Court File No.: CV-15-54325900CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

REBECCA GREEN

Plaintiff

- and -

THE HOSPITAL FOR SICK CHILDREN,
GIDEON KOREN and JOEY GARERI

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE MOVING PLAINTIFF
(Motion for Certification returnable October 11-12, 2017)

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PART I - INTRODUCTION

1. Without following either standard written procedures or chain of custody, and in breach of forensic standards, the defendants tested thousands of people's hair samples. The test results obtained and communicated by the defendants were inadequate and unreliable. These hair tests were used to determine whether parents should be allowed access to their children, or worse, whether parents should lose custody entirely.

2. Between 2005 and 2015 the Motherisk Drug Testing Laboratory ("MDTL") screened thousands of parents and children for drug and alcohol abuse. During this time, the MDTL reported approximately 10,000 positive test results to Children's Aid Societies ("CAS") and individuals.[1] Every test result provided by MDTL between 2005 and 2015 was provided negligently, materially impacting the integrity of thousands of families.

3. In 2015, an independent review conducted by the Honourable Susan Lang found that the test results reported by MDTL were unequivocally unreliable for use in child protection and criminal proceedings (the "Independent Review").[2] The defendants shut down the MDTL in 2015[3] and the Hospital for Sick Children apologized to those impacted.[4] This class action is for the thousands of individuals who have received an apology but have not had their day in court.

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[1] The Independent Review, Motion Record, Tab 2(F), p. 408.

[2] The Independent Review, Motion Record, Tab 2(F), p. 148.

[3] The MDTL ceased operations in March 2015 and closed permanently in April 2015 for all purposes except research; SickKids Summary of Findings to Date, Motion Record, Tab 2(G), p. 489.

[4] Statement Issued by CEO of SickKids, Motion Record, Tab 2(I), p. 503; Toronto Star Article, January 22, 2016, Motion Record, Tab 2(J), p. 507.

4. The MDTL conducted screens for drug and alcohol abuse by testing the hair of patients. MDTL's hair strand testing was forensic in purpose,[5] but at no time did the defendants meet required forensic standards to reliably provide forensic interpretations for the class. Not a single hair test was reliable or adequate for the purpose it was provided for. As a result, this action is particularly suitable for a determination in common as to the negligence of the defendants.

5. In the case of the representative plaintiff, her hair test was reported by MDTL as "clear evidence" of alcohol abuse and this interpretation was presented to the CAS and the court.[6] For approximately 2 years, Ms. Green was denied custody and full access to her only child based on the test results provided by MDTL. Ms. Green's results should never have been presented as "clear evidence" and the defendants were negligent to do so.

6. Despite having no forensic training or procedures, [7] MDTL actively marketed its testing services to CAS offices for use in court and child protection proceedings. At the start of the class period in 2005, MDTL made a business plan to increase their gross revenue by "2-5 fold".[8] The implication was a doubling of hair testing over the class period, a result of aggressive and targeted marketing to CAS agencies.

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[5] The Independent Review, Motion Record, Tab 2(F), p. 148.

[6] Correspondence from Joey Gareri, August 12, 2011, Motion Record, Tab 3(E), p. 564.

[7] Answers to Preliminary List of Questions for Dr. Gideon Koren" dated July 24, 2015, Reply Record, vol. 1, Tab 1(I), p. 174; The Independent Review, Motion Record, Tab 2(F), p. 216.

[8] Motherisk Drug Testing Lab – Business Plan 2006/2007, Reply Record, vol. 1, Tab 1(EE), p. 419.

7. The Independent Review of the MDTL was released on December 17, 2015 and made the following overarching findings:

1) The hair-strand drug and alcohol testing used by MDTL between 2005 and 2015 was inadequate and unreliable for use in child protection and criminal proceedings.

2) Between 2005 and 2015, MDTL operated in a manner that did not meet internationally recognized forensic standards.

3) The Hospital for Sick Children did not provide meaningful oversight over MDTL.

4) The use of MDTL hair-testing evidence in child protection and criminal proceedings has serious implications for the fairness of those proceedings and warrants an additional review.[9]

8. The above failures are common to the class for whom MDTL reported a positive test. The specific alleged failures against the defendants concern centralized operating procedures and practices common to the class members, including:

(a) **No one at MDTL had Forensic Expertise**: MDTL staff provided forensic interpretations without the appropriate qualifications and expertise;[10]

(b) **Improper use of ELISA Results**: MDTL relied on the unconfirmed test results of its enzyme-linked immunosorbent assay ("ELISA"), which should only be used as a preliminary screening test;[11]

(c) **Absence of Standard Operating Procedures and Contemporaneous Documentation**: MDTL had no written standard operating procedures for the hair tests it carried out and did not keep reliable contemporaneous documentation;[12]

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[9] The Independent Review, Motion Record, Tab 2(F), p. 148.

[10] Amended Statement of Claim, paras. 86-99, Motion Record, Tab 2(C), pp. 85-88.

[11] Amended Statement of Claim, paras. 16, 17-25 and 60-61, Motion Record, Tab 2(C), pp. 67-70 and 78.

[12] Amended Statement of Claim, paras. 16 and 26-30, Motion Record, Tab 2(C), pp. 67 and 70-71.

(d) **Absence of Operational Oversight:** there was an absence of oversight of the laboratory technicians who were assigned to carry out the ELISA tests, resulting in reporting anomalies or errors;[13]

(e) **Sample Washing:** MDTL failed to wash hair samples routinely before analysis;

(f) **Chain-of-Custody:** MDTL had inadequate chain-of-custody procedures;[14]

(g) **Record Keeping:** MDTL had inadequate record keeping practices;[15] and

(h) **Flawed GC-MS procedures**: after 2010, MDTL used gas chromatography-mass spectrometry ("GC-MS") to purportedly confirm test results, but the GC-MS procedure was flawed.[16]

9. Class actions concerning the centralized management, operation and practices of a laboratory, clinic, hospital or facility are eminently suited to certification.[17] Similarly, the absence of appropriate operational practices and management can ground a class action.[18] This action passes the test to continue as a class proceeding and will provide invaluable access to justice to a marginalized and vulnerable class of parents.

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[13] Amended Statement of Claim, paras. 16 and 31-35, Motion Record, Tab 2(C), pp. 67 and 71-72.

[14] Amended Statement of Claim, paras. 16, 41-44 and 65, Motion Record, Tab 2(C), 67, 73-74 and 79.

[15] Amended Statement of Claim paras. 16 and 45-47, Motion Record, Tab 2(C), pp. 67 and 74-75.

[16] Amended Statement of Claim, paras. 48-59, Motion Record, Tab 2(C), pp. 75-78.

[17] *Rumley v. British Columbia*, 2001 SCC 69, paras. 29-30, Plaintiff's Book of Authorities ("**PBOA**"), Tab 33; *Levac v. James*, 2016 ONSC 7727, PBOA, Tab 23; *Healey v. Lakeridge*, [2006] O.J. No. 4277 (S.C.J.) PBOA, Tab 18; *Dolmage v. Ontario*, 2010 ONSC 1726, PBOA, Tab 11*; Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.), PBOA, Tab 8.

[18]*Rumley v. British Columbia*, 2001 SCC 69, paras. 29-30, PBOA, Tab 33; *Cloud v. Canada (Attorney General)*, [2003] OJ No 2698 (Div. Ct.) per Cullity J. dissenting, para. 25, PBOA, Tab 7; *Baroch v. Canada Cartage*, 2015 ONSC 40, para. 31, PBOA, Tab 2.

PART II - THE FACTS

10. The defendants have filed no evidence from Dr. Koren, Mr. Joey Gareri or any individual employed by the Hospital for Sick Children or MDTL. The only expert evidence filed by the defendants consists of two opinions for the purpose of a summary judgment motion against Ms. Green's purported individual claim.[19] The summary judgment motion against Ms. Green is not proceeding with certification. The defendants have filed no lay or expert evidence regarding the operations of MDTL or the proposed class at large.

11. The plaintiff's factual record is built upon the Independent Review and the defendants' own documents and admissions. The Independent Review was created from a review of thousands of original documents and interviews with the defendants, whom were represented throughout the review by the same counsel representing them on this motion.[20] The factual record in this case demonstrates a common operation and management of the MDTL and common breaches vis-a-vis the hair testing of the class members. There is ample evidence to support some basis in fact.

A. Overview of the MDTL

i. Creation and Scope of Operations

12. The Motherisk program was founded by Dr. Gideon Koren in 1985 and continues to operate at The Hospital for Sick Children ("SickKids"). The MDTL was a subset of the larger Motherisk program at SickKids. By the start of 2005, MDTL was testing over a thousand hair

[19] Affidavit of Jeffery Wilson, Responding Motion Record of Dr. Koren, vol. 1, Tab A, pp. 1-19; Affidavit of Dr. Salomone, Responding Motion Record of Dr. Koren, vol. 1, pp. 187 -194.

[20] The Independent Review, Motion Record, Tab 2(F), pp. 174-175.

samples a year.[21] The 2005/2006 fiscal year also marked the first time MDTL created a business plan to expand and market hair testing to CAS offices.[22] By 2005, the hair testing at MDTL had become its own distinct operation within SickKids.

B. Management and Operational Structure at MDTL

13. The management structure of MDTL was centralized and revolved around three positions from 2005 to 2015: 1) a laboratory director; 2) a laboratory manager; and 3) starting in 2009, a laboratory supervisor.[23]

Laboratory Director

14. For the duration of the class period, Dr. Koren was the laboratory director with responsibility for the management and operation of the MDTL.[24] Dr. Koren signed all results until February 2013 because in the words of the lab manager, Mr. Gareri, "…Dr. Koren wanted final review of the results to identify any outlying findings that he may want to follow up on."[25] Despite Dr. Koren signing off on all results and having a supervisory role over the lab, in Dr. Koren's own words "I have no formal or informal training in forensic toxicology."[26] Dr. Koren was unqualified to operate a forensic lab and negligently managed the MDTL for the duration of the class period.

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[21] The Independent Review, Motion Record, Tab 2(F), p. 211.

[22] Motherisk Drug Testing Lab – Business Plan 2006/2007, Reply Record, vol. 1, Tab 1(EE), p. 419.

[23] The Independent Review, Motion Record, Tab2(F), p. 213.

[24] Dr. Koren was formally appointed in 2009, but referred to himself as the director prior to 2009; The Independent Review, Motion Record, Tab 2(F), p. 213-214.

[25] Lang Review – Final List of Questions, Reply Record, vol. 2, Tab 1(XX), p. 1103

[26] Answers to Preliminary List of Questions for Dr. Gideon Koren" dated July 24, 2015, Reply Record, vol. 1, Tab 1(I), p. 174.

Laboratory Manager

15. The laboratory manager for the vast majority of the class period, from April 2005 until 2015, was Mr. Gareri.[27] Mr. Gareri had no formal training or experience in forensic toxicology or hair analysis and no training in management at the time of his appointment.[28] In Mr. Gareri's own "approved" interview summary to the Independent Review, his abilities were described as:

> Ultimately, Gareri had no training in management and only his Master's degree research experience in analytics when he took over management of the laboratory in 2005. The reality is that he learned "on the job" on a job that you should not be learning on. In retrospect, Gareri would not have hired himself back in 2005 to act as the Laboratory Manager unless a formal training program was in place.[29]

16. Despite having no training in hair analysis or forensic toxicology, Mr. Gareri signed MDTLs interpretations and had primary responsibility for providing interpretations for the results of the class members.[30] Mr. Gareri negligently managed the MDTL for the duration of the class period.

Laboratory Supervisor

17. MDTL's first laboratory supervisor was appointed in 2009. The laboratory supervisor was not involved in interpreting MDTL test results or communicating with CAS agencies.[31]

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[27] The Independent Review, Motion Record, Tab 2(F), p. 215.

[28] The Independent Review, Motion Record, Tab 2(F), p. 216.

[29] Summary of Interview with Joey Gareri – June 17, 23 and 30, 2015, Reply Record, vol. 1, Tab 1(C), p. 80.

[30] The Independent Review, Motion Record, Tab 2(F), p. 216.

[31] The Independent Review, Motion Record, Tab 2(F), p. 217.

The role of the laboratory supervisor in the operation and management of the laboratory vis-à-vis the class members' test results was minimal.

C. MDTL Marketed its Testing for Legal Purposes

18. The defendants actively marketed and expanded the MDTL hair testing for legal purposes.

19. The start of the proposed class period is also the first year the MDTL created a business plan.[32] The 2005/2006 business plan detailed the growing marketing of MDTL operations. The "Marketing Strategy" of MDTL going forward was made clear in 2005:

> The number of samples analyzed per year has been growing steadily. The gross revenue 2004/2005 was $625K. Increased demand has been achieved by word of mouth, conference attendance, poster presentations, website (www.motherisk.org), interviews with various newspapers and medical magazines, and continuing relationships with existing clients. In addition, Susan Santiago, performs all public relations work for the Program, she sends out flyers, does poster presentations and arranges information to be distributed so that people know about Motherisk. Motherisk Drug Testing Lab anticipates that proper and adequate marketing and promotional activities of hair testing services has potential to increase gross annual revenues by between 2-5 fold.[33]

20. From 2005 to 2015 the number of hair tests conducted by MDTL increased steadily in accordance with its stated intentions. In 2005, MDTL conducted tests on 1,450 samples from

[32] Motherisk Drug Testing Lab – Business Plan 2006/2007, Reply Record, vol. 1, Tab 1(EE), p. 408.

[33] Motherisk Drug Testing Lab – Business Plan 2006/2007, Reply Record, vol. 1, Tab 1(EE), p. 419.

CAS agencies and in 2014 MDTL tested 2,235 samples from CAS agencies.[34] MDTL had a peak year in 2009, testing 3,047 samples from CAS agencies.[35]

21. The defendants' ability to double testing volume by 2009 was a result of active marketing and outreach. Mr. Gareri "tried to visit MDTL's main clients at least once a year."[36] and in Mr. Gareri's own words "there was an element of 'salesmanship' that permeated the situation at the lab."[37]

22. The defendants actively sought to provide testing to child protection agencies. A regular newsletter was published by MDTL dedicated to CAS clients. The 2007 newsletter excitedly advertised that MDTL could test for alcohol consumption and also test for the *quantum* of consumption. The 2007 newsletter advised the CAS that:

> "We are often asked 'Can you test for alcohol use?'. Since May of this past year the answer is 'Yes, we can!'…Since alcohol is a legal drug, detecting *any* alcohol consumption is not very useful, nor is it feasible analytically. The alcohol hair test {Fatty Acid Ethyl Ester (FAEE) analysis} distinguishes moderate drinking from *regular excessive alcohol consumption.*"[38][emphasis in original]

[34] Lang Review – Final List of Questions, Reply Record, v. 2, Tab 1(XX), p. 1092.

[35] Lang Review – Final List of Questions, Reply Record, v. 2, Tab 1(XX), p. 1092.

[36] Summary of Interview with Joey Gareri – June 17, 23 and 30, 2015, Reply Record, vol. 1, Tab 1(C), p. 57.

[37] Summary of Interview with Joey Gareri – June 17, 23 and 30, 2015, Reply Record, vol. 1, Tab 1(C), p. 62.

[38] Motherisk Drug Testing Newsletter for Children's Aid Societies, Vol. 3 – December 2007, Reply Record, vol. 1, Tab 1(FF), p. 423.

23. The 2007 newsletter went on to note that MDTL would provide written interpretations "for court" at no extra cost and provide an expert witness "if the judge wants an expert witness."[39]

24. The MDTL advertised and expanded their role again in 2009, advising CAS clients on how to readily receive opinions on results. The 2009 CAS newsletter produced by MDTL advised that "we have increased our consultation staff by 300%. The Motherisk Laboratory now has dedicated counselors available daily for interpretation of hair and meconium results…We are the toxicologists so you don't have to be."[40][emphasis in original]

D. Communicating Test Results

25. Test results have little use unless communicated. For the duration of the class period, MDTL engaged in common template communications and centralized communications and interpretations through common staff members. The management of communications for the entire class period was negligent.

26. The written interpretations of MDTL were based on templates, as the Hospital stated to the Independent Review:

> "[Ms. Moller] drafted the interpretation letters in accordance with a template provided by Mr. Gareri."
>
> "Other laboratory counselors took over the role of drafting interpretation letters from Ms. Moller when she left the laboratory. As was the process with Ms. Moller, any subsequent counsellors performing this task were provided a draft based on

[39] Motherisk Drug Testing Newsletter for Children's Aid Societies, Vol. 3 – December 2007, vol. 1, Tab 1(FF), p. 424.

[40] Motherisk Drug Testing Newsletter for Children's Aid Societies, Vol. 4 – December 2009, Reply Record, vol. 1, Tab 1(GG), p. 427.

> several available template statements and all drafts were reviewed, edited, approved and signed by Mr. Gareri."[41]

27. MDTL also relied on numerous "laboratory counsellors" to provide oral opinions over the phone to CAS agencies.[42] The "laboratory counsellors" answered all routine calls and any "non-routine" calls were sent to Mr. Gareri.[43] Up until 2012, the laboratory counsellors had no training at all and at no point did any counsellor have training in forensic toxicology.[44] As the independent review noted, the "counsellors" were in fact providing medico-legal opinions, not counselling.[45]

28. The Independent Review found that the all MDTL staff members who provided interpretations did not have the necessary forensic expertise at *any time* between 2005 to 2015.[46]

29. The communications from MDTL failed to adequately provide sufficient information regarding the limitations of test results. As the Independent Review noted, "Hair test results, viewed in isolation, cannot provide any meaningful information about drug use or alcohol

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[41] Follow-up Questions for HSC and MDTL (September 18, 2015), Reply Record, vol. 1, Tab 1(M), pp. 232-233.

[42] The Independent Review, Motion Record, Tab 2(F), p. 298.

[43] Request to Admit dated May 4, 2017, at request 61, Transcript Brief, Tab E, p.406; Plaintiff Response to Request to Admit, Transcript Brief, Tab F, p.420.

[44]The Independent Review, Motion Record, Tab 2(F), p. 298.

[45] The Independent Review, Motion Record, Tab 2(F), p. 298.

[46] The Independent Review, Motion Record, Tab 2(F), pp. 295-296.

consumption and can be potentially misleading."[47] The communication failures identified by the Independent Review included:

(a) "MDTL did not routinely provide an interpretation of the hair test results to its customers. Instead, it provided the numerical results to customers (who may have also had the concentration ranges) and invited customers to call an MDTL staff person or laboratory counsellor for further information…Providing numerical test results, and nothing more, suggested a degree of precision and ease of interpretation that was incorrect and would have misled customers.";[48]

(b) "MDTL failed to communicate to the customers adequately, or at all, the limitations in hair analysis – including the lack of dose-response relationship across individuals and the potential impact of external contamination on the interpretation of hair test results for drugs of abuse.";[49]

(c) MDTL kept "haphazard" notes of oral opinions provided over the phone;[50] and

(d) From 2005-2010 MDTL used only the ELISA test and failed to communicate the limitations of ELISA. The Independent Review found that ELISA cannot be used reliably to identify or quantify the amount of drug in a sample.[51] Dr. Koren himself acknowledged that ELISA could not generate quantitative results as reliably as other tests[52] and the defendant's own expert on cross-examination described his views on using ELISA to quantify drug consumption: "You can

[47] The Independent Review, Motion Record, Tab 2(F), p. 299.

[48] The Independent Review, Motion Record, Tab 2(F), pp. 299-300.

[49] The Independent Review, Motion Record, Tab 2(F), pp. 299-300.

[50] The Independent Review, Motion Record, Tab 2(F), p. 302.

[51] The Independent Review, Motion Record, Tab 2(F), pp. 302-303.

[52] The Independent Review, Motion Record, Tab 2(F), p. 303

> quantify, but that result should be used very cautiously. Probably better, even better not used for medical-legal purposes".[53]

30. In instances when MDTL staff considered communicating the limitations on results, the suggestion was rejected. In 2011, Mr. Gareri suggested sending a "customer update memo" describing changes to MDTL testing procedures and the impact of alcohol containing products on testing. The suggested letter was rejected:

> "I would not mention the alcohol containing products in this letter – its mentioned in the interpretation sheet. It sounds as if we are saying that the method we've been offering our clients for several years now is worthless in a sense, while we don't have an alternative in-house method for EtG. I'm afraid this might be harmful for our business and our credibility."[54]

31. When a standard format interpretation sheet was drafted which advised that alcohol products could cause false positives, the interpretation sheet was completely rejected as follows:

> hey Joey
>
> On Friday I received the FAEE hair interpretation sheet that goes out with all the hair FAEE data. I was very concerned with the last statement in which is[sp] says that 60% of the test may be false positive due to hair product use. This statement gives the implication that our test is not accurate. It is a statement that can be used in court if asked weather[sp] hair care products interfear[sp] with this test."[55]

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[53] Cross-Examination of Dr. Salomone, question 123, Transcript Brief, Tab A, p. 32.

[54] Email from Netta Fulga to Joey Gareri and Gideon Koren dated March 4, 2011, Reply Record, vol. 1, Tab 1(W), p. 301.

[55] E-mail from Katarina Aleksa to Joey Gareri, dated April 16, 2007, Reply Record, vol. 1, Tab 1(X), p. 304.

32. A revised draft of the standardized interpretation sheet was provided to be sent out with results which removed any reference to false positive and hair products.[56]

33. MDTL management ensured that the purported reliability of their testing would not be open to any doubt or qualification in the standardized communications. The standardized communications from MDTL and the failure to provide frank and honest disclosure of the limitations of hair testing was in breach of duties owed to the class, for the duration of the class period.

E. Adequacy and Reliability of MDTL's Testing

34. The Independent Review found that MDTL's hair testing was not reliable or adequate for use in child protection or criminal proceedings.[57] The procedures used to generate results were negligently managed throughout the duration of the class period.

i. MDTL Never met Forensic Standards

35. The Independent Review found that for the entire duration of the proposed class period, MDTL never met forensic standards. The Independent Review found that for the duration of the class period, no one at MDTL had the expertise to give forensic Interpretations.[58] The MDTL tests were forensic because:

> "A hair test can be forensic even if it is never tendered as evidence and even if no court proceeding is ever initiated. What distinguishes a clinical test from a forensic test is the purpose

[56] Original Interpretation Sheet advising of false positives, Exhibit "Z" to the Tovee Reply Affidavit, Reply Record, vol. 1, Tab 1(Z), p. 308; revised Interpretation Sheet removing reference to false positives, Exhibit "Y" to the Tovee Reply Affidavit, Reply Record, vol. 1, Tab 1(Y), p. 306.

[57] The Independent Review, Motion Record, Tab2(F), pp. 148 and 284.

[58] The Independent Review, Motion Record, Tab 2(F), pp. 295-299.

> behind the test. If the test is either carried out or used for a legal purpose, it is a forensic test."[59]

36. MDTL actively marketed itself to CAS agencies for the sole purpose of providing results and interpretations for use in court and child protection proceedings. MDTL placed itself into the business of forensic testing. The problem was that Dr. Koren mistakenly never viewed the lab to be forensic. In Dr. Koren's own words:

(a) "While I was aware that forensic labs existed, I did not view forensic work as MDTL's primary role";

(b) "I also did not understand that forensic labs followed different standards than clinical labs, i.e. using GC/MS versus ELISA."; and

(c) "I was not aware of the recommendations from the Goudge Inquiry and no one from HSC communicated those recommendations to me."[60]

37. Given that the lab director did not view the lab as forensic, no one in the lab had the expertise for forensic interpretations. In the words of the Independent Review: "The result was inevitable: MDTL's testing and operations fell woefully short of internationally recognized forensic standards."[61]

38. The failure to meet forensic standards is a common breach for all test results and all class members for the complete duration of the proposed class period.

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[59] The Independent Review, Motion Record, Tab 2(F), p. 148.

[60] Answers to Preliminary List of Questions for Dr. Gideon Koren, dated July 24, 2015, Reply Record, vol. 1, Tab 1(I), p. 176.

[61] The Independent Review, Motion Record, Tab 2(F), p. 149.

ii. Reliance on ELISA

39. From 2005 to 2010, the MDTL relied on ELISA tests to provide results and interpretations.[62] Even after September 2010, MDTL continued to rely on ELISA to test infants less than six months.[63] ELISA is only intended to be a preliminary screening test and as noted in the Independent Review, the Immunalysis kits that MDTL used came with an explicit written warning on the kit regarding the preliminary nature of any results.[64] The international consensus, even prior to 2005, recognized ELISA as only a screening test, the MDTL did not follow this consensus.[65]

40. From 2005-2010, contrary to all standards and explicit warnings, MDTL relied on and reported the unconfirmed results of its ELISA tests, both qualitatively (to distinguish positive from negative) and quantitatively (to calculate the drug concentration in the sample).[66] This operation was a common breach applicable on a class wide basis.

iii. Failed GC-MS Confirmation of ELISA

41. After 2010, the defendants purported to confirm the ELISA results using GC-MS.[67] The defendants failed to apply the appropriate procedures for use of GC-MS to provide reliable identification and quantification of drugs.[68] The Independent Review found that :

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[62] The Independent Review, Motion Record, Tab 2(F), pp. 150 and 231-236.

[63] Request to Admit, dated May 4, 2017, at request 155, Transcript Brief, Tab E, p. 412; Response to Request to Admit, Transcript Brief, Tab F, p. 420.

[64] The Independent Review, Motion Record, Tab 2(F), pp. 150 and 231-236.

[65] The Independent Review, Motion Record, Tab 2(F), pp. 150 and 231-236.

[66] The Independent Review, Motion Record, Tab 2(F), pp. 150 and 231-236.

[67] Independent Review, Motion Record, Tab 2(F), pp. 257-260.

(a) contrary to accepted standards, MDTL only operated the GC-MS scans requiring a 65 percent or higher match on a similarity index to identify a drug, as opposed to the recognized standard of requiring 95 percent or higher similarity;

(b) MDTL inappropriately relied almost exclusively on GC-MS scans; and

(c) MDTL failed to record data that lead to a match of a given drug. [69]

42. As a result, even after 2010 when MDTL purported to confirm ELISA results, it failed to do so in a manner consistent with international standards, this failure is common to the class.

iv. No Operating Procedures or Contemporaneous Documentation

43. For the time period from 2005-2010, the defendants could not produce any written analytical procedures.[70] Similarly, for 2005 to 2010 the defendants did not maintain contemporaneous documentation.[71] Forensic standards require contemporaneous documentation to ensure a "meaningful review of the reliability of test results" and standardized procedures to ensure consistency.[72] Dr. Koren's own expert confirmed on cross-examination that:

> Q. If a lab had no written standard operating procedures, that would call into question the accuracy and reliability of all of its testing?
>
> A. Yes.[73]

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[68] The Independent Review, Motion Record, Tab 2(F), p. 269.

[69] The Independent Review, Motion Record, Tab2(F), p. 269-271.

[70] The Independent Review, Motion Record, Tab 2(F), pp. 151 and 237-239.

[71] The Independent Review, Motion Record, Tab 2(F), pp. 151 and 237-239.

[72] The Independent Review, Motion Record, Tab 2(F), pp. 151 and 237-239.

[73] Cross-Examination of Dr. Salomone, Q. 199, Transcript Brief, Tab A, p. 48.

44. The MDTL failed to meet this requirement and therefore fell "well below expected standards for a forensic laboratory." for the duration of the class period for all class members.[74]

v. Failure to Maintain Chain of Custody

45. Forensic reliability requires the maintenance of a chain of custody for any given sample.[75] Given the defendants mistakenly did not view the MDTL as a forensic lab, the defendants did not maintain adequate chain of custody procedures, including:

(a) MDTL did not require chain of custody forms for samples collected at SickKids, and therefore there is no record of whether the sample was sealed, who received it and when; [76]

(b) MDTL kept no chain-of-custody documentation *of any kind* once a sample was received, regardless of where it originated from;[77]

(c) many chain of custody forms were incomplete;[78] and

(d) MDTL did not limit access to its samples, allowing students, researchers or anyone else in the lab access to a sample.[79]

46. Dr. Koren's own expert was of the following opinion on the importance of chain of custody:

> It is essential because samples might be, for example, replaced with another sample which in custody is not controlled. It is essential because in some steps of the analysis process there might be some error. So, afterwards, if you need to go back and identify where the error occurred, you can in this way under --

[74] The Independent Review, Motion Record, Tab 2(F), p. 151.

[75] The Independent Review, Motion Record, Tab 2(F), p. 253.

[76] The Independent Review, Motion Record, Tab 2(F), pp. 253-254.

[77] The Independent Review, Motion Record, Tab 2(F), pp. 253-254.

[78] The Independent Review, Motion Record, Tab 2(F), pp. 253-254.

[79] The Independent Review, Motion Record, Tab 2(F), pp. 253-254.

> understand the -- in which step which – and which person is responsible for this error.[80]

47. The failure to maintain appropriate chain of custody procedures is common to all class members for the duration of the class period.

vi. Failure to Wash Samples Appropriately or Consistently

48. Washing a hair sample prior to analysis is essential as it serves to remove exterior contamination of the sample.[81] From 2005 to 2010, the MDTL did not routinely wash hair samples when testing for drugs of abuse and this is inconsistent with recognized forensic standards.[82]

vii. Absence of Oversight

49. The defendants failed to provide adequate oversight within the MDTL and SickKids failed at an institutional level to oversee MDTL. From 2005 to 2010, virtually all of the ELISA tests were carried out by one MDTL employee, Ms. Karaskov. Between 2005 to 2010, neither Dr. Koren as laboratory director, nor anyone else, at MDTL reviewed the work of Ms. Karaskov.[83] Mr. Gareri as laboratory manager referred to Ms. Karaskov's work as a "black box" and the independent review noted three types of reporting discrepancies is Karaskov's work.[84]

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[80] Cross-Examination of Dr. Salomone, Q. 21, Transcript Brief, Tab A, p. 8.

[81] The Independent Review, Motion Record, Tab 2(F), pp. 240-242 and 251.

[82] The Independent Review, Motion Record, Tab 2(F), pp. 240-241 and 251; Request to Admit dated May 4, 2017, at request 110, Transcript Brief, Tab E, p. 408; Response to Request to Admit, Transcript Brief, Tab F, p. 420.

[83] The Independent Review, Motion Record, Tab 2(F), p. 103.

[84] The Independent Review, Motion Record, Tab 2(F), p. 103.

50. SickKids also failed to provide any meaningful oversight of the MDTL, with the Independent Review finding that:

> There is no evidence that anyone in a leadership position at the hospital gave any meaningful consideration to the reality that MDTL was, for the most part, carrying out hair tests for forensic, not clinical purposes…
>
> SickKids focused on bringing MDTL into its clinical licensing and accreditation process, and it did so slowly and in the absence of any meaningful oversight of the laboratory's work.[85]

51. The failure to oversee the operations within the lab and the failure at the level of SickKids to oversee the operations and management of the lab is a common failure to the class for the duration of the class period.

F. Child Protection Proceedings and the MDTL

52. A positive drug test for a parent under investigation by a CAS, or seeking the return of their child, carries devastating consequences. The textbook edited by Dr. Koren's own expert, Dr. Salomone, states it clearly: "…it should always be kept in mind that hair results may have drastic consequences on the persons concerned."[86]

53. The defendants knew the MDTL test results were used as a basis to intervene in parent-child relationships and sought to provide them for this very purpose. With the appearance of the best intentions, Dr. Koren's own description of the function of MDTL was:

> I understood that the MDTL test results were provided either to Children's' Aid or clinicians to be able to assess the potential risks that children were facing in their environments. The samples were requested in most cases and reported to CAS. It helped

[85] The Independent Review, Motion Record, Tab 2(F), p. 336.

[86] Exhibit 1 to the cross-examination of Dr. Salomone, Transcript Brief, Tab A(1), p. 138.

> estimate potential environmental risks by assessing the use of and exposure to drugs. It is my understanding that in the vast majority of cases these results were used by CAS to mitigate the potential harm to which children were exposed through collaborative interventions."[87] [emphasis added]
>
> Dr. Gareri and the other counsellors at MDTL had discussions with social workers at CAS on a regular basis. From those discussions, our understanding was that CAS used the hair testing results in the majority of cases to inform their interactions with families.[88] [emphasis added]

54. While Dr. Koren may have viewed the drug tests as providing for "collaborative interventions", a parent facing a positive drug test from SickKids has little choice but to accede.

55. The implication of a positive hair test from the MDTL is compounded due to the reputation of SickKids versus the vulnerability of the class members, as noted by the Independent Review:

> The fact that MDTL was housed in such a prominent institution bolstered its reputation and credibility with customers and with the community – the assumption being that such a highly regarded institution would take steps to ensure that the services provided by its laboratories met the standards of excellence that have come to be associated with SickKids. Unfortunately, in the case of MDTL, that assumption proved incorrect.[89]

56. The positive reputation of SickKids in this action was a disservice to the class. It was not surprising that the Independent Review made the conclusion that "the use of MDTL hair-

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[87] Answers to Preliminary List of Questions for Dr. Gideon Koren" dated July 24, 2015, Reply Record, vol. 1, Tab 1(I), p. 182.

[88] Answers to Preliminary List of Questions for Dr. Gideon Koren, dated July 24, 2015, Reply Record, vol. 1, Tab 1(I), p. 182.

[89] The Independent Review, Motion Record, Tab 2(F), p. 203.

testing evidence in child protection and criminal proceedings has serious implications for the fairness of those proceedings."[90]

i. Child Protection Regime Guaranteed MDTL Impact

57. Unreliable positive drug tests of parents were provided to child protection agencies. The sole purpose of child protection agencies is to investigate, intervene and remove children from potential harm. The structure of the child protection system virtually guaranteed an impact on class members in this case.

58. The structure of child protection proceedings placed parents at a further disadvantage in regaining or maintaining custody when confronted with a result from MDTL. The defendant's own expert has opined that in the context of a protection hearing "If the balance of probabilities does not tip either way, then the resulting doubt should be resolved in favour of the safety of the child."[91] When there is a tie in the evidence, the court must find in favour of intervention.

59. Furthermore, the defendant's own expert opined that a court's decision to place a child in protection is not a discretionary decision.[92] The protection order is guided by statue and the statute's sole overarching objective is the protection of the child.[93] In other words, if harm is suspected, non-discretionary intervention is the default.

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[90] The Independent Review, Motion Record, Tab 2(F), p. 148.

[91] Exhibit 1 to the cross-examination of Jeffery Wilson, Transcript Brief, Tab D(1), p. 400.

[92] Affidavit of Jeffery Wilson, at para. 15, Responding Motion Record of Dr. Koren, Tab A, p. 5; The Independent Review, Motion Record, Tab 2(F), p. 353-354; CFSA, s. 1(1), Plaintiff's Factum Schedule "B", Tab B.

[93] Affidavit of Jeffery Wilson, at para. 15, Responding Motion Record of Dr. Koren, Tab A, p. 5; The Independent Review, Motion Record, Tab 2(F), p. 353-354; CFSA, s. 1(1), Plaintiff's Factum Schedule "B", Tab B.

ii. CAS Manual

60. The manual provided to CAS agencies ensures that a positive drug test would lead to intervention in a parent's relationship to their child.

61. The Child Protection Standards set out the minimum standards for CAS agencies in Ontario. They are "a mandatory framework" within which child protection services are delivered.[94]

62. Used alongside the Child Protection Standards is the Child Welfare Eligibility Spectrum (The "Eligibility Spectrum"). The purpose of the Eligibility Spectrum is "to assist Children's Aid Society staff in making **consistent** and accurate decisions about eligibility for service at the time of referral." [emphasis added][95] Within the Eligibility Spectrum there are different "scales" of harm, which are grounded in Part III of the *Child and Family Services Act*, which deals with child protection.[96]

63. The five sections of the Eligibility Spectrum, each containing several scales of harm, are:

(a) Physical/Sexual Harm by Commission

(b) Harm by Omission

(c) Emotional Harm/Exposure to Conflict

(d) Abandonment/Separation

(e) Caregiver Capacity

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[94] Child Protection Standards in Ontario, February 2007, Reply Record, vol. 2, Tab 1(UU), p. 759.

[95] Ontario *Child Welfare Eligibility Spectrum*, revised October, 2006, Reply Record, vol. 2, Tab 1(WW) p. 979.

[96] Part III of the *Child and Family Services Act*, Plaintiff's Factum, Schedule B, Tab "B".

64. Each of the scales is divided into four levels of severity: extremely severe, moderately severe, minimally severe, and not severe.[97]

65. The "Child Protection Entry Point", called the "Intervention Line", is drawn between the moderately severe and minimally severe levels of severity.[98] The Eligibility Spectrum describes the use of the Intervention Line as follows:

> If allegations are made that fall within the "Extremely Severe" level the Children's Aid Society is required to intervene by providing a protection investigation ("traditional" or "customized"). Cases where no information is available about the child and family other than a description of the incident/condition that may place a child in need of protection, that are rated as moderately severe (above the Intervention Line) are opened for a protection investigation ("traditional" or "customized") (CPS-06:S2). Cases that are rated as moderately severe where information about the child's vulnerability and/or the family's needs and protective capacities is available and indicates that these mitigate against the risk, do not require a child protection investigation but are provided with a "community link service".[99]

iii. The Intervention Line and MDTL Results

66. The "Caregiver with Problem" scale directly refers to caregiver substance use in assessing whether behaviour is "extremely severe" or "moderately severe". Under this scale, "extremely severe" behaviour, which mandates intervention, includes:

> Caregiver Has Problem and is Unable to Care for Child
>
> It is alleged/verified that due to a physical, mental-emotional, or behavioural problem (e.g. **as a result of an alcohol or drug addiction**, mental illness or physical or intellectual inability), caregiver has no current capacity to care for the child, even with

[97] Ontario *Child Welfare Eligibility Spectrum*, revised October, 2006, Reply Record, vol. 2, Tab 1(WW), p. 981.

[98] Ontario *Child Welfare Eligibility Spectrum*, revised October, 2006, Reply Record, vol. 2, Tab 1(WW), p. 987.

[99] Ontario *Child Welfare Eligibility Spectrum*, revised October, 2006, Reply Record, vol. 2, Tab 1(WW), p. 987.

> supplementary child care services, and no change is expected in the near future.[100][emphasis added]

67. Under "moderately severe", the criteria includes:

> Caregiver Has Problem Causing Risk that the Child is Likely to be Harmed
>
> It is alleged/verified that caregiver has a problem created by a physical, mental emotional, or behavioural condition that threatens to interfere with his/her child caring ability (or that has already caused some erratic child care quality). Examples are chronic physical illnesses, physical disabilities, mental or emotional illnesses, **substance abuse**, criminal activity, intellectual disability.
>
> …Caregiver does not yet have the problem well enough under control so that he/she can reasonably care for the child without putting him/her at some risk (**e.g. alcoholism is still a problem**) but caregiver is starting treatment and this may be possible in future.[101]

68. Substance abuse or addictions will always be a factor in favour of the CAS intervening in a family.

69. Positive MDTL results placed all class members in an impossible position with a child protection agency. If the parent challenges the result and denies using drugs or alcohol, the parent is an addict in denial who is not in control. If the parent does not challenge the MDTL results, they are simply an addict. In each situation, intervention is required.

70. In every situation of a positive MDTL test, it was the reputation of a world renowned hospital versus a parent under investigation by the CAS. When a parent states that they are not

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[100] Ontario *Child Welfare Eligibility Spectrum*, revised October, 2006, Reply Record, vol. 2, Tab 1(WW), p. 1062.

[101] Ontario *Child Welfare Eligibility Spectrum*, revised October, 2006, Reply Record, vol. 2, Tab 1(WW), p. 1063.

abusing substances but a hair-strand test shows "chronic" abuse, it undermines the parent's credibility, tainting the entire CAS process.

G. The Representative Plaintiff

71. The proposed representative plaintiff is Ms. Rebecca Green. From 2009 to 2012, Ms. Green's only child was subject to a series of CAS protection orders based on drug screen results from the MDTL. From 2009 to 2012 Ms. Green's parental access to her only child was repeatedly interfered with as a result of unreliable MDTL hair tests. Ms. Green only gained unimpeded custody and access to her child after returning a negative hair test from MDTL.[102] The MDTL test result was the lynchpin to access.

72. Ms. Green's involvement with MDTL hair testing began in October 2009, approximately 2 months after her child was apprehended by the Toronto CAS. Ms. Green was addicted to cocaine in 2009 and for the early part of 2010.[103] The Toronto CAS apprehended Ms. Green's son at birth on August 30th, 2009. Ms. Green's son tested positive for cocaine at birth.[104] Ms. Green broke her addiction to cocaine and last used cocaine in early 2010.[105]

73. Approximately two months after Ms. Green's son was apprehended, she began hair strand testing through the MDTL as a condition to increase and regain custody of her son. [106]

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[102] Affidavit of Rebecca Green, sworn November 3, 2016 ("Affidavit of Rebecca Green"), paras. 4-6, Motion Record, Tab 3, pp. 536-537.

[103] Affidavit of Rebecca Green, para. 3, Motion Record, Tab 3, p. 536.

[104] Affidavit of Rebecca Green, paras. 3-5, Motion Record, Tab 3, pp. 536-537.

[105] Affidavit of Rebecca Green, para. 3, Motion Record, Tab 3, p. 536.

[106] Service Plan Recording from the Children's Aid Society of Toronto, February 26, 2011 to August 26, 2011, Reply Record, vol. 2, Tab1(OO), p. 540; Service Plan Recording from the Children's Aid Society of Toronto, August 26, 2011 to February 26, 2012, Reply Record, vol. 2, Tab 1(PP), p. 559.

74. Ms. Green underwent hair strand testing from October 2009 until February 24, 2012. A chart of all Ms. Green's tests and interpretations provided by MDTL are below:[107]

Sample #	**Date Collected**	**MDTL Reported Result**
112917	October 6, 2009	positive for cocaine and alcohol
115583	May 4, 2010	positive for cocaine and alcohol
118380	December 7, 2010	positive for cocaine(trace) and alcohol
120702	April 29, 2011	positive for alcohol
123788	November 16, 2011	positive for alcohol
125061	February 24, 2012	Negative for all substances

75. For each hair test, Ms. Green attended at the MDTL laboratory.[108] Ms. Green completed a standard format Clinic Registration form, assigning her a "Registration Number" and indicating the "Responsible Physician" was Dr. Gideon Koren.[109] Despite Dr. Koren being assigned as the "responsible physician" for Ms. Green and personally signing-off on each of her test results (wherein Ms. Green is listed as the "Patient"), Dr. Koren never once met with Ms. Green to consider other factors relevant to her test results.[110] Ms. Green requested the results be

[107] Affidavit of Rebecca Green, para 8, Motion Record, Tab 3, p. 537.

[108] Affidavit of Rebecca Green, para. 10, Motion Record, Tab 3, p. 538.

[109] Documents produced by SickKids with respect to Ms. Green, Reply Record, vol. 2, Tab1(LL), p. 476; Exhibits 3 and 4 to the cross-examination of Rebecca Green, Transcript Brief, Tabs B(3) and B(4), p. 253 and 255.

[110]Cross-Examination of Rebecca Green, questions 11-14, Transcript Brief, Tab B, p. 157; MDTL Test Results, Motion Record, Tab 3(A), pp. 545-555; Documents produced by SickKids with respect to Ms. Green, Reply Record, vol. 2, Tab1(LL), p. 476; Exhibits 3 and 4 to the cross-examination of Rebecca Green, Transcript Brief, Tabs B(3) and B(4), p. 253 and 255.

sent to her and she had direct correspondence with the MDTL lab manager regarding the results.[111]

i. MDTL Interpretations Were Unreliable

76. The MDTL standard format interpretations stated Ms. Green was a "chronic" alcoholic consuming "4-6 standards drinks per day over several months."[112] At the same time as the MDTL interpretations were advising the CAS that Ms. Green was consuming 4-6 standard drinks per day, Ms. Green was undergoing almost daily urine tests, which indicated no alcohol, except for 1 positive result.[113] Ms. Green also provided a listing of hair products containing alcohol to MDTL, given her understanding this could impact test results. MDTL did nothing with this list and nothing with the urine tests when providing opinions to the CAS on test results.

77. Despite MDTL having no chain of custody procedures, no forensic training, no contemporaneous documents and poor oversight, Mr. Gareri still provided the forensic opinion to the CAS that Ms. Green's test was "clear evidence" of substance abuse.[114]

ii. MDTL Interpretations Key to Access and Custody

[111] Transcript Brief, Tab B, p. 157; MDTL Test Results, Motion Record, Tab 3(A), pp. 545-555; Documents produced by SickKids with respect to Ms. Green, Reply Record, vol. 2, Tab1(LL), p. 476; Exhibits 3, 4 and 6 to the cross-examination of Rebecca Green, Transcript Brief, Tabs B(3), B(4) and B(6), pp. 253, 255 and 259.

[112] MDTL Interpretation of Alcohol Hair Analysis Guide, Motion Record, Tab 3(B), p. 557.

[113] Letter from Dr. Tisher, dated December 7-21, 2011, Motion Record, Tab 3(D), pp. 561-562; Urine test results of Ms. Green, Reply Record, vol. 2, Tab 1(TT), pp. 583-755.

[114] Correspondence from Joey Gareri, dated August 12, 2011, Motion Record, Tab 3(E), p. 564.

[115] Service Plan Recording from the Children's Aid Society of Toronto, February 26, 2011 to August 26, 2011, Reply Record, vol. 2, Tab1(OO), p. 540.

[116] Service Plan Recording from the Children's Aid Society of Toronto, August 26, 2011 to February 26, 2012, Reply Record, vol. 2, Tab 1(PP), p. 559.

[117] Interpretation of Alcohol Hair Analysis Guide, Motion Record, Tab 3(B), p. 557,

H. The Class

82. The proposed class consists of:

(i) All persons who reside in Canada who tested positive from a hair-strand drug and/or alcohol test administered by the Motherisk Drug Testing Laboratory between January 2005 and April 2015 (the "Class" or "Class Members");

(ii) All parents, grandparents, children, grandchildren, siblings and spouses (within the meaning of section 61 of the *Family Law Act*, R.S.O. 1990, c. F-3, as amended) of a Class Member (the "Family Law Class" or the "Family Law Class Members");

83. Extensive data has been collected on the nature of the class to date, including data which:

(a) divides test samples by whether they were requested by a "child protection agency", whether the sample is from Ontario, whether the sample was positive; and [118]

(b) divides test samples by the named organization which made the request for a sample, whether the organization is a CAS organization or some other organization.[119]

84. Between 2005 and 2015 the MDTL tested the hair of 18,463 individuals to screen for drug and alcohol abuse.[120] Of the 18,463 individuals who were tested, a total of 10,004 were

[118] Lang Review – Final List of Questions, Reply Record, vol. 2, Tab 1(XX), pp. 1092-1094.

[119] Excel sheet produced by the Hospital listing positive and negative individuals, Reply Record, vol. 2, Tab 1(YY), pp. 1109-1110.

[120] The Independent Review, Motion Record, Tab 2(F), p. 408.

reported by MDTL as having a positive result.[121] Approximately 6,958 of the reported positives were individuals referred from child protection agencies.[122]

I. Common Issues

85. The proposed common issues focus on the operation and management of the MDTL. Given the commonality of the failings in the management structure and operations at MDTL, the proposed issues are appropriate for certification:

1. By its operation or management of the Motherisk Drug Testing Laboratory between January 2005 and April 2015, did the Defendants breach a duty of care it owed to the Class?

2. If the answer to common issue (1) is "yes", can the court make an aggregate assessment of damages suffered by all Class members as part of the common issues trial?

3. If the answer to common issue (1) is "yes", are the Family Class members entitled to damages pursuant to section 61 of the Family Law Act, R.S.O. 1990, c. F-3?

4. If the answer to common issue (3) is "yes", in what amount?

5. If the answer to common issue (1) is "yes", does the Defendants' conduct justify an award of punitive damages?

6. If the answer to common issue (5) is “yes”, what amount of punitive damages ought to be awarded against the Defendants?

[121] The Independent Review, Motion Record, Tab 2(F), p. 408.

[122] The Independent Review, Motion Record, Tab 2(F), p. 408.

PART III - ISSUES AND THE LAW

A. The Test on a Motion for Certification

86. The test for certification is set out in section 5(1) of the *Class Proceedings Act, 1992* (the "*CPA*") which states that the court shall certify a class proceeding if the test is met.[123]

B. The "Some Basis in Fact" Test is a Low Hurdle

87. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation* ("***Pro-Sys***"), Justice Rothstein confirmed that the test for certification is decidedly not meant to be a test of the merits of the action; rather, certification is concerned with the form of the action and whether it can proceed as a class action.[124] Justice Rothstein confirmed that the standard of proof to be applied to the certification requirements is "some basis in fact." That is, the plaintiff must show some basis in fact for each of the certification requirements set out in the *CPA*.[125] The standard of proof "asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements."[126]

88. The "some basis in fact" test for the elements of certification sets a low evidentiary standard for plaintiffs. On a motion for certification, a court may not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case; the focus

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[123] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5, Plaintiffs' Factum, Schedule "B", Tab B.

[124] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, paras. 99-100, PBOA, Tab 31; *Hollick v. Toronto (City)*, 2001 SCC 68, paras. 16-26, PBOA, Tab 20.

[125] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, para. 99, PBOA, Tab 31. *Hollick v. Toronto (City)*, 2001 SCC 68, para. 25, PBOA, Tab 20.

[126] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, para. 100, PBOA, Tab 31.

at certification is whether the action can appropriately go forward as a class proceeding.[127] The "some basis in fact" test is less stringent than the ordinary civil threshold of "balance of probabilities".

C. The Test Should be Applied in a Broad and Purposive Manner

89. It is well established that courts must construe the *CPA* generously and must not take an overly restrictive approach.[128] As directed by the Supreme Court of Canada in *Hollick*, the test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions: (a) providing access to justice for litigants; (b) promoting the efficient use of judicial resources; and (c) sanctioning wrongdoers to encourage behaviour modification.[129]

D. Section 5(1)(a) Reasonable Causes of Action Have Been Pled

90. Certification shall not be denied pursuant to section 5(1)(a) unless it is plain and obvious that the claims have no prospect of success.[130]

i. MDTL Owed a Duty of Care to the Class

91. This action alleges negligence in the defendants' operation and management of a laboratory. Laboratories owe an established duty of care to individuals being tested to provide

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[127] *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57, paras. 99-100, PBOA, Tab 31. *McCracken v. CNR Co*., 2012 ONCA 445, paras. 75-76, 80, PBOA, Tab 27.

[128] *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 15, PBOA, Tab 20.

[129] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, paras. 26-29, PBOA, Tab 40; *Hollick v. Toronto (City)*, 2001 SCC 68, paras. 15, 16. PBOA, Tab 20.

[130] *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.), para. 41, PBOA, Tab 8; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 21, Plaintiff's Factum, Schedule "B", Tab B.

accurate and reliable results, accurate and reliable interpretations and to hire and oversee competent staff.

92. In *Cleveland v. Hamilton Health Sciences Corporation*, a case concerning negligent blood screening at the Ministry of Health's Newborn Screening Program, the court held:

> …the laboratory had a duty to take care to assess the quality of the sample before testing. It also had a duty to accurately interpret and report the result. In either case, a failure to do so falls below the standard of care.[131]

93. The Newborn Screening laboratory in *Cleveland* was analogous to MDTL. The lab in *Cleveland* was a centralized lab which received blood samples from newborn infants to screen for medical conditions. In almost all instances, the infants never attended at the lab. Analogous to the MDTL lab, the Newborn Screening Lab failed to properly store and record the bodily samples provided and failed to accurately interpret and report results. The court ultimately held that the Newborn Screening lab was negligent:

> …the provincial laboratory fell below the standard of care reasonably to be expected of a testing laboratory in its testing and reporting of Tyler's results, not once, but twice. A high degree of care was required as the laboratory knew that physicians would rely on the results to make important decisions about follow-up and treatment.[132]

94. The "high degree of care" required in the *Cleveland* case is directly applicable to MDTL. The defendants knew the MDTL results would be used to "make important decisions". The defendants intended the MDTL results to be used in child protection and custody decisions directly impacting parents and children.

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[131] *Cleveland v. Hamilton Health Sciences Corporation,* [2009] O.J. No. 5361 (S.C.J.), para 26, PBOA, Tab 6.

[132] *Cleveland v. Hamilton Health Sciences Corporation,* [2009] O.J. No. 5361 (S.C.J.), para. 60, PBOA, Tab 6.

95. Similarly, in certifying a class action concerning systemic negligence in cancer screening at a New Brunswick laboratory, the New Brunswick Court of Appeal held:

> …the following propositions are not plainly wrong: (1) the Regional Hospital owed a duty in tort to select competent medical staff, including a competent Chief of Pathology and Director of Clinical Laboratory Services; (2) it also owed a duty in tort to implement processes to monitor Dr. Menon's competence in all facets of his work at the Miramichi Regional Hospital and, where warranted, to compel remedial action; (3) both the Regional Hospital and Dr. Menon, as Chief of Pathology and Director of Clinical Laboratory Services, were required to establish systems for the safe operation of the pathology department and laboratory at the Miramichi Regional Hospital, all with a view to preventing the institutional failures described in the Amended Statement of Claim; (4) Dr. Menon, as Chief of Pathology and Director of Clinical Laboratory Services, was duty bound to discharge his manifold responsibilities in competent fashion; and (5) competency in any of those areas of responsibility is not a matter reserved exclusively, if at all, for overseeing professional bodies. **Every Chief of Pathology and Director of Clinical Laboratory Services is duty bound to maintain a minimal level of competence in the discharge of his or her responsibilities, and any harm-causing failure to do so may give rise to liability in a court of law**. More specifically, if the work of a Chief of Pathology and Director of Clinical Laboratory Services is significantly substandard over an extended period, his or her competence may be brought into question. If that occurs, he or she should expect the hospital to take steps with a view to sizing up the problem and avoiding harm to patients. Remedial measures could predictably include a wholesale review of the pathology work in the department and laboratory under his or her supervision, and notification of same to the patients in question. That process might well result in mental distress and anxiety for the patients as well as out-of-pocket expenses for follow-up medical consultations.[emphasis added][133]

96. The court held that "Every Chief of Pathology and Director of Clinical Laboratory Services is duty bound to maintain a minimal level of competence in the discharge of his or her

[133] *Gay v. Regional Health Authority 7,* 2014 NBCA 10, para. 69, PBOA, Tab 14.

responsibilities, and any harm-causing failure to do so may give rise to liability in a court of law."[134]

97. The MDTL was part of SickKids. The class members were assigned registration numbers from MDTL, received results from MDTL, attended at SickKids, were assigned Dr. Koren as the responsible physician and listed as "Patients" on the result forms.[135] It is well established that hospitals in the situation of SickKids vis-a-vis the class members have a duty to provide competent personnel and adequate facilities:

> It is a well-established principle that hospitals have a duty to their patients to maintain "safe systems" for the provision of medical services. The hospital is further responsible for the provision of competent personnel and adequate facilities. [136]

ii. Analogous US Case Law

98. It has been held in the United States that testing laboratories owe a duty of care to the individuals impacted by test results, whether in the employee drug testing context or otherwise. The Louisiana Court of Appeal held the following in respect of an employee who sued a laboratory for negligence regarding an unreliable lab report given to his employer:

> [t]o suggest that [the laboratory] does not owe [plaintiff] a duty to analyze his bodily fluid in a scientifically reasonable manner is an abuse of fundamental fairness and justice…The risk of harm in our society to an individual because of a false positive drug

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[134] *Gay v. Regional Health Authority 7*, 2014 NBCA 10, para. 69, PBOA, Tab 14.

[135] MDTL Test Results, Motion Record, Tab 3(A), pp. 545-555; Documents produced by SickKids with respect to Ms. Green, Reply Record, vol. 2, Tab1(LL), p. 476; Exhibits 3 and 4 to the cross-examination of Rebecca Green, Transcript Brief, Tabs B(3) and B(4), p. 253 and 255.

[136] *Granger (Litigation guardian of) v. Ottawa General Hospital*, [1996] O.J. No. 2129 (Gen. Div.), per Cunningham J. at paras 37-38, PBOA, Tab 17; *Yepremian et al. v. Scarborough General Hospital et al.* (1980), 28 O.R. (2d) 494 (C.A.), per Blair J.A. at p. 35, PBOA, Tab 42. See also: *Gay v. Regional Health Authority 7*, 2014 NBCA 10 at para. 58, PBOA, Tab 14.

> test is so significant that any individual wrongfully accused of drug usage by his employer is within the scope of protection of the law.[137]

99. Similarly, the Illinois Court of Appeal noted the clear rationale for imposing a duty on a testing laboratory:

> The drug testing laboratory is in the best position to guard against the injury, as it is solely responsible for the performance of the testing and the quality control procedures. In addition, the laboratory, which is paid to perform the test, is better able to bear the burden financially than the individual wrongly maligned by a false positive report. [138]

100. The above rationale is directly applicable in the case of MDTL. Any argument that the duty of care should rest with child protection agencies, or other bodies relying on MDTL results, is misplaced given that the defendants had the sole power over the tests and interpretations. The defendants advised their CAS clients that "We are the toxicologists so you don't have to be."[139] It would be incorrect to now shift any duty.

iii. Proximity and Foreseeability

101. Proximity and foreseeability are met in this case.

102. Every single one of the class members provided their bodily materials to MDTL. Dr. Koren reviewed the class members' test results to assess whether follow up was required and signed off on the results. Ms. Green herself attended the MDTL in person, received a

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[137] *Elliot v. Laboratory Specialists, Inc.*, 588 So. 2d 175 (La. Ct. App. 1991), p. 176 in original, PBOA, Tab 12.

[138] *Stinson v. Physicians Immediate Care Ltd.*, 646 N.E.2d 930, (Ill. App. Ct. 1995), p. 934, PBOA, Tab 34.

[139] Motherisk Drug Testing Newsletter for Children's Aid Societies, Vol. 4 – December 2009, Reply Record, vol. 1, Tab 1(GG), p. 427.

registration number and was assigned Dr. Koren as a "responsible physician."[140] The MDTL reported results to both individuals and CAS offices, in the case of the representative plaintiff the MDTL engaged in direct telephone calls with Ms. Green about the results, and received correspondence concerning her results.[141] A sufficient close and direct relationship existed between the parties.[142]

103. It was reasonably foreseeable that a breach of the duty of care would harm the class members. Dr. Koren himself stated that he understood the results would be used by the CAS for "collaborative interventions."[143] It is undeniably foreseeable that providing an unreliable test result indicating parental drug abuse to an agency dedicated to protecting children would cause a loss or interference in custody.

iv. Damages and Causation

104. The unreliable test results provided by the defendants caused significant monetary and non-monetary damages to the class members, including but not limited to:

(a) pain and suffering;

(b) impaired ability to participate in normal family affairs and relationships;

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[140] Exhibit 6 to the cross-examination of Rebecca Green, Transcript Brief, Tab B(6), p. 259; MDTL Test Results, Motion Record, Tab 3(A), pp. 545-555; Documents produced by SickKids with respect to Ms. Green, Reply Record, vol. 2, Tab1(LL), p. 476; Exhibits 3 and 4 to the cross-examination of Rebecca Green, Transcript Brief, Tabs B(3) and B(4), p. 253 and 255.

[141] MDTL Test Results, Motion Record, Tab 3(A), pp. 545-555; Documents produced by SickKids with respect to Ms. Green, Reply Record, vol. 2, Tab1(LL), p. 476; Exhibits 3 and 4 to the cross-examination of Rebecca Green, Transcript Brief, Tabs B(3) and B(4), p. 253 and 255.

[142] *Cooper v. Hobart*, 2001 SCC 79 at para. 33, PBOA 9.

[143] Answers to Preliminary List of Questions for Dr. Gideon Koren" dated July 24, 2015, Reply Record, vol. 1, Tab 1(I), p. 182.

(c) loss of custody of a child(s), be it temporary or permanent, on false pretenses, resulting in loss of dignity and interference with familial relations;

(d) unnecessarily protracted and more complex legal proceedings, resulting in increased legal costs, including the need for expert responding evidence;

(e) requirement of supervised visitation of a child(s) on false pretenses, resulting in loss of dignity and interference with familial relations;

(f) exacerbation of depression, anxiety, emotional distress and mental anguish, leading to impairment of mental and emotional well-being;

(g) destruction of credibility, character and trustworthiness;

(h) loss of friendship and companionship; and

(i) an impaired ability to obtain and sustain employment, resulting either in lost or reduced income and ongoing loss of income.

105. The plaintiff will be able to succeed on a "but for" causation analysis. The very purpose of the MDTL testing was for intervention in parent-child relationships.

106. The case of *Cleveland* is analogous. It was held that even in the context of a doctor's negligent follow up on the flawed laboratory test results, which ultimately resulted in the plaintiff patient's medical condition going undetected; it was the *originating* laboratory which bore 75% of the responsibility.[144]

107. The Court of Appeal decision in *Livent* described the nature of the but-for test.[145] The Court of Appeal for Ontario held the following in respect of the "but for" causation test:

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[144] *Cleveland v. Hamilton Health Sciences Corporation*, [2009] O.J. No. 5361 (S.C.J.) at para. 60, PBOA, Tab 6.

[145] *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 ONCA 11 at para. 311, PBOA, Tab 24.

> It is not necessary that the defendant's negligence be the sole cause of the injury, as explained by Major J. in *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, at para. 17:
>
> As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence. [Emphasis in original.][146]

108. Similarly in *Chen v. Ross* 2014 BCSC 374, the court held that:

> The plaintiff need not establish that a defendant's wrongful conduct is the *sole* cause of his injury. So long as a substantial connection between the harm and the defendant's negligence beyond the "*de minimus*" range is established, the defendant will be fully liable for the harm suffered by a plaintiff, even if other causal factors, which the defendants are not responsible for, were at play in producing that harm.[147]

109. The pivotal role hair testing plays in child protection investigations and proceedings is undeniable. A positive test from the MDTL ***inevitably*** carries consequences in every instance, some of which are described above. This is particularly true given that protection orders are "non-discretionary" and the CAS has a mandatory obligation to act in the face of evidence which demonstrates a parent may have an addiction.

v. Material Contribution to Risk

110. If for some reason the plaintiff does not succeed on a "but for" standard, this is a case in which the "material contribution" test is appropriate. The Supreme Court of Canada has described the "material contribution" test as follows:

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[146] *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 ONCA 11 at para. 312, PBOA, Tab 24.

[147] *Chen v. Ross*, 2014 BCSC 374, at para. 291, PBOA, Tab 4.

> …a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.[148]

111. It has been noted that the material contribution test is particularly well suited and applicable to cases of public interest. Emir Crowne and Omar Ha-Redeye in their article *A material contribution to the jurisprudence – the Supreme Court of Canada clarifies the law of causation* suggest that the test may be available for high profile public interest cases, for example, "civil claims regarding police inaction in incidents of domestic violence and sexual assault provide problematic chain of causation issues, and yet contain strong policy reasons for finding liability, to ensure public protection and responsibility."[149] This case precisely fits such a rationale, such that the plaintiff will succeed on material contribution, in the alternative, if necessary.

E. 5(1)(b) There is an Identifiable Class of Two or More Persons

112. Section 5(1)(b) of the *CPA* states that the court shall certify a proceeding if there is an identifiable class of two or more persons.[150] This certification requirement will be satisfied by demonstrating "some basis in fact" to support it.[151] This element is satisfied. The class is bound

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[148] *Clements v. Clements*, 2012 SCC 32 at para. 46, PBOA, Tab 5.

[149] Emire Crowne & Omar Ha-Redeye, "Clements v. Clements: A material contribution to the jurisprudence – the Supreme Court of Canada clarifies the law of causation" (2012) 2 UWO J Leg Stud 1 at p. 12, PBOA, Tab 43.

[150] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5, Plaintiffs' Factum, Schedule "B", Tab B.

[151] *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 25, PBOA, Tab 20.

by the years 2005 to 2015 and the objective criteria of a positive test result from the MDTL. The defendants' own documents provided to the Independent Review already provide for the ability to readily identify and categorize the class members.

F. 5(1)(c) The Proposed Common Issues Should be Certified

113. The third criterion for certification is the common issues criterion. For an issue to be a common issue, it need only be a necessary and substantial component to the resolution of each class member's claim.[152]

114. There can be significant individual issues which remain after the determination of the common issues. In medical product liability cases, it is typical for all issues relating to causation and damages to be individual issues which are determined following the common issues trial. Cases such as these are readily certified notwithstanding that the common issues (relating to the standard of care and breach) are only part of the issues to be determined for each class member.

115. The proposed common issues are essential ingredients of the claims of class members and are consistent with the principles adopted by the Ontario Court of Appeal in *Fulawka v. Bank of Nova Scotia*:

> (a) the common issues would avoid duplication of fact-finding or legal analysis relating to the defendant's operation and management of MDTL with the related inquiry into liability;
>
> (b) there is a rational relationship between the class and the common issues as all of the class members; and

[152] *Hollick v. Toronto (City)*, 2001 SCC 68, para. 18, PBOA, Tab 20.

(c) the answers to the common issues are necessary to each class member claim.[153]

116. The proposed common issues are also consistent with the recent principles adopted by the Supreme Court of Canada in *Vivendi Canada Inc. v. Dell'Aniello*:

(a) for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members;

(b) a common question can exist even if the answer given to the question might vary from one member of the class to another, and a common question may require nuanced and varied answers based on the situations of individual members; and

(c) the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question does not give rise to conflicting interests among the members; success for one member must not result in failure for another.[154]

117. As the Court of Appeal for Ontario recently re-affirmed in *Hodge v. Neinstein,* "Even a significant level of difference among the class members does not preclude a finding of commonality. If material differences do emerge, the court can deal with them at that time."[155]

118. Each common issue is addressed below.

1. By its operation or management of the Motherisk Drug Testing Laboratory between January 2005 and April 2015, did the Defendants breach a duty of care it owed to the Class?

119. Common issue (1) goes to the requirement that there be a duty of care and a breach. Whether the Defendant owes a duty of care is a threshold question common to all class

[153] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, para. 81, PBOA, Tab 13.

[154] *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, paras. 44–46, PBOA, Tab 39.

[155] *Hodge v. Neinstein*, 2017 ONCA 494, para. 114, PBOA, Tab 19; *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57, para. 112, PBOA, Tab 32; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 54, PBOA, Tab 40.

members. It does not depend on the evidence of individual class members. Determining duty and breach requires a review of the defendant's behaviour and the duties established by law. Like in *Rumley v. British Columbia*, an action on behalf of children at a residential school in which it was alleged that the institution failed to have in place appropriate management and operation procedures, the Plaintiffs have framed this action in systemic negligence. Common issues in respect of claims for systemic negligence are frequently certified.[156]

120. Common issue 1 is similar to common issues certified in cases concerning the operational or managerial negligence of clinics, labs and doctors concerning their common interactions with the class. Most recently in *Levac v James*, 2016 ONSC 7727, concerning an infectious outbreak at a clinic, the following common issues were certified:

> (a) whether the Defendants owed a duty of care to the Class Members to maintain infection control practices;
>
> (b) Did any Defendant breach his, her, or its duty of care with respect to the design and or performance of the Defendants' invariable IPAC Practice?
>
> (c) whether the Defendants' conduct was sufficient to attract punitive damages[157]

121. Similarly, the common issues concerning negligence in *Healey v. Lakeridge*, which concerned a tuberculosis outbreak and the alleged negligence of a hospital and doctors, consisted of:

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[156] *Rumley v. British Columbia*, 2001 SCC 69 at paras. 29-30, PBOA, Tab 33; *Dolmage v. Ontario*, 2010 ONSC 1726 at paras. 177, 215, PBOA, Tab 11; *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.) at para. 96, PBOA, Tab 8; *Johnson v. Ontario*, 2016 ONSC 5314 at para. 155, PBOA, Tab 21; *T.L. v. Alberta (Director of Child Welfare)*, 2006 ABQB 104 at para. 151, PBOA, Tab 37.

[157] *Levac v. James*, 2016 ONSC 7727 at paras. 73, 86-88, PBOA, Tab 23.

> (a) Did the defendants owe a duty of care to the Class Members and if so, what is the standard of care applicable to each defendant?
>
> (b) Did the defendants breach the standard of care and if so, when and how?[158]

122. The requisite commonality is confirmed by the Independent Review, which reviewed the common and standardized operations of the MDTL. The Independent Review did not require evidence from class members. The Independent Review was premised on the defendants own centralized conduct and management.

123. The issues of duty, standard and breach rely exclusively on the conduct of the defendants, which can all be determined in common for the entire class, and "are a substantial and necessary factual link in the chain of proof leading to liability for every member of the class."[159] This proposed common issue should be certified.

> **2. If the answer to common issue (1) is "yes", are the Family Class members entitled to damages pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c. F-3?**
>
> **3. If the answer to common issue (3) is "yes", in what amount?**

124. The family law act claims in common issues 2 and 3 are derivative of the claims in common issue 1 and a positive outcome of common issue 1. Given the nature of the impact of the negligence in this case, a family law act common issues is particularly relevant.

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[158] *Healey v. Lakeridge*, [2006] O.J. No. 4277 (S.C.J.) at paras. 94, 97, PBOA, Tab 18.

[159] *Jones v. Zimmer GMBH*, 2013 BCCA 21 at para. 36, PBOA, Tab 22.

4. If the answer to common issue (1) is "yes", can the court make an aggregate assessment of damages suffered by all Class members as part of the common issues trial?

125. The Plaintiffs propose a common issue asking whether an aggregate award of damages might be made following the liability phase of the common issues trial. Section 24 of the *CPA* permits the court to determine the aggregate or part of a defendant's liability to class members where it can reasonably be determined without proof by individual class members.[160] For an aggregate assessment common issue to be certified, there need only be some basis in fact to conclude that there is a "reasonable possibility" that an aggregate assessment be made.[161] Several further principles are relevant to the availability of aggregate damages:

(a) **The aggregate damages common issue may be for all or part of the total damages:** The determination of aggregate damages need not determine the entirety of the damages claimed for the entirety of the class. In *Good v. Toronto*, an action on behalf of demonstrators at the G20 summit whose *Charter* rights had been allegedly infringed, the Divisional Court and the Ontario Court of Appeal held that although damages may be different for each class member, it is open to a common issues judge to determine that there was ***a base amount of damages*** that each member of the class (or subclass) may be entitled to.[162] Furthermore, the court concluded that there are powers to design a claims process under section 24 whereby entitlement to the base award could be determined.

(b) **The availability of aggregate damages ought to be left to the trial judge:** Appellate courts have repeatedly instructed that the availability of aggregate damages ought to be left to the trial judge. This was stated by Justice Rothstein in the Supreme Court of Canada decision *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, an action conspiracy to overcharge for computer software:

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[160] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 24, Plaintiffs' Factum, Schedule "B", Tab B.

[161] *Vezina v. Loblaw Companies Ltd*., [2005] O.J. No. 1974 (S.C.J.) at para. 25, PBOA, Tab 38.

[162] *Good v. Toronto (Police Services Board)*, 2014 ONSC 4583 (Div. Ct.) at para. 75, citing *Pro-Sys Consultants v. Microsoft,* 2013 SCC 57 at para. 134, PBOA, Tabs 15 and 31.

> "The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the CPA should be available is one that should be left to the common issues trial judge."[163] [emphasis added]

(c) **Aggregate awards of damage may be ordered even when damages are not suffered by every single member of the class**: It is well-established by the Court of Appeal that pursuant the *CPA* and the attendant jurisprudence that aggregate awards of monetary relief are appropriate "notwithstanding that identifying individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis".[164] As the Court of Appeal found in *Markson v. MBNA*, an action on behalf of credit card holders alleging that illegal interest rates had been charged, "[i]t may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2) and (3) […]."[165]

2. The Supreme Court of Canada has also endorsed collective recovery in cases where the court acknowledged the nature of injuries suffered were individually difficult to quantify but used average amounts to compensate for the general experience and the presumption of harm arising from such an experience.[166]

126. The existence of common harm and the appropriateness of aggregate damages in respect of the "base level" of harm are supported by the facts of this case. As an aggregate, the Class all shared common experiences, including:

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[163] *Good v. Toronto (Police Services Board)*, 2016 ONCA 250, para. 81, PBOA, Tab 16.

[164] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 48, PBOA, Tab 26.

[165] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at paras. 42-49, PBOA, Tab 26.

[166] *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at para. 116, PBOA, Tab 35; *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, para. 41, PBOA, Tab 32.

(a) a positive test result which mandates some level of action on behalf of child protection agencies;

(b) impact on the fairness of their interaction with CAS agencies; and

(c) impacting the class member's credibility which would taint the entire child protection proceeding.

127. Given the applicable principles and the evidence relied upon by the Plaintiffs, the aggregate damages common issue should be certified.

5. If the answer to common issue (1) is "yes", does the Defendants' conduct justify an award of punitive damages?

6. If the answer to common issue (5) is "yes", what amount of punitive damages ought to be awarded against the Defendants?

128. A punitive damages inquiry focusses on the blameworthiness of a Defendant's conduct. This determination can be made without evidence from individual class members.[167]

129. Most recently, the Ontario Court of Appeal in *Good v. Toronto* endorsed the certification of punitive damages common issues. The Court of Appeal reasoned that the issue is eminently certifiable as its determination depends solely on the conduct of the defendant, which was common to the entire class.[168]

130. In this case, the defendants marketed improper forensic testing services to increase revenue. The defendants intended the results to be used in CAS interventions and withheld frank and honest disclosure regarding the limits of the testing. The defendants favoured the

[167] *Rumley v. British Columbia*, 2001 SCC 69 at para. 34, PBOA, Tab 33.

[168] *Good v. Toronto (Police Services Board)*, 2016 ONCA 250, para. 80, PBOA, Tab 16. See also *Dine v Biomet*, 2015 ONSC 7050 at paras. 54-61, PBOA, Tab 10.

maintenance of "business" interests over providing reliable and adequate test results for child protection proceedings. Punitive damages are appropriate and should be certified.

i. The Existence of Individual Issues is Not a Bar to Certification

131. Section 6 of the *CPA* statutorily codifies the principle that the court "shall not refuse to certify a proceeding as a class proceeding" by reason of "a claim for damages that would require individual assessments."[169] Any individual issues which may remain after the common issues trial do not detract from the core commonality of this action which would significantly advance the case.

132. Even in cases where causation or damages are completely individual issues, the scope of duty and any concomitant breach have been repeatedly certified as common issues because they focus upon a defendant's knowledge and conduct and "can be resolved without the participation of class members, and, depending on its resolution, will either advance or dispose of their claims."[170]

133. The Plaintiffs have satisfied the criteria of section 5(1)(c) of the Act. The claim raises issues that are common to the class. The common issues are substantial ingredients to the resolution of the class' claims. The common issues ought to be certified.

G. 5(1)(D) A Class Action is the Preferable Procedure

134. The Independent Review took particular note of the vulnerability of parents who are involved with child protection agencies. The common issues in this action brought on behalf of vulnerable parents will be best resolved through a class proceeding. Section 5(1)(d) of the *CPA*

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[169] *Class Proceedings Act, 1992,* S.O. 1992, c. 6, s. 6(1), Plaintiff's Factum, Schedule B, Tab B.

[170] *Pardy et al. v. Bayer Inc.*, 2004 NLSCTD 72 at para. 133, PBOA, Tab 29.

requires that a class proceeding be the "preferable procedure for the resolution of the common issues." The preferability analysis is as follows:

> (a) the preferability requirement has two concepts at its core: (i) first, whether the class action would be a fair, efficient and manageable method of advancing the claim; and (ii) second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members;
>
> (b) this determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole; and
>
> (c) the preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over individual issues.[171]

135. In *AIC Limited v. Fischer* ("***AIC***"), the Supreme Court of Canada held that the preferability analysis required a comparative exercise in which the court must consider whether other means of resolving the claim are preferable:

> This [preferability] is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the CPA, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals. The point is well expressed in one U.S. Federal Court of Appeals judgment and it applies equally to CPA proceedings: 'our focus is not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms or litigation', *Klay v. Humana Inc.*, (2004) 382 F. 3d 1241 (U.S.C.A. 11th Cir.), at p. 1269[172]

136. To assist lower courts in their preferability analysis, the Supreme Court of Canada in *AIC* identified five questions to be asked which ought to inform the overall comparative preferability analysis:

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[171] *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918 (C.A.), para. 67, BOA, Tab 30; *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 27-31, PBOA, Tab 20.
[172] *AIC Limited v. Fischer*, 2013 SCC 69 at para. 23, PBOA, Tab 1.

(i) what are the barriers to access to justice?

(ii) what is the potential of the class proceeding to address those barriers?

(iii) what are the alternatives to a class proceeding?

(iv) do the alternatives address the relevant barriers?

(v) how do the two proceedings compare?[173]

137. Even if a common issues trial will be followed by individual assessments on remaining issues, certification will still be preferable where threshold issues can be decided as common issues with common evidence. It is the norm in class actions that there may be some individual issues of specific causation and certain damages issues which remain following the resolution of the common issues. This is explicitly provided for under section 25 of the CPA which confers on the judge a great deal of judicial discretion to streamline individual issues determinations following a common class trial. Section 25 states:

> Individual issues
>
> 25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,
>
> (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
>
> (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
>
> (c) with the consent of the parties, direct that the issues be determined in any other manner.
>
> Directions as to procedure

[173] *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 27-38, PBOA, Tab 1.

> (2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.
>
> Idem
>
> (3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,
>
> (a) dispense with any procedural step that it considers unnecessary; and
>
> (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.
>
> [...][174]

138. Section 25 permits the court wide latitude to design the least expensive and most expeditious method of determining the issues, including by dispensing with certain procedural steps and authorizing others relating to discovery, and providing for special rules relating to the admission of evidence and means of proof. In *Lundy v. VIA Rail Canada Inc*., Justice Perell held that there is a very generous jurisdiction for the court by order to design the individual issues stage of the class action using creativity and the principles of proportionality.[175]

i. Access to Justice Can Only Be Realized by Class Proceeding

139. Canadian courts have consistently found that access to justice is the overriding consideration in making a preferability assessment. It is well-settled that "class actions can facilitate procedural justice by providing a vehicle for bringing claims to court for people who, cannot or will not independently enforce their rights" while also "facilitat[ing] the substantive

[174] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 25, Plaintiffs' Factum, Schedule "B", Tab B.
[175] *Lundy v. VIA Rail Canada Inc*., 2015 ONSC 1879 at para. 47, PBOA, Tab 25.

element of access to justice because the class as a whole is stronger than individual claimants when facing a defendant with considerable resources to defend itself".[176]

140. There is no alternative process available to address the claims of all class members. The ongoing Motherisk Commission is exclusively dedicated to restoring familial relationships, stating categorically "we do not fund legal services to pursue financial compensation."[177]

141. The social barriers faced by these particular class members favours a common, collective process to address the significance of the allegations and elicit the most relevant evidence.[178] A class proceeding is the only way to marshal the evidence and expertise required to assist these individuals in coming forward and seeking redress.[179]

ii. Judicial Economy Can Only Be Achieved by a Class Proceeding

142. The central legal issue in this action will be the nature and extent of the duty owed by the defendants to the class members and whether or not any such duty was breached. Those issues are amenable to collective resolution as they do not require individual testimony. One is a pure question of law and the other turns on the Defendant's conduct.

143. Proceeding by way of individual trials would require that all of the same parties' evidence, technical, expert, factual or otherwise, would have to be repeated in thousands of

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[176] The Hon. Frank Iacobucci, "What Is Access to Justice in the Context of Class Actions?", *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley*, ed. J. Kalajdzic (Lexis Nexis, 2011), p. 7, PBOA, Tab 44.

[177] Legal Aid Memorandum of understanding, Reply Record, vol. 2, Tab 1(NN), p. 524.

[178] The Hon. Frank Iacobucci, "What Is Access to Justice in the Context of Class Actions?", *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley*, ed. J. Kalajdzic (Lexis Nexis, 2011), p. 4, PBOA, Tab 44.

[179] *Rumley v. British Columbia*, 2001 SCC 69 at para. 39, PBOA, Tab 33.

individual cases.[180] This gives rise to the very real potential that the claims of class members would yield inconsistent judicial findings of fact and law. It would also needlessly tax the courts and the judiciary.

144. The interests of judicial economy are served by proceeding by way of class proceeding.[181]

iii. Class Proceeding Can Also Achieve Behaviour Modification

145. Nine years ago the Goudge Inquiry investigated the flawed forensic pathology of Dr. Charles Smith at SickKids.[182] The Independent Review confirmed that the lessons of the Goudge inquiry were not applied by the Defendants to MDTL.[183] Dr. Koren "was not aware of the recommendations from the Goudge Inquiry and no one from HSC communicated those recommendations to [him]."[184] The lessons regarding the requirements and importance of reliable forensic results must be enforced. As in cases involving public entities, "a successful prosecution of this case as a class proceeding would act as a warning and as a deterrent"[185].

146. For all of these reasons, the Plaintiffs respectfully submit that the components of section 5(1)(d) of the *CPA* are satisfied.

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[180] *Rumley. v. British Columbia*, 2001 SCC 69 at para. 38, PBOA, Tab 33.

[181] *Nantais v. Telectronics Proprietary (Canada) Ltd.*, [1995] O.J. No. 2592 (Gen. Div.), at para. 41, PBOA, Tab 28; *Wilson v. Servier Canada Inc*., [2000] O.J. No. 3392 (S.C.J.), paras. 124-125, PBOA, Tab 41.

[182] The Independent Review, Motion Record, Tab 2(F), pp. 350-352.

[183] The Independent Review, Motion Record, Tab 2(F), p. 158 and 239.

[184] Answers to Preliminary List of Questions for Dr. Gideon Koren" dated July 24, 2015, Reply Record, vol. 1, Tab 1(I), p. 176.

[185] *Tiboni v. Merck Frost Canada Ltd*., [2008] O.J. No. 2996 (S.C.J.), para. 101, PBOA, Tab 36.

H. 5(1)(E) The Representative Plaintiff and Litigation Plan are Adequate

i. The Plaintiff is an Excellent Representative

147. The adequacy of a proposed representative plaintiff involves the court's inquiry into the motivation of the plaintiff and the competence of class counsel. Any proposed representative need not be "typical" of the class but must be "adequate" in the sense that:

> [...] the two most important considerations in determining whether a plaintiff was appropriate were whether there was a common interest with other class members and whether the representative plaintiff would 'vigorously prosecute' the claim.[186]

148. The proposed representative plaintiff is Ms. Rebecca Green. Ms. Green falls within the class definition and has a significant stake in the action. Ms. Green has bravely stepped forward and has provided full disclosure to the defendants, including her entire CAS record and medical records. Ms. Green has been frank and honest regarding her previous addiction to cocaine. The MDTL results provided as "clear evidence" of Ms. Green's purported chronic alcohol abuse were fundamentally unreliable and interfered in access to her child. Ms. Green will vigorously represent the class and does not have a conflict with other class members. Furthermore, there is a reasonable plan for litigating this action and for providing notice.

ii. Litigation Plan is Adequate

149. The Plaintiffs have produced a reasonable and practical litigation plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying the class members of this proceeding. This litigation plan can be modified or adjusted over the course of the proceeding. Accordingly, the litigation plan need only be

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[186] *Campbell v. Flexwatt*, [1997] B.C.J. No. 2477 (C.A.), paras. 75-76, PBOA, Tab 3.

"workable in its essentials" at the certification stage. As Justice Goudge observed in *Cloud v. Canada*, "litigation plans, [are] something of a work in progress."[187]

PART IV - ORDER REQUESTED

150. The Plaintiffs request that this Court make an order certifying this action as a class proceeding, and awarding costs of the motion, fixed and payable forthwith, in favour of the plaintiff.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of September, 2017.

Koskie Minsky **LLP**

Lawyers for the Plaintiff

[187] *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (3d) 401 (C.A.), para. 95, PBOA, Tab 8.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *AIC Limited v. Fischer*, 2013 SCC 69
2. *Baroch v. Canada Cartage*, 2015 ONSC 40
3. *Campbell v. Flexwatt*, [1997] B.C.J. No. 2477 (C.A.)
4. *Chen v. Ross*, 2014 BCSC 374
5. *Clements v. Clements*, 2012 SCC 32
6. *Cleveland v. Hamilton Health Sciences Corporation*, [2009] O.J. No. 5361 (S.C.J.) –
7. *Cloud v. Canada (Attorney General)*, [2003] OJ No 2698 (Div. Ct.)
8. *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.)
9. *Cooper v. Hobart*, 2001 SCC 79
10. *Dine v Biomet*, 2015 ONSC 7050
11. *Dolmage v. Ontario*, 2010 ONSC 1726
12. *Elliot v. Laboratory Specialists, Inc.*, 588 So. 2d 175 (La. Ct. App. 1991)
13. *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443
14. *Gay v. Regional Health Authority 7*, 2014 NBCA 10
15. *Good v. Toronto (Police Services Board)*, 2014 ONSC 4583 (Div. Ct.)
16. *Good v. Toronto (Police Services Board)*, 2016 ONCA 250
17. *Granger (Litigation guardian of) v. Ottawa General Hospital*, [1996] O.J. No. 2129 (Gen. Div.)
18. *Healey v. Lakeridge*, [2006] O.J. No. 4277 (S.C.J.)
19. *Hodge v. Neinstein*, 2017 ONCA 494
20. *Hollick v. Toronto (City)*, 2001 SCC 68
21. *Johnson v. Ontario*, 2016 ONSC 5314
22. *Jones v. Zimmer GMBH*, 2013 BCCA 21

23. *Levac v. James*, 2016 ONSC 7727

24. *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 ONCA 11

25. *Lundy v. VIA Rail Canada Inc*., 2015 ONSC 1879 a

26. *Markson v. MBNA Canada Bank*, 2007 ONCA 334

27. *McCracken v. CNR Co*., 2012 ONCA 445

28. *Nantais v. Telectronics Proprietary (Canada) Ltd*., [1995] O.J. No. 2592 (Gen. Div.)

29. *Pardy et al. v. Bayer Inc*., 2004 NLSCTD 72

30. *Pearson v. Inco Ltd*., [2005] O.J. No. 4918 (C.A.)

31. *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57

32. *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211

33. *Rumley v. British Columbia*, 2001 SCC 69

34. *Stinson v. Physicians Immediate Care Ltd*., 646 N.E.2d 930, (Ill. App. Ct. 1995)

35. *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64

36. *Tiboni v. Merck Frost Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.)

37. *T.L. v. Alberta (Director of Child Welfare)*, 2006 ABQB 104

38. *Vezina v. Loblaw Companies Ltd*., [2005] O.J. No. 1974 (S.C.J.)

39. *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1

40. *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46

41. *Wilson v. Servier Canada Inc.*, [2000] O.J. No. 3392 (S.C.J.)

42. *Yepremian et al. v. Scarborough General Hospital et al.* (1980), 28 O.R. (2d) 494 (C.A.), per Blair J.A.

43. Emire Crowne and Omar Ha-Redeye, "Clements v. Clements: A material contribution to the jurisprudence – the Supreme Court of Canada clarifies the law of causation" (2012) 2 UWO J Leg Stud 1

44. The Hon. Frank Iacobucci, "What Is Access to Justice in the Context of Class Actions?", *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley*, ed. J. Kalajdzic (Lexis Nexis, 2011),

SCHEDULE "B"
RELEVANT STATUTES

***Class Proceedings Act, 1992*, S.O. 1992, c.6**

Certification

5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

Aggregate assessment of monetary relief

24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order. 1992, c. 6, s. 24 (4).

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims. 1992, c. 6, s. 24 (5).

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis. 1992, c. 6, s. 24 (6).

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 24 (7).

Idem

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 24 (8).

Extension of time

(9) The court may give leave under subsection (8) if it is satisfied that,

(a) there are apparent grounds for relief;

(b) the delay was not caused by any fault of the person seeking the relief; and

(c) the defendant would not suffer substantial prejudice if leave were given. 1992, c. 6, s. 24 (9).

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so. 1992, c. 6, s. 24 (10).

Individual issues

25 (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner. 1992, c. 6, s. 25 (1).

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity. 1992, c. 6, s. 25 (2).

Idem

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate. 1992, c. 6, s. 25 (3).

Time limits for making claims

(4) The court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 25 (4).

Idem

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 25 (5).

Extension of time

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5). 1992, c. 6, s. 25 (6).

Determination under cl. (1) (c) deemed court order

(7) A determination under clause (1) (c) is deemed to be an order of the court. 1992, c. 6, s. 25 (7).

Child and Family Services Act, R.S.O. 1990, c. C.11

Paramount Purpose

(1)(1) The paramount purpose of this Act is to promote the best interests, protection and well being of children.

PART III
CHILD PROTECTION

Interpretation

37 (1) In this Part,

"child" does not include a child as defined in subsection 3 (1) who is actually or apparently sixteen years of age or older, unless the child is the subject of an order under this Part; ("enfant")

"child protection worker" means a Director, a local director or a person authorized by a Director or local director for the purposes of section 40 (commencing child protection proceedings); ("préposé à la protection de l'enfance")

"parent", when used in reference to a child, means each of the following persons, but does not include a foster parent:

1. A parent of the child under section 6, 8, 9, 10, 11 or 13 of the *Children's Law Reform Act*.
2. In the case of a child conceived through sexual intercourse, an individual described in one of paragraphs 1 to 5 of subsection 7 (2) of the *Children's Law Reform Act*, unless it is proved on a balance of probabilities that the sperm used to conceive the child did not come from the individual.
3. An individual who has been found or recognized by a court of competent jurisdiction outside Ontario to be a parent of the child.
4. In the case of an adopted child, a parent of the child as provided for under section 158 or 159.
5. An individual who has lawful custody of the child.
6. An individual who, during the 12 months before intervention under this Part, has demonstrated a settled intention to treat the child as a child of his or her family, or has acknowledged parentage of the child and provided for the child's support.
7. An individual who, under a written agreement or a court order, is required to provide for the child, has custody of the child or has a right of access to the child.
8. An individual who acknowledged parentage of the child by filing a statutory declaration under section 12 of the *Children's Law Reform Act* as it read before the day subsection 1 (1) of the *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016* came into force; ("père ou mère")

"place of safety" means a foster home, a hospital, a person's home that satisfies the requirements of subsection (5) or a place or one of a class of places designated as a place of safety by a Director or local director under section 18, but does not include,

(a) a place of secure custody as defined in Part IV, or

(b) a place of secure temporary detention as defined in Part IV. ("lieu sûr") R.S.O. 1990, c. C.11, s. 37 (1); 2006, c. 19, Sched. D, s. 2 (5); 2006, c. 5, s. 6 (1, 2); 2016, c. 23, s. 38 (5).

Child in need of protection

(2) A child is in need of protection where,

(a) the child has suffered physical harm, inflicted by the person having charge of the child or caused by or resulting from that person's,

(i) failure to adequately care for, provide for, supervise or protect the child, or

(ii) pattern of neglect in caring for, providing for, supervising or protecting the child;

(b) there is a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child or caused by or resulting from that person's,

(i) failure to adequately care for, provide for, supervise or protect the child, or

(ii) pattern of neglect in caring for, providing for, supervising or protecting the child;

(c) the child has been sexually molested or sexually exploited, by the person having charge of the child or by another person where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child;

(d) there is a risk that the child is likely to be sexually molested or sexually exploited as described in clause (c);

(e) the child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, the treatment;

(f) the child has suffered emotional harm, demonstrated by serious,

(i) anxiety,

(ii) depression,

(iii) withdrawal,

(iv) self-destructive or aggressive behaviour, or

(v) delayed development,

and there are reasonable grounds to believe that the emotional harm suffered by the child results from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child;

(f.1) the child has suffered emotional harm of the kind described in subclause (f) (i), (ii), (iii), (iv) or (v) and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(g) there is a risk that the child is likely to suffer emotional harm of the kind described in subclause (f) (i), (ii), (iii), (iv) or (v) resulting from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child;

(g.1) there is a risk that the child is likely to suffer emotional harm of the kind described in subclause (f) (i), (ii), (iii), (iv) or (v) and that the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to prevent the harm;

(h) the child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, treatment to remedy or alleviate the condition;

(i) the child has been abandoned, the child's parent has died or is unavailable to exercise his or her custodial rights over the child and has not made adequate provision for the child's care and custody, or the child is in a residential placement and the parent refuses or is unable or unwilling to resume the child's care and custody;

(j) the child is less than twelve years old and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, those services or treatment;

(k) the child is less than twelve years old and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately; or

(l) the child's parent is unable to care for the child and the child is brought before the court with the parent's consent and, where the child is twelve years of age or older, with the child's consent, to be dealt with under this Part. R.S.O. 1990, c. C.11, s. 37 (2); 1999, c. 2, s. 9.

Best interests of child

(3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall take into consideration those of the following circumstances of the case that he or she considers relevant:

1. The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.
2. The child's physical, mental and emotional level of development.
3. The child's cultural background.
4. The religious faith, if any, in which the child is being raised.
5. The importance for the child's development of a positive relationship with a parent and a secure place as a member of a family.
6. The child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community.
7. The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity.
8. The merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent.
9. The child's views and wishes, if they can be reasonably ascertained.
10. The effects on the child of delay in the disposition of the case.
11. The risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent.
12. The degree of risk, if any, that justified the finding that the child is in need of protection.
13. Any other relevant circumstance. R.S.O. 1990, c. C.11, s. 37 (3); 2006, c. 5, s. 6 (3); 2016, c. 23, s. 38 (18).

Where child an Indian or native person

(4) Where a person is directed in this Part to make an order or determination in the best interests of a child and the child is an Indian or native person, the person shall 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. R.S.O. 1990, c. C.11, s. 37 (4).

Place of safety

(5) For the purposes of the definition of "place of safety" in subsection (1), a person's home is a place of safety for a child if,

(a) the person is a relative of the child or a member of the child's extended family or community; and

(b) a society or, in the case of a child who is an Indian or native person, an Indian or native child and family service authority designated under section 211 of Part X has conducted an assessment of the person's home in accordance with the prescribed procedures and is satisfied that the person is willing and able to provide a safe home environment for the child. 2006, c. 5, s. 6 (4); 2016, c. 23, s. 38 (17).

LEGAL REPRESENTATION

Legal representation of child

38 (1) A child may have legal representation at any stage in a proceeding under this Part.

Court to consider issue

(2) Where a child does not have legal representation in a proceeding under this Part, the court,

(a) shall, as soon as practicable after the commencement of the proceeding; and

(b) may, at any later stage in the proceeding,

determine whether legal representation is desirable to protect the child's interests.

Direction for legal representation

(3) Where the court determines that legal representation is desirable to protect a child's interests, the court shall direct that legal representation be provided for the child. R.S.O. 1990, c. C.11, s. 38 (1-3).

Criteria

(4) Where,

(a) the court is of the opinion that there is a difference of views between the child and a parent or a society, and the society proposes that the child be removed from a person's care or be made a society or Crown ward under paragraph 2 or 3 of subsection 57 (1);

(b) the child is in the society's care and,

(i) no parent appears before the court, or

(ii) it is alleged that the child is in need of protection within the meaning of clause 37 (2) (a), (c), (f), (f.1) or (h); or

(c) the child is not permitted to be present at the hearing,

legal representation shall be deemed to be desirable to protect the child's interests, unless the court is satisfied, taking into account the child's views and wishes if they can be reasonably ascertained, that the child's interests are otherwise adequately protected. R.S.O. 1990, c. C.11, s. 38 (4); 1999, c. 2, s. 10.

Where parent a minor

(5) Where a child's parent is less than eighteen years of age, the Children's Lawyer shall represent the parent in a proceeding under this Part unless the court orders otherwise. R.S.O. 1990, c. C.11, s. 38 (5); 1994, c. 27, s. 43 (2).

PARTIES AND NOTICE

Parties

39 (1) The following are parties to a proceeding under this Part:

1. The applicant.
2. The society having jurisdiction in the matter.
3. The child's parent.
4. Where the child is an Indian or a native person, a representative chosen by the child's band or native community.

Director to be added

(2) At any stage in a proceeding under this Part, the court shall add a Director as a party on his or her motion.

Right to participate

(3) Any person, including a foster parent, who has cared for the child continuously during the six months immediately before the hearing,

(a) is entitled to the same notice of the proceeding as a party;

(b) may be present at the hearing;

(c) may be represented by a solicitor; and

(d) may make submissions to the court,

but shall take no further part in the hearing without leave of the court.

Child twelve or older

(4) A child twelve years of age or more who is the subject of a proceeding under this Part is entitled to receive notice of the proceeding and to be present at the hearing, unless the court is satisfied that being present at the hearing would cause the child emotional harm and orders that the child not receive notice of the proceeding and not be permitted to be present at the hearing.

Child under twelve

(5) A child less than twelve years of age who is the subject of a proceeding under this Part is not entitled to receive notice of the proceeding or to be present at the hearing unless the court is satisfied that the child,

(a) is capable of understanding the hearing; and

(b) will not suffer emotional harm by being present at the hearing,

and orders that the child receive notice of the proceeding and be permitted to be present at the hearing.

Child's participation

(6) A child who is the applicant under subsection 64 (4) (status review), receives notice of a proceeding under this Part or has legal representation in a proceeding is entitled to participate in the proceeding and to appeal under section 69 as if he or she were a party.

Dispensing with notice

(7) Where the court is satisfied that the time required for notice to a person might endanger the child's health or safety, the court may dispense with notice to that person. R.S.O. 1990, c. C.11, s. 39.

COMMENCING CHILD PROTECTION PROCEEDINGS

Warrants, orders, apprehension, etc.

Application

40 (1) A society may apply to the court to determine whether a child is in need of protection. R.S.O. 1990, c. C.11, s. 40 (1).

Warrant to apprehend child

(2) A justice of the peace may issue a warrant authorizing a child protection worker to bring a child to a place of safety if the justice of the peace is satisfied on the basis of a child protection worker's sworn information that there are reasonable and probable grounds to believe that,

(a) the child is in need of protection; and

(b) a less restrictive course of action is not available or will not protect the child adequately. R.S.O. 1990, c. C.11, s. 40 (2).

Idem

(3) A justice of the peace shall not refuse to issue a warrant under subsection (2) by reason only that the child protection worker may bring the child to a place of safety under subsection (7). R.S.O. 1990, c. C.11, s. 40 (3); 1993, c. 27, Sched.

Order to produce or apprehend child

(4) Where the court is satisfied, on a person's application upon notice to a society, that there are reasonable and probable grounds to believe that,

(a) a child is in need of protection, the matter has been reported to the society, the society has not made an application under subsection (1), and no child protection worker has sought a warrant under subsection (2) or apprehended the child under subsection (7); and

(b) the child cannot be protected adequately otherwise than by being brought before the court,

the court may order,

(c) that the person having charge of the child produce him or her before the court at the time and place named in the order for a hearing under subsection 47 (1) to determine whether he or she is in need of protection; or

(d) where the court is satisfied that an order under clause (c) would not protect the child adequately, that a child protection worker employed by the society bring the child to a place of safety. R.S.O. 1990, c. C.11, s. 40 (4); 1993, c. 27, Sched.

Child's name, location not required

(5) It is not necessary, in an application under subsection (1), a warrant under subsection (2) or an order made under subsection (4), to describe the child by name or to specify the premises where the child is located. R.S.O. 1990, c. C.11, s. 40 (5).

Authority to enter, etc.

(6) A child protection worker authorized to bring a child to a place of safety by a warrant issued under subsection (2) or an order made under clause (4) (d) may at any time enter any premises specified in the warrant or order, by force if necessary, and may search for and remove the child. R.S.O. 1990, c. C.11, s. 40 (6).

Apprehension without warrant

(7) A child protection worker who believes on reasonable and probable grounds that,

(a) a child is in need of protection; and

(b) 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),

may without a warrant bring the child to a place of safety. R.S.O. 1990, c. C.11, s. 40 (7).

Police assistance

(8) A child protection worker acting under this section may call for the assistance of a peace officer. R.S.O. 1990, c. C.11, s. 40 (8).

Consent to examine child

(9) A child protection worker acting under subsection (7) or under a warrant issued under subsection (2) or an order made under clause (4) (d) may authorize the child's medical examination where a parent's consent would otherwise be required. R.S.O. 1990, c. C.11, s. 40 (9).

Place of open temporary detention

(10) Where a child protection worker who brings a child to a place of safety under this section believes on reasonable and probable grounds that no less restrictive course of action is feasible, the child may be detained in a place of safety that is a place of open temporary detention as defined in Part IV (Youth Justice). R.S.O. 1990, c. C.11, s. 40 (10); 2006, c. 19, Sched. D, s. 2 (6).

Right of entry, etc.

(11) A child protection worker who believes on reasonable and probable grounds that a child referred to in subsection (7) is on any premises may without a warrant enter the premises, by force, if necessary, and search for and remove the child. R.S.O. 1990, c. C.11, s. 40 (11).

Regulations re power of entry

(12) A child protection worker authorized to enter premises under subsection (6) or (11) shall exercise the power of entry in accordance with the regulations. R.S.O. 1990, c. C.11, s. 40 (12).

Peace officer has powers of child protection worker

(13) Subsections (2), (6), (7), (10), (11) and (12) apply to a peace officer as if the peace officer were a child protection worker. R.S.O. 1990, c. C.11, s. 40 (13).

Protection from personal liability

(14) No action shall be instituted against a peace officer or child protection worker for any act done in good faith in the execution or intended execution of that person's duty under this section or for an alleged neglect or default in the execution in good faith of that duty. R.S.O. 1990, c. C.11, s. 40 (14).

SPECIAL CASES OF APPREHENSION OF CHILDREN

Apprehension of children in care

Warrant to apprehend child in care

41 (1) A justice of the peace may issue a warrant authorizing a peace officer or child protection worker to bring a child to a place of safety if the justice of the peace is satisfied on the basis of a peace officer's or child protection worker's sworn information that,

(a) the child is actually or apparently under the age of sixteen years and has left or been removed from a society's lawful care and custody without its consent; and

(b) there are reasonable and probable grounds to believe that there is no course of action available other than bringing the child to a place of safety that would adequately protect the child. R.S.O. 1990, c. C.11, s. 41 (1).

Idem

(2) A justice of the peace shall not refuse to issue a warrant to a person under subsection (1) by reason only that the person may bring the child to a place of safety under subsection (4). R.S.O. 1990, c. C.11, s. 41 (2).

No need to specify premises

(3) It is not necessary in a warrant under subsection (1) to specify the premises where the child is located. R.S.O. 1990, c. C.11, s. 41 (3).

Apprehension of child in care without warrant

(4) A peace officer or child protection worker who believes on reasonable and probable grounds that,

(a) a child is actually or apparently under the age of sixteen years and has left or been removed from a society's lawful care and custody without its consent; and

(b) there would be a substantial risk to the child's health or safety during the time necessary to obtain a warrant under subsection (1),

may without a warrant bring the child to a place of safety. R.S.O. 1990, c. C.11, s. 41 (4).

Apprehension of child absent from place of open temporary detention

(5) Where a child is detained under this Part in a place of safety that has been designated as a place of open temporary detention as defined in Part IV (Youth Justice) and leaves the place without the consent of,

(a) the society having care, custody and control of the child; or

(b) the person in charge of the place of safety,

a peace officer, the person in charge of the place of safety or that person's delegate may apprehend the child without a warrant. R.S.O. 1990, c. C.11, s. 41 (5); 2006, c. 19, Sched. D, s. 2 (7).

Idem

(6) A person who apprehends a child under subsection (5) shall,

(a) take the child to a place of safety to be detained until the child can be returned to the place of safety the child left; or

(b) return the child or arrange for the child to be returned to the place of safety the child left. R.S.O. 1990, c. C.11, s. 41 (6).

Section Amendments with date in force (d/m/y)

Apprehension of child under twelve

42 (1) A peace officer who believes on reasonable and probable grounds that a child actually or apparently under twelve years of age has committed an act in respect of which a person twelve years of age or older could be found guilty of an offence may apprehend the child without a warrant and on doing so,

(a) shall return the child to the child's parent or other person having charge of the child as soon as practicable; or

(b) where it is not possible to return the child to the parent or other person within a reasonable time, shall take the child to a place of safety to be detained there until the child can be returned to the parent or other person.

Notice to parent, etc.

(2) The person in charge of a place of safety in which a child is detained under subsection (1) shall make reasonable efforts to notify the child's parent or other person having charge of the child of the child's detention so that the child may be returned to the parent or other person. R.S.O. 1990, c. C.11, s. 42 (1, 2).

Where child not returned to parent, etc., within twelve hours

(3) Where a child detained in a place of safety under subsection (1) cannot be returned to the child's parent or other person having charge of the child within twelve hours of being taken to the place of safety, the child shall be dealt with as if the child had been taken to a place of safety under subsection 40 (7) and not apprehended under subsection (1). R.S.O. 1990, c. C.11, s. 42 (3); 1993, c. 27, Sched.

Section Amendments with date in force (d/m/y)

Runaways

43 (1) In this section,

"parent" includes,

(a) an approved agency that has custody of the child,

(b) a person who has care and control of the child.

Warrant to apprehend runaway child

(2) A justice of the peace may issue a warrant authorizing a peace officer or child protection worker to apprehend a child if the justice of the peace is satisfied on the basis of the sworn information of a parent of the child that,

(a) the child is under the age of sixteen years;

(b) the child has withdrawn from the parent's care and control without the parent's consent; and

(c) the parent believes on reasonable and probable grounds that the child's health or safety may be at risk if the child is not apprehended.

Idem

(3) A person who apprehends a child under subsection (2) shall return the child to the child's parent as soon as practicable and where it is not possible to return the child to the parent within a reasonable time, take the child to a place of safety.

Notice to parent, etc.

(4) The person in charge of a place of safety to which a child is taken under subsection (3) shall make reasonable efforts to notify the child's parent that the child is in the place of safety so that the child may be returned to the parent.

Where child not returned to parent within twelve hours

(5) Where a child taken to a place of safety under subsection (3) cannot be returned to the child's parent within twelve hours of being taken to the place of safety, the child shall be dealt with as if the child had been taken to a place of safety under subsection 40 (2) and not apprehended under subsection (2).

Where custody enforcement proceedings more appropriate

(6) A justice of the peace shall not issue a warrant under subsection (2) where a child has withdrawn from the care and control of one parent with the consent of another parent under circumstances where a proceeding under section 36 of the *Children's Law Reform Act*would be more appropriate.

No need to specify premises

(7) It is not necessary in a warrant under subsection (2) to specify the premises where the child is located.

Child protection proceedings

(8) Where a peace officer or child protection worker believes on reasonable and probable grounds that a child apprehended under this section is in need of protection and there may be a substantial risk to the health or safety of the child if the child were returned to the parent,

(a) the peace officer or child protection worker may take the child to a place of safety under subsection 40 (7); or

(b) where the child has been taken to a place of safety under subsection (5), the child shall be dealt with as if the child had been taken there under subsection 40 (7). R.S.O. 1990, c. C.11, s. 43.

POWER OF ENTRY AND OTHER PROVISIONS FOR SPECIAL CASES OF APPREHENSION

Authority to enter, etc.

44 (1) A person authorized to bring a child to a place of safety by a warrant issued under subsection 41 (1) or 43 (2) may at any time enter any premises specified in the warrant,

by force, if necessary, and may search for and remove the child. R.S.O. 1990, c. C.11, s. 44 (1).

Right of entry, etc.

(2) A person authorized under subsection 41 (4) or (5) or 42 (1) who believes on reasonable and probable grounds that a child referred to in the relevant subsection is on any premises may without a warrant enter the premises, by force, if necessary, and search for and remove the child. R.S.O. 1990, c. C.11, s. 44 (2).

Regulations re power of entry

(3) A person authorized to enter premises under this section shall exercise the power of entry in accordance with the regulations. R.S.O. 1990, c. C.11, s. 44 (3).

Police assistance

(4) A child protection worker acting under section 41 or 43 may call for the assistance of a peace officer. R.S.O. 1990, c. C.11, s. 44 (4).

Consent to examine child

(5) A child protection worker who deals with a child under subsection 42 (3) or 43 (5) as if the child had been taken to a place of safety may authorize the child's medical examination where a parent's consent would otherwise be required. R.S.O. 1990, c. C.11, s. 44 (5).

Place of open temporary detention

(6) Where a person who brings a child to a place of safety under section 41 or 42 believes on reasonable and probable grounds that no less restrictive course of action is feasible, the child may be detained in a place of safety that is a place of open temporary detention as defined in Part IV (Youth Justice). R.S.O. 1990, c. C.11, s. 44 (6); 2006, c. 19, Sched. D, s. 2 (8).

Protection from personal liability

(7) No action shall be instituted against a peace officer or child protection worker for any act done in good faith in the execution or intended execution of that person's duty under this section or section 41, 42 or 43 or for an alleged neglect or default in the execution in good faith of that duty. R.S.O. 1990, c. C.11, s. 44 (7).

Section Amendments with date in force (d/m/y)

HEARINGS AND ORDERS

Rules re hearings

45 (1) In this section,

"media" means the press, radio and television media. R.S.O. 1990, c. C.11, s. 45 (1).

Application

(2) This section applies to hearings held under this Part, except hearings under section 76 (child abuse register). R.S.O. 1990, c. C.11, s. 45 (2).

Hearings separate from criminal proceedings

(3) A hearing shall be held separately from hearings in criminal proceedings. R.S.O. 1990, c. C.11, s. 45 (3).

Hearings private unless court orders otherwise

(4) A hearing shall be held in the absence of the public, subject to subsection (5), unless the court, after considering,

(a) the wishes and interests of the parties; and

(b) whether the presence of the public would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding,

orders that the hearing be held in public. R.S.O. 1990, c. C.11, s. 45 (4); 2009, c. 33, Sched. 7, s. 1 (2).

Media representatives

(5) Media representatives chosen in accordance with subsection (6) may be present at a hearing that is held in the absence of the public, unless the court makes an order excluding them under subsection (7). R.S.O. 1990, c. C.11, s. 45 (5).

Idem

(6) The media representatives who may be present at a hearing that is held in the absence of the public shall be chosen as follows:

1. The media representatives in attendance shall choose not more than two persons from among themselves.

2. Where the media representatives in attendance are unable to agree on a choice of persons, the court may choose not more than two media representatives who may be present at the hearing.

3. The court may permit additional media representatives to be present at the hearing. R.S.O. 1990, c. C.11, s. 45 (6).

Order excluding media representatives or prohibiting publication

(7) The court may make an order,

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

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

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

where the court is of the opinion that the presence of the media representative or representatives or the publication of the report, as the case may be, would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding. R.S.O. 1990, c. C.11, s. 45 (7).

Prohibition: identifying child

(8) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family. R.S.O. 1990, c. C.11, s. 45 (8).

Idem: order re adult(9) The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part. R.S.O. 1990, c. C.11, s. 45 (9).

Transcript
(10) No person except a party or a party's solicitor shall be given a copy of a transcript of the hearing, unless the court orders otherwise. R.S.O. 1990, c. C.11, s. 45 (10).
Section Amendments with date in force (d/m/y)

Time of detention limited
46 (1) As soon as practicable, but in any event within five days after a child is brought to a place of safety under section 40 or subsection 79 (6) or a homemaker remains or is placed on premises under subsection 78 (2),

(a) the matter shall be brought before a court for a hearing under subsection 47 (1) (child protection hearing);

(b) the child shall be returned to the person who last had charge of the child or, where there is an order for the child's custody that is enforceable in Ontario, to the person entitled to custody under the order; or

(c) a temporary care agreement shall be made under subsection 29 (1) of Part II (Voluntary Access to Services).

Idem: place of open temporary detention

(2) Within twenty-four hours after a child is brought to a place of safety that is a place of open temporary detention, or as soon thereafter as is practicable, the matter shall be brought before a court for a hearing and the court shall,

(a) where it is satisfied that no less restrictive course of action is feasible, order that the child remain in the place of open temporary detention for a period or periods not exceeding an aggregate of thirty days and then be returned to the care and custody of the society;

(b) order that the child be discharged from the place of open temporary detention and returned to the care and custody of the society; or

(c) make an order under subsection 51 (2) (temporary care and custody). R.S.O. 1990, c. C.11, s. 46.

Child protection hearing

47 (1) Where an application is made under subsection 40 (1) or a matter is brought before the court to determine whether the child is in need of protection, the court shall hold a hearing to determine the issue and make an order under section 57.

Child's name, age, etc.

(2) As soon as practicable, and in any event before determining whether a child is in need of protection, the court shall determine,

(a) the child's name and age;

(b) the religious faith, if any, in which the child is being raised;

(c) whether the child is an Indian or a native person and, if so, the child's band or native community; and

(d) where the child was brought to a place of safety before the hearing, the location of the place from which the child was removed.

Where sixteenth birthday intervenes

(3) Despite anything else in this Part, where the child was under the age of sixteen years when the proceeding was commenced or when the child was apprehended, the court may hear and determine the matter and make an order under this Part as if the child were still under the age of sixteen years. R.S.O. 1990, c. C.11, s. 47

Territorial jurisdiction

48 (1) In this section,

"territorial jurisdiction" means a society's territorial jurisdiction under subsection 15 (2). R.S.O. 1990, c. C.11, s. 48 (1).

Place of hearing

(2) A hearing under this Part with respect to a child shall be held in the territorial jurisdiction in which the child ordinarily resides, except that,

(a) where the child is brought to a place of safety before the hearing, the hearing shall be held in the territorial jurisdiction in which the place from which the child was removed is located;

(b) where the child is in a society's care under an order for society wardship under section 57 or an order for Crown wardship under section 57 or 65.2, the hearing shall be held in the society's territorial jurisdiction; and

(c) where the child is the subject of an order for society supervision under section 57 or 65.2, the hearing may be held in the society's territorial jurisdiction or in the territorial jurisdiction in which the parent or other person with whom the child is placed resides. R.S.O. 1990, c. C.11, s. 48 (2); 2006, c. 5, s. 7.

Transfer of proceeding

(3) Where the court is satisfied at any stage of a proceeding under this Part that there is a preponderance of convenience in favour of conducting it in another territorial jurisdiction, the court may order that the proceeding be transferred to that other territorial jurisdiction and be continued as if it had been commenced there. R.S.O. 1990, c. C.11, s. 48 (3).

Orders affecting society

(4) The court shall not make an order placing a child in the care or under the supervision of a society unless the place where the court sits is within the society's territorial jurisdiction. R.S.O. 1990, c. C.11, s. 48 (4).

Section Amendments with date in force (d/m/y)

Power of court

49 The court may, on its own initiative, summon a person to attend before it, testify and produce any document or thing, and may enforce obedience to the summons as if it had been made in a proceeding under the *Family Law Act*. R.S.O. 1990, c. C.11, s. 49; 1993, c. 27, Sched.

Section Amendments with date in force (d/m/y)

Evidence

Past conduct toward children

50 (1) Despite anything in the *Evidence Act*, in any proceeding under this Part,

(a) the court may consider the past conduct of a person toward any child if that person is caring for or has access to or may care for or have access to a child who is the subject of the proceeding; and

(b) any oral or written statement or report that the court considers relevant to the proceeding, including a transcript, exhibit or finding or the reasons for a decision in an earlier civil or criminal proceeding, is admissible into evidence. 1999, c. 2, s. 12.

Evidence re disposition not admissible before finding

(2) In a hearing under subsection 47 (1), evidence relating only to the disposition of the matter shall not be admitted before the court has determined that the child is in need of protection. R.S.O. 1990, c. C.11, s. 50 (2).

Adjournments

51 (1) The court shall not adjourn a hearing for more than thirty days,

(a) unless all the parties present and the person who will be caring for the child during the adjournment consent; or

(b) if the court is aware that a party who is not present at the hearing objects to the longer adjournment. R.S.O. 1990, c. C.11, s. 51 (1).

Custody during adjournment

(2) Where a hearing is adjourned, the court shall make a temporary order for care and custody providing that the child,

(a) remain in or be returned to the care and custody of the person who had charge of the child immediately before intervention under this Part;

(b) remain in or be returned to the care and custody of the person referred to in clause (a), subject to the society's supervision and on such reasonable terms and conditions as the court considers appropriate;

(c) be placed in the care and custody of a person other than the person referred to in clause (a), with the consent of that other person, subject to the society's supervision and on such reasonable terms and conditions as the court considers appropriate; or

(d) remain or be placed in the care and custody of the society, but not be placed in,

(i) a place of secure custody as defined in Part IV (Youth Justice), or

(ii) a place of open temporary detention as defined in that Part that has not been designated as a place of safety. R.S.O. 1990, c. C.11, s. 51 (2); 2006, c. 19, Sched. D, s. 2 (9); 2006, c. 5, s. 8 (1, 2).

Criteria

(3) The court shall not make an order under clause (2) (c) or (d) 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). 1999, c. 2, s. 13.

Placement with relative, etc.

(3.1) Before making a temporary order for care and custody under clause (2) (d), the court shall consider whether it is in the child's best interests to make an order under clause (2) (c) to place the child in the care and custody of a person who is a relative of the child or a member of the child's extended family or community. 2006, c. 5, s. 8 (3); 2016, c. 23, s. 38 (17).

Terms and conditions in order

(3.2) A temporary order for care and custody of a child under clause (2) (b) or (c) may impose,

(a) reasonable terms and conditions relating to the child's care and supervision;

(b) reasonable terms and conditions on the child's parent, the person who will have care and custody of the child under the order, the child and any other person, other than a foster parent, who is putting forward a plan or who would participate in a plan for care and custody of or access to the child; and

(c) reasonable terms and conditions on the society that will supervise the placement, but shall not require the society to provide financial assistance or to purchase any goods or services. 2006, c. 5, s. 8 (3).

Application of s. 62

(4) Where the court makes an order under clause (2) (d), section 62 (parental consents) applies with necessary modifications. R.S.O. 1990, c. C.11, s. 51 (4).

Access

(5) An order made under clause (2) (c) or (d) may contain provisions regarding any person's right of access to the child on such terms and conditions as the court considers appropriate. R.S.O. 1990, c. C.11, s. 51 (5).

Power to vary

(6) The court may at any time vary or terminate an order made under subsection (2). R.S.O. 1990, c. C.11, s. 51 (6).

Evidence on adjournments

(7) For the purpose of this section, the court may admit and act on evidence that the court considers credible and trustworthy in the circumstances. R.S.O. 1990, c. C.11, s. 51 (7).

Use of prescribed methods of alternative dispute resolution

51.1 At any time during a proceeding under this Part, the court may, in the best interests of the child and with the consent of the parties, adjourn the proceeding to permit the parties to attempt through a prescribed method of alternative dispute resolution to resolve any dispute between them with respect to any matter that is relevant to the proceeding. 2006, c. 5, s. 9.

Section Amendments with date in force (d/m/y)

Delay: court to fix date

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

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

(b) may give such directions and make such orders with respect to the proceeding as are just. R.S.O. 1990, c. C.11, s. 52.

Reasons, etc.

53 (1) Where the court makes an order under this Part, the court shall give,

(a) a statement of any terms or conditions imposed on the order;

(b) a statement of every plan for the child's care proposed to the court;

(c) a statement of the plan for the child's care that the court is applying in its decision; and

(d) reasons for its decision, including,

(i) a brief statement of the evidence on which the court bases its decision, and

(ii) where the order has the effect of removing or keeping the child from the care of the person who had charge of the child immediately before intervention under this Part, a statement of the reasons why the child cannot be adequately protected while in the person's care.

Idem

(2) Clause (1) (b) does not require the court to identify a person with whom or a place where it is proposed that a child be placed for care and supervision. R.S.O. 1990, c. C.11, s. 53.

ASSESSMENTS

Order for assessment

54 (1) In the course of a proceeding under this Part, the court may order that one or more of the following persons undergo an assessment within a specified time by a person appointed in accordance with subsections (1.1) and (1.2):

1. The child.
2. A parent of the child.
3. Any other person, other than a foster parent, who is putting forward or would participate in a plan for the care and custody of or access to the child. 2006, c. 5, s. 10 (1).

Assessor selected by parties

(1.1) An order under subsection (1) shall specify a time within which the parties to the proceeding may select a person to perform the assessment and submit the name of the selected person to the court. 2006, c. 5, s. 10 (1).

Appointment by court

(1.2) The court shall appoint the person selected by the parties to perform the assessment if the court is satisfied that the person meets the following criteria:

1. The person is qualified to perform medical, emotional, developmental, psychological, educational or social assessments.
2. The person has consented to perform the assessment. 2006, c. 5, s. 10 (1).

Same

(1.3) If the court is of the opinion that the person selected by the parties under subsection (1.1) does not meet the criteria set out in subsection (1.2), the court shall select and appoint another person who does meet the criteria. 2006, c. 5, s. 10 (1).

Regulations

(1.4) An order under subsection (1) and the assessment required by that order shall comply with such requirements as may be prescribed. 2006, c. 5, s. 10 (1).

Report

(2) The person performing an assessment under subsection (1) shall make a written report of the assessment to the court within the time specified in the order, which shall not be more than thirty days unless the court is of the opinion that a longer assessment period is necessary. R.S.O. 1990, c. C.11, s. 54 (2).

Copies of report

(3) At least seven days before the court considers the report at a hearing, the court or, where the assessment was requested by a party, that party, shall provide a copy of the report to,

(a) the person assessed, subject to subsections (4) and (5);

(b) the child's solicitor or agent of record;

(c) a parent appearing at the hearing, or the parent's solicitor of record;

(d) the society caring for or supervising the child;

(e) a Director, where he or she requests a copy;

(f) where the child is an Indian or a native person, a representative chosen by the child's band or native community; and

(g) any other person who, in the opinion of the court, should receive a copy of the report for the purposes of the case. R.S.O. 1990, c. C.11, s. 54 (3).

Child under twelve

(4) Where the person assessed is a child less than twelve years of age, the child shall not receive a copy of the report unless the court considers it desirable that the child receive a copy of the report. R.S.O. 1990, c. C.11, s. 54 (4).

Child twelve or older

(5) Where the person assessed is a child twelve years of age or more, the child shall receive a copy of the report, except that where the court is satisfied that disclosure of all or part of the report to the child would cause the child emotional harm, the court may withhold all or part of the report from the child. R.S.O. 1990, c. C.11, s. 54 (5).

Conflict

(5.1) Subsections (4) and (5) prevail despite anything in the *Personal Health Information Protection Act, 2004*. 2004, c. 3, Sched. A, s. 78 (1).

Assessment is evidence

(6) The report of an assessment ordered under subsection (1) is evidence and is part of the court record of the proceeding. R.S.O. 1990, c. C.11, s. 54 (6).

Inference from refusal

(7) The court may draw any inference it considers reasonable from a person's refusal to undergo an assessment ordered under subsection (1). R.S.O. 1990, c. C.11, s. 54 (7).

Report inadmissible

(8) The report of an assessment ordered under subsection (1) is not admissible into evidence in any other proceeding except,

(a) a proceeding under this Part, including an appeal under section 69;

(b) a proceeding referred to in section 81;

(b.1) a proceeding under Part VII respecting an application to make, vary or terminate an openness order; or

(c) a proceeding under the *Coroners Act*,

without the consent of the person or persons assessed. 1999, c. 2, s. 14; 2006, c. 5, s. 10 (2).

Consent order: special requirements

55 Where a child is brought before the court on consent as described in clause 37 (2) (l), the court shall, before making an order under section 57 or 57.1 that would remove the child from the parent's care and custody,

(a) ask whether,

(i) the society has offered the parent and child services that would enable the child to remain with the parent, and

(ii) the parent and, where the child is twelve years of age or older, the child has consulted independent legal counsel in connection with the consent; and

(b) be satisfied that,

(i) the parent and, where the child is twelve years of age or older, the child understands the nature and consequences of the consent,

(ii) every consent is voluntary, and

(iii) the parent and, where the child is twelve years of age or older, the child consents to the order being sought. R.S.O. 1990, c. C.11, s. 55; 2006, c. 5, s. 11.

Section Amendments with date in force (d/m/y)

Society's plan for child

56 The court shall, before making an order under section 57, 57.1, 65 or 65.2, obtain and consider a plan for the child's care prepared in writing by the society and including,

(a) a description of the services to be provided to remedy the condition or situation on the basis of which the child was found to be in need of protection;

(b) a statement of the criteria by which the society will determine when its wardship or supervision is no longer required;

(c) an estimate of the time required to achieve the purpose of the society's intervention;

(d) where the society proposes to remove or has removed the child from a person's care,

(i) an explanation of why the child cannot be adequately protected while in the person's care, and a description of any past efforts to do so, and

(ii) a statement of what efforts, if any, are planned to maintain the child's contact with the person;

(e) where the society proposes to remove or has removed the child from a person's care permanently, a description of the arrangements made or being made for the child's long-term stable placement; and

(f) a description of the arrangements made or being made to recognize the importance of the child's culture and to preserve the child's heritage, traditions and cultural identity. R.S.O. 1990, c. C.11, s. 56; 2006, c. 5, s. 12.

Section Amendments with date in force (d/m/y)

Order where child in need of protection

57 (1) Where the court finds that a child is in need of protection and is satisfied that intervention through a court order is necessary to protect the child in the future, the court shall make one of the following orders or an order under section 57.1, in the child's best interests:

Supervision order

1. That the child be placed in the care and custody of a parent or another person, subject to the supervision of the society, for a specified period of at least three months and not more than 12 months.

Society wardship

2. That the child be made a ward of the society and be placed in its care and custody for a specified period not exceeding twelve months.

Crown wardship

3. That the child be made a ward of the Crown, until the wardship is terminated under section 65.2 or expires under subsection 71 (1), and be placed in the care of the society.

Consecutive orders of society wardship and supervision

4. That the child be made a ward of the society under paragraph 2 for a specified period and then be returned to a parent or another person under paragraph 1, for a period or periods not exceeding an aggregate of twelve months. R.S.O. 1990, c. C.11, s. 57 (1); 2006, c. 5, s. 13 (1-3).

Court to inquire

(2) In determining which order to make under subsection (1) or section 57.1, the court shall ask the parties what efforts the society or another agency or person has made to assist the child before intervention under this Part. 2006, c. 5, s. 13 (4).

Less disruptive alternatives preferred

(3) The court shall not make an order removing the child from the care of the person who had charge of him or her immediately before intervention under this Part unless the court is satisfied that alternatives that are less disruptive to the child, including non-residential services and the assistance referred to in subsection (2), would be inadequate to protect the child. 1999, c. 2, s. 15 (1).

Community placement to be considered

(4) Where the court decides that it is necessary to remove the child from the care of the person who had charge of him or her immediately before intervention under this Part, the court shall, before making an order for society or Crown wardship under paragraph 2 or

3 of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family under paragraph 1 of subsection (1) with the consent of the relative or other person. R.S.O. 1990, c. C.11, s. 57 (4); 2016, c. 23, s. 38 (18).

Idem: where child an Indian or a native person

(5) Where the child referred to in subsection (4) is an Indian or a native person, unless there is a substantial reason for placing the child elsewhere, the court shall place the child with,

(a) a member of the child's extended family;

(b) a member of the child's band or native community; or

(c) another Indian or native family. R.S.O. 1990, c. C.11, s. 57 (5).

(6) REPEALED: 1999, c. 2, s. 15 (2).

Idem

(7) When the court has dispensed with notice to a person under subsection 39 (7), the court shall not make an order for Crown wardship under paragraph 3 of subsection (1), or an order for society wardship under paragraph 2 of subsection (1) for a period exceeding thirty days, until a further hearing under subsection 47 (1) has been held upon notice to that person. R.S.O. 1990, c. C.11, s. 57 (7).

Terms and conditions of supervision order

(8) If the court makes a supervision order under paragraph 1 of subsection (1), the court may impose,

(a) reasonable terms and conditions relating to the child's care and supervision;

(b) reasonable terms and conditions on,

(i) the child's parent,

(ii) the person who will have care and custody of the child under the order,

(iii) the child, and

(iv) any other person, other than a foster parent, who is putting forward or would participate in a plan for the care and custody of or access to the child; and

(c) reasonable terms and conditions on the society that will supervise the placement, but shall not require the society to provide financial assistance or purchase any goods or services. 2006, c. 5, s. 13 (5).

Where no court order necessary

(9) 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. R.S.O. 1990, c. C.11, s. 57 (9).

Custody order

57.1 (1) Subject to subsection (6), if a court finds that an order under this section instead of an order under subsection 57 (1) would be in a child's best interests, the court may make an order granting custody of the child to one or more persons, other than a foster parent of the child, with the consent of the person or persons. 2006, c. 5, s. 14.

Deemed to be order under *Children's Law Reform Act*

(2) An order made under subsection (1) and any access order under section 58 that is made at the same time as the order under subsection (1) shall be deemed to be made under section 28 of the *Children's Law Reform Act* and the court,

(a) may make any order under subsection (1) that the court may make under section 28 of that Act; and

(b) may give any directions that it may give under section 34 of that Act. 2006, c. 5, s. 14.

Restraining order

(3) When making an order under subsection (1), the court may, without a separate application, make a restraining order in accordance with section 35 of the *Children's Law Reform Act*. 2009, c. 11, s. 3.

Same

(4) An order under subsection (3) is deemed to be a final order made under section 35 of the *Children's Law Reform Act*, and shall be treated for all purposes as if it had been made under that section. 2009, c. 11, s. 3.

Appeal under s. 69

(5) Despite subsections (2) and (4), an order under subsection (1) or (3) and any access order under section 58 that is made at the same time as an order under subsection (1) are orders under this Part for the purposes of appealing from the orders under section 69. 2006, c. 5, s. 14.

Conflict of laws

(6) No order shall be made under this section if,

(a) an order granting custody of the child has been made under the *Divorce Act* (Canada); or

(b) in the case of an order that would be made by the Ontario Court of Justice, the order would conflict with an order made by a superior court. 2006, c. 5, s. 14.

Application of s. 57 (3)

(7) Subsection 57 (3) applies for the purposes of this section. 2006, c. 5, s. 14.

Section Amendments with date in force (d/m/y)

Effect of custody proceedings

57.2 If, under this Part, a proceeding is commenced or an order for the care, custody or supervision of a child is made, any proceeding respecting custody of or access to the same child under the *Children's Law Reform Act* is stayed except by leave of the court in the proceeding under that Act. 2006, c. 5, s. 15.

Section Amendments with date in force (d/m/y)

ACCESS

Access order

58 (1) The court may, in the child's best interests,

(a) when making an order under this Part; or

(b) upon an application under subsection (2),

make, vary or terminate an order respecting a person's access to the child or the child's access to a person, and may impose such terms and conditions on the order as the court considers appropriate. R.S.O. 1990, c. C.11, s. 58 (1).

Who may apply

(2) Where a child is in a society's care and custody or supervision,

(a) the child;

(b) any other person, including, where the child is an Indian or a native person, a representative chosen by the child's band or native community; or

(c) the society,

may apply to the court at any time for an order under subsection (1). R.S.O. 1990, c. C.11, s. 58 (2).

Notice

(3) An applicant referred to in clause (2) (b) shall give notice of the application to the society. R.S.O. 1990, c. C.11, s. 58 (3).

Idem

(4) A society making or receiving an application under subsection (2) shall give notice of the application to,

(a) the child, subject to subsections 39 (4) and (5) (notice to child);

(b) the child's parent;

(c) the person caring for the child at the time of the application; and

(d) where the child is an Indian or a native person, a representative chosen by the child's band or native community. R.S.O. 1990, c. C.11, s. 58 (4).

Child over sixteen

(5) No order respecting access to a person sixteen years of age or more shall be made under subsection (1) without the person's consent. R.S.O. 1990, c. C.11, s. 58 (5).

Six-month period

(6) No application shall be made under subsection (2) by a person other than a society within six months of,

(a) the making of an order under section 57;

(b) the disposition of a previous application by the same person under subsection (2);

(c) the disposition of an application under section 64 or 65.1; or

(d) the final disposition or abandonment of an appeal from an order referred to in clause (a), (b) or (c),

whichever is later. R.S.O. 1990, c. C.11, s. 58 (6); 2006, c. 5, s. 16.

No application where child placed for adoption

(7) No person or society shall make an application under subsection (2) where the child,

(a) is a Crown ward;

(b) has been placed in a person's home by the society or by a Director for the purpose of adoption under Part VII (Adoption); and

(c) still resides in that person's home. R.S.O. 1990, c. C.11, s. 58 (7).

Section Amendments with date in force (d/m/y)

Access: where child removed from person in charge

59 (1) Where an order is made under paragraph 1 or 2 of subsection 57 (1) removing a child from the person who had charge of the child immediately before intervention under this Part, the court shall make an order for access by the person unless the court is satisfied that continued contact with him or her would not be in the child's best interests. R.S.O. 1990, c. C.11, s. 59 (1).

Access after custody order under s. 57.1

(1.1) If a custody order is made under section 57.1 removing a child from the person who had charge of the child immediately before intervention under this Part, the court shall make an order for access by the person unless the court is satisfied that continued contact will not be in the child's best interests. 2006, c. 5, s. 17 (1).

Access after supervision order or custody order under s. 65.2 (1)

(1.2) If an order is made for supervision under clause 65.2 (1) (a) or for custody under clause 65.2 (1) (b), the court shall make an order for access by every person who had access before the application for the order was made under section 65.1, unless the court is satisfied that continued contact will not be in the child's best interests. 2006, c. 5, s. 17 (1).

Termination of access to Crown ward

(2) Where the court makes an order that a child be made a ward of the Crown, any order for access made under this Part with respect to the child is terminated. 2006, c. 5, s. 17 (2).

Access: Crown ward

(2.1) A court shall not make or vary an access order made under section 58 with respect to a Crown ward unless the court is satisfied that,

(a) the relationship between the person and the child is beneficial and meaningful to the child; and

(b) the ordered access will not impair the child's future opportunities for adoption. 2006, c. 5, s. 17 (2).

Termination of access: Crown ward

(3) The court shall terminate an access order with respect to a Crown ward if,

(a) the order is no longer in the best interests of the child; or

(b) the court is no longer satisfied that the requirements set out in clauses (2.1) (a) and (b) are satisfied. 1999, c. 2, s. 16; 2006, c. 5, s. 17 (3).

Society may permit contact or communication

(4) If a society believes that contact or communication between a person and a Crown ward is in the best interests of the Crown ward and no openness order under Part VII or access order is in effect with respect to the person and the Crown ward, the society may permit contact or communication between the person and the Crown ward. 2006, c. 5, s. 17 (4).

Review of access order made concurrently with custody order

59.1 No order for access under section 58 is subject to review under this Act if it is made at the same time as a custody order under section 57.1, but it may be the subject of an application under section 21 of the *Children's Law Reform Act* and the provisions of that Act apply as if the order had been made under that Act. 2006, c. 5, s. 18.

Section Amendments with date in force (d/m/y)

Restriction on access order

59.2 If a society has applied to a court for an order under this Act respecting access to a child by a parent of the child and the court makes the order, the court shall specify in the order the supervision to which the access is subject if, at the time of making the order, the parent has been charged with or convicted of an offence under the *Criminal Code* (Canada) involving an act of violence against the child or the other parent of the child, unless the court considers it appropriate not to make the access subject to such supervision. 2006, c. 24, s. 1.

Section Amendments with date in force (d/m/y)

PAYMENT ORDERS

Order for payment by parent

60 (1) Where the court places a child in the care of,

(a) a society; or

(b) a person other than the child's parent, subject to a society's supervision,

the court may order a parent or a parent's estate to pay the society a specified amount at specified intervals for each day the child is in the society's care or supervision.

Criteria

(2) In making an order under subsection (1), the court shall consider those of the following circumstances of the case that the court considers relevant:

1. The assets and means of the child and of the parent or the parent's estate.
2. The child's capacity to provide for his or her own support.
3. The capacity of the parent or the parent's estate to provide support.
4. The child's and the parent's age and physical and mental health.
5. The child's mental, emotional and physical needs.
6. Any legal obligation of the parent or the parent's estate to provide support for another person.
7. The child's aptitude for and reasonable prospects of obtaining an education.
8. Any legal right of the child to support from another source, other than out of public money.

Order ends at eighteen

(3) No order made under subsection (1) shall extend beyond the day on which the child attains the age of eighteen years.

Power to vary

(4) The court may vary, suspend or terminate an order made under subsection (1) where the court is satisfied that the circumstances of the child or parent have changed.

Collection by municipality

(5) The council of a municipality may enter into an agreement with the board of directors of a society providing for the collection by the municipality, on the society's behalf, of the amounts ordered to be paid by a parent under subsection (1). R.S.O. 1990, c. C.11, s. 60 (1-5).

Enforcement

(6) An order made against a parent under subsection (1) may be enforced as if it were an order for support made under Part III of the *Family Law Act*. R.S.O. 1990, c. C.11, s. 60 (6); 1993, c. 27, Sched.

Section Amendments with date in force (d/m/y)

SOCIETY AND CROWN WARDSHIP

Placement of wards

61 (1) This section applies where a child is made a society ward under paragraph 2 of subsection 57 (1) or a Crown ward under paragraph 3 of subsection 57 (1) or under subsection 65.2 (1). 2006, c. 5, s. 19 (1).

Placement

(2) The society having care of a child shall choose a residential placement for the child that,

(a) represents the least restrictive alternative for the child;

(b) where possible, respects the religious faith, if any, in which the child is being raised;

(c) where possible, respects the child's linguistic and cultural heritage;

(d) where the child is an Indian or a native person, is 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, if possible; and

(e) takes into account the child's wishes, if they can be reasonably ascertained, and the wishes of any parent who is entitled to access to the child. R.S.O. 1990, c. C.11, s. 61 (2).

Education

(3) The society having care of a child shall ensure that the child receives an education that corresponds to his or her aptitudes and abilities. R.S.O. 1990, c. C.11, s. 61 (3).

Placement outside or removal from Ontario

(4) The society having care of a child shall not place the child outside Ontario or permit a person to remove the child from Ontario permanently unless a Director is satisfied that extraordinary circumstances justify the placement or removal. R.S.O. 1990, c. C.11, s. 61 (4).

Rights of child, parent and foster parent

(5) The society having care of a child shall ensure that,

(a) the child is afforded all the rights referred to in Part V (Rights of Children); and

(b) the wishes of any parent who is entitled to access to the child and, where the child is a Crown ward, of any foster parent with whom the child has lived

continuously for two years are taken into account in the society's major decisions concerning the child. R.S.O. 1990, c. C.11, s. 61 (5).

Change of placement

(6) The society having care of a child may remove the child from a foster home or other residential placement where, in the opinion of a Director or local director, it is in the child's best interests to do so. R.S.O. 1990, c. C.11, s. 61 (6).

Notice of proposed removal

(7) If a child is a Crown ward and has lived continuously with a foster parent for two years and a society proposes to remove the child from the foster parent under subsection (6), the society shall,

(a) give the foster parent at least 10 days notice in writing of the proposed removal and of the foster parent's right to apply for a review under subsection (7.1); and

(b) if the child is an Indian or native person,

(i) give at least 10 days notice in writing of the proposed removal to a representative chosen by the child's band or native community, and

(ii) after the notice is given, consult with representatives chosen by the band or community relating to the plan for the care of the child. 2006, c. 5, s. 19 (2).

Application for review

(7.1) A foster parent who receives a notice under clause (7) (a) may, within 10 days after receiving the notice, apply to the Board in accordance with the regulations for a review of the proposed removal. 2006, c. 5, s. 19 (2).

Board hearing

(8) Upon receipt of an application by a foster parent for a review of a proposed removal, the Board shall hold a hearing under this section. 2006, c. 5, s. 19 (2).

Where child is Indian or native person

(8.1) Upon receipt of an application for review of a proposed removal of a child who is an Indian or native person, the Board shall give a representative chosen by the child's band or native community notice of receipt of the application and of the date of the hearing. 2006, c. 5, s. 19 (2).

Practices and procedures

(8.2) The *Statutory Powers Procedure Act* applies to a hearing under this section and the Board shall comply with such additional practices and procedures as may be prescribed. 2006, c. 5, s. 19 (2).

Composition of Board

(8.3) At a hearing under this section, the Board shall be composed of members with the prescribed qualifications and prescribed experience. 2006, c. 5, s. 19 (2).

Parties

(8.4) The following persons are parties to a hearing under this section:

1. The applicant.
2. The society.
3. If the child is an Indian or a native person, a representative chosen by the child's band or native community.
4. Any person that the Board adds under subsection (8.5). 2006, c. 5, s. 19 (2).

Additional parties

(8.5) The Board may add a person as a party to a review if, in the Board's opinion, it is necessary to do so in order to decide all the issues in the review. 2006, c. 5, s. 19 (2).

Board decision

(8.6) The Board shall, in accordance with its determination of which action is in the best interests of the child, confirm the proposal to remove the child or direct the society not to carry out the proposed removal, and shall give written reasons for its decision. 2006, c. 5, s. 19 (2).

No removal before decision

(8.7) Subject to subsection (9), the society shall not carry out the proposed removal of the child unless,

(a) the time for applying for a review of the proposed removal under subsection (7.1) has expired and an application is not made; or

(b) if an application for a review of the proposed removal is made under subsection (7.1), the Board has confirmed the proposed removal under subsection (8.6). 2006, c. 5, s. 19 (2).

Where child at risk

(9) A society may remove the child from the foster home before the expiry of the time for applying for a review under subsection (7.1) or at any time after the application for a review is made if, in the opinion of a local director, there would be a risk that the child is likely to suffer harm during the time necessary for a review by the Board. 2006, c. 5, s. 19 (3).

Review of certain placements

(10) Sections 34, 35 and 36 (review by Residential Placement Advisory Committee, further review by Children's Services Review Board) of Part II (Voluntary Access to Services) apply to a residential placement made by a society. R.S.O. 1990, c. C.11, s. 61 (10).

Transitional

(11) This section as it read on the day before this subsection came into force continues to apply in respect of proposed removals and requests for review under section 68 if the notice of the proposed removal of the child was given by the society on or before that day. 2006, c. 5, s. 19 (4).

Section Amendments with date in force (d/m/y)

Society wards – medical treatment and marriage

Society ward: consent to medical treatment

62 (1) Where a child is made a society ward under paragraph 2 of subsection 57 (1), the society may consent to and authorize medical treatment for the child where a parent's consent would otherwise be required, unless the court orders that the parent shall retain any right that he or she may have to give or refuse consent to medical treatment for the child.

Idem

(2) The court shall not make an order under subsection (1) where failure to consent to necessary medical treatment was a ground for finding that the child was in need of protection.

Court order

(3) Where a parent referred to in an order made under subsection (1) refuses or is unavailable or unable to consent to medical treatment for the child and the court is satisfied that the treatment would be in the child's best interests, the court may authorize the society to consent to the treatment.

Consent to child's marriage

(4) Where a child is made a society ward under paragraph 2 of subsection 57 (1), the child's parent retains any right that he or she may have under the *Marriage Act* to give or refuse consent to the child's marriage. R.S.O. 1990, c. C.11, s. 62.

Custodianship of wards

Crown custodian of Crown wards

63 (1) Where a child is made a Crown ward under paragraph 3 of subsection 57 (1) or under subsection 65.2 (1), the Crown has the rights and responsibilities of a parent for the purpose of the child's care, custody and control and has the right to give or refuse consent to medical treatment for the child where a parent's consent would otherwise be required, and the Crown's powers, duties and obligations in respect of the child, except those assigned to a Director by this Act or the regulations, shall be exercised and performed by the society caring for the child. R.S.O. 1990, c. C.11, s. 63 (1); 2006, c. 5, s. 20.

Society custodian of society wards

(2) Where a child is made a society ward under paragraph 2 of subsection 57 (1), the society has the rights and responsibilities of a parent for the purpose of the child's care, custody and control. R.S.O. 1990, c. C.11, s. 63 (2).

Section Amendments with date in force (d/m/y)

Society's obligation to a Crown ward

63.1 Where a child is made a Crown ward, the society shall make all reasonable efforts to assist the child to develop a positive, secure and enduring relationship within a family through one of the following:

1. An adoption.
2. A custody order under subsection 65.2 (1).
3. In the case of a child who is an Indian or native person, a plan for customary care as defined in Part X. 2006, c. 5, s. 21.

Section Amendments with date in force (d/m/y)

REVIEW

Status review

64 (1) This section applies where a child is the subject of an order under subsection 57 (1) for society supervision or society wardship. 2006, c. 5, s. 22.

Society to seek status review

(2) The society having care, custody or supervision of a child,

(a) may apply to the court at any time for a review of the child's status;

(b) shall apply to the court for a review of the child's status before the order expires, unless the expiry is by reason of subsection 71 (1); and

(c) shall apply to the court for a review of the child's status within five days after removing the child, if the society has removed the child from the care of a person with whom the child was placed under an order for society supervision. 2006, c. 5, s. 22.

Application of cl. (2) (a) and (c)

(3) If a child is the subject of an order for society supervision, clauses (2) (a) and (c) also apply to the society that has jurisdiction in the county or district in which the parent or other person with whom the child is placed resides. 2006, c. 5, s. 22.

Others may seek status review

(4) An application for review of a child's status may be made on notice to the society by,

(a) the child, if the child is at least 12 years of age;

(b) a parent of the child;

(c) the person with whom the child was placed under an order for society supervision; or

(d) a representative chosen by the child's band or native community, if the child is an Indian or native person. 2006, c. 5, s. 22.

Notice

(5) A society making an application under subsection (2) or receiving notice of an application under subsection (4) shall give notice of the application to,

(a) the child, except as otherwise provided under subsection 39 (4) or (5);

(b) the child's parent;

(c) the person with whom the child was placed under an order for society supervision;

(d) any foster parent who has cared for the child continuously during the six months immediately before the application; and

(e) a representative chosen by the child's band or native community, if the child is an Indian or native person. 2006, c. 5, s. 22.

Six-month period

(6) No application shall be made under subsection (4) within six months after the latest of,

(a) the day the original order was made under subsection 57 (1);

(b) the day the last application by a person under subsection (4) was disposed of; or

(c) the day any appeal from an order referred to in clause (a) or the disposition referred to in clause (b) was finally disposed of or abandoned. 2006, c. 5, s. 22.

Exception

(7) Subsection (6) does not apply if the court is satisfied that a major element of the plan for the child's care that the court applied in its decision is not being carried out. 2006, c. 5, s. 22.

Interim care and custody

(8) If an application is made under this section, the child shall remain in the care and custody of the person or society having charge of the child until the application is disposed of, unless the court is satisfied that the child's best interests require a change in the child's care and custody. 2006, c. 5, s. 22.

Section Amendments with date in force (d/m/y)

Court may vary, etc.

65 (1) Where an application for review of a child's status is made under section 64, the court may, in the child's best interests,

(a) vary or terminate the original order made under subsection 57 (1), including a term or condition or a provision for access that is part of the order;

(b) order that the original order terminate on a specified future date;

(c) make a further order or orders under section 57; or

(d) make an order under section 57.1. R.S.O. 1990, c. C.11, s. 65 (1); 2006, c. 5, s. 23 (1).

(2) REPEALED: 2006, c. 5, s. 23 (2).

(3) REPEALED: 1999, c. 2, s. 19.

Status review, Crown ward and former Crown wards

65.1 (1) This section applies where a child is a Crown ward or is the subject of an order for society supervision under clause 65.2 (1) (a) or a custody order under clause 65.2 (1) (b). 2006, c. 5, s. 24.

Society to seek status review

(2) The society that has or had care, custody or supervision of the child,

(a) may apply to the court at any time, subject to subsection (9), for a review of the child's status;

(b) shall apply to the court for a review of the child's status before the order expires if the order is for society supervision, unless the expiry is by reason of subsection 71 (1); and

(c) shall apply to the court for a review of the child's status within five days after removing the child, if the society has removed the child,

(i) from the care of a person with whom the child was placed under an order for society supervision described in clause 65.2 (1) (a), or

(ii) from the custody of a person who had custody of the child under a custody order described in clause 65.2 (1) (b). 2006, c. 5, s. 24.

Application of cl. (2) (a) and (c)

(3) Clauses (2) (a) and (c) also apply to the society that has jurisdiction in the county or district,

(a) in which the parent or other person with whom the child is placed resides, if the child is the subject of an order for society supervision under clause 65.2 (1) (a); or

(b) in which the person who has custody resides, if the child is the subject of a custody order under clause 65.2 (1) (b). 2006, c. 5, s. 24.

Others may seek status review

(4) An application for review of a child's status under this section may be made on notice to the society by,

(a) the child, if the child is at least 12 years of age;

(b) a parent of the child;

(c) the person with whom the child was placed under an order for society supervision described in 65.2 (1) (a);

(d) the person to whom custody of the child was granted, if the child is subject to an order for custody described in clause 65.2 (1) (b);

(e) a foster parent, if the child has lived continuously with the foster parent for at least two years immediately before the application; or

(f) a representative chosen by the child's band or native community, if the child is an Indian or native person. 2006, c. 5, s. 24.

When leave to apply required

(5) Despite clause (4) (b), a parent of a child shall not make an application under subsection (4) without leave of the court if the child has, immediately before the application, received continuous care for at least two years from the same foster parent or from the same person under a custody order. 2006, c. 5, s. 24.

Notice

(6) A society making an application under subsection (2) or receiving notice of an application under subsection (4) shall give notice of the application to,

(a) the child, except as otherwise provided under subsection 39 (4) or (5);

(b) the child's parent, if the child is under 16 years of age;

(c) the person with whom the child was placed, if the child is subject to an order for society supervision described in clause 65.2 (1) (a);

(d) the person to whom custody of the child was granted, if the child is subject to an order for custody described in clause 65.2 (1) (b);

(e) any foster parent who has cared for the child continuously during the six months immediately before the application; and

(f) a representative chosen by the child's band or native community, if the child is an Indian or native person. 2006, c. 5, s. 24.

Six-month period

(7) No application shall be made under subsection (4) within six months after the latest of,

(a) the day the order was made under subsection 57 (1) or 65.2 (1), whichever is applicable;

(b) the day the last application by a person under subsection (4) was disposed of; or

(c) the day any appeal from an order referred to in clause (a) or a disposition referred to in clause (b) was finally disposed of or abandoned. 2006, c. 5, s. 24.

Exception

(8) Subsection (7) does not apply if,

(a) the child is the subject of,

(i) an order for society supervision described in clause 65.2 (1) (a),

(ii) an order for custody described in clause 65.2 (1) (b), or

(iii) an order for Crown wardship under subsection 57 (1) or clause 65.2 (1) (c) and an order for access under section 58; and

(b) the court is satisfied that a major element of the plan for the child's care that the court applied in its decision is not being carried out. 2006, c. 5, s. 24.

No review if child placed for adoption

(9) No person or society shall make an application under this section with respect to a Crown ward who has been placed in a person's home by the society or by a Director for the purposes of adoption under Part VII, if the Crown ward still resides in the person's home. 2006, c. 5, s. 24.

Interim care and custody

(10) If an application is made under this section, the child shall remain in the care and custody of the person or society having charge of the child until the application is disposed of, unless the court is satisfied that the child's best interests require a change in the child's care and custody. 2006, c. 5, s. 24.

Section Amendments with date in force (d/m/y)

Court order

65.2 (1) If an application for review of a child's status is made under section 65.1, the court may, in the child's best interests,

(a) order that the child be placed in the care and custody of a parent or another person, subject to the supervision of the society, for a specified period of at least three months and not more than 12 months;

(b) order that custody be granted to one or more persons, including a foster parent, with the consent of the person or persons;

(c) order that the child be made a ward of the Crown until wardship is terminated under this section or expires under subsection 71 (1); or

(d) terminate or vary any order made under section 57 or this section. 2006, c. 5, s. 24.

Variation, etc.

(2) When making an order under subsection (1), the court may, subject to section 59, vary or terminate an order for access or make a further order under section 58. 2006, c. 5, s. 24.

Same

(3) Any previous order for Crown wardship is terminated if an order described in clause (1) (a) or (b) is made in respect of a child. 2006, c. 5, s. 24.

Terms and conditions of supervision order

(4) If the court makes a supervision order described in clause (1) (a), the court may impose,

(a) reasonable terms and conditions relating to the child's care and supervision;

(b) reasonable terms and conditions on the child's parent, the person who will have care and custody of the child under the order, the child and any other person, other than a foster parent, who is putting forward a plan or who would participate in a plan for care and custody of or access to the child; and

(c) reasonable terms and conditions on the society that will supervise the placement, but shall not require the society to provide financial assistance or purchase any goods or services. 2006, c. 5, s. 24.

Access

(5) Section 59 applies with necessary modifications if the court makes an order described in clause (1) (a), (b) or (c). 2006, c. 5, s. 24.

Custody proceeding

(6) Where an order is made under this section or a proceeding is commenced under this Part, any proceeding respecting custody of or access to the same child under the *Children's Law Reform Act* is stayed except by leave of the court in the proceeding under that Act. 2006, c. 5, s. 24.

Rights and responsibilities

(7) A person to whom custody of a child is granted by an order under this section has the rights and responsibilities of a parent in respect of the child and must exercise those rights and responsibilities in the best interests of the child. 2006, c. 5, s. 24.

Section Amendments with date in force (d/m/y)

Director's annual review of Crown wards

66 (1) A Director or a person authorized by a Director shall, at least once during each calendar year, review the status of every child,

(a) who is a Crown ward;

(b) who was a Crown ward throughout the immediately preceding twenty-four months; and

(c) whose status has not been reviewed under this section or under section 65.2 during that time. R.S.O. 1990, c. C.11, s. 66 (1); 2006, c. 5, s. 25 (1).

Idem

(2) After a review under subsection (1), the Director may direct the society to make an application for review of the child's status under subsection 65 (1) or give any other direction that, in the Director's opinion, is in the child's best interests. R.S.O. 1990, c. C.11, s. 66 (2); 2006, c. 5, s. 25 (2).

Section Amendments with date in force (d/m/y)

Investigation by judge

67 (1) The Minister may appoint a judge of the Court of Ontario to investigate a matter relating to a child in a society's care or the proper administration of this Part, and a judge who is appointed shall conduct the investigation and make a written report to the Minister. R.S.O. 1990, c. C.11, s. 67 (1); 1999, c. 2, s. 20.

Application of *Public Inquiries Act, 2009*

(2) Section 33 of the *Public Inquiries Act, 2009* applies to an investigation by a judge under subsection (1). 2009, c. 33, Sched. 6, s. 45.

Section Amendments with date in force (d/m/y)

Complaint to society

68 (1) A person may make a complaint to a society relating to a service sought or received by that person from the society in accordance with the regulations. 2006, c. 5, s. 26.

Complaint review procedure

(2) Where a society receives a complaint under subsection (1), it shall deal with the complaint in accordance with the complaint review procedure established by regulation, subject to subsection 68.1 (2). 2006, c. 5, s. 26.

Available to public

(3) A society shall make information relating to the complaint review procedure available to any person upon request. 2006, c. 5, s. 26.

Society's decision

(4) Subject to subsection (5), the decision of a society made upon completion of the complaint review procedure is final. 2006, c. 5, s. 26.

Application for review by Board

(5) If a complaint relates to one of the following matters, the complainant may apply to the Board in accordance with the regulations for a review of the decision made by the society upon completion of the complaint review procedure:

1. An alleged inaccuracy in the society's files or records regarding the complainant.
2. A matter described in subsection 68.1 (4).
3. Any other prescribed matter. 2006, c. 5, s. 26.

Review by Board

(6) Upon receipt of an application under subsection (5), the Board shall give the society notice of the application and conduct a review of the society's decision. 2006, c. 5, s. 26.

Composition of Board

(7) The Board shall be composed of members with the prescribed qualifications and prescribed experience. 2006, c. 5, s. 26.

Hearing optional

(8) The Board may hold a hearing and, if a hearing is held, the Board shall comply with the prescribed practices and procedures. 2006, c. 5, s. 26.

Non-application

(9) The *Statutory Powers Procedure Act* does not apply to a hearing under this section. 2006, c. 5, s. 26.

Board decision

(10) Upon completing its review of a decision by a society in relation to a complaint, the Board may,

(a) in the case of a review of a matter described in paragraph 1 of subsection (5), order that a notice of disagreement be added to the complainant's file;

(b) in the case of a matter described in subsection 68.1 (4), make any order described in subsection 68.1 (7), as appropriate;

(c) redirect the matter to the society for further review;

(d) confirm the society's decision; or

(e) make such other order as may be prescribed. 2006, c. 5, s. 26.

Notice of disagreement

(11) A notice of disagreement referred to in clause (10) (a) shall be in the prescribed form if the regulations so provide. 2006, c. 5, s. 26.

No review if matter within purview of court

(12) A society shall not conduct a review of a complaint under this section if the subject of the complaint,

(a) is an issue that has been decided by the court or is before the court; or

(b) is subject to another decision-making process under this Act or the *Labour Relations Act, 1995*. 2006, c. 5, s. 26.

Transitional

(13) This section as it read immediately before the day this subsection came into force continues to apply in respect of complaints made to a society before that day and of any reviews requested of the Director before that day. 2006, c. 5, s. 26.

Section Amendments with date in force (d/m/y)

Complaint to Board

68.1 (1) If a complaint in respect of a service sought or received from a society relates to a matter described in subsection (4), the person who sought or received the service may,

(a) decide not to make the complaint to the society under section 68 and make the complaint directly to the Board under this section; or

(b) where the person first makes the complaint to the society under section 68, submit the complaint to the Board before the society's complaint review procedure is completed. 2006, c. 5, s. 26.

Notice to society

(2) If a person submits a complaint to the Board under clause (1) (b) after having brought the complaint to the society under section 68, the Board shall give the society notice of that fact and the society may terminate or stay its review, as it considers appropriate. 2006, c. 5, s. 26.

Complaint to Board

(3) A complaint to the Board under this section shall be made in accordance with the regulations. 2006, c. 5, s. 26.

Matters for Board review

(4) The following matters may be reviewed by the Board under this section:

1. Allegations that the society has refused to proceed with a complaint made by the complainant under subsection 68 (1) as required under subsection 68 (2).
2. Allegations that the society has failed to respond to the complainant's complaint within the timeframe required by regulation.
3. Allegations that the society has failed to comply with the complaint review procedure or with any other procedural requirements under this Act relating to the review of complaints.
4. Allegations that the society has failed to comply with clause 2 (2) (a).
5. Allegations that the society has failed to provide the complainant with reasons for a decision that affects the complainant's interests.
6. Such other matters as may be prescribed. 2006, c. 5, s. 26.

Review by Board

(5) Upon receipt of a complaint under this section, the Board shall conduct a review of the matter. 2006, c. 5, s. 26.

Application

(6) Subsections 68 (7), (8) and (9) apply with necessary modification to a review of a complaint made under this section. 2006, c. 5, s. 26.

Board decision

(7) After reviewing the complaint, the Board may,

(a) order the society to proceed with the complaint made by the complainant in accordance with the complaint review procedure established by regulation;

(b) order the society to provide a response to the complainant within a period specified by the Board;

(c) order the society to comply with the complaint review procedure established by regulation or with any other requirements under this Act;

(d) order the society to provide written reasons for a decision to a complainant;

(e) dismiss the complaint; or

(f) make such other order as may be prescribed. 2006, c. 5, s. 26.

No review if matter within purview of court

(8) The Board shall not conduct a review of a complaint under this section if the subject of the complaint,

(a) is an issue that has been decided by the court or is before the court; or

(b) is subject to another decision-making process under this Act or the *Labour Relations Act, 1995*. 2006, c. 5, s. 26.

Section Amendments with date in force (d/m/y)

2006, c. 5, s. 26 - 30/11/2006

APPEALS

Appeal

69 (1) An appeal from a court's order under this Part may be made to the Superior Court of Justice by,

(a) the child, if the child is entitled to participate in the proceeding under subsection 39 (6) (child's participation);

(b) any parent of the child;

(c) the person who had charge of the child immediately before intervention under this Part;

(d) a Director or local director; or

(e) where the child is an Indian or a native person, a representative chosen by the child's band or native community. R.S.O. 1990, c. C.11, s. 69 (1); 1999, c. 2, s. 35.

Exception

(2) Subsection (1) does not apply to an order for an assessment under section 54. R.S.O. 1990, c. C.11, s. 69 (2).

Care and custody pending appeal

(3) Where a decision regarding the care and custody of a child is appealed under subsection (1), execution of the decision shall be stayed for the ten days immediately following service of the notice of appeal on the court that made the decision, and where the child is in the society's custody at the time the decision is made, the child shall remain in the care and custody of the society until,

(a) the ten-day period of the stay has expired; or

(b) an order is made under subsection (4),

whichever is earlier. R.S.O. 1990, c. C.11, s. 69 (3).

Temporary order

(4) The Superior Court of Justice may, in the child's best interests, make a temporary order for the child's care and custody pending final disposition of the appeal, except an order placing the child in a place of secure custody as defined in Part IV (Youth Justice) or a place of secure temporary detention as defined in that Part that has not been designated as a place of safety, and the court may, on any party's motion before the final disposition of the appeal, vary or terminate the order or make a further order. R.S.O. 1990, c. C.11, s. 69 (4); 1999, c. 2, s. 35; 2006, c. 19, Sched. D, s. 2 (10).

No extension where child placed for adoption

(5) No extension of the time for an appeal shall be granted where the child has been placed for adoption under Part VII (Adoption). R.S.O. 1990, c. C.11, s. 69 (5).

Further evidence

(6) The court may receive further evidence relating to events after the appealed decision. R.S.O. 1990, c. C.11, s. 69 (6).

Place of hearing

(7) An appeal under this section shall be heard in the county or district in which the order appealed from was made. R.S.O. 1990, c. C.11, s. 69 (7).

s. 45 applies

(8) Section 45 (hearings private, etc.) applies with necessary modifications to an appeal under this section. R.S.O. 1990, c. C.11, s. 69 (8).

Section Amendments with date in force (d/m/y)

EXPIRY OF ORDERS

Time limit

70 (1) Subject to subsections (3) and (4), the court shall not make an order for society wardship under this Part that results in a child being a society ward for a period exceeding,

(a) 12 months, if the child is less than 6 years of age on the day the court makes an order for society wardship; or

(b) 24 months, if the child is 6 years of age or older on the day the court makes an order for society wardship.

Same

(2) In calculating the period referred to in subsection (1), time during which a child has been in a society's care and custody under,

(a) an agreement made under subsection 29 (1) or 30 (1) (temporary care or special needs agreement); or

(b) a temporary order made under clause 51 (2) (d),

shall be counted.

Previous periods to be counted

(2.1) The period referred to in subsection (1) shall include any previous periods that the child was in a society's care and custody as a society ward or as described in subsection (2) other than periods that precede a continuous period of five or more years that the child was not in a society's care and custody. 1999, c. 2, s. 21 (1).

Idem

(3) Where the period referred to in subsection (1) or (4) expires and,

(a) an appeal of an order made under subsection 57 (1) has been commenced and is not yet finally disposed of; or

(b) the court has adjourned a hearing under section 65 (status review),

the period shall be deemed to be extended until the appeal has been finally disposed of and any new hearing ordered on appeal has been completed or an order has been made under section 65, as the case may be. R.S.O. 1990, c. C.11, s. 70 (3); 1999, c. 2, s. 21 (2).

Six-month extension

(4) Subject to paragraphs 2 and 4 of subsection 57 (1), the court may by order extend the period permitted under subsection (1) by a period not to exceed six months if it is in the child's best interests to do so. 1999, c. 2, s. 21 (3).

Section Amendments with date in force (d/m/y)

Expiry of orders

71 (1) An order under this Part expires when the child who is the subject of the order,

(a) attains the age of eighteen years; or

(b) marries,

whichever comes first. R.S.O. 1990, c. C.11, s. 71 (1).

(2) REPEALED: 2006, c. 5, s. 27.

Section Amendments with date in force (d/m/y)

EXTENDED CARE

Extended care

71.1 (1) A society may provide care and maintenance to a person in accordance with the regulations if,

(a) a custody order under subsection 65.2 (1) or an order for Crown wardship was made in relation to that person as a child; and

(b) the order expires under section 71. 2006, c. 5, s. 28.

Same, Indian and native person

(2) A society or agency may provide care and maintenance in accordance with the regulations to a person who is an Indian or native person who is 18 years of age or more if,

(a) immediately before the person's 18th birthday, he or she was being cared for under customary care as defined in section 208; and

(b) the person who was caring for the child was receiving a subsidy from the society or agency under section 212. 2006, c. 5, s. 28.

Same, prescribed support services

(3) A society or agency may provide care and maintenance in accordance with the regulations to a person who is 18 years of age or more if, when the person was 16 or 17 years of age, he or she was eligible for support services prescribed by the regulations, whether or not he or she was receiving such support services. 2011, c. 12, s. 1.

Resuming receipt

(4) Subject to the terms and conditions in this section, a person who chooses to stop receiving care and maintenance under this section may choose to resume receiving it. 2011, c. 12, s. 1.

Same

(5) Subsection (4) applies where the person has chosen to stop receiving care and maintenance on one occasion or, at the discretion of the society or agency providing the care and maintenance, on more than one occasion. 2011, c. 12, s. 1.

DUTY TO REPORT

Duty to report child in need of protection

72 (1) Despite the provisions of any other Act, if a person, including a person who performs professional or official duties with respect to children, has reasonable grounds to suspect one of the following, the person shall forthwith report the suspicion and the information on which it is based to a society:

1. The child has suffered physical harm, inflicted by the person having charge of the child or caused by or resulting from that person's,

   i. failure to adequately care for, provide for, supervise or protect the child, or

   ii. pattern of neglect in caring for, providing for, supervising or protecting the child.

2. There is a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child or caused by or resulting from that person's,

   i. failure to adequately care for, provide for, supervise or protect the child, or

   ii. pattern of neglect in caring for, providing for, supervising or protecting the child.

3. The child has been sexually molested or sexually exploited, by the person having charge of the child or by another person where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child.

4. There is a risk that the child is likely to be sexually molested or sexually exploited as described in paragraph 3.

5. The child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, the treatment.

6. The child has suffered emotional harm, demonstrated by serious,

    i. anxiety,

    ii. depression,

    iii. withdrawal,

    iv. self-destructive or aggressive behaviour, or

    v. delayed development,

    and there are reasonable grounds to believe that the emotional harm suffered by the child results from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.

7. The child has suffered emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm.

8. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 resulting from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.

9. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 and that the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to prevent the harm.

10. The child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, treatment to remedy or alleviate the condition.

11. The child has been abandoned, the child's parent has died or is unavailable to exercise his or her custodial rights over the child and has not made adequate

provision for the child's care and custody, or the child is in a residential placement and the parent refuses or is unable or unwilling to resume the child's care and custody.

12. The child is less than 12 years old and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, those services or treatment.

13. The child is less than 12 years old and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately. 1999, c. 2, s. 22 (1).

Ongoing duty to report

(2) A person who has additional reasonable grounds to suspect one of the matters set out in subsection (1) shall make a further report under subsection (1) even if he or she has made previous reports with respect to the same child. 1999, c. 2, s. 22 (1)

Person must report directly

(3) A person who has a duty to report a matter under subsection (1) or (2) shall make the report directly to the society and shall not rely on any other person to report on his or her behalf. 1999, c. 2, s. 22 (1).

Offence

(4) A person referred to in subsection (5) is guilty of an offence if,

(a) he or she contravenes subsection (1) or (2) by not reporting a suspicion; and

(b) the information on which it was based was obtained in the course of his or her professional or official duties. 1999, c. 2, s. 22 (2).

Same

(5) Subsection (4) applies to every person who performs professional or official duties with respect to children including,

(a) a health care professional, including a physician, nurse, dentist, pharmacist and psychologist;

(b) a teacher, person appointed to a position designated by a board of education as requiring an early childhood educator, school principal, social worker, family counsellor, youth and recreation worker, and operator or employee of a child care

centre or home child care agency or provider of licensed child care within the meaning of the *Child Care and Early Years Act, 2014*;

(b.1) a religious official, including a priest, a rabbi and a member of the clergy;

(b.2) a mediator and an arbitrator;

(c) a peace officer and a coroner;

(d) a solicitor; and

(e) a service provider and an employee of a service provider. 1999, c. 2, s. 22 (3); 2006, c. 1, s. 2; 2010, c. 10, s. 23; 2014, c. 11, Sched. 6, s. 2 (1).

Same

(6) In clause (5) (b),

"youth and recreation worker" does not include a volunteer. 1999, c. 2, s. 22 (3).

Same

(6.1) A director, officer or employee of a corporation who authorizes, permits or concurs in a contravention of an offence under subsection (4) by an employee of the corporation is guilty of an offence. 1999, c. 2, s. 22 (3).

Same

(6.2) A person convicted of an offence under subsection (4) or (6.1) is liable to a fine of not more than $1,000. 1999, c. 2, s. 22 (3).

Section overrides privilege

(7) This section applies although the information reported may be confidential or privileged, and no action for making the report shall be instituted against a person who acts in accordance with this section unless the person acts maliciously or without reasonable grounds for the suspicion. R.S.O. 1990, c. C.11, s. 72 (7); 1999, c. 2, s. 22 (4).

Exception: solicitor client privilege

(8) Nothing in this section abrogates any privilege that may exist between a solicitor and his or her client. R.S.O. 1990, c. C.11, s. 72 (8).

Conflict

(9) This section prevails despite anything in the *Personal Health Information Protection Act, 2004*. 2004, c. 3, Sched. A, s. 78 (2).

Duty of society

72.1 (1) A society that obtains information that a child in its care and custody is or may be suffering or may have suffered abuse shall forthwith report the information to a Director. 1999, c. 2, s. 23 (1).

Definition

(2) In this section and sections 73 and 75,

"to suffer abuse", when used in reference to a child, means to be in need of protection within the meaning of clause 37 (2) (a), (c), (e), (f), (f.1) or (h). 1999, c. 2, s. 23 (1).

Section Amendments with date in force (d/m/y)

Duty to report child's death

72.2 A person or society that obtains information that a child has died shall report the information to a coroner if,

(a) a court made an order under this Act denying access to the child by a parent of the child or making the access subject to supervision;

(b) on the application of a society, a court varied the order to grant the access or to make it no longer subject to supervision; and

(c) the child subsequently died as a result of a criminal act committed by a parent or family member who had custody or charge of the child at the time of the act. 2006, c. 24, s. 1.

Section Amendments with date in force (d/m/y)

REVIEW TEAMS

Review team

73 (1) In this section,

"review team" means a team established by a society under subsection (2).

Same

(2) Every society shall establish a review team that includes,

(a) persons who are professionally qualified to perform medical, psychological, developmental, educational or social assessments; and

(b) at least one legally qualified medical practitioner.

Chair

(3) The members of a review team shall choose a chair from among themselves.

Duty of team

(4) Whenever a society refers the case of a child who may be suffering or may have suffered abuse to its review team, the review team or a panel of at least three of its members, designated by the chair, shall,

(a) review the case; and

(b) recommend to the society how the child may be protected.

Disclosure to team permitted

(5) Despite the provisions of any other Act, a person may disclose to a review team or to any of its members information reasonably required for a review under subsection (4).

Subsection overrides privilege

(6) Subsection (5) applies although the information disclosed may be confidential or privileged and no action for disclosing the information shall be instituted against a person who acts in accordance with subsection (5), unless the person acts maliciously or without reasonable grounds.

Where child not to be returned without review or hearing

(7) Where a society with a review team has information that a child placed in its care under subsection 51 (2) (temporary care and custody) or subsection 57 (1) (order where child in need of protection) may have suffered abuse, the society shall not return the child to the care of the person who had charge of the child at the time of the possible abuse unless,

(a) the society has,

(i) referred the case to its review team, and

(ii) obtained and considered the review team's recommendations; or

(b) the court has terminated the order placing the child in the society's care. R.S.O. 1990, c. C.11, s. 73.

COURT-ORDERED ACCESS TO RECORDS

Record

74 (1) In this section and sections 74.1 and 74.2,

"record" means recorded information, regardless of physical form or characteristics; ("dossier")

"record of personal health information" has the same meaning as in the *Mental Health Act*. ("dossier de renseignements personnels sur la santé") 1999, c. 2, s. 24 (1); 2004, c. 3, Sched. A, s. 78 (3).

Motion or application, production of record

(2) A Director or a society may at any time make a motion or an application for an order under subsection (3) or (3.1) for the production of a record or part of a record. 1999, c. 2, s. 24 (1).

Order

(3) Where the court is satisfied that a record or part of a record that is the subject of a motion referred to in subsection (2) contains information that may be relevant to a proceeding under this Part and that the person in possession or control of the record has refused to permit a Director or the society to inspect it, the court may order that the person in possession or control of the record produce it or a specified part of it for inspection and copying by the Director, by the society or by the court. 1999, c. 2, s. 24 (1).

Same

(3.1) Where the court is satisfied that a record or part of a record that is the subject of an application referred to in subsection (2) may be relevant to assessing compliance with one of the following and that the person in possession or control of the record has refused to permit a Director or the society to inspect it, the court may order that the person in possession or control of the record produce it or a specified part of it for inspection and copying by the Director, by the society or by the court:

1. An order under clause 51 (2) (b) or (c) that is subject to supervision.
2. An order under clause 51 (2) (c) or (d) with respect to access.
3. A supervision order under section 57.
4. An access order under section 58.
5. An order with respect to access or supervision on an application under section 64 or 65.1.

5.1 A custody order under section 65.2.

6. A restraining order under section 80. 1999, c. 2, s. 24 (1); 2006, c. 5, s. 29.

Court may examine record

(4) In considering whether to make an order under subsection (3) or (3.1), the court may examine the record. R.S.O. 1990, c. C.11, s. 74 (4); 1999, c. 2, s. 24 (2).

Information confidential

(5) No person who obtains information by means of an order made under subsection (3) or (3.1) shall disclose the information except,

(a) as specified in the order; and

(b) in testimony in a proceeding under this Part. R.S.O. 1990, c. C.11, s. 74 (5); 1999, c. 2, s. 24 (3).

Conflict

(5.1) Subsection (5) prevails despite anything in the *Personal Health Information Protection Act, 2004*. 2004, c. 3, Sched. A, s. 78 (4).

Application: solicitor client privilege excepted

(6) Subject to subsection (7), this section applies despite any other Act, but nothing in this section abrogates any privilege that may exist between a solicitor and his or her client. R.S.O. 1990, c. C.11, s. 74 (6).

Matters to be considered by court

(7) Where a motion or an application under subsection (2) concerns a record of personal health information, subsection 35 (6) (attending physician's statement, hearing) of the *Mental Health Act* applies and the court shall give equal consideration to,

(a) the matters to be considered under subsection 35 (7) of that Act; and

(b) the need to protect the child. 1999, c. 2, s. 24 (4); 2004, c. 3, Sched. A, s. 78 (5).

Same

(8) Where a motion or an application under subsection (2) concerns a record that is a record of a mental disorder within the meaning of section 183, that section applies and the court shall give equal consideration to,

(a) the matters to be considered under subsection 183 (6); and

(b) the need to protect the child. 1999, c. 2, s. 24 (4).

Section Amendments with date in force (d/m/y)

Warrant for access to record

74.1 (1) The court or a justice of the peace may issue a warrant for access to a record or a specified part of it if the court or justice of the peace is satisfied on the basis of information on oath from a Director or a person designated by a society that there are reasonable grounds to believe that the record or part of the record is relevant to investigate an allegation that a child is or may be in need of protection. 1999, c. 2, s. 25.

Authority conferred by warrant

(2) The warrant authorizes the Director or the person designated by the society to,

(a) inspect the record specified in the warrant during normal business hours or during the hours specified in the warrant;

(b) make copies from the record in any manner that does not damage the record; and

(c) remove the record for the purpose of making copies. 1999, c. 2, s. 25.

Return of record

(3) A person who removes a record under clause (2) (c) shall promptly return it after copying it. 1999, c. 2, s. 25.

Admissibility of copies

(4) A copy of a record that is the subject of a warrant under this section and that is certified as being a true copy of the original by the person who made the copy is admissible in evidence to the same extent as and has the same evidentiary value as the record. 1999, c. 2, s. 25.

Duration of warrant

(5) The warrant is valid for seven days. 1999, c. 2, s. 25.

Execution

(6) The Director or the person designated by the society may call on a peace officer for assistance in executing the warrant. 1999, c. 2, s. 25.

Solicitor-client privilege

(7) This section applies despite any other Act, but nothing in this section abrogates any privilege that may exist between a solicitor and his or her client. 1999, c. 2, s. 25.

Matters to be considered

(8) If a warrant issued under this section concerns a record of personal health information and the warrant is challenged under subsection 35 (6) (attending physician's statement, hearing) of the *Mental Health Act*, equal consideration shall be given to,

(a) the matters set out in subsection 35 (7) of that Act; and

(b) the need to protect the child. 1999, c. 2, s. 25; 2004, c. 3, Sched. A, s. 78 (6).

Same

(9) If a warrant issued under this section concerns a record of a mental disorder within the meaning of section 183 and the warrant is challenged under section 183, equal consideration shall be given to,

(a) the matters set out in subsection 183 (6); and

(b) the need to protect the child. 1999, c. 2, s. 25.

Section Amendments with date in force (d/m/y)

Telewarrant

74.2 (1) Where a Director or a person designated by a society believes that there are reasonable grounds for the issuance of a warrant under section 74.1 and that it would be impracticable to appear personally before the court or a justice of the peace to make application for a warrant in accordance with section 74.1, the Director or person designated by the society may submit an information on oath by telephone or other means of telecommunication to a justice designated for the purpose by the Chief Justice of the Ontario Court of Justice.

Same

(2) The information shall,

(a) include a statement of the grounds to believe that the record or part of the record is relevant to investigate an allegation that a child is or may be in need of protection; and

(b) set out the circumstances that make it impracticable for the Director or person designated by the society to appear personally before a court or justice of the peace.

Warrant to be issued

(3) The justice may issue a warrant for access to the record or the specified part of it if the justice is satisfied that the application discloses,

(a) reasonable grounds to believe that the record or the part of a record is relevant to investigate an allegation that a child is or may be in need of protection; and

(b) reasonable grounds to dispense with personal appearance for the purpose of an application under section 74.1.

Validity of warrant

(4) A warrant issued under this section is not subject to challenge by reason only that there were not reasonable grounds to dispense with personal appearance for the purpose of an application under section 74.1.

Application of provisions

(5) Subsections 74.1 (2) to (9) apply with necessary modifications with respect to a warrant issued under this section.

Definition

(6) In this section,

"justice" means justice of the peace, a judge of the Ontario Court of Justice or a judge of the Family Court of the Superior Court of Justice. 1999, c. 2, s. 26.

Section Amendments with date in force (d/m/y)

CHILD ABUSE REGISTER

Register

75 (1) In this section and in section 76,

"Director" means the person appointed under subsection (2); ("directeur")

"register" means the register maintained under subsection (5); ("registre")

"registered person" means a person identified in the register, but does not include,

(a) a person who reports to a society under subsection 72 (2) or (3) and is not the subject of the report, or

(b) the child who is the subject of a report. ("personne inscrite") R.S.O. 1990, c. C. 11, s. 75 (1).

Director

(2) The Minister may appoint an employee of the Ministry as Director for the purposes of this section. R.S.O. 1990, c. C. 11, s. 75 (2).

Duty of society

(3) A society that receives a report under section 72 that a child, including a child in the society's care, is or may be suffering or may have suffered abuse shall forthwith verify the reported information, or ensure that the information is verified by another society, in the manner determined by the Director, and if the information is verified, the society that verified it shall forthwith report it to the Director in the prescribed form. R.S.O. 1990, c. C. 11, s. 75 (3); 2009, c. 33, Sched. 7, s. 1 (3).

Protection from liability

(4) No action or other proceeding for damages shall be instituted against an officer or employee of a society, acting in good faith, for an act done in the execution or intended execution of the duty imposed on the society by subsection (3) or for an alleged neglect or default of that duty. R.S.O. 1990, c. C. 11, s. 75 (4).

Child abuse register

(5) The Director shall maintain a register in the manner prescribed by the regulations for the purpose of recording information reported to the Director under subsection (3), but the register shall not contain information that has the effect of identifying a person who reports to a society under subsection 72 (2) or (3) and is not the subject of the report. R.S.O. 1990, c. C. 11, s. 75 (5).

Register confidential

(6) Despite any other Act, no person shall inspect, remove, alter or permit the inspection, removal or alteration of information maintained in the register, or disclose or permit the disclosure of information that the person obtained from the register, except as this section authorizes. R.S.O. 1990, c. C. 11, s. 75 (6).

Coroner's inquest, etc.

(7) A person who is,

(a) a coroner, or a legally qualified medical practitioner or peace officer authorized in writing by a coroner, acting in connection with an investigation or inquest under the *Coroners Act*; or

(b) the Children's Lawyer or the Children's Lawyer's authorized agent,

may inspect, remove and disclose information in the register in accordance with his or her authority. R.S.O. 1990, c. C. 11, s. 75 (7); 1994, c. 27, s. 43 (2).

Minister or Director may permit access to register

(8) The Minister or the Director may permit,

(a) a person who is employed by,

(i) the Ministry,

(ii) a society, or

(iii) a recognized child protection agency outside Ontario; or

(b) a person who is providing or proposes to provide counselling or treatment to a registered person,

to inspect and remove information in the register and to disclose the information to a person referred to in subsection (7) or to another person referred to in this subsection, subject to such terms and conditions as the Director may impose. R.S.O. 1990, c. C.11, s. 75 (8).

Director may disclose information

(9) The Minister or the Director may disclose information in the register to a person referred to in subsection (7) or (8). R.S.O. 1990, c. C.11, s. 75 (9).

Research

(10) A person who is engaged in research may, with the Director's written approval, inspect and use the information in the register, but shall not,

(a) use or communicate the information for any purpose except research, academic pursuits or the compilation of statistical data; or

(b) communicate any information that may have the effect of identifying a person named in the register. R.S.O. 1990, c. C.11, s. 75 (10).

Registered person

(11) A child, a registered person or the child's or registered person's solicitor or agent may inspect only the information in the register that refers to the child or registered person. R.S.O. 1990, c. C.11, s. 75 (11).

Physician

(12) A legally qualified medical practitioner may, with the Director's written approval, inspect the information in the register that is specified by the Director. R.S.O. 1990, c. C.11, s. 75 (12).

Amendment of register

(13) The Director or an employee of the Ministry acting under the Director's authority,

(a) shall remove a name from or otherwise amend the register where the regulations require the removal or amendment; and

(b) may amend the register to correct an error. R.S.O. 1990, c. C.11, s. 75 (13).

Register inadmissible: exceptions

(14) The register shall not be admitted into evidence in a proceeding except,

(a) to prove compliance or non-compliance with this section;

(b) in a hearing or appeal under section 76;

(c) in a proceeding under the *Coroners Act*; or

(d) in a proceeding referred to in section 81 (recovery on child's behalf). R.S.O. 1990, c. C.11, s. 75 (14).

Section Amendments with date in force (d/m/y)

Hearing re registered person

76 (1) In this section,

"hearing" means a hearing held under clause (4) (b). R.S.O. 1990, c. C.11, s. 76 (1).

Notice to registered person

(2) Where an entry is made in the register, the Director shall forthwith give written notice to each registered person referred to in the entry indicating that,

(a) the person is identified in the register;

(b) the person or the person's solicitor or agent is entitled to inspect the information in the register that refers to or identifies the person; and

(c) the person is entitled to request that the Director remove the person's name from or otherwise amend the register. R.S.O. 1990, c. C.11, s. 76 (2).

Request to amend register

(3) A registered person who receives notice under subsection (2) may request that the Director remove the person's name from or otherwise amend the register. R.S.O. 1990, c. C.11, s. 76 (3).

Director's response

(4) On receiving a request under subsection (3), the Director may,

(a) grant the request; or

(b) hold a hearing, on ten days written notice to the parties, to determine whether to grant or refuse the request. R.S.O. 1990, c. C.11, s. 76 (4).

Delegation

(5) The Director may authorize another person to hold a hearing and exercise the Director's powers and duties under subsection (8). R.S.O. 1990, c. C.11, s. 76 (5).

Procedure

(6) The *Statutory Powers Procedure Act* applies to a hearing and a hearing shall be conducted in accordance with the prescribed practices and procedures. R.S.O. 1990, c. C.11, s. 76 (6).

Hearing

(7) The parties to a hearing are,

(a) the registered person;

(b) the society that verified the information referring to or identifying the registered person; and

(c) any other person specified by the Director. R.S.O. 1990, c. C.11, s. 76 (7).

Director's decision

(8) Where the Director determines, after holding a hearing, that the information in the register with respect to a registered person is in error or should not be in the register, the Director shall remove the registered person's name from or otherwise amend the register, and may order that the society's records be amended to reflect the Director's decision. R.S.O. 1990, c. C.11, s. 76 (8).

Appeal to Divisional Court

(9) A party to a hearing may appeal the Director's decision to the Divisional Court. R.S.O. 1990, c. C.11, s. 76 (9).

Hearing private

(10) A hearing or appeal under this section shall be held in the absence of the public and no media representative shall be permitted to attend. R.S.O. 1990, c. C.11, s. 76 (10).

Publication

(11) No person shall publish or make public information that has the effect of identifying a witness at or a participant in a hearing, or a party to a hearing other than a society. R.S.O. 1990, c. C.11, s. 76 (11).

Record inadmissible: exception

(12) The record of a hearing or appeal under this section shall not be admitted into evidence in any other proceeding except a proceeding under clause 85 (1) (d) (confidentiality of register) or clause 85 (1) (e) (amendment of society's records). R.S.O. 1990, c. C.11, s. 76 (12).

Section Amendments with date in force (d/m/y)

POWERS OF DIRECTOR

Director's power to transfer

77 (1) A Director may direct, in the best interests of a child in the care or supervision of a society, that the child,

(a) be transferred to the care or supervision of another society; or

(b) be transferred from one placement to another placement designated by the Director.

Criteria

(2) In determining whether to direct a transfer under clause (1) (b), the Director shall take into account,

(a) the length of time the child has spent in the existing placement;

(b) the views of the foster parents; and

(c) the views and preferences of the child, where they are reasonably ascertainable. R.S.O. 1990, c. C.11, s. 77.

HOMEMAKERS

Homemaker

78 (1) In this section,

"homemaker" means a person who is approved by a Director or local director for the purposes of this section.

Homemaker may remain on premises

(2) Where it appears to a person entering premises under section 40 or 44 that,

(a) a child who in the person's opinion is unable to care for himself or herself has been left on the premises without competent care or supervision; and

(b) no person having charge of the child is available or able to consent to the placement of a homemaker on the premises,

the person may, instead of taking the child to a place of safety,

(c) remain on the premises; or

(d) arrange with a society for the placement of a homemaker on the premises.

Homemaker's authority

(3) A homemaker who remains or is placed on premises under subsection (2) may enter and live there, carry on normal housekeeping activities that are reasonably necessary for the care of any child on the premises and exercise reasonable control and discipline over any such child.

Protection from personal liability

(4) No action shall be instituted against a homemaker who remains or is placed on premises under subsection (2) for,

(a) entering and living on the premises;

(b) anything done or omitted in connection with normal housekeeping activities on the premises;

(c) providing goods and services reasonably necessary for the care of any child on the premises; or

(d) the exercise of reasonable control and discipline over any child on the premises,

so long as the homemaker acts in good faith with reasonable care in the circumstances.

Notice to person having charge of child

(5) Where a homemaker remains or is placed on premises under subsection (2), the society shall forthwith notify or make reasonable efforts to notify the person last having charge of the child that a homemaker has been placed on the premises.

Court order, etc.

(6) Where a child with whom a homemaker has been placed under subsection (2),

(a) is found not to be in need of protection, the homemaker shall leave the premises; or

(b) is found to be in need of protection, the court may authorize the homemaker to remain on the premises until,

(i) a specified day not more than thirty days from the date of the order, or

(ii) a person who is entitled to custody of the child returns to care for the child,

whichever is sooner.

Extension

(7) Where no person returns to care for the child before the day specified in an order under clause (6) (b), the court may,

(a) extend the order; or

(b) hold a further hearing under section 47 and make an order under section 57. R.S.O. 1990, c. C.11, s. 78.

OFFENCES, RESTRAINING ORDERS, RECOVERY ON CHILD'S BEHALF

Abuse, failure to provide for reasonable care, etc.

Definition

79 (1) In this section,

"abuse" means a state or condition of being physically harmed, sexually molested or sexually exploited.

Child abuse

(2) No person having charge of a child shall,

(a) inflict abuse on the child; or

(b) by failing to care and provide for or supervise and protect the child adequately,

(i) permit the child to suffer abuse, or

(ii) permit the child to suffer from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development.

Leaving child unattended

(3) No person having charge of a child less than sixteen years of age shall leave the child without making provision for his or her supervision and care that is reasonable in the circumstances.

Reverse onus

(4) Where a person is charged with contravening subsection (3) and the child is less than ten years of age, the onus of establishing that the person made provision for the child's supervision and care that was reasonable in the circumstances rests with the person.

Allowing child to loiter, etc.

(5) No parent of a child less than sixteen years of age shall permit the child to,

(a) loiter in a public place between the hours of midnight and 6 a.m.; or

(b) be in a place of public entertainment between the hours of midnight and 6 a.m., unless the parent accompanies the child or authorizes a specified individual eighteen years of age or older to accompany the child.

Police may take child home or to place of safety

(6) Where a child who is actually or apparently less than sixteen years of age is in a place to which the public has access between the hours of midnight and 6 a.m. and is not accompanied by a person described in clause (5) (b), a peace officer may apprehend the child without a warrant and proceed as if the child had been apprehended under subsection 42 (1).

Child protection hearing

(7) The court may, in connection with a case arising under subsection (2), (3) or (5), proceed under this Part as if an application had been made under subsection 40 (1) (child protection proceeding) in respect of the child. R.S.O. 1990, c. C.11, s. 79.

Restraining order

80 (1) Instead of making an order under subsection 57 (1) or section 65.2 or in addition to making a temporary order under subsection 51 (2) or an order under subsection 57 (1) or section 65.2, the court may make one or more of the following orders in the child's best interests:

1. An order restraining or prohibiting a person's access to or contact with the child, and may include in the order such directions as the court considers appropriate for implementing the order and protecting the child.
2. An order restraining or prohibiting a person's contact with the person who has lawful custody of the child following a temporary order under subsection 51 (2) or an order under subsection 57 (1) or clause 65.2 (1) (a) or (b). 2006, c. 5, s. 30 (1).

Idem: notice

(2) An order shall not be made under subsection (1) unless notice of the proceeding has been served personally on the person to be named in the order. R.S.O. 1990, c. C.11, s. 80 (2).

Duration of the order

(3) An order made under subsection (1) shall continue in force for such period as the court considers in the best interests of the child and,

(a) if the order is made in addition to a temporary order under subsection 51 (2) or an order made under subsection 57 (1) or clause 65.2 (1) (a), (b) or (c), the order may provide that it continues in force, unless it is varied, extended or terminated by the court, as long as the temporary order under subsection 51 (2) or the order under subsection 57 (1) or clause 65.2 (1) (a), (b) or (c), as the case may be, remains in force; or

(b) if the order is made instead of an order under subsection 57 (1) or clause 65.2 (1) (a), (b) or (c) or if the order is made in addition to an order under clause 65.2 (1) (d), the order may provide that it continues in force until it is varied or terminated by the court. 2006, c. 5, s. 30 (2).

Extension, variation and termination

(4) An application for the extension, variation or termination of an order made under subsection (1) may be made by,

(a) the person who is the subject of the order;

(b) the child;

(c) the person having charge of the child;

(d) a society;

(e) a Director; or

(f) where the child is an Indian or a native person, a representative chosen by the child's band or native community. R.S.O. 1990, c. C.11, s. 80 (4).

Idem

(5) Where an application is made under subsection (4), the court may, in the child's best interests,

(a) extend the order for such period as the court considers to be in the best interests of the child, in the case of an order described in clause (3) (a); or

(b) vary or terminate the order. R.S.O. 1990, c. C.11, s. 80 (5); 2006, c. 5, s. 30 (3).

Child in society's care not to be returned while order in force

(6) Where a society has care of a child and an order made under subsection (1) prohibiting a person's access to the child is in force, the society shall not return the child to the care of,

(a) the person named in the order; or

(b) a person who may permit that person to have access to the child. R.S.O. 1990, c. C.11, s. 80 (6).

Section Amendments with date in force (d/m/y)

Recovery because of abuse

81 (1) In this section,

"to suffer abuse", when used in reference to a child, means to be in need of protection within the meaning of clause 37 (2) (a), (c), (e), (f), (f.1) or (h). R.S.O. 1990, c. C.11, s. 81 (1); 1999, c. 2, s. 29.

Recovery on child's behalf

(2) When the Children's Lawyer is of the opinion that a child has a cause of action or other claim because the child has suffered abuse, the Children's Lawyer may, if he or she considers it to be in the child's best interests, institute and conduct proceedings on the child's behalf for the recovery of damages or other compensation. R.S.O. 1990, c. C.11, s. 81 (2); 1994, c. 27, s. 43 (2).

Idem: society

(3) Where a child is in a society's care and custody, subsection (2) also applies to the society with necessary modifications. R.S.O. 1990, c. C.11, s. 81 (3).

Section Amendments with date in force (d/m/y)

Prohibition

82 No person shall place a child in the care and custody of a society, and no society shall take a child into its care and custody, except,

(a) in accordance with this Part; or

(b) under an agreement made under subsection 29 (1) or 30 (1) (temporary care or special needs agreement) of Part II (Voluntary Access to Services). R.S.O. 1990, c. C.11, s. 82.

Offence

83 If a child is the subject of an order for society wardship under subsection 57 (1) or an order for society supervision or Crown wardship under that subsection or subsection 65.2 (1), no person shall,

(a) induce or attempt to induce the child to leave the care of the person with whom the child is placed by the court or by the society, as the case may be;

(b) detain or harbour the child after the person or society referred to in clause (a) requires that the child be returned;

(c) interfere with the child or remove or attempt to remove the child from any place; or

(d) for the purpose of interfering with the child, visit or communicate with the person referred to in clause (a). R.S.O. 1990, c. C.11, s. 83; 2006, c. 5, s. 31.

Section Amendments with date in force (d/m/y)

Offence

84 No person shall,

(a) knowingly give false information in an application under this Part; or

(b) obstruct, interfere with or attempt to obstruct or interfere with a child protection worker or a peace officer who is acting under section 40, 41, 42, 43 or 44. R.S.O. 1990, c. C.11, s. 84.

Offences

85 (1) A person who contravenes,

(a) an order for access made under subsection 58 (1);

(b) REPEALED: 1999, c. 2, s. 30 (1).

(c) subsection 74 (5) (disclosure of information obtained by court order);

(d) subsection 75 (6) or (10) (confidentiality of child abuse register);

(e) an order made under subsection 76 (8) (amendment of society's records);

(f) subsection 79 (3) or (5) (leaving child unattended, etc.);

(g) a restraining order made under subsection 80 (1);

(h) section 82 (unauthorized placement);

(i) any provision of section 83 (interference with child, etc.); or

(j) clause 84 (a) or (b),

and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation is guilty of an offence and on conviction is liable to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or to both. R.S.O. 1990, c. C.11, s. 85 (1); 1999, c. 2, s. 30 (1, 4).

Idem

(2) A person who contravenes subsection 79 (2) (child abuse), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation is guilty of an offence and on conviction is liable to a fine of not more than $2,000 or to imprisonment for a term of not more than two years, or to both. R.S.O. 1990, c. C.11, s. 85 (2).

Idem

(3) A person who contravenes subsection 45 (8) or 76 (11) (publication of identifying information) or an order prohibiting publication made under clause 45 (7) (c) or subsection 45 (9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than three years, or to both. R.S.O. 1990, c. C.11, s. 85 (3).

Section Amendments with date in force (d/m/y)

CHILD'S RELIGIOUS FAITH

How child's religious faith determined

86 (1) For the purposes of this section, a child shall be deemed to have the religious faith agreed upon by the child's parent, but where there is no agreement or the court cannot readily determine what the religious faith agreed upon is or whether any religious faith is agreed upon, the court may decide what the child's religious faith is, if any, on the basis of the child's circumstances.

Child's wishes to be consulted

(2) The court shall consider the child's views and wishes, if they can be reasonably ascertained, in determining what the child's religious faith is, if any.

Religious faith of child

(3) A Protestant child shall not be committed under this Part to the care of a Roman Catholic society or institution and a Roman Catholic child shall not be committed under this Part to a Protestant society or institution, and a Protestant child shall not be placed in a foster home with a Roman Catholic family and a Roman Catholic child shall not be placed in a foster home with a Protestant family, and, where a child committed under this Part is other than Protestant or Roman Catholic, the child shall be placed where practicable with a family of his or her own religious faith, if any.

Where only one society

(4) Subsection (3) does not apply to the commitment of a child to the care of a society in a municipality in which there is only one society.

Director's discretion re foster placement

(5) Where a society,

(a) is unable to place a child in a suitable foster home within a reasonable time because of the operation of subsection (3); and

(b) would be able to place the child in a suitable foster home but for the operation of subsection (3),

the society may apply to a Director who may order that subsection (3) does not apply to the child in respect of the placement. R.S.O. 1990, c. C.11, s. 86.

INJUNCTIONS

Injunction

87 (1) The Superior Court of Justice may grant an injunction to restrain a person from contravening section 83, on the society's application. R.S.O. 1990, c. C.11, s. 87 (1); 1999, c. 2, s. 35.

Variation, etc.

(2) The court may vary or terminate an order made under subsection (1), on any person's application. R.S.O. 1990, c. C.11, s. 87 (2).

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

MOTION TO BE MADE PROMPTLY

21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs. R.R.O. 1990, Reg. 194, r. 21.02.

FACTUMS REQUIRED

21.03 (1) On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 15.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 5.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 5.

(4) REVOKED: O. Reg. 394/09, s. 5.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

FACTUM OF THE MOVING PLAINTIFF
(Motion for Certification returnable October 11-12, 2017)

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