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British Columbia (Director of Family and Child Services) v. T.L.K.

IN THE MATTER OF the Child, Family and Community Service Act, SBC 1994 c. 27 and the Child K.M.G., born March 13, 1996
Between
Director of Child and Family Services, and
T.L.K., mother of K.M.G., and
R.W.G., father of K.M.G.

[1996] B.C.J. No. 2554

Penticton Registry No. 12919

British Columbia Provincial Court
(Family Division)
Penticton, British Columbia

Stansfield Prov. Ct. J.

Heard: October 25, 1996.
Judgment: filed November 5, 1996.

(11 pp.)

Practice -- Discovery -- Production and inspection of documents -- Time when available -- What documents must be produced -- Procedural fairness to parents.

Motion for adjournment of hearing due to untimely disclosure of evidence, in the context of the Director's application for continuing custody of a child. When there was no satisfactory explanation for fractured ribs on both sides of the chest and a healing fracture of the right tibia in seven-month-old KMG, the Director of Family and Child Services removed her from her parents' care. The morning of the hearing for continued custody, the Director provided the parents with 130 pages of records, statements, and other documents produced that morning to Director's counsel by a social worker on the case. The parents' objection initially was disallowed and the maternal grandmother testified. The parents discovered her statement to police among the papers received

that morning during the lunch break. They argued they would have cross-examined very differently had they been aware of its contents earlier.

HELD: Motion allowed. Hearing adjourned and new hearing date chosen. Director ordered to file an affidavit deposing that all documents in his possession or control which could be relevant to the matters in issue had been produced to counsel for the Director. Director's counsel ordered to file written certification that all relevant documents had been produced or made available to counsel for the parents within four days. Documents subject to privilege or to an O'Connor order for editing were to be listed and the reason for withholding particularized. Counsel for the Director ordered to provide the parents with a thorough summary of the evidence doctors would lead at the hearing. Procedural fairness was very important. Section 64 of the Child, Family and Community Service Act was the minimum requirement for disclosure, which all parties had to meet. Unless otherwise specified, section 64's minimum requirements were sufficient where minimal interference in the child/parent relationship was sought, but wholly inadequate where a permanent severance of the child/ parent relationship was the objective. Disclosure had to be timely, preferably within 45 days of the presentation for hearing, but no later than a few days prior to the case conference. Questions about adequate disclosure in a particular case, or rulings on privilege or other issues, were to be raised at the commencement date. Reasonable disclosure applied to all parties. Counsel was responsible to determine what documents had to be disclosed. Relevant documents included those adverse to the party's interests, and were not limited to intended evidence. The court could require an affidavit deposing that all documents had been provided to counsel, and certification from counsel that all relevant documents had been produced or made available to the other parties.

Statutes, Regulations and Rules Cited:

Child, Family and Community Service Act, s. 64.

Counsel:

Jeffrey J. Peterson, for the Director.
Kathryn J. Ginther, for T.L.K.
Peter G. Robinson, for R.W.G.

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1 STANSFIELD PROV. CT. J.:-- K.M.G. is only 7 months old. On May 16, 1996, at the age of two months, she was admitted to Penticton General Hospital because of "failure to thrive"; x-rays disclosed fractured ribs on both sides of her chest, and a healing fracture of the right tibia. She was "removed" (in the old child protection parlance, apprehended) from the care of her two parents on May 18, 1996, when the Director formed the opinion there had been no satisfactory explanation for the injuries.

2 The Director now seeks a continuing custody order. On October 25, 1996, the parties appeared before me to begin leading evidence. Counsel for the parents indicated they had been given that morning 130 pages of various records, statements and other documents which they understood had been produced only that morning to Director's counsel by one of the two primary social workers on the case. They said they needed an adjournment.

3 We proceeded, however, with evidence from K.'s maternal grandmother who, as it turns out, supports the Director's position. After lunch the parents' counsel informed me they had found in the 130 pages of new disclosure an 8 page written statement given by the maternal grandmother to police which, counsel said, would have caused them to conduct a very different cross-examination had it been known to them that morning. We ended up adjourning for the balance of the day, losing valuable court time. We then confronted significant difficulties in trying to find additional court time to which we could adjourn the continuation.

4 I used strong language to describe what I perceived and still perceive to be deplorable conduct on the part of the Director in failing to make reasonable disclosure to parents whose daughter the Director seeks permanently to remove. Unfortunately this is not an isolated incident; it begs a response from the court.

5 Any parent who faces the possibility of permanently losing her or his child surely ought to be able to trust that the process through which that could occur - at a minimum - will be fair. In fact, as a matter of law, fairness is "owed" to them: the Court of Appeal has said in respect of child protection proceedings that:

> ... the parents... in such an important matter are entitled, as a debt of justice, to a fair hearing conducted according to the law. J.P.G. v. Supt. of Fam. & Child Service (1993) 25 B.C.A.C. 116 at 118

6 I trust by now it goes without saying that reasonable disclosure is an integral component of fairness. As Mr. Justice Sopinka of the Supreme Court of Canada said in R. v. Stinchcombe [1991] 3 S.C.R. 326, in respect of civil, not criminal, practice:

> justice (is) better served when the element of surprise (is) eliminated from the trial and the parties (are) prepared to address issues on the basis of complete information of the case to be met...

and, in respect of Crown investigations, which I suggest are equivalent to the Director's investigation:

> the fruits of the investigation... (are) property of the public to be used to ensure that justice is done.

7 Regrettably, in protection proceedings frequently there is inadequate, untimely disclosure,

causing unfairness to parents, and loss of valuable court time. These directions will address disclosure in this case, and indirectly will provide parameters for other cases. I will also address the scheduling of the balance of the hearing.

Disclosure

8 Section 64 of the Child, Family and Community Service Act (the "CFCSA") provides that:

> 64 (1) If requested, a party to a proceeding under this Part, including a director, must disclose fully, and in a timely manner to another party to the proceeding:
>
> (a) the orders a party intends to request,
>
> (b) the reasons for requesting those orders, and
>
> (c) the party's intended evidence.
>
> (2) the duty to disclose is subject to any claim of privilege.
> (3) Evidence may be excluded from a hearing under this Part if no reasonable effort was made to disclose the evidence in accordance with this section.

9 The section does not say the duties imposed under section 64 are the only duties of disclosure. There is no suggestion that the court cannot define what is reasonable and fair in particular cases, or in particular classes of cases. All courts, including courts of inferior jurisdiction, are competent to determine their own process. Section 64 defines a statutory minimum disclosure that applies equally to all parties to the proceeding.

10 As to the means of ensuring fair conduct by all parties, it can be seen that the remedy in subsection (3) for failure to comply with section 64 is in most cases going to be a hollow one. It is difficult to imagine a judge presiding at a protection hearing, whose paramount consideration is the safety and well-being of a child, excluding evidence in the way she or he would in a criminal or civil adversarial trial, if that evidence may be helpful in determining the best interests of the child. Always there will be a risk that procedural fairness for one or more of the parties will be subordinated to the paramount interests of the child, when that procedural fairness could have been preserved through fair conduct earlier. Thus it is important that the courts find ways of ensuring procedural fairness which cannot easily be subverted. Section 64 in defining its minimums clearly does not achieve that objective for the more serious classes of cases.

Common law fairness duty of disclosure

11 Under the predecessor legislation, the Family and Child Service Act, I reviewed this subject in some depth in Superintendent v. S.H. and O.D. and others, [1995] B.C.J. No. 932, February 21,

1995, Kelowna Registry Files No. 2024 (F&CS), and 2945 (FRA). While the legislation has changed, nothing in the new legislation causes me to resile in any way from what I said in S.H. For ease of reference I will repeat some of those comments:

> Balanced against the paramount considerations of the safety and well-being of the child are the secondary but still substantial interests of the parents... It is arguable that there is no court-imposed consequence, whether in criminal sanctions or civil liability, that is more substantial than to deny a person the opportunity and privilege to raise her or his own child. The Court of Appeal has said in respect of protection proceedings that:
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> > ... the parents ... in such an important matter are entitled, as a debt of justice, to a fair hearing conducted according to the law. J.P.G. v. Supt. of Fam. & Child Service (1993), 25 B.C.A.C. 116 at 118
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> As significant as the rights and the jeopardy of the parents may be, the safety and well-being of the child remains the paramount consideration. It is for that reason that as a judge of this court all too frequently one finds oneself making a permanent order of guardianship with a heavy heart against the wishes of a parent or parents, but convinced that the interests of the child demand that result.
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> This consideration of interests occurs in a trial process which has its own distinct character. Again, the Court of Appeal offers guidance:
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> > While the inquiry provided for by the Act is to be conducted upon the basis that it is a judicial proceeding, unlike some judicial proceedings it is not an adversary proceeding and there is no lis before the court. It is an inquiry to determine whether a child is in need of protection and, as the statute directs, the safety and well-being of the child are the paramount considerations. D.R.H. and A.H. v. Supt. of Fam. & Child Service (1984), 58 B.C.L.R. 103 at 105
> >
> > ... proceedings under the (F&CS Act) are not a trial in the ordinary legal sense of the word. Rather, such proceedings are to determine if a child is in need of protection. This includes, of course, consideration as to the best possible permanent arrangements that can be made for the child's future care and upbringing.J.P.G. (supra) at 118

... (In) J.P.G. (supra) counsel for the Superintendent had not disclosed to counsel for the parents transcripts of interviews with two of the children in issue in which the children had made allegations of sexual abuse against the father. It was observed that the transcripts "might have been useful for cross-examination of the teacher and social worker who were called at the hearing" (and who were permitted to give hearsay evidence of the 13 year old's allegation of sexual abuse). The Court of Appeal referred to Regina v. Stinchcombe, [1991] 3 S.C.R. 326 with apparent incorporation into Family and Child Service Act proceedings of its principles that the Crown has a legal duty to disclose all relevant information to the defence (bearing in mind, of course, that there is no lis in protection proceedings and thus no "defence"). Mr. Justice Sopinka in Stinchcombe said:

> I would add that the fruits of the investigation which are in the possession of the counsel for the Crown are not the property of Crown for use in securing a conviction but the property of the pubic to be used to ensure that justice is done.

... the Ontario Provincial Court in Children's Aid Society v. G.M., [1992] O.J. No. 181, Sudbury Court Registry No. C178/91 ... said at p. 6:

> While the Stinchcombe case deals with the production by the Crown in criminal matters, there is arguably a parallel between the Crown's role in such cases and the role of the society in cases involving the welfare of children.

On p. 5 of ... Stinchcombe, the Honourable Mr. Justice Sopinka commented on the unacceptability of using the element of surprise as a tactical weapon in criminal and civil cases, stating as follows:

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

What is clear, however, with respect to the matter of disclosure is that unless the respondents have full disclosure of the society's case, they cannot easily sustain a defence to allegations brought against them in child welfare proceedings.

> ... In child protection matters, the court must assure that justice is done. While the primary purpose of the Act must be the protection of children, this purpose cannot be achieved by improper or unfair means. It is vitally important, therefore, that counsel, whose clients are after all at risk to losing their children either temporarily or permanently in protection proceedings, have fair and full access to information in the possession of the society. While there may be a public policy consideration in protecting the names of informants, without whom the society could not carry out its mandate to protect children and assist families, such a goal can be achieved without setting aside the principles of full and frank disclosure in such matters.

... there exists a positive obligation upon the Superintendent of Family and Child Service to disclose to parents information in the possession of the Superintendent which may be relevant in the parents' fight to retain or recover custody of their children. In that regard, I respectfully adopt the reasoning in Benoit, and believe it to be wholly consistent with the observation by the Court of Appeal in J.P.G. v. Superintendent (supra) that the parents "are entitled as a debt of justice to a fair hearing conducted according to the law".

In that regard, it is not surprising to me that the Court of Appeal would see in reference to the matter of pre-trial disclosure a parallel with the criminal law. While there may not be a lis as such in protection proceedings, there is no question but that parents often find themselves in a position not unlike that of a criminal accused person in that they:

(a) are "accused" of various sorts of conduct,
(b) deserve full opportunity to understand the case they have to meet, and
(c) find themselves pitted against an agency of the State which frequently is possessed of substantially greater resources than they, and which has access to information to which they do not have access.

> ... As to expectations of confidentiality, I don't question that foster parents may reasonably expect that their general personal affairs will not be disclosed to the world, but they must expect that personal information that is relevant to their care of the children with whom they have been entrusted may be disclosed to the other persons who are vitally concerned with that issue.
>
> I recognize there is a parallel in the policy issue which underlies O'Connor: just as if people are aware medical records they expect to be confidential might be disclosed in a court proceeding they might decline needed care, so too, it might reasonably be argued, prospective foster parents might be reluctant to offer themselves for this important public service. That policy concern can be met in my view, however, by limiting disclosure to information which bears directly on the care of children or other information which could be relevant in supporting the parents' position that returning home would foster the children's safety and well-being...
>
> In this case we are dealing with the Superintendent's own files, maintained by the Superintendent to monitor the care given to children in her care at the various resources in which the Superintendent chooses to place the children from time to time. The request for disclosure does not come from third parties who are, in effect, intruding into the Superintendent's affairs, but rather from the parties whose interests, after those of the children themselves, are most directly affected by the orders sought in this litigation.
>
> There remain the questions of relevance and privilege....

Order for Disclosure

12 I want to be very clear. These directions are not obiter comments (save to the extent I comment on cases other than those in which a continuing custody (permanent) order is sought), nor are they gratuitous observations about the CFCSA. This is an interpretation of the legislation in the course of a hearing, necessary for the fair and proper conduct of that hearing. Obviously the directions I make are binding on the parties to this litigation. But my interpretation of the legislation, and the common law obligations of the Director, are conclusions of law by a judge of the Provincial Court of British Columbia, binding (unless and until there is a determination to the contrary by a court of superior jurisdiction) upon the Director and the Minister for Children and Families, and those within that Ministry or the Ministry of the Attorney General who instruct both social workers and contract counsel. I shouldn't have to say that, but Mr. Peterson's reference to the Ministry's disclosure "protocol" suggests to me that whoever is directing both social workers and

contract counsel still doesn't "get it": the Court of Appeal says parents are owed procedural fairness; there can't be fairness in the absence of disclosure which is proportionate to the jeopardy faced by parents in the particular case.

13 Because the remedy for non-compliance in section 64 is typically going to be of little assistance, the courts will have to determine as the issue arises what other sanctions can be imposed in the event parties - but especially the Director, who will be presumed to know better - persist in the kind of conduct that occurred in this case.

14 In summary, counsel in this matter - and, by the principles of stare decisis and judicial comity, the Director and counsel in other CFCSA matters - should be guided by the following:

1. all parties (that is, parents as well as the Director) at a minimum are required to comply with the disclosure requirements of section 64;
2. disclosure must be timely; preferably by the date set within 45 days of the presentation for "commencement" of the hearing, in no case later than a few days prior to the case conference (failure to disclose before the case conference functionally sabotages the settlement objective of that process);
3. subject to further or contrary directions from the commencement or case conference or hearing judge, the minimum requirements under section 64 will be sufficient where the Director is seeking minimal interference in the child/parent relationship (for example, a return to the parent(s) with supervision, or perhaps a three month temporary order where the plan of care reflects a clear commitment to work towards a return of the child);
4. the minimum standard of disclosure is wholly inadequate where the Director is seeking a permanent severance of the child/parent relationship;
5. if any party wishes to question what will be adequate disclosure in a particular case, or wishes a ruling on privilege or other issues, those matters should be raised at the "commencement" date;
6. the requirement to effect reasonable disclosure (that is, beyond the section 64 minimum) applies to all parties; counsel for parents should make diligent enquiry of their clients as to what documents are in their possession or control which may be relevant to the best interests of the children; parents are not criminal defendants who can sit back and withhold their position;
7. in a case such as this one, in which at least inferentially it is alleged that one or other of the parents more likely than not caused K.'s injuries, and that she cannot ever in safety be returned to either of them, it is all the more important that they be advised of the whole of the case they have to meet; that is especially so when the Director's burden of proof in unexplained injury cases is lower than the normal standard (see Superintendent v. M.(B.) 28 RFL (2d) 278 at 287 per Proudfoot J.A.);

8. the responsibility to determine what documents must be disclosed is that of counsel, not the social workers or their supervisors, or parents; counsel should adopt the practice that is well known to them in Supreme Court civil litigation of securing from or reviewing with their client all documents which may be relevant to matters in issue, listening to any concerns of the clients regarding relevance or privilege, and then making the legal determination as to what must be produced, and making any applications that may be necessary to withhold or edit any documents;
9. "relevant" documents include those which are adverse to the party's interest, and definitely are not limited to the party's "intended evidence";
10. "disclosure" need not include photocopying and delivering all documents; subject to any order to the contrary, it is sufficient if the other parties are provided with a reasonable and timely opportunity to inspect all documents, and to copy at their own expense such of them as they require;
11. where there is a particular concern as to whether a party has fulfilled its obligations, the court may require an affidavit from that party deposing to the fact all documents have been provided to counsel, and certification from counsel that (s)he has produced or made available to the other parties all relevant documents.

Order regarding disclosure by the Director in this case

15 By November 12, 1996, the Director must file an Affidavit sworn by a representative of the Ministry for Children and Families authorized to speak for the Director in this matter, deposing to the fact that all documents in the possession or control of the Director which may be relevant to the matters in issue in this continuing custody proceeding have been produced to counsel for the Director. By November 16, 1996, counsel for the Director must file with the court written certification that all relevant documents have been produced or made available to counsel for the parents; if counsel for the Director takes the position any documents are privileged, or should be the subject of an O'Connor order for editing, then such documents are to be listed and the basis for the withholding particularized. To avoid that listing, and to try to avoid further applications, counsel for the Director is at liberty to edit for confidentiality in advance of production by blacking out portions which the Director believes must be withheld - rather as counsel for the federal Crown does regularly in producing edited Informations to Obtain Search Warrants containing information regarding confidential informants - but in that case, counsel for the parents are at liberty to apply for an O'Connor determination.

16 If counsel for the Director believes there may be a category of disclosure which has not been effected by counsel for the parents, he is at liberty to apply in writing for further directions at the time he files the certification referred to above, and I will invite a response in writing from parents' counsel, and then make an order.

17 I gather the Director intends to call at least three physicians in this hearing. I direct that counsel for the Director provide to counsel for the parents at least 14 days before the doctors are to be called, a thorough summary of the evidence intended to be led from each doctor.

Hearing Continuation Dates

18 I am troubled by the length of time this matter already has been outstanding, given K.'s very young age. Appearances to date have been as follows:

May 24, 1996:	presentation hearing; interim order of custody to the Director, by consent; adjourned to June 3.
June 3, 1996:	Justice of the Peace; adjourned to June 28, 1996.
June 28, 1996:	Stansfield PCJ; commenced hearing; adjourned by consent to July 12, 1996.
July 12, 1996:	Stansfield PCJ; fixed date for case conference for August 9, 1996;
August 9, 1996:	Cartwright PCJ; conducted case conference; adjourned to continue August 19, 1996;
August 19, 1996:	Cartwright PCJ; concluded case conference; adjourned to August 26, 1996, to fix date for hearing;
August 26, 1996:	Stansfield PCJ; fixed date for hearing commencing October 25, 1996, but asked counsel to consult with Registry to seek guidance from Judge Cartwright as case conference judge regarding priority to be given in assigning dates, given young age of child.
October 25, 1996:	hearing begins.

19 We are only a few months into the new case management system under the CFCSA, with the addition of the case conference, and no doubt there are "wrinkles" to iron out. Generally the case conference process seems to be working well (recently Associate Chief Judge Schmidt undertook a significant number of conferences in Surrey, and found 63% of the cases resolved at the conference stage without an adversarial hearing); no doubt it was important to provide an opportunity for that "ADR" process (not just "alternate" dispute resolution, but frequently the "appropriate" dispute resolution process). But when it was determined the matter would not be resolved without a hearing, with hindsight it can be seen that active steps should have been taken to "fast track" the scheduling. I don't believe that my suggestion that Judge Cartwright's assistance as case conference judge was

pursued, and we got to October 25, 1996, without any earlier or additional dates having been set. It may be that there is required a sort of "triage" approach to serious cases, especially those involving very young children.

20 Whatever hindsight might teach us, the focus at this point must be on bringing this matter to resolution. Thus far I have been able to free myself for two days before Christmas: November 25 and December 6. I am informed by the registry that counsel can attend November 25, but that Ms. Ginther will be on holidays by December 6. We will proceed November 25, 1996, beginning at 9:00 a.m. No other matters are to be scheduled for that date.

21 Administrative Judge Klinger has indicated there is a probability that I could be available the week of January 6-10, 1997, although I do not invite counsel to assume the hearing should expand to fill that time as it is hoped one or more other hearings also could proceed that week. I ask that counsel advise the Registry immediately whether they can guarantee their availability that week. In the meantime, I will continue to explore the possibility of being freed from other obligations in November.

22 When we are clear about available dates, I want to meet with all three counsel to discuss what matters really are in dispute, and what evidence could be admitted to shorten the hearing from counsel's present estimate of five days. I would be grateful if in the meantime counsel would discuss that issue amongst themselves and advise me through the Registry of the fruits of those discussions.

STANSFIELD PROV. CT. J.