CHILD PROTECTION

Disclosure in Child Protection Proceedings

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Overview

Prompted by events preliminary to and at his trial on 13 counts of criminal breach of trust, a Calgary lawyer applied at trial for disclosure of the Crown's case against him; an application ultimately resulting in the Supreme Court of Canada's unanimous decision on November 7, 1991, which defined (and, thus, clarified disparate provincial and territorial law, policy and *ad hoc* practices on) "the Crown's obligation to make disclosure to the defence"[1] in criminal proceedings. In the wake of the decision, *R. v. Stinchcombe*,[2] courts have determined that not only (i) the moving party (the Crown or its responsible agents) but also (ii) the respondent parties (parents or other guardians) to quasi-criminal child protection proceedings must make comparable disclosure.

Disclosure in Criminal Proceedings

Principal ratios of the decision by Sopinka J. for the seven-member Court in *Stinchcombe*, requiring disclosure by Crown to defence in criminal proceedings, are that:[3]

(a) all relevant information must be disclosed subject to the reviewable discretion of the Crown...[including] not only that which the Crown intends to introduce into evidence but also that which it does not...[without] distinction...between inculpatory and exculpatory evidence.

(b) initial disclosure should occur before the accused is called upon to elect the mode of trial [where s(he) had a right of election] or to plead...triggered by a request by or on behalf of the accused...[which] may be made at any time after the charge. Provided the request for disclosure has been timely, it should be complied with so as to enable the accused sufficient time before election or plea to consider the information. [If accused is unrepresented]..., Crown counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done....[T]he obligation to disclose is a continuing one and...must be...[performed on each occasion] when additional information is received.

(c) Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose...[to] enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial.

Because an accused enjoys, at common law and under the *Charter of Rights and Freedoms* (the "Charter"),[4] both the presumption of innocence and the right to remain mute, he or she is not taxed in a criminal proceeding with a reciprocal obligation to disclose to the Crown.

Disclosure in Child Protection Proceedings

Generally

Three years before *Stinchcombe*, Main PCJ, one of Ontario's Provincial Court judges with considerable judicial experience in adjudicating child protection proceedings, had expressed his abiding concern about the then unsatisfactory disclosure in protection proceedings. He wrote, in *Children's Aid Society of Metropolitan Toronto v. F. (R.)*:[5]

> ...These matters cannot continue to be dealt with hastily, on incomplete evidence and without early and full disclosure from both sides so as to allow for complete answer and

[1] *R. v. Stinchcombe* (1991), 130 NR 277 (SCC), per Sopinka J. for the Court, at 278.
[2] (1991), 130 NR 277 (SCC).
[3] (1991) 130 NR 277 (SCC), per Sopinka J. for the Court; (*a*): at 296-297; (b): at 295-296; (*c*) at 294.
[4] Part I of the *Constitution Act*, 1982; being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c. 11, e.g. s. 11 (*c*), (*d*)).
[5] (1988), 66 OR (2*d*) 528, at 535.

> reply.... [T]he present vehicle of summary-like proceedings is totally inadequate and unacceptable to do justice to the extremely difficult issues raised.

Implicitly and expressly deriving from *Stinchcombe* have been disclosure-obligating decisions in two species of circumstances generating child-protection proceedings: (i) where circumstances are exigent, and (ii) where they are not. Child-protection disclosure in allegedly exigent circumstances was considered on March 17, 1994 by the Supreme Court of Canada in *Richard B. and Beena B. v. Children's Aid Society of Metropolitan Toronto et eux.* (B&B).[6] Among decisions to address disclosure in child protection litigation in situations not involving exigency are those of Guay J., Ontario Court (Provincial Division) on January 17, 1992 in *Children's Aid Society for the Districts of Sudbury and Manitoulin v. Ginette M., Benoit M., and Ernie S.* (MM&S)[7] and of Noble J., Ontario Court (General Division) on February 4, 1994, jointly determining *Payukaytano James and Hudson's Bay Family Services v. Thompson Children* ("Thompson")[8] and *Payukaytano James and Hudson's Bay Family Services v. Pamela Chookomoolin* ("Chookomoolin").[9]

Disclosure in Proceedings Where Circumstances Exigent

In B&B, whose circuitous litigation history exceeds 11 years,[10] a girl born on June 25, 1983, about four weeks prematurely, was transferred almost immediately after birth to Toronto's Hospital For Sick Children because she presented numerous physical ailments, including patent ductus arteriosus (heart defect), sepsis (presence of microorganisms or their poisonous products in bloodstream), bradycardia (slow heartbeat, under 60 beats per minute), intraventricular hemorrhage (ventricle bleeding) and anemia (reduction in circulating red blood cells). In treating the child, in intensive care on life-support systems, her attending physicians avoided blood use out of respect for the wishes of the girl's parents. The parents were Jehovah's Witnesses who objected to its use, primarily for religious reasons and, additionally, because they felt there were alternatives that obviated blood use and acknowledged that Canada's blood supply was not then being tested for viruses such as HIV.

On July 30, 1983, however, the girl's hemoglobin level dropped to the extent that one attending physician believed that her life was in danger. The physician, a neonatologist, had concluded that the child's ailments now included potentially life-threatening congestive heart failure whose treatment might require a blood transfusion, to which the child's parents declined consent. Children's Aid Society of Metropolitan Toronto (CAS) applied for temporary wardship of the child, which, if granted, would authorize CAS to consent to allow the child's physicians to use blood transfusions if necessary. CAS was granted the first of several temporary wardship orders, by Main PCJ, Toronto, on July 31, 1983.[11]

One ground of the parents' appeals from these wardship, and from other orders[12] was that they and their child had been denied fundamental justice, contra section 7 of the Charter, in the child protection proceeding that was commenced on July 31, 1983 and that produced the wardship orders, not least because of insufficient disclosure to them of the CAS case. Although CAS had furnished (i) fragmentary disclosure during the final 10 minutes of the approximately two hours between notifying the parents of their child's apprehension and the initial wardship hearing and the commencement of the hearing, as well as (ii) material disclosure during the hearing, at the parents' request, the parents complained that the disclosure was inadequate. They pointed, in particular, to a medical opinion, not disclosed during hearings in the proceeding for temporary wardship orders and only later discovered by the parents' counsel. That medical opinion, by a cardiologist, contradicted the opinion of the neonatologist who had consulted him. The cardiologist concluded that the child did not have congestive heart failure.

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[6] SCC File No. 23298.

[7] (January 17, 1992), Doc. Sudbury C178/91 (unreported).

[8] (February 4, 1994), Doc. 5388/93 (unreported).

[9] (February 4, 1994), Doc. 5565/93 (unreported).

[10] Summarized for the period 1983 to 1992, in B.&B. (1992), 10 OR (3*d*) 321 (Ont CA), at 325-328.

[11] Supra note 10 at 325, 327-328.

[12] Ibid. at 325-328.

Respecting the initial wardship hearing generally, and disclosure in particular, in a child protection proceeding, Tarnopolsky J.A. for the Ontario Court of Appeal wrote:[13]

> ...I would not go so far...as to suggest that the omission [to disclose the cardiologist's opinion to the parents] caused no unfairness. The...[parents] were disadvantaged in their ability...[to meet the CAS case].
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> ...There is no doubt that the procedural conditions of initial wardship are not ideal. The parents receive a very short notice period and are at a clear disadvantage in terms of the information available to them. They are highly dependent on the degree of disclosure provided by the medical personnel involved in the case.
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> The Supreme Court of Canada has made it clear that procedural fairness, in particular, is to be judged in a contextual manner, despite certain characteristic requirements.

He approvingly refers to the judgment of Wilson J. in *Singh v. Canada* (Minister of Employment & Immigration),[14] to the effect that, at minimum, fundamental justice under section 7 of the Charter comprehends procedural fairness that "may demand different things in different contexts." He then continues:[15]

> It is clear from the nature of the proceedings in this case that, if the claims of the... [appellants] are assumed to be correct, an emergency situation existed. That context must lend meaning to the proper standard of procedural fairness.

After citing Dickson CJC in *B.C.G.E.U. v. British Columbia* (Attorney General),[16] he concludes:[17]

> ...[The] language [of Dickson CJC] implies that drastic conditions may dictate interference with persons' usual procedural rights. Conditions which may trigger such interference will be such that the usual procedure obstructs the ability of the court to deal with a serious concern in a sufficiently timely fashion....
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> ...In light of the dire need for preventive action, which was revealed by the evidence presented at the hearing [on July 31, 1983], it is my opinion that the hearing was conducted in accordance with the principles of fundamental justice.
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> ...The state must obtain the authority which ordinarily belongs to the parents. The hurried manner of proceeding is directed at the emergency which is frequently inherent in the course of events the...[child welfare legislation] seeks to avert.

In dismissing from the bench on March 17, 1994, the parents' appeal[18] from the judgment of the Ontario Court of Appeal, the Chief Justice of the Supreme Court of Canada, for the full Court, stated that the Court would provide reasons (pending as of the date of this publication) for its decision in relation to issues other than appellants' objection as to disclosure and other fundamental justice questions. Thus, both the decision and rationale of Tarnopolsky J.A. for Ontario Court of Appeal prevail as to application of fundamental justice to child-protection proceedings, including disclosure.

The decision of Tarnopolsky J.A. neither refers to *Stinchcombe* nor clearly articulates the respects in which CAS disclosure to the parents, before and during the initial wardship hearing on July 31, 1983, might, save for its exigent circumstances, have been wanting.

Practitioners give heed. For any practitioner approached to accept retention in a child protection hearing involving circumstances that are, or that the state maintains to be, exigent, a family law specialist's knowledge of the subject is essential. Extensive assistance from one or more of the practitioner's partners or associates may prove to be invaluable and a resilient constitution capable of advocacy with negligible respite will be crucial.

Disclosure in Proceedings Where Circumstances Not Exigent

Where the context of a child protection proceeding is not clamorous, the state disclosure volunteered or ordered, in reliance on *Stinchcombe*, is exceedingly more bountiful than in exigent circumstances; largely because

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[13] Ibid. at 344.
[14] [1985] 1 SCR 177, at 212-213.
[15] Supra note 10 at 345.
[16] [1988] 2 SCR 214, at 245-246.
[17] Supra note 10 at 345-346; 352.
[18] Supra note 6.

time permits adequate voluntary disclosure or applications for compelled adequate disclosure.

In the wardship proceeding of MM&S,[19] one of the parents' complaints was that they "had not been given access to the...[CAS] records or, at least, that the disclosure which they had been given to such records was incomplete"[20] with respect to "the case to be met by them..."[21] At least some of the disclosure, involving allegations the apprehended children had been abused in foster care, was "held back until the eve of trial,..."[22]

Historically, state and state agencies charged with responsibility for child protection had enjoyed considerable and well-intentioned protection from having to disclose.[23]

While Guay J., in adjudicating this complaint of the parents, acknowledged[24] that *Stinchcombe* "...deals with production by the Crown in criminal matters," he continued:[25] "there is arguably a parallel between the Crown's role in such cases and the role of the...[CAS] in cases involving the welfare of children."

After remarking that the Rules of the Ontario Court (Provincial Division)[26] are disclosure-inadequate and the record's access (and confidentiality) part (VIII) of the Ontario *Child and Family Services Act*[27] was not yet in force, Guay J further develops the disclosure parallel between criminal and child-protection proceedings:[28]

> ...unless the...[parents] have full disclosure of the...[CAS] case, they cannot easily sustain a defence to the allegations brought against them in child welfare proceedings.

In deciding that there had been neither adequate nor sufficiently timely disclosure by CAS to the parents, Guay J. appears to propound four fundamental, related and overlapping disclosure guidelines:

(a) It is "vitally important" that persons at risk of losing their children temporarily or permanently have "fair [including timely] and full" access to information in possession of the state or state's agency (for example, a Children's Aid Society) responsible for child protection.[29]

Included would be "information relating to the alleged abuse of children in a foster home" while the protection proceeding for those children is pending.[30] Such information of alleged abuse "is too crucial to be allowed to be held back until the eve of trial,"[31] as occurred in MM&S. Disclosure dry-latching that bore potential for "serious unfairness"[32] in that case was averted due to the necessity of an adjournment for unrelated reasons.

(b) Although judicial respect is warranted for the "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," that policy is attainable "without setting aside the principles of full and frank disclosure...."[33]

Respect for child protection informant identity is, in some Canadian jurisdictions, maintained by judicial public policy because common law does not expressly contemplate, and their legislation is silent as to, privilege precluding disclosure of child protection informant identity.

(c) Absent statutory privilege or subject to review and consideration of statutory privilege (as to identity of child protection informant or as to other disclosure), "there is no juridical reason to prevent...full and frank disclosure...in a timely fashion"[34] of the case of the state or state's agency in child protection matters.

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[19] (January 17, 1992), Doc. Sudbury C178/91 (unreported).
[20] M.M.&S. (January 17, 1992), Doc. Sudbury C178/91 (unreported), at 2.
[21] Ibid. at 5.
[22] Ibid. at 8.
[23] Ibid. at 9.
[24] Ibid. at 6.
[25] Ibid.
[26] RRO 1990, Reg. 199, as am.: O. Regs. 705-91; 71/92; 467/93.
[27] RSO 1990, c. C.11.
[28] Supra note 20 at 7.
[29] Ibid. at 8.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] Ibid. at 9.

Guay J. provides examples of statutory privilege by reference to Ontario's *Mental Health Act*[35] and, correctly, implies respect for its disclosure withholding provision can be fairly balanced with the necessity of disclosure in child-protection proceedings.

(d) The content of disclosure in child-protection proceedings must be "full" and "frank."[36]

Content of the disclosure, Guay J. states, "would include case worker notes, statements by experts and prospective witnesses and all relevant evidence" possessed by or available to the state or responsible state agency that is "not protected by law from production to third parties."[37] Guay J. suggests[38] that the vehicle for disclosure could be an affidavit of documents similar to that contemplated by Rules of Civil Procedure of the Ontario Court (General Division), R. 30.03.

Sauce for the goose should, however, be sauce for the gander. Guay J. thus implies, in obiter:[39]

> ...the same principles should apply to disclosure by the...[parents]. Child protection proceedings are not criminal proceedings and there is no right, Charter or otherwise, against self-incrimination. Such proceedings are civil in nature and have been described elsewhere as having an inquisitorial aspect, albeit, in an adversarial context.

No doubt, also implicit in Guay J.'s decision in MM&S is the child's entitlement to receive disclosure if he or she is a separate party to, or separately represented in, a child-protection proceeding.

In *Thompson* and *Chookomoolin*,[40] the state agency responsible for child protection (the Society) had, following institution of protection proceedings, voluntarily "made certain documentary and evidentiary disclosure" to the affected parents and to counsel for the separately represented children who had been apprehended.[41]

On April 13, 1993, Carr J. ordered (pursuant to RRO 1990, Reg. 199, R. 23) further state agency disclosure to parents and children in both proceedings; specifically, disclosure of[42] "all Children's Aid Society case workers' notes, exclusive of non-Children's Aid Society witnesses, relevant to the proceedings..."

Carr J, in the spirit of Guay J.'s obiter in MM&S,[43] further ordered on April 13, 1993 (in one of the two proceedings;[44] the other proceeding not having been heard on this point) that parents involved in the proceeding reciprocate with disclosure after the Children's Aid Society had done so. The April 13, 1993 Order produced certain additional documentary and evidentiary disclosure by the Society to the parents and children. (Whether the parents reciprocated is not apparent from the record.) The Society's additional disclosure did not, however, wholly comply with Carr J's Order.

To the extent of its non-compliance with the Order, the Society took an appeal to Ontario Court (General Division), heard by Noble J.

Practitioners give heed: the task of resolving the disclosure issues was compounded, both for the court of first instance and for the appeal court, by shortcomings in disclosure applications of the parents and children. In the applications, Noble J. remarks, "[n]o specific disclosure is sought. No specific information is described ..."[45]

Ultimate issue on the appeal was whether the parents and children were "entitled to further disclosure beyond that which has already been made as ordered" by Carr J. on April 13, 1993.[46] Resolution of this issue, in Noble J.'s view, generated two subsidiary issues:[47]

(i) a threshold question whether the Society's records and files contain information relevant to the proceedings and, if so,

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[35] RSO 1990, c. M.7.
[36] Supra note 20 at 9.
[37] Ibid.
[38] Ibid. at 9-10.
[39] Ibid. at 10.
[40] (February 4, 1994), Doc. 5388/93 and Doc. 5565-93 (unreported).
[41] Ibid. at 4.
[42] Ibid. at 2.
[43] Supra note 20 at 10.
[44] Thompson; Chookomoolin (February 4, 1994), Doc. 5388/93 and Doc. 5565/93 (unreported), at 2, 16-17.
[45] Ibid. at 5.
[46] Ibid. at 4.
[47] Ibid. at 11.

(ii) by what right can the courts permit a party in these proceedings to withhold relevant information which in the vast majority of cases the courts would have to insist should be laid before the tribunal so that a just result might be obtained in accordance with law. [See: *D. v. National Society for the Prevention of Cruelty to Children.*][48]

As to (i), the Court held the Society's records and files contained as yet undisclosed information pertinent to the proceedings.[49] As to (ii), the Court considered *Slayutych v. Baker et al.*[50] and, in passing, *Marks v. Beyfus*,[51] and ordered the Society provide additional disclosure save for "material which would or even could disclose the identity of the Society's informant;"[52] material that, nonetheless, had to be disclosed, after being "summarized or recast" to preclude an informant's identification.[53]

Although not expressly framed as a second ultimate issue on the appeal in *Thompson* and *Chookomoolin*, Noble J. had before him the question of the Society's entitlement to disclosure from the parents, children, or both, in each of the proceedings. He determined that question in the Society's favor. He ordered:[54]

> The Children's Aid Society shall be entitled[55]...to disclosure by the...parents on each case forthwith of all facts relating to the matters in issue on...[the] two applications for crown wardship by the production of all relevant documents in the possession of the... [parents] and by disclosure of names of witnesses intended to be called by the... [parents] or any of them...together with a concise summary of the evidence expected to be adduced by each witness on the hearing.

No like disclosure obligation was imposed by Noble J. on the children because, he concluded, they are "at best parties by inference and only to the extent that these applications deal with their rights, as well as the rights of the...[parents]."[56]

[48] [1977] 1 All ER 589 (HL) at 599.
[49] Supra note 44 at 11.
[50] [1976] 1 SCR 254.
[51] (1890), 25 QBD 494 (CA).
[52] Supra note 44 at 16.
[53] Ibid.
[54] Ibid. at 17.
[55] RRO 1990, Reg. 199, R. 23.
[56] Supra note 44 at 16.

The *Thompson* and *Chookomoolin* cases were decided by reference to Ontario court rules. In Canadian jurisdictions lacking identical or equivalent rules, resort may, arguably, be had by the superior courts to their inherent *parens patriae* authority[57] to order disclosure in their capacity as either court of first instance in a child-protection proceeding or as appellate court determining an appeal from a protection proceeding in provincial court (which does not enjoy *parens patriae* authority).

Disclosure Before Proceedings

The issue of disclosure by the state or state agency responsible for child protection, before protection proceedings are commenced, is addressed in Dilemmas of Disclosure, published in 1994 by The Institute for the Prevention of Child Abuse:[58]

> Some difficult issues arise when a child protection agency is investigating an allegation of abuse or contemplating legal proceedings, but no court action has been commenced. Prior to court proceedings being commenced, there is no legal obligation to disclose information, either to a person suspected of abusing a child, or even to an innocent custodial parent. There are no clear rules about how much such situations should be handled. However, subject to overriding concerns about protecting children and respecting the interests of those who have provided the agency with information in confidence, professional and ethical considerations suggest that child protection agencies should maintain a fair approach in their dealings with individuals, in particular parents.
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> A parent being interviewed in a situation of suspected abuse or neglect should normally be informed of the nature of the allegations, though not if this might compromise the safety of a child or a confidential reporting source. If the police are involved in an interview because a parent is being investigated for possible criminal prosecution, they will want to ensure that the suspect's legal rights are respected. A police failure to provide a caution about such fundamental rights as the right to consult a lawyer, or the use of improper trickery or deception, may

[57] Ibid. at 12.
[58] Generally, as to *parens patriae* authority, see: *Re Eve*, [1986] 2 SCR 388.

result in any statement from the suspect being ruled inadmissible in criminal proceedings.

If a child is apprehended from parents, they should be informed of the reasons for this, as well as being given information about pending court proceedings and advised about the value of obtaining legal representation. If a child is not removed from parental care, parents should ordinarily be informed that an investigation is proceeding, unless there are concerns that they may disrupt the investigation, or intimidate or pressure their child. Parents should be told about the outcome of any investigation about the possible abuse of their child.

Closing

The paper chase in child protection proceedings generates other legal and practical dilemmas.

Legally, for example, what obligation to disclose should be imposed on a parent or other guardian of an apprehended child where, arising out of the alleged circumstances of apprehension, the parent or other guardian has been charged, or is subject to police suspicion or police investigation, for a criminal or provincial offence?

Practically, for example, what are the boundaries of the legal practitioner's duty to identify the existence of information that may be relevant to, hence subject to disclosure in, child protection proceedings?

Substantively answering these dilemmas would overreach the self-imposed limits of this commentary. Suffice to cite baseball player and coach Yogi Berra, who said in 1973: "it ain't over 'til it's over."[59]

Caveat: The author of this commentary was counsel, with W. Glen How, Q.C. and John M. Burns, for the appellants in *Richard B. and Beena B. v. Children's Aid Society of Metropolitan Toronto et eux.* before the Supreme Court of Canada on March 17, 1994.

Appreciation: To barrister Peter J. Doucet, 43 Cedar Street South, Timmins, Ontario, P4N 2G5, for the Thompson/Chookomoolin decision of Ontario Court (General Division).

Clarification: To constituents of (1994), 1 *Family Law* who contacted me about my commentary entitled: "Binding Bargains: When is a Deal a Deal? Solicitor Agreements in Matrimonial Matters" (at 12-14): From the dawn of legal memory, a solicitor's agreement (oral or written) has bound her (his) client provided (i) litigation (either trial or appellate) has been instituted and was pending or in progress when the agreement is made and (ii) the agreement pertains to the subject of the litigation. Matrimonial legislation in Canadian jurisdictions defining procedural requirements of making domestic agreements between spouses, former spouses and conjugal spouses – requirements that purport to go to validity of such agreements – has been interpreted as lacking the "irresistible clearness" required to interfere with this legal principle. A separate issue, not addressed in that commentary, is whether any circumstances obtain in which a solicitor who makes an agreement with a colleague to settle a matter not the subject of litigation may, if the client subsequently withdraws from part or all of the agreement, be susceptible to professional disciplinary proceedings.

[59] Dickson, Paul, *Baseball's Greatest Quotations* (Harper Collins: New York, 1991) 43.