consider, I do not accept that this is a constitutional necessity either.

[92] On this last point, I also acknowledge T.L.'s observation that there may be other provincial regimes that contain additional procedural safeguards in respect of their child protection agencies' information gathering powers. For example, T.L. highlighted ss. 283 and 284 of the Ontario *Child, Youth and Family Services Act, 2017,* S.O. 2017, c. 14, which impose a notice requirement on the Ontario Minister of Children and Youth Services when personal information is collected from a

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"service provider". However, the fact that another legislator may have adopted a search and seizure regime that may arguably offer additional procedural protection for an individual's privacy interests does not render British Columbia's regime unconstitutional.

[93] In sum, I find that s. 96 of the *Act* contains adequate procedural safeguards that minimize the risk that the Director might exercise the authority to seek information from public bodies in a manner that is abusive or otherwise improper. This factor also militates towards a finding that s. 96 of the *Act* is a constitutionally reasonable law.

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Conclusion: Section 96 of the **Act is a Reasonable Law**

[94] In summary, after having considered the four factors discussed above, I am of the view that the AGBC has met the burden to demonstrate that s. 96 of the *Act* is a reasonable law. Empowering the Director to require public bodies to provide information about persons implicated in child protection matters so that the Director can make decisions concerning the best interests of a child in an informed manner is a highly compelling purpose. The regime is not criminal in nature, and the mechanism it employs to obtain information is minimally intrusive. Finally, while the Legislature could certainly choose to impose additional limits on the Director's s. 96 authority as suggested by both T.L. and West Coast LEAF, the existing procedural safeguards are sufficient from a constitutional standpoint.

[95] I therefore conclude that s. 96 of the *Act* strikes a reasonable balance between the state's interest in ensuring child protection and the individual's privacy interest in medical information provided to public bodies. Accordingly, it respects the right to be secure against unreasonable search or seizure that is protected by s. 8 of the *Charter.*

Section 1 of the Charter

[96] In light of my conclusion that s. 96 of the *Act* does not violate s. 8 of the *Charter,* there is no need to conduct a hypothetical assessment of whether this provision could be justified under s. 1 of the *Charter,* and I decline to do so.

DISPOSITION

[97] For the reasons set out above, the petition is dismissed.

[98] With respect to costs, neither T.L. nor the AGBC took a position or made any submissions in their materials or at the hearing of the petition. West Coast LEAF expressly did not seek costs, and requested that none be awarded against it.

[99] In my view, this case raised issues of sufficient public importance so as to justify a departure from the ordinary principle whereby costs are awarded to the successful party. Accordingly, there will be no order as to costs notwithstanding the AGBC's success in this proceeding.

"Brongers J."

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