WARNING

THIS IS AN APPEAL UNDER THE

CHILD AND FAMILY SERVICES ACT

AND IS SUBJECT TO S. 45 OF THE ACT WHICH PROVIDES:

45(7) The court may make an order,

(a) excluding a particular media representative from all or part of a hearing;

(b) excluding all media representatives from all or a part of a hearing; or

(c) prohibiting the publication of a report of the hearing or a specified part of the hearing,

where the court is of the opinion that the presence of the media representative or representatives or the publication of the report, as the case may be, would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding.

45(8) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

45(9) The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.

COURT OF APPEAL FOR ONTARIO

CITATION: Children's Aid Society of the Regional Municipality of Waterloo v. C.T., 2017 ONCA 931

DATE: 20171201

DOCKET: C63467 & C63470

MacFarland, Watt and Benotto JJ.A.

BETWEEN

The Children's Aid Society of the Regional Municipality of Waterloo

Appellant

and

C.T.

(Appellant by Cross-Appeal)

and

J.B.

Respondent

(Appellant by Cross-Appeal)

and

Brigitte Gratl

Appellant by Cross-Appeal

Jeffrey Boich, for the Children's Aid Society of the Regional Municipality of Waterloo

Julie Kirkpatrick, for C.T.

Katherine Hensel, for J.B.

Catherine Bellinger, Office of the Children's Lawyer, for the child

Susan M. Sack and Kelly Eckert, for Brigitte Gratl

Stan Jenkins and Marie Abraham, for the intervener Legal Aid Ontario

Heard: September 27, 2017

On appeal from the orders of Justice G.A. Campbell of the Superior Court of Justice, dated February 9, 2017 and May 30, 2017, allowing an appeal from the judgment of Justice P.A. Hardman of the Ontario Court of Justice, dated December 15, 2015.

Benotto J.A.:

OVERVIEW

[1] This appeal involves a 10-year-old girl. It is the second appeal from the trial decision. Following a 17-day trial, she was made a Crown ward with no access for the purpose of adoption. The biological parents appealed the no access order. The first appeal judge found no error with the trial judge's determination of access, but nonetheless ordered access followed by an openness hearing before him. In a wide-ranging analysis, he said trial counsel was incompetent; ordered her to pay costs personally; declared the trial unfair; and said there had been a miscarriage of justice. In oral reasons, he apologized to the parents "on behalf of the …system". As a result, there are several secondary issues on this appeal.

[2] The Children's Aid Society, supported by the Children's Lawyer, appeals the appeal judge's orders as to access. The biological parents cross-appeal seeking declarations that there has been a miscarriage of justice. The impugned trial counsel cross-appeals the findings of ineffective assistance and the costs award against her. Legal Aid Ontario obtained intervener status on the costs award.

[3] For the reasons that follow, I would allow the appeal by the Children's Aid Society and restore the trial judge's determination of no access. I would dismiss the parents' cross-appeal. I would allow counsel's appeal as to ineffective assistance and costs.

THE FACTS

[4] C.T. ("the mother") and J.B. ("the father") are the biological parents of a child born January 12, 2007. This child was not the mother's first. Another child, who is an adult and not part of these proceedings, had been previously removed from her care after the child was found in need of protection largely as a result of the effects of the mother's substance and alcohol abuse. That child was successfully placed for adoption. In this way, the mother was known to the child welfare authorities.

[5] In 2006 the Children's Aid Society of the Regional Municipally of Waterloo ("the Society") received a referral from a public health nurse who learned that the mother was pregnant again. Shortly after the child's birth, the mother tested positive for marijuana. A nurse observed the mother's speech to be slurred. Although the child remained in her mother's care, there were incidents of police involvement as a result of domestic violence reports. There were also ongoing reports to the Society about the mother's alleged use of drugs in the presence of the child. A series of hair screens completed on the child in 2010 and 2011 showed positive results for cocaine and marijuana. In January 2012 the father told the Society that the mother was "prostituting herself."

[6] In May 2012 the parents and the Society agreed that the child should be found in need of protection. The parents signed a Statement of Agreed Facts. The Statement outlined and summarized the background including the following:

i From 2002 to 2012 there were ongoing issues regarding the parents' drug usage;

ii The mother was involved in the sex trade industry;

iii There were incidents of domestic violence between the parents;

iv The mother had mental health issues including bipolar disorder and personality disorder;

v The father was diagnosed with chronic pain, dysrhythmias, and panic disorder;

vi Since February 2012, the father has had only supervised visits with the child and further access would be at the discretion of the Society; and

vii The child is not an Indian or native person.

[7] Upon the finding that the child was in need of protection, she remained in the mother's care subject to a supervision order. One of the conditions of the order required the mother to abstain from illegal drug use. In September 2012 the mother tested positive for cocaine and the child was apprehended.

[8] The Society commenced a status review application seeking 8 months' Society wardship. In July 2013 the Society amended its status review application to seek Crown wardship, no access, following another Motherisk test showing that both the mother and the child tested positive for cocaine.

The Trial

[9] The amended status review application proceeded to trial before Hardman J. for 15 days in 2014 and 2015. During the trial, the Motherisk drug testing came under scrutiny and the Ontario government commissioned an independent review of the drug testing program. In June 2015, after the trial ended, but before the trial judge released her decision, the child was placed with a proposed adoptive parent. On December 15, 2015 the trial judge released her reasons.

[10] The trial judge made an order of Crown wardship, no access, for the purpose of adoption. She concluded that the child was still in need of protection. She detailed the reasons for her conclusion that the mother was not able to parent the child, including:

i Her failure to address her issues of mental health and emotional instability;

ii Her continued use of drugs and involvement with others in the drug lifestyle;

iii Her inability to properly look after the child while in her care;

iv Her inability to recognize her responsibilities as a parent;

v Her inability to learn or gain any insight into her parenting problems or possible solutions;

vi Her inability to follow through with commitments made or expectations, including those of a court order;

vii Her complete inability to focus unselfishly on the child and the child's needs;

viii Her inability to maintain a stable home and safe surroundings for the child; and

ix Her inability to ensure that the child is not exposed to harmful activity or inappropriate people.

[11] The trial judge also set out concerns about the father's inability to protect the child or meet her best interests. She found that he had issues with transience, physical and mental health, and drug use. He had not addressed his finances, his homelessness and his own health. He was unable to care for himself, let alone the child.

[12] The trial judge was aware of the fact that the Motherisk test results were the subject of scrutiny, controversy and complaint. She ignored the test results and placed no weight on them. She concluded that the evidence – apart from the Motherisk results – supported her conclusion that the best interests of the child were not served by placing the child with the mother or the father.

[13] The trial judge considered access. She concluded that neither parent's access was beneficial for the child. She found at para. 211 that "[g]iven the parents' difficulty in recognizing rules and boundaries, I would have concern about them undermining any placement with direct contact with the child."

After Trial

[14] Bridgette Gratl represented the mother throughout the trial. She (together with father's counsel) appealed the trial judge's order. In June 2016 the mother terminated the solicitor-client relationship with Gratl.

[15] In July 2016 the parents received an affidavit by Todd Perrault, a clinical investigator with the Office of the Children's Lawyer. He outlined the views and preferences of the child and the adoptive parent's position on access and openness. Following receipt of Perrault's affidavit, the parents amended their

appeal to address only the issue of access. The child's status as a Crown ward was thus conceded.

[16] In August 2016 the parents filed affidavits declaring for the first time that the father was Cree and the mother was Mi'kmaq. The following month the parents requested – and all parties agreed – to attend a process of Aboriginal Alternative Dispute Resolution. The matter did not resolve and the appeal continued.

The Appeal

[17] The appeal was heard in the Superior Court in Kitchener for three days in early 2017. The appeal judge delivered oral reasons for his decision. The first 16 paragraphs of his reasons are a scathing review of Ontario's child welfare system and an apology to the parents for the manner in which they were "treated, ignored, demeaned and disbelieved."

[18] He considered fresh evidence including the affidavit of Perrault, which indicated that the child loves her parents, wants to see her parents, and also wants to be adopted by the proposed adoptive parent. By this time, the child had been with the proposed adoptive parent for almost two years and was flourishing.

[19] The appeal judge concluded that – although the trial judge did not err – the parents should have access. He ordered access but stayed the execution of the order save for one visit to be followed by an openness hearing before him.

[20] The appeal judge outlined what he considered to be: a miscarriage of justice; the trial judge's interference, bias and abuse of the trial process; procedural delay; and the incompetence of trial counsel. He invited costs submissions against trial counsel personally.

[21] Meanwhile, the Society appealed and moved for a stay of the openness hearing, pending appeal. On April 28, 2017, Strathy C.J.O. determined that there was a serious issue to be tried, granted the stay and made the following endorsement at paras. 7 and 9:

> [7] In my view, there is also as serious issue to be resolved of whether the judge had jurisdiction to order an openness hearing before him in a region in which the Family Court does not have jurisdiction. At paras. 94 and 95 of his reasons, he found that he had that jurisdiction, but did not elaborate beyond stating that he had a family patent. He did not address the fact that Kitchener-Waterloo is not a "part of Ontario where the Family Court has jurisdiction" within s. 21.8(1) of the *Courts of Justice Act*.

> [9] If the appellant is correct in its interpretation of the law, any openness hearing would be a nullity. The same result would follow if the judge has no jurisdiction to conduct the openness hearing.

[22] Later in May, the parties returned to the appeal judge to deal with allegations against trial counsel and the costs that might follow. Gratl together with Jane McKenzie, trial counsel for the father, asked the appeal judge to set aside his findings about their conduct. The appeal judge set aside his findings against McKenzie and ordered that all references to her ineffective assistance be expunged from his original reasons. His decision concerning Gratl was different. He resiled somewhat from his view that she had been "solely" responsible for a miscarriage of justice at trial, but he concluded that she was responsible for the mother not having access to her child for 14 months because she had not applied for access pending appeal. He ordered her to personally pay costs totaling $100,000: $50,000 to Legal Aid Ontario and $50,000 to new counsel for the mother.

ISSUES BEFORE THIS COURT

[23] The Society appeals the access order. The parents seek declarations that their rights under the *Canadian Charter of Rights and Freedoms* have been violated and that there has been a miscarriage of justice. Gratl appeals the findings of incompetence and the resulting costs order. Legal Aid Ontario (LAO) obtained intervener status because of the costs that were ordered to be paid directly to the mother's counsel on appeal.

[24] The appeals and cross-appeals raise the following issues:

1) Did the appeal judge err in ordering access?

2) Are the parents entitled to the declarations sought?

3) Did the appeal judge err in finding ineffective assistance of counsel and ordering costs against the counsel?

ANALYSIS

[25] Despite the appeal judge's sweeping condemnation of the child welfare system, the justice system, and the treatment of Indigenous citizens, I intend to focus on the issues I have articulated. The most important issue is the future of the child, now 10 years old. Thus, I begin with the only issue that was properly before the appeal judge: access to her by the parents.

Did the appeal judge err in ordering access?

[26] The Society, supported by the OCL, submits that the appeal judge erred when he overturned the no access provision because he failed to apply the mandatory provisions in s. 59(2.1) of the *Child and Family Services Act,* R.S.O. 1990, c. C.11 ("the *Act*"); he ordered access in the absence of an evidentiary foundation; and he had no jurisdiction to seize himself of the openness hearing.

[27] The parents submit that the issue of access is far more complex. It engages, they say, a broad-based best interests analysis viewed through the lens of the *Charter* rights of the parents and the child, the Indigenous heritage of the child and the general unfairness of the child welfare system.

[28] I have concluded that in ordering access, the appeal judge erred in four ways:

1. He did not apply the correct standard of review. Having found that the trial judge made no errors, there was no basis for appellate intervention.

2. The fresh evidence on access did not support the access order.

3. He did not comply with s. 59(2.1) of the *Act*, which sets out the requirements for ordering access to a Crown ward.

4. He erred in his consideration of the child's Indigenous heritage.

[29] Further, the process the trial judge proposed for the openness hearing was wrong in law.

[30] I will address each of these points in turn.

The standard of review

[31] The trial judge made extensive factual and credibility findings relating to access. The appeal judge found no error with the trial judge's determination of access. At para. 81 he said: "the trial judge may well have been correct". And at para. 73, he found no overriding and palpable error by the trial judge.

[32] The appeal judge referred to his own decision in *Van Wieren v. Bush*, 2015 ONSC 4104, 65 R.F.L. (7th) 463 on the standard of review. There, at para. 9 he said: "It is not the function of the Appeal court to retry the case. If there is <u>some</u> evidence upon which the trial judge could have reached her factual conclusions, the appeal court will not intervene". [Emphasis in the original.]

[33] Despite this self-instruction on the standard of review, the appeal judge changed the no access order after having found no error by the trial judge. The trial judge had made extensive findings of credibility and her conclusions on the best interests of the child were supported by the evidence. In *Woodhouse v. Woodhouse* (1996), 29 O.R. (3d) 417 this court quoted with approval the

concurring reasons of Cory and Iacobucci JJ. in *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141, at p.192:

> On issues of credibility, a trial judge is uniquely well placed to make the necessary findings. An appellate court should, apart from exceptional situations, refrain from interfering with those findings.
>
> Similarly, the trial judge is in the best position to assess evidence pertaining to the best interests of the child. It is the trial judge who not only hears the evidence but also has the great advantage of watching the demeanour of all who testify. It is the trial judge who can take into account the significant pauses in the responses, the changes in facial expression, the looks of anger, confusion, and concern. In the vast majority of cases as a result of hearing and seeing all of the witnesses, it is the trial judge who is in the most advantageous position to determine the best interests of the child.

[34] The conclusion that the trial judge made no errors should have ended the appellate inquiry. Instead, the appeal judge went on to consider the fresh evidence about access. As I will explain, the fresh evidence did not support overturning the trial judge's decision. Nor did it satisfy the mandatory requirements of the *Act.*

The fresh evidence about access

[35] The test for fresh evidence in a child protection matter is undoubtedly more flexible than in other types of cases where the *R. v. Palmer*, [1980] 1 S.C.R. 759 test requires the applicant to satisfy four criteria: (i) the evidence could not have been adduced at trial; (ii) the evidence must be relevant in that it bears on a decisive or potentially decisive issue; (iii) the evidence must be reasonably capable of belief; and (iv) the evidence must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[36] When an appeal involves a child protection matter, a more flexible rule applies. In *Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)*, [1994] 2 S.C.R. 165, at p. 188, L'Heureux-Dubé J. invoked the child-centered focus of the *Act* to conclude that the admission of fresh evidence in child welfare matters requires a "sufficiently flexible rule, where an accurate assessment of the present situation of the parties and the children, in particular, is of crucial importance". Likewise, this court has said that it is important to have the most current information possible when determining the child's best interests "[g]iven the inevitable fluidity in a child's development": *Children's Aid Society of Owen Sound v. R.D.* (2003), 44 R.F.L. (5th) 43, at para. 21, per Abella J.A.

[37] Here, the fresh evidence did not provide "an accurate assessment of the present situation" because the parents had not seen the child since the trial. In any

event, once the appeal judge found no error with respect to access, the fresh evidence was of marginal value. As this court stated in *CAS Waterloo v. V.L.*, 2007 ONCA 113, [2007] O.J. 613, at paras. 13 and 14:

> The mother submitted additional fresh evidence on this appeal. She has turned her life around in commendable fashion. However, at this stage, such evidence cannot change the result reached by both lower courts.
>
> …. Time is an important consideration in the [*Act*] and a child is not to be kept in limbo while a parent having difficulties attempts to straighten out her life.

[38] In addition, there was nothing in the fresh evidence about access that was not before the trial judge. For example, the appeal judge said that he relied heavily on the fresh evidence, especially that of Perrault who said:

> [the child] would like to see her mother weekly but would want the visits supervised at the Children's Aid Society's visiting centre.
>
> …
>
> [O]verall, [the child] was very clear that she wanted to be adopted by [the proposed adoptive mother]. She was equally clear that she misses her parents and would like to have some contact with them.

[39] The same evidence was before the trial judge. It was not new. The appeal judge also exaggerated Perrault's evidence by reframing the above extract. At para. 82 the appeal judge said: "I have evidence that [the child] *desires, expects, hopes and prays* for contact with her (both) parents." [Emphasis added.]

[40] The appeal judge appears to have ignored the fresh evidence that spoke against access. The child's therapist (Angela Harvey) and the adoption worker (Tecla Jenniskens) spoke of the negative effects that parental contact has had on the child. In their view, the negative effects would continue.

[41] In short, the fresh evidence before the appeal judge of this child's best interests did not justify a change in the trial judge's access order. The appeal judge also did not apply the mandatory requirements of the *Act.*

The statutory requirements for access to a Crown ward

[42] Until 2011, Crown wards with access were not eligible for adoption. In 2011, s.141.1 of the *Act* was amended to allow societies to place Crown wards with access for adoption. The legislation still establishes a high threshold for ordering access. Section 59(2.1) sets out a conjunctive test:

Access: Crown ward

> (2.1) A court shall not make or vary an access order made under section 58 with respect to a Crown ward unless the court is satisfied that,
>
> > (a) the relationship between the person and the child is beneficial and meaningful to the child; and
> >
> > (b) the ordered access will not impair the child's future opportunities for adoption.

[43] This section creates a presumption against access for a Crown ward. The onus is on the parents who seek access to present evidence that satisfies the test: *CAS Hamilton v. C.G.*, 2013 ONSC 4972, [2013] O.J. No. 3520.

[44] The mandatory requirements are clear. First, the relationship between the person and the child must be beneficial and meaningful *to the child*, as opposed to the person seeking access. Second, the access must not impair the child's opportunities for adoption. Courts have interpreted the words "will not impair" to require that access not diminish, reduce, jeopardize or interfere with the child's opportunities for adoption: See e.g. *Catholic Children's Aid Society of Toronto v. M.M. and J.P.,* 2012 ONCJ 369, [2012] O.J. No. 2717, at para. 180 and *CAS of Haldimand and Norfolk v. RD and SCM*, 2011 ONSC 4857, [2011] O.J. No. 4082. The test for access clearly emphasizes the success of the adoption once the necessity of adoption has been established.

[45] The appeal judge failed to identify how the parents had discharged their burden to show that access was "meaningful and beneficial" to the child. There was also uncontroverted evidence of the adoptive mother that she would not adopt if there was contact with the parents. This would make the access order statutorily impossible.

[46] The appeal judge nonetheless ordered access. He erred in doing so.

[47] I will return to the statutory requirements when, in connection with the child's Indigenous heritage, I explain how the appeal judge sought to further circumvent the operation of s. 59(2.1).

Child's Indigenous heritage

[48] The parents submitted on the first appeal, and before this court, that – despite the requirements of s. 59(2.1) – a child's Indigenous heritage introduces different considerations into the access analysis. Indigenous children adopted by non-Indigenous families often experience challenges, risks, and vulnerabilities that other children adopted across cultural and racial boundaries do not. These

challenges, risks, and vulnerabilities often lead to actual harm to the children throughout the course of their lives, and particularly as they enter adolescence.

[49] The parents argue that if they do not have access to the child, she is likely to suffer from a lack of connection to her Indigenous culture, heritage and community. In their view, she risks losing a clear identity and sense of belonging.

[50] The appeal judge accepted these submissions at para. 83:

> [The child's] entitlement to explore her heritage and her culture (as guaranteed by the *Act*) has been overlooked/thwarted and frustrated by the ineptness of [trial counsel for the mother and the OCL].

[51] On this basis, the appeal judge made his own finding that it was in the child's best interests to overturn the no access provision of the trial judge.

[52] In coming to this conclusion, the appeal judge erred in two respects: (i) there was no evidence relating to *this child* to support his conclusion; and (ii) he misinterpreted the correlation between the child's best interests and the mandatory requirements of s. 59(2.1).

No evidence relating to this child

[53] Courts recognize the pervasive effects of the historical and continuing harms to First Nations families. This does not, however, automatically exempt Indigenous children from the access provisions for Crown wards under the *Act*. The legislation makes clear that the circumstances of *each individual child* must be considered in their entire context.

[54] A parallel can be drawn with the court's approach to the sentencing of Indigenous offenders. In *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 60, the Supreme Court describes the proper approach:

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society. To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the *case-specific* information presented by counsel. [Emphasis in original, case reference omitted.]

[55] While *Gladue* principles do not directly apply to access to a Crown ward, the Supreme Court's comments about *context*and the need for *case-specific* evidence are instructive: see C*.M. v. Children's Aid Society of the Regional Municipality of Waterloo*, 2015 ONCA 612, [2015] O.J. No. 4705.

[56] As Mackinnon J. said in *Children's Aid Society of Ottawa v. K.F.*, 2015 ONSC 7580, 71 R.F.L. (7th) 110, at para. 65, a factual foundation that connects systemic factors to the particular child remains essential:

> Taking judicial notice of these systemic and background factors would provide the necessary context for understanding why the provincial legislature has included the special additional purposes and provisions applicable to "Indian" and "native" children. It would not displace the need for a factual foundation …

Similarly, in *Catholic Children's Aid Society of Hamilton v. G.H*., 2017 ONSC 742, [2017] O.J. No. 1380, at paras. 42 and 44 Harper J. said:

> I find that there is no evidentiary record in this case on the basis of which I can assess and balance the importance of the preservation of the Aboriginal heritage of the child when considering the other factors set out in the *CFSA.*
>
> …
>
> [T]here is no evidence relating to the uniqueness of the child's particular Aboriginal culture, heritage or traditions for me to take into account.

[57] The appeal judge made no mention that the parents or the child were in any way involved in an Indigenous community or its culture. There is no evidence that the parents had any connection to their culture; that the child was ever exposed to the Indigenous culture; or that anyone from the Indigenous community had ever been involved with the parents or the child. The statement of facts agreed to by the parents in May 2012 stated: "the child is not an Indian or native person." Although at trial the mother said she had applied for status, the Indigenous heritage of the child was not raised until the appeal stage when the father declared that he was Cree and the mother was Mi'kmaq.

[58] I recognize that Indigenous membership has expanded to include self-identification. However, there still must be evidence in relation to the child so a determination can be made as to whether access is beneficial and meaningful to her. The appeal judge erred by ordering access based on nothing but the parents' self-identification with Indigenous heritage in the absence of any evidence on this issue specific to this child. He then again ignored the requirements of s. 59(2.1). I turn to that issue now.

Statutory Requirements

[59] The appeal judge acknowledged that the proposed adoptive mother will not proceed with adopting the child if there is an order for access. On this basis, pursuant to s. 59(2.1) an access order was not possible. He resolved this impediment by declaring a conflict between s. 59(2.1) and the "best interests" provisions of the *Act* (s. 37(3)).

[60] Section 37(3) provides:

> **Best interests of child**
>
> (3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall take into consideration those of the following circumstances of the case that he or she considers relevant:
>
> 1. The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.
>
> 2. The child's physical, mental and emotional level of development.
>
> 3. The child's cultural background.
>
> 4. The religious faith, if any, in which the child is being raised.
>
> 5. The importance for the child's development of a positive relationship with a parent and a secure place as a member of a family.
>
> 6. The child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community.
>
> 7. The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity.
>
> 8. The merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent.
>
> 9. The child's views and wishes, if they can be reasonably ascertained.

> 10. The effects on the child of delay in the disposition of the case.
>
> 11. The risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent.
>
> 12. The degree of risk, if any, that justified the finding that the child is in need of protection.
>
> 13. Any other relevant circumstance. R.S.O. 1990, c. C.11, s.37 (3); 2006, c. 5, s. 6 (3); 2016, c. 23, s. 38 (18).

[61] The appeal judge determined that the child's best interest was to have access and this - he concluded - superseded the requirements of s. 59(2.1). This determination was in error in two respects. First, as set out above, there was no factual foundation from which he could make the determination that it was in this child's best interests to have access to her parents because of their Indigenous heritage.

[62] Second, there is no conflict between s. 37(3) and s. 59(2.1). The over-arching purpose of the *Act* is the child's best interests. This objective is inherent throughout the *Act.* Once it has been decided that the child's best interests require her to become a Crown ward, s. 59(2.1) *specifically provides the requirements for an access order.* While the goal of best interests is never abandoned, neither are the specific and mandatory requirements that must be established before an order for access can be made. These mandatory provisions are applied in the context of the child's best interests. But they are still mandatory.

The openness hearing

[63] The appeal judge overturned the trial judge's no access order, made an order for access and then stayed the enforcement of the order – except for one supervised visit – pending an openness hearing which he was going to conduct. The appeal judge had no jurisdiction to order the hearing or to seize himself of it.

[64] By making the access order, to be followed by the openness hearing, the appeal judge ignored the mandatory process set out in s. 145.1.1 (3) of the *Act.* This process involves notices by the Society to all parties and timelines before the hearing.

[65] Further, the appeal judge conflated "access" with "openness". They are not the same. This was explained in detail by McDermot J. in *F. v. Simcoe Muskoka Child, Youth and Family Services,* 2017 ONSC 5402, [2017] O.J. No. 4730, at paras. 31 and 34:

> [T]he criteria for access for a Crown wardship order differ with the criteria for an openness order. That results from the fact that a request for adoption shifts the nature of the best interests of the child. While a Crown wardship order is intended to provide for the protection of and permanency of the arrangements for the child for the foreseeable future, adoption is for the purpose of ensuring that the adoptive parents successfully become the child's new family. … Openness cannot be confused with access. [Case citations omitted.]

[66] Simply put, when a Crown wardship order is granted with access, the parental relationship with the child is preserved. When a Crown ward is sought to be placed for adoption, the goal is permanency and the success of the adoption.

[67] The appeal judge had no jurisdiction to seize himself of the hearing. Although he had been appointed to the Family Branch of the Superior Court, he was sitting in a non-Family Branch site and was acting in his appellate capacity as a Superior Court judge. The court with jurisdiction to conduct an openness hearing in Kitchener-Waterloo is not the Superior Court but the Ontario Court of Justice. For such a hearing, "Court" is defined in the *Act* as "the Ontario Court of Justice or the Family Court of the Superior Court of Justice". There is no Family Court of the Superior Court of Justice in Kitchener. Thus, in Kitchener, only the Ontario Court of Justice has jurisdiction.

[68] The appeal judge called the process of an access order followed by an openness hearing a "pathway plan". He said it was consented to by all parties. It clearly was not. The Society and the OCL objected and referred to transcripts of the proceedings to demonstrate their opposition. Counsel for the Society repeatedly submitted that the requirements of s. 59(2.1) must be met. In particular, he referred to the adoptive mother's evidence that she would not proceed with the adoption if the biological parents had access. In short, the so-called pathway plan was ill-conceived and neither statutorily or jurisdictionally possible.

Are the parents entitled to the declarations sought?

[69] The parents' cross-appeal for declarations that there has been a miscarriage of justice and that their s. 7 *Charter* rights and the rights of the child have been violated.

[70] They say the entire process was unfair and rely on the appeal judge's comments including:

- The "passive acquiescence" by the Society and the lawyers with respect to the validity of the Motherisk test results;

- The delays in the case resulting in an entrenched status quo for the child;

- The conduct of the trial judge; and

- The disregard of the child's Indigenous heritage.

[71] The appeal judge made extensive comments about miscarriages of justice but declined to address the parents' *Charter* rights.

[72] The parents' factum makes it clear that they are not challenging the constitutionality of any provision of the legislation. They also seek no *Charter* remedy. Instead, they simply ask for a declaration of a *Charter* right violation. They also ask this court to declare that there has been a miscarriage of justice.

[73] The remedy of a declaration is not available here.

[74] A declaratory judgment is "a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs": Zamir & Woolf, *The Declaratory Judgment*, 3rd ed. (London: Sweet & Maxwell, 2002) at para. 1.02. The nature of the relief was articulated by the Supreme Court of Canada in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. There, Dickson J. said at pp. 830-832:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.
>
> The principles that guide the court in exercising jurisdiction to grant declarations have been stated time and again….Lord Dunedin set out this test
>
> The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.
>
> ….Lord Denning described the declaration in these general terms
>
> .. if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.
>
> …
>
> As Hudson suggests in his article, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dal.L.J. 706:

> The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.

[75] The Supreme Court recently affirmed these principles stating "[a] declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties": *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11.

[76] I see no utility to the remedy sought by the parents. There is no issue; there are not two parties; there are no relative interests which fall to be determined; and nothing will be settled as a result.

[77] I would decline to grant declaratory relief.

Asserted miscarriages of justice

[78] While my decision not to grant the declarations sought would end the discussion as to miscarriage of justice, I must address two aspects of the appeal judge's commentary in this regard. The first is the suggestion that the child's initial apprehension predetermined the result. The second is his attack on the conduct of the trial judge and – to a lesser extent - the OCL.

Initial apprehension

[79] The apprehension of the child in September 2012 followed the mother's positive drug test by Motherisk. The Motherisk test results have been the subject of criticism and have been seriously challenged. The parents argue that the justice system's passive acquiescence to the test results led to a miscarriage of justice because the child should not have been apprehended in the first place. This submission ignores two important facts. The first is that the trial judge, aware of the potential problems with this evidence, explicitly ignored the Motherisk test results and placed no weight on them. The second is that the evidence of the parents' conduct *apart from the test results* supported the trial judge's findings. The trial judge set out the basis for the child's lack of care and need for protection, including, her need for extensive dental work, the dangerous environments into which the mother introduced her child, the parents' inappropriate conduct during access visits, and the mother's failure to address her own behavioral issues or to acknowledge or prioritize the needs of her child.

[80] I turn to the conduct of the trial judge.

Judicial conduct of the trial

[81] The appeal judge was harsh in his criticism of the trial judge. At para. 67:

> Both parent's counsel cite various examples of inappropriate judicial conduct and bias throughout the 14 day trial and the mid-trial off-the-record conference (that so shocked one experienced trial counsel that she was rendered mute!) of the trial judge trying to assert control over Ms. Gratl, as well as occasions of unsolicited, casual, threatening or sarcastic comments to those present, including counsel and the parents. See paras. 17-20, inclusive, of Mother's factum. The not so subtle messages for the trial judge cited at paras. 19 & 20 of the Mother's factum, I believe, would convince any litigant (or any observer of the whole trial) that the trial judge was:
>
> (a) antagonized by Mother's counsel;
>
> (b) angry at how long the trial was taking;
>
> (c) suggesting both directly and indirectly that "someone" might have to "pay costs" if things didn't change;
>
> (d) was disbelieving of much of what the Mother and Father had to offer (didn't use cocaine/was indigenous– hearsay!);
>
> (e) had already decided the outcome of the trial "they should be grateful …", "it's a waste of our time" … "what cloud are you living on?", telling Mother's counsel to "just sit down"; and
>
> (f) as Mother's present counsel argued, it was not just the trial judge's words but the tone of those words and her demeanor that caused the parents to despair and conclude that trial fairness was not occurring

[82] He then concluded at para. 69:

> Whether the test of trial fairness is an objective one or a subjective one, on the evidence before me, I find that the trial process was unfair, unjust and skewed against the parents. The integrity of the administration of justice was compromised by this trial and brought into disrepute. Both parents had good reason to have formed a reasonable apprehension of bias. They realized that they didn't have a fair hearing of the issues.

[83] Having found that the Crown wardship order was correct and that the trial judge made no error with respect to access, these remarks are both *obiter* and wrong in law.

[84] There is a strong presumption of judicial impartiality and a heavy burden on a party who seeks to rebut this presumption. In order to rebut the presumption of

impartiality, a test has been developed by the Supreme Court of Canada. It was first articulated by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

> [T]he apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. … [T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the judge], whether consciously or unconsciously, would not decide fairly."

[85] The Supreme Court has repeatedly endorsed this test. In his reasons in *R. v. S. (R. D.)*, [1997] 3 S.C.R. 484, Cory J. explained, at para. 111, that the test set down by de Grandpré J. contains a "two-fold objective element": not only must the person considering the alleged bias be reasonable, but "the apprehension of bias itself must also be reasonable in the circumstances of the case." Justice Cory added, at para. 113, that:

> [T]he threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.

[86] This two-fold objective element is based on reasonableness: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable. The reasonable person must be informed and know the relevant circumstances, including the traditions of integrity and impartiality on which the judicial system is based. A mere suspicion is not enough.

[87] This stringent test for a party alleging apprehension of bias is grounded in the need to preserve the integrity of the judicial system. It also recognizes the need to maintain the public confidence in the judicial system. The analysis contemplates a hypothetical observer who is informed of all the facts*. It does not depend upon the views or conclusions of the litigant.*

[88] The appeal judge did not apply the law on apprehension of bias. He referred only to the impressions of counsel and the parents, not to the objective observer informed of all the facts. Nor did he articulate exactly what conduct by the trial judge created the apprehension bias. These are essential components of a court's determination when – as here – the impartiality of a judicial officer is under review. Instead he accepted appeal counsel's submissions about the trial judge's "tone" when that counsel was not present during the trial, looked at comments by the trial

judge in the absence of context, and appears to have simply accepted the submissions in counsel's factum.

[89] The appeal judge also criticized the OCL for a "cavalier and inadequate approach" at trial. He referred to her submissions from the counsel table. Counsel are entitled to make submissions. The submissions by the OCL were supported by the evidence. No counsel present objected. I see nothing in the submissions to substantiate the appeal judge's assessment.

Did the appeal judge err in finding ineffective assistance of counsel and ordering costs against her?

[90] The parents raised ineffective assistance of counsel at trial as a ground of appeal.

[91] In his oral ruling of February 9, 2017, the appeal judge made "findings" of incompetence, inadequacy and ineffectiveness against the mother's counsel Brigitte Gratl. He cited complaints by the parents that she was "treating the client with disdain", being "confrontative" with the trial judge, was unwilling to explain, and did not have proper theory development. He found that trial counsel had breached the Law Society of Upper Canada's *Rules of Professional Conduct* and the Advocates' Society's *Principles of Civility*.

[92] The appeal judge referred to "uncontroverted evidence" to come to the conclusions about counsel. But Gratl was not present at the appeal and filed no evidence.[1]

[93] Gratl moved to set aside these findings. A five-day hearing resulted. On May 30, 2017 the appeal judge varied his decision. I quote his reasons at para 53:

> Having conceded that the "incompetent counsel" finding should be set aside for the reasons set out earlier, I have concluded that even though I cannot find that Mr. Gratl's (*sic)* level of advocacy preceding and during the trial itself (including the period after March 17, 2015 until December 15, 2015) was of such a scandalous quality as to solely cause a miscarriage of justice, Ms. Gratl's continuing involvement as [mother's] counsel after December 15, 2015 until June 23, 2016 did indeed cause a miscarriage of justice and undermined any appearance of fairness or of justice. Had Ms. Gratl been attentive to her then-client's interests, there is no doubt in my mind that a motion for access pending appeal would have succeeded and the parent-child relationship would have been continued (such as it had pre-December 15, 2015). It is solely and directly a result of Ms. Gratl that the relationship may never be successfully re-established. [Emphasis in original.]

[94] There are several errors in this conclusion.

[95] First, having found no error on the part of the trial judge, the issue of ineffective assistance was moot. Ineffective assistance of counsel as a ground of appeal has a very narrow application. It is a ground of appeal. It is not a springboard from which an appellate court engages in a retrospective analysis of every aspect of a lawyer's conduct. The far-reaching analysis in which the appeal judge engaged is more properly done in the context of a civil negligence action, with all of its procedural safeguards, or a disciplinary investigation by the Law Society of Upper Canada.

[96] Since the trial judge did not err, there was no ground of appeal left to explore. There was no prejudice to the parents and thus no miscarriage of justice. In *R. v. B. (G.D.)*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 29:

> In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The letter is left to the professional's self-governing body.

[97] Second, it was not open to the appeal judge to consider counsel's failure to apply for an access order after the trial judgment. The issue before him was the no access order at trial. In any event, I do not share the appeal judge's view that the motion "would have succeeded" in the face of the reasons of the trial judge, and the opposition of the Society and the OCL.

[98] The appeal judge's order on the issue of costs owed by the counsel derived from his conclusion as to competence. Accordingly, it should also be reversed.

[99] In the result, I would allow the counsel's appeal on the finding of ineffective assistance and on the order of costs against her.

[100] Legal Aid Ontario was granted intervener status. It submits that, if the costs order is allowed by this court, the costs should be paid directly to LAO in accordance with s.46 of the *Legal Aid Services Act*. As a result of my conclusion it is unnecessary to address this issue.

DISPOSITION

[101] I would allow the Society's appeal and restore the trial judge's order of no access; dismiss the parents' cross-appeal; and allow the cross-appeal of Brigitte Gratl on ineffective assistance and the consequent costs order.

[102] No party sought costs of this appeal. I would therefore make no order as to costs.

"M.L. Benotto J.A."

"I agree J. MacFarland J.A."

"I agree David Watt J.A."

Released: December 01, 2017

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[1] In his later ruling the appeal judge stated that Gratl should have known that her conduct would be in issue during the appeal. In the light of my conclusions, nothing turns on this.