A Call to Action

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

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

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

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

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

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

Submitted by: Shannon Buchan, Elaine Davies, Laurel Dietz, Julie Donati, Jeff Johnston, Jo McFetridge, Forrest Nelson, Georgia Peters, Declan Redman and Diane Turner. **Supported by:** Dianne Andiel, Jo-Anne Kahan, Steven Kelliher, Erin Lumley, Judith Pitcher, Amanda Prenger and Samantha de Wit.

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Summary

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

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

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

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

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

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

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

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

Many children who lose the attachment and bond with their families resulting from forced and prolonged separation develop chronic psychological issues. Children, once taken from their families, may be moved from one foster home to another - with all the implications for social and educational dislocation. Proper parenting can be compromised and children may not otherwise learn those skills. Research indicates that only 21% of children in care graduate from high school[1]. More than half of the boys and 30% of the girls in care have contact with the justice system [2]. Most disturbingly it was found that between the ages of 19 and 25 former

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

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

children in care died at a rate 6.5 times higher than the rate for the general population[3]. Joseph Doyle, the Erwin H. Schell Associate professor at MIT credited with much ground-breaking work in this area, found that placing children in care increases the likelihood that they will drop out of school and that they will be convicted of a crime as adults[4]. He found no evidence of benefits and when this study was replicated for 16 to 18 year old boys in BC there was again evidence of harm and no evidence of benefits.[5]

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

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

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[3]Page 59 of Health and Well-Being of Children in Care in British Columbia • Report 1 on Health Services Utilization and Mortality A Joint Special Report by the RCY and PHO for BC. Available online at *http://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/reports-publications/special-reports/complete_joint_report.pdf*

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

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

Litigation Support Plan

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

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

- Volunteers to assist with the website that links law firms and tracks support;
- Advocacy for parents both within and outside the courtroom. A parent struggling with the bureaucracy in the effort to regain custody of their children can be overwhelming;
- Taking calls from parents at the moment of apprehension can be critical. This may mean initiating and maintaining a help-line;
- Helping to identify and connect clients to less disruptive measures (than removal) and to available services. (Bar members are knowledgeable and have many connections to community resources and services.);
- Supporting parents in accessing less disruptive measures on an ongoing basis;
- Senior litigation counsel taking on child apprehension cases on a pro-bono basis or as part of a team, including those involving criminal allegations;
- Undertaking meritorious appeals of decisions when parents' counsel have exhausted their time and resources;
- Preparation of various applications, including disclosure or increased access applications – an excellent opportunity for students and junior lawyers to obtain courtroom experience;
- Bar initiated, multi-disciplinary training to address "Improved Practices", in addition to existing CLE courses largely designed and taught by Director's counsel;
- Training initiatives to educate volunteers;
- Letter-writing campaigns to press for improvements, including for social workers to be subject to professional bodies;
- Litigation support or multi-firm teams to review and advance cases where there is potential liability on the part of the Ministry and/or staff for breach of fiduciary duty, misfeasance, abuse of public office, or negligence, bad faith/malice;
- Volunteers to conduct "Independent Views of the Child Reports" so they are produced by independent, qualified individuals, rather than reports from partisan social workers
- Attending with clients to 'family case conferences' MCFD arranges out of Court, to prevent parents from being bullied into arrangements and in some cases preventing apprehension;
- Request to UVic law students to engage in litigation/client support;
- *Rowbotham* type applications for additional legal aid funding;
- Where possible and appropriate, reviewing disclosure, case preparation, witness interviews, carrying disbursements for necessary reports (currently funded or not by MCFD);

[Any questions please contact the lawyers indicated above or view the website, make comments and sign up to support this initiative]

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Index of Issues:

1) **Court Delays** - Court delays make legislative protections for families mandated under the *Child, Family and Community Service Act* meaningless.

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

3) **Systemic Unfairness** - Lack of adherence by the Ministry to the principles of fundamental justice and due process can occur at various stages and can be particularly damaging at the Presentation Hearing.

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

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

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

7) **Impact of Trauma** - The term 'trauma' is utilized with little comprehension of its manifestations and practical impact in the course of an apprehension and ensuing litigation.

<u>Appendices and Links</u>

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

Appendix B – *J.P. v. British Columbia (Children and Family Development)* 2015 BCSC 1216 (some related J.P. decisions and reasons: *J.P. v. Eirikson* 2015 BCSC 847 dismissing the claim against Dr. Erikson (Master Harper); *J.P. v. B .G.* 2012 BCSC 938 first decision in joint CFCSA and family case in favour of J.P.: *J.P. v. B.G.* 2012 BCSC 979 decision on some of the financial issues such as interim child support; *J.P. v. British Columbia (Children and Family Development)* 2013 BCSC 515 reasons for dismissing B.G's application to disqualify Judge Walker; *J.P. v. British Columbia (Children and Family Development* 2013 BCSC 1403 precluding the Province from re-litigating previous findings.

Appendix C – The United Nations International Covenant on Civil and Political Rights

Appendix D – Declaration of the Rights of a Child

Appendix E – The Universal Declaration of Human Rights

Appendix F – Convention on the Rights of a Child

Appendix G – Child, Family and Community Service Act

Appendix H – Supporting Literature List: Also see Call to Action website

Appendix I – Child Advocacy in Child Protection Proceedings