Ontario Association of Child Protection Lawyers
Overview of Submissions to the Committee
Bill 207: Moving Ontario Family Law Forward Act

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Presenters:

Tammy Law
151 Bloor St. W., Suite 604
Toronto, Ontario
M5S 1S4

David Miller
47 Sheppard Ave. E., Suite 410
Toronto, Ontario
M2N 5X5

The Ontario Association of Child Protection Lawyers "OACPL" is an organization representing child protection defence lawyers across the Province of Ontario. The purposes of the OACPL are to advocate for the particular and unique concerns of child protection parents and their counsel in matters that impact on their interests. The mandate of the OACPL includes preserving and defending procedural protections for parents and families enshrined in the *Charter of Rights and Freedoms*, and advocating for parents and defence counsel before government and judicial bodies on matters that relate to child protection law and policy. The OACPL has been recognized as a leading voice in child protection law by the Ontario Court of Appeal. The OACPL's submissions have been read and considered by multiple ministries and organizations including: the Motherisk Commission; the Family Law Rules Committee; the Ministry of Children, Community, and Social Services; and Legal Aid Ontario.

The OACPL was not consulted on the proposed change to appeal routes set out in Bill 207: Moving Ontario Family Law Forward Act. The OACPL expresses its deep concerns about the changes to the appeal routes set out in Bill 207 in child protection cases. Of particular concern are the serious restrictions the new appeal routes place on access to a panel of 3 judges at the Ontario Court of Appeal. The new appeal routes will limit most cases from the Ontario Court of Justice to one appeal before a single judge of the Superior Court of Justice. While the new appeal routes proposed in Bill 207 may be appropriate in family law cases, they are inappropriate in child protection law cases where extremely serious rights, including Charter rights of parents and children, are at stake.

The OACPL recommends the following 3 alternative proposals:

a. **The leave requirement for appeals to the Ontario Court of Appeal be removed for all cases commenced under the *Child, Youth and Family Services Act*;**

b. **The leave requirement for appeals to the Ontario Court of Appeal be removed for all cases commenced at the Ontario Court of Justice under the *Child, Youth and Family Services Act*; or**

c. **There be one appeal directly to the Ontario Court of Appeal for all cases commenced under the *Child, Youth and Family Services Act*.**

The remainder of this submission will address the reasons why we believe this proposal is appropriate and in the best interests of children and families caught up in the child welfare system.

1. Child Protection Involves State Interference in Charter Rights

Unlike private family law disputes, child protection cases commenced under the *Child, Youth and Family Services Act* involve significant state interference and consequences for families and children. Specifically, the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G.(J.)* held in the context of child protection cases that:

> The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.

This statement has been repeatedly affirmed in appellate courts across the country, and most recently by our own Court of Appeal in *Kawartha-Haliburton Children's Aid Society v. M.W.*

Ontario judges have repeatedly noted the important consequence of child protection proceedings to children and families. Child protection proceedings may lead to orders that terminate parental rights on a final basis. These orders, called "Extended Society Care" orders (previously called Crown Wardship orders) have been described by the courts as "the capital punishment of family law" as a result of how serious the consequences are to parents and children.

As a result, courts have affirmed that protections under s.7 and s.15 of the *Canadian Charter of Rights and Freedoms* applies to child protection cases. In recent years, issues relating to these rights and their application to child welfare have been litigated in all levels of court. Many of these cases have made their way to the Ontario Court of Appeal, where the seriousness of the interests at stake have been recognized. Appellate decision-making on these issues, which impact on the public interest and the lives of vulnerable parents and families, must be robust, available, and fair.

The appeal routes proposed by Bill 207 makes it extremely difficult for these appeals to be heard at the Ontario Court of Appeal due to the leave requirements imposed and the lack of financial means of child protection clients. The current Bill effectively restricts appeals to the Ontario Court of Appeal, and most concerningly, suggests that a final appeal from these very serious orders at the Ontario Court of Justice should lie to a single judge the Superior Court of Justice.

Just as it would be unfair for any legislation to restrict the right of appeal of a murder conviction to the Superior Court level, it is unfair that this legislation limits appeal rights to cases that are "the capital punishment of family law" to the Superior Court. The interests of justice for these families demand that they have full and fair appeal routes and that they have access to a panel at the highest court of this province as a final appeal.

2. Child Protection Proceedings Carry the Risk of Miscarriages of Justice

The assumption that child protection cases at the Ontario Court of Justice are less complex and therefore of less consequence to litigants is incorrect. Recent major inquiries in this province, and in particular the recently completed Motherisk Commission, highlight the real risk of miscarriages of justice in child protection proceedings.

The Motherisk Commission highlighted the complexity of child protection proceedings including the fact that many involve expert evidence, under-resourced parents, and the difficulties of "undoing" miscarriages of justices. Even more so than in criminal law, there are no remedies for parents and children who have had their children removed and parental rights terminated on the basis of faulty evidence. As highlighted by the Motherisk Commission, parents are often "simply overpowered" by the state, even when represented by counsel.

In these circumstances, removing access to the court of appeal is another barrier that vulnerable parents and children must deal with in order to have their cases properly reviewed. The reality is that parents who are involved in child welfare are often financially impecunious and rely on Legal Aid Ontario for access to justice. It is virtually impossible for these parents to have their cases heard at the Court of Appeal if a leave requirement is implemented. Given the real risk of irreversible miscarriage of justice, as demonstrated by the Motherisk Commission, any barrier to access to the Court of Appeal would potentially lead to unnecessary and unfair removal of children from their families.

We further note that many of the most complex cases involving expert evidence are litigated in courts in Toronto, which is a jurisdiction presided over by the Ontario Court of Justice. It makes no sense that these cases are only permitted a final appeal to a single judge of the Superior Court of Justice. We are concerned that this further increases the risk of miscarriages of justice.

3. Child Protection Proceedings Involve Complex Indigenous Law

In recent years, there have been significant changes to child welfare legislation, particularly in relation to indigenous children. It is a well-known fact that indigenous children are over-represented in child welfare, and significant efforts have been made to stop the mass removal of indigenous children from their families. Many of the Ontario Courts of Justice in this province are located in the northern parts of the province. Many deal with complex and cutting-edge indigenous law issues that have implications on self-governance and large communities. It makes no sense that these very complex cases would only have one right of appeal to a single judge of the Superior Court.

4. The New Appeal Routes Do Not Simplify Child Protection Cases

One of the stated purposes of implementing the new appeal routes is to "simplify" family law cases and promote early resolution. While this rationale is appropriate for family law cases involving private litigants, many of whom are self-represented, it is less persuasive in child protection.

Child protection litigants have a right to counsel through Legal Aid Ontario or state-funded counsel. This means that in most cases child protection parents have lawyers, who are able to navigate the appropriate appeal routes on behalf of their clients. There is virtually no benefit to the simplification of appeal routes in child welfare, however, there is significant prejudice to the ability of child protection parents to access justice.

The appeal routes also promote inequality by virtue of where a child lives. A child who lives in a Superior Court jurisdiction has access to an appeal to a panel of 3 judges before the Divisional Court while a child who lives in an Ontario Court of Justice jurisdiction has access to an appeal only to a single judge. While this may be appropriate in family law cases involving

private litigants, it is inappropriate in matters that involve *Charter*-protected rights such as child welfare, and in fact may be subject to legal challenges in the future.

Conclusion

The OACPL believes that one of the three options it proposes would make appeal routes more fair for child protection litigants. We urge the Committee to carefully examine the implications of changing the current appeal routes to child protection. We hope the Committee will make recommendations that improves access to justice for parents and children in the child protection system, rather than the opposite. We welcome any questions the Committee may have about our position.