ONTARIO ASSOCIATION OF CHILD PROTECTION LAWYERS

April 3, 2018

Family Rules Committee
Court of Appeal for Ontario
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N5

Dear Family Rules Committee:

Re: Amendments to the Family Law Rules that apply in child protection proceedings

The Ontario Association of Child Protection Lawyers (the "OACPL") is an organization comprised of lawyers committed to the defense of parents in child protection proceedings. Although the OACPL was only formed in 2017, the interest shown by parents counsel has been staggering. For example, in Toronto alone, the membership list numbers 50 lawyers, many of which are senior members of the child protection defence bar. Many parents lawyers have indicated that they believe an organization such as OACPL is necessary to ensure that parents and families are treated fairly by the legal system.

The goals of OACPL include:

1. Supporting and strengthening the parents' bar through mentorship, resources, education, sharing of information and training;

2. Advocating on behalf of parents' counsel and the interests of our clients through litigation and law reform;

3. Providing a voice for parents' counsel and our clients;

4. Ensuring and strengthening procedural safeguards for parents and compliance with the *Charter of Rights and Freedoms* ("the *Charter*").

The OACPL is extremely interested in the operation and interpretation of the Family Law Rules. The Rules impact the work of every member of the OACPL and our clients. The OACPL has a strong interest in the fair and just implementation of Rules in child welfare proceedings.

The OACPL's submissions are set out below. The first part includes our response to the recommendations made by the Motherisk Commission. The second part are additional proposals that, we believe, will strengthen the procedural protections for parents and families. The OACPL asks that the Family Rules Committee consider and adopt these proposals as it looks towards amendments to the Rules.

RECOMMENDATIONS FROM THE MOTHERISK COMMISSION

The OACPL has reviewed the Report of the Motherisk Commission released on February 26, 2018 (the "Report"). The OACPL agrees with many of the conclusions reached by the Commission. In particular, the OACPL agrees with its conclusion that the legal system's failure to ensure that families have proper procedural protections when litigating against the Children's Aid Society contributed to the improper use of hair testing and the resulting miscarriages of justice. The OACPL agrees with the Report's recommendations for changes to the Family Law Rules but also wishes to provide additional proposals to further strengthen those recommendations.

The recommendations of the Motherisk Report, along with OACPL's position with respect to each of those recommendations, is set out below.

Recommendation 1 of the Motherisk Report: The Family Rules Committee should amend the Family Law Rules to:

a. require that, where a party wishes to introduce medical or scientific test results in a proceeding, the results be accompanied by a report from an expert explaining the meaning of the test results and the underlying science behind the testing; and

b. require the content of expert reports to include the requirements in Rule 52.2 of the Federal Courts Rules, and in addition, require these reports to include the known or possible impacts of gender, socioeconomic status, culture, race, and other factors in the testing or assessment of results, as well as an explanation of what steps, if any, the expert took to address these impacts.

The OACPL agrees with this recommendation but also recommends the following additional related amendments:

a. Rule 20.1(13)(a) should be deleted. Rules 20.1(9), (10), (12) *and* the above recommendation of the Report should be applicable to <u>all</u> expert evidence tendered in child protection proceedings, *including* s.54 assessments under the *Child and Family Services Act* ("the *CFSA*").

Rule 20.1(9), (10), (12) and the recommendations of the Report confer important procedural protections with respect to the content of an expert's report and the right of parties to cross-examine the expert. However, expert evidence in child protection proceedings is not only limited to medical or scientific testing. Frequently, psychologists, psychiatrists, and physicians are retained to provide expert evidence in their fields of expertise. There is no reason to limit the Commission's recommendations only to "medical or scientific" testing.

In addition, parenting capacity assessments under s. 54 of the *CFSA* are frequently used by Children's Aid Societies and form an important piece of evidence in child welfare proceedings. However, currently, Rule 20.1(13)(a) states that the other procedural protections afforded by Rule 20.1(3) to (12), including the right to cross-examine the expert at trial, do not apply to s.54 assessments. The OACPL submits that Rule 20.1(13)(a) should be amended to clearly specify that s.54 assessments should be subject to the same procedural safeguards and scrutiny as other expert

evidence. Given the importance of s.54 assessments and the weight they carry, it would be extremely prejudicial for parents and families if such assessments are governed by fewer procedural protections than other types of expert evidence. In addition, from a practical and principled perspective, there should be consistency in how courts and litigants use and examine expert evidence, whether the expert is a s. 54 assessor or not.

Recommendation 2 of the Motherisk Report: The Family Rules Committee should amend the Family Law Rules to require courts to:

a. assess the necessity for and reliability of any expert evidence through a *voir dire* before admitting that expert's report into evidence on any motion in a child protection proceeding, except at the first appearance.

b. deviation from this requirement should only be permitted where the parent expressly acknowledges to the court that the findings of the expert are correct and the court is satisfied that the parent adequately understands the expert opinion and the consequences of such an acknowledgement.

The OACPL proposes that this recommendation be modified as follows:

a. on a motion, the *voir dire* requirement should apply to litigation experts only;

b. rather than "*assess the necessity for and reliability* of any expert evidence through a *voir dire*", the court should "<u>determine the admissibility</u> of any expert evidence through a *voir dire*".

c. rather than allowing deviation from the requirement only where "the parent expressly acknowledges to the court *that the findings of the expert are correct*", the court should allow deviation from the requirement only where "the parent expressly <u>waives the *voir dire*</u>".

d. prior to deviating from a requirement for a *voir dire* and in addition to what is listed above, the court should also inquire as to whether the parent has had an opportunity to seek independent legal advice.

e. the expert must disclose a copy of his or her entire file to all parties before the *voir dire*.

The OACPL requests that the *voir dire* requirement be limited only to litigation experts at the motion stage. The Motherisk "experts" were properly classified as litigation experts, as they were retained by a party (usually the children's aid society) to perform testing and provide opinion testimony about a matter in dispute in the litigation (i.e. drug and alcohol use). In general, Motherisk was specifically retained by children's aid societies in anticipation that such evidence would form an important part of their case. As such, this type of evidence took on a persuasiveness and significance in the litigation which, as we have seen, led to its improper use and reliance. As stated by the Report, in such cases, it would be appropriate to require an assessment of the admissibility of such evidence through a *voir dire*.

While this type of *voir dire* is necessary to assess expert evidence provided by litigation experts, it would lead to disastrous results and lengthy delays if it is also implemented to assess evidence provided by participant experts. At the motions stage, parents typically rely on opinion evidence from longstanding treatment providers (such as psychiatrists and doctors) who are participant experts (as opposed to litigation experts). These experts are usually part of the parent's support network and likely would not have entered into a relationship with the parent expecting to testify at court. In some cases, our members have been told by such professionals that they will end their relationship with the parent if they are forced to testify. The OACPL believes that a rule requiring parent's participant experts to testify at a temporary proceeding would jeopardize the parent's relationships with her support network and would also create a chilling effect on the willingness of professionals to service clients who may have child welfare involvement. It would also force the parent to choose between either losing his or her relationship with the professional and tendering evidence at a temporary motion.

The OACPL further asks that the Committee be extremely cautious about the wording used in any amendments with respect to this recommendation. For example, the OACPL suggests that the words "determine the admissibility of any expert evidence" be substituted for "assess the necessity for an reliability of any expert evidence" to take into account the ever-changing caselaw about the admissibility of expert evidence. In fact, the Report's focus on necessity and reliability is a more narrow approach to the admissibility of expert evidence than espoused by the Supreme Court's case in *White Burgess Langille Inman v. Abbott and Haliburton Co.* In that case, the Supreme Court held that there are two steps to determining the admissibility of expert evidence, with the first step including four separate factors from *R. v. Mohan* (relevance, necessity, absence of an exclusionary rule, and a properly qualified expert), and the second step which is the discretionary gatekeeping step to be engaged by judges. There is no reason why the Rules should limit the court's inquiry to two of the factors in the first step of the inquiry stated in *White Burgess*.

The OACPL also requests that any wording which requires an admission by the parent, and in particular, "an admission that the findings of the expert are correct" be removed. In our opinion, this wording should be replaced with a requirement that the parent expressly waive the *voir dire*, preferably with the assistance of counsel. There are many possible reasons why a parent may choose to waive the *voir dire* and yet object to conceding the correctness of the findings by the expert at the initial stages. For example, one reason is that at an initial stage, parents may feel unprepared to adequately challenge the qualifications of the expert or the science underlying the expert's opinion. Given the time pressures placed on parents at the temporary care and custody stage, parents have often only recently retained counsel and are unable to obtain the relevant authorizations from Legal Aid Ontario to mount a proper challenge. Insisting on an admission as a pre-requisite for dispensing with a *voir dire* could lead to unjust results, including a refusal by courts to allow parents to subsequently challenge those findings at trial. It would be extremely prejudicial to require an admission at a motion prior to parents having any ability to assess and evaluate those findings.

In addition, prior to dispensing with a *voir dire*, the OACPL proposes that courts should inquire as to whether the parent has had an opportunity to seek independent legal advice on the issue. Full

and informed consent is only possible if the parent has had the opportunity to seek legal advice on the consent. In other areas of our law, such as private family law, agreements are routinely set aside if a litigant fails to obtain independent legal advice. There is no reason why a less stringent requirement should apply in child protection, where the stakes for the litigants and the children are much higher.

Finally, parents' counsel also require disclosure of the expert's file to meaningfully cross-examine the expert at a *voir dire*. Advance disclosure of the expert's file would also allow counsel to consult with other experts to assist in the preparation of the cross-examination. Holding a *voir dire* without a corresponding requirement for disclosure would inadequately address the problems with introducing expert evidence at the interim stage.

Recommendation 3 of the Motherisk Report: The Family Rules Committee should amend the Family Law Rule relating to summary judgment motions to:

a. permit only evidence that would be admissible at trial, and in particular, to prohibit hearsay evidence that does not meet the common law test for admissibility;

b. require all expert evidence tendered at a summary judgment motion to comply with the Rule regarding experts and expert reports (as amended by these Recommendations);

c. require the court to conduct a *voir dire* before admitting any expert evidence; and

d. permit deviation from these requirements only where the parent expressly acknowledges to the court that the findings of the expert are correct and the court is satisfied that the parent adequately understands the expert opinion and the consequences of such an acknowledgement.

The OACPL agrees with this recommendation, however, the OACPL also proposes that:

a. rather than allowing deviation from the requirement only where "the parent expressly acknowledges to the court *that the findings of the expert are correct*", the court should allow deviation from the requirement only where "the parent expressly waives the *voir dire*". [reasons as stated above]

b. prior to deviating from a requirement for a *voir dire* and in addition to what is listed above, the court should also inquire as to whether the parent has had an opportunity to seek independent legal advice. [reasons as stated above]

c. Rule 20.1(12) be amended to allow any party to cross-examine the expert at the trial, *and at summary judgment*.

The ability of parties to cross-examine the expert on the substance of his or her report should be allowed at summary judgment as well as at trial. As noted in the Report, the inability of parents' counsel to examine experts and the prevalent use of summary judgment in child protection proceedings were contributing factors leading to the uncritical adoption of Motherisk testing.

The OACPL is aware that some courts have dismissed counsel's request to cross-examine experts at summary judgment because, in the court's opinion, counsel should have conducted out of court questioning as permitted by Rule 20(5). With respect, this type of reasoning fails to recognize the limitations placed on parents counsel as a result of the significant cutbacks in legal aid funding, and fails to understand the cost pressures faced by most parents counsel. As the Committee is well aware, the vast majority of parents who are involved with child protection have lawyers through legal aid. Persistent underfunding of the legal aid plan has meant that in recent years, counsel's requests for out-of-court examinations (despite the fact that it is available as of right), and requests for experts, have been routinely refused. In addition, the requirement that a motion be brought to have an expert cross-examined is another hurdle that parents' counsel need to contend with given the limited number of hours available on a legal aid certificate. Finally, because there is no separate authorization for out of court questioning on legal aid certificates, any questioning conducted by counsel comes out of the hours allotted to counsel for casework, which takes away from counsel's ability to defend a summary judgment motion. In-court questioning, by contrast,

is paid as court time by Legal Aid Ontario. Given the financial constraints, it is simply unrealistic to expect that the theoretical availability of out of court questioning would lead to actual questioning being done. Reliance on Rule 20(5) in place of in-court cross-examination of experts will lead to continued inability of parents' counsel to effectively and fairly represent their clients.

Furthermore, the Rules needs to recognize and address the great disparity in resources between children's aid societies and parents. Due to the financial limitations imposed by the legal aid system, parents often have difficulty retaining their own experts for summary judgment, which means that often the only way to refute the expert opinion is through "denial", which the summary judgment caselaw has rejected as improper for the purposes of summary judgment. As noted in the Report, this has created an uneven playing field for parents who are perversely forced to rebut expert evidence without being able to afford their own expert. While cross-examination of the expert does not completely resolve this issue, at a bare minimum, it should be available to parent's counsel as of right so that the evidence can be tested.

As noted in the Report, the failure of the court to allow cross-examinations of experts has led to egregious miscarriages of justice. One way of minimizing this risk is to permit parents' counsel to cross-examine the expert *as of right* whenever the expert's evidence is relied on at trial *and* at summary judgment.

Recommendation 4 of the Motherisk Report: The Family Rules Committee should amend the Family Law Rules to require children's aid societies to provide automatic, ongoing, thorough and timely disclosure to parents.

The OACPL agrees with this recommendation, however, the OACPL submits that in addition to the above, the Family Law Rules should:

a. require the Society to provide initial disclosure to parents as soon as possible, and in any event, no later than 5 days after the commencement of the protection proceeding.

b. require the Society to ensure that the disclosure is searchable, organized, and legible.

c. require the Society to waive all fees for the production of disclosure

Receiving disclosure is critical to a parent's ability to bring a temporary care and custody hearing and a court's ability to adjudicate that hearing. Delay on the part of the Society in producing the very disclosure that led to the child's apprehension and placement in foster care can create an unfair status quo that can be difficult for a parent to overcome.

Moreover, any argument that this requirement is onerous on the Society is unacceptable, particularly given the fact that this disclosure is relied on by the Society to craft its initial affidavit. At the first court appearance, the Society tenders an affidavit from a worker which it asks the court to rely on in making a "without prejudice" order pending the temporary care and custody motion. In crafting that affidavit, *the Society worker has relied on the disclosure in its possession*. There is no justifiable reason why this disclosure could not be given to the parent at the same time as the Society's affidavit that summarizes it.

The OACPL further notes that in some jurisdictions, the delay in receiving disclosure is significant, often taking three months or longer from the date of the request. Parents who are self-represented are often unaware of the need to *request* disclosure. Meanwhile, and as a result, parents and families are unable to put up a proper defense to the allegations made by the Society, thereby creating an unfair status quo. The current delays in the production of disclosure are unacceptable.

The form of the disclosure received from children's aid societies is also problematic. Members have noted that disclosure is often unorganized and voluminous, with thousands of pages organized in a haphazard fashion. While the OACPL does not expect children's aid societies to produce a perfectly organized file, there should be some coherence to the disclosure. At present, contact logs, assessments, supervision notes, children's information, doctor's reports are interspersed together into one disorganized file. In addition, at times, disclosure is printed in 8 point font, without paragraph breaks, making the disclosure illegible. Given the volume of materials, children's aid societies have begun to deliver disclosure electronically, which,

inexplicably, remain unsearchable, thereby impeding access. As noted in various criminal cases, disclosure, in order to be meaningful, must be reasonably accessible. The greater the volume of materials disclosed, the more important it is for such material to be organized and searchable. Thousands of pages of disclosure that are illegible, disorganized, and not searchable infringes on a parent's right to disclosure and should be rectified by the Rules.

Finally, the OACPL notes the alarming trend of children's aid societies charging money for disclosure requests. Some agencies even charge parents above the legal aid rate for copies of the file. Given that most parents involved in the child protection system live well below the poverty line, the requirement that disclosure be paid for is an infringement of the parents' right to disclosure. Of particular note, disclosure in criminal law is not accompanied by a request for payment. There is no reason why criminal accused should be provided greater access to disclosure than parents who risk losing their children.

Timely, full, and accessible disclosure is a right of the parents under Section 7 of the *Charter*. The Family Law Rules should ensure that this right is respected.

ADDITIONAL RULE CHANGES RECOMMENDED BY THE OACPL

In addition to the recommendations contained within the Motherisk Commission's Report, the OACPL further proposes that additional changes to the Rules be made to ensure that parents are fairly treated within the child protection system. The Motherisk Commission's Report details many problematic developments over the last 20 years that have eroded the procedural rights of parents. Counsel who represent parents have first-hand experience of these procedural erosions and believe that it has led to a system that is less fair for parents and families. Whatever the outcome of child welfare proceedings, they should be fair to everyone involved, including the parents.

OACPL Recommendation 1: The OACPL proposes that Rule 2(3) specifically acknowledge that dealing with child protection cases justly means that *Charter* rights and procedural fairness must be respected and applied in child protection cases. In particular, the OACPL proposes that the following new Rule 2(3)(e) be added:

> 2(3)(e) in child protection cases, ensuring that the rights of parents and children as guaranteed by the *Charter of Rights and Freedoms*, including the right to procedural fairness and to a fair trial, are respected, so that miscarriages of justice will be avoided.

The Supreme Court of Canada has held that section 7 of the *Charter* applies to child protection cases. The Supreme Court of Canada has further stated that the interests at stake in child protection proceedings are unquestionably of the highest order, and that few state actions can have a more profound effect on the lives of both parent and child. The application of the *Charter* is a cornerstone of what it means to deal with cases justly in the child protection context, and should be clearly stated in the Rules.

The OACPL submits that the current omission of any reference to the *Charter* is a problematic one as it encourages litigants and courts to view child protection as a civil dispute between private parties, thereby lessening the significance of these types of proceedings in the life families and children. By contrast, criminal rules of procedure specifically and clearly reference the application of the *Charter*. The OACPL submits that without a shift towards more rigorous recognition of *Charter* guaranteed procedural rights for families and children, we will continue to run the risk of miscarriages of justice in our child protection system.

OACPL Recommendation 2: The OACPL proposes that Rule 3(5) and Rule 33(1), (3), (4) either be abolished or amended so that it is consistent with the *CFSA* and the procedural rights guaranteed by the *Charter*.

At present, Rules 3(5), 33(1), (3) and (4) operates to defeat the wording of s. 52 of the *CFSA*, which states:

52 Where an application is made under subsection 40 (1) or a matter is brought before the court to determine whether a child is in need of protection and the determination has not been made within three months after the commencement of the proceeding, the court,

(a) shall by order fix a date for the hearing of the application, and the date may be the earliest date that is compatible with the just disposition of the application; and

(b) may give such directions and make such orders with respect to the proceeding as are just.

[Emphasis added.]

The *CFSA* clearly notes that the overriding consideration is that the disposition is "just". Dealing with cases justly includes ensuring that the procedural protections are in place for parents, especially given the significant implications of a protection finding to a parent's life. The failure of the Rules to emphasize a "just disposition" is arguably contrary to s.7 of the *Charter*.

The following are just some of the problems encountered by our members as a result of the wording and operation of Rules 3(5), 33(1), (3) and (4):

a. Our members have identified instances where courts have ordered parents to proceed to a protection hearing even though Legal Aid Ontario had only just approved funding for counsel;

b. Our members have described courts forcing parties to agree to a protection finding when one of the parents had not been properly served;

c. Our members have described being forced to trial on the issue of finding prior to parents receiving proper disclosure from the Society;

d. Our members have experienced courts forcing the matter to trial prior to parents being able to secure funding for an expert to challenge the Society's expert, even where the medical

or scientific provided by the Society formed the entire basis of the Society's case for the protection finding.

Protection findings are extremely important in the life of a child protection file and are stigmatizing for the parent. For example: a finding that a child is in need of protection justifies further state intrusion; the facts found at the finding stage are relied on at the disposition stage; parents at the finding stage are judged incapable or unable to keep their children at risk. Given its importance, the OACPL submits that it is imperative that the Rules make the process more fair for parents, not less so. The OACPL asks that the Committee ensure that the timelines are imposed in a fair and just manner for families, consistent with the wording in the *Act*.

OACPL Recommendation 3: The OACPL proposes that Rule 16(6.1), which allows the court to weigh evidence, evaluate credibility, and draw inferences on summary judgment, be amended such that it will no longer apply to child protection cases.

Parents in child protection cases enjoy section 7 *Charter* rights to procedural fairness and to a fair trial, which includes the fundamental right to cross-examine Society witnesses. Rule 16(6.1) permits summary judgment motion judges to weigh evidence, evaluate credibility of witnesses, and draw reasonable inferences to reach final decisions, all in the absence of any opportunity by the parent to cross-examine the Society's witnesses. The OACPL submits that this rule, applied to child protection cases, will lead to miscarriages of justice.

As described above, the purported right of parents to conduct questioning is a hollow right, as legal aid retainers generally do not permit counsel to engage in questioning. It is extremely dangerous that Rule 16(6.1) allows evidence to be weighed, credibility to be evaluated, and inferences to be drawn, all in the absence of any evidence being tested by cross-examination. The importance of cross-examination cannot be understated. For example, Dean Wigmore famously described cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth."

Instead of minimizing the power imbalance between children's aid societies and parents, the absence of the right to cross-examine coupled with the ability of courts to weigh evidence and assess credibility, only further disempowers parents. Many of our clients are the most marginalized in society. Their evidence is routinely discounted and labelled as being "not credible" when contrasted to the evidence of the children's aid society. In fact, this is what happened in the Motherisk scandal, where a contest between the supposed experts at Motherisk and the parent invariably led to the rejection of the parent's evidence. Similarly, the natural tendency to view a social worker's evidence as being more accurate and trustworthy, is a myth that should not be encouraged by the judicial system. Unfortunately, Rule 16(6.1) invites courts to fall into this type of inappropriate reasoning.

The OACPL recognizes that Rule 16(6.1) is an appropriate option in private family law cases to ensure access to justice by allowing a proportionate, expeditious and less expensive means of achieving just results. This rule, however, has no place in the child protection justice system for two main reasons. First, the *Charter* does not apply to procedures in private family law cases. Second, access to justice is not a primary concern in child protection cases whereas parents' right to a fair trial and procedural fairness, are. The emphasis on expediency and expenses in Rule 16(6.1) has no place in child protection. It is essential that child protection cases never sacrifice justice for the sake of expedience.

Any rule that abrogates the parents' right of cross-examination is a recipe for miscarriages of justice in child protection cases. Procedural fairness under section 7 of the *Charter* demands that, in reaching final decision about child protection cases, untested evidence not be weighed, the credibility of witnesses whose evidence has not been tested not be evaluated, and reasonable inferences not be drawn from untested evidence.

The Supreme Court of Canada case of *Hryniak v. Mauldin*, which discusses the use of the powers such as are provided in Rule 16(6.1), makes no mention of the *Charter*, and has no analysis of whether those powers are in accordance with section 7 *Charter* rights to procedural fairness in child protection cases. *Hryniak* discusses private law cases, not public law cases. There is no mention of the unique needs of the child protection justice system in *Hryniak*, and the principles

in *Hryniak* should not simply be transferred over to child protection cases. *Hryniak* starts with the statement that "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today." This statement applies to the civil and family law justice systems, not the child protection justice system. The Motherisk Commission's Report tragically outlines that the main problems in the child protection justice system have resulted from procedural fairness failures, not access to justice failures.

To be clear, the OACPL is not proposing the complete abolishment of summary judgment motions (except in crown wardship cases as stated below). Our proposal continues to allow courts the ability to grant final orders on summary judgment so long as the evidence led justifies the final orders sought without use of the additional powers under Rule 16(6.1).

OACPL Recommendation 4: The OACPL proposes that Rule 16 be abolished in *crown wardship* cases.

The OACPL is fundamentally opposed to summary judgment for crown wardship cases. As noted in the Motherisk Commission's Report, Justice Lang called crown wardship the "capital punishment" of child protection law. Defence for Children International-Canada, in their submissions to the Commission also noted that "for children, losing one's family is often the beginning of a life sentence".[1] Yet, despite the severity of crown wardship orders and the *Charter* rights that crown wardship proceedings engage, there is currently no right to a trial in crown wardship cases. This is in contrast to criminal cases where accused persons charged with minor offences such as theft and mischief have a right to trial by default. This disparity was recognized by one of the judges who participated in the Motherisk Commission's consultation process, who stated: "[the court must be as] cautious as in a criminal trial given the enormous potential impact of child protection decisions."[2] The OACPL agrees with this statement and submits that parents and children should have the full panoply of rights guaranteed by a trial process, the most central being the right to an oral hearing and cross-examination. Our members have repeatedly advised

[1] Motherisk Report, pg. xxii
[2] Motherisk Report, pg. 102.

us that the use of summary judgment for crown wardship cases is unfair, undignified, and inappropriate.

The parents we represent have also frequently noted the unfairness of having their children permanently removed from their care through the summary judgment process. Many are unable to understand why they are able to confront their accusers at trial for minor criminal charges but are unable to do so in crown wardship proceedings where the state is seeking to remove their children from their care permanently. Parents who have their children removed after summary judgment inevitably feel that they have not been heard (indeed, because they have not been).

In addition, our members have also noted the inability of many parents to respond to summary judgment motions in the full and complete manner demanded by the summary judgment caselaw. Many of our clients do not speak English as a first language, have limited education, and have other cognitive impairments and/or disabilities which makes it extremely difficult for them to respond to lengthy, and often confusing, summary judgment materials. In order for procedural fairness to be meaningful, parents need to understand the case they have to meet. Voluminous summary judgment materials, particularly where the parents have difficulty with written English, is problematic and should not be permitted.

Our members have also noted that certain Societies engage in the practice of providing parents' counsel and the courts with a "dump" of materials for summary judgment. Many of our members have, for example, described receiving volumes of materials for a summary judgment motion, sometimes amounting to more than 1000 pages. The OACPL submits this is inappropriate and unacceptable. While there has been some judicial recognition of this, our members have also experienced that some courts have allowed such summary judgment motions to proceed, despite the volume of the record filed. Serious consideration should be given to limiting the number of pages a children's aid society may serve on such motions.

Given the importance of crown wardship proceedings to parents and children, the OACPL submits that Rule 16 should be amended to abolish its use in crown wardship cases. The OACPL believes that this strikes the appropriate balance between efficiency and fairness as it continues to allow the

Society to proceed with final orders for s.57.1, supervision, and society wardship without a trial. The OACPL notes that requiring oral evidence in crown wardship cases would also encourage Societies to narrow their cases to the most important issue(s) instead of the current approach, where often, marginally relevant evidence in the form of multiple and voluminous affidavits detailing every single interaction between the worker and the parents are tendered for the summary judgment motion. The OACPL further notes that the obvious crown wardship cases will continue to be dealt with quickly as those cases can generally be disposed of with the calling of one Society witness (e.g. parents not participating but not in default, parents charged with major offences against the children, etc.). More efficient case management by judges, focusing on narrowing of issues, would also enable most cases to proceed far more quickly than they do now.

While the OACPL understands that our proposal to abolish summary judgment for crown wardship cases may lead courts to be concerned about a backlog of cases, as noted above, we do not believe this is necessarily the case. Furthermore, the OACPL submits that a resource issue should not be a reason why families are denied a full and fair trial when they are faced with an application that could permanently sever family relationships. The OACPL notes that criminal courts are also subject to resource issues, however, there is no suggestion that that system abolish trials for its most serious cases.

OACPL Recommendation 5: The OACPL proposes that Rule 19(11), the current rule with respect to disclosure of information in a non-party's control, be amended so that it is equivalent to the Society's right to disclosure from non-parties as set out in s.74(3) of the *Child and Family Services Act*.

Section 74(3) of the *Child and Family Services Act* states:

> (3) Where the court is satisfied that a record or part of a record that is the subject of a motion referred to in subsection (2) contains information that *may be relevant* to a proceeding under this Part and that the person in possession or control of the record has refused to permit a Director or the society to inspect it, the court may order that the

person in possession or control of the record produce it or a specified part of it for inspection and copying by the Director, by the society or by the court. [Emphasis added.]

By contrast, Rule 19(11) states that a party (i.e. a parent) will only be able to obtain records from a non-party's control if it is not protected by a legal privilege and "if it would be unfair" for that party to proceed with the document. Practically speaking, it is extremely difficult for a parent to show why it would be unfair to proceed without a certain document if he or she has never even seen the document. Caselaw has further held that this section imposes a more stringent and difficult criteria for non-CAS parties to obtain disclosure from non-parties.

An analogy can be drawn to the criminal law, where the same test applies to motions for third party disclosure whether the moving party is the defense or the Crown. There is no justification as to why the Society should have a lower threshold to meet than any other party to a case.

OACPL Recommendation 6: The OACPL proposes that Rule 23(21.1) be added to regulate the use of trial affidavits that are usually permitted by child protection trial courts to take the place of oral evidence-in-chief. The OACPL further proposes that witnesses who have provided evidence through affidavits be available for cross-examination as of right.

The use of trial affidavits is now a ubiquitous feature of child protection trials, primarily used for Society-employed witnesses. The OACPL is not opposed in principle to the use of trial affidavits for Society-employed witnesses. The OACPL has concerns, however, that there are no rules regarding their use, and that trial affidavits are often drafted as if they are for motions rather than for trials (and thus not taking into account the very different evidentiary rules at motions and trials), and are not delivered to counsel well in advance of the beginning of trial. It is proposed that the new Rule 23(21.1) include the following:

23(21.1) In child protection trials, a trial affidavit in place of oral evidence-in-chief may be used only if:

(a) The trial affidavit is served at least 14 days before the trial starts;

(b) The trial affidavit is sworn within 30 days of the start of the trial;

(c) The trial affidavit only contains admissible evidence from that witness;

(d) No exhibits are attached to the trial affidavit; and

(e) The deponent of the affidavit is made available for cross-examination by the opposing party as of right.

It takes considerable preparation for parents' counsel to conduct a proper cross-examination on a trial affidavit of a Society worker. These trial affidavits are often longer than 50 pages, and it is not rare for them to be longer than 100 pages. As noted above, such lengthy affidavits pose significant problems for parents and their utility is questionable. However, even assuming that such affidavits contain admissible evidence, parents' counsel need time to adequately prepare for the deponent's cross-examination. Parents' counsel need to review the affidavit sometimes line-by-line, and compare them with the Society's disclosure. Such disclosure often contains thousands of pages, is provided without any discernably organization, and is not searchable when provided in digital form.

The requirement of at least 14 days notice for service of trial affidavits will ensure that parents' counsel have the time necessary to prepare a proper cross-examination. The adversarial process requires effective cross-examinations to ensure just results, which is especially essential in child protection cases considering the grave interests at stake. As well, the notice period will allow any evidentiary or other issues to be addressed or vetted prior to trial, leading to shorter and better-run trials.

The requirement for the trial affidavit to contain only admissible evidence to be in trial affidavits, and the prohibition against exhibits being attached to trial affidavits, are rules being proposed to address a problem often encountered by our members, that being that trial affidavits are often

drafted as if they are for a motion rather than for a trial, despite the very different evidentiary standards. The OACPL believes that this rule will further ensure that the party preparing a trial affidavit will carefully vet it for inadmissible evidence, rather than leaving that exercise for the opposing party or for the trial judge.

The requirement that trial affidavits be sworn within 30 days of the start of trial will ensure that affidavits that were previously used for motions will not simply be recycled at trial. This will also ensure that the evidence within a trial affidavit is the current evidence of the witness rather than the past evidence, that might have changed over time. Child protection judges have repeatedly demanded that Society workers continuously reassess their position and beliefs about a family as further information becomes available in the Society's investigation. The use of past affidavits without serious reconsideration of its contents undermines this responsibility.

Attaching exhibits to a trial affidavit is a common misunderstanding of the purpose of a trial affidavit. A trial affidavit is different from an affidavit on a motion. A trial affidavit is the substitute for the direct examination of that witness. It essentially acts as a transcript of the direct examination of that witness. Exhibits are attached to affidavits in motions because that is the primary and accepted way to submit documents into evidence in a motion. In a trial, there is an accepted and preferred procedure for submitting exhibits into evidence – including them in an exhibit book (sometimes called a documents brief) if possible, and asking the trial judge to accept them into evidence as exhibits. The attachment of exhibits to trial affidavits leads to confusion about the evidentiary purpose of the attached exhibit, causes disorganization and duplication with respect to the court's exhibit list, ignores the proper procedure for evidence to be admitted as exhibits at trial, and adds to the volume of paper in the trial.

Finally, the deponent of the affidavit must be made available for cross-examination by the opposing party as of right. Given the issues at stake in a child protection proceeding, it is inappropriate to restrict counsel's ability to cross-examine deponents at trial.

OACPL Recommendation 7: The OACPL proposes that the Rules be amended to allow for the filing of documents with electronic or photocopied signatures.

At present, there appears to be a significant variation in the willingness of courts to accept documents with electronic or photocopied signatures around Ontario. Some jurisdictions have welcomed the filing of such documents, and other have rejected them at the counter on the basis that an "original" signature is required. The OACPL believes that acceptance of documents with electronic or photocopied signatures will improve the efficiency of the system, and will decrease the significant burdens on parents' counsel.

As the Committee is aware, most parents' counsel who practice child protection accept legal aid certificates and are sole practitioners. To ensure economic survival, it is important for many parents' lawyers to reduce office expenses and overhead, and to be as efficient as possible. Allowing electronic and photocopied signatures reduces the number of meetings between counsel and parents as well as time spent in meetings.

Of course, there are some documents that can be signed by a lawyer on a client's behalf. However, others (such as affidavits, Society consent forms, Statements of Agreed Facts, etc) cannot be signed by the lawyer on the client's behalf. Clients who live far from their lawyers' office, or who rely on public transit (which the vast majority of legally aided clients do), often request to fax or email scanned documents to the lawyer so they can be filed with the court. There is no reason why the client should have to physically get themselves to the lawyer's office to sign a document that they have already reviewed and approved.

The idea that an original signature is required if there is going to be some sort of "handwriting analysis" of the court document at a later date to determine whether the affiant of an affidavit actually signed that affidavit is not a reasonable justification for a requirement that, on an aggregate scale, likely costs clients, lawyers, and Legal Aid Ontario hundreds of thousands of dollars annually.

This problem is particularly acute for lawyers who assist self-represented litigants on a limited retainer basis. The lawyer may assist with the preparation of documents but cannot sign them him or herself, as the lawyer is not counsel of record. Therefore, the client must go to the lawyer's office to physically sign *all* documents that are to be filed with the court. Deadlines are often tight and it is not realistic in most cases for the client to mail the documents to the lawyer.

Allowing the filing of documents with electronic or photocopied signatures would improve efficiencies for parent's counsel and would be a significant improvement to the practice of family and child protection law in Ontario.

OACPL Recommendation 8: The OACPL proposes that the Family Rules Committee set up a subcommittee to examine and make recommendations towards the establishment of separate rules for child protection.

The current family law rules appear to be written specifically to deal with private family law matters, with child protection as an afterthought. Many of the sections are inapplicable to child protection work (motions to change, costs, financial disclosure, garnishments, etc.) and many of the rules pertaining to child protection are sprinkled throughout in a disjointed fashion. The child protection sections of the Rules are cumbersome and difficult for new practitioners and self-represented persons to master. Including one specific rule for child protection at Rule 33 is hardly satisfactory and does not reflect the many procedural differences between child protection and private family law court.

In addition, there is an inherent difference between private family law and child protection. At its root, child protection is a proceeding which involves a state applicant whereas family law does not. As reflected in the new *Child and Youth Family Services Act*, our child protection system is inherently connected to broader societal problems of racism, reconciliation with indigenous peoples, children's rights, human rights and poverty. The Rules need to enable a fair process, having regard to the disadvantages faced by many of the litigants involved in child protection proceedings. In addition, the application of the *Charter* in child protection also means that an

understanding of the procedural protections provided by the *Charter* should clearly be reflected in the content of the Rules.

Finally, although these submissions represent some of the most pressing concerns of our members, an attempt to keep these submissions to a reasonable length has meant that many issues of concern have not been raised in this paper. Given the fundamental role the Rules play in ensuring fairness for parents and children, our members are concerned that there is no dedicated forum in which we can raise our concerns about the Rules as they apply to child protection. We are furthermore concerned that there has been little to no representation from the defense bar on the Rules committee up to this point.

The OACPL proposes that a subcommittee examine and make recommendations towards the establishment of separate rules for child protection. The OACPL proposes that the subcommittee be composed of representatives from the Society, the OCL, and the defense bar.

Conclusion

The OACPL asks that the Family Rules Committee to consider the above proposals for much-needed change. The OACPL appreciates your time and consideration of this letter, and welcomes any opportunity for further discussion with the Family Rules Committee.

Sincerely,

The Ontario Association of Child Protection Lawyers
Per: Tammy Law
David Miller
Jessica Gagne