SCHEDULE B

Evidence and Disclosure Issues

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There are many issues when a court is dealing with concurrent cases. These concurrent cases consist of a blend of family law, criminal law, and child protection. The differing rules and standards between the three make it difficult for courts to reach a proper solution for families dealing with concurrent cases.

Cases dealing with domestic violence may involve legal issues from three main areas of law: criminal, family, and child protection. A difficult time in a family's life can be further complicated when courts try to make decisions which may unknowingly impact other related proceedings. Judges and lawyers may be unaware that a family case has a related criminal matter. Individuals involved with a criminal matter may want to include evidence brought up in a related child protection matter. One family could have three separate matters in three different courts, each trying to resolve different problems.

But the rules governing each area of law make it difficult to unite all three. These three areas of law have differing purposes and goals. Each has their own distinct rules of evidence, disclosure, and privacy although there is some overlap. While it may not be possible to completely unite the three in Canadian courts, a better understanding of these evidentiary issues might assist judges and lawyers as they help families come to a solution.

First, this paper examines the context in which the three areas of law operate. This pertains to the purposes and goals of each area. Second, this paper describes the standards and burdens of proof for each area of law. Third, some of the main evidentiary issues are explained. This includes key cases and legislation which deal with such issues. Finally, at the end of these three sections, the problems with evidence in concurrent proceedings should be more apparent.

Purposes and Goals

Criminal, family, and child protection law have different purposes and goals. Between the three of them, there are also different standards of proof, burdens of proof, privacy concerns and rules of evidence. The three areas of law also fall under both private and public law; some cases involve state actors and others only involve private individuals.

Criminal law is an area of public law which is concerned with the safety of the public and maintaining a peaceful and just society.[1] It seeks to balance the safety of individuals, their property, and their fundamental rights.[2] Criminal proceedings are initiated by the state by way of a Crown prosecutor in a criminal proceeding. The Crown prosecutes an individual if they believe it is in the public interest.[3] It is important to note that the complainant does not prosecute an accused in criminal proceedings; rather it is the state prosecuting an accused.

Child protection proceedings are primarily concerned with the safety of children.[4] But importantly, child protection law balances this interest with maintaining the parent-child relationship, as long as it does not put the child in danger. The state is only supposed to intervene in a private family matter when parents are "unable or unwilling to provide a minimum standard of care for their children."[5] It considers what is in the best interests of the child, which involves a

[1] Department of Justice Canada, *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice systems: Report of the Federal-Provincial-Territorial (FPT) Ad Hoc Working Group on Family Violence, Executive Summary* (Ottawa: Department of Justice Canada, 2013) at 27 ["Executive Summary"].
[2] *Ibid*.
[3] *Ibid*.
[4] Halsbury's Laws of Canada, "Infants and Children" (Markham, Ont: Lexis Nexis Canada, 2014) at para HIC-172 "Child protection legislation" ["Infants and Children"].
[5] *Ibid.*

number of more specific concerns.[6] The "best interests tests" looks to the child's emotional, physical, and mental needs.[7]

Family law takes place between private parties, which distinguishes it from child protection proceedings which involve the state.[8] For the most part, family law and child protection law are similar aside from this main distinction. Because family proceedings are between two private actors, the only information available in court is that which is willingly made available by the involved parties.[9] As a result, the amount of disclosure can be problematic for concurrent proceedings as families may not be aware that a court does not have information from a related proceeding and they may not provide such information to the family court. When determining parenting arrangements, decisions are made based on the "best interests" of the child, similar to child protection proceedings. This considers the safety of other family members, the child's well-being, and promoting a meaningful parent-child relationship as long as it is safe.[10]

Standards and Burdens of Proof

The key difference between these three areas of law is the divide between criminal and civil proceedings. Child protection and family law are subcategories of civil law whereas criminal law is its own category. This is apparent with the differing standards and burdens of proof among the three areas.

[6] *Ibid* at para HIC-173 "Purposes of child protection legislation".
[7] *Ibid* at para HIC-173 "Best interests test".
[8] Executive Summary, *supra* note 1 at 29.
[9] *Ibid*.
[10] *Ibid*.

In criminal law, the burden of proof rests on the state, which effectively refers to the Crown prosecutor in a case. Criminal law must meet a standard of proof beyond a reasonable doubt. In child protection cases, the burden of proof rests on the applicant, which is the Child Protection Agency. In family law, the burden of proof rests on the applicant, which is the party who first brought the case to court. Both child protection and family law have a standard of proof where decisions are made on a balance of probabilities.

These different standards significantly impact the outcome of concurrent proceedings. In a criminal case, the standard of proof beyond a reasonable doubt is higher than the standard in a family or child protection case. Additionally, the accused has a disclosure right to all of the relevant materials in a criminal law proceeding. Parties in family law or child protection cases do not share this same right, so a victim of spousal violence may be unable to access the disclosure material in a criminal proceeding. Thus the civil case would have different material available to make a decision.[11] In an opposite situation, the same information and evidence may be before both a civil and a criminal court, yet the judges may hold different results simply because of different standards of proof.[12]

It used to be that civil proceedings regarding criminal conduct were decided on an enhanced balance of probabilities standard, closer to the criminal standard of proof.[13] However, that is no longer the law and it is now clear that civil proceedings dealing with criminal conduct must be decided on a balance of probabilities like other types of civil proceedings.[14]

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[11] *Ibid* at 6.
[12] *Ibid.*
[13] Halsbury's Laws of Canada, "Evidence" (Markham, Ont: Lexis Nexis Canada, 2014) at para HEV-65 "Quantum of proof" ["Evidence"].
[14] *Ibid.*

R v W(D)[15] **– Standard of Proof in Criminal Cases**

R v W(D) ("***W(D)***") was a criminal sexual assault case with very little evidence, where the trial judge only had the testimonies of the complainant and the accused before the court. The main issue on appeal considered the trial judge's recharge to the jury when the trial judge characterized the law as the jury needing to determine whether they believed the complainant or the accused; if they believed the complainant, then the accused should be found guilty and if they believed the accused, then the accused should be found not guilty.[16]

The Supreme Court of Canada held that this recharge mischaracterized the standard of proof in criminal law, although it specifically dealt with evidence issues in a sexual assault case.[17] The Supreme Court also set out three principles regarding the standard of proof and how a trial judge should charge a jury on determining credibility:

> "First, if you believe the evidence of the accused, obviously you must acquit.
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused."[18]

[15] *R v W(D),* [1991] 1 SCR 742, SCJ No 26 ["*W(D)*"].
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*

These principles are particularly important in the common "he said-she said" cases, often sexual assault, but which may also come up in domestic violence cases. It essentially requires the decision maker to determine which evidence they believe, with any reasonable doubt favouring the accused due to the standard of proof in criminal proceedings.

***Charter* Rights**

Child protecting proceedings involve a state actor and therefore engage with the Canadian Charter of Rights and Freedoms ["*Charter*"]. Sections 7, 8, and 9 are particularly important in the context of child protection proceedings. Section 7 protects the individual's right to life, liberty and security.[19] Section 8 protects an individual from unreasonable search and seizure.[20] Section 9 states that an individual is free from arbitrary arrest and detention.[21]

Analysis of these *Charter* rights is complicated by the need to also consider the child's rights and freedoms, rather than just the parents'.[22]

Section 7 is a broad right, encompassing the individual's right to life, liberty, and security of person. Included in this broad definition is an individual's right to privacy, which is further entrenched in additional legislation and cases including *R v O'Connor*.[23]

Section 8 also pertains to privacy rights as it protects against unreasonable search and seizure. This right is protected both by the exclusion of evidence obtained in a way which is found to have been an unreasonable search and seizure and by actively trying to prevent unreasonable

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[19] *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 at s. 7 ["*Charter*"].
[20] *Ibid* at s. 8.
[21] *Ibid* at s. 9.
[22] Nicholas Bala and Kate Kehoe, *Concurrent Legal Proceedings in Cases of Family Violence: The Child Protection Perspective* (Justice Canada, 2013) at 35.
[23] Halsbury's Laws of Canada "Access to Information and Privacy" at HAP-203 "Right to privacy in disclosure".

searches and seizures from taking place.[24] Under section 24(2) of the *Charter*, evidence which was improperly obtained by breaching an individual's *Charter* rights is inadmissible in court proceedings against them.[25]

Res Judicata

As set out above, criminal convictions require a higher standard of proof than civil proceedings. In a criminal case, guilt is only found if there is proof beyond a reasonable doubt. So an accused may be found not guilty if the evidence does not lead the decision-maker to conclude that there is proof beyond a reasonable doubt of the accused's guilt. But that same evidence can be used in a family or child protection case, which is decided on a balance of probabilities.[26] The Supreme Court of Canada decided this issue in *Penner v Niagara (Regional Police Services Board)* and determined that issue estoppel does not prohibit a subsequent civil action when the standards of proof and purposes of the two proceedings differ.[27] Although *Penner* was not decided in the context of concurrent criminal and family or child protection cases, because family and child protection cases are civil cases and both follow the Rules of Civil Procedure, it is likely that the same principles in *Penner* apply.[28]

Evidence

Common Types of Evidence

Form 35.1

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[24] *Ibid* at HAP-205 "Nature of right".
[25] *Ibid* at HAP-205 "Exclusion of evidence".
[26] Department of Justice Canada*, Intimate Partner Violence Risk Assessment Tools: A Review* (Ottawa: Department of Justice Canada, 2012) at 113 ["IPV Risk Assessment Tools"].
[27] *Ibid*; *Penner v Niagara (Regional Police Services Board),* 2013 SCC 19, SCJ No 19.
[28] IPV Risk Assessment Tools, *ibid*.

The province of Ontario has set out specific rules when one party is making an application for custody or access in a family law case. Under section 21 of the *Children's Law Reform Act* ("***CLRA***"), the party seeking custody or access must file a Form 35.1 with the court. This form is an affidavit which sets out both the party's current or prior involvement with a family law proceeding, as well as any child protection or criminal law proceedings.[29]

Evidence of Past Conduct

Courts have considered whether past conduct is admissible evidence in family and child protection cases. This differs from admissibility in criminal cases, because often this type of evidence is considered not to be probative of an accused's guilt and it is also considered highly prejudicial against an accused.[30] It is only admissible in a criminal case if it falls under one of the exceptions, such as similar fact evidence.[31]

The reason that this type of evidence is permissible in family and child protection cases while it may not be permissible in criminal proceedings is that it is used for different purposes because these proceedings have different goals from one another. In family and child protection cases, the evidence is permissible if it is used as evidence to help determine whether a child will be safe in the care of an individual and to help determine the child's best interests; whereas in criminal proceedings, this type of evidence is used to determine guilt.[32]

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[29] Centre for Research & Education on Violence against Women and Children, *Enhancing Safety: When Domestic Violence Cases are in multiple legal systems (Criminal, family, child protection) A Family Law, Domestic Violence Perspective* (London: Centre for Research & Education on Violence against Women and Children, 2012) at 22 ["Enhancing Safety"].
[30] IPV Risk Assessment Tools, *supra* note 26 at 116.
[31] *Ibid* at 116-7.
[32] *Ibid* at 117.

Some legislation in Canada requires disclosure of past conduct if a child's safety is in danger. However, this is limited since trial judges have the discretion to exclude such evidence.[33]

Testimony from Children

Special accommodations can be made for children when they are giving evidence in court. This is for the purpose of providing children with further protection. Fear and intimidation can often deter children from giving evidence in court. These accommodations were devised to ensure that children could give their evidence even if they were afraid or intimidated by another party.

One accommodation is the use of a screen in criminal proceedings so that children cannot see the accused. This is permitted unless the judge believes it would interfere with the proper administration of justice in this specific instance.[34] The Supreme Court of Canada has held in a number of cases that the use of screens for child witnesses is not unconstitutional as it violates neither the accused's section 7 *Charter* rights nor the presumption of innocence.[35]

A second accommodation is the use of a closed-circuit television, which allows a child witness to give live testimony. This is permitted under the *Criminal Code of Canada* ("***CCC***"), although there are the same advantages and concerns with this method as there are with using a screen and outlined above.[36] It is also subject to section 486.2(7) of the *CCC* which allows a

[33] *Ibid* at 117.
[34] Halsbury's Laws of Canada, "Youth Justice", at HYJ-144 "When screen available" ["Youth Justice"].
[35] *Ibid* at HYJ-144 "Constitutionality of screens".
[36] *Ibid* at HYJ-145 "When testimony by closed-circuit television available".

closed-circuit television to be used in criminal proceedings as long as it does not interfere with the administration of justice.[37]

A video recording of a child witness giving testimony cannot be used in criminal proceedings, except in cases where the child witness is the complainant in sexual offence cases.[38] So this type of evidence is not used in cases of domestic violence, unless it fits within the one exception.

Internet Evidence

Technology has had a significant impact on the law, and it has particularly impacted the rules of evidence. One key example is that of the Internet and information available online which individuals can easily access. Other scholars have suggested that child protection proceedings are more open to admitting Internet evidence in a case, particularly given the disadvantaged position parents are usually in against a state child protection agency.[39] However, this position is qualified with the fact that courts may give little weight to such evidence when it is admitted.[40]

Expert Evidence

There are various types of expert evidence which can be used in concurrent proceedings. This includes evidence from medical professionals, mental health professionals, and social workers.[41]

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[37] *Criminal Code*, RSC 1985, c C-46, at s 486.2(7).
[38] Youth Justice, *supra* note 34 at HYJ-146 "Adoption while testifying".
[39] Infants and Children, *supra* note 4 at HIC-202 "Balance of evidentiary rules with child welfare".
[40] *Ibid* at HIC-202 "Balance of evidentiary rules with child welfare".
[41] Bala and Kehoe, *supra* note 22 at 19.

In any case where an expert witness gives evidence, the court must be certain that the witness is qualified to give that expert evidence. A proper assessment of the expert's qualifications involves whether they are qualified to give an opinion on that type of evidence, and to ensure that their opinion evidence is neutral and without bias.[42] It is also important that the judge's role to evaluate the expert evidence rather than simply deferring on the expert opinion without any analysis.[43]

One problem with expert evidence is that expert witnesses are very expensive. This raises an important concern in the context of child protection cases. Child protection agencies have the burden of proof in their cases, and these agencies also have greater access to financial support since they are government agencies. As a result, they are in a better position to hire expert witnesses to give evidence than the average parent in a child protection case.[44]

Typically criminal courts do not have expert opinion evidence available. One option is for those involved with the criminal proceedings to check with other concurrent family or child protection proceedings to see if any such evidence is included in the proceedings.[45]

Third Party Records

Expert evidence also relates to another concern, which pertains to the disclosure of third party records. This issue is not limited to expert evidence, however, although it is commonly raised in proceedings with respect to expert evidence.

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[42] National Judicial Institute, *Domestic Violence Program Development for Judges: April 2012 British Columbia Community Consultation Report*, (Fall 2012) at 14 ["DV Program Development"]
[43] *Ibid* at 15.
[44] Bala and Kehoe, *supra* note 22 at 19.
[45] IPV Risk Assessment Tools, *supra* note 26 at 85.

Disclosure

Ideally, courts would have full access to all relevant information when making a decision. The reality is that there are issues with providing full access to information, due to disclosure and privacy rules.

General Rules in Criminal Proceedings

Disclosure

The accused in a criminal proceeding has a right to receive full disclosure from the prosecution. However, *R v Stinchcombe* limits this right to include all relevant materials related to the criminal investigation of the accused.[46]When dealing with third party records, the availability of disclosure is assessed by applying the *Wigmore* test for privilege.[47] Third party records are typically disclosed provided they meet the above tests, and as long as they should not be excluded under sections 278.1 to 278.91 of the *CCC* for sexual offences or under the *R v O'Connor* rules to determine whether the complainant has a reasonable expectation of privacy attached to the third party documents.[48]

R v Stinchcombe [49] – Criminal Disclosure

[46] Executive Summary, *supra* note 1 at 107.
[47] *Ibid* at 108.
[48] *Ibid*.
[49] *R v Stinchcombe*, [1991] 3 SCR 326, SCJ No 83 ["*Stinchcombe*"].

R v Stinchcombe ("***Stinchcombe***") *is* not a case with concurrent proceedings, but it was a Supreme Court of Canada case which held that the accused has a right to all relevant Crown information and the Crown must disclose this information.

The facts in *Stinchcombe* involved a lawyer charged with theft, fraud, and breach of duty. The Crown called a former secretary of the accused as a witness at the preliminary inquiry, and she apparently gave evidence which was favorable to the defence.[50] The secretary was interviewed by police after the preliminary inquiry, and the accused's request for disclosure of that interview was refused; the Crown indicated they were no longer calling the secretary as a witness.[51] Justice Sopinka, writing for the majority, noted that the "fruits of the investigation" are not the property of the Crown, but the property of the public to ensure that justice is done.[52]

However, there are some limits to this right. The right to disclosure is subject to the Crown's disclosure with respect to the withholding of information and the timing of disclosure.[53] Justice Sopinka pointed out, as an example, that the Crown must respect privileged information and redaction may be necessary in some cases, thus delaying the timing of disclosure.[54] After receiving disclosure from the Crown, defence counsel has an obligation to only use the information defending the criminal charges.[55]

Procedure from R v O'Connor[56]

[50] *Ibid* 83 at paras 2-4.
[51] *Ibid* at para 5.
[52] *Ibid* at para 12.
[53] *Ibid* at para 20.
[54] *Ibid*.
[55] *Children's Aid Society of Algoma v P(D)*, 2006 ONCJ 170, OJ No 1878 at para 16 ["*PD*"].
[56] *R v O'Connor*, [1995] 4 SCR 411, SCJ No 98 ["*O'Connor*"].

*R v O'Connor ("**O'Connor**")*sets out the procedure for producing third party records in criminal proceedings where privacy interests are engaged.[57] First, the accused serves a *subpoena duces tecum* on the third party which holds the records in question.[58] The accused is also supposed to notify the Crown prosecutor and any other parties whose privacy interests are attached to the third party records about the *subpoena duces tecum*.[59] Second, the accused must bring an application before the court with evidence that the third party records are relevant to either the issues in the case or the competency to testify with respect to the third party records in question.[60] Finally, if the court finds that the third party records are relevant to address either of these questions, then the court must balance the salutary and deleterious effects of ordering the production of the third party records.[61]

General Rules Child Protection Proceedings

Disclosure

Disclosure of third party records in child protection proceedings must follow the rules set out in provincial legislation.[62] The legislative rules for third party disclosure in child protection proceedings are usually set at a low standard since the protection and safety of children is of primary concern.[63] Because a child protection agency is a state institution, *Charter* rights are triggered and the admissibility rules for third party records are similar to those in criminal proceedings.[64]

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[57] Evidence, *supra* note 13 at HEV-194 "Production of private records in prosecutions for non-sexual offences."
[58] *O'Connor, supra* note 55 at para 134.
[59] *Ibid*.
[60] *Ibid*.
[61] *Ibid*.
[62] Executive Summary, *supra* note 1 at 109.
[63] IPV Risk Assessment Tools, *supra* note 26 at 103-4.
[64] Executive Summary, *supra* note 1 at 109.

Redaction of private information is common upon disclosure of third party materials.[65] This ensures that a balance is struck between respect for privacy rights and disclosure rights.

***P(D) v Wagg*[66] – Civil Disclosure**

P(D) v Wagg ("***Wagg***") was a civil case where the plaintiff wanted disclosure of materials from a related criminal proceeding. The facts in *Wagg* were interesting because the materials from the criminal proceedings, consisting of statements which the accused made to the police, were inadmissible at trial because the trial judge held the police infringed upon the accused's right to a lawyer; furthermore, the case was stayed by the trial judge due to unreasonable delay.[67]

Justice Rosenberg noted the difference between civil discovery and criminal disclosure in his reasons. The information gathered from civil discovery is information which belongs to an individual, therefore privacy rights are attached to the information.[68] In contrast, as stated in *Stinchcombe*, criminal disclosure belongs to the public and thus there are no attached privacy rights.[69]

Justice Rosenberg ultimately held that the statement was admissible at trial. Much of the reasoning behind this holding was due to the difference between civil and criminal proceedings, and the finding of fact that the statement made was not privileged information.[70]

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[65] *Ibid*.
[66] *P(D) v Wagg*, [2004] OJ No 2053, 71 OR (3d) 229 ["*Wagg*"].
[67] *Ibid* at paras 5-6.
[68] *Ibid* at para 38.
[69] *Ibid.*
[70] *Ibid* at paras 67-70.

Wagg effectively upheld and clarified the screening procedure set out by the Divisional Court which should be used in order to produce evidence from a criminal proceeding in a civil proceeding. This process begins with the appropriate agencies receiving notice of the request for disclosure, so that these agencies can determine the public interest and consequences of producing such materials. They can then either consent to production of the materials, or refuse to consent and the party seeking disclosure can request a court order.

The discovery process in a civil trial is sufficiently distinct from a criminal trial to warrant a different rule. In civil cases, parties are obligated to provide an affidavit of documents and all relevant materials are produced as part of this process. A criminal trial is different because the accused has a right under section 10(b) of the *Canadian Charter of Rights and Freedoms* than an accused has a right against self-incrimination or assist the Crown. A civil case like this one is different.

General Rule Family Law Proceedings

In family law cases, the standard for disclosure of third party materials is higher than the standards of either criminal or child protection proceedings, because it is between private parties with privacy rights. Similar to child protection cases, disclosure in family cases is typically governed by provincial legislation.[71] These statutory rules generally provide that there must be proof that it would be unfair to proceed without the documents and that the third party documents in question are not privileged.[72] Case law now indicates that disclosure of third party

[71] IPV Risk Assessment Tools, *supra* note 26 at 104.
[72] *Ibid*.

records from a criminal proceeding will often be allowed in the family case if the criminal matters relate to the safety and best interests of the child and the materials often do.[73]

For other third party records, such as medical documents, the party who wants to receive disclosure of the third party records must show that they are relevant to the family proceedings.[74] In order to show relevance, the party must usually show, on a balance of probabilities, that the third party medical records will disclose a physical or mental health issue which will impact the ability to care for the child.[75] If a party is able to show that the third party records are relevant, the onus then shifts to the other party to show that the third party documents should not be disclosed due to privacy rights and privilege.[76]

Children's Aid Society of Algoma v P(D)[77] – Third Party Records and Privacy

In *Children's Aid Society of Algoma v P(D) ("**PD**")*, the Children's Aid Society brought a motion asking for disclosure of police, probation, and parole records along with any other records included in the Crown's brief. Justice J.D. Keast, writing for the Ontario Court of Justice, held that the Children's Aid Society must receive these records because the purpose of child protection is just as important as criminal justice within society.[78] The motion was brought under section 74 of the *CFSA*.

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[73] *Ibid*.
[74] *Ibid* at 107-8.
[75] *Ibid*.
[76] *Ibid*.
[77] *PD, supra* note 55.
[78] *Ibid*.

Justice Keast noted that section 74 is often used to obtain records from a concurrent criminal proceeding.[79] This was a particularly common practice before *Wagg* was decided.[80] The problem was that the response to these disclosure requests was not standard.[81]

Justice Keast applied a two step test from section 74 to determine whether the records should be disclosed. The first step was a determination of whether the records might be relevant to the case at hand and if that step is met, the second step weighs the public and privacy interests based on the principles set out in *Wagg*.[82]

Justice Keast held that section 74 of the *CFSA* overrides other legislative Acts concerning privacy rights, specifically because of the wording in subsection (6) that "this section applies despite any other Act".[83]

Justice Keast also reasoned that child protection agencies directly deal with individuals also involved with the criminal justice system. Specifically, child protection and criminal cases are alike as they both attend to the same problem which is to protect society, although they approach this purpose differently.[84] Child protection agencies intervene at an earlier point, hopefully before a child is engaged with the criminal justice system. In contrast, the criminal justice system is involved after an individual is accused of committing a criminal offence.

Importantly, Justice Keast also noted how intertwined these different organizations are, in particular the child protection and criminal justice systems. The two cannot

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[79] *Ibid* at para 8.
[80] *Ibid* at para 14.
[81] *Ibid* at para 15.
[82] *Ibid* at para 23.
[83] *Ibid* at paras 36-8; *Child and Family Services Act*, RSO 1990, CHAPTER C 11, s. 74(6) ["*CFSA*"].
[84] *Ibid* at paras 48-51.

be separated from one another, and they cannot be distinguished from each other when considering the protection of society.[85] In the reasons for the decision, Justice Keast noted that child protection cases involve a significant amount of investigation and that criminal cases also involve investigation before relevant evidence is determined and used in criminal proceedings; for this reason, information from the criminal investigation is useful for the child protection investigation.[86] A strict compartmentalization of the two investigations disrupts and prevents communication between two agencies dealing with the same or related issues.[87]

Children's Aid Society of Huron County v RG[88] – Right to Remain Silent

Children's Aid Society of Huron County v RG ("***CAS Huron County***") was a child protection case with a concurrent criminal proceeding. The parents of three children separated after the father was charged with assaulting the mother. The Children's Aid Society then intervened to ensure that the children were safe since there were accusations of violence in the home. After the Children's Aid Society got involved with the case, the mother was only allowed to have access with her children if it was supervised. The mother's new partner was approved as a supervisor. Shortly afterwards, the new partner was charged with assaulting the children and there was some question as to whether the mother also assaulted the children.

Justice Glenn was critical of the delays experienced in this child protection case. Justice Glenn wrote that one of the problems with concurrent child protection and criminal cases is the length it takes to resolve the proceedings. The child protection case often waits for the criminal case to be resolved, since the outcome of the criminal case can have a significant impact on the

[85] *Ibid* at para 58.
[86] *Ibid* at para 129.
[87] *Ibid* at para 130.
[88] *Children's Aid Society of Huron County v RG*, [2003] OJ No 3104, 124 ACWS (3d) 712 ["*CAS Huron County*"].

decision in the child protection case. Justice Glenn points out that ideally, a child protection case would involve persons who are upfront about all circumstances. But this runs contrary to the accused's right to remain silent in a criminal case thus delaying the child protection case until the criminal case is resolved.[89]

A related problem with such delay is that time determines the status quo in a family law case. A family court considers the status quo in making a custody and access decision.[90] So this can impact a later decision in a concurrent proceeding.

Sharing Evidence among Related Proceedings

Privacy Rights

There are certain instances where it is clear that information must be disclosed, despite privacy rights. But these instances are limited to situations where the information must be disclosed in order to prevent harm.[91] Situations which fall outside of this general rule are more complicated because it requires a balance between competing privacy rights and disclosure in the protection of other interests. This is particularly relevant in cases which involve youth justice, child protection, and cases which involve a publication ban.[92]

R v Nedelcu[93] – Impeachment

In *R v Nedelcu* ("***Nedelcu***"), the Supreme Court of Canada decided a case where the accused was charged with impaired driving and dangerous driving causing bodily harm. The

[89] *Ibid.*
[90] Infants and Children, *supra* note 4 at HIC-32 "The bonding principle".
[91] Executive Summary, *supra* note 1 at 7.
[92] *Ibid* at 77.
[93] *R v Nedelcu*, 2012 SCC 59, 3 SCR 311 ["*Nedelcu*"].

accused was riding a motorcycle with a co-worker whom was not wearing a helmet; when the accused lost control of the motorcycle and crashed, the co-worker was seriously injured and suffered a brain injury. That co-worker's family also sued the accused in a civil proceeding.

The Supreme Court held that testimony which a party was compelled to give in a civil proceeding can be used against that individual in a criminal trial but only for the purposes of impeaching the witness "where the evidence is not incriminating".[94] The Court was primarily concerned with the accused's right against self-incrimination.

This relates to the testimony of a parent in a child protection proceeding could be used to implicate the same parent in a criminal proceeding. Essentially, it was a question of whether the statement given in the child protection case could be used to impeach that parent's testimony in a criminal proceeding.

In a case like this, the issue is not whether evidence can be tendered as proof of any wrongdoing on the part of the parent. Rather, the issue is whether such evidence can be used to determine whether the witness and their evidence is credible and how much weight a court should give to their evidence. There is a question of whether a court is able to make such a determination.

***Juman v Doucette*[95] – Implied Deemed Undertaking**

In *Juman v Doucette* ("***Juman***"), the Supreme Court determined that a party of a civil proceeding cannot use evidence obtained through discovery to the police or other outside parties

[94] IPV Risk Assessment, *supra* note 26 at 100.
[95] *Juman v Doucette*, 2008 SCC8, 1 SCR 157 ["*Juman*"].

unless a court order authorizes them do so.[96] This includes evidence of criminal conduct.[97] And there are only limited circumstances where this rule does not apply.[98]

The Supreme Court also held that one of the main exceptions to this implied undertaking rule arises when a statute explicitly provides that such information must be disclosed.[99] An example of this is the *Child and Family Services Act*, which requires that individuals in certain positions must report any suspicions of child abuse that they have to the police.[100]

The Court gave a further exception for situations of "immediate and serious danger".[101] This exception permits a party to go directly to the police without a court order, if the situation is of "immediate and serious danger".

Hearsay Evidence

R v Khan ["*Khan*"][102] - Hearsay

Khan is one case in a long line of case law which sets out the guidelines in determining whether hearsay evidence is admissible in a criminal case. Justice McLachlin of the Supreme Court of Canada wrote the majority's decision and held that a child's out-of-court statements

[96] IPV Risk Assessment Tools, *supra* note 26 at 99.
[97] *Ibid*.
[98] *Ibid*.
[99] *Ibid*.
[100] *CFSA, supra* note 83 at s. 72.
[101] *Juman, supra* note 95 at para 4.
[102] *R v Khan*, [1990] 2 SCR 531, SCJ No 81 ["*Khan*"].

were admissible hearsay evidence in a criminal proceeding provided the statement meets a two-part test.[103]

Khan involved a doctor as the accused who was charged with sexually assaulting one of his patients, a three and a half year old girl, during a medical appointment while her mother was not present in the examination room.[104]

The Supreme Court of Canada's decision in *Khan* marked a new "principled approach" to hearsay exceptions, which provided more flexibility in admitting hearsay evidence provided it meets certain guidelines. The guidelines in *Khan* require that the hearsay statement is necessary and reliable.[105]

There are a few child protection cases which have applied the guidelines in *Khan* and suggest that the approach in *Khan* may be further relaxed in child protection proceedings.[106] Despite these cases, the reality is that children are usually called to give evidence in court although there are certain accommodations available to ensure that children are safe and can give their evidence without being afraid or intimidated by someone else in the court.[107]

***Prince Edward Island (Director of Child Protection) v CP*[108] – Hearsay Evidence**

Prince Edward Island (Director of Child Protection) v CP ("***PEICA***") was a child protection case at the Prince Edward Island Court of Appeal. At issue was whether hearsay evidence was admissible in the child protection proceedings. The hearsay evidence in question

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[103] *Ibid* at paras 33-4.
[104] *Ibid* at paras 2-3.
[105] *Ibid* at paras 21 and 33.
[106] Infants and Children, *supra* note 4 at HIC-203 "Hearsay and the rule in Khan".
[107] *Ibid* at HIC-203 "Relaxing the rule in Khan".
[108] *Prince Edward Island (Director of Child Protection) v CP*, 2014 PECA 18, PEIJ No 45 ["*PEICA*"].

was a report from an expert witness who had discussed the child protection case with thirteen other individuals involved with the case; only a few of whom were called to give evidence at trial.[109] Other hearsay evidence, including the pre-sentence report from one of the parent's most recent criminal conviction, was included.[110]

Justice Mitchell, writing for the Prince Edward Island Court of Appeal, held that this hearsay evidence was inadmissible in the child protection proceeding. There were other available methods to obtain evidence regarding the parent's criminal record without resorting to the use of hearsay evidence; for this reason, the hearsay evidence was entirely inadmissible.[111]

***RB v Children's Aid Society of Metropolitan Toronto*[112] – Charter Rights**

RB v Children's Aid Society of Metropolitan Toronto ("***CAS Toronto***") was a constitutional law case where the Supreme Court of Canada decided the issue of whether parents can refuse a blood transfusion for their child for religious reasons. It was also a child protection proceeding because the Children's Aid Society was granted wardship of the child so that the blood transfusion could be done.

The Supreme Court considered whether the parents' *Charter* rights were breached, either under section 2(1) which is freedom of religion or section 7 which is the right to life, liberty, and security of person. For the purposes of evidence issues in concurrent proceedings, *CAS Toronto* is relevant for the fact that the Supreme Court of Canada limited the parents' *Charter* rights in

[109] *Ibid* at para 24.
[110] *Ibid* at para 25.
[111] *Ibid* at para 81.
[112] *RB v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, [1994] SCJ No 24 ["*CAS Toronto*"].

raising their child and upheld the prior decisions awarding temporary wardship to the Children's Aid Society for medical treatment.

Legislation

Section72 of the Child and Family Services Act ("*CFSA*")[113]

Section 72 of the *CFSA* requires any person, including those who are a professional or perform official duties with respect to children, who has "reasonable grounds to suspect" that a child is in need of protection must report those suspicions to a child protection agency.[114]

Under subsection (4), only the delineated persons are guilty of an offence if they fail to report their suspicions.[115] There is a further subsection (7) which states that section 72 applies to confidential or privileged information and that an action cannot be made against person who reports their suspicions unless the reporter acted with malice or if they had no reasonable grounds for their suspicions.[116] However, subsection (8) clarifies that subsection (7) does not override solicitor-client privilege.[117]

Justice Keast in *PD* noted how unusual this provision is as the wording applies to all citizens so that every citizen must adhere to this duty to report suspicions and that section 72 goes further than section 74 in addressing when privacy rights apply; therefore, *Wagg* does not apply to either section.[118]

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[113] *CFSA, supra* note 83 at s. 72.
[114] *Ibid.*
[115] *Ibid* at s. 72(4).
[116] *Ibid* at s. 72(7).
[117] *Ibid* at s. 72(8).
[118] *PD, supra* note 55 at paras 71-3.

Section 74(5) of the CFSA[119]

Section 74(5) of the *CFSA* provides that any confidential information obtained from the disclosure of records must not disclose that confidential information to anyone else unless it falls under subsection (a) where the court can specifically include an exception to this rule in the order or subsection (b) where disclosure of the confidential information is made in testimony in a proceeding which falls under this section.[120] This section narrows the uses for disclosed information, so as to provide some protection for privacy rights and prevent the misuse of such information.

Rule 30.1 Deemed Undertaking Rule of the Rules of Civil Procedure[121]

Rule 30.1 of the *Rules of Civil Procedure* from the *Courts of Justice Act* sets out the deemed undertaking rule found in Rule 30.1.01(3). It provides that any evidence obtained through documentary discovery, examination for discovery, inspection of property, medical examination, or examination for discovery by written questions cannot be used for any other purposes aside from the proceeding in which it was obtained.[122]

This rule is limited as it only applies to the specific methods set out in the *Rules* by which the evidence was obtained, and as this rule is found in the *Rules* it can only apply to civil proceedings. Criminal cases follow the principles set out in the common law under *Stinchcombe*.

Conclusion

[119] *CFSA, supra* note 83 at s. 74(5).
[120] *Ibid at* s. 74(5).
[121] Rules of Civil Procedure, RRO 1990, REGULATION 194, Rule 30.1.
[122] *Ibid* at Rule 30.1(3).

Concurrent proceedings present a host of issues, but one of the most complex issues is how to deal with evidence rules and differing standards among the different proceedings. Many of the rules pertaining to evidence and disclosure are based on the differing standards and burdens of proof. Family law, criminal law, and child protection law are three distinct areas of law despite some overlap between the three areas. The mix of legislation and case law encompassing both civil and criminal law creates an atmosphere which can be difficult to navigate when dealing with concurrent proceedings. It is crucial that judges and lawyers have some understanding of how these matters relate to each other and the impact that a decision in one matter can have on a related matter, such as the impact of an order in family court on a criminal charges. It is also important for individuals involved with concurrent proceedings to know that the legal professionals in the various courts may not be aware of other related proceedings in other courts. The difficulty is ensuring that there is communication among the various parties involved with a proceeding while still respecting the privacy rights of those individuals. This is not an easy task, but is becoming ever more relevant in Canadian courts.

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