Child Protection – General

Abuse of Process

From: *Catholic Children's Aid Society of Toronto v. E.S.,* [2016] O.J. No. 2558 (OCJ).

> **78** The common law doctrine of abuse of process engages the inherent power of the court to "prevent misuse of its procedure, in a way that would... bring the administration of justice into disrepute". Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79 v. City of Toronto, et al., (2003) 3. S.C.R. 77 para. 37.
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> **79** The doctrine is flexible, and unencumbered by the specific requirements of concepts such as issue estoppel".Canam Enterprises Inc. v. Coles, (2000) 51O.R. (3d) 481 at. Para. 55.
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> **80** The doctrine may be used to prevent "relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice". Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79 v. City of Toronto, et al., (2003) 3. S.C.R. 77 para. 37
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> **81** The Supreme Court of Canada has made observations as to why relitigation of an issue is to be avoided as a matter of public policy:
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> - * There can be no assumption that relitigation will yield a more accurate result than the original proceeding;
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> Relitigation is a waste of judicial resources.
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> - * An inconsistent result in the subsequent proceeding "in and of itself will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality".

Abuse of process found when child started protection application immediately before CLRA trial. CLRA judge refused to grant adjournment and continued with trial. Both courts found that this was litigation strategy instigated by mother. *V.F. v. Halton Children's Aid Society,* 2016 O.J. 1085 (O.C.J.).

There was no abuse of process found when parents were in a mediation- arbitration process, where no decision had been made and society started a protection application. *Catholic Children's Aid Society of Toronto v. E.S.,* [2016] O.J. No. 2558 (OCJ).

Access – (non-crown ward)

Discretion of the Society – Conflicting case law: *H.C. v. Durham CAS*, 2003 64 O.R. 3d 84, Div. Ct. permits it; *CAS Toronto v. B.* 45 RFL 5th 131, applies Strobridge and says not permitted. *CAS Toronto v. D.P.* 2005 O.J. No. 930 (SCJ) distinguishes H.C. limiting it to supervised, interim motions, and only relates to the specific terms of the access, not

whether it should take place. This case says that on a final basis, at least, the Act does not permit this. One of the litigants should not determine the access. Followed in

Discretion of the society – extended access/suspending visits

From: *Children's Aid Society of Toronto v. N.N.*, 2017 ONCJ 827:

The concept of "access at the discretion of the society" should not be treated by the society as permitting it to place a child on what is tantamount to a new placement under the guise of an "extended access visit." It is critically important under the scheme of the *CFSA* that the society obtain prior judicial authorization before effecting what is really a change in the child's placement pending final determination of the matter.

The society should not be able to get around a disputed change in placement by calling it an "extended access visit," just as, at the other end of the spectrum, it should not be able to terminate access by calling it a "suspension."

Pitfalls with the concept of extended access visits are set out in a decision by L. Glenn J. of the Ontario Court of Justice in *Children's Aid Society of Huron County* v. *R.G.*, 2003 CanLII 64289 (ON SC), [2003] O.J. No. 310. The central points from this decision with respect to this issue are paraphrased below:

a. In an extended access visit with a parent, the society in effect expands its power of discretion over access to the point where the child is actually living full-time with that parent, even though, according to the order, the child is supposed to be in the care of the society.

b. Not only is this a contravention of the order, but it can leave the society badly exposed if the child were harmed during the visit because the child is still technically in the care of the society.

c. If the visit breaks down and the child is removed from the parent, it results in what is in effect a re-apprehension, but without the requirement that there be a court hearing within five days under s. 46 (1) of the *CFSA* because there is already an order that has placed the child in the care of the society. No child should be subject to this kind of upheaval in the hands of the State without the prompt and automatic review of a court.

Flexibility

It is important that societies and courts do not get locked into a default position of requiring supervised access. The restriction on a parent's access should be proportionate to the risk concerns. If a parent has difficulties managing three children at a time, the response should not be to keep a case perpetually supervised, but rather to explore whether that parent can manage one child at a time, or two children at a time. It should be explored whether visits can be structured in the community and be gradually increased if successful. It is in the best interests of children to maximize a parent's ability to

succeed, while ensuring the children's safety and welfare. *Children's Aid Society of Toronto v. T.-J.M.,* 2010 ONCJ 701 (CanLII).

Grandparents

Chapman test was applied in *CCAS of Hamilton v. E.L. and N.R.,* 2016 ONSC 1789. *Chapman v. Chapman*, 15 RFL (5th) 46 (Ont. CA). Grandparents do not have a legal right of access to grandkids. The test is always best interests, and the courts will give considerable weight to the wishes of the custodial parent. The onus is on the grandparents to show it is in the children's best interests. It is not in the best interests of the children to be caught up in a real conflict, however the court must be vigilant to prevent custodial parents from alleging hypothetical conflicts as a basis for denying contact. Where there is real conflict, a child's best interests will rarely be served by a custody order. Branconnier2006CarswellBC (SC)- the wishes of the parent must not be interfered with absent some evidence of willful disregard for those interest. Great weight must be given to parental autonomy to determine what is best for their children. *Morecroft v. Morecroft* (1991) 122 NBR (2d) 271 (NBQB).

Justice Nelson set out a 3 part test in *Giansante v. DiChiara* [2005] O.J. No. 3184 (SCJ). One: Does a positive GP-grandchild relationship already exist? Two: Does the parent's decision imperil this relationship? Three: Has the parent acted arbitrarily? Court can still intervene if no pre-existing relationship. *T.L. v. J.L.S.* [2006] O.J. No. 2176 (OCJ).

Grandparents aren't on equal footing as parents. *Singh v. Batoolall* [2009] O.J. No. 1046 (SCJ).

Grandparents awarded custody over father. Biological connection is only one of the factors in determining best interests. *Sui v. Law* 65 RFL 6th 37 (OCA).

Importance of increasing access where appropriate

From: *Catholic Children's Aid Society of Toronto v. R.M.,* 2017 ONCJ 784

> **[75]** In a constructive child protection case where it appears that the child is in need of protection, the risk concerns are clearly delineated for the parents and clear expectations are established to assist the parents in addressing them. The hard work that is required by the parents, the society, counsel and the court will then begin, to ensure that the parents have the best chance to reunify their family.
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> **[76]** This means that if a child is apprehended from a parent, the process of reunification, if done properly, often takes some time.
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> **[77]** It is imperative in this process that the initial access order not stay frozen until trial, unless it would be unsafe for the child to change it. Families sometimes fail in the reunification process because no steps were ever taken to change the original access order.
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> **[78]** The failure to change temporary access places a trial judge in a difficult predicament. The statutory time limit for a child to stay in society care set out in subsection 70 (1) of the Act may have expired. This means that the child must either be made a crown ward or returned to a parent

> who might only have had supervised access for two hours once each week since the child was apprehended. Even if the access was positive, how can the judge confidently return the child to a parent if he or she does not even know that the parent can safely parent the child for a full day?
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> **[79]** In a constructive child protection case, access is constantly being re-evaluated. Where it can safely be done, access should be gradually increased. This not only improves the parent/child bond, but gives the court some basis to assess whether the parent is capable of parenting the child on a full-time basis. In child protection cases, full family reunification is often achieved one hour at a time.
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> **[80]** This means that if the level of access is in dispute, the court should be receptive to access change motions. The goal should be to gradually increase a parent's access. Material change or compelling evidence that is necessary for the child to make the change should generally not be required. The Act is remedial legislation. It would be contrary to the purpose of the Act to construct a legal test to change access that is too onerous for parents to meet, discourages them from moving to court to increase their access with the child and sets up more families to fail.

Limited Resources of Society to facilitate access

Generally not a valid argument. **"**First, the court cannot take judicial notice that the society has "limited resources", whatever that may mean. Second, even if that were true, this does not necessarily require that this limitation must manifest itself in the reduction of access that is otherwise appropriate. Third, although this limited resource argument may fall within paragraph 37(3)¶13 of the Act, simply stating that there are limited resources and that the society has adopted a policy position because of it, is not enough to justify what the position actually is." *Children's Aid Society of Algoma v. S.P.,* 2011 ONCJ 93 (CanLII).

Maximum Contact Principle -Applies to child protection cases. "I see no reason to exclude the application of this principle in child protection cases where a child is separated from a parent, not necessarily because of a parental break-up, but because of the intervention of the state in the form of a children's aid society that apprehends the child. From the child's point of view, the impact of being separated from his or her parent is very personal. The child does not appreciate the reasons, sometimes even the necessity, that underlie the separation through which he or she is going. What the child knows is that he or she was in contact with his or her primary caregiver 24/7 in an environment that was familiar to the child and, all of a sudden, that world changed almost completely." *Children's Aid Society of Algoma v. S.P.,* 2011 ONCJ 93 (CanLII). Followed in *Catholic Children's Aid Society of Toronto v. Z.Y.J.,* 2017 ONCJ 353.

Non-parties – An access order can be made in favour of non-parties. *Windsor-Essex Children's Aid Society v. J.D.,* 2017 ONCJ 20.

Parents in jail – Where vulnerable infant, release of parents was uncertain, lifestyle of parents was problematic and child far from jail, access not allowed. *Highland Shores Children's Aid v. M.B.,* 2014 ONCJ 34 (CanLII). In *Children's Aid Society of Haldimand Norfolk* v. *L.P.* [2011] O.J. No. 3529 (Ont. S.C.) Justice A. Ramsay dismissed a mother's motion for access to a child until her release date from jail. (paragraph 21). Similarly in *Children's Aid Society of London and Middlesex* v. *D.C.* [2000] O.J. No. 4686 (Ont.

S.C.) at paragraph 24 *per* G. Campbell J., the court ruled that no access will be granted between a father in prison and his two children until he is released from jail and makes a proper access application.

Telephone access permitted in *T.P.M. v. M.C.* [2009] N.B.J. No. 314 (N.B. Queen's Bench) per B.L. Baird J. at paragraphs 25 and 53. Also in *Newfoundland and Labrador (Manager of Child, Youth and Family Services, Zone A) v. M.G.* [2013] N.J. No. 76 (NFL and LAB Supreme Ct) per R.A. Fowler J. at paragraph 55.

Siblings –Different principles apply to sibling access. Under s. 58, a child who is in society care may apply for access to a sibling and this ability continues even after the child making the application is placed for adoption. The prohibition against access applications under s. 58 (7) does not apply to an application brought by a child who has been placed for adoption. As well, the prohibition in s. 160 to the effect that the court cannot order access to an adopted child by a birth parent or a member of a birth parent's family, does not apply to prevent asibling from seeking access to an adopted child. S. 140 (2) does not apply to sibling access. *CAS Niagara and J.C.,* 2007 Canlii 8919 Div.Ct.

Sibling access ordered using s. 59 (2.1) analysis in *Durham Children's Aid Society* v. *R.S.,* [2010] O.J. No. 1134:

> **68** It is well established that section 59(2.1) provides a legal basis for ordering sibling access in appropriate cases: *A.G. (Re),* 2009 CanLII 34991 (On S.C). "These would include cases where the court concludes that sibling access is sufficiently important to a child that the CAS should be required to seek an adoption placement that will accept the access order, prior to entertaining an application to terminate based on a proven inability by the CAS to locate a suitable placement accepting the order."

The court has discretion to order sibling access for a sibling in care to a sibling not in care absent consent from the parent. *M.A.R.P. (Litigation Guardian of) v. Catholic Children's Aid Society,* [1998] O.J. No. 2023 (Gen. Div.). However, the court should be cautious in making such an order as it might be impossible to enforce. Further, the court should consider the best interests of the children not in care. *Jewish Family and Child Service v. S.K.*, 2015 ONCJ 246.

In *Children's Aid Society of Toronto v. R.H.,* [2016] O.J. No. 1711 (OCJ) a child was made a crown ward by summary judgment. He sought sibling access to twins who were with another caregiver pursuant to s. 57.1 of the Child and Family Services Act. The court felt that the caregiver needed to be put on notice and have the opportunity to respond. The child also asked for access to a sibling who was still before the court. Court found it was premature to make such an order as the two-part test in section 59 (2.1) had to be examined at the relevant time (trial) from the perspective of the sibling.

Sibling access – society to encourage it
– *CAS of London and Middlesex v. S.M.,* (2000) O.J. No. 2064 (SCJ). A fixed order for access could compromise the adoption. Followed by Perkins J. in *Family, Youth and Child Services of Muskoka v. D.F.,* [2002] O.J. No. 4466 (SCJ).

Status Quo – The status quo is an important consideration in any placement decision. *Children's Aid Society of Ottawa v. E.S.* [2010] O.J. No. 5684 (SCJ).

Temporary access: The test for temporary access when a child is removed from the parent in charge is s. 51 (5); otherwise, it is in section 58.

Section 58 of the CFSA does not preclude court from varying final order for access on an interim basis: *Children's Aid Society of Algoma v. B. (Amanda)and C. (Steven)*, 2012 ONCJ 351, (Ont. C.J.), *per* Justice John Kukurin.

The test for varying a temporary access order is set out in s. 58 (1) of the Act. There must be a comparison of the current situation to the situation at the time of the original order. The change does not necessarily have to be material but there needs to be a change in circumstances based on the best interests of the child. *Children's Aid Society of Algoma v. C.P.,* 2013 ONCJ 740 (CanLII).

Subsection 51 (5) of the Act provides that where an order is made under clause 2 (c) or (d) of subsection 51 (2), the court may order access on any terms that it considers appropriate. In determining what order is appropriate, the court should consider the paramount purpose of the Act, being the best interests, protection and well-being of children and the secondary purposes of maintaining the integrity of the family unit, assisting families in caring for their children and recognizing the least disruptive action consistent with the best interests of the children (subsections 1 (1) and (2) of the Act). In assessing best interests, the court should consider the relevant factors set out in subsection 37 (3) of the Act. *JFCS v. H.B.S.* [2012], O.J. No. 5055 (OCJ); *Catholic Children's Aid Society of Toronto v. Z.Y.J.,* 2017 ONCJ 353.

Unreasonable Reduction - *Catholic Children's Aid Society of Metropolitan Toronto v. Pier Angelii M.*, 1998 CanLII 14476 (ON C.J.).To cut back access in preparation for a possible success in its Crown wardship application and then to argue "limited relationship" between a child and a parent strikes this court as a frank attempt to use its discretion regarding access to design the outcome of the trial.

Access - (Crown Wards)

Access is dealt with in sections 58 and 59 of the Act. Section 58 permits one to seek an access order in respect of a child who is in the "care and custody or supervision" of a Society. But section 59(2.1) creates a presumption against access where the child is a Crown Ward.

Test:

- Two part test under s.59.2: must show beneficial and meaningful and not impair possibility of adoption.

- The rebuttable presumption under s. 59(2.1) is conjunctive, a person must rebut both elements of s. 59(2.1) or the access cannot be ordered. Even if a parent is able to rebut the presumption, it does not automatically mean that an access order will be made. The person seeking the access still has to show that the proposed access is in the child's best interests under s. 58(1).

- The focus of section 59 (2.1) is very narrowly on the tests of beneficial and meaningful relationship and no impairment of adoption opportunities. Best interests, including a child's wishes, are not mentioned. It is only when one gets through the narrow gateway of section 59 (2.1) that the wider best interests test of section 37 (3) becomes open for discussion. The new section 63.1 makes it clear the legislature has determined that the best interests of children who cannot return to a parent's care and who are adoptable lie in a permanent family placement by way of adoption or a custody order. Parents might be able to satisfy a court that future adoption opportunities for a child do not likely exist, either because the child's wishes to return to their care are so overwhelming that the child would not consent to a placement or because the child's special needs are so extreme that an adoption is not a realistic possibility. *C.A.S. of Toronto v. T.L. and E.B*., 2010 ONSC 1376 (CanLII).

The test for access clearly emphasizes the success of the adoption once the necessity of adoption has been established. *Children's Aid Society of the Regional Municipality*, 2017 ONCA 931

Access Holder:

In *Children's Aid Society of Toronto v. E.U*., 2014 ONCJ 299 (CanLII, the court found that granting the parents a right of access to a 9-year-old child would impair the child's opportunity to be adopted by the foster parent as the parents kept trying to undermine the placement. Granting an access order would lead inevitably to litigation over openness and the foster parents were becoming increasingly frustrated with the parents. However, the child was granted access rights to the parents as the foster parents respected the child's desire to have contact with the parents and could negotiate with the child an openness arrangement without the likelihood of litigation.

Beneficial and Meaningful: Justice Joseph Quinn's interpretation of the first branch of the test set out in s. 59(2.1) in *Children's Aid Society of Niagara v. M.J*., [2004] O.J. No. 2872 (S.C.) is frequently cited:

> "What is a "beneficial and meaningful" relationship in *clause 59(2)(a)*? Using standard dictionary sources, a "beneficial" relationship is one that is "advantageous." A "meaningful" relationship is one that is "significant." Consequently, even if there are some positive aspects to the relationship between parent and child, that is not enough -- it must be significantly advantageous to the child.
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> I read *clause 59(2)(a)* as speaking of an existing relationship between the person seeking access and the child, and not a future relationship. This is

> important, for it precludes the court from considering whether a parent might cure his or her parental shortcomings so as to create, in time, a relationship that is beneficial and meaningful to the child. This accords with common sense, for the child is not expected to wait and suffer while his or her mother or father learns how to be a responsible parent."

More is required than just a display of love or affection between parent and child. This is particularly so where there is evidence of a number of other factors and dynamics respecting the parent which have impacted on the child's emotional health and well-being. Even if there are some positive aspects to the relationship between parent and child, that is not enough - it must be significantly advantageous to the child. An access order cannot be merely a consolation prize for disappointed adults. See: *The Children's Aid Society of Hamilton v. C.H.,* 2014 ONSC 3731.

The parents have to show more than just that a child has a good time during visits. *Children's Aid Society of Peel (Region) v. S. (M.)* [2006] O.J. No. 5344 (OCJ). More is required than just a display of love between parent and child. The Divisional Court has held that a person seeking access must prove that his or her relationship with the child "brings a significant positive advantage to the child". *Children's Aid Society of Niagara Region v. J.C.* [2007] O.J. No. 1058).

In *Children's Aid Society of Toronto v. A.G.* [2015] 2015 ONSC 6638, the appeal court found that it is improper to import considerations of openness into the beneficial and meaningful test. The court must consider whether the relationship is beneficial and meaningful to the child at the time of the hearing. This was also the decision in *T.L.K v Children's Aid Society Haldimand Norfolk; Feldman on behalf of the child H.B v Children's Aid Society of Haldimand Norfolk and T.K.L.*, 2015 ONSC 5665.

"Beneficial" requires the trier of fact to decide whether, overall, the relationship between the child and the parent is a benefit for the child. This is not a comparative analysis: the question is whether, taking everything into account, access between the child and his father would be good for the child. The analysis is made on an objective standard – the court is asked to decide whether an access relationship would be good for the child – nothing more than that. *Children's Aid Society of Toronto v. J.L.*, 2017 ONSC 2380.

"Meaningful" requires the trier of fact to assess the subjective importance of access for the child. This is separate from the question of whether the access would be "beneficial", a question that requires an objective assessment of the advantages of access for the child. Of course there is some overlap between "beneficial" and "meaningful" – one of the "benefits" of access is continuation of a close family bond between parent and child – something that, by definition, would be meaningful to the child would also be a benefit. Some of the case law seems to combine the two questions – "beneficial" and "meaningful" – into one analysis – "beneficial and meaningful". In my respectful opinion these two analyses ought not to be conflated. *Children's Aid Society of Toronto v. J.L.*, 2017 ONSC 2380.

In *Frontenac Children's Aid Society v. C.T. and M.T.,* 2010 ONSC 3054, the court indicated that the court should also consider the potential detriment to the child of not making an access order.

In *Children's Aid Society of Toronto v. E.U.,* 2014 ONCJ 299, the court took into consideration whether the parents would support an adoptive placement, or possibly undermine it, in determining whether access for the child was beneficial. The court considered that the parents in E.U., would not support an adoptive placement, but still found that access would be significantly advantageous for the ten-year old child, writing at paragraphs 247 and 250:

> **[247]** However, the court needs to be careful about defaulting to a finding that a relationship is not beneficial to a child when parents engage in this type of behaviour. It must examine this behaviour in light of the ability of the child before the court to manage it and then weigh this factor against the other benefits and detriments of the relationship.
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> **[250]** The court finds that the relationship between the child and the parents is beneficial for this child. The impact of the parents' behaviour is mitigated by the child's maturity, resilience and insight and her demonstrated ability to manage this behaviour. The parents, despite their behaviour, have not shaken the child's resolve to live with the caregivers. The child still wants to see her parents, despite their behaviour. The effect of such future behaviour on the child will also be mitigated by the child's knowledge that the court had decided that she will live permanently with the caregivers. The uncertainty that she has coped with for the past 22 months will now be removed.

From *Children's Aid Society of Toronto v L.C.*, 2013 ONCJ 3 (CanLII): Justice Geraldine Waldman observed in *Children's Aid Society of Toronto v. S.A.,* 2012 ONCJ 42 (CanLII), 2012 ONCJ 42, that the court should be conscious of the fact that deficiencies in a parent that might be a concern when the issue is whether to return a child to that parent's care may not be a concern (or may be a lesser concern) when the issue is access. I agree with that observation. Justice Murray considered the following in finding the mother's relationship with the children to be beneficial and meaningful:

> L. and B. have regular, positive, loving interactions with their mother, interactions in which she demonstrates sensitivity to their physical and some of their emotional needs. Dr. Fitzgerald testified that L.'s capacity to form future attachments indicated an early relationship with a primary caregiver that was nurturing in some respects. His view was that the child did not show signs of an attachment disorder. That caregiver was Ms. L.C.. In my view, the children's relationship with their mother is beneficial to them.

The challenge is finding the fine balance between what will preserve a beneficial and meaningful relationship in the best interests of the children and, at the same time, what will permit flexibility to allow the mental and emotional transition towards permanency by the children in their new adoptive home. *CAS of Ottawa v. B. (J.)* 2017 ONSC 1194 (SCJ).

Impairment of future possibility of adoption

The second element of the test under s. 59(2.1) places a burden on the person seeking access to show that an access order would not impair a child's future abilities to be adopted.

CCAS v. L.S. & W.D., 2011 ONSC 5850 (CanLII): The operative words of s. 59(2.1)(b) – "will not impair" – place an onus on the parents to satisfy the court that access to the Crown Ward will not diminish, reduce, jeopardize or interfere with the child's future opportunities for adoption (par. 427). Based on their behaviour, attitude and – perhaps, lack of comprehension the court found that there is a strong likelihood that both parents would continue to behave inappropriately and make damaging statements to the children, during any future access, this would be extremely destructive, and impair opportunity for adoption. The prospect of further delay and uncertainty inherent in a post-adoption openness application, might tip the scales away from an otherwise desirable adoptive family coming forward. Court also alludes to risk of future litigation with new openness changes as s. 145.1.2(7) effectively sets out that the adoptive parents' views about an openness order are only a consideration, but not determinative. The recent amendments to the *CFSA* create new dynamics in the adoption process. This new reality – with multi-phased implications -- must be addressed when parents try to satisfy the conjunctive test in s. 59(2.1) (par.435).

Court should look at whether continued access will scare off adopted parents (this won't always be the case) or delay the adoption process. *Children's Aid Society of the Regional Municipality of Waterloo v. M. (L.)* 2013 39 R.F.L. (7th) 154 (Ont. S.C.J.).

Access won't impair adoption when it isn't in the child's best interests to be adopted. In *Children's Aid Society of Toronto v. J.P., 2015 ONCJ 190,* the court writes:

> **[71]** In J.C.'s case, I am satisfied that even if the Society were able to find a family ready to adopt him, it is not in J.C.'s best interests to be placed for adoption at this time or in the foreseeable future in light of his serious mental health issues and his need for long term residential treatment to address those issues. Given what is known about this child's limited ability to form meaningful relationships, the risk of an adoption breakdown would simply be too great and would not be fair to the child nor to his potential adoptive parents.
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> **[72]** There is ample evidence in this case that J.C., at this time, is not capable of developing "a positive, secure and enduring relationship within a family" and accordingly, the Society should focus on providing treatment to J.C., so that in the future he will be able to form such an enduring relationship.

Low evidentiary standard to meet this branch set out in *The Children's Aid Society of Ottawa v. K.F.*, 2013 ONSC 7207 (CanLII):

> [83] The real issue in this case is whether an access order would impair the children's future opportunities for adoption. The onus is on the grandparents to satisfy the court of both of the statutory requirements for access to a Crown ward. In my view, to the extent this is within their power, they have done so. The grandparents have established that they are cooperative with the CAS, they are not disruptive and they are motivated by the children's welfare. Other than consequences of snacks with too much juice and sugar, now satisfactorily addressed, there has been no feedback from the foster parents that might disincline prospective adoptive parents from openness. The grandparents have not said or done anything during access that would lead a court

> to consider that their approach to seeking an openness order or their conduct if one were granted would be an impediment to an adoption placement. There might be other reasons why potential adoptive parents might oppose an openness order, but not any facts specific or personal to the grandparents on the record before me.
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> [84] It seems to me that in this case, the evidentiary onus has shifted to the CAS. I will not attempt to exhaustively delineate the type of evidence a Society might bring forward to meet the shift of the evidentiary onus to itself. It might be special needs suggesting a child may be difficult to place. It might be from foster parents to show bothersome or inappropriate contact from the applicant for access, or that existing access is disruptive or unsettling to the children on their return to foster care. An access supervisor might report disparaging remarks or refusal to follow foster parent's routines during access. A Society may be in a position to lead some evidence to show that individual prospective adoptive parents under consideration or adoptive parents in general may be discouraged by the possibility of an openness hearing or an openness order. I did not receive this type of evidence. The court cannot presume that all Crown wardship orders with access will automatically deter potential adoptive parents.
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> [85] The ultimate onus of satisfying the court of both of the statutory requirements for access to a Crown ward remains on the applicant for access. In my view, such an applicant is not required to lead evidence to establish that an access order would not deter potential adoptive parents except in reference to the applicant's own conduct or attributes, always considered in relation to the needs of the particular children.

From: *Children's Aid Society of Toronto v. R.C.* 2016 ONCJ 335 about onus for second prong of test:

> [133] Again, the court recognizes that the onus is on the parent to satisfy this second prong of the test. Obviously, a parent who seeks access following the making of a Crown wardship order cannot prove conclusively that she will not impair her child's opportunities for adoption. However, what the mother can do, is adduce evidence that raises a prima facie case in her favour. It would then fall to the society to rebut that prima facie case.

Also see:

Whether the possibility of a future openness application being brought would deter potential applicants for adoption was discussed in *Catholic Children's Aid Society v. M.M.* [2012] O,J. No. 3240 by Murray, J in paragraph 234-236, when she wrote:

> I can only speculate as to whether the prospect of an openness application and hearing would be a deterrent to prospective adoptive parents, since I have no evidence about the pool of prospective adoptive parents for L.M…..
> For the court to evaluate these arguments, evidence about the characteristics of the pool of prospective adoptive parents is required. It is the Society, and not M.M. and J.N., who has access to this data. The Society chose not to present evidence on this point.
> M.M. and J.N. bear the onus of satisfying me that an order for access will not impair L.M.'s opportunities for adoption. They have presented all the evidence they could reasonably be expected to marshal on this point. The Society has presented no evidence on the beliefs and attitudes of its pool of potential adoptive parents as regards possible openness arrangements for L.M., and I decline to make a finding on this point without evidence.

While many forms of access may deter future adoptive applicants, some other forms, such as cards and letters won't and will be ordered. *Children's Aid Society of Toronto v.*

C.J. 2014 ONCJ 221 (CanLII); *Catholic Children's Aid Society of Toronto v. S.B.,* 2013 ONSC 7087.

In *Catholic Children's Aid Society of Toronto v. L.D.E.,* 2012 ONCJ 530 (CanLII), Justice Penny Jones wrote:

> Recent cases have considered potential reasons why courts might reject claims for access on the second prong of the test. See Catholic Children's Aid Society of Toronto, Applicant, and M.M. Respondent, and J.N., Respondent [2012] O.J. No. 3240 and Catholic Children's Aid Society of Hamilton v. L.S., supra. The following is a list of reasons why claims for access have been rejected, or might be rejected, in the future. This list is in no way exhaustive.
>
> 1. Prospective adoptive parents might be deterred from applying to adopt a child with an access order if they are made aware that the person who has the access order might make an application for an openness order because:
>
> a. They would be facing further litigation
> b. They would not know the result of such litigation
> c. They would not know what form an openness order might take
> d. If an openness application is brought, the adoption will be delayed
> e. If an openness order is granted they will have to deal with potentially difficult people and they would be required to deal with those potentially difficult people without the assistance of the Society unless the Society agreed to become involved
>
> 2. Parents of an adoptable child who have a record of being difficult to deal with and not supportive of foster placements might find their access request refused because of their past disruptive behavior. The risk that these parents might undermine a potential placement for adoption if continued contact were permitted would likely be viewed as a reason not to grant an access order because such an order would impair that child's future opportunities for adoption.

Justice Waldman in *Children's Aid Society of Toronto v. S.A., R.M. and S.R.,* [2012] O.J. No 377 (OCJ) at para 165 ordered access for an 11 year old Crown ward. She cited a number of factors which led her to the conclusion that an access order would not impair adoption:

(a) The child was not ready to be placed for adoption in any event;
(b) Given the child's age she would have to consent to the adoption;
(c) There was no history of the mother undermining the child's placement and the current foster placement was supportive of access continuing;
(d) Continued contact with her mother would provide the child with stability and continuity and that the access could support a move to adoption in that respect; and
(e) The concerns which lead to the apprehension and Crown wardship order were not such as to discourage an adoptive family if contact was required.

In *Chatham-Kent Children's Services v. M.T.,* 2015 ONCJ 209, the court found that the adoption pool for an older child (age 6) with developmental needs would be reduced and did not order access.

The phrase "impair the child's future opportunity for adoption" means more than just impairing a child's opportunity to actually be adopted. The impairment also applies to an undue delay in the child being adopted. To interpret this phrase otherwise would be contrary to the paramount purpose of the Act set out in subsection 1(1) – to promote the best interests, protection and well-being of children. See: *Catholic Children's Aid Society of Toronto v. M.M.,* [2012] O.J. No. 2717.

In *Children's Aid Society of Toronto v. A.F.,* 2015 ONCJ 678, the court set out the following attributes the court will consider at this stage of the analysis:

> **[166]** The first attribute is a difficulty with aggression, anger or impulse control. Persons with this attribute are often confrontational. This attribute may threaten the physical or emotional security of the adoptive parents and their family.
>
> **[167]** The second attribute is a lack of support for an alternate caregiver of the child. This might manifest itself in an undermining of the adoptive placement and the child's sense of security with the adoptive family. Persons with this attribute may be relentlessly critical of the adoptive parents and make their lives very difficult. They are usually unable to accept their reduced role in the child's life.
>
> **[168]** The third attribute is dishonesty and secrecy. Persons with this attribute can often not be trusted to comply with the terms of court orders or to accurately report any important issues about the child.
>
> **[169]** The fourth attribute is a propensity to be litigious. Persons with this attribute are usually unable to accept a reduced role in the child's life and are likely to engage in openness litigation.

Benefits of adoption:
The benefits of adoption are set out in *CAS Peel v. W.O., R.S.B. , H.B. and S.B.* [2002] O.J. No. 1099 (OCJ). Creates exclusive and binding legal relationship. Permanent home. Inheritance and devolution of property rights apply. No third party interference. No risk of future court action.

Proof of Adoptability - There is no obligation on the society to prove that the children are adoptable, let alone that there is a prospective adoptive family. *See Children's Aid Society of Niagara Region v. J.C., S.B. and R.R.,* 2007 CanLII 8919, (Ont. Div. Ct.). However, to the contrary see: *CCAS of Toronto v. S.S.B.* [2013] ONSC 7087: The society needs to lead evidence that the child is adoptable before the court determines if there will be impairment by access. Follows: *Children's Aid Society of Toronto v. J.D.* [2007] O.J. No. 3575 (OCJ) that discusses the spectrum of adoptability. Babies with no special needs require little evidence of adoptability, while older children with special needs are on the other end of the spectrum and require more evidence of adoptability. With older children, the evidence should be able to be related to the children before the court. Also followed in *CAS of Haldimand and Norfolk v. R.D.,* 2011 O.J. No. 4082 and *Children's Aid Society of Toronto v. C.J.* 2014 ONCJ 221 (CanLII). Adoption Statistics about age, race, cultural background, special needs and sibling groups should be provided. *Durham CAS v. R.S.* [2010] ONSC 1649.

Just because a child will not consent to an adoption at this time, does not mean that they would not consent later when presented with a viable adoptive home. The current failure to consent may not be enough to beat the test. *CAS Niagara Region v. C.(J.)* [2007] WDFL 2003 (Div. Ct.). However, some evidence should be provided as to likelihood of this happening. *CCAS of Toronto v. S.S.B.* [2013] ONSC 7087.

Nature of access post-crown wardship:
Native Child & Family Services of Toronto v. J.E.G., 2014 ONCJ 109:
It is well settled that an access order is qualitatively different after a crown wardship order from an access order before Crown wardship. In this regard, I agree with the comments made by Clay, J. in para 90 of his decision, *Children's Aid Society of the Region of Peel v. A.R.* [2013] O.J. No. 2969 (OCJ) when he wrote:

> The Court finds that an access order should be made in all of the circumstances of this matter. However the access that will be granted will be significantly less than the current access. The granting of a Crown Ward order means the end of any effort to return the child to the mother's care. Part of the reason for access prior to a Crown Ward disposition is to work on re-integration and to assess the nature and quality of the parenting ability and the relationship between parent and child. After a Crown Ward disposition the access is simply to preserve a form of the relationship that has shown a positive benefit for the child.

Similarly, I accept the proposition that an access order post Crown wardship is qualitatively different than a contact order post adoption. Openness allows for a form of *contact* by the biological parent or member of the biological family (or other person who enjoyed a significant emotional tie with the child) post adoption. After an adoption order is made, the parent-child relationship that previously existed between the child and her biological parents and which was terminated by the Crown wardship order becomes vested in the adoptive parents. Thus**,** it is not the parent-child aspect of the relationship that is being continued post ad option by way of an openness order. See: *Re S.M*. [2009] O.J. No. 2907 a decision of Katarynych, J.

Access – Post-adoption under CLRA: This option is still available and not inconsistent with the CFSA openness provisions. Best interests of child and adoptive family rights will be given precedence. Parents are more likely to have a chance of success if established post-crown-no access decision access. *J.A. v. J.B.,* 2011 ONCJ 726 (CanLII). If a party wishes to just change a final order for access, they do not have to bring a status review application- they can just apply to vary access under section 58 of the Act. See: *H.A. v. CAS of Ottawa*, [2003] O.J. No. 713 (Ont. Div. Ct.).

Adding Parties - The court in *Children's Aid Society of London and Middlesex v. S.H.* [2002] O.J. No. 4491 (SCJ- Family Court) set out four principles for the court to consider in exercising its discretion to add a party as follows:

> (1) whether the addition of the party is in the best interests of the child,
>
> (2) whether the addition of the party will delay or prolong proceedings unduly,

> (3) whether the addition of the party is necessary to determine the issues, and
> (4) whether the additional party is capable of putting forward a plan that is in the best interests of the child.

The court in *Children's Aid Society of London and Middlesex v. J.P.*, [2000] O.J. No. 745, (Ont. Fam. Ct.), added one more principle:

> (5) whether the person seeking to be added as a party has a legal interest in the proceeding (i.e., whether an order can be made in their favour or against them).

It is not necessary for all factors to favour the person seeking party status for the court to add him or her. While delay and legal interest are relevant, they are not, by themselves, determinative. The overarching consideration is the child's best interests. *A.M. v. Valoris Pour Enfants et Adultes de Prescott-Russell*, 2017 ONCA 601.

The governing rule is 7 (5). If the party is capable of putting forward a viable plan and there is no one else to put forward their plan, the party should be added. *Catholic Children's Aid Society of Toronto v. H.(D.),* 2009 ONCJ 2 (CanLII) (OCJ). Aunt not added where she waited one year to apply, child settled elsewhere, since at some point, there are diminishing returns to continued litigation, where harm of remaining in limbo of foster care outweighs possible benefit resulting from full custody trial. *Children's Aid Society of Peel Region v. Mizan A.*, 2009 ONCJ 348.

If a statute prescribes a limited role for a certain class of persons, i.e. foster parents in the CFSA then courts should consider bestowing party status under Rule 7 very cautiously and rarely. *CAS Niagara v. Wendy D.*, 2001 O.J. No. 5964. However if the Act extends preferential treatment(extended family) the chances are better. Grandparents added where there is a viable plan of care *CAS Halton v. C.S., D.D. and M.G. J.* 2004 CarswellOnt. 2027 (OCJ).

Grandparents not added where older child's clear wish was not to live with them. *Children's Aid Society of Toronto v. K.A.* 2014 ONCJ 304 (CanLII).

Adequate Parenting - The issue is not whether a child will be better off with someone other than the parent. The issue is whether the child has received a level of parenting care that is below the minimum standard tolerated in our community. See *Saskatchewan Minister of Social Services v. S.E. and E.E.*, [1992] S.J. No. 375, 1992 (Sask. Q.B.); *Children's Aid Society of Toronto v. V.L.*, 2009 ONCJ 766.

Adoption – Service (Dispensing with consent)

In adoption applications, there should be even less flexibility or room to deviate from the statutory criteria for dispensing with notice and an even higher standard required of the evidence because the stakes are even higher than in child protection cases. Adoption forever severs the child's ties to the biological parent. Further, an order that dispenses

with a required parental consent effectively decides the application for adoption in most cases. An order to dispense with notice to parents whose consent is otherwise required, virtually guarantees that the order dispensing with their consent will be made. For these reasons, I find that the court does not have jurisdiction under Rule 2 to dispense with service of notice in any circumstances other than those set out in section 138. This is so even though requiring service may be unfair, unjust, and contrary to the best interests of the child. *K.C.F. v. M.W.,* 2016 ONCJ 689.

Age - Age, by itself, does not disqualify a parent from caring for his or her child, especially when that age is so close to adulthood. Inexperience for caring for infants is likely to afflict almost any first time parent. No one would be able to care for his or her child if this was a bar to parental care and custody. *Children's Aid Society of Algoma v. S.M.M.,* 2014 ONCJ 12 (CanLII).

Amendments - The court has discretion to make a finding that a child is in need of protection pursuant to a clause of the Act not pleaded, if justified by the evidence, the father had prior disclosure of the relevant evidence, is not caught by surprise and has had a full opportunity to test this evidence. *Durham Children's Aid Society v. R.S. and J.M. [2005] O.J. No. 570 (SCJ)* and *Children's Aid Society of Hamilton-Wentworth v. K.R. [2001] O.J. No. 5754 (SCJ-Family Court).*

Amicus – *Amicus* ordered in child protection case where mother had breakdowns with 3 prior lawyers. Court found that section 7 Charter rights were engaged, but it was likely that if another lawyer was appointed that relationship would breakdown. If this was on the eve of trial or a summary judgment motion, this would leave the mother without any assistance. Court found that amicus appointments not limited to criminal law. It is important for child protection courts to have this option, as there is state intervention in the family, power imbalances and charter rights are engaged. Court set out preliminary parameters on the role of *amicus. Children's Aid Society of Toronto v. S.A*., 2017 ONCJ 553.

Although the Attorney General and a court appointed amicus should discuss rates and the mode of payment, there was no obligation on the Attorney General to negotiate rates. It could pay counsel prepared to take legal aid rates. *Morwald-Benevides v. Benevides*, 2017 ONCA 699, 2017.

Apprehension - The warrant for the apprehension still requires substantial risk. However even if the apprehension is invalid this does not affect the application. *CAS St. Thomas v. F*., 2003 36 RFL (5^{th}) 310 (OCJ).

Evidentiary requirements to issue warrant set out in *Children's Aid Society of Algoma v. R.S.*, 2013 ONCJ 688 (CanLII):

> Whether it is of a Justice of the Peace, or of a child protection worker, the belief that a child is in need of protection cannot exist in a factual or statutory vacuum. The belief must be tied to at least one of the many grounds set out in section 37(2) that permit such belief to exist. Put somewhat

differently, the person having the belief (or at least the reasonable and probable grounds for believing) must be able to identify from what harm or risk of harm the child needs to be protected.

The second pre-requisite is not the same for the Justice of the Peace as it is for the child protection worker. For the former (the Justice of the Peace), the belief is either that a less restrictive course of action is not available, or that a less restrictive course of action will not protect the child adequately. Although these are phrased disjunctively, from a logic standpoint, the unavailability of a less restrictive course of action trumps, and effectively forecloses, consideration of whether a less restrictive course of action would adequately protect the child.

What seems to be inherent in the formation of either belief is the need for information about both the availability of less restrictive courses of action, and what these courses of action involve. The source of any and all knowledge of a Justice of the Peace considering a request for an apprehension warrant is "a child protection worker's sworn information". Accordingly, it seems to follow that the contents of this sworn information must include details about alternative courses of action, why they would be inadequate to protect the child, or that these simply do not exist. A Justice of the Peace that does not have the information needed to form either one or the other of these beliefs cannot meet the second pre-requisite in section 40(1)(b), and thus would not be authorized to issue the warrant sought. The requirement of the two pre-requisite conditions for a Justice of the Peace is not disjunctive; it is conjunctive.

From: *Kunuwanimano Child and Family Services v. S.L.,* 2017 ONCJ 518:

[12] Section 40 CFSA begins with authorizations from a justice of the peace to apprehend a child [ss.2 and 3]. It then continues with court ordered authorizations to apprehend. [ss 4]. Subsection 6 provides to a child protection worker the authority to enter a place pursuant to the warrant or order to search for and remove a child. It is not until subsection 7 when the CFSA first provides for warrantless apprehensions. This is, in my view, an indication that apprehension pursuant to warrant or order is intended to be the general rule, and apprehension without warrant is intended to be the exception.

[14] The CFSA gives extraordinary powers to a society. Who else in our society can legally take a child away from its caregiver? However, it dictates how those powers are to be exercised. Also, and more importantly, it establishes judicial oversight on much of what the society does. One of the first ways in which it does so is to involve a Justice of the Peace who must first be satisfied, based on what the worker puts before him or her, that it is appropriate to issue a warrant to apprehend. What the Justice of the Peace needs is reasonable and probable grounds to believe that, firstly, the child is in need of protection, and, secondly, that a less restrictive course of action is not available or will not protect the child adequately.

[15] This is not what a child protection worker apprehending without warrant needs. This worker need much more. She needs reasonable and probable grounds to believe not only that a child is in need of protection, but also that
".... there would be a substantial risk to the child's health or safety during the time necessary to bring the matter on for a hearing under subsection 47 (1) or obtain a warrant under subsection (2) ....(my emphasis)

[16] This second requirement is a temporal one. It forces the worker to ask
- How much time would it take to bring this matter to court?
- How much time would it take to obtain a warrant from a Justice of the Peace?[6]
- Is there a risk to the child's health or safety within this time frame?
- What is the risk to the child's health or safety within this time frame?
- Is the risk to health or safety of the child a substantial one?

[17] Not to be minimized, or forgotten entirely, is the "reasonable and probable grounds" to believe all of this, and also to believe that the child is in need of protection. There is plenty of case

> law that deals with 'reasonable and probable grounds' (R&PG), particularly in the criminal law sphere. It has both a subjective and an objective component, both of which must be present. Moreover, the words "child in need of protection" has a specific meaning in the CFSA and, correspondingly, in apprehensions taking place under the CFSA. The apprehending worker must have R&PG to believe that the child is in need of protection under at least one of the grounds specified under the CFSA in its s.37(2).

Apprehension – Effective date

In case where parents had joint custody, society told parties that if father gave mother access to child, child would be apprehended. Date society did this was effective day of apprehension and case was dismissed when it was brought into court 11 days later, instead of 5 days later. Court also criticized society for counseling father to breach a domestic court order. *Children's Aid Society of Brant v. C.H.,* 2017 O.J. No. 2209 (OCJ).

Apprehension – Five Day Rule

Subsection 46 (2) of the *Child and Family Services Act* provides that a child must be brought to court as soon as practicable and in any event within 5 days of his or her apprehension. If the fifth day falls on a holiday or a day the court is closed, the case can be brought to court on the next day that the court is open. Subsections 89 (1) and (2) of the Legislation Act provide for this. Its terms are not inconsistent with the paramount purpose set out in the Act. *Children's Aid Society of Toronto v. A.H.,* 2017 ONCJ 265.

Assessments

- We have the right to determine who pays for the assessment. – *CAS Toronto v. O.(K.)* (2003) 48 RFL (5^{th}) (OCJ).

When so much time has passed, it is important to remember the cautionary words in *Children's Aid Society of Toronto v. R.(J.)* (2003), 39 R.F.L. (5th) 257 (Ont. C.J.), when the court spoke of the use of section 54 assessments and confirmed that the evidentiary value of the opinion in a report must be limited to the information then made available to the assessor. The court stated:

> But there is a price to be paid for this "fresh" and "independent" look. The only real certainty for a parent and child in this assessment process is the uncertainty of the snapshot that may emerge.
>
> The utility of the assessment findings and opinion are only as good as the information upon which those findings have been based. Findings and opinions fuelled by histories taken by others put in issue the extent to which the histories themselves were an accurate depiction of circumstances and persons. Findings and opinions rooted in "tests" peculiar to the field of assessment, whether standardized or otherwise, for measuring aspects of human functioning are sometimes ill understood.

Second opinions: *Catholic Children's Aid Society of Toronto v. B.W.,* 2013 ONCJ 417 (CanLII): In a perfect world, with unlimited resources and no time constraints, second opinions can be a nice thing to have. But we are not living in a perfect world; we do not have unlimited resources, and we are not without serious time constraints. And, most importantly for the purpose of this motion, the court must be guided by the wording of the legislation, which requires a finding that the proposed assessment is "necessary" before judicial discretion will be exercised in favour of ordering a section 54 assessment.- Request for a second opinion was denied.

Assessments – Release to child over 12

Court found release of report not in children's best interests and would cause them emotional harm in analysis under subsection 54 (5) of the CFSA. Views and preferences of the children are only one factor – the court must look at the overarching purposes of the Act and provide for the safety and well-being of children. The court also found that the test for emotional harm under clause 37 (2) (f) was not applicable in this analysis. See: *Children's Aid Society of Ottawa v M.,* 2015 ONSC 4422.

Best Interests – In assessing the best interests of a child, the court needs to consider the harm a child might suffer in losing a relationship with a parent, caregiver or sibling. The relevant clauses in subsection 37 (3) of the CFSA are the child's emotional needs in connection with his relationship with the parent (s. 37(3)1), the importance of the child's development of a positive relationship with the parent (s. 37(3)5), the child's relationships and emotional ties to the parent (s. 37(3)6) and the risk of harm to the child if he were kept away from his parent (s. 37(3)11) were all highly relevant. Children's Aid Society of Toronto v. G.S. 2012 ONCA 783.

Bifurcated Hearing – The *CFSA* contemplates this. The same judge does not have to preside over both stages - Kelly 2003 45 RFL (5th) 403 SCJ. *Children's Aid Society of Algoma v. B.A.,* [2001] O.J. No. 2745, (Ont. Ct. Justice). At paragraph 21 it is stated that:

> If a finding is made in a case, the Act does not, by subsection 50(2), require a repetition of any **evidence** that may apply to both finding and disposition that has already been adduced. Such **evidence** is already before the Court. A **bifurcated** proceeding is still only one proceeding. Subsection 50(2) does not purport to exclude any **evidence** that is relevant to disposition, it merely provides for an order of precedence of presentation of **evidence** in a child protection case.

Care and Control – Subrule 7 (4) of the *Family Law Rules* says that every person who has care and control of the child, except a foster parent shall be named a party. In Children's Aid Society of Toronto v. C.K., 2013 ONCJ 2917, the children were placed in the father's custody. His parents assisted with caring for the children and asked to named as parties. The court rejected this position writing at paragraph 33:

> The paternal grandparents have shared in the care of the children, but do not have control over them. The children have been placed by the court, subject to supervision orders, in the custody of

> the father, not the paternal grandparents. The father, not the paternal grandparents, has the exclusive legal right to make decisions about the children, including their medical care, religion and education. He is the person who has control of them.

Charge of the Child –Can't use self-help tactics to establish being in charge. *Windsor-Essex Children's Aid Society v. E.T. and G.M.* 2012 ONCJ 109. There can be more than one person in charge. *CAS Toronto v. A.(S.) and R.(M.)* 2008 ONCJ 348 (OCJ). Case law interpreting this section indicates that the person who "had charge of the child immediately before" apprehension is not necessarily the person who had physical care of the child at the moment of apprehension, or even necessarily the person named in a custody order. Where custodial arrangements preceding apprehension are unclear, the courts will look to see if there is an individual who has been the child's primary caregiver for a significant period of time prior to apprehension, and may find that that individual is the person who "had charge of the child immediately before" apprehension.

In paragraphs 22-32 of *Children's Aid Society of London and Middlesex v. S.D.* ,[2008] O.J. No. 3796, Justice R.J. Harper does a thorough review of the case law related to who has charge of a child as follows:

> 22 The structure of s. 51(2)(a) and (b) directs the court to return a child to the "care and custody of the person who had charge of the child immediately before intervention" without supervision or with supervision and terms and conditions. The court cannot keep the child in the care of the Society *"unless the court is satisfied that there are reasonable grounds to believe that there is a risk that the child is likely to suffer harm and that the child cannot be protected adequately by an order under clause (2)(a) or (b)."* [my emphasis]
>
> 23 The term "charge" is not defined in the *CFSA*. It has been interpreted in at least three cases. In *Children's Aid Society of Algoma v. Teena G. et al.* (2002), 2002 CanLII 52569 (ON CJ), 125 A.C.W.S. (3rd) 1020 (Ont. C.J.), Kukurin J. considered the definition of "charge." He made the following comment at para. 15: "... 'Charge' has connotation of authority and responsibility. 'Charge' of a child suggests some established relationship, not something transient or temporary. ..."
>
> 24 Kukurin J. did not think that simply having possession of a child was sufficient to bring that person within the meaning of the term "charge".
>
> 25 In *Children's Aid Society of Ottawa v. H.C. and C.C.* (2003), 2003 CanLII 38754 (ON SC), 127 A.C.W.S. (3d) 1159 (Ont. Sup. Ct.), Blishen J. also considered the meaning of the term "charge" in s. 51. Blishen J. found that "charge" was linked to the term "care and custody" within s. 51:
>
> > [14] In order to apply the appropriate test on this care and custody motion, it is necessary to determine who was "the person who had charge of the child immediately before intervention". The word "charge" is not defined under the *Child and Family Services Act*. However, a close reading of the legislation makes it clear that the term "charge" is linked to the term "care and custody" as outlined in clauses 51(2)(*a*) and (*b*), which state that the child
> > ... remain in or be returned to the care and custody of the person who had charge of the child immediately before intervention.
>
> 26 Blishen J. stated that questioning who had "charge" of the child is akin to questioning who had "care and custody." Like Kukurin J., Blishen J. was of the opinion that there had to be an active relationship of care and not mere possession of the child.

> 27 Most recently, in *Children's Aid Society of Toronto v. S.A.*, 2008 ONCJ 348 (CanLII), [2008] O.J. No. 3110 (Ont. C.J.), Spence J. considered the same issue. In that case, Spence J. splits the idea of "charge" and "custody." He adopts a definition of "charge" that is grounded in actively caring for the child and potentially distinct from the legal notion of "custody." Spence J. ultimately determines "charge" to mean an active, caring relationship. He states:
>
> > [48] However, clause 51(2)(a) of the *Child and Family Services Act* does not talk about returning the child to the person who had "custody" but rather, returning the child to the person who had "charge" of the child. There clearly is a difference between the meaning of "custody" and "charge". There could be many instances where one person has custody of the child and another person has "charge" of that child.
>
> 28 Spence J. gives an example of his reasoning to demonstrate the difference. He describes a situation whereby a single mother, who has custody and charge of a child, informally relinquishes that child to an aunt for care purposes. After several months in the aunt's care, for example, the child would no longer be in the mother's "charge" but rather the aunt's. Spence J. was of the view that for a person to have "charge" of a child there must be evidence of active care and responsibility.
>
> 29 I agree with the reasoning of Spence J. I am of the view that there must be evidence that a person has an active relationship with the child that includes care and responsibility. It is something more than physical possession or limited incidents of care.
>
> 30 I am of the view that s. 51 is structured in the manner that it is because the statute establishes a priority to the person who may have had the most active and responsible involvement with the child immediately before the apprehension.
>
> 31 If the court determines that the evidence discloses that there is a person who had the charge of the child immediately before intervention, then the court must return the child to that person unless there are reasonable grounds to believe that there is a risk that the child is likely to suffer harm and that the child cannot be protected adequately by an order that provides for a return on terms (s. 51(3)).
>
> 32 It is possible that more than one person had the charge of the child immediately before intervention and they subsequently compete for the return of the child to them at a temporary care hearing. In that case the court must consider the risk of harm of returning the child to either person.

The Act gives priority to the person who had charge of the children prior to society intervention under Part III of the Act (subsection 51 (2) of the Act). There can be more than one person in charge of the children. See: *Children's Aid Society of Toronto v. A.(S.) and R. (M.)* 2008 ONCJ 348 (OCJ).

Where child lived with mother, society told mother that they would apprehend if child not placed with father, society delayed (2 months) in bringing case to court, court found that both parents had elements of charge of the child and test in 51 (2) applied to both. *CCAS of Toronto v. W.I.,* [2014] ONCJ 620.

Where the mother had taken the children from North Carolina in the middle of court proceedings and the father had obtained a chasing order for custody, the court found that both parents had charge of the child, even though the children had been with the mother

in Ontario for one year. *Children's Aid Society of Toronto v. C.S. and K.J.*, 2015 ONCJ 111.

Charter of Rights – It applies to child protection cases. In particular, the removal of a child from a parent engages that parent's security of the person. Court required state to pay for counsel in *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 SCR 46. The court found that the s. 7 protection of a person's physical and psychological security extends beyond the sphere of criminal law, and can be engaged in child protection proceedings. The court found that the Minister's application to extend the custody order was a prospective violation of Mother's s. 7 rights to security of person, that in the circumstances of that case the restriction on her security of person would not be in accordance with the principles of fundamental justice if she was required to proceed without counsel, and that the appropriate remedy under s. 24 would have been to order the funding of counsel for Mother.

The court held in G.(J.) that if a potential s. 7 breach was established, s. 1 did not save the breach. Justice Lamer noted that "there are only two possible remedies a judge can order under s. 24(1) to avoid a prospective s. 7 breach where the absence of counsel for one of the parties would result in an unfair hearing: "an order that the government provide the unrepresented party with state-funded counsel, or a stay of proceedings." Finding that it was clearly inappropriate to order a stay in protection proceedings in which the safety and best interests of a child were at issue, Justice Lamer found that the only alternative was an order for state-funded counsel.

In G. (J.) the court held that the remedy of an order for state-funded counsel was available, provided that the applicant established inability to pay for a lawyer. Justice Lamer did not engage in an analysis as to what test a court should employ to assess inability to pay. At one point Justice Lamer referred to "the parent *(who)* wants a lawyer but is unable to afford one"; at another he referred to the "indigent parent"[17]. The analysis was unnecessary, because it was obvious that the parent in G. (J.), who was supported by public assistance, could not afford a lawyer

Justice Lamer did provide that in future applications for state-funded counsel in protection proceedings the court should, in addition to assessing the applicant's ability to pay for a lawyer, consider whether an applicant has exhausted all possible avenues for obtaining state-funded legal assistance.

R. v.Morgenthaler, [1988] 1 S.C.R. 30 at 173: The right to security of person has been held by the Supreme Court of Canada to protect both the physical and psychological integrity of the individual.

Manitoba (Director of Child and Family Services) v HH and CG 2017 MBCA 2017 MBCA: It was a breach of the Charter to fail to hold a hearing as to whether the child was in need of protection within a reasonable period of time when requested by the parents. The remedy to the breach was not an interim protection hearing (as ordered by the trial court) but an expedited hearing.

***Also look under counsel

Child over 12 attending hearings:

Subsection 39 (4) of the Act creates a presumption that children12 and over may attend hearings. The resumption is rebuttable if the child will suffer emotional harm. In high-conflict case, where protection issue is over-immersion of children in conflict, court found presumption was rebutted. Court has a continuing obligation to monitor whether children should attend. *Jewish Family and Child Service of Greater Toronto v. L.R.,* 2017 ONCJ 472; request for stay dismissed in J*ewish Family and Child Service of Greater Toronto v. R.,* 2017 ONSC 4442.

Child receiving copy of family assessment

In *Jewish Family and Child Service of Greater Toronto v. L.R.,* 2017 ONCJ 472; request for stay dismissed in J*ewish Family and Child Service of Greater Toronto v. R.,* 2017 ONSC 4442, a family assessment was conducted by a social worker. His report indicated it should not be shared with children 12 and 16. It was not a section 54 report. The children's lawyer wanted to share the assessment with the children. The court said no – it would cause them emotional harm. The court found that subsections 54 (5) and 116 (6) of the Act were instructive. These subsections restrict children's access to court-ordered and secure treatment assessments if it will cause them emotional harm.

Child as Witness: Father not allowed to call a 16 year old child in a child protection case in *CAS of Ottawa v. S.M.,* 2011 ONSC 2434 (CanLII) and set out the following considerations for the court to consider in exercising its jurisdiction:

(a) The age and maturity of the child,
(b) The child's view with respect to testifying,
(c) The trauma that such an experience might or would cause the child especially if it involves testifying for or against a parent,
(d) The purpose for which the child is being called as a witness,
(e) The reliability and probative value of the child's evidence,
(f) The importance and relevance of the child's evidence, and
(g) The availability of evidence from other sources to address the issue in question.

The Ontario Court of Appeal in *Miglin v. Miglin*, 34 R.F.L. (5th) 255 (S.C.C.), made it clear that calling children as witnesses in a family law dispute is a discretionary decision of the trial judge. See also section 39(5) of the *Child and Family Services Act* of Ontario.
Children's Lawyer – Role

Motion by OCL to be removed denied. There was a medically fragile baby and mother and society differed about whether life-saving measures should be used. Case discusses that the role of the OCL extends beyond merely advocating children's views and preferences. *Children's Aid Society of Brant v. K.N.,* 2017 ONCJ 202.

In *Jewish Family and Children's Services of Greater Toronto v. J.K. and S.K., 2014 ONCJ 792 (CanLII), 2014 ONCJ, 792*, Justice Caroline Jones found:

> It is not essential to the appointment of a legal representative for the child under Section 38 of the *Act*, that the child be capable of providing instructions to counsel. Thus, a legal representative may be appointed under the *Act* for a child who is severely developmentally delayed or even non-verbal.
>
> For a non-verbal child who is unable to communicate wishes, the position will be formulated on behalf of the child by his or her legal representative will be based upon the factors relevant to the child's interests, other than the child's wishes.

Clinical Records - If no consent is given, a court may order the release under s.35(5) of the Mental Health Act subject to sections (6) and (7). 2 step procedure. In chambers, determine if danger to third party. If none, disclosure ordered. Second, the party summoning the information has the onus, that notwithstanding the danger, disclosure would serve the interest of justice. *CCAS Toronto v. J.S.,* 1980 O.J. No. 2175 (OCJ).

- even if get the consent the report cannot be disclosed without following the procedure in s. 35(9) *CAS Algoma v. C.L.* 2003 O.J. No. 5559.
- S.74 CFSA – the information sought must be relevant.

Cognitive Ability - *Children's Aid Society of Kingston v. F.R.* (1975), 23 R.F.L. 391 (Ont. Prov. Ct. – F.D.). Thomson J. reviewed the development of legal principles pertaining to "low parental intelligence" within the framework of child protection and, at para. 8, said:

> **8** It is my opinion that the court should take the following approach when faced with cases such as the one now before me. First of all, the fact of low parental intelligence should not be taken as determinative in itself of the child's need for protection. Rather, the question should be one of deciding whether, in light of their individual capabilities, these parents are able to meet their parental responsibilities. If the answer to this question is no, then the judge should decide whether, given the proper assistance and intervention, the parents can be provided with the tools necessary to care adequately for their child. This issue should not be resolved by simply noting the difficulties involved in securing the needed help when the child remains within the home. The actions of the persons involved in this case show that, with a co-ordinated effort, extensive assistance can be given to parents such as the R. Only if it is felt that the risk to the child is too great, even with outside help, should the court remove the child from the home. If such removal is necessary, it would seem to me that in most cases this would require an order of Crown wardship, at least if the child is young, highly adoptable and not too closely attached to his or her natural family. I think that it should also be noted that the risk to the child need not be physical; it would seem to be understandable that if a child lives in an environment which is grossly deficient in stimulation and emotional involvement, he or she may be damaged or at least may fail to develop to the extent to which he or she is capable. It is difficult to apply this known fact to individual cases but clearly the court's perspective should be broader than a simple examination of the child's physical health. It may be that the child's intelligence and capabilities, if known, would be relevant information when deciding whether the parents are able to care adequately for the child. If, even with outside help, it appears to the judge that they are not able to perform the task, an order removing the child would be indicated.

Consents –

Section 55 of the Act sets out a list of questions to ask if there is an L finding and the placement is other than with the person in charge, including if services to keep the family together have been offered, if 12 or over, the child had ILA, and understands the consent, the consent is voluntary and the child consents.

Counsel (Right to public funding) – to get publicly funded counsel:
1. Financial circumstances must be extraordinary
2. Must make serious effort to save money, borrow money, obtain employment and exhaust assets.
3. Must be prudent with finances
Huron-Perth CAS v. J. (J.) (OCJ) [2006] O.J. No. 5372

Counsel ordered by court in *Catholic Children's Aid Society of Toronto v. J.R.C.,* 2015 ONCJ 729. There is no principled reason to restrict consideration of the potential breach to s. 7 rights posed by a protection proceeding to cases in which a parent is threatened with loss of custody. Justice Lamer in G. (J.) held that the key to establishing a restriction of security of person in a protection proceeding is:

> • That a state action would label a parent as unfit, "usurp the parental role", or pry into the intimacies of the parent/child relationship; and
> • That the state action would have a "serious and profound effect" on the person's psychological integrity.

The court in J.R.C. wrote:

[74] In this case, the order claimed by the Society would usurp and restrict J.'s role as a parent in very significant ways.
• J. will not be permitted to make decisions about her children which would allow them to be cared for by their father at any time.
• J. will become a single parent by virtue of state action, and suffer all the stress and anxiety that is the result of that transition. She alone will be responsible for maintaining employment and caring for two young children.
• J. will not be allowed to determine when or where or under what conditions the children might see their father. She will have to insure that they do not see him, except when supervised by persons pre-approved by the Society.
• The Society will be authorized to take very intrusive actions into J.'s family life to monitor compliance. Workers may come to the home for unannounced visits at any time of day or night. They will be able to interview the children, speak to the children's daycare providers, teachers, and the family doctor, and canvass neighbours. Given the Society's view of the matter (that G. should have supervised access in perpetuity), that intrusion could well extend for years, up to the time that E. reaches the age of 18.

[75] In addition, it is important to note there is a real possibility that J. could lose custody of the children as a result of the trial. Although the Society now requests a supervision order, its view set out in its Plan of Care is that J. does not recognize and accept the risk which G. poses to the children. The court is not restricted in ordering a disposition to the relief requested by the parties. It is open to the court to make any order available under s. 57 of the Act—including orders for Society or even Crown wardship-- if the court finds that the order is in the best interests of the children.

[89] It is worth note that the Ontario Court of Appeal in a recent criminal case, in R. v. Rushlow, set out a less restrictive approach to a financial test for the appointment of state-funded counsel than that found in R. v. Malik.

Crown Wardship

A Crown Wardship order is probably the most profound order that a court can make. The judge must exercise this only with the highest degree of caution, only on the basis of compelling evidence and only after a careful examination of possible alternative remedies. *CAS Hamilton v. M.,* 2003 O.J. No. 1274 (UFC).

In determining the best interests of the child, the court must assess the degree to which the risk concerns which existed at the time of the apprehension still exist today. They must be examined from the child's perspective. *CAS Toronto v. C.M.* [1994] 2 S.C.R. 165.

Consideration should be given as to whether the Society has given the parent an opportunity to parent. Where the Society frustrates contact with the parent and offers no services, this consideration must come into the equation. *Children and Family Services for York Region v. A.W. and M.M. [2003] O.J. no. 996 (Sup. Ct.); CCAS v. P.A.M. [1998] O.J. No. 3766 (OCJ) CAS of the United Counties of Stormount, Dundas and Glengarry v. C.K. [2001] O.J. No. 128 (Sup. Ct.).*

Minimum Standard: The issue is not whether the children will be better off with parents other than the natural parents. If that was the criterion for a protection order, not many children would remain with their natural parents. The issue, however, really is whether the children concerned are receiving a level of parenting care that is below the minimum standard tolerated in our community. Sask. Minister of Social Services v. E.(S.) [1992] 5 WWR 289 (Sask. QB); *Family & Children's Services of St. Thomas and Elgin v. A.C.,* 2013 ONCJ 453 (CanLII).

Difficulty of jumping from supervised access to a return home to a parent: From: *Children's Aid Society of Toronto v. R.H.,* 2016 ONCJ 181, par. 140:

> The mother has only had supervised access with the child since 2012. It would be irresponsible for a court to return the child to her care until she could demonstrate that she could adequately parent the child without supervision for extended periods. This would be a lengthy process. Even in the best-case scenario, the court could not place the child with the mother without first testing whether she could adequately parent him, first, on a fully unsupervised basis, second for full days, and third, for overnight visits. This process would need to take place for at least 9 months to a year for the court to effectively evaluate whether a return of the child was viable. There is a huge difference between managing a child in a structured setting for a short period of time and caring for a child on an extended basis. The time to attempt extended access in this manner has long passed as the statutory timelines in the Act have been exceeded.

Criminal convictions - Under Canadian law, a criminal conviction is admissible in a civil proceeding and generally constitutes *prima facie* proof, not conclusive proof, of the underlying facts or guilt, although it can be rebutted with evidence that was not available at the criminal trial. See *W.H. v. H.C.A*., 2006 CanLII 27865 (ONCA); *Children's Aid Society of Halton Region v. J.O.*, 2013 ONCJ 191 (CanLII).

Custody Orders – Now one of the options under s. 57.1. Should be careful in granting domestic interim custody order if it compromises the procedural protections afforded a parent under the CFSA. *O.(D.) v. C.(C.),* 2009 ONCJ 239 (CanLII).

The court when making a 57.1 custody order may order any of the incidents of custody/access set out in section 28 and 34 of the Children's Law Reform Act. *Windsor-Essex Children's Aid Society v. E.W., 2014 ONCJ 562 (CanLII).*

Custody orders (Section 57.1) - Consents: It must be an informed consent. Require the following:

a) She has been made aware that the society will no longer be obliged to be involved with the family.
b) The society will not be a party to any future change of custody/access motions.
c) Her rights and obligations as a custodial parent have been explained to her.
d) The option (and possible benefits) of proceeding under the *Children's Law Reform Act* have been discussed with her.
e) She understands the nature and consequences of the consent, and
f) The consent appears to be voluntary.

Children's Aid Society of Toronto v. K.(C.), 2008 ONCJ 38 (CanLII) (OCJ).

A court can make an order under s. 57.1 that has the effect of varying an existing final order under the *Children's Law Reform Act*. However, there would need to be three specific pre-conditions: first, all persons who are parties to the final order under the *Children's Law Reform Act* must be parties in the *CFSA* proceeding; second, all parties in the *CFSA* proceeding must be served with the claim of any party who seeks an order under s. 57.1; third, a court must find that there has been a material change in circumstances. All applications under the CLRA, including change motions are pursuant to section 21. Section 29 sets out the legal criteria to change an order and section 28 sets out the powers of the court. See: *Children's Aid Society of London and Middlesex v S.A.R.,* 2015 ONSC 2534.

A final access order does not have to be made at the same time as the custody order. The phrase "at the same time as the order is made" has been interpreted to mean that the access order referred to is one made within the same case. Section 57.1 was formulated to allow a court to make a custody order without the need for a separate application under the *Children's Law Reform Act*. It allows for permanency planning in an expeditious manner. Defining the child's access to others is part of this permanency planning. Also, if the access order had to be made literally at the same time as the custody order, it would defeat the purpose of the summary judgment rule which, in part, is a rule to allow for the expeditious and cost-effective resolution of cases. *Windsor-Essex Children's Aid Society v. J.D.,* 2017 ONCJ 20.

DNA Testing – The court has jurisdiction under section 10 of the CLRA to order DNA testing in a child protection case. *Children's Aid Society of Brant v. H.H.,* [2007] O.J. No. 4083 (OCJ). The court can also direct who pays for the testing. *Catholic Children's Aid Society of Toronto v. N.S.,* 2015 ONCJ 388.

Dismissal (use of s. 51 (2)) - Section 51(2) of the Act does not provide a basis for a motion for summary dismissal of a protection application. The Act does *not* require the Society at this stage of a proceeding to establish on the balance of probabilities that a child is in need of protection. The Family Law Rules require that a hearing be held to determine that issue within 120 days of the date the proceeding was commenced. That timeline may be extended if it is in a child's best interests. *Catholic Children's Aid Society of Toronto v. E.S., [2016] O.J. No. 2558*.

Dispensing with service – The court cannot dispense with service on a party if he is capable of being served, even if the party has had little involvement with the child or might be a risk if served. *Windsor Children's Aid Society of Toronto v. R.L.* 2012 ONCJ 325 and *Children and Family Services for York Region v. E.T.* 2009 Canlii 72329 (SCJ). To the contrary see: *CAS of Toronto v. L.O.* [2003] O.J. No. 4459.

Disposition - The significance of the child-centered approach is that good intentions are not enough. The test is not whether the parents have seen the light and intend to change, but whether they have in fact changed and are now able to give the child the care that is in his or her best interests. There is not to be experimentation with a child's life with the result that in giving the parents another chance, the child would have one less chance: *Children's Aid Society of Winnipeg (City)* v. R. (1980), 19 R.F.L. (2d) 232 (Man.C.A.). There has to be some demonstrated basis for a determination that the parents are able to parent the child without endangering his or her safety. *Children's Aid Society of Brockville, Leeds and Grenville v. C.* [2001] 2001CarswellOnt 1504.

In *N.V.C. v. Catholic Children's Aid Society of Toronto*, 2017 ONSC 796, the court found that in assessing a child's best interests the court needs to consider the effect of separating a child from his biological family. The risk each child may suffer by remaining in a parent's care; as well as the risk of emotional harm each child may suffer by being kept away from a parent (or other significant person in their life). *CAS of Toronto v. S. (G.)*, 2012 ONCA 783 (CanLII), 2012 ONCA 783 (Ont. C.A.).

In *Frontenac CAS v. C.T.,* [2010] ONSC 3054Canlii, the court found that the mother would not be able to parent the child, but adjourned the disposition in order to discuss the viability of alternatives other than crown wardship (such as custody or the negotiation of openess arrangements). The court found that the ADR mechanisms set out in the Act should be engaged and it was premature to make the disposition.

Justice Perkins set out the process to follow in a disposition hearing (not involving a native child or a potential custody order) in *CAS of Toronto v. T.L.* [2010] O.J. No. 942 as follows:

1. Determine whether the disposition that is in the child's best interests is return to a party, with or without supervision. If so, order the return and determine what, if any, terms of supervision are in the child's best interests and include them in the order. If not, determine whether the disposition that is in the child's best interests is society wardship or Crown wardship. (Section 57.)

2. If a society wardship order would be in the child's best interests, but the maximum time for society wardship under section 70(1) has expired, determine whether an extension under section 70(4) is available and is in the child's best interests. If so, extend the time and make a society wardship order. If not, make an order for Crown wardship.

3. If a Crown wardship order is to be made, and a party has sought an access order, determine whether the relationship between the child and the person who would have access is both meaningful and beneficial to the child. (Section 59(2.1)(a)). If not both meaningful and beneficial, dismiss the claim for access. If so, go to the next step.

4. Determine whether the access would impair the child's future opportunities for adoption. (Section 59(2.1)(b)). If so, dismiss the claim for access. If not, go to the next step.

5. Determine whether an access order is in the child's best interests. If not, dismiss the claim for access. If so, make an access order containing the terms and conditions that are in the child's best interests. (Section 58.)

Disposition – Best interests

A comprehensive best interests analysis requires consideration of the strengths and weaknesses of every option.

a. The court must consider the risk each child may suffer by remaining or being placed in a parent or other person's care.

b. The court must also consider the risk of emotional harm each child may suffer by being kept away from a parent or other significant person in their life. *CAS of Toronto v. S. (G.),* 2012 ONCA 783 (CanLII), 2012 ONCA 783 (Ont CA); *CAS of Hamilton v. C. (K.)* 2016 ONSC 2751 (CanLII), 2016 ONSC 2751 (SCJ).

Catholic Children's Aid Society of Hamilton v. V.C., 2017 ONSC 5557.

Disposition – Delay

Delay in the litigation process in child protection matters must be measured from the child's perspective. The court must consider the impact of delay on the best interests of the child. *CAS of Toronto v. T. (L.),* 2016 ONCA 146 (CanLII), 2016 ONCA 146 (OCJ); *CAS of Ottawa v. F. (L.),* 2016 ONSC 4044 (CanLII), 2016 ONSC 4044 (Divisional Ct).

The court must also consider the strict timelines that govern child protection proceedings, and section 1(1) which sets out that the paramount purpose the *Act* is to promote the best interests, protection and well-being of children. *M. (C.) v. CAS of Waterloo,* 2015 ONCA 612 (CanLII), 2015 ONCA 612 (Ont CA); *CAS of Ottawa v. B.H.,* 2017 ONSC 4799 (CanLII), 2017 ONSC 4799 (Divisional Ct).

Child development does not wait. Multiple issues of parental dysfunction cannot be quickly changed. The child is not to be held in limbo waiting for change in a parent that is unlikely to happen. The parent's chance to correct parenting inadequacies must be balanced with a child's right to appropriate development within a realistic time

frame, if damage to the child is to be minimized. *Catholic Children's Aid Society of Hamilton v. V.C.,* 2017 ONSC 5557.

Disposition – Insight

A lack of parental insight with respect to fundamental problems like physical and emotional harm may justify Crown wardship even if there are other positive aspects to a parenting plan. *Catholic Children's Aid Society of Hamilton v. V.C.,* 2017 ONSC 5557; *CCAS of Toronto v. M. (M.),* 2012 ONCJ 369 (CanLII), 2012 ONCJ 369 (OCJ); *CAS of Hamilton v. S. (A.),* 2017 ONSC 2226 (CanLII), 2017 ONSC 2226 (SCJ).

Disposition – Permanency

The court of appeal upheld the trial judge's decision that emphasized permanency planning over a family plan (proposed supervision or custody order), when the trial judge found that there would be a high risk of continued litigation if a custody order was made. *Children's Aid Society of Toronto v. E.S.,* 2013 ONCA 77 (CanLII).

Drug Testing - Can be ordered as term of supervision. *CAS of Halton Region v. Z.I. and R.M. D.,* [2010] O.J. No. 5632; *Durham CAS v. R.R*. [2005] O.J. No. 360, or as a term of unsupervised access in *CAS of London and Middlesex v. M.L.G et al* [2006] O.J. No. 5101 (Ont. Fam. Ct.).

Drug Use - The small use of marijuana is not in and of itself a protection concern, in the absence of evidence indicating that this amount of marijuana is impairing the ability of the mother to parent. See: *Children's Aid Society of Toronto v. T.R.* [2009] O.J. 4192 OCJ. In *CCAS of Toronto v. S.S*., 2010 ONCJ 700, the court wrote:

> The small use of marijuana is not in and of itself a protection concern, in the absence of evidence indicating that this amount of marijuana is impairing the ability of the mother to parent. See *Children's Aid Society of Toronto v. Tobian R. and Richard G.*, 2009 ONCJ 384 (CanLII), 2009 ONCJ 384, [2009] O.J. No. 4192, 2009 CarswellOnt 9518 (Ont. C.J.). However, the court notes that, at the time the children were brought into care, the mother was paying for marijuana when she claimed she could not pay rent or afford prescription cream for Alitheia's rash. The mother also used marijuana while pregnant and continued to use marijuana while breast-feeding, despite professional advice to the contrary. She used marijuana just before going to the sleep disorder clinic knowing that it would likely sabotage the results. How the mother's need to smoke marijuana has impacted upon her judgment throughout the course of this case ***is*** a protection concern.

In the absence of evidence that a parent's drug use in and of itself negatively impacts on his/her parenting capacity or skills, the drug use in and of itself cannot constitute an impediment to good and competent parenting. *CCAS of Toronto v. A.V*. [2010] O.J. No. 5835 (OCJ).

Duty of Society- to ensure that its pleadings are fair and well balanced. Full and frank disclosure means that the society must include evidence that may be helpful to the parent. Hasting CAS and Sa.(A) [2007] O.J. No. 5467. Due to the special powers granted under the *Act* to the Society, the Society has a duty to act with fairness and reasonableness and

must always exercise good faith and respect the rights of all persons: see, for example, *Children and Family Services of York Region v. E. (P.)* O.J. No. 4884 (Ont. S.C.J.); and *Children's Aid Society of London and Middlesex v. S. (E.V.P.)* 2004, 1 R.F.L. (6th) 68 (Ont. S.C.J.).

The Society has a duty to reassess its position as circumstances warrant over time: see *Children's Aid Society of the Niagara Region v. D. (W.)* 2004 CanLII 66347 (ON S.C.),; *Children's Aid Society of the Niagara Region v. B. (C.)*, [2005] O.J. No. 3878 (Ont. S.C.J.); *Children and Family Services of York Region v. E. (P.)*, [2003] O.J. No. 4884 (Ont. S.C.J.); and *Children's Aid Society of London and Middlesex v. S. (E.V.F.)* 2004 CanLII 34346 (ON S.C.).

The society must look beyond an allegation for corroboration or independent evidence of it. It must be alert to rancour that might reasonably be animating the allegations. It should investigate all pieces of relevant information, not just those pieces for which there is uncontroverted proof. *CAS of Waterloo Region v. B.-C. (A.) and B.- C. (J.)* [1996] O.J. No. 4245 (Ont. Prov. Ct.).

It has long been recognized that the Society, as an agent of the State, is not an ordinary litigant and the adversarial concept of winning and losing does not apply: see *Re Catholic Children's Aid Society of Metropolitan Toronto and P.M.* (1982), 36 O.R. (2d) 451 (Ont. Prov. Ct.). The Society must act with "fairness and reasonableness", exercise good faith, due diligence and reason. An aggressive litigation strategy has no part in child protection cases and is contrary to the Society's role. The Society must understand it is the court that determines the child's future, relying on the Society to present all relevant evidence in a fair and just manner. The court does not "rubber stamp" decisions previously made by supervisors or management at the Society. *Children's Aid Society of Hamilton v. E.O.*, 2009 CanLII 72087 (Ont. S.C.J.).

The Society's duty of disclosure does not simply involve delivery of case notes to parents' counsel. The duty extends to disclosure to the court. After all, the Society and the court are guided by the paramount purpose in the *C.F.S.A.* The Society, as with Crown counsel in a criminal case, is not to focus on winning the case, but, rather, to seek a determination that is in the best interests of the child. Further, the court has the responsibility of making that determination and is not to simply "rubber stamp" decisions of the Society. *Children's Aid Society of Hamilton v. E.O.,* 2009 CanLII 72087 (ON S.C.).

The society may not utilize the child protection system as a means of delay and then rely on the statutory time limits to argue Crown wardship is the only remedy available. By the same token, a parent may not frustrate the society's efforts to assist and then claim that the society did not fulfill its statutory duty to provide guidance, counseling or other services. There is a reciprocal obligation on the parent to obtain services and to take advantage of the opportunities given to them, *Catholic Children's Aid Society v. L.M. and T.R.*, 2011 ONCJ 146 (CanLII); *Catholic Children's Aid Society of Toronto v. C.T. and*

J.Y.,2012 ONCJ 372 (CanLII); *Children's Aid Society of Toronto v. L.G., [2015] O.J. No. 3034.*

Society criticized for abdicating its responsibilities when it didn't take a position about access in a high-conflict case where child suffering emotional harm. *CCAS of Hamilton v. E.L. and N.R.*, 2016 ONSC 1789.

Enforcement of extra-provincial orders – There is no section in the CFSA comparable to sections 40 and 41 of the CLRA which permits the recognition and enforcement of foreign orders. The court in *Chatham-Kent Children's Services v. A.H.,* [2014] O.J. No. 1727 set out the following:

a) The society has no standing to use the enforcement proceedings of the CLRA to order the return of the children elsewhere.

b) There is a fundamental premise that if children are at risk, the *local* agency that acts on behalf of the state where the children are located has and must have the power to act on the basis of its own information.

c) Enforcement provisions with respect to extra-provincial orders in the *CFSA* would not necessarily enure to the benefit of the child. Enforcement of an order by requiring a minor child to be returned to a prior locale would result in a change of schools, homes and environment. The enforcement of an extra-provincial order may therefore visit upon the children already found to be at risk and solely as a consequence of the conduct of their parents further harm and further risk;

d) The fundamental and significant difference between the *CLRA* and the *CFSA* is that the *CFSA* governs the conduct of and intervention of the state with respect to children; the *CLRA* governs the conduct of private citizens with respect to children; the *CLRA* is not designed to and does not concern children who are at risk but concerns children who are cared for appropriately by one of their parents if not both, hence the existence of enforcement provisions.

Extension of Timelines under s.70 (4)

CAS of Ottawa Carleton v. K.F. [2003] O.J. No. 2326 (Sup.Ct.) test:

1. The decision to extend must be made in accordance with the child's best interests.
2. The decision to extend must be viewed from the child's perspective.
3. The factors in s. 37 (3) must be considered.
4. The court must be satisfied, balancing the factors set out in s. 37(3), that there are unusual or equitable principles in the circumstances that would justify granting an exception to the general rule "for the child's sake".

There is conflicting case law as to whether the court has jurisdiction to extend society wardship more than 6 months in excess of the statutory limits. The case law is set out by Justice Perkins in *CCAS v. N.B.* 2010 ONSC 615 Canlii (SCJ) as follows:

8 Section 70(4) seems to me to permit a total period of society wardship of only 18 months for a child of this age. See *R.L. v. CAS of Niagara,* [2002] O.J. No. 4793 (C.A.), at para. 5; *CCAS of Hamilton v. M.A.M.*, [2003] O.J. No. 1274 (S.C.J. Fam. Ct.), at para. 157; *J.C.J.-R. v. CAS of Oxford*, [2003] O.J. No. 2208 (S.C.J.), at pars. 18-19. Other cases take the view that there is not a fixed maximum: *CAS of Toronto v. K.B.*, [2007] O.J. No. 5090 (O.C.J.), at para. 38; *CAS of Toronto v. L.U.*, [2007] O.J. No. 5549 (O.C.J.), at para. 12, affirmed without reference to this legal issue [2008] O.J. No. 2170 (S.C.J.); *CAS of Sudbury v. P.M.*, [2002] O.J. No. 1217 (O.C.J.).

9 However, even if a further period of society wardship were available in this case, the decision whether to extend the time under section 70 is a discretionary one to be made in the child's best interests: *CAS of Toronto v. L.U.*, [2008] O.J. No. 2170 (S.C.J.), at para. 8. Where the ordinary time has already been significantly exceeded, the discretion would be exercised only in an exceptional case: *CAS of Toronto v. D.S.*, [2009] O.J. No. 4605 (S.C.J.), at paras. 70-72.

Also See: *Children's Aid Society of London and Middlesex v. M.O.,* 2014 ONSC 2435 (CanLII) that supports this view and reviews the conflicting case law.

The more liberal approach (extending society wardship 6 months from the date of the hearing to permit a transition of children to the mother) was recently taken in *Bruce Grey Child and Family Services and M.S.*, [2013] O.J. No. 3948 and in *Children's Aid Society of Toronto v. B.-L.,* 2014 ONCJ 90 (CanLII) where the court writes:

> Whether it is in a child's best interests to have the time extended is determined from the child's, and not the parent's perspective, in reference to the factors set out in Section 37(3) of the Act. Society counsel, citing Justice Margaret Scott in Kawartha-Haliburton Children's Aid Society v. K.M., (2001) O.J. 5047 (Sup. Ct.) suggested that the application of s. 70(4) is limited to cases in which a small discrete task—such as the completion a parenting skills program—is involved. In my view, this is an unjustifiably narrow reading of this case and of the statute. Justice Scott held that if the statutory time limit was to be extended, it would require an exceptional reason grounded in the best interests factors found in the Act. She found that in that case, Mother had not made progress in dealing with her parenting deficiencies and that there was no reason to think that a further 6 months of the Society wardship would put her in a position to adequately parent the child. There have been other cases in which a court has determined that, although a parent was not ready to have a child immediately placed in her care, her progress in improving parenting ability and the prospect of further significant her improvement within 6 months justified an extension of the time allowed for the Society wardship.

In *Catholic Children's Aid Society of Toronto v. N.J.,* 2017 ONSC 4884, the court upheld a trial decision where the court made a 2 month transition order returning the child to the mother, followed by a 12 month supervision order (reduced to 10 months on appeal, so as not to offend paragraph 4 of subsection 57 (1) of the Child and Family Services Act. The child had been in care for 26 months. The appeal court essentially endorsed an extension of the wardship order.

Note: Although not a section 70 (4) case, in *N.V.C. v. Catholic Children's Aid Society of Toronto, 2017 ONSC 796,* on appeal, the court found the child not to be in need of protection. Ordinarily, this should result in the immediate return home of the child. However, the court recognized that the best interests of the child required this to be done in a transitioned manner. This is a similar argument that is being made to grant an extension order when the court decides a child should be returned to a parent. The court wrote at paragraph 142:

> In light of the Child's special needs, a plan must be in place, prior to the permanent return of the Child, to ensure that he is accepted in a school, has appropriate before and after school care, that he has a pediatrician, and that arrangements have been made for appropriate supports for his special needs such as speech and occupational therapy.

Family Plans – Under subsection 57(4), the court must first consider family or community plan. A plan of society wardship or crown wardship with a kin placement does not qualify as a family or community plan and should only be considered after the former. *Catholic Children's Aid Society of Toronto v. H.(D.)*, 2009 ONCJ 2 (CanLII) (OCJ).

Amendments to the *CFSA* have clarified that the factors in s. 37(3) are subject to the paramount duty in s. 1 to protect the best interests of an apprehended child. In other words, family and parental relationships are to be recognized only to the extent that they are "consistent with the best interest, protection and well-being of the children": see *Syl Apps Secure Treatment Centre v. D.(B.),* [2007] S.C.J. No. 38 (S.C.C.). A plan proposed for a family placement is to be given similar weight as all other factors in section 37(3) to be balanced by the court to determine the child's best interests: see *Children's Aid Society of Northumberland v. D.P*. [2008] O.J. No. 2047 (Ont. Sup. Ct.) at para. 126.

Finding - s. 52 provides that a date should be fixed for a hearing in every case where finding issue has not been determined after 3 months. The rules provide that the finding hearing take place within 120 days of the start of the case (Rule 33(1). The court can only extend the timelines if it is in the best interest of the child (Rule 33 (3)).

Finding – Risk factors – s. 37 (2)

<u>37(2)(a) and (b): physical harm and risk of physical harm</u>
In cases where the Society is alleging that the child is in need of protection due to physical harm or a risk of physical harm, the following principles have been applied:

The Society must prove causation by act, omission, or pattern. It is not necessary to prove intention: *Jewish Family and Child Service v. K.(R.)*, 2008 ONCJ 774, affirmed at *Jewish Family and Child Service v. R.K.*, 2009 ONCA 903 (CanLII), 2009 ONCA 903 (Ont. C.A.). Physical harm caused by neglect or error in judgment is still physical harm. But, it must be more than trifling physical harm. CAS Niagara v. P.T. (2003) 35 RFL 290; *Children's Aid Society of Rainy River v. B.(C.)*, 2006 ONCJ 458 (CanLII).

Harm caused by neglect or error in judgment comes within the finding: *Children's Aid Society of the Niagara Region v T.P.* [2003] O.J. No. 412 (Ont. Fam. Ct.).

The risk of harm must be real and likely, not speculative: *Children's Aid Society of Rainy River v. B.(C.)*, 2006 ONCJ 458 (CanLII); *Children's Aid Society of Ottawa-Carlton v. T. and T.*, [2000] O.J. No. 2273, (Ont. Fam. Ct.).).

A child may be at risk even if the conduct is not directed specifically towards that child: *Catholic Children's Aid Society of Metropolitan Toronto v. O.(L.M.)*, 1995 CanLII 6216 (ON C.J.).

A pattern of allegations is not sufficient to prove a finding if the underlying facts of the allegations are not proven: *Kenora-Patricia Child and Family Services v. L.(N.*), 2005 ONCJ 247 (CanLII).

Physical abuse, inappropriate discipline, inadequate supervision, domestic violence, untreated mental illness, untreated addictions, inadequate shelter/food are common circumstances leading to findings of physical harm/risk of physical harm.

Verbal abuse, aggression, and inappropriate situations that children are exposed to can constitute risk of physical harm: *Catholic Children's Aid Society of Hamilton v. S. (L.)*, 2011 ONSC 5850, at para. 380.

Limited capacity of the parents if there is an inability to sufficiently acquire or improve parenting skills: *Children's Aid Society of Hamilton v. O.(E.)*, [2009] O.J. No. 5534, at paras. 211-215.

Instability of housing and caregiving arrangements can create a risk of harm under (b): *Catholic Children's Aid Society of Hamilton v. S. (L.),* 2011 ONSC 5850, at para. 380.

Sub-clause 37 (2) (b) (ii) speaks of a pattern of neglect. This is almost impossible to establish when a child is apprehended at birth. The appropriate subclause to consider in this situation will be 37 (2) (b) (i). *The Children's Aid Society of the Districts of Sudbury and Manitoulin v. R.S.,* 2017 ONCJ 519.

In *Children's Aid Society of Toronto v. L.E.* [2012] O.J. 3770, the court wrote: The use of physical discipline was discussed by the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),* [2004] 1 S.C.R. 76. This was a criminal law case, but the court's comments about the use of physical discipline are helpful. The court wrote at paragraph 37:

- Based on the evidence currently before the Court, there are significant areas of agreement among the experts on both sides of the issue (trial decision, at para. 17). Corporal punishment of children under two years is harmful to them, and has no corrective value given the cognitive limitations of children under two years of age. Corporal punishment of teenagers is harmful, because it can induce aggressive or antisocial behaviour. **Corporal punishment using objects, such as rulers or belts, is physically and emotionally harmful. Corporal punishment which involves slaps or blows to the head is harmful (emphasis mine).** These types of punishment, we may conclude, will not be reasonable.

Finding - Drug use

The court writes in paragraph 112 of Children's Aid Society of Simcoe County v. T.W., [2012] O.J. No. 2866 (SCJ):

> 112 There is a substantial body of jurisprudence that stands for the proposition that where a parent is abusing drugs or alcohol, the child is at risk: *Lennox and Addington Family and Children's Services v.S.W.*, 2010 ONSC 2585, [2010] O.J. No. 1862 at paras. 6, 13-15, 22, 47-51, 58-62, 106; *Children's Aid Society of Ottawa v. M.C.*, [2003] O.J. No. 6307, 2003 CanLII 67754 (Ont. S.C.J.) at paras. 22-24, 31, 34;*Children's Aid Society of Waterloo Region v. F.(S.J.M.)*, [1994] O.J. No. 955, 1994 CanLII 4424 (Ont. S.C.J.) at paras. 12-13; *Children's Aid Society of London and Middlesex v. S.M.*, [2000] O.J. No. 2064(S.C.J.) at paras. 22-23; *Children's Aid Society of Durham v. M.F.*, [2000] O.J. No. 4007 (S.C.J.) at paras. 3-5, 12-14; *Children's Aid Society of Hamilton v. L.V.*, [2009] O.J. No. 1468 (S.C.J.) at paras. 11, 13, 70, 80-81, 83, 94, 97; *Children's Aid Society of Owen Sound v. A.L.*, [2008] O.J. No. 5133 (Ct. J.) at paras. 34, 40, 58-61; *Children's Aid Society of Toronto v. A.T.*, 2011 ONSC 511, [2011] O.J. No. 6220 at paras. 28-32; *Frontenac Children's Aid Society v. S.A.E.*, [2001] O.J. No. 5487 (S.C.J.) at paras. 3, 23, 27, 29. As Perkins J. stated in *Children's Aid Society of Toronto v. A.T.,* 2011 ONSC 511, [2011] O.J. No. 6220 (S.C.J.) at para. 30:
>
> - The father's objection to the trial judge's taking judicial notice of certain facts surrounding drug addiction is not well founded. The substantial impairment of a person's parenting abilities caused by cocaine, to the point of obliviousness and unconsciousness, and the resulting risks to children in the parent's care, are facts commonly understood by reasonable people, and all the more by judges who hear child protection cases. That there is a serious risk of relapse among people who have been regular users of narcotics is similarly well known. We are long past having to prove these basic facts in each case.

Finding – Rudeness and Verbal Abuse

Rudeness and verbal abuse to a worker, is not by itself a basis for finding a child in need of protection, unless it is happening in front of a child. *Children's Aid Society of London and Middlesex v. A.W.,* 2015 ONSC 2224.

Finding - Unexplained injuries

Unexplained injury cases are ones in which the child, usually an infant, suffers one or several serious injuries (such as fractures) and the parents either provide no explanation or provide an explanation that is not consistent with the expert evidence as to cause of injury. Absent an explanation from the parents, courts are reluctant to return children with unexplained injuries to their parents. *Children's Aid Society of Toronto v. P.A.* (2002) O.J. No. 5344 (OCJ) and cases cited within.

If the parents cannot explain injury despite opportunity, there should be a finding. *M. v. M.* 1981 37 O.R. 2d 120 County Ct. Where a child suffers injury while in the care of his or her parents and the Director brings evidence the injury is consistent with being inflicted and not consistent with non-accidental causes, the court may draw an inference the parents, or one of them, inflicted the injuries and the burden then shifts to the parents to provide a satisfactory or reasonable explanation of how the injuries were sustained without being inflicted by the parents. Inflicted trauma by a third party could be a satisfactory explanation, but where the injury occurs while the child is in the care of both parents, it may not be a satisfactory explanation for one parent to deny causing the injury

and blame the other, since that would lead to an inference of failure to adequately supervise or protect the child. (See *Nova Scotia (Minister of Social Services) v. B.(R.R.)*, [1981] N.S.J. No. 76, (N.S. Prov. Ct.) at para. 6; *Children's Aid Society of London & Middlesex v. P.(F.)*, [2000] O.J. No. 3582, (Ont. S.C.J.) at paras. 113 and 144; *British Columbia (Superintendent of Family & Child Service v. G.(C.)*, [1989] B.C.J. No. 1577, (B.C. C.A.) at para. 31; *Children's Aid Society of Sudbury & Manitoulin (Districts) v. C.(C.)*, [2001] O.J. No. 5802, (Ont. C.J.) at para. 7.)

It is not necessary for the Society to prove which caregiver caused harm if one or the other must have either caused the harm or failed to protect the child from the other caregiver: *Catholic Children's Aid Society of Toronto v. De S. (M.),* 2005 ONCJ 336 (CanLII).

A good summary of the law with respect to unexplained injuries is contained in *JFCS v. Y. B.,* [2011] O.J. No. 5892 (OCJ) as follows:

> **16** In some "unexplained injury" cases where the cause of the injuries is determined to be non-accidental, the issue of identifying the perpetrator(s) is a necessary component of determining whether the child is in need of protection. However, this is not always the case. As a general rule, where the person(s) who had exclusive opportunity to inflict the injury have not provided a satisfactory explanation for the injury, this has almost always justified a protection finding and a refusal to return the child to such person(s): *Children's Aid Society of London and Middlesex v. K.W.*, 1995 CanLII 9824, 60 A.C.W.S. (3d) 314, [1996] W.D.F.L. 512, 9 O.F.L.R. 162, [1995] O.J. No. 4104, 1995 CarswellOnt 634 (Ont. Fam. Ct.); *Children's Aid Society of the Region of Peel v. J.L.*, 2001 CanLII 37562, 109 A.C.W.S. (3d) 742, [2001] O.J. No. 4422, 2001 CarswellOnt 3967 (Ont. C.J.); *Children's Aid Society of the Districts of Sudbury and Manitoulin v. C.C.*, 2001 CanLII 37561, 115 A.C.W.S. (3d) 807, [2001] O.J. No. 5802, 2001 CarswellOnt 5125 (Ont. C.J.); *Children's Aid Society of Toronto v. P.A.*, 2002 CanLII 61173, 121 A.C.W.S. (3d) 1082, [2002] O.J. No. 5344, 2002 CarswellOnt 4935 (Ont. C.J.); *Catholic Children's Aid Society of Toronto v. M.D.S.*, 2005 ONCJ 336, 140 A.C.W.S. (3d) 669, [2005] O.J. No. 2914, 2005 CarswellOnt 2932 (Ont. C.J.); *Director of Child Welfare for Prince Edward Island v. J.C.D.*, 2009 PECA 19, 71 R.F.L. (6th) 26, 289 Nfld. & P.E.I.R. 45, 890 A.P.R. 45, [2009] P.E.I.J. No. 39, 2009 CarswellPEI 43 (P.E.I.C.A.).
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> **17** In child protection cases, the onus is always on the applicant Children's Aid Society to prove that the child is in need of protection. However, in "unexplained injury" cases, the tactical onus to provide a satisfactory explanation for the injury shifts to the parent if two necessary preconditions exist: (1) that the evidence is sufficient to establish on a balance of probabilities that the child's injury may have been caused by that parent; and (2) that the evidence is not sufficient to establish on a balance of probabilities that the injury was caused by someone else: *Children's Aid Society of the Districts of Sudbury and Manitoulin v. L.N., V.M. and D.M.*, 2011 CarswellOnt 12356 (Ont. S.C.).
>
> **18** In this case the above preconditions have been met because: I am satisfied on a balance of probabilities that the father may have been the perpetrator; and there is insufficient evidence to establish on a balance of probabilities that Ya.B.'s injuries were caused by Ms. A.So. or Ms. M.D.[4]. Accordingly, the "unexplained injury" principle applies. As none of Ya.B.'s caregivers have provided a plausible and credible explanation for Ya.B.'s injuries, Ya.B. should on that basis alone be found to be in need of protection pursuant to s.37(2)(a)(i) and (b)(i) of the Act. Similarly, because S.B. was in the care of the same caregivers as Ya.B., she is also found to be in need of protection pursuant to s.37(2)(b)(i) of the Act.

The Society often tenders evidence about a parent's response to learning of a child's injury or serious medical condition as relevant to their parenting capacity or responsibility for the injury. However, it has been held that this sort of evidence is just as

dangerous and prejudicial in child protection proceedings as it is in criminal proceedings: *Children's Aid Society of Nipissing and Parry Sound v. Stephanie S.* 2006 ONCJ 32.

37(2)(c) and (d): sexual molestation or exploitation

The conduct in question must be engaged in by the caregiver or, if the conduct is by another, the caregiver must have failed to protect, having known or ought to have known of the possibility.

For consideration of whether the father's sexual abuse of unrelated children places his own children at risk, see *Children's Aid Society of Oxford County v. G.(M.)* 1994 ONCJ 4268 (CanLII).

A court made a finding of emotional harm where the child's allegations of sexual abuse by the father were not accepted as being true: *Children's Aid Society of Renfrew County v. G.(R.)*, 2004 ONCJ 436 (CanLII).

Phallometric testing may be useful for treating known sexual offenders but it is not reliable for proving risk: *Children's Aid Society of the Region of Peel v. S.R.-T.,* 2003 CanLII 52497 (ON C.J.).

A finding was not made out where the conduct complained of was inappropriate behaviour by parent that did not directly involve the children: *Children's Aid Society of Rainy River v. B.(C.)*, 2006 ONCJ 458 (CanLII).

37(2)(f) and (g): emotional harm and risk of emotional harm

The harm must be demonstrated by a serious form of one of the listed conditions or behaviours. The Society must establish prescribed symptoms of emotional harm and must show a real likelihood of harm on a balance of probabilities. *Children's Aid Society of Rainy River v. B.(C.)*, 2006 ONCJ 458 (CanLII).

Expert evidence required?

From: *Chukwunomso v. Ransome,* 2017 ONCJ 121

> I am aware of the recent decision in the case of *N.V.C. v. Catholic Children's Aid Society of Toronto* [2017] O.J. No. 525. In paragraphs 101 and following of that decision, Wilson, J., seems to suggest that a court is precluded from deciding that a child is at risk of emotional harm without evidence from an expert. If I correctly understand that to be the learned judge's reasoning, I must respectfully disagree. Courts will often make decisions about emotional harm – or risk of emotional harm – to a child based on panoply of evidence. That panoply may include an expert's report. But an expert's report is only one piece of evidence. In my view, the presence or absence of an expert's report regarding harm, or potential harm to a child, is neither conclusive nor, in many cases, even mandatory in order to permit the court to arrive at a correct conclusion. For example, in *Simcoe Muskoka Child, Youth and Family Services v. L.V.*, 2016 ONSC 7039 (CanLII), Quinlan, J. stated at paragraph 18: **"Expert evidence will sometimes** [my emphasis] **be required to establish a risk of emotional harm, but it is not a necessary prerequisite"**. As well, see paragraphs 31 and 32 of the decision of Parfett, J. in *Children's Aid Society of Ottawa v. P.Y.*, 2007 CanLII 14325 (ON SC) for a similar opinion. Furthermore, courts are required to consider not only the available evidence in any case – expert or otherwise - but, as well, judges should employ intelligence and common sense in drawing logical inferences from their general

> understanding of life itself. This application of intelligence and common sense is often referred to as taking judicial notice. An example of this application of judicial notice in the context of satisfying a court that emotional harm has occurred, can be found in the decision of MacAdam, J. in *A.B.C. v. Nova Scotia (Attorney General)*, 2011 NSSC 475 (CanLII), where the learned judge stated in paragraph 50: **"Experts are not required to establish that ABC suffered psychological and emotional harm as a result of the assaults by Lalo. The court is entitled to take judicial notice that such effects can be expected** [my emphasis] **albeit they may not occur in every case**."

Other line of cases regarding need for expert evidence:

In order to substantiate a finding of emotional harm, a clinical diagnosis is not necessary, but expert evidence is usually required: *Children's Aid Society of Ottawa v. P.Y.*, 2007 CanLII 14325 (ON S.C.); *Re S.(D.)* [2001] CarswellOnt 733 Ont. S.C.J.*; Catholic Children's Aid Society of Hamilton-Wentworth v. C.L. [2002] O.J. No. 4255.*

Exposure to domestic violence

Exposure to a pattern of domestic violence has been accepted as creating a risk of emotional harm: *Children's Aid Society of Toronto v. S.A.C.*, [2005] O.J. No. 2154 (O.C.J.), aff'd [2005] O.J. No. 4718 (S.C.), aff'd 2007 ONCA 474, leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 462); *Jewish Family and Child Service v. K.(R.)*, 2008 ONCJ 774, affirmed at *Jewish Family and Child Service v. R.K.*, [2009] O.J. No. 5422, (Ont. C.A.). In *Children's Aid Society of Toronto* v. *S.A.C*, *supra* after hearing expert evidence on domestic abuse, Justice Zuker conducted a lengthy review of caselaw involving domestic violence in child protection, as well as social science literature on the effects of abuse, the dynamics of abusive relationships, and the interplay between domestic violence and substance abuse. His findings include:

- Witnessing violence perpetrated against their mother may have an abusive and detrimental impact on a child's development.
- Children may feel guilty, blame themselves and feel depressed.
- They can develop fears, insecurity and low self-esteem as a result of witnessing domestic violence
- They can suffer emotional confusion that can result in bedwetting, nightmares, sleeping or eating disturbances, self-harm and weight loss.

General

The Society can prove causation by act, omission, or pattern: *Children's Aid Society of Ottawa v. C.D.*, 2009 CanLII 11808 (ON S.C.).

It is not necessary to prove intention: *Jewish Family and Child Service v. K.(R.)*, 2008 ONCJ 774, affirmed at *Jewish Family and Child Service v. R.K.*, 2009 ONCA 903 (Ont. C.A.).

Sometimes, the evidence of a child's distressed reactions to parental behaviour is sufficiently clear that a finding can be made without the opinion of an expert. *Children's Aid Society of Ottawa v. P.Y. and A.S.,* (2007) O.J. 1639 (S.C.J.); *Catholic Children's Aid Society of Toronto v. E.S., [2016] O.J. No. 2558*.

A child who rejects a parent and won't return to their care may be at risk of emotional harm. *Children's Aid Society of Dufferin v. R.N,* 2014 ONCJ 176.

Constantly taking a child unnecessarily for medical treatment can place a child at risk of emotional harm. *Children's Aid Society of London and Middlesex v. S.E.,* 2016 ONSC 3987.

School Attendance

Failure to ensure a child regularly attends school can pose a risk of emotional harm, as the child's development will be impaired. *Children's Aid Society of Toronto v. J.P.*, 2009 O.J. No. 2401 (OCJ); *Children's Aid Society of London and Middlesex v. L.W.,* 2016 ONSC 3; *Children's Aid Society of Toronto v. E.U.,* 2014 ONCJ 299.

The CFSA is engaged where neglect of education becomes a child protection issue. To decide otherwise is to relegate children who are at risk of emotional harm due to a parent's failure to provide educational instruction without the remedies and protection afforded to any other child who is at risk of emotional harm. In my view this would be an absurd, illogical and inequitable result which would be incompatible with the object of the CFSA found in S. 1(1) of its preamble. The CFSA focuses on the **consequences** of abuse and neglect, or the reasonable risk thereof, of any number of unspecified parental responsibilities. There is no limit to the kind of responsibility that a parent may breach for the purpose of scrutiny under the CFSA, provided the breach gives rise to a protection concern under the provisions of the Act. It follows then that the education of a child is one of the responsibilities of parents. Accordingly, neglect of education which either causes emotional harm, or the risk thereof, may be dealt with under the CFSA provided the Society can relate it to a protection issue under S. 37(2) of the Act. *Durham Children's Aid Society v. B.P., [*2007] O.J. No. 4183 (SCJ).

37 (2) (i) – Abandonment or unavailability

This is a risk ground if the caregiver is in jail. *CAS Kingston v. H. and G.*, (1979) 24 O.R. 2d 146.

Parents' inability to seek to have a child returned to their care from a residential placement was held to sustain a finding of need of protection in the case of *Kenora-Patricia Child and Family Services v. A.M.,* 2005 ONCJ 39 (OCJ) at para.116.

37(2)(l) – consent

In a significant number of cases, parents will consent to a finding under s.37(2)(l) (the parent is unable to care for the child and the child is brought before the court with the parent's consent"). (The consent of any child over 12 is also required.) In some cases the parent was unable to care for the child due to illness or incarceration and s.37(2)(l)

was pleaded; in many others, the parent and Society consent to an "(l)" finding due to the parent's wish to avoid a more negative finding such as s.37(2)(b).

Where a finding is made under s.37(2)(l), and the court is considering making a final order that would remove the child from the parent's care and custody, the court is required to ask whether the Society has offered the parent and child services that would enable the child to remain with the parent and whether the parent and child (if over 12) have had independent legal advice. The court also must be satisfied that the parent and child do consent, that the consents are voluntary, and that the parent and child understand the nature and consequences of the consent (s.55).

Finding not Pleaded - –The court has discretion to make a finding that a child is in need of protection pursuant to a clause of the Act not pleaded, if justified by the evidence, the parent had prior disclosure of the relevant evidence, is not caught by surprise and has had a full opportunity to test this evidence. *Durham Children's Aid Society v. R.S. and J.M.* [2005] O.J. No. 570 (SCJ) and *Children's Aid Society of Hamilton-Wentworth v. K.R.* [2001] O.J. No. 5754 (SCJ-Family Court), where Justice Czutrin stated:

"While it is better practice, and the sections are set out in the forms to plead the subsections relied on, the court cannot be prohibited from finding a child in need of protection if the appropriate box has not been checked off, especially where the facts support such a conclusion. Events in a child's life are ever evolving and not frozen to events that existed at the beginning of the court process. It is open for me to find a child in need of protection where the evidence supports the facts that fall under any subsection of s. 37 where the evidence and facts have been established, and as in this case, cannot come as a surprise."

Finding in need of Protection (Relevant time - Timing) - Child protection proceeding is unlike ordinary civil litigation and court can choose a flexible approach that would admit evidence arising at any time up to the date of the court hearing , subject to adequate disclosure to all parties. *CAS Brant v. T (JA.)* 2005 ONCJ 302 - Justice Thibodeau, -also *CAS* of *Hamilton-Wentworth v. K.R. and C.W*. 2001 O.J. No. 5754. Justice Czutrin - principles:

a) Only facts related to disposition are statutorily excluded at the finding phase
b) Best interests are paramount. Child welfare legislation is different from general legislation and litigation in this regard.
c) This approach facilitates an accurate assessment of present circumstances.
d) To be overly technical could put the child at risk.
e) It prevents multiplicity of proceedings
f) Could bring the administration of justice into disrepute
g) Allows parents as well to bring in evidence
h) Rigid approach makes it more of a game

In assessing the question of risk at the time of the hearing, the trial judge may consider any relevant evidence to determine whether there is a present risk of harm, including evidence prior to the time of the apprehension, or afterwards up to the date of trial. *N.V.C. v. Catholic Children's Aid Society of Toronto,* 2017 ONSC 796.

The court in *N.V.C. v. Catholic Children's Aid Society of Toronto,* 2017 ONSC 796 found that the finding of risk of harm, and hence the child's need for protection, must be

determined at the time of the hearing, not the date of the apprehension. This was followed in *Halton Children's Aid Society v. J.T.,* 2017 ONCJ 267.

This approach was rejected in *Children's Aid Society of Toronto v. S.A.,* 2017 ONCJ 366, following *CAS Hamilton v. K.R.,* above. The court noted that the Child and Family Services Act does not restrict the day when the finding can be considered, such as in the Nova Scotia legislation. The court also writes:

> **[24]** A restrictive approach focusing only on the circumstances as of the date of the protection hearing based on the present tense wording of the finding provision in the *CFSA* (whether the child "is" at risk), is inconsistent with the purpose of the Act as a whole, the provisions of which cannot be considered in isolation but rather as part of a legislative framework to promote the best interests, protection and well being of the child.
>
> **[25]** To hold otherwise would make subsection 57(9) of the Ontario Act superfluous. If the only time that the court could consider for a protection finding was the time of the hearing there would never be a need to utilize subsection 57(9) which is for circumstances where the concerns relating to the finding no longer exist and thus no disposition order is required.
>
> > (9) *Where no court order necessary.*— Where the court finds that a child is in need of protection but is not satisfied that a court order is necessary to protect the child in the future, the court shall order that the child remain with or be returned to the person who had charge of the child immediately before intervention under this Part.

Foster Parents – The court must, on a case by case and contextual basis consider whether to grant leave to allow foster parents party status. The considerations include the age of the child, time line considerations of the Act, whether there has been a finding, whether they will be called to testify and if their evidence will be challenged, length of time the child is with them, whether there has been contact with proposed caregivers. Acknowledges that foster parents' rights are limited prior to Crown Wardship. Foster parents can't ask for adoption order at this stage. *CCAS Toronto v. Rosalene Deyra S. and Angeline S.* 2008 CanLii 8607 (SCJ).

Subsection 39 (3) of the CFSA and subrule 7 (4) of the rules do not preclude adding foster parents. Court of Appeal ruled that motions judge properly added them when society wanted to place child with family members instead of a foster parent who was planning to adopt. While delay and legal interest are relevant, they are not, by themselves, determinative. The overarching consideration is the child's best interests. *A.M. v. Valoris Pour Enfants et Adultes de Prescott-Russell*, 2017 ONCA 601.

The rights to participate at a hearing under s. 39 (3) of the CFSA do not extend to participation at a settlement conference. *Children's Aid Society of St. Thomas and Elgin County v. Steven G. and Cathy C.*, 2009 ONCJ 186 (Ont. C.J.),

Prior to the initial hearing, foster parents are meant to provide temporary care for children pending their return to their family or transfer to a more permanent placement. They are

not intended to provide a comparative basis for the determination of a child's best interests from the outset. *R.L. and T.L. v. CAS Niagara Region*, 2002 CanLii 41858 (CA)

Former foster parents were permitted to bring domestic custody application when child made a ward in *Newfoundland and Labrador (Director of Child, Youth and Family Services) v. Penn,* 2009 CarswellNfld 185 (CA).

Gladue principles

From: *Children's Aid Society of the Regional Municipality*, 2017 ONCA 931

> [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 (CanLII), [2015] O.J. No. 4705.
>
> [56] As Mackinnon J. said in Children's Aid Society of Ottawa v. K.F., 2015 ONSC 7580 (CanLII), 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 …

Hearings – Domestic and Child Protection cases together

Court of Appeal found it was an appropriate use of rule 2 to hear a child protection and domestic case together in *Children's Aid Society of Ottawa v. A.V.*, 2016 ONCA 361.

Hearing – Form of Hearing (also see proportionality)

From: *Children's Aid Society of Ottawa v. A.V.*, 2016 ONCA 361:

> The law is clear that a "hearing" in a child protection matter may take many forms, depending upon the circumstances. It may proceed on consent, take the form of a motion seeking leave to withdraw, a motion for summary judgment, or a trial: *Catholic Children's Aid Society of Metropolitan Toronto v. O. (L.M.)* (1997), 149 D.L.R. (4th) 464 (Ont. C.A.); *Children and Family Services for York Region v. J.G.S.* (2004), 246 D.L.R. (4th) 562 (Ont. S.C.); *Children's Aid Society of Hamilton-Wentworth v. K.B.,* 2002 CanLII 61224 (Ont. S.C.), at para. 35; and *Family Law Rules*, r. 16(2).

***Manitoba (Director of Child and Family Services) v HH and CG* 2017 MBCA 2017 MBCA:**

The statutory process contemplated by Part 111 of the Act contemplates a streamlined and expeditious hearing. Significantly, hearings under Part 111 may be as informal as a

judge may allow. It bears emphasis that there is no requirement in Part 111 to conduct a conventional trial. Section 37 permits the judge or Master:

(a) to compel the attendance of any person to give evidence under oath and to produce documents;

(b) to accept evidence by affidavit;
(c) to accept as evidence medical and other reports;
(d) to direct an investigation into any matter.

Immigration issues – The court cannot keep children in care to ensure that children remain in the jurisdiction pending the hearing of a Hague application. Independent protection concerns must justify such an order. *Children's Aid Society of Toronto v. C.S. and K.J.,* 2015 ONCJ 111.

Indian and Native Considerations – Definitions

Aboriginal – A collective name for the original peoples of North America and their descendants. The Canadian constitution recognizes three groups of Aboriginal people: Indians (commonly referred to as First Nations), Metis and Inuit.

Band and Indian Band – First Nation community with which a child is registered or with whom the child is eligible for registration.

Band Council – The governing body of a First Nation. It usually consists of a Chief and Councillors, who are elected for 2 or 3 year terms under either the Indian Act or First Nation custom.

First Nation – An Indian Band or native community that is recognized under the Indian Act.

Native Community- Must be designated under Section 209 of the *Child and Family Services Act*.

Representative of the Band – This is a person chosen by the child's Band or native community to make representations respecting a child who is a member of the First Nation or a child who may be eligible for membership. The term "Band Rep" is commonly used.

Indian and Native Children – Charter

The definition of Indian and Native children was found to violate section 15 (1) of the Charter, where an indigenous child did not meet the definition and lost the additional protections afforded to qualifying indigenous children in the Act. Charter remedy was to include the child in the definition. Native Child and Family Services of Toronto v. C.R.,

2017 ONCJ 440, following *Catholic Children's Aid Society of Hamilton v. G.H., T.V. and Eastern Woodlands Metis of Nova Scotia,* 2016 ONSC 6287 (CanLII).

Indian and Native Considerations – Customary Care

This means the care and supervision of an Indian or native child by a person who is not the child's parent according to the custom of the child's band or native community.

Section 63.1 of the *CFSA* states that permanency can be achieved by adoption, a final custody order or by entering into a customary care agreement.

An underlying principle of customary care is that responsibility for the care and safety of children is a collective responsibility that extends beyond family to the community as a whole.

Requirements are:
1. Child is believed to be in need of protection and requires placement with alternate caregivers to be safe.
2. The First Nation of the child issues a Band Council Resolution declaring that the child will be cared for pursuant to a custom of the First Nation and as specified in a Formal Customary Care Agreement. This resolution declares a belief that the child is in need of protection.
3. Signatories are a representative of the First Nation, the child's biological parents (where both are available), the caregivers, a representative of the society that will be providing a subsidy to the caregiver and the child if 12 or over. It can include extended members of the child's family.
4. The placement is supervised by the society or a society designate (often the Band).
5. Customary caregivers who receive society subsidies must meet the same licensing standards as a foster home.

Children placed under Formal Customary Care arrangements are not subject to the statutory timelines in the *CFSA.* The child is not legally a child in the care of the society. There are no time limits to these agreements.

A First Nation community can enter into an agreement with any CAS.

The court upon receipt and review of a Status Review Application requesting termination of any outstanding court order (where child is in care) must determine that the Customary Care Agreement is in the child's best interests. It may not be appropriate where a child is being moved from another caregiver who the child has a secure attachment with; the child is over 12 and does not consent; the parents are opposed and wish to proceed with the protection hearing and when the First Nation will not make a formal Customary Care Declaration respecting the child.

Excellent paper on customary care by Rebecca Kingdon – Formal Customary Care, A Practice Guide to Principles, Processes and Best Practices, presented at 47 Sheppard Education Program – January 26, 2016.

Indian and Native Considerations – Determination

A must-read case on this issue is by Justice Starr - *Children's Aid Society of Halton Region v. M.M.,* 2016 ONCJ 323. The case sets out the following pathway in par. 72:

> **[72]** These are the key questions and issues that must be asked and the path of enquiry to be applied:
>
> 1. Has the child been recognized by the Indian Registrar as having Indian status?
> 2. If the child has been recognized as an Indian, then pursuant to subsection 2(1) of the *Indian Act*, the child is an Indian and the court must find that the child is an Indian under the *CFSA*.
> 3. If not a recognized Indian, is the child entitled to be recognized as an Indian under the *Indian Act*? To be entitled to be recognized, the child must fit within one of the categories of persons in subsections 6(1), 6(2) and who is not excluded bysubsection 7(1) of the *Indian Act*. Where the parent is not an Indian by virtue of registration (a status Indian) then this determination will involve reviewing the parent's ancestral lineage to ensure that the parent was entitled to be registered based on the rules governing government recognition. It will also, in cases where the parent was born prior to April 17, 1985, require a review of the pre-1985 *Indian Act*.
> 4. If the child is the child of a person who is entitled to be registered, then the child is an Indian for the purposes of the *Indian Act*, and accordingly, the court must find the child to be an Indian under the *CFSA*.
> 5. If the child is not entitled to be registered as an Indian, then the child is not an Indian for the purposes of the *CFSA;*
> 6. If the child is Indian, identify the child's band. The court should determine first whether the child is a member of a particular band, and if not, whether the child is connected to a band as defined in clause 2(1) (b) or (c) or the *Indian Act*. If so, then identify the child's band;
> 7. If no band can be identified then the court should determine whether the child is a member of (or connected to) a native community as defined in section 3 of the *CFSA*. If so, then identify the native community. This will require a review of section 209 of the *CFSA* and require a determination as to whether the community in question is one of those designated by the Minister as a native community.
> 8. If no band or native community can be identified for an Indian child then the court should simply make that finding.
> 9. If a child is not registered as an Indian or entitled to be registered as an Indian then the court must ask: is the child a member of one of a community designated by the Minister as a "native community" pursuant to section 209 of the *CFSA*? If so, then the child is a native person as defined in section 3 of the *CFSA*. If not, then the child is not a native person.
> 10. If the child is a native person it will be easy to identify the child's native community as the finding that the child is a "native person" hinges on the identification of a particular "native community".

The court sets out the following important observations:

1. The determination of Indian or Native status can be made by Form 14 motion
2. Hearsay evidence is permissible as set out in rule 14
3. Independent and corroborative *d*ocumentary evidence should not be required by courts in all cases to "prove" that a child is Indian under the*CFSA* by virtue of the child's entitlement to status. The *Indian Act* itself suggests reliance on other forms of evidence. For example, under subsection 14.2(1) of the current *Indian Act*, a protest regarding the inclusion or addition or omission or deletion of a person from the Indian Register, or a Band List may be made by notice in writing.
4. "definitive" proof is not what is required. The standard to be applied is a balance of probabilities.
5. While it is expected that parents will alert the agency to the possibility that their children may have some connection to the aboriginal community and that they will work co-operatively with the society as it discharges its responsibilities, the onus is not on the parents – it is on the society.
6. Similarly, the onus should not fall on the shoulders of an Indian band or native community. There is nothing in the statute to suggest that the band or native community is required to actively participate in any proceeding under the Act. Notice to and inclusion of bands wishing to participate is entirely an obligation of the children's aid societies.
7. Not only does the onus of giving notice to the band and of fulfilling the investigatory and service objectives *vis-à-vis* Indian and native children under the *CFSA* fall squarely on the shoulders of children's aid societies, but so too does the responsibility of ensuring that the affidavit evidence put before the court is balanced, fair and presents a factual recitation of incidents or events, in their totality.
8. Where the possibility is raised that a child may be an Indian or native person, such assertion should be treated as a *prima facie* case for such a finding. It thus lies to the society, if it wishes to take a contrary position, to "prove" that the child is not Indian or native.
9. In the absence of a reasonable explanation, any failure on the part of the society to call relevant evidence, ought to result in the court drawing an adverse inference. The adverse interest that should be drawn in such circumstances is that such failure amounts to an implied admission that that the missing evidence or of the absent witness would be contrary to the society's case, or at least would not support it.
10. The society should be taking reasonable steps to gather all relevant evidence to make this determination as early as possible and certainly as soon as the possibility of eligibility is brought to its attention. In this case the society took far too long to investigate this issue.
11. The benefit of any doubt should inure to the benefit of the subject children. These three additional principles ought to be considered and applied when appropriate because there is simply too much at stake for aboriginal children, families, bands and communities. For the court to do otherwise would sacrifice access to justice in the form of receiving the benefits and special considerations afforded to Indian and native children in the name of the adversarial system.

12. Considerations of poor litigation conduct and motive are not factors upon which the court can refuse to make a finding that the children are Indian or native persons. If the children fit the definitional criteria for such a finding, the court has no choice but to make a finding that they are Indian or native persons as those terms are defined in the *CFSA*. If the children fit the criteria they will have access to a wider range of services, additional options in terms of dispute resolution and possible placement, and, even greater opportunities in terms of adoption. There is simply too much at stake for these children. No matter how egregious and frustrating the litigation conduct of the parties, suspect their motives, or the resulting delay, such considerations cannot influence the court in its determination of whether these children fit within the definition of Indian or native persons.

Indian and Native Considerations – Legislation

Subsection 37(4) of the *CFSA* requires the court to "take into consideration the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child's cultural identity" when determining the best interests of an "Indian or native" child.

Subsection 57(5) provides that, "unless there is a substantial reason for placing the child elsewhere", Aboriginal children shall be placed with a member of the child's extended family, a member of the child's "band or native community", or "another Indian or native family."

Section 213 provides that the Society shall regularly consult with Aboriginal communities about the apprehension and placement of, and plans of care for, Aboriginal children.

The Act makes clear the Legislature's intention that First Nations' issues be seriously considered. However, all considerations, including First Nations' issues, are subject to the ultimate issue: what is in the best interests of the child? Nothing displaces the best interests of the child and no section of the Act overrides the child's best interests. *Algonquins of Pikwakanagan v. Children's Aid Society of the County of Renfrew, [2014] O.J. No. 4485* (OCA).

Court must consider what efforts will be made to maintain children's contact with their First Nation community in determining crown wardship. Attachment may take priority to issues of culture and heritage, but do not negate them. *Children's Aid Society of County of Renfrew v. Algonquins of Pikwákanagán, C.K., N.A. M.B., K.A.*, 2012 ONSC 4518 (CanLII).

Intervention - The standard for State intervention into a family's circumstances is based on a societal interest in the protection of children. As stated in *Re: D. (M.G.L.)* by the Ontario Court of Appeal at (1984) 41 R.F.L. (2d) 176 at p. 186, interference should only occur when the level of parental care falls below the minimum level of care to which all children are entitled. This is a very subjective standard and is assessed objectively. *Children's Aid Society of St. Thomas & Elgin v. J.P.G.,* 2016 ONCJ 295.

Investigations - A parent is not entitled to withhold a workers access to a child for the purposes of an investigation and it appears the Applicant's right of access to the child has no apparent boundary: *Children's Aid Society of Hamilton-Wentworth v. C.*, 1993 CanLII 5608 (ON SCDC), [1993] O.J. No. 2360, S.C.J.; *Family and Children's Services of St. Thomas & Elgin v. F.(W.)*, 2003 CanLII 54117 (ON CJ), [2003] O.J. No.717, C.J. and affirmed at[2005] O.J. No. 88, S.C.J. Further, this principle may also extend to a right of access to a child's residence if there is a causal connection between the alleged risk and the condition of the child's home. *Children's Aid Society of St. Thomas & Elgin v. J.P.G.,* 2016 ONCJ 295.

Jurisdiction – 5 day rule – Subsection 46 (2) of the *Child and Family Services Act* provides that a child must be brought to court as soon as practicable and in any event within 5 days of his or her apprehension. If the fifth day falls on a holiday or a day the court is closed, the case can be brought to court on the next day that the court is open. Subsections 89 (1) and (2) of the Legislation Act provide for this. Its terms are not inconsistent with the paramount purpose set out in the Act. *Children's Aid Society of Toronto v. A.H.,* 2017 ONCJ 265.

Jurisdiction – Unborn children

The court has no jurisdiction over unborn children. *Winnipeg Child and Family Services v. G. (D.F.),* [1997] 3 S.C.R. 925.

Kin Assessments - Subsection 57(4) of *Child and Family Services Act* does NOT compel children's aid society to conduct kin assessment on every relative or other person who comes forward regardless of that person's background or circumstances — Kin assessments fall within exclusive purview of society and court relies on society's expertise to determine when it is and when it is not appropriate to conduct kin assessment — Only if court finds that society has either shirked that duty or has been unreasonable in its position to not conduct kin assessment would court intervene — In *Catholic Children's Aid Society of Hamilton v. M.S., R.M. and K.N.*, 2016 ONSC 2905, the court found that the society had justifiable reasons for deciding not to conduct kin assessment as:

- society workers had experienced violent and aggressive behaviour of natural father;
- on several occasions, grandmother had defended her son's behaviour towards society workers and she herself had backed down from his aggressive behaviour towards her;
- nothing in grandmother's material suggests viable plan that she could implement that would protect child against her natural father should he one day appear at front door
- grandmother had well established pattern of not co-operative with society, which made her unlikely candidate for honouring any terms of supervision that society might wish to impose upon her.

Least Restrictive Alternative – Crown wardship is the court's last resort. The court is required to inquire into the efforts made by the society and other community services to

provide services to the child and the parent-an inquiry that is not limited to the timeframe prior to the litigation, but also includes an inquiry into the society's efforts after the removal of the child. It is a particularly careful scrutiny when the society shifts its position to recommend permanent removal. *Children and Family Services for York Region v. H.C.,* 2008 Canlii 64678 (SCJ); *Frontenac CAS v. C.T.* 2010 ONSC 3054.

Media s. 45- The public is excluded unless ordered otherwise. A maximum of 2 media reps may be chosen to attend and report. The court can exclude the media or prohibit publication of all or part of the proceeding if it would cause emotional harm to the child. The child shall not be directly or indirectly identified. The awareness of older children of the proceeding is irrelevant. The court found that it was unlikely that media coverage would inflict emotional harm on children who were 4 and 5. See: *CAS Niagara v. D.,* 2003 42 RFL (5th) 27.

In *Chatham-Kent Children's Services v. A.H.* [2014] O.J. no. 1247 (SCJ) the court found that the Dagenais/Mentuck test applies to child protection cases stating that it is clear law that restrictions on the open court principle and freedom of the press in relation to judicial proceedings can only be ordered where the party seeking such a restriction establishes through convincing evidence that:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

Note Cites: *Dagenais and Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835; *R. v. Mentuck* [2001] S.C.J. No. 73.

The court writes:

> **34** In my opinion, freedom of communication and freedom of expression are fundamental to the safeguarding of both democracy and accountability for and on behalf of all Canadians including all participants in the administration of justice. These freedoms "reassure the public that all persons regardless of race, colour or creed are equal before the law and that there is no arbitrary action or abuse of power"[12].
>
> **35** I also entirely agree with the opinion of the court in *M. (Y.) v. Children's Aid Society* 65 D.L. R. (4th) 427 (that "justice must not only be done but must also appear to be done. The courts, the administration of justice, public bodies and agencies, all have been the subject of scrutiny by the media. Agencies such as the ones involved here have great power and can exercise certain controls over the lives of citizens. The public ought to feel comfortable that such authority is being handled properly. Surely, personnel of these agencies ought not to fear reasonable public scrutiny of their operations."
>
> **36** The courts have repeatedly found that the open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. At every stage the rule should be one of public accessibility and concomitant judicial accountability. Indeed, the

court has held that curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance[14]. This principle and the *Charter* support the media's right to publish or broadcast information about court proceedings and the media's right to gather that information, and the rights of listeners to receive the information.

37 But these freedoms are not absolute. The Supreme Court of Canada has clearly confirmed that under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.

38 In the case before me, the question is therefore whether public access to sensitive information involving children who are vulnerable and missing and have been found to require the protection of a government agency under the *CFSA* will endanger and fail to protect the integrity of our justice system.

39 In other words, have the parties to the litigation shown that without the protective or limiting orders they seek, there is a serious risk to the proper administration of justice? It is trite law that the interest that is jeopardized must have a public component. Purely personal concerns would not justify the restriction sought[15].

41 The case before me is not a criminal matter; it is not a civil matter; it is not a family law matter. And this is not a case about a religious community. This is a matter that concerns only the children of the appellants.

42 In my opinion, in certain circumstances, the protection of a vulnerable child and that child's privacy may well go beyond merely the name of the child in protection proceedings. Children who are the subject of an application by the state for intervention are also allegedly vulnerable in their environment at home, at school and/or in their neighbourhood. They are subject to the conduct and attitudes of the adults who interact with them. Disclosure to others of the intimacy of their lives is beyond their control. Without the ability or opportunity for critical thought, they are swept into a process of the balancing of rights of others and in that process, it can be difficult to hear their voice.

43 Because of the best interests test, allegations about the conduct or attitude of adults toward a child cannot be separated and considered insolation from the child; the allegations cannot be measured without exposure of the impact of that conduct or attitude on the child and/or the child's response thereto. In other words, the child's world and privacy are inextricably linked to an investigation of the parent's.

44 In child protection matters, therefore, the need to shield a vulnerable child rests not only on the child's chronological age but also and perhaps more significantly, the factual circumstances in which the child lives or has been placed.

45 The paramount purpose of the *CFSA* is to promote the best interests, protection and well being of children. The health, welfare and education of children in the context of their best interests are, and must be, the primary focus of the judiciary in the application of the provisions of this legislation. The foundation of this approach lies in s. 15(1) of the *Charter* which guarantees equal protection and equal benefit of the law to all persons including children.

46 The Supreme Court of Canada has also recognized that children are "highly vulnerable members of our society, and given society's interest in protecting them from harm, fair process in the child protection context must reflect that children's lives and health may need to be given priority where the protection of these interests diverges from the protection of parents' rights to freedom from state intervention.[17] " In my view, in exigent circumstances, this may also apply to other freedoms available to other individuals including the media.

> **47** But I am also of the view, that the infringement, if any, must be limited as soon and as far as possible in order to ensure the accountability of the state and the integrity of the administration of justice. Indeed, the *CFSA* emphasizes the need for consideration of the least restrictive alternatives in virtually every aspect of its provisions.

Medical Treatment – Under Ontario's *Child and Family Services Act*, the society's ability to consent to medical treatment for the child, in the absence of parental consent to that exercise of society discretion, requires a court order removing custody of the child from his parents and entrusting it to the society. *CAS Toronto v. L.P.,* 2010 ONCJ 320. The Society was allowed to make the child a temporary ward to obtain a necessary blood transfusion. *B. v. CAS Toronto*, 1995 9 RFL (4^{th}) 157. Entitled to infringe s.7 of Charter in Jehovah Witness case *H.*v. *CAS Toronto 1996*, 138 DLR 4^{th} 194 (Ont. General Division). Refused where only 30% chance of success. *CAS Toronto v. F.,* 1988 66 O.R. 2d 528.

Mobility – In *Children's Aid Society of Toronto v. G.M.,* 2015 ONCJ 463, the society sought and were given permission on a temporary motion in a status review to place a child with the maternal grandfather in the Cayman Islands as the evidence was overwhelming that it was in the children's best interests. The court applied the temporary mobility principles set out in Boudreault v. Charles, [2014] O.J. No. 5779 (OCJ), but noted the difference in a child protection case, including a different, risk-based best interests test, the secondary purpose of the least disruptive course of action, the need to balance a family placement against the principle of making reasonable efforts to return the child to a parent and how a move outside the jurisdiction could frustrate that objective. The court reviewed additional considerations in paragraph 41 as follows:

> **[41]** Other considerations which will impact on whether the proposed temporary move should be allowed in a child protection case include:
>
> a) Whether the proposed move is in the context of a protection application or a status review application. The court will likely apply a stricter test during an original protection proceeding since there has not yet been a finding that the child is in need of protection, the statutory time limits are less likely to have been exceeded, the parents will be just beginning to address the risk concerns and should be given a reasonable opportunity to show that they can safely parent the child.
>
> b) The nature of the protection issues, including the severity of the risk concerns. This will likely dictate how long a parent might take or should be given to address these concerns. If the risk to a child is low to moderate and will likely be addressed in a timely manner, it is not a proportionate response to move a child far away from the parent to an extended family member. The parent should be given every reasonable chance to succeed. The consideration is different if the risk concerns are high and unlikely to be addressed by the parent in a timely manner.
>
> c) Whether the proposed move will involve a change in who is caring for the child. If the change is being proposed in a status review proceeding (as is the case here) the test in subsection 64 (8) of the Act and the law set out in paragraphs 32-34 above must be applied.

d) Whether the child is in the care of the society at the time of the motion. It is generally advantageous to a child to be placed with a member of his or her family, rather than remain in a foster placement.

e) Whether the child will be moving to reside with a parent, which move will generally be viewed more favourably than a move to live with an extended family member.

f) How closely the child protection case resembles a domestic dispute. In some cases the society is only involved to monitor high conflict between parents and to protect the child from emotional harm. There may only be a supervision order in place. The closer the case resembles a domestic dispute the more appropriate it will be for the court to apply the principles reviewed in *Boudreault* in assessing whether to permit a proposed move on a temporary basis with one of the parents.

g) The nature of the relationship between the child and the proposed caregiver.

h) The proposed caregiver's ability to meet the needs of the child in the new jurisdiction, including the child's academic, medical, social, and development needs. It needs to be kept in mind that many children in child protection cases have special needs due to their exposure to substandard parenting.

i) The proposed caregiver's ability to work cooperatively and honestly with the society and to comply with court-ordered terms of supervision.

j) The proposed caregiver's willingness to facilitate any order for access to the left-behind parent and extended family members.

k) The ability and willingness of a child protection agency in the new jurisdiction to monitor any supervision order. Its ability to do so needs to be assessed in the context of the degree of any risk concerns with the caregiver – the higher the risk, the more important the ability to monitor the caregiver becomes.

l) The nature of the relationship between the child and the left-behind parent or parents and their extended families and the possible emotional risk of harm to a child of diminishing those relationships. The court will generally be more reluctant to approve a move where the left-behind parent has been actively involved in raising a child. That parent should be given a longer opportunity, within the parameters of the statutory time limits, to demonstrate that he or she can adequately address the risk concerns.

m) The impact of the move on the left-behind parent or parent's ability to present a positive plan for the child.

n) The child's age, stage of development and degree of maturity.

o) The child's views and preferences**.**

Natural Justice Principles - *New Brunswick Minister of Health v. G.*, 1999 CanLII 653 (S.C.C.), [1999] 3 S.C.R. 46, the Court stated that,

> … the state can remove a child from parental custody only in accordance with the principles of fundamental justice which are to be found in the basic tenets of our legal system. The Chief Justice went on to say…

> Thus, the principles of fundamental justice in child protection proceedings are both substantive and procedural. The state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination. ...
>
> For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. ... If [they are] denied the opportunity to participate effectively at the hearing, the judge may be unable to make an accurate determination of the child's best interests. There is a risk that the parent will lose custody of the child when in actual fact it might have been in the child's best interest to remain in his or her care.

Although the best interests of the child are paramount, the fundamental right of a parent, (even a former step-parent) to be heard cannot be sacrificed. A stepfather was ordered to be served as a parent in a status review in Children and Family Services For York Region v. E.T., 2009 CanLII 72329 (ON S.C.).

Openness – General

Since the 2011 amendments, the existence of an access order does not preclude the society from placing a child for adoption. A Society may place a crown ward with access for adoption, and once that child is placed for adoption, the access order is terminated under section 143 of the Act, subject to notice and a possible application for an openness order being commenced by either the subject of the access order or by the person or persons (including the child depending on the wording of the order) who has/have the benefit of the access order. The operative sections relating to openness applications are section 141.1.1, section 145.1.1 and section 145.1.2 of the Act.

Openness – Access Holder

The distinction between who has been granted an access order (the access holder) and who is the person with respect to whom an access order has been granted (the access recipient) has now become a critical consideration because only the access holder has the right to bring an openness application if served with a Notice of Intent to place a child for adoption. The access recipient only has the right to be given notice of the society's Notice of Intent to place a child for adoption. *Children's Aid Society of Toronto v. K.A., 2014 ONCJ 304 (CanLII).*

Openness – Definition

From: *N.P.T.S. v. Catholic Children's Aid Society of Toronto* 2016 ONCJ 242

Openness is not defined in the legislation. In enacting the openness provisions, the legislature crafted terms quite separate from the Act's provisions for access. An order for access typically allows visits involving direct, exclusive contact with a child. The purpose of an openness order is the preservation of a "beneficial and meaningful" relationship for

the child, while supporting the child's security in his adoptive family: *Catholic Children's Aid Society v. M.M.*, [2012] O.J. No. 3240 (Ont. Ct.), para. 198.

An access order post crown wardship is qualitatively different than a contact order post adoption. Further, there is a significant legal difference between an "access" order and an "openness" order. Although "openness" is not defined in the legislation, its purpose is quite different from access, which is why the legislature crafted terms separate and distinct from the Act's provisions for access: *The Children's Aid Society, Region of Halton v. T.A.G., A.D., J.P.P.*, 2012 ONCJ 746 (Ont. Ct.), para. 233.

An openness order does not necessarily mean that there will be direct and exclusive contact between the person who previously enjoyed access and the child. The court may allow indirect contact by means of pictures or letters, or occasional direct contact on special occasions. The court may leave the particulars of contact in the discretion of the adoptive parents: *Catholic Children's Aid Society v. M.M. ,supra*, 2012 (Ont. Ct.), para. 198; *The Children's Aid Society, Region of Halton v. T.A.G., A.D., J.P.P.*, *supra*, 2012 (Ont. Ct.), para. 233.

"Openness" connotes some contact post-adoption between a child and a member of the child's biological family. The legislation does not specify or limit what type of contact is contemplated in openness arrangements, but the purpose of the openness provisions is clear: to facilitate a child's development in his adoptive home by providing a link for the child to his past and heritage. This is a very different purpose than that of an access order: *Native Child and Family Services of Toronto v. K.W.-H.*, 2007 ONCJ 169 (Ont. Ct.), para 14.

The birth parent cannot go back to the "old" access order. That order was terminated on the placement of the child for adoption (under *C.F.S.A*. s. 143): *Re Proposed Openness Order for S.M.*, *supra*, 2009 (Ont. Ct.), para. 24-25.

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. The primary concern is the success of the adoption itself. Therefore, in making an openness order, the court must consider whether openness would interfere with the success of the proposed adoption of the child. In such a contest, the interests of the biological parent requesting openness are secondary to the interests of the adoption succeeding. Adoption is different. It is basically a negative process which effectively cuts out the biological parents as operative parents of the child. The adoptive family is now the "forever family" and any openness order has to be structured to meet the interests of permanency and the success of the adoption. That is quantitatively different from maintaining an ongoing relationship between parent and child in the face of a Crown wardship order. *F. v. Simcoe, Child Youth and Family Services*, 2017 ONSC 5402.

Deference must be given to the views of the prospective adoptive parents. This is because openness must be concerned with the success of the proposed adoption and the comfort level of the adoptive parents with the proposed contact with the birth parents is therefore paramount: see *Native Child and Family Services of Toronto v. J.E.G.,* 2014 ONCJ 109 (CanLII) at para. 59 and *L.M. v. Valoris enfants et adultes de Prescott-Russell*, 2014 CSON 2921 (CanLII) at para. 78; *F. v. Simcoe, Child Youth and Family Services*, 2017 ONSC 5402.

Openness Orders (Principles) - A full review of the law is set out in *Re Proposed Openness Order for S.M.,* 2009 ONCJ 317 (CanLII). Some points are as follows:

1. Meaningful and beneficial is conjunctive and must be looked at from the child's perspective.
2. Even though true measure of benefit or meaningfulness of relationship to child may require unfolding of time, court may not make openness order in anticipation or on eventuality — If PRESENT benefit and PRESENT meaningfulness are not evident at time of hearing, court has no discretion to make openness order that gives opportunity for FUTURE benefit or FUTURE meaningfulness to child.
3. It is critical for court first to identify nature of relationship that is to continue before it can begin to evaluate "benefit" to child in continuation of that relationship.
4. Occasional "contact" between child and former parent is NOT something that "continues" relationship in any meaningful way — To keep "relationship" alive requires more than occasional "contact" — Infrequent contact between child and former parent over long intervals is recipe for withering of any "relationship".
5. If the openness order operates after adoption for some time before breakdown, the person named in order might be entitled to apply for access order under *Children's Law Reform Act*, per *Howard v. Golding*, 1993 CanLII 3046 (Ont. Prov. Div.). Contempt is also another remedy. However, the adoption cannot be set aside on the basis that the openness order is not being complied with. The order is stand-alone and cannot be incorporated into an adoption order.
6. There is no authority to make a temporary openness order, so the society should test-drive the arrangement first through subsection 59 (4) of the Act which permits contact.
7. Adjudication of an openness application is not, however, the same decision-making as an adjudication of a crown wardship access.
8. An openness order cannot be permitted to undercut the security of the child in his adoptive placement.
9. The importance of a stable adoptive home cannot be overstated. An openness order should not leave a child straddling his "old" and the "new" life in a manner that disinclines him to root himself in his adoptive life:

Whether or not there will even be an openness order will depend on the views of the potential adoptive parents, and the willingness of the biological parents to support the child in her new adoptive home, hopefully after the contact order has been "road tested" and found to be workable in this child's best interests: *Native Child & Family Services of Toronto v. J.E.G.*, *supra*, 2014 (Ont. Ct.), para. 93.

In *S.S.K. v. Halton Children's Aid Society*, 2014 ONCJ 169, Justice Zisman permitted some supervised contact and letters once per month for a 14-year-old-child who brought the openness application. The mother was highly litigious and not in support of the adoptive placement, but supported some contact. The court wrote at paragraph 37:

> Maintaining a relationship with the biological parents is important for the child's self of sense and identity. An openness order will permit the child to move forward with her life without sacrificing her relationships with her birth family which are and continue to be significant and important to her.

Openness Orders – Temporary

In *N.P.T.S. v. Catholic Children's Aid Society of Toronto* 2016 ONCJ 242, a temporary openness order was not made where the mother had a strong sense of the children being "her" children, and not the children of the caregivers. She was unable to accept that the children were being adopted and unable to accept and move on from the circumstances under which the children came to live with the proposed adoptive family. The openness schedule requested by the children and the mother would have required a lot of contact between the adults and a lot of co-operation. It would have required a high-functioning relationship between adults with mutual respect for each other's roles in the children's lives.

The openness arrangement is not intended to serve the needs and interests of the biological parent. The court's primary concern, indeed the court's only concern in these cases and at this point in the case, is the children's best interests, which at present requires that the court ensure and protect the viability of the children's placement.

The court found that the security and stability of the children in the home of the proposed adoptive family was the most important factor for the court. If there was an openness order made there was a risk of destabilizing and even of jeopardizing the placement. This was too big a risk for these children, and not one the court was prepared to take.

In *Bruce-Grey Child and Family Services v. R.G.,* 2016 ONCJ 557, the court made a temporary openness order with siblings (mother had no right of access). The test on temporary order is best interests – there is no beneficial and meaningful component. In this case it was the actions of the adults that had thwarted sibling contact and access was ordered despite opposition from the foster mother and a 4 year contact gap with the siblings.

Openness – Time limits –Jurisdiction

The court has no jurisdiction to extend the 30 day time limit to file an openness application. Rule 3 offers no assistance. *Children's Aid Society of Halton Region v. W.P., 2013 ONCJ 132 (CanLII).*

Paramountcy – By adding sections 57.1 and 57. 2 to Act in 2007, Legislature moved away from notion of absolute stays, although older case law could still be instructive — Introduction of section 57.2 recognizes possibility that proceedings could be duplicated and conflicting orders made but, once stay is lifted, order of domestic court would no

longer sit in abeyance — Exercise of any discretion under section 57.2 is ultimately fact-driven and it would be impossible to identify how broad criteria would be specifically factored — Nevertheless, section 57.2 (as in section 57.1) should be an exercise in which court balances fairness and potential prejudice to adults against possible lifting of stay, which would then be assessed against child's best interests to assure that what is fair to adults is also in child's interests. *J.D. v. N.R.,* 2009 ONCJ 523 (CanLII).

A protection order suspends any outstanding custody order under either provincial or federal legislation. While it is established that the child protection legislation is paramount - *Fortowsky v. Roman Catholic Children's Aid Society for Essex County*, [1960] O.W.N. 235, 23 D.L.R. (2d) 569, 5 R.F.L. Rep. 7, [1960] O.J. No. 600, 1960 CarswellOnt 54 (Ont. C.A.) - it has been accepted that courts do have the jurisdiction to make a custody-and-access decision when there is a concurrent child protection proceeding, it just would be stayed until the child protection proceeding terminated: See: *J.B. v. C.P. and Windsor-Essex Children's Aid Society*, [1999] O.J. No. 2698 (OCJ).

Note: The paramountcy of child protection proceedings over a Divorce Act custody proceeding was put in doubt in *D.D. v. H.D.,* 2015 ONCA 409. The court explicitly did not determine the jurisdictional issue but went ahead and made a custody order in the face of child protection proceedings.

Parent's rights secondary to child's welfare:

The *CFSA* requires a careful balancing of the paramount objective to promote the best interests, protection and wellbeing of children, with the value of maintaining the family unit. The legislation does not emphasize parental rights but rather recognizes the importance of maintaining the family unit as a means of fostering the best interests of children. The values and purposes outlined under section 1(2) must be always be evaluated in contemplation of what is best for the child. A child-centred focus must not be lost at any stage of a protection hearing, see *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, 1994 CanLII 83 (SCC), [1994] 2 S.C.R. 165. In *Child and Family Services Act v. K.L.W.*, [2002] 2 S.C.R. 519, the Supreme Court of Canada again affirmed that child protection legislation is about protecting children from harm and commented at para. 80: "It is a child welfare statute and not a parents' rights status."

Parties
If you qualify as a statutory parent under subsection 37 (1) of the CFSA you must be named. *Catholic Children's Aid Society of Toronto v. D.L.,* 2014 ONCJ 587.

Sub-rule 7 (4) 2 of the Family Law Rules supplements s. 39 (3) of the CFSA. This meant that caregivers who qualified under the rule, but not under the CFSA before the apprehension should have been, and were added by the court as parties. *Children's Aid Society of Toronto v. T.-J.M.,* 2010 ONCJ 701 (CanLII).

Subrule 7 (4) of the *Family Law Rules* says that every person who has care and control of the child, except a foster parent shall be named a party. In Children's Aid Society of

Toronto v. C.K., 2013 ONCJ 2917, the children were placed in the father's custody. His parents assisted with caring for the children and asked to named as parties. The court rejected this position writing at paragraph 33:

> The paternal grandparents have shared in the care of the children, but do not have control over them. The children have been placed by the court, subject to supervision orders, in the custody of the father, not the paternal grandparents. The father, not the paternal grandparents, has the exclusive legal right to make decisions about the children, including their medical care, religion and education. He is the person who has control of them.

Past Behaviour - *P.F. v. A.W., [2016] O.J. No. 6321* : Absent evidence of a change in attitude, or therapy to address past bad behavior, the best way to predict how a person will behave in the future is to examine past conduct. As Justice W.L. MacPherson stated in *CAS v. C.T.*, 2015 ONSC 32 (CanLII);

> The best predictor of future behaviour is past behaviour. Children are not to be used as therapeutic tools by their parents.

Payment Orders – Under section 60 of the CFSA, with the criteria set out in subsection 60 (2). The power to order payment is discretionary and not governed by the Child Support Guidelines (the guidelines). See: *Children's Aid Society of the District of Muskoka v B.W.*[1994] O.J. No 2954 (Ont. Prov. Ct.). In *Children's Aid Society of the County of Dufferin v G.B.*, 2004 ONCJ 163, the court wrote at paragraph 21:

> Section 60 of the Act does not require the payment by the parent to be in accordance with the table amount under Child Support Guidelines, O. Reg. 391/97, as amended. However, if this child support guideline were to be applied, the monthly child support payment would be $674.00.

The court imputed income to the payor, applied the guidelines and reduced support by one-third, based on a contribution it felt the other parent should be responsible for.

In *JFCS v. A.K.,* [2014] ONCJ 227 (Canlii), the court used the guidelines as a starting point. The court recognized that child protection proceedings are different than private civil disputes – there are increased legal fees and the court does not want to discourage litigants from advocating reasonable positions against institutional litigants – further, a payor's earning capacity will likely be compromised, due to having to attend access, plan of care and service provider meetings that take place during work hours.

Photocopies - The Society has to produce photocopies of their records to parents upon request . *CAS Peel v. V.J.*, 1993 O.J. No. 3245 (OCJ).

Plans of Care –Under s. 53(1) (c) must state the plan of care when giving a decision. Under s. 56 the court needs to consider the Society's plan. The plan of care can be a triable issue. Can conditions be attached to a disposition order? *Toronto CAS v. P.V.*, 2005 ONCJ 472.

Pleadings – Late filing extension orders

The party seeking late filing must show that the best interests of the child require an extension. In the vast majority of the cases it will be in the child's best interests to permit full participation- the threshold to meet this test will be low. However when the evidence is clear that the party has no chance of success (tantamount to summary judgment) and the child's placement needs to be determined, the party will have more difficulty meeting the test. *JFCS v. M.J.P.* 2012 ONCJ 66.

In *CAST v. J.Y.-W*, 2014 ONCJ 342, the court allowed late filing of an Answer/Plan of Care on the issue of disposition only. The court also made findings of fact that were not in issue in the material.

At paragraph 44 in *Children's Aid Society of Toronto v. E.O.,* 2016 ONCJ 2 (CanLII), the court commented [my emphasis]:

> [44] Notwithstanding the fact that mother had been incarcerated, she nevertheless could have filed her Answer and Plan of Care. She chose not to do so. In considering whether to allow mother an extension of time, the court balanced the needs of the child, and the right of the child not to remain in litigation drift, with the mother's parental rights as set out in the Act.

Parents not permitted extension of time to file Answer when the only issue was supervision and an Answer would have added little to the case. See: *Catholic Children's Aid Society of Toronto v. Y.P.,* 2017 ONCJ 795.

Proportionality

From: *Manitoba (Director of Child and Family Services) v HH and CG* 2017 MBCA 2017 MBCA:

The principle of proportionality discussed in Hryniak applies no less to a child protection proceeding than to any other family or civil adjudication (see *Morrill v Morrill*, 2016 MBCA 93; and *Nafie v Badawy,* 2015 ABCA 36 at paras 104, 164, 599 AR 1). As the Supreme Court noted (at paras 27-28):

> [T]he conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> This requires a shift in culture. The principle goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

Publication - in child protection proceedings, the restrictions in s.45(10) of the CFSA apply to the transcript of the actual child protection hearing, and not case conferences. Generally, a party to a family law case is entitled to a transcript of his/her own court appearance upon proof of a legitimate need for the transcript and that the probative value of the transcript outweighs any possible harm: *CAS Niagara Region v. N.(R.) and N.(G.),* [2004] O.J. No.1526 (Ont.S.C.) per Quinn J.

Public Guardian and Trustee (special party)

One is mentally incapable in respect of an issue where one is not able to understand information that is relevant to making a decision regarding the issue or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision regarding the issue. *CAS of Niagara Region v. W.D.* [2003] O.J. No. 3244 (OCJ).

There are a number of components to determine the test of mental capacity, including:

(a) the onus is on the party alleging mental incapacity;

(b) the test is functional ability, particular to the task or activity at issue;

(c) the ability to appreciate reasonably foreseeable consequences includes the ability to consider a reasonable range of possible outcomes, positive and negative; and

(d) caution must be exercised before removing a party's right to self-determination.

See: *C.A.S. v. J.H.V.,* 2016 ONSC 4996.

Lack of sophistication, education or cultural differences is not sufficient to ground a finding of mental incapacity - that must stem from sources such as mental illness, dementia, development delay or physical injury. As noted by Backhouse J. in *C.C. and Children's Aid Society of Toronto*, [2007] O.J. No. 5613,

> [33] Appointing a legal representative ultimately means the Court is making a finding that the person does not understand the issues in the proceeding and does not appreciate the consequences of making or not making decisions in the case. Such an appointment is highly prejudicial to the incapable person, particularly where the primary issue in dispute is custody, access or child protection.
>
> [34] Courts have considered the following types of evidence in determining the appropriateness of the appointment of a representative or litigation guardian:
>
> (a) Medical or psychological evidence as to capacity;
> (b) Evidence from persons who know the litigant well;
> (c) The appearance, demeanour and conduct of the litigant before the Court;

(d) The testimony of the litigant; and,
(e) The opinion of the litigant's own counsel.

A person is assumed to be capable and there must be compelling evidence of incapacity for a court to find a person a special party. *Nezic v. Nezic* 2013 Carswell Ont 4003 at para 2.

Costantino v. Costantino (2016) CarswellOn 18301, par 57:
The jurisprudence has identified the following factors that should be considered when applying the test for determining whether a party is under disability and requires a litigation guardian:

a) A person's ability to know or understand the minimum choices or decisions required and to make them;
b) An appreciation of the consequences and effects of his or her choices or decisions;
c) An appreciation of the nature of the proceedings;
d) A person's inability to choose and keep counsel;
e) A person's inability to represent him or herself;
f) A person's inability to distinguish between relevant and irrelevant issues; and,
g)A person's mistaken beliefs regarding the law or court procedures. *Huang v Pan* 2016 ONSC 6306 (CanLII).

…par. 58:

Issues of mental capacity generally are to be decided on medical evidence. Courts have, in some circumstances, considered various types of evidence in determining whether a Litigation Guardian should be appointed:

a) Medical or psychological evidence as to capacity;
b) Evidence from persons who know the litigant well;
c) The appearance and demeanour of the litigant;
d) The testimony of the litigant; and,
e) The opinion of the litigant's own counsel.

Appointment not made in situation where evidence that participation by mother would cause her significant anxiety, as she mother appreciated the nature of the case, and was able to understand the consequences of her choices. *Evans v. Evans,* 2017 CarswellOnt 10917.

Service – It is important to serve each parent, whether they are involved in the child's life or not, or adoption is at risk. *D.C. v. W.A.,* [2003] O.J. No. 5119.

Service (Dispensing) - Courts should not lightly grant orders dispensing with service on a parent, particularly in child protection cases. This is the case, even if the parent has had

little involvement with the child or might be a risk if served. It is a fundamental principle of natural justice that a parent be provided with both procedural and substantive protection. See: *Windsor Children's Aid Society of Toronto v. R.L.* 2012 ONCJ 325; *Children and Family Services for York Region v. E.T.* 2009 Canlii 72329 (SCJ); *Halton Children's Aid Society v. D.R.,* 2015 ONCJ 314, per Justice V.A. Starr. If service is dispensed with, it robs a child of a potential family relationship, even if that potential is small.*See: Jewish Family and Child Service of Greater Toronto v. K.B., 2016 ONCJ 259*, where the court preferred to make order by Facebook in the following form:

> I am counsel in a civil case in Toronto, Ontario that involves you. Pursuant to the May 6, 2016 order of Justice Stanley Sherr, of the Ontario Court of Justice, my client has been given permission to serve you with notice of this case by this message.
>
> You may obtain copies of all court documents in this matter and a copy of the order of Justice Sherr by contacting me at Glass and Associates, 4600 Bathurst Street, 1st Floor, Toronto, Ontario, M2R 3V3, Telephone number: 416-638-7800; email address: swestreich@glassassoc.com.
>
> S.R.
> Barrister and Solicitor

Service (Effective Date)

Special service can be effected under clause 6 (3) (d) of the Family Law Rules, by leaving the document residing at the same address and mailing the document the same or next day. Service is effective on the 5th day after the document is mailed. In counting days, days the court office is closed are not counted. See: subrules 6 (11.3) and 3(2). *Children's Aid Society of Toronto v. M.V.-N.,* 2017 ONCJ 675.

Service (Irregular) – This is the exception and not the rule. When the state is intervening in the life of a family the need for procedural fairness is heightened. The society should not be taking short cuts for service. *CCAS v. C.H. and M.H.,* [2009] O.J. No. 2404.

Service (Searches to make)

Justice Victoria Starr sets out the following searches that can be made in *K.C.F. v. M.W.,* 2016 ONCJ 689 (CanLII).

> a. E-mail, text, telephone or message (i.e. text or i-message or other messaging via social media), where the party asks for an address for service or gives effective notice by uploading and attaching a copy of the documents to the message, or, sets out details of the application within the body of the message;
>
> b. Conduct a reverse cell and telephone number look-up. This method may provide an address for the owner of the account associated with the telephone or cell number and thus, the name and address of the person to be located or, a

person who may have information about the whereabouts of a party or on whom subservice can be carried out;

c. Search for the party on social media sites, including:
    - Facebook
    - Twitter
    - LinkedIn
- What's Up

d. Conduct general internet searches using various search engines. Search engines like Google, Bing, and Yahoo! provide some of the largest conglomerations of websites and information. One may be able to locate a person through the posts that person has made in discussion groups; reviews they have provided online; resumes posted to job or career sites; ads on Craig's List; newspaper articles; etc.

e. Directory searches including:
    - Online telephone directories (such as 411.ca and whitepages.ca; which are important online directories but just two of many). It is important to search in multiple locations if the party has a connection to, or has lived in, or worked in other cities or provinces, as he or she may now be living there;
    - Professional associations or organizations to which the party or a friend or relative of the party may belong (i.e. engineers, accountants, lawyers). Government employee directories also exist as may union membership lists,
    - High school and post-secondary institution Alumni membership database directories;

f. Find and make inquiries of relatives and friends. The whereabouts of such persons may also be found using the same techniques just cited;

g. Obtain a credit report from a credit reporting service such as Equifax;

h. Search public records. Such records include: birth, death, marriage and divorce certificates; deeds, mortgages, and other related property records; various licenses, including professional and business licenses; driving records and; court records. These records are kept by government agencies. The release of these records is often subject to certain restrictions or fees. Not all contain contact information but some do and some can serve as a lead to other records or sources that may assist in finding someone. Most importantly, many of these records are available online. For example, many court decisions in civil, criminal, family separation and divorce cases are published online and are available on a national scale (such as on CanLii: http://www.canlii.org/en/);

i. Hire a "Skip Tracer". A 'skip trace' is the language used to describe the process of tracing a person's past to locate their current whereabouts. A "skip

tracer" is the professional who does this type of work. These professionals are adept at conducting the various types of searches I have referred to above and more for a fee. They are frequently used by law firms and other businesses particularly when trying to locate a judgment debtor;

j. Although not available in this case, where the case involves a child support claim pursuant to section 33 or 37 of the Family Law Act, RSO 1990, c F.3, and the claimant needs to learn or confirm the proposed respondent's whereabouts, the claimant may bring a motion pursuant to subsection 42(4) of the Act for an order requiring a person or public body to provide the court or the moving party with any information that is shown on a record in the person's or public body's possession or control and that indicates the proposed respondent's place of employment, address or location. The scope of those from whom such information may be obtained is broad. It includes: friends or relatives, employers, union or other organisation the person may belong to. It also includes public authorities such as the Ministry of Transportation, Ontario Health Insurance Plan, the Crown, Family Responsibility Office, Ontario Works, Ontario Disability Insurance Plan, Corrections Canada, Ministry of Community and Correctional Services, and so on;

k. Obtain an order for subservice by advertisement, on a friend, relative, employer, the Family Responsibility Office, or other person or public body such as those I have described above and then carry out the approved method of service; and,

l. Retain a private investigator.

Service – Restraining orders

Subsection 80 (2) requires personal service of request. However, if order is sought pursuant to a request for a custody order under subsection 57.1 (3), personal service is not required – special service is sufficient. *Children's Aid Society of Toronto v. M.V.-N.*, 2017 ONCJ 675.

Status Review Proceedings -

The court has the authority to make interim orders. S. 51(2) is the authority and s. 64(10) establishes the criteria. *CAS Toronto v. R.*, 1993 16 O.R. (3d) 351. The original order is presumed to be correct. *Children's Aid Society of the Regional Municipality of Waterloo v. T.F.,* [1994] O.J. No. 208 Hardman J.

There is a two-fold examination. First, whether the child continues to be in need of protection and second, the child's best interests encompassing the entirety of the situation. The function of the status review hearing is not to retry the original need for a protection order but rather to evaluate whether there is a need for a continued order for

protection. Once a finding of the need for protection has originally been made, there is still the requirement, upon a status review, to consider whether the child is or is no longer in need of future protection. Children's needs are continually evolving and these ever-changing circumstances must be taken into account. The courts must continually evaluate the need for state intervention in order to insure that the objectives of the Act are being met. Best interests must be examined from the child's perspective and will take precedence to parental interests. Court must consider emotional harm of removing from caregivers who the child sees as psychological parents.

Catholic Children's Aid Society of Metropolitan Toronto v. C.M. [1994] 2 S.C.R. 165 (S.C.C.).

Must be brought before the protection application expires or lose jurisdiction. *CAS Sudbury v. L.(J.),* 2000 12 RFL (5th) 41 OCJ.

Once it has been decided that the child is still in need of protection, the court must consider the least restrictive alternative consistent with the child's best interests. *CAS Peel v. W.,* 1995 14 RFL (4th) 196 (OCJ).

Status Review: Leave criteria for crown wards in placement more than 2 years

From: Children's Aid Society of Toronto v. S.C, 2017 ONCJ 240:

> **[17]** In *Catholic Children's Aid Society of Metropolitan Toronto v. Beverley Anne F.,* [1988] O.J. No. 2950 (OCJ), the court set out five criteria (the five criteria) to apply on a motion for leave to bring a status review application. These are as follows:
>
> a) The court must be satisfied that the status review application for which leave is sought is being brought in good faith.
>
> b) Leave ought not to be granted if the relief can be obtained otherwise than by reviewing the whole order itself.
>
> c) There must be some unusual circumstances that justify the review, in spite of the child's permanent status.
>
> d) The court must be satisfied that the review would likely accomplish the purposes of the Act as set out in section 1.
>
> e) The applicant must establish a case that appears to have merit. Does the case have any realistic chance of success?
>
> **[18]** Some cases have stated that the court must be satisfied (on a balance of probabilities) on all five criteria, not just some of them, before granting leave to bring a status review application. See: *Children's Aid Society of Toronto v. M.C. and K.H.,* [2003] O.J. No. 4017 (OCJ); *Children's Aid Society of the Regional Municipality of Waterloo v. L.M.,* 2015 ONCJ 103.

[19] Other cases have held that while the five criteria are helpful guidelines, the court's discretion is not fettered by holding that the moving party must satisfy the court on all five criteria, or that no other considerations can apply when determining whether to grant leave to bring a status review application. See: *S.R. v. Catholic Children's Aid Society of Toronto,* 2011 ONCJ 11, per Justice Robert Spence; *Children's Aid Society of Brant v. A.C.,* [2015] ONCJ 436, per Justice Kathleen Baker.

[20] The court will follow the latter line of cases. In the absence of statutory authority, the court should not be fettered from conducting a full contextual analysis in determining whether leave should be granted to bring a status review application.

[21] In *Children's Aid Society of Brant v. A.C., supra*, Justice Baker agreed with the comments of Justice Lawrence Thibideau in *Children's Aid Society of Haldimand and Norfolk v. Jennifer Ann M.-F.,* 2011 ONCJ 53, where he wrote:

> **[22]** The granting of leave is not mere formality. It is a matter of substance. ...
>
> **[23]** Any judicial determination with respect to granting leave to permit a parent-originated status review must be done in the context of the philosophy and goals and requirements of the Act, including those in subsection 1(1), subsection 1(2), subsection 37(2), subsection 37(3), section 57, especially subsection 57(3), section 58, especially subsection 58(7), section 59, especially subsection 59(2.1) ...
>
> **[46]** It is logical to conclude that the test for leave in these circumstances has to be substantial. If not, the plan and its implementation are jeopardized... The test was then stated as follows:
>
> **[56] ...** Has the moving parent placed before the court, with the request for leave, apparently credible and weighty evidence that is sufficient to warrant holding a hearing on the merits? Is the evidence sufficient to demonstrate there is reasonable prospect of success?

[22] In paragraph 38 of *S.R. v. Catholic Children's Aid Society of Toronto, supra*, Justice Spence emphasized the importance of the fifth criteria – whether the applicant has presented a case that appears to have merit.

[23] The onus is on the father to convince the court, on a balance of probabilities that leave should be granted. In assessing the merits of the motion, the court must have regard to the legislative principles set out in the Act. The first and foremost is the paramount purpose of the Act, which is to promote the best interests, protection and well-being of the child. In reviewing these purposes, the court should weigh the circumstances flowing up to the leave application with the secure placement of the child. See: *Simcoe Muskoka Child, Youth and Family Services v. L.P.* [2015] ONSC 6026.

[24] The society argues that the father has not brought this motion in good faith. It submits that he has not provided sufficient details of his plan and has not shown that he can deliver what is in the best interests of the child. The society relies on case law which states that these are essential elements of establishing a "*bona fides*" claim. See: *C. v. Children's Aid Society of Ottawa-Carleton*, 2000

> Canlii 22539 (Ont. SCJ); *Children's Aid Society of Lanark County and Town of Smith Falls v. P.L.,* 2012 ONSC 7208 (Ont. Family Court).
>
> **[25]** With respect, this interpretation of the first criteria is too restrictive. The quality of the moving party's plan, and the ability of the moving party to deliver on the plan are more appropriate considerations when determining the merits of the proposed status review application.

In *Sean R. v. Catholic Children's Aid Society of Toronto*, 2011 ONCJ 11 (Ont. C.J.), court found that the father's status review application was product of wishful thinking on his part and had no merit — To allow it to proceed would only create further delay in achieving finality and stability in lives of these children and would not only be contrary to their best interests but would run counter to everything for which *Child and Family Services Act* stood.

A party cannot seek leave before 6 months have expired since the date of the last order or the completion of the appeal. See: subsection 65.1 (8) of the *Child and Family Services Act* and *Children's Aid Society of Toronto v. S.C.,* 2017 ONCJ 725.

Status Review – Placement of child for adoption

A status review application can't be brought once a child has been placed for adoption. See: Subsection 65.1 (9) of the *Child and Family Services Act* and *Children's Aid Society of Toronto v. S.C.,* 2017 ONCJ 725.

Stays pending Appeal - The legislation does not set out the test for determining whether or not a stay should be granted. However, cases decided under the *CFSA* have incorporated the tests outlined in the jurisprudence including *RJR-MacDonald Inc. v. Canada (A.G.)* 1994 CanLII 117 (S.C.C.), concerning injunctive relief and *Circuit World Corporation v. Lesperance* 1997 CanLII 1385 (ON C.A.), concerning the test for staying an order pending appeal: see *Children's Aid Society of the District of Sudbury and Manitoulin v. C.B.* [2003] O.J. No. 5469 at para. 6; *Children's Aid Society of Haldimand-Norfolk v. H.V*., [2001] O.J. No. 4055 (Ont. Sup. Ct.) at para. 14; *Children's Aid Society of the Districts of Sudbury and Manitoulin v. B.(S.)* [2006] O.J. No. 1808 (Sup. Ct.). In deciding whether to grant a stay, the court is to consider the following questions:

1) Is there a serious issue to be tried?

2) Would the applicant suffer irreparable harm if the stay is refused? and,

3) Which party would suffer greater harm from the granting or the refusal of the remedy pending a decision on the merits; in other words, where does the balance of convenience lie?

Some of the cases have added a fourth requirement, that the court should consider whether or not the appeal was brought in good faith. All three requirements of the test for

a stay must be satisfied and the court is to consider those criteria with a view that the issuance of a stay is an extraordinary remedy. These criteria are, of course, to be applied within the context of the paramountcy of the best interests of the child.

Striking Pleadings

Courts used combination of rules 1(8.2), 2 and 33 to strike a parent's pleadings where the parent was no longer seeing the children or participating in the case. Should be done with utmost caution. *Frontenac Children's Aid Society v. C.N.,*[2007] O.J. No. 1186 (SCJ); *Children's Aid Society of London and Middlesex v. A.M.,* 2016, ONSC 2163.

Supervision Orders – Final
Should not be made if the parents are ungovernable. *Windsor-Essex CAS v. L.H.,* [2004] O.J. No. 3889 (OCJ).
Supervision orders – Temporary

The court should be cautious in issuing supervision orders, which are an intrusion into the lives of families by the state. These orders create obligations that can subject caregivers to contempt remedies if terms are breached, or expose them to the risk of losing care of a child due to an alleged breach. *Children's Aid Society of Toronto v. T.J.M.,* 2010 ONCJ 701; *Children's Aid Society of Toronto v. M.R.,* 2015 ONCJ 196.

Must be proportionate to the risk. The requirement for a mother to have babysitters first get police record checks was rejected when this wasn't a protection concern. *Director of Child Protection for P.E.I. v. J.P.,* April 25, 2013.

Supervision vs. Custody order

Where the court found that the mother's relationship with the child would be frustrated if the society was not involved, the court found it to be in the child's best interests to make a one-year supervision order instead of a custody order under s. 57.1 of the CFSA. *Halton Children's Aid Society v. J.T.,* 2017 ONCJ 267.

Temporary Care and Custody Test - s. 51 (2) and (3) – also see Evidence.
At a temporary care and custody hearing, the onus is on the society to establish, on credible and trustworthy evidence, that there are reasonable grounds to believe that there is a real possibility that if a child is returned to the respondents, it is more probable than not that he or she will suffer harm. Further, the onus is on the society to establish that the child cannot be adequately protected by terms of conditions of an interim supervision order. See: *Children's Aid Society of Ottawa-Carleton v. T.* [2000] O.J. No. 2273 (Ont. Sup. Ct.). Simply stated, this is a two-part test that the society has to meet.

The first part of the two-part test only has to be met against one of two parents who had charge of the child. Either will do. It is a low threshold. *Children's Aid Society of Algoma v. S.M.M., 2014 ONCJ 12 (CanLII).*

A court must choose the order that is the least disruptive placement consistent with adequate protection of the child (subsection 1 (2) of the Act): *Children's Aid Society of Hamilton v. B.D. and F.T.M.*, 2012 ONSC 2448 (Canlii).

The degree of intrusiveness of the society's intervention and the interim protection ordered by the court should be proportional to the degree of risk. CCAS of Toronto v. J.O.1, 2012 ONCJ 269 Canlii.

In assessing risk, the court should consider the criminal history of parents, including evidence of violent conduct and the potential exposure of the children to violence. *Children's Aid Society of Algoma v. B.W. and R.M.*, 2002 CarswellOnt 5500 (OCJ).

Exposure to a pattern of domestic violence has been accepted as creating a risk of emotional harm to children. *Children's Aid Society of Toronto v. M.S.,* [2010] O.J. No. 2876 (SCJ).

The Act gives priority to the person who had charge of the children prior to society intervention under Part III of the Act (subsection 51 (2) of the Act). There can be more than one person in charge of the children. See: *Children's Aid Society of Toronto v. A.(S.) and R. (M.)* 2008 ONCJ 348 (OCJ).

Articulation of principles set out in *CAST v. L.P.* 2010 ONCJ 320:

A. A temporary custody order is available only if the society provides evidence that satisfies the statutory criteria for such orders:
   1. reasonable grounds to believe that there is a risk that the child is likely to suffer harm; and
   2. reasonable grounds to believe that the child cannot be adequately protected by an order that the child remain in or be returned to the care and custody of the person who had charge of the children immediately before intervention under Part III of the Act, either with no conditions or subject to children's aid society supervision and on such reasonable terms and conditions as the court considers appropriate.

The adjudication is about the society's reasonable belief in risk. What is really evaluated in this interim motion is the degree to which the society has kept pace with its investigation, informed its beliefs by the ever-expanding information available to it and measured its belief against the criteria established by s. 51(3).

The onus is by its nature not a difficult onus for the agency to meet since the standard of proof is made low by the very wording of the Act: "reasonable" grounds, a "risk", and "likely" harm, and "adequate" protection for the child. This illustrates that the order sought is intended to be a temporary order while the matter moves through the courts and the focus is on protecting Noah T. in that short term. *Children's Aid Society of Dufferin County v. A.T.,* 2011 ONCJ 52 (CanLII). In this case, a mother, who otherwise parented

her child well, obstinately refused to give the father access and the child was placed temporarily with the father.

The Divisional Court has held that a Society seeking an order for temporary Society care at this early stage of a case has only to demonstrate that it has reasonable grounds to believe that there is a protection risk for the child that justifies Society intervention. *L.D. v. Durham Children's Aid Society and R.L. and M.L.*, 2005 CanLII 63827, 21 R.F.L. (6th) 252, [2005] O.J. No. 5050 (Ont. Div. Ct.). The burden on the Society at this stage does not go as high as showing that on the balance of probabilities there is an actual risk to the child in the parent's care. *CCAS of Toronto v. M.L.R.,* 2011 ONCJ 652.

Temporary orders – Family placement

Court must consider family and community plans prior to placing child in care (s.51 (3.1). The test is not perfection. Rather it is a balancing of risks as opposed to benefits. Even where the proposed caregiver has a CAS history, it is open to the court to craft supervision terms designed to protect the child while at the same time preserving the child's cultural heritage and family ties. *CCAS of Toronto v. J.O.1*, 2012 ONCJ 269. This is a best interests analysis.

Temporary supervision Terms- Must be reasonable and proportionate to risk concern

The interim protection terms imposed must be proportionate to the need shown by the evidence. *CAS Toronto v. M.A.* 2002 O.J. No. 1432 (OCJ)., *Windsor-Essex CAS v. Sarah B.* 2007 OJ No. 2700.

Child protection orders are an intrusion into the lives of families by the state. They create obligations that can subject caregivers to contempt remedies if terms are breached, or expose them to a higher risk of losing care of a child due to an alleged breach. The Act sets out stringent tests for such orders to be made where warranted by the evidence. Supervision terms, in particular, should be proportionate and address a specific risk concern. Clause 51(3.2)(*a*) of the Act requires supervision terms to be reasonable So, if there is no issue about a child's medical care, a supervision term that a parent ensure that the child's medical needs are met is not required and is not reasonable. If there is no issue about a child's school attendance, there is no need to have a term that the parent ensure that the child attends school. *CAS of Toronto v. T.J.-M.* 2010 ONCJ 701.

It isn't appropriate to require parent to get a psychiatric assessment as a supervision term. Should be sought pursuant to section 54 of the CFSA. See: *Catholic Children's Aid Society of Toronto v. J.O.1*, 2012 ONCJ 269 (CanLII).

Temporary Supervision orders – Test (clause 51 (2) (b))

It is the subsection 51 (3) test modified: There must be reasonable grounds to believe that without supervision terms it would be more probable than not that the child would suffer harm being placed with the parent. *Windsor-Essex CAS v. Sarah B.* 2007 OJ No. 2700.

Although the onus which an agency faces at this stage is not great the court must be cautious in issuing supervisory orders, which are an intrusion into the lives of families by the state. These orders create obligations that can subject caregivers to contempt remedies if terms are breached, or expose them to the risk of losing care of a child due to an alleged breach. *Children's Aid Society of Toronto v. T.J.M.*, 2010 ONCJ 701.

Temporary Care Test – Variation during protection proceeding

Children's Aid Society of Toronto v. K.D., 2011 ONCJ 55 (CanLII) sets out a four-part test for s. 51 (6):

1. Has there been a material change since the making of the previous temporary order?
2. If so, is that material change risk-based? In other words, is it a change that makes it either more likely, or less likely, to affect the risk of harm to the child?
3. If the material change is risk-based, is it significant enough to vary the child's placement, having regard to the length of time that the *status quo* has been in place and how soon trial is likely to occur?
4. In considering step number 3, is the requested variation proportional to the change in circumstances, having regard to the court's mandate to be guided by the paramount purposes, as stated in subsections 1(1) and (2) of the Act?

> These four steps are not individual factors to be weighed one against the other, or considered as a collective stew, but rather, a discrete step-by-step path to follow. If the court cannot answer "yes" to each of these steps then, in my view, it is not appropriate to move on to consider whether the court should exercise its judicial discretion in favour of the requested variation.
>
> As well, I wish to make it clear that given the foregoing statutory analysis, this approach pertains to ***any*** variation of a temporary placement order, irrespective of the fact that the society may have previously obtained a finding that the children are in need of protection. In other words, the fact of the finding in need of protection does not, by itself, change the test that the society must meet, as the order continues to remain "custody during adjournment".

This test has also been applied in varying temporary supervision terms. *Children's Aid Society of Toronto v. M.R.,* 2015 ONCJ 196.

Justice Susan Himel in *Children's Aid Society v. E.L.* [2003] O.J. No. 3281 (O.S.C) who, in writing about subsection 51(6) of the Act, said at par. 42:The statute does not provide that the moving party on a variation motion must demonstrate a material change in circumstances. However, in order to give effect to the statutory scheme and recognizing that stability and continuity for children is desirable, it is appropriate to impose a threshold test of material change in circumstances.

In *Catholic Children's Aid Society of Toronto v. R.M.,* 2017 ONCJ 784, the court set out distinct tests for the variation of a placement order and the variation of an access order under subsection 51 (6) as follows:

> **[84]** The court will apply the following legal test to change a temporary placement order during the adjournment of a protection application:
>
> a) The moving party has the onus of first establishing a material change in circumstances since the making of the last court order.
>
> b) The court should take a flexible approach in determining what constitutes a sufficiently material change in circumstances. What is sufficiently material will depend on the circumstances of the case.
>
> c) Once a material change in circumstances is established, a contextual analysis should be conducted by the court to determine if the placement order should be changed. The purposes in section 1 of the Act should always be at the forefront of the analysis. The following non-exhaustive list of factors should be considered, where relevant:
>
> 1. The nature and extent of the variation sought and the proportionality of the requested change to the change in circumstances since the making of the last order. In particular, the court should examine the extent to which the passage of time has yielded a fuller picture to the court about the child, the parent or any family and community member involved with the family.
>
> 2. The degree to which the change in circumstances reduces or increases the risk of harm to the child.
>
> 3. The extent to which the proposed change meets the objectives set out in section 1 of the Act and the expanded objectives set out in section 1 of the *Child, Youth and Family Services Act*, 2017 (*CYFSA*), which is in Schedule 1 to Bill 89. [1]
>
> 4. The tiered considerations for temporary custody orders set out in section 51 of the Act that parallel other provisions of the Act that endeavour to keep the level of intervention proportionate to the child's need;
>
> 5. The best interest factors set out in subsection 37 (3) of the Act and the expanded best interest factors set out in subsection 74 (3) of the *CYFSA*.
>
> 6. When the trial of the case will take place. If the case will proceed

1 While the court is not yet statutorily mandated to consider the additional purposes and best interests factors set out in the *CYFSA*, they are still helpful considerations for the court.

to trial soon, the court needs to determine if the evidence of change is enough to change placement prior to a full testing of the evidence at trial. The risk is that the child's placement is changed just prior to trial and changed again after trial. This could cause considerable disruption to a child.

[85] The court will apply the following legal test to change a temporary access order during an adjournment of a protection application:

a) The moving party has the onus of establishing that a sufficient change in circumstances has taken place since the making of the last court order. Whether the change is sufficient to change the order will depend on the circumstances of the case.

b) The court should conduct a contextual analysis when exercising its discretion as to whether it is in a child's best interests to change the access order, and if so, what terms and conditions are appropriate. The purposes in section 1 of the Act should always be at the forefront of the analysis. The suggested non-exhaustive list of factors should be considered, where relevant:

1. The nature and extent of the variation sought and the proportionality of the requested change to the change in circumstances since the making of the last court order. In particular, the court should examine the extent to which the passage of time has yielded a fuller picture to the court about the child, the parent or any family and community member involved with the family.

2. The degree to which the change in circumstances reduces or increases the risk of harm to the child.

3. The extent to which the proposed change meets the objectives set out in section 1 of the Act and the expanded objectives set out in section 1 of the *CYFSA*.

4. The best interest factors set out in subsection 37 (3) of the Act and the expanded best interest factors set out in subsection 74 (3) of the *CYFSA*.

5. The importance of:

    a. Ensuring that access not remain static unless the safety of the child requires this;

    b. Gradually and safely increasing access between a child and the parents; and

c. Providing the court with some basis to assess the parent's long-term parenting potential.

6. The stage of the proceeding. Is a trial that will determine the issue imminent? If so, it might be in the best interests of the child to have the trial judge determine the issue.

Temporary Care Test – Status Review - If apprehend off of a supervision order the child still needs to be brought before the court within 5 days. S. 64(2)

- Under section 64(8) of the CFSA, the Court held, there is effectively a presumption that that the child will remain in care until the party has satisfied the court that the best interests of the child require a change in the care and custody of the child. The risk of harm test for other temporary orders was not the appropriate test. Therefore, the kin in this case were entitled to have the status quo preserved pending trial unless the mother could show that the child's best interests required the change now. The Court found that notwithstanding the sea change in the mother's circumstances and the rekindling of the bond between mother and child, it could not be said that the child would be better off in the mother's care pending trial such that the change was required on a temporary basis. In the result, the status quo was to continue until trial. *Children's Aid Society of Brant v. L. (J.)*, 2008 CarswellOnt 6306 (Ont. C.J.)

Subsection 64(8) does not create a presumption in favour of whomever has care and custody of a child. It goes further than a presumption. The use of the words "shall remain" implies that the *status quo* must remain in effect. The only exception is where the court is satisfied that the best interests of the child requires a change in that *status quo*. In my view, the use of the word "require" in this provision is not accidental. "Require" is a fairly strong word. It denotes considerably more than being merely desirable. It carries the connotation of necessity or obligation. Moreover, the criterion for determining that there is a requirement for a change is the best interests of the child. Whenever this test is to be applied under the statute, the person making the determination must take a number of listed considerations into account. Moreover, evidence that is merely credible and trustworthy may not be sufficient for the court to admit or to act upon in making determinations under subsection 64(8). That is a standard of evidence that applies to temporary care and custody determinations under subsection 51(2) of the Act. Subsection 64(8) determinations are generally made in the context of a motion. The onus to satisfy the court falls on the party seeking to change the *status quo*. *CAS Algoma v. S.S.,* 2010 ONCJ 332. Endorsed by Justice Murray in *Children's Aid Society of Toronto v. S.G.,* 2011 ONCJ 746 Canlii, saying that the party seeking the placement change must show a material change and circumstances and that the child's best interests require the change.

Subsection 64 (8) of the *Child and Family Services Act* gives priority to one of the best interest factors namely, the importance of continuity of care for a child. *Children's Aid Society of Toronto v. K.S.,* 2017 ONCJ 164.

Changing Access in Status Review:

Section 58 of the CFSA does not preclude court from varying final order for access on an interim basis: *Children's Aid Society of Algoma v. B. (Amanda)and C. (Steven)*, 2012 ONCJ 351, (Ont. C.J.), *per* Justice John Kukurin.

The test for varying a temporary access order is set out in s. 58 (1) of the Act. There must be a comparison of the current situation to the situation at the time of the original order. The change does not necessarily have to be material but there needs to be a change in circumstances based on the best interests of the child. *Children's Aid Society of Algoma v. C.P.,* 2013 ONCJ 740 (CanLII).

Time - The length of time a child is in care is at all times a relevant consideration in determining placement when a child is found to be in need of protection. *Children's Aid Society of Toronto v. D.S.,* 2009 CanLII 60090 (ON S.C.).

Timelines and the Charter – *Jewish Family and Child Service of Toronto v JZ,* 2014 ONCJ 119 (CanLII):

Rule 2 must be considered when determining whether to extend timelines under Rule 33. In order to satisfy the court that there has been a breach of his section 7 *Charter* rights, the father must establish on a balance of probabilities, first, that the delay complained of impaired his security of the person, and second, that the impairment was not in accordance with the principles of fundamental justice. There must be a sufficient causal connection between the state-caused delay and the prejudice suffered by the respondent and that the delay he has complained of in this case has had a "serious and profound effect" on his psychological integrity, as objectively assessed. For the first part of the test in s. 7 of the Charter to be triggered.

Section 7 of the *Charter* requires not a particular type of process, but a fair process having regard to the nature of the proceeding and the interests at stake . . . . The procedures required to meet the demands of fundamental justice depend on the context. . . The question at the s. 7 stage is whether the principles of fundamental justice relevant to the case have been observed in substance, having regard to the context and the seriousness of the violation. The issue is whether the process is fundamentally unfair to the affected person. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 (CanLII), [2007] 1 SCR 350.

In order to be fair, the hearing must involve reasonable notice with particulars to the parents, as well as an opportunity for them to participate meaningfully in the proceedings. In *Winnipeg Child and Family Services v. K.L.W*. 2000 SCC 48 (CanLII), [2000] 2 SCR 519.

It is not discriminatory for the legislature of a province to create different legislative schemes, even within the same piece of legislation, which are directed at different purposes. The objectives of each legislative provision are different, and it is for that very

reason that a claimant cannot compare one provision with another provision in the same legislation in order to ground a claim under section 15(1) of the *Charter*.

In order to succeed [in a claim under section 15 of the *Charter]* the claimants must show unequal treatment under the law – more specifically that they failed to receive a benefit that the law provided, or was saddled with a burden the law did not impose on someone else. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 (CanLII), [2004] 3 S.C.R. 657.

While section 24 of the Charter permits the court to make an appropriate order to address a *Charter* breach, it would not be appropriate to return children to a parent as a remedy, where the children would be at an unacceptable risk of harm.

Transferring Jurisdiction –The onus is on the party seeking the transfer. Section 48 (3) of the CFSA test applies if changing territorial jurisdiction of the society, based on preponderance of convenience. However if transfer is to different municipality within territorial jurisdiction of society, subrule 5 (8) test of substantially more convenient, a harder test applies. The preponderance of convenience is to be weighed considering the best interests of the child and not necessarily the convenience of any party. *CAST v. A.T.* 2010 ONCJ 456.

The Ontario Court of Justice does not have jurisdiction to transfer a case to a court out of the province. *Children's Aid Society of Toronto v. B.B.* [2012] O.J. No. 666 (OCJ).

Transfer Between Children's Aid Societies.
Need to balance s.86 (3) with s. 70 (excessive delay) and s. 1 best interests of the child
S.86(3) connotes an active step. Does it apply if there is already a child in care?
As interested party, the other Society should be served with the motion.
A different Society can maintain carriage and still place with another family
CCAS of Toronto v. S.R., 2005 O.J. No. 2577 (OCJ).

Transportation – Court has discretion to order society to pay transportation costs of access, but should be exercised cautiously. *CAS Niagara v. S. (L*) 2009 CarswellOnt 38 (SCJ).

Vaccinations – The court refused to bring children into care just because the parents refused to vaccinate the children. Although the court found that this was preferable, unless an imminent risk of harm could be shown, the state couldn't interfere with parental decisions. *P. (J.), Re*, 2010 CarswellAlta 2333 (Alta. Prov. Ct.).

Warrants (Justice of the Peace) – Judges can issue a warrant to apprehend a child pursuant to subsection 41 (1) of the Child and Family Services Act. Section 5 of the Justices of the Peace Act, makes every judge a Justice of the Peace.

Withdrawal of applications – In protection application, need leave of court. *Children and Family Services for York Region v. JGS* [2004] O.J. No. 4681 (S.C.J.). Also need it if wish to withdraw status review application. *Weechi-it-te-win Child and Family Services*

v. D.M. and J.F. [1992] 3 C.N.L.R. 165 (Ont. Ct. Prov. Div.) and even if you wish to withdraw status review application for a crown ward. *Catholic Children's Aid Society of Toronto* v. R.G. [2014] O.J. No. 3773.

The court, in *Catholic Children's Aid Society of Toronto v. B.(D.)*, 2002 CarswellOnt. 1868 (Ont. C.J.), considered the circumstances under which a withdrawal would be appropriate, as follows:

> [12] If I were satisfied that there were no continuing grounds for protection, I would permit a withdrawal of the protection of the protection application regardless of whether all parties consented. Trial time is valuable and a protection trial is not a forum for a parent to prove a point or obtain vindication.
>
> [13] The consent of the parties to a withdrawal would be persuasive, but not determinative. Similarly, in appropriate circumstances, the lack of consent would not be a bar to such relief, provided I were satisfied that the proposed disposition or plan addressed the significant societal interest in the welfare of children apparently in need of protection.
>
> [14] The reason or reasons given for the request to withdraw the application must be considered in each case. I can anticipate situations in which I would agree to an application's being withdrawn even when the grounds for a protection finding remain outstanding. For example, I might agree to a withdrawal if an allegedly abusive parent had been sentenced to a lengthy jail term on a totally unrelated matter or the grounds for protection still exist but were apparently manageable given the co-operative approach adopted by the parent to society involvement.
>
> [15] In cases which the society wishes to withdraw in favour of a pending private custody proceeding, I would consider factors such as the nature of the allegations giving rise to the apparent need for protection, the perceived degree of risk to the child, the nature of the claims asserted in the private custody litigation (for example, has the parent identified by the society as the person who harmed or placed the child At risk, put forth a claim for custody) and, last, the position of the parties on whether a withdrawal should be allowed.

Cited with approval in: *Windsor-Essex Children's Aid Society v. J.W.,* 2015 ONCJ 297.

Without Prejudice Orders – They have a limited shelf life. The longer they exist, the less relevance they should have in making any decision. *CAS Toronto v. K.N.* 2008ONCJ 340.

The facts of each case need to be carefully examined to determine if the "shelf life" of a without prejudice order has run out. Such a determination has significant ramifications for child protection litigants. The test in subsection 51 (2) is designed to set up a rigorous standard for society intervention in the life of a person who has charge of a child. Once this test has been met, and an order placing the child elsewhere has been made, the onus shifts to that person to show, in a subsequent motion brought pursuant to subsection 51 (6) of the Act, to demonstrate a sufficient change in circumstances that justifies returning a child to his or her care.[1]The court does not and should not lightly eliminate the subsection 51 (2) rights of the person who had charge of the child.Court found it hadn't run out where consent adjournments and mother preserved right to argue temporary care motion and circumstances beyond the parent's full control caused the delay. *CCAS of Toronto v. W.I.* [2014] ONCJ 62. Followed in *Catholic Children's Aid Society v. F.Y.I., 2016 ONCJ 463.*