Court File No. DC1212/20

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

JUSTICE FOR CHILDREN AND YOUTH
and
A.G. (THE CHILD)

Appellants

and

J.G., L.L. and CHILDREN AND FAMILY SERVICES OF YORK REGION

Respondents

APPELLANT'S FACTUM

Samira Ahmed & Mary Birdsell
Justice for Children and Youth
1500 – 55 University Avenue
Toronto, ON M5J 2H7

Tel: 416-920-1633
Fax: 416-920-5855
ahmeds@lao.on.ca
birdsem@lao.on.ca

Lawyers for A.G., the child (Appellant)

AND TO: **Allison Moonsie-Mohan**
Children and Family Services for York Region
16915 Leslie Street
Newmarket, ON L3Y 4X7

Tel: 905-895-2318
Fax: 905-895-9047
alisonm@yorkcas.org

Lawyer for the Applicant, Children and Family Services of York Region (Respondent on Appeal)

AND TO: **Deborah Perkins-Leitman and Martha McCarthy**
Martha McCarthy & Company LLP
146 Davenport Road
Toronto, ON M5R 1J2

Tel: 416-862-6226
Fax: 416-862-9001
deborah@mccarthyco.ca
martha@mccarthyco.ca

Lawyers for the Respondent J.G. (Respondent on Appeal)

AND TO: **Lynzi LeMaire**
18 Rainsford Road
Markham, ON L3P 6J9

Tel: 416-881-2901
lynzim67@gmail.com

Respondent L.L. (Respondent on Appeal – unrepresented)

Court File No. DC1212/20

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

JUSTICE FOR CHILDREN AND YOUTH
and
A.G. (THE CHILD)

Appellants

and

J.G., L.L. and CHILDREN AND FAMILY SERVICES OF YORK REGION

Respondents

INDEX

PART 1 - IDENTIFICATION 1
PART 2 - OVERVIEW 1
PART 3 - FACTS 2
History of JFCY's Involvement with AG 3
Issue Leading Up to Decision in Question 4
Proceedings leading to the Decision on Appeal 5
PART 4 - ISSUES 9
A. Justice Jarvis' Order is Final and Leave is Not Required 9
a. An appeal to the Divisional Court is provided by the *Courts of Justice Act* ... 9
b. The Order is final 9
c. In the alternative, the test for leave to appeal is met 11
B. Standard of Review 12

C. The Court Below Erred in Interfering with AG and his Counsel's Solicitor-Client Relationship and AG's Access to Legal Services 13

a. The right to access legal services is a right of everyone and fundamental to the proper administration of justice.....13

b. Courts have no jurisdiction over the solicitor-client relationship 14

c. Children have an independent right to access legal services.....16

d. The Court's authorization is not required for AG to access legal services.....17

e. Parent/CAS' Permission to Access Legal Services is not Required 19

f. AG has capacity to retain and instruct legal counsel 20

g. Access to legal services is consistent with the best interests of the child and the protection of children 21

h. There was no legal or factual basis on which to restrain AG's Counsel.....26

i. Section 137 of the CYFSA 26

ii. Rule 40 of the Rules of Civil Procedure 27

iii. Parens Patriae.....28

D. The Hearing was Procedurally Unfair 28

i. Inadequate Notice 29

ii. Refusal of Clear Request for an Adjournment 29

iii. Counsel had no Opportunity to Respond.....29

iv. Inadequate Reasons 29

PART 5 - ORDER SOUGHT 30

PART 6 - TIME ESTIMATE.....30

PART 7 - LIST OF AUTHORITIES.....31

PART 8 - LEGISLATION.....36

PART 1 – IDENTIFICATION

1. This is an Appeal of a restraining order[1] of final effect (the Order) of a Justice of the Unified Family Court, made in the context of child protection proceedings under *Child and Youth Family Services Act* ("*CYFSA*")[2]. The Order restrained Justice for Children and Youth ("JFCY"), and Ms. Ahmed (collectively "AG's Counsel") from having any direct or indirect contact with their 14 ½ year old client, AG. AG is not a party to the underlying *CYFSA* proceeding, although he is the subject.[3] The Father, Mother, and the Children and Family Services of York Region, (the Society) are Respondents to this Appeal. The Order was made in response to a motion brought by the Father, on less than 18 hours notice. The Order was issued in spite of the clear objection of AG. AG's Counsel was retained by AG to provide legal services *separate and independent* from the court's proceedings. The Order improperly violates AG's independent legal rights.

PART 2 – OVERVIEW

2. The impugned Order inappropriately interferes with AG's solicitor-client relationship without any evidentiary basis; violates AG's fundamental rights, including his right to access legal services without the consent of any third party, his rights under the *CYFSA*, and the United Nations *Convention on the Rights of the Child* (*UNCRC*)[4]; and, was made in a manner inconsistent with the right to a fair hearing. It is consistent with, and essential for the best interests of a child, for children to have access to legal services irrespective of immaturity or

[1] Term 3 of Order of Jarvis, J., dated January 3, 2020, pg. 32, Tab 4 of Appellant's Appeal Book [Order], Note: Term 3 is explained in s.1(a) of Schedule A
[2] *Child, Youth and Family Services Act*, SO 2017, c 14, Schedule 1 [*CYFSA*]
[3] Endorsement of Reasons and Order of Jarvis, J. dated December 20, 2019, pg. 37, Tab 5 of the Appellant's Appeal Book *[Reasons, Jarvis, J.]*
[4] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, [*UNCRC*]. The UNCRC is incorporated by reference into the *CYFSA*

alienating influences. Children are not property and are entitled to independent legal services. Access to legal services is not a privilege earned by good behaviour or adherence to court orders but rather is an independent right that serves to enhance decision making capacity. Importantly, the issue is not about AG's right to have counsel represent him *in the CYFSA proceeding* (which he has not requested); rather, the Order – without limitation – restrains AG's Counsel *for any purpose*.

PART 3 – FACTS

3. AG is 14 ½ years old, and is the younger of two children of parents JG (Father) and LL (Mother), who have a long history of high conflict family litigation, and of ten child protection "activations".[5] There have been multiple proceedings in which the Mother made allegations of abuse by the Father against her and the two children, and the Father has made allegations that the Mother has alienated the children against him.[6]

4. This child protection matter commenced on December 6, 2017 in response to AG's allegations of sexual abuse by his Father. The Society found AG to be credible but the investigation was inconclusive.[7] The Society's involvement has focussed on the impact of the ongoing parental conflict on AG's well-being.[8]

5. In January of 2018, the Court ordered an interim supervision order whereby AG continued

[5] Children and Family Services for York Region's "Amended Amended" Child Protection Application dated November 8, 2019, at para 2, Tab 14 of the Appellant's Appeal Book; Decision and Reasons of Bennett, J. dated February 7, paras 38, 68-108, 2019, Tab 9 of the Appellant's Appeal Book [*Bennett, J. Decision*]
[6] Decision and Reasons of Fryer J., dated May 6, 2016, Tab 12 of Appeal Book [*Fryer, J. Decision*]; Decision and Reasons of MacPherson, J., dated January 16, Tab 11 of Appeal Book [*MacPherson, J. Decision, January*]; Decision and Reasons of MacPherson, J., dated October 18, 2018, Tab 10 of Appeal Book [*MacPherson, J. Decision, October*]; *Bennett, J. Decision*; and Decision and Reasons of MacPherson, J., dated June 27, 2019, Tab 8 of Appeal Book [*MacPherson, J. Decision, June*]
[7] *Bennett, J. Decision* at paras 110-111
[8] *MacPherson, J. Decision, January* at para 36

to live with his Mother[9], began having access visits with his Father, and participated in reunification therapy.[10] When this did not work, the Court's reunification efforts involved: in February, 2019, AG moving from his Mother's home to his paternal aunt and uncle[11]; and in June, 2019, adding a black out period whereby AG is not to have contact with his Mother, siblings, or maternal relatives.[12] Since August, 2019, AG has been living with his Father.[13]

6. AG is not a party to the child protection litigation. The Court declined to appoint the Office of the Children's Lawyer ("OCL") for AG on three occasions, stating AG was "too impacted by the conflict and potential alienation", "too empowered", "too engaged", and because AG is "not following the recommendations of the CAS, and not following the court order".[14]

History of JFCY's Involvement with AG

7. At the end of July 2019, AG independently sought out and retained the services of legal counsel at JFCY.[15] JFCY is a Specialty Legal Clinic that has been providing legal services *exclusively* to children and youth in Ontario for over 40 years.[16] JFCY is AG's Counsel, not as appointed by any Court, but as retained by AG. JFCY had been previously retained by AG's older brother.[17]

---

[9] From 2010-2017, AG lived with his mother and she was his primary attachment figure. *Fryer, J. Decision*, para 178

[10] *Ibid* at para 53

[11] *Bennett, J. Decision,* at para 216

[12] *MacPherson, J., Decision, June*, at paras 41-47, para 65

[13] Order of McGee, J., dated September 19, 2019, Tab 7 of Appeal Book.

[14] *MacPherson, J. Decision, January*, at para 47; *MacPherson, J., Decision, October*, at paras 37-39 Tab 8 of Appeal Book; *Bennett, J. Decision*, at paras 185-186

[15] Exhibit A to Affidavit of Athena Caldarola, sworn December 20, 2019 [*Caldarola Affidavit*], [*Retainer*], Tab 23 of Appellant's Appeal Book

[16] JFCY is funded by Legal Aid Ontario ("LAO"), and is expert in providing legal services to children, in a solicitor-client relationship, in a broad range of legal subject areas. It represents young people and supports their ability to understand the law, the nature of legal proceedings, and comprehend the administration of justice. JFCY's mandate and expertise is set out in the Affidavit of Anne Irwin, sworn December 20, 2019, at para 4-9, Tab 16 of the Appellant's Appeal Book [*Irwin Affidavit*]

[17] *McPherson, J. Decision, June, at* para 64; December 20, 2019 Transcript, pg. 85, lines 1-32, pg. 86, lines 1-10 [*December 20*]

8. AG's Counsel's solicitor-client relationship has been limited to assisting AG in emergency situations.[18] Each situation was independent from the ongoing proceedings. On July 31, 2019, AG contacted AG's Counsel after having run away from his paternal aunt and uncle's home and been missing for five days. AG's Counsel facilitated AG's safe return based on a promise that he would have ongoing contact with AG's Counsel. AG's Counsel went above and beyond to assist with the AG's safe return.[19] On October 24, 2019, AG contacted AG's Counsel to report his concerns about wanting to kill his Father and sought help to notify the Society.[20] Between and after these situations, AG was either unable or uninterested in accessing assistance from AG's Counsel[21] until December 11, 2019.[22]

Issue Leading Up to Decision in Question:

9. On December 11, AG contacted AG's Counsel, after he had been missing for a day, and indicated that he was unwilling to disclose his whereabouts or to speak to the Society or his Father. AG's Counsel asked questions to try and ascertain whether he was safe and obtained consent to notify all the parties, including York Regional Police Services (YRPS), that he had reached out to his counsel, believed he was safe, and was refusing to speak to anyone.[23]

10. As a safety precaution, AG's Counsel asked AG to maintain daily contact, and on each occasion, asked if he would speak to any of the other parties.[24] The YRPS had ongoing contact

[18] Transcript of Proceeding, December 18, 2019, pg. 4, line 31- pg. 5 line 16, pg. 7, lines 16-24 [*December 18*]
[19] Exhibit D to *Caldarola Affidavit*, pgs. 1-2, Tab 24 of the Appellant's Appeal Book [*Tab 24*]; Exhibit A to Affidavit of Susan A. McDonald, dated December 19, 2019, Tab 25 of the Appellant's Appeal Book; Exhibit Q and R of Affidavit of John Gannage dated December 17, 2019 Tab 26, and Tab 27 of the Appellant's Appeal Book
[20] *Tab 24*, p.342; *December 20*, pg. 29, lines 15-27
[21] *December 20*, pg. 33, lines 21-32, pg. 34, lines 1-6; Exhibit S, Affidavit of John Gannage dated December 17th, 2019, Tab 28 of the Appellant's Appeal Book
[22] *December 20*, pg. 42, lines 5-6, 11-32, pg. 43, lines 1-17
[23] *Tab 24*, pg. 345
[24] *Caldarola Affidavit*, at para 8-16, Tab 15 of the Appellant's Appeal Book

with AG's Counsel, and on December 12, AG spoke to YRPS with AG's Counsel.[25]

Proceedings leading to the Decision on Appeal:

11. On December 17, 2019, at 3:30 pm, the Father short served AG's Counsel with a motion scheduled for the next day, December 18, 2019 at 9:30 AM. The motion, among other things, sought a restraining order preventing AG's Counsel from communicating with AG, which would effectively render the solicitor-client relationship impossible. [26]

12. On December 18, 2019, AG's Counsel requested an adjournment in order to properly respond to the restraining order motion and to focus efforts on securing the return of AG to a place of safety.[27] The Court adjourned the proceedings until Friday, December 20, 2019, with the expectation that AG's counsel would facilitate a meeting between AG and the Society to evaluate AG's safety and well-being.[28] Justice Jarvis repeatedly stated that he would not entertain the restraining order motion:

- "I don't have a difficulty in terms of [JFCY] […] providing independent legal advice to a child".[29]
- "[T]hat causes me some concern given the short period of time since the motion was initiated and made returnable [….] Ms. Ahmed should have counsel or should be given an opportunity to deal with those particular issues".[30]
- "I don't know whether I am prepared to deal with that issue with such a short timeframe involved without having a, a, a more robust record".[31]
- Friday, "wouldn't be to argue paragraphs 2 and 3" [restraining order].[32]
- "My concern between now and Friday, is making sure that the Society and then me is satisfied that [AG is …]'s in a place of safety. [...] If I don't have that degree of satisfaction, I am going to the order you're requesting in paragraph 4 [police powers]".[33]
- "I understand that it may be impossible" [to deliver materials in response to the

[25] *Ibid* at paras 8-10, 18
[26] Notice of Motion by Respondent Father dated December 17, 2019, Tab 13 of the Appellant's Appeal Book
[27] *December 18,* pg. 3, lines 15-30, pg. 22, lines 28-31
[28] *Ibid,* pg. 24, lines 8-16, *December 20*, pg. 17, lines 31-pg. 18, line 7
[29] *Ibid* pg. 6, lines 13-16
[30] *Ibid* pg. 11, lines 26-32 -pg. 12, lines 1-3
[31] *Ibid* pg. 23, lines 1-5
[32] *Ibid* pg. 21, lines 1-6
[33] *Ibid* pg. 22, lines 12-21

motion].[34]

13. On December 19, AG's counsel spent a full day arranging a meeting with the Society, facilitating AG's agreement to go to a place of safety, and then at the Society's request driving AG to York Region – all of which was not concluded until well after 11:00 pm.[35]

14. At the December 20, 2019 hearing, Justice Jarvis stated again that he would not entertain a restraining order motion:

- "[All I was concerned with was] "some degree of satisfaction expressed from the worker that there weren't protection or safety concerns". [36]
- "I don't have a difficulty at this stage in terms of, of [AG] being able to speak to you, although I know that's a prayer for relief that's been requested."[37]
- "Referring to perhaps the allegations or suggestions being made by [the Father] that in some fashion either you or the institution or organization with which you are involved acted in some fashion inappropriately. I am not going to make a finding like that".[38]
- "We're not in a situation right now where we are going to be determining the extent to which there needs to be involvement by Ms. Ahmed's association or exactly what that can provide. I'm not going to make an order that prevents [AG] from speaking to people".[39]

15. Justice Jarvis directed that the focus would be on a practical plan for AG's placement either at a foster placement or returning to his Father's home.[40] The Society asked whether AG could speak to the Court and Justice Jarvis did not address this request.[41] Before the lunch break, Justice Jarvis advised AG's Counsel that she would be permitted limited cross-examination of the Society worker, who would be giving viva voce evidence.[42] However, after the lunch break, Justice Jarvis changed his mind, and indicated the AG's Counsel would not be permitted to

[34] *Ibid* pg. 25, 6-8
[35] *Caldarola Affidavit*, at para 20-24; *December 20*, pg. 4, lines 15-24
[36] *December 20*, pg. 18, lines 4-7
[37] *Ibid* pg. 7, lines 6-9
[38] *Ibid* pg. 7, lines 25-30
[39] *Ibid* pg. 9, lines 3-13
[40] *Ibid* pg. 20, lines 21-24
[41] *Ibid* pg. 2, lines 23-28
[42] *Ibid* pg. 23, lines 25-26

participate.[43] Justice Jarvis refused to hear submissions from AG's Counsel, who sought to participate if the Court were considering any orders against AG or AG's Counsel.[44]

16. Society counsel clarified that the witness was testifying to determine AG's placement.[45] Justice Jarvis agreed, but then stated:

> "Correct. […] I may deal too with what I'm going to do in terms of, of whatever – there may be some tail end aspects to the matter which, for which I will receive submissions of counsel. One of which will be, depending on what my decision is, what contact [AG] should have with, with individuals. I don't know, I haven't decided yet. I want to hear Mr. Kendall's evidence and submissions from counsel".[46]

17. Justice Jarvis then permitted counsel for the Father to ask questions about AG's Counsel.[47]

18. The *viva voce* evidence of Mr. Kendall, the Society worker, provided evidence about AG's concerns about living at his Father's home. AG had thoughts of wanting to hurt or kill his father.[48] AG describes "crazy arguments" and screaming and yelling in the Father's home[49]and that he couldn't take it anymore.[50] One argument led him to attempt to run away on December 2, 2019 and he was returned by police after a few hours.[51] AG is very isolated.[52]

19. AG's Counsel provided affidavit evidence regarding JFCY's expertise[53] and AG's Counsel's assistance in this matter:[54] AG's Counsel responded to a request for legal services from AG; advised and sought instructions; contacted the Society and the police on AG's behalf;

---

[43] *Ibid* pg. 24, lines 3-6
[44] *Ibid* pg. 24, lines 16-32
[45] *Ibid* pg. 25, lines 13-18
[46] *Ibid* pg. 25, lines 19-29
[47] *Ibid* pg. 53, lines 30-32, pg. 54, line 14-32
[48] *Ibid* pg. 32, lines 4-5, 10, 11, 23-24
[49] *Ibid* pg. 43, lines 31-32, pg. 57, lines 16-18
[50] *Ibid* pg. 43, lines 29-32, pg. 44, lines 1-10
[51] *Ibid* pg. 40, 11-32, pg. 41, lines 1-10
[52] *Ibid* pg. 51, lines 22-24, pg. 28, lines 1-5, pg. 38, lines 1-20, pg. 46, lines 12-13, pg. 66, lines 10-11, pg. 16, lines 13-16, pg. 28, 25-32, pg. 29, 1-10
[53] *Irwin Affidavit*
[54] *Caldarola Affidavit*, at para 5-24

and facilitated AG's return to a place of safety. In oral testimony, Mr. Kendall described the myriad ways that AG's Counsel assisted the Society,[55] and stated legal services:

> could possibly be helpful for him to understand this process, to understand what's going on and, and, and what his best interests are. I don't think that he necessarily knows that and I, and I do think it would be beneficial for him[56]

20. At the end of the *viva voce* testimony, Justice Jarvis requested submissions about a restraining order against AG's Counsel. Justice Jarvis refused to accept AG's Counsel's Book of Authorities stating, no one should expect "a well read or well-researched decision" and "there will obviously be further steps taken in this proceeding".[57]

21. Justice Jarvis's Order completely restrained solicitor-client communications rendering it impossible to get instructions and meet the obligations of AG's Counsel's retainer consistent with the *Rules of Professional Conduct*. AG's Counsel raised this issue and Justice Jarvis replied: "It may be a rule of professional conduct but right now I'm saying there's no contact with him […] you need not concern yourself with that". His Honour left the job of explaining his ruling to the Society worker, and stated AG should be told, "his representation by a lawyer […] will be a direct function of his returning to his father's care and continuing to reside there until further order of the court" and stated "he must earn the confidence of the court". [58]

22. The order does not make any mention of an end date or continuation of this motion but is instead, "without prejudice to their bringing a formal notice of motion with respect to whether an order should issue granting them standing in the proceedings and representing [AG]" - AG had never sought to have counsel participate in the proceedings[59], and since no further instructions

---

[55] *December 20*, pg. 29, lines 15-19, pg. 34, lines 7-32, pg. 35, lines 10-18, pg. 41, lines 30-pg. 42, line 6, 13-32, pg. 43, lines 5-17
[56] *Ibid* pg. 53, lines 4-12
[57] *Ibid* pg. 79, lines 5-25
[58] *Reasons, Jarvis, J.*, *supra*, pg. 37, Transcript of Ruling, *December 20*, pg. 4, lines 11-15, Pg. 7, lines 29-32, Pg. 8, lines 1-12 [*Ruling*]
[59] *Reasons, Jarvis, J. Ibid* note 3, Term 3; *December 20*, pg. 17, lines 5-6, pg. 19, lines 14-16, pg. 20, lines 26-27

can be obtained, the effect is a final determination of AG's right to access Counsel.

PART 4 – ISSUES

23. This appeal raises the following issues:

A. Is the Order temporary or final and is leave to appeal to this Honourable Court required?

B. What is the appropriate standard of review?

C. Did Justice Jarvis err in fact and in law by restraining AG's Counsel from communicating with AG and preventing AG from accessing legal services, by

   a. interfering with AG's fundamental right to access legal services;

   b. exceeding his jurisdiction and interfering in AG and his Counsel's solicitor-client relationship;

   c. failing to recognize the independent right of children to access legal services under the *Charter*, *Rules of Professional Conduct*, *United Nations Convention on the Rights of the Child*, legislation, and at common law;

   d. improperly finding that AG's access to legal services is subject to the approval and oversight of the Court;

   e. improperly treating AG's access to legal services as requiring the permission of a parent or CAS;

   f. improperly treating access to legal services as inconsistent with the best interests of the child; and

   g. restraining AG's Counsel without any legal or factual basis?

D. Was the hearing of the motion procedurally unfair and did the Court provide adequate reasons for the Order restraining AG's Counsel?

A. JUSTICE JARVIS' ORDER IS FINAL AND LEAVE IS NOT REQUIRED

a. An appeal to the Divisional Court is provided by the *Courts of Justice Act*

24. An appeal of a final order of a judge of the Unified Family Court lies to the Divisional Court, without leave.[60] An appeal of a temporary order also lies to the Divisional Court, however, leave is required.[61]

b. The Order is final

25. The Order restraining AG's Counsel from communicating with AG is final as it entirely disposes of the question of AG's right to access his counsel. An appeal accordingly lies to the Divisional Court without leave.

26. The relevant test as to whether an order is final or interlocutory is set out *Hendrickson v Kallio*, which held that an order is interlocutory where it does not determine the real matter in dispute between the parties, "but only some matter collateral". An order is interlocutory if the merits of the case remain to be determined.[62]

27. Orders may be treated as final where they finally determine a party's substantive rights. Orders that are seemingly ancillary to the main action have also been treated as final for the purposes of an appeal. If they

> have a terminating effect on an issue or on the exposure of a party, they plainly "dispose of the rights of the parties" and are appropriately treated as final. Where such orders set the stage for a determination on the merits, they do not "dispose of the rights of the

---

[60] *Courts of Justice Act,* 1990, c C43, ss. 6(1)(b), 21.8, 21.9.1 [*CJA*]; *Family Law Rules,* O Reg. 114/9, r. 38(4)(c) [*FLR*]; *Christodoulou v Christodoulou*, 2010 ONCA 93 at para 6-10, 37

[61] *CJA Ibid* s. 19(1)(b)

[62] *Hendrickson v. Kallio*, [1932] 4 DLR 580, pg. 2, [1932] OJ NO 380. **Note:** Often the application of the test, is not straightforward, producing inconsistent and unpredictable results. Given the novelty of the case at bar, case law on this point is largely unhelpful. See: John Sopinka, Mark A Gelowitz & W David Rankin, *The Conduct of an Appeal*, 4th ed (Toronto: LexisNexis, 2018) ["*Conduct of an Appeal*"], § 1.17; Gerard Kennedy, *Hryniak, the 2010 Amendments, and the First Stages of a Culture Shift?: The Evolution of Ontario Civil Procedure in the 2010s,* (Doctorate in Law and Philosophy, York University, 2020) [unpublished], at pgs. 140-141 [*Kennedy*]; *Mancinelli v Royal Bank of Canada*, 2017 ONSC 1526, (Div Ct) at para 2; *Parsons v Ontario*, 2015 ONCA 158, 125 OR (3d) 168 at para 209 (dissenting on this issue)

parties" and are appropriately treated as interlocutory.[63]

28. Here, while the merits of the *CYFSA* proceeding remain outstanding, the restraining Order matter – a stand-alone matter – has been completely determined. Thus, the Order restraining AG's Counsel is appropriately characterized as final, notwithstanding it was described as "interim". Neither AG nor AG's Counsel were parties to, or had any standing in the underlying *CYFSA* application.[64] They were only before the Court as a result of the Father's motion and were only parties to that motion.[65]

29. The Order terminates all communication between AG and AG's Counsel, and as a practical matter renders the retainer and solicitor-client relationship impossible.

30. Though the Order is made "without prejudice" to AG's counsel seeking appointment to participate under a separate motion, the terms of the Order make this impossible, as AG's Counsel cannot get instructions. The Court set no limits, no end date, nor any provision for termination or re-consideration. AG's rights have been entirely disposed of.[66]

31. No further action can be taken about the Order. It is therefore properly characterized as final. Leave to appeal to the Divisional Court is not required.

c. In the alternative, the test for leave to appeal is met

---

[63] *Conduct of an Appeal*, *supra* note 62, § 1.47; *Kennedy*, at pg. 141

[64] *MacPherson, J. Decision, January, at para 47; MacPherson, J., Decision, October, at paras 37-39 Tab 8 of Appeal Book; Bennett, J. Decision, at paras 185-186*

[65] The motion could be considered a separate but related matter, considered together with the application, pursuant to the Court's jurisdiction under section 21.9 of the *CJA*: *King v Mann*, 2020 ONSC 108 at para 1; *CJA, supra*, s. 21.9; Endorsement of Jarvis, J. dated December 18th, 2019 at pg. 42, Tab 6 of the Appellant's Appeal Book [*Jarvis, J., December 18*]

[66] It is not, for example, interim pending a determination on the merits of the *CYFSA* application, particularly as AG and his counsel have no standing in that proceeding. This is not a case of mere disqualification of counsel, which are generally considered to be interlocutory orders - see for example: *Marrocco v John Doe*, 2014 ONSC 5663 at para 8. Justice Jarvis did not simply determine whether AG's Counsel may appear before him on the proceeding at hand; AG's Counsel has never sought appointment as counsel for the child in the proceeding. Rather, the effect of the Order is to finally and irrevocably sever AG and AG's Counsel's ability to continue their solicitor-client relationship for all purposes, both related and unrelated to the proceeding.

14. Alternatively, if the impugned Order is considered interlocutory and leave is required, the test for leave is met in this case. Given the motion for leave is to be determined simultaneously with the substance of the appeal, this Court may consider the totality of the Appellant's argument when assessing the request for leave.[67]

15. The test for leave to appeal is set out in Rule 62.02(4) of the *Rules of Civil Procedure*: leave to appeal shall not be granted unless (a) there is a conflicting decision on the matter and it is desirable that leave to appeal be granted; or (b) there appears to be good reason to doubt the correctness of the order in question, and the proposed appeal involves matters of such importance that leave to appeal should be granted.[68]

16. In order to meet the test of "doubt as to correctness", this Court must be satisfied that the correctness of the Order is open to serious debate.[69] Justice Jarvis's Order improperly grants relief without a legal or factual basis for doing so. The relief is entirely unprecedented, is extraordinarily intrusive, and is contrary to the proper administration of justice. As such, the correctness of the order is open to serious debate.

17. The proposed appeal also meets the second prong of the test under rule 62.02(4), as it involves: a matter of public importance relevant to the development of the law and the administration of justice;[70] and transcends the interests of the parties, thereby requiring resolution by appellate authority.[71] The Order would substantially change the well-established face of childrens' rights to access legal services. The proposed appeal is a matter of significant

---

[67] *FLR* supra note 60, s. 38(3); Note: The Appellant requested that leave to appeal be granted if the court determines the Order is temporary. See the Alternative Argument in the Appellant's Notice of Appeal.
[68] *Rules of Civil Procedure*, RRO 1990, Reg 194, [*RCP*], Rule 62.02
[69] *Ash v. Lloyd's Corp.*, [1992] OJ No 894 at para 2, 8 O.R. (3d) 282. *[Ash]*; H.M.Q. v. Chartis Insurance, 2014 ONSC 6792 at para 16; *Judson v. Mitchele*, 2011 ONSC 6004 at para 15
[70] *Ash* at para 3; *Greslik v. Ontario Legal Aid Plan* (1988), 65 OR (2d) 110 para 7, [1988] OJ No 525 (H Ct J)
[71] *Rankin v. McLeod Young Weir Ltd et.al.* (1986), 57 OR (2d) 569 at para 15, [1986] OJ No 2380 (H Ct J); *Toms v. Agro* (1992), 8 OR (3d) 95 at paras 14-17, [1992] OJ No 398 (Gen Div)

importance to all children and youth seeking to access legal services, and to all lawyers who provide legal services to children and youth. The Order results in a clear injustice and ought to be corrected, regardless of whether the Order is interlocutory or final.

B. STANDARD OF REVIEW

32. The standard review on appeal for a question of law is correctness and for a finding of fact, the standard of review is a palpable and overriding error.[72]

33. While family law decisions ought not to be interfered with lightly[73], the Order was made in error, both legally and factually; and Justice Jarvis exceeded his jurisdiction by restraining Counsel and AG from maintaining their solicitor-client relationship. No deference is due to the lower Court in this matter.

C. THE COURT BELOW ERRED IN INTERFERING WITH AG AND HIS COUNSEL'S SOLICITOR-CLIENT RELATIONSHIP AND AG'S ACCESS TO LEGAL SERVICES

34. AG has an independent right to access legal services. The Court has no jurisdiction to interfere with that right. Justice Jarvis's Order is contrary to the well-established legal principles concerning the foundational importance of legal services, the sacrosanct nature of the solicitor-client relationship, and children's rights to legal assistance under domestic, constitutional, and international law, and is without any evidentiary or legal basis. The Order must be quashed.

a. The right to access legal services is a right of everyone and fundamental to the proper administration of justice

35. The right to seek legal advice and assistance is well-established in Canadian law and recognized as being of fundamental importance to the proper administration of justice and the

[72] *Housen v. Nikolaisen*, 2002 SCC 33 (SCC) at para 7-37
[73] *C. (G.C.) v. New Brunswick (Minister of Health & Community Services)*, [1988] 1 S.C.R. 1073 (S.C.C.) at para 5

rule of law. As Justice Binnie stated:

> Everyone is entitled to seek the advice of a lawyer. This freedom also reflects the importance of the societal role of lawyers in a country governed by the rule of law. Lawyers represent people, communicate legal information and give advice. The execution of these functions contributes to the maintenance of the rule of law. Indeed, these functions are deemed so important that they are often protected by strong privileges of confidentiality that are linked to our basic values and constitutional rights.[74]

36. Courts have repeatedly commented that a solicitor-client relationship, and the protection of solicitor-client privilege are principles of fundamental justice. The Supreme Court of Canada has described the right as "a principle of fundamental justice and civil right of supreme importance in Canadian law"[75]. The Court has commented that, "The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system"[76] and that privilege is "fundamentally important to our judicial system".[77] The relationship and communications between solicitor and client "are essential to the effective operation of the legal system".[78] Solicitor-client privilege, and the vital relationship it protects, are an expression of our societal commitment to personal autonomy and access to justice.[79]

37. "[L]awyers uphold the rule of law. They provide those subject to our legal system a means to self determination under and through the law..."[80] Lawyers enhance their clients' capacity to understand the legal system and its impact on them, and to ensure that individuals have access to

---

[74] *Wood v Schaeffer*, 2013 SCC 71 at para 103 (per Binnie J, dissenting on other grounds)
[75] *Lavallee, Rackel & Heintz v Canada (Attorney General)*; W*hite, Ottenheimer & Baker v Canada (Attorney General); R v Fink, 2002 SCC 61* at para 36
[76] *R v McClure*, 2001 SCC 14 at para 2; see also, *New Brunswick (Minister of Health and Community Services) v G.(J.)*, [1999] SCJ No 47 at para 68-76 [*G.(J.)*]
[77] *Smith v Jones*, [1999] 1 SCR 455, at para 45, citing *Anderson v Bank of British Columbia* (1876), 2 Ch D 644 (CA) at 649
[78] *R v Gruenke*, [1991] 3 SCR 263 at 289
[79] *General Accident Assurance Co. v Chrusz*, [1999] OJ No 3291 at paras 91-93 180 DLR (4th) 241; see also, *British Columbia (Auditor General) v British Columbia (Ministry of Attorney General)*, 2013 BCSC 98 at paras 23-25, 40 BCLR (5th) 390
[80] *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 50

justice in a broad sense. Access to legal services is a fundamental right with a significant constitutional dimension. The Court erred by impermissibly interfering with this fundamental right.

b. Courts have no jurisdiction over the solicitor-client relationship

38. The conduct of the lawyer-client relationship is not the purview of the courts, but rather, by virtue of the *Law Society Act,* is the exclusive and sole responsibility of the Law Society of Ontario (LSO).[81]

39. An independent bar composed of lawyers who are free of influence of public authorities is an important component of this legal framework.[82] The independence of the bar is also a principle of fundamental justice. The state cannot operate in ways that undermine the lawyer's duties to her client.[83] The LSO is responsible for ensuring lawyers' professional conduct and is uniquely responsible for their discipline.[84] The Court below accordingly exceeded its jurisdiction and fell into error by purporting to govern AG's relationship and access to AG's Counsel.

40. The courts' authority to engage with the solicitor-client relationship is limited to its own process. It is trite law that courts have the implied and inherent right to control their own processes, including who may appear before them. For example, a disqualification motion may be brought against counsel of record in a proceeding when the integrity of the adversarial process is compromised – for instance if counsel were acting against a former client contrary to the lawyer's duty of loyalty.[85] Notably, a request for such relief is at the behest of the *former client,* whose own right to counsel is implicated, not a third party stranger to the solicitor-client

[81] *Law Society Act,* RSO 1990, c L.8, s. 4.1.2 [*LSA*]
[82] *Finney v Barreau du Québec*, 2004 SCC 36 at para 1
[83] *Canada (Attorney General) v. Federation of Law Societies of Canada,* 2015 SCC 7 at para 83-84
[84] *LSA, supra* note 81 at s. 4.2
[85] *Canadian National Railway Co. v. McKercher,* 2013 SCC 39 at paras 13-15

relationship. It is not open to third parties to request that the court interfere in a private retainer, particularly where the parties to it are not before the court. The Court's authority to govern counsel ends at the courtroom door.

41. Courts have specifically declined to supervise the lawyer-client relationship in this manner, even where the child is a party to the proceeding. In *Foster v Spence*, dismissing the mother's motion to remove the Office of the Children's Lawyer, the Court stated:

> I do not have any jurisdiction to monitor or to regulate how the Office of the Children's Lawyer conducts its practice any more than I have any jurisdiction as to how [mother's counsel] conduct[s] your practice. . . [B]eyond the broad public interest in protecting children involved in litigation by setting them up as parties to the dispute, etcetera, I do not have any way to organize how lawyers carry on their practice[86]

42. In the case at bar, AG is not a party to the application nor does he or AG's Counsel have standing. Using the Court's process to interfere in a private retainer between a lawyer and her client who are not before the Court is abusive and unknown to law, and the Court below erred in granting such relief.

c. Children have an independent right to access legal services

43. Children have an independent right to access legal services. They are not disentitled from doing so by virtue of their age, personal circumstances, conduct, or capacity. They do not require a parent's consent or the Court's authorization to access legal services. They do not have to "earn" their rights through good conduct.

44. As the Court recently stated in *R v R*, "children do not require a court order for representation" and even when a statute regulates representation in proceedings, such as appointments under the *CYFSA* discussed below, "[t]here are no limitations on [a] young person

[86] *Foster v Spence*, [2000] OJ No 5848 at para 1, 130 ACWS (3d) 128

obtaining legal information or engaging counsel in other realms".[87]

45. Childhood is not a "legal disability" such that children cannot retain and instruct counsel.[88] Children of all ages are recognized across provincial and federal law as individual rights-holders capable of exercising their rights with or without the assistance of legal counsel.[89] Children and young people can and do retain counsel everyday – JFCY's mandate and funding from Legal Aid Ontario are proof of this. There is no requirement, legal or otherwise, to obtain the consent of the young person's parents prior to being retained by a child client, nor is there any requirement to seek the authorization of the court.

46. The impugned Order infringes AG's right to access legal services generally, including for matters unrelated to the child protection proceedings, for example, legal issues related to his health and mental health, youth criminal justice, and education. A court has no authority to place an absolute bar on the child's access to legal services.

47. Children are uniquely disadvantaged in accessing legal services because they are financially dependent and generally do not have the means to hire counsel on a paid retainer. As there are limited legal services options, the Court has further disadvantaged AG from accessing legal services, by restraining AG's Counsel. The OCL is only engaged in family law matters when they are appointed by Court order.[90]

---

[87] *R v R*, 6 March 2020, Toronto FS-14-398227-0001 (ONSC) at para 89

[88] *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner),* 2018 ONCA 559, at para 91, 88 [*OCL v IPC*]

[89] Twelve year olds are subject to criminal law sanction and entitled to instruct defense counsel, see 2.1 and 25(1) of the *Youth Criminal Justice Act*, SC 2002, c1 [*YCJA*]; unaccompanied minors are able to initiate immigration and refugee law claims see s. 167(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, and children are entitled to make citizenship applications s. 5(1.05) of the *Citizenship Act*, RSC 185, c C-29; a child of any age can consent to or refuse health care treatment if the child is capable of understanding the nature and consequences of the treatment see s. 10 & 11 of the *Health Care and Consent Act*, 1996, SO 1996, c 2, Sch A [*HCCA*]; and a child of 16 can make an advance health care directive per s. 26 of *HCCA*. The common law also recognizes other rights of children, including the right of 16-year olds to unilaterally withdrawing from parental control.

[90] *CJA*, *supra* note 60, s. 89(3)

d. The Court's authorization is not required for AG to access legal services

48. Justice Jarvis appears to have conflated AG's right to seek to have counsel appointed to represent him in the *CYFSA* protection proceedings with his right to access legal services generally.

49. While the *Family Law Rules* require the court to authorize a child to be represented by counsel in family proceedings and counsel's participation in *CYFSA* matters is subject to appointment,[91] this is because children are not ordinarily parties to the litigation. This does not amount to an authority to determine whether a child is entitled to consult a lawyer, nor to prevent a child from accessing legal services outside the proceeding.

50. The *CYFSA* contemplates that children can have access to a lawyer at any time, separate and apart from their direct participation in a child protection proceeding. Children in care have the unrestricted right to, without reasonable delay, speak in private with and receive visits from a lawyer and to receive or write private communications with a lawyer.[92]

51. The *CYFSA* acknowledges that at the age of seven children are presumed capable of instructing legal counsel and making informed decisions, as children have the right to legal counsel to decide whether to accept or refuse adoption. Additionally, at any age, a child has the right to apply on their own, or with counsel, to initiate protection proceedings or as of the age of twelve to vary or terminate supervision orders, interim or extended custody orders.[93]

52. Children can obtain legal representation and advice for matters under the *CYFSA* outside of court proceedings including: reviews of residential placements; complaint against a Society*;* or a complaint against a residential placement provider.[94]

---

[91] *FLA, supra* note 62, r. 4(7); *CYFSA supra* note 1 at s. 78(1)
[92] *CYFSA*, *ibid*, s. 10(1)(b)(i), 10(4)(c)
[93] *Ibid*, s.180(6), s. 74(2)(c), 75(2), 81(4), 113(4)(a), 115(4)(a)
[94] *Ibid*, s. 120, s. 66 (1), 66(4)

53. Furthermore, in child protection matters, a child has a separate and distinct right to participate, apart from direct representation before the court. All children older than twelve are entitled to participate, including to receive notice and be present at their protection proceedings. This right to participate cannot be restricted without a Court order[95] because:

> The right to participate is based on the fact that it is equally important for young people to know that fair process, respect and being heard are significant values integral to any court proceeding and these values are cornerstones to the judicial systems a whole.[96]

54. Regardless of whether they have standing in the litigation, if a child is able to attend and receive notice, it must follow that the child also has the right to understand how their rights or interests are affected by the proceedings. Legal advice can only be provided by a lawyer, who has the requisite skills and expertise and ability to assist the child impartially, not a Society worker, as the Court below suggests.[97] Child's counsel can also advocate to the parties; it remains open to those parties as to how this influences their respective positions in the proceeding.

55. The *CYFSA* requires the recognition of children as individual rights holders,[98] and its provisions necessitate respect and support for the child's ability to access independent legal services without interference. The impugned Order is entirely contrary to the spirit and intent of the *CYFSA.*

e. Parent/CAS' Permission to Access Legal Services is not Required

56. The suggestion that a third party's consent is required or must be obtained for a child to access legal services is also contrary to a lawyer's compliance with the *Rules of Professional*

---

[95] *Ibid*, s. 79 (4)
[96] *Jewish Family and Child Services of Greater Toronto v S.K*, 2013 ONCJ 681 at para 11
[97] *Reasons, Jarvis J.*, supra note 3, pg. 37
[98] *CYFSA*, *supra* note 2, preamble, ss. 1, 3, 10

Conduct, particularly the duties of loyalty and confidentiality, which attaches to the existence of a retainer, the advice given or information shared.[99]

57. Parents may be unhappy with their child's right of access to legal services, especially when their position is at odds with the position being advanced on behalf of the child.[100] Requiring a parent's permission or authorization for a child to access legal services is tantamount to limiting children's access to situations where they do not significantly disagree with their parent, (when it might be less important) and is strikingly inappropriate.

58. The Court of Appeal stated that it is inappropriate to allow a disgruntled parent to interfere with a child's privileged relationship and sabotage counsel's ability to exercise their duties.[101] In high conflict scenarios, it is particularly desirable that a child have access to independent legal services to avoid representations being "tainted by the influence of either parent".[102]

f. AG has capacity to retain and instruct legal counsel

59. The *Rules of Professional Conduct* specifically contemplate the provision of legal services to people who may have diminished capacity because of their age, mental or physical health, or other disability, and directs the lawyer to, as far as reasonably possible, maintain a normal lawyer and client relationship.[103] The lawyer has the responsibility to assess capacity on an ongoing basis and, "[i]n any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned".[104]

60. A person's right to access legal services does not depend on the court's evaluation of his

---

[99] Law Society of Ontario, *Rule of Professional Conduct* (22 June 2000; amendments 24 October 2013), Section 2.1-1, Section 3.3-1, Section 3.4-1, Section 3.7-1, Section 5.1-1, see commentary para 3 [*RPC*]
[100] *M. v. M*. [2002] O.J. No. 5713 at para 27-29, 114 ACWS (3d) 1061 [*M v M*]; *JF&CS v JK*, 2014 ONCJ 792 at para 49
[101] *OCL v IPC, supra* note 88 at para 72; see also, *M. v. M*, *ibid* at para 21
[102] *Seaton v Zheng*, 2019 ONSC 3999 at para 92-93
[103] *RPC supra* note 99 at S. 3.2-9
[104] *Ibid* at S. 3.2-9 at para 3 and S. 5.1 at para 7

personal characteristics, behavior, or mental health. The Court erred in considering AG's age, relative maturity, mental health status, or "parental alienation" as valid reasons to prevent communication in his solicitor-client relationship. These characteristics do not vitiate AG's right to access legal services, impact his capacity to instruct counsel, or justify the court's intrusion into his solicitor-client relationship.

61. There was no evidence before the Court to suggest that AG lacks capacity to instruct counsel; and gauging capacity to give instructions is the exclusive realm of the lawyer and the LSO.[105] The capacity to instruct counsel is fundamental to an individual's agency and cannot be undermined lightly or without evidence.[106]

62. AG is 14 ½ years old. Regardless of a child's maturity, a lawyer must as far as reasonably possible, maintain a normal lawyer and client relationship.[107] It is not controversial that a child of this age can be engaged in a solicitor-client relationship.

63. Children as young as age 7 are presumed to have capacity and rights to instruct counsel in *CYFSA* matters.[108] At age 12 children are subject to criminal liability, and must retain and instruct counsel in the criminal justice system, and at age 14 can be sentenced as an adult. [109]

64. Children's capacity to act and make decisions independently is recognized in many other legal contexts, including health and mental health care, and counselling services.[110]

65. A child subject to "alienating influences" cannot be seen to lack capacity to access legal services. Alienation is *not* a syndrome or a recognized mental disorder[111] that renders a child

---

[105] *Ibid* at S. 3.2-9 at para 1- 5; see also, *Geldart v Geldart*, 2018 ONSC 300 at para 26-29 [*Geldart*]
[106] *Geldart*, *Ibid* at para 32
[107] *RPC*, *supra* note 99 at S. 3.2-9
[108] As described at paras 51-54 above, see also, *supra* notes 96-98
[109] *YCJA*, *supra* note 89, s. 2, and 64
[110] *HCCA*, *supra* note 89, s. 10, 11, 81; *CYFSA*, *supra* note 2, s. 23(1), 161(6), 171(6); *RPC*, *supra* note 99, S. 3.2-9
[111] *A.M. v. C.H.*, 2019 ONCA 764, para 35; William O'Donohue, Lorraine Benuto, & Natalie Bennett, "Examining the validity of parental alienation syndrome" (2016) 13:2-3 Journal of Child Custody, 114; Jean Mercer, "Are intensive parental alienation treatments effective and safe for children and adolescents?" (2019) 16:(1) Journal of

incapable, rather it is a factual finding used in custody proceedings regarding a parent's inappropriate behaviour toward a child.[112]

g. Access to legal services is consistent with the best interests of the child and the protection of children

66. Access to justice and legal services are supported by the *CYFSA*, and the special protections of children's rights under legislation, the *Charter*, and international law. These rights are fundamental to the best interests of children. As such, the impugned Order is contrary to the legal principle of the best interests of the child.

67. Justice Jarvis's Order appears to suggest that AG's access to legal services is somehow *separable* from or contrary to his best interests or his protection. A child's vulnerability and need for protection does not diminish their rights; protection of a child, includes protection of their independent access to support services, including legal services.

68. The first principle of the *CYFSA* is that, "children are *individual rights holders* with rights to be respected and views to be heard" and as such the services must be "child-centered" and "consistent with and build upon principles expressed in the *UNCRC*". [113] This is the backdrop for understanding how the paramount purpose of, "the best interests, protection and well-being of children is to be achieved" [114]

69. The Ontario Court of Appeal has recognized that when children face conflict in family law or child protection, they are at their most vulnerable. The Court of Appeal has further admonished that failure to offer a child access to a private sphere in which to speak to counsel,

---

Child Custody, pg. 76; Linda C Neilson, "Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?" (2018) (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research and Vancouver: The FREDA Centre for Research on Violence Against Women and Children) at pg. 19-22, 45-47 [*Neilson*]; the SCC has cautioned that we must nor conflate even sever mental disorder with lack of capacity, see *Starson v Swayze*, 2003 SCC 32, para 77

[112] *Malhotra v Henfoeffer*, 2018 ONSC 6472 at para 107

[113] *CYFSA*, *supra* note 2, preamble

[114] *Ibid*, s. 1(1)

"could cause further trauma and stress to the child, who may have divided loyalties, exposing the child to retribution and making the child the problem in the litigation".[115] Children require legal services because they require a safe person to speak to and this role is best undertaken by counsel because, "it is difficult enough for children to be the subjects of litigation. For their voices to be heard, they must be guaranteed confidentiality when they say, "please, don't tell my mom" or "please, don't tell my dad".[116]

70. The Supreme Court affirmed in *AC v Manitoba*, "it is by definition, in a child's best interests to respect and promote his or her autonomy".[117] This does not mean that a child has the right to decide where they live; it means that a child has independently held views, irrespective of them being warped and misconceived[118], they still belong to and are real to the child. Lawyers help children to understand the law, the justice system, and their place within it. Lawyers can thus help enhance the child's capacity to respect the law and its processes, and even to make more mature and well thought out decisions. Research has shown that children are left feeling more satisfied with a decision, regardless of whether the outcome is what they wanted, when they feel heard or understand what is happening.[119]

71. Courts have stressed that is naive to attempt to shield adolescents from high conflict litigation because children are directly affected by the proceedings and as such, may be anxious about how the proceedings will impact their day to day life and this is the proper role of a lawyer.[120]

---

[115] *OCL v IPC, supra* note 88 at para 71-72
[116] *Ibid* at para 70-71
[117] *AC v Manitoba*, 2009 SCC 30, at paras 87-88
[118] *L.(N.) v M.(R.R.),* 2015 ONCA 915 at para 34
[119] Rachel Birnbaum and Nicholas Bala, "The Child's Perspective on Legal Representation: Young Adults Report on their Experiences with Child Lawyers" (2009) 25 Can. J. Fam. L. 11 at pg 13-14, 22-23, 63; Rachel Birnbaum, & Michael Saini "A qualitative synthesis of children's participation in custody disputes" (2012) 22(4), Research on Social Work Practice, 405-407
[120] *Jewish Family and Child Services of Greater Toronto v. LK*, 2012 ONCJ 8 at para 21-37

72. The existence of parental alienating influences does not somehow distinguish a child's right to legal services. Often in cases about parental alienation, the paramount focus on the best interests of the child is diminished by the focus on parental conflict.[121] *CYFSA* proceedings are child centred because, "it's a child welfare statute and not a parents' rights statute".[122] Where there is a risk of a child being used as a pawn by either parent, it is even more necessary that a child have their own *independent* trustworthy adults, therapeutic and legal, where they can be free from external influences and engage in protected discussions about their own best interests.

73. The *UNCRC*[123] is incorporated by reference into the CYFSA[124], and is the authoritative articulation of the human rights of children.[125] The Supreme Court has repeatedly noted that the values reflected in international human rights law, including the *UNCRC*, will help inform the approaches taken in Canadian courts.[126] The *UNCRC* and accompanying *General Comments* from the UN Committee on the Rights of the Child, expressly recognize children's right to legal services as inextricable from and integral to the protection of their best interests,[127] because it is assists a child to understand their rights and the processes where decisions are being made about them.[128]

74. The *UNCRC* recognizes that children's rights are not given to them due to their association with adults on whom they depend – they are free-standing and independent from adults in their

---

[121] *Neilson, supra* note 111 , pg. 19-22, 45-47
[122] *CFSA v KLW,* 2000 SCC 48 at para 80
[123] *UNCRC, supra* note 3
[124] CYFSA, supra note 2, preamble
[125] *UNCRC, supra* note 3, Preamble; *R v Sharpe*, 2001 SCC 2 at para 171 [*Sharpe*]; *AB v Bragg Communications*, 2012 SCC 46 at paras 17-18 [*AB v Bragg*]
[126] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70; *Kanthasamy v Canada (Citizenship & Immigration*), 2015 SCC 61 at para 37 [*Kanthasamy*]
[127] UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the rights of the child to have his or her best interests taken as a primary consideration,* 29 May 2013, CRC/C/GC/14, at para 4, and 96 [*CRC General Comment 14*]
[128] *CRC General Comment No.12, The Right of the Child to be Heard*, CRC/C/GC/12, July 2009, at para 34, 41 [*CRC General Comment 12*]

lives.[129] In *B.J.B. v. D.L.G.,* Justice Martinson held:

> The Convention [on the Rights of the Child] is very clear: all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation.[130]

75. The *UNCRC* makes clear that, children are inherently vulnerable and deserving of protection, and that protection is dependent on the meaningful recognition of their individual human rights.[131] The *UN Committee on the Rights of the Child* makes clear that "an adult's judgement of a child's best interests cannot override the obligation to respect all the child's rights".[132] The denial of rights, including independent access to legal services is not consistent with the best interests of the child principle.

76. The Supreme Court of Canada has consistently recognized children as being inherently vulnerable and therefore deserving of *enhanced* – not diminished – protection of their rights in various legal contexts.[133] The Ontario Court of Appeal states that a child's "relationship with counsel should be guarded with more vigilance than accorded to an adult client".[134] This enhanced protection of the right to legal services is particularly important because as the Supreme Court has noted, "children generally do not understand their legal rights as well as adults, and are less likely to assert those rights".[135]

77. The Supreme Court of Canada has held that child protection hearings engage the section 7

---

[129] *Ibid* at paras 2 and 18
[130] *B.J.B. v. D.L.G.*, 2010 YKSC 44 (favourably cited by the British Columbia Supreme Court in *A.A.A.M. v Director of Adoption*, 2017 BCSC 2077)
[131] *CRC General Comment 12*, *supra* note 128 at paras 4-5
[132] *CRC General Comment 14*, *supra* note 127 at para 61
[133] *Sharpe*, supra note 125 at para 175-177; *AB v Bragg*, *supra* note 125 at paras 17-18; *Kanthasamy*, *supra* note 126 at para 41; *FN (Re)*, 2000 SCC 35, [2000] 1 SCR 880, at para 10, 14 [*FN (Re)*]
[134] *OCL v IPC*, *supra* note 88 at paras 91, 88
[135] *YCJA*, *supra* note 89, s. 25(4); *R v LTH*, 2008 SCC 49, para 24, [2008] 2 SCR 739

Charter rights of the child.[136] Children are accordingly entitled to robust protection in this context, including access to legal services, to ensure the meaningful protection of their *Charter*-protected interests.[137]

78. The impugned Order is contrary to the rights based protections of *CYFSA*, the *UNCRC*, and well-established legal entitlement of children to enhanced protections, including protection of their solicitor-client relationships. Protection of children and their best interests is not simply paternalistic but must recognize and protect their independent human rights.

h. There was no legal or factual basis on which to restrain AG's Counsel

79. Justice Jarvis's Order is a misuse of the power to restrain a person under section 137 of the *CYFSA* and there is no other authority or residual common law power of the Court to make such an order. Justice Jarvis' does not set out what authority was used to restrain AG's Counsel.

i. Section 137 of the CYFSA

80. Section 137 of the *CYFSA* provides that a court may, in the child's best interest, instead of making a supervision or care order, make "an order restraining or prohibiting a person's access to or contact with the child" and may include such directions considered appropriate for implementing the order and protecting the child.[138] The provision is intended to be a less intrusive alternative to protection orders.

81. Restraining orders are an intrusive remedy with severe consequences[139] intended for use where an adult is posing a safety risk to a child due to domestic abuse, violent behaviour, and/or

---

[136] *G.(J.), supra* note 76 at paras 68-76
[137] *AMRI v KER*, 2011 ONCA 417 at para 120
[138] *CYFSA, supra* note 2, s. 137
[139] Failure to abide by a s.137 order can result in criminal law sanction, see, *Marshall v Reid,* 2018 ONSC 648, para 11-15; a restraining order is a serious remedy and should not be ordered except in the clearest of cases, see, *Children's Aid Society of Toronto v. L.S.*, 2017 ONCJ 506 at para 43-44

mental health issues.[140] Section 137 is intended to assist with protecting a child and must be consistent with the child's best interests.[141]

82. On a plain reading s. 137 is *not* aimed at permitting interference with the solicitor-client relationship, or preventing a child, whether or not a party to the litigation, from accessing legal services.[142] AG's Counsel's role, as with all counsel, is to provide services in accordance with the law, and Rules of Professional Conduct. AG's Counsel's interests are indivisible from AG's, she has no personal stake in the outcome.[143]

83. It is unprecedented that a child's lawyer would be restrained from communicating with him, particularly under the *CYFSA,* and especially in the circumstances of this case, where AG has repeatedly manifested his need and desire for legal services.

84. There is nothing in the evidence to suggest that involvement of counsel has done anything but provide for safety. AG's solicitor-client relationship has not led AG to run away. On two occasions AG has run away, and then called his counsel, who have advised him and facilitated contact with the appropriate authorities, and his return to a place of safety.[144] It is more supportable to suggest that if AG had been able to access his counsel prior to running away,

---

[140] **Section 137 of the *Child, Youth Family Services Act,* domestic violence or violent behaviour cases**: *Nogdawindamin Family and Community Services v AW,* 2018 ONCJ 833 at para 11; **Section 137 of the *Child, Youth Family Services Act* mental health issues cases**: *Children's Aid Society of Ottawa v DM,* 2019 ONSC 7509 at para 4; *Jewish Family and Child Service of Greater Toronto v EKB,* 2019 ONSC 6214 at paras 7-8; **Section 80 of the *Child and Family Services Act* domestic violence or violent behaviour cases**: *Children's Aid Society of Algoma v M (D),* 2011 ONCJ 817 at paras 26-32; *Children's Aid Society in the County of Brant v. C. (ACB.),* 2015 ONCJ 436 at para 79 [*Brant v C(ACB)*]; *Children's Aid Society of Durham (County) v L(C),* 110 ACWS (3d) 668 at paras 7-8, 11-12, 15, 17, 2001 CarswellOnt 4561; *Children's Aid Society of Toronto v MV-N*, 2017 ONCJ 675 at paras 50, 53-54, and 56;*Children's Aid Society of Waterloo (Regional Municipality) v G(N)*, 2008 ONCJ 802 at paras 47, 75, 78, 85, 198; *Hastings Children Aid Society v L (M),* 2011 ONCJ 647 at paras 8, 39; *Irving v Gardiner*, 2011 ONCJ 689 at paras 67-69, 71-74. **Section 80 of the *Child and Family Services Act* mental health issues cases:** *Children's Aid Society of Ottawa v M (M),* 2012 ONSC 3529 at paras 123-124; *Simcoe Muskoka Child, Youth & Family Services v. H (J),* 2016 ONSC 2912 at paras 114-115

[141] See for example: *Brant v C(ACB), Ibid* at para 79

[142] *Rizzo & Rizzo Shoes Ltd*. (Re), [1998] 1 SCR 27, para 21

[143] *Interpretation Act*, RSO 1990, c I.11,s. 29(1)

[144] *Caldarola Affidavit, supra* note 15 at para 8-9

those incidents may have been prevented.

ii. Rule 40 of the Rules of Civil Procedure

85. The Court also cannot rely on Rule 40 of *Rules of Civil Procedure*, which was pled by the Respondent Father, to restrain counsel. [145] Injunctive relief under the *Courts of Justice Act* and Rule 40 is only available where an ongoing tort is alleged to have occurred. The legislature has created a comprehensive scheme for dealing with family law "if it contemplated additional support by civil action, it would have made provision for this".[146]

iii. Parens Patriae

86. The Father requested that the court exercise its *parens patriae* jurisdiction to restrain AG's Counsel. The use of *parens patriae* is a measure of last resort[147] to be exercised where: there is an unintended gap in legislation; the child is in danger; and/or the paramount purpose of the legislation can be met through the exercise of this power.[148]

87. There is no unintended gap in the *CYFSA* regarding the restraint of child's counsel, and the child was not in danger as a result of having access to legal services. The paramount purpose of the *CYFSA* is the protection, best interests, and well-being of children.[149] It is contrary to legislative intention to restrain a child from receiving legal services. As discussed at paras 50 - 55 above, the *CYFSA* is clear that children are entitled to access independent legal advice and representation.[150] There is accordingly no residual *parens patriae* power to restrain counsel.

88. Legal services are not dangerous – they are the cornerstone of the administration of justice.

---

[145] *RCP, supra* note 68, Rule 40.01
[146] *Frame v. Smith*, [1987] 2 SCR 99 at para 12; see also, *Ludmer v Ludmer*, 2014 ONCA 827 at para 42
[147] *B (AC) v B (R)*, 2010 ONCA 714 at para 26-29
[148] *K.F. v. Children's Aid Society of Ottawa,* 2018 ONSC 364 at para 11
[149] *CYFSA, supra* note 2, s. 1
[150] *CYFSA*, supra note 2; See discussion above at paras 50 – 55, and *supra* notes 92-95

The goals of child protection or custody access matters, including reintegration with a parent, ought not to be pursued by trampling on a child's *Charter* protected right to access legal services.

D. THE HEARING WAS PROCEDURALLY UNFAIR

18. The Court's conduct substantially denied AG and AG's Counsel the right to a fair hearing in significant and incurable ways[151]:

i. Inadequate Notice: The fairness of the hearing was compromised by short service. A motion must be brought on 6 days' notice[152], unless there is evidence of urgency or hardship that justifies short service.[153] There was no urgency, at the time of the hearing, AG had returned to a place of safety *because of* AG's counsel's involvement.

ii. Refusal of Clear Request for an Adjournment: Despite the Court's apparent acceptance that an adjournment was necessary to provide adequate opportunity to respond[154], in the final moments and without advance warning, the Court changed its mind without providing reasons and proceeded with the motion[155], apparently without regard to the impact on the fairness of the hearing.[156]

iii. Counsel had no Opportunity to Respond: Counsel was provided with mere minutes to present her case, without any opportunity to present evidence or to prepare comprehensive submissions on the issue.[157] The Court refused to allow AG's Counsel to cross-examine the

---

[151] Donald Brown, *Civil Appeals* (Toronto: Thomson Reuters, 2009) (loose-leaf updated 2016) ch 1:1211; 6:2122; 12:2111; 12:8110
[152] *FLR, supra* note 60, s. 14(11)
[153] *Rosen v Rosen*, [2005] ONSC 5336, para 7 -12
[154] *December 20*, at p 9, lines 24-26, p 10 lines 8 – 20, p 11 lines 22-32, p 12 line 1-5, 13 – 16, p 13 lines 10-15, p 21 line 1 – 6, p 24 line 1-4, p 25 lines 1-8 and 18-21
[155] *December 20*, pg. 79, lines 5-25
[156] S*abatin v. Ganji*, 2018 ONSC 5680, para 19; *JAMV v EAC*, [1997] O.J. No. 5323, para 7-8
[157] *Ontario (Ministry of Community, Family and Children's Services) v Ontario (Crown Employees Grievance Settlement Board)*, [2005] OJ No 221, para 33; *Children's Aid Society of Metropolitan Toronto v. A. (M.),* [1993] O.J. No. 93 (Ont. Gen. Div), para 35

witness, and refused to accept the legal authorities she sought to provide despite recognizing AG's Counsel status as a Respondent to the motion.[158]

iv. Inadequate Reasons: The Court's decision is unintelligible because it cites no authority nor evidence justifying[159] the extraordinary and unprecedented decision to restrain Counsel.

PART 5– ORDER

89. The Appellants request an order:

1. Quashing the Order of Justice Jarvis restraining Counsel Samira Ahmed and Justice for Children from contact with the child AG and upholding the right of AG to seek full and unfettered access to legal services;

2. Costs;

3. Such further and other orders as counsel may advise and this Honourable Court may permit.

PART 6 – TIME ESTIMATE

111. The Appellant requests three hours for oral submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of March, 2020.

Samira Ahmed, Mary Birdsell & Jane Stewart
Counsel for the Appellant
Justice for Children and Youth

[158] *Jarvis, J., December 18, supra* note 65, at Tab 6 of the Appellant's Appeal Book.
[159] *R v Sheppard,* 2002 SCC 26, [2002] 1 SCR 869 at para 55

PART 7 - LIST OF AUTHORITIES

1. *Christodoulou v Christodoulou*, 2010 ONCA 93
2. *Hendrickson v Kallio*, [1932] 4 DLR 580, [1932] OJ NO 380
3. *Mancinelli v Royal Bank of Canada*, 2017 ONSC 1526
4. *Parsons v Ontario*, 2015 ONCA 158
5. *King v Mann*, 2020 ONSC 108
6. *Marrocco v John Doe*, 2014 ONSC 5663
7. *Ash v Lloyd's Corp.*, [1992] OJ No 894, 8 OR (3d) 282
8. *HMQ v Chartis Insurance*, 2014 ONSC 6792
9. *Judson v Mitchele*, 2011 ONSC 6004
10. *Greslik v Ontario Legal Aid Plan* (1988), 65 OR (2d) 110, [1988] OJ No 525 (H Ct J)
11. *Rankin v McLeod Young Weir Ltd et.al.* (1986), 57 OR (2d) 569, [1986] OJ No 2380 (H Ct J)
12. *Toms v Agro* (1992), 8 OR (3d) 95
13. *Housen v Nikolaisen*, 2002 SCC 33 (SCC)
14. *C (GC) v New Brunswick (Minister of Health & Community Services)*, [1988] 1 SCR 1073 (SCC)
15. *Wood v Schaeffer*, 2013 SCC 71, [2013] 2 SCR 1053
16. *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink*, 2002 SCC 61
17. *R v McClure*, 2001 SCC 14
18. *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, [1999] SCJ No 47
19. *Smith v Jones*, [1999] 1 SCR 455
20. *R v Gruenke*, [1991] 3 SCR 263

21. *General Accident Assurance Co. v Chrusz,* [1999] OJ No 3291, 180 DLR (4th) 241

22. *British Columbia (Auditor General) v British Columbia (Ministry of Attorney General),* 2013 BCSC 98

23. *Groia v Law Society of Upper Canada*, 2018 SCC 27

24. *Finney v Barreau du Québec*, 2004 SCC 36

25. *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7

26. *Canadian National Railway Co. v McKercher,* 2013 SCC 39

27. *Foster v Spence,* [2000] OJ No 5848

28. *R v R,* 6 March 2020, Toronto FS-14-398227-0001 (ONSC)

29. *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner),* 2018 ONCA 559

30. *Jewish Family and Child Services of Greater Toronto v SK*, 2013 ONCJ 681, [2013] OJ No 5578

31. *M v M,* [2002] OJ No. 5713

32. *JF&CS v JK*, 2014 ONCJ 792

33. *Seaton v Zheng*, 2019 ONSC 3999

34. *Geldart v Geldart*, 2018 ONSC 300

35. *AM v CH*, 2019 ONCA 764

36. *Starson v Swayze*, 2003 SCC 32

37. *Malhotra v Henfoeffer*, 2018 ONSC 6472

38. *AC v Manitoba*, 2009 SCC 30

39. *L(N) v M(RR),* 2015 ONCA 915

40. *Jewish Family and Child Services of Greater Toronto v. LK*, 2012 ONCJ 8

41. *CFSA v KLW,* 2000 SCC 80

42. *R v Sharpe*, 2001 SCC 2

43. *Kanthasamy v Canada (Citizenship & Immigration*), 2015 SCC 61

44. *AB v Bragg Communications*, 2012 SCC 46

45. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

46. *BJB v DLG*, 2010 YKSC 44

47. *FN (Re)*, 2000 SCC 35, [2000] 1 SCR 880

48. *R v LTH*, 2008 SCC 49, [2008] 2 SCR 739

49. *AMRI v KER*, 2011 ONCA 417

50. *Marshall v Reid*, 2018 ONSC 648

51. *Children's Aid Society of Toronto v LS*, 2017 ONCJ 506,

52. *Nogdawindamin Family and Community Services v AW*, 2018 ONCJ 833, 299 ACWS (3d) 570

53. *Children's Aid Society of Ottawa v DM*, 2019 ONSC 7509

54. *Jewish Family and Child Service of Greater Toronto v EKB*, 2019 ONSC 6214

55. *Children's Aid Society of Algoma v M (D)*, 2011 ONCJ 817

56. *Children's Aid Society in the County of Brant v C (ACB.)*, 2015 ONCJ 436, [2015] WDFL 5538

57. *Children's Aid Society of Durham (County) v L(C)*, (2001) 110 ACWS (3d) 668

58. *Children's Aid Society of Toronto v MV-N*, 2017 ONCJ 675

59. *Children's Aid Society of Waterloo (Regional Municipality) v G(N)*, 2008 ONCJ

60. *Hastings Children Aid Society v L (M)*, 2011 ONCJ 647

61. *Irving v Gardiner*, 2011 ONCJ 689

62. *Children's Aid Society of Ottawa v M (M)*, 2012 ONSC 3529, [2012] WDFL 5867

63. *Simcoe Muskoka Child, Youth & Family Services v H (J)*, 2016 ONSC

64. *Rizzo & Rizzo Shoes Ltd*. (Re), [1998] 1 SCR 27

65. *Frame v Smith*, [1987] 2 SCR 99

66. *Ludmer v Ludmer*, 2014 ONCA 827

67. *B (AC) v B (R)*, 2010 ONCA 714

68. *KF v Children's Aid Society of Ottawa,* 2018 ONSC 364

69. *Rosen v Rosen*, [2005] ONSC 5336

70. S*abatin v Ganji*, 2018 ONSC 5680

71. *JAMV v EAC*, [1997] OJ No. 5323

72. *Ontario (Ministry of Community, Family and Children's Services) v Ontario (Crown Employees Grievance Settlement Board)*, [2005] OJ No 221

73. *Children's Aid Society of Metropolitan Toronto v A (M)*, [1993] OJ No. 93

74. *R v Sheppard*, 2002 SCC 26

Secondary Sources

75. John Sopinka, Mark A Gelowitz & W David Rankin, *The Conduct of an Appeal*, 4th ed (Toronto: LexisNexis, 2018).

76. Gerard Kennedy, *Hryniak, the 2010 Amendments, and the First Stages of a Culture Shift?: The Evolution of Ontario Civil Procedure in the 2010s,* (Doctorate in Law and Philosophy, York University, 2020).

77. William O'Donohue, Lorraine Benuto, & Natalie Bennett, "Examining the validity of parental alienation syndrome" (2016).

78. Journal of Child Custody, 114; Jean Mercer, "Are intensive parental alienation treatments effective and safe for children and adolescents?" (2019).

79. Journal of Child Custody, pg. 76; Linda C Neilson, "Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?" (2018) (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research and Vancouver: The FREDA Centre for Research on Violence Against Women and Children).

80. Rachel Birnbaum and Nicholas Bala, “The Child’s Perspective on Legal Representation: Young Adults Report on their Experiences with Child Lawyers” (2009) 25 Can. J. Fam. L. 11.

81. Rachel Birnbaum, & Michael Saini "A qualitative synthesis of children’s participation in custody disputes” (2012) 22(4), Research on Social Work Practice.

Section 8 - Legislation

Child, Youth and Family Services Act, SO 2017, c 14, Schedule 1

Preamble

The Government of Ontario acknowledges that children are individuals with rights to be respected and voices to be heard.

The Government of Ontario is committed to the following principles:

Services provided to children and families should be child-centred.

Children and families have better outcomes when services build on their strengths. Prevention services, early intervention services and community support services build on a family's strengths and are invaluable in reducing the need for more disruptive services and interventions.

Services provided to children and families should respect their diversity and the principle of inclusion, consistent with the Human Rights Code and the Canadian Charter of Rights and Freedoms.

Systemic racism and the barriers it creates for children and families receiving services must continue to be addressed. All children should have the opportunity to meet their full potential. Awareness of systemic biases and racism and the need to address these barriers should inform the delivery of all services for children and families.

Services to children and families should, wherever possible, help maintain connections to their communities.

In furtherance of these principles, the Government of Ontario acknowledges that the aim of the Child, Youth and Family Services Act, 2017 is to be consistent with and build upon the principles expressed in the United Nations Convention on the Rights of the Child.

With respect to First Nations, Inuit and Métis children, the Government of Ontario acknowledges the following:

The Province of Ontario has unique and evolving relationships with First Nations, Inuit and Métis peoples.

First Nations, Inuit and Métis peoples are constitutionally recognized peoples in Canada, with their own laws, and distinct cultural, political and historical ties to the Province of Ontario.

Where a First Nations, Inuk or Métis child is otherwise eligible to receive a service under this Act, an inter-jurisdictional or intra-jurisdictional dispute should not prevent the timely provision of that service, in accordance with Jordan's Principle.

The United Nations Declaration on the Rights of Indigenous Peoples recognizes the importance of belonging to a community or nation, in accordance with the traditions and customs of the community or nation concerned.

Further, the Government of Ontario believes the following:

First Nations, Inuit and Métis children should be happy, healthy, resilient, grounded in their cultures and languages and thriving as individuals and as members of their families, communities and nations.

Honouring the connection between First Nations, Inuit and Métis children and their distinct political and cultural communities is essential to helping them thrive and fostering their well-being.

For these reasons, the Government of Ontario is committed, in the spirit of reconciliation, to working with First Nations, Inuit and Métis peoples to help ensure that wherever possible, they care for their children in accordance with their distinct cultures, heritages and traditions.

Paramount purpose

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

Other purposes

(2) The additional purposes of this Act, so long as they are consistent with the best interests, protection and well-being of children, are to recognize the following:

> vi. includes the participation of a child or young person, the child's or young person's parents and relatives and the members of the child's or young person's extended family and community, where appropriate.

Member of child's or young person's community

(3) For the purposes of this Act, the following persons are members of a child's or young person's community:

> 1. A person who has ethnic, cultural or creedal ties in common with the child or young person or with a parent, sibling or relative of the child or young person.
>
> 2. A person who has a beneficial and meaningful relationship with the child or young person or with a parent, sibling or relative of the child or young person.

Rights of children, young persons receiving services

3 Every child and young person receiving services under this Act has the following rights:

1. To express their own views freely and safely about matters that affect them.
2. To be engaged through an honest and respectful dialogue about how and why decisions affecting them are made and to have their views given due weight, in accordance with their age and maturity.
3. To be consulted on the nature of the services provided or to be provided to them, to participate in decisions about the services provided or to be provided to them and to be advised of the decisions made in respect of those services.
4. To raise concerns or recommend changes with respect to the services provided or to be provided to them without interference or fear of coercion, discrimination or reprisal and to receive a response to their concerns or recommended changes.
5. To be informed, in language suitable to their understanding, of their rights under this Part.

6. REPEALED: 2018, c. 17, Sched. 34, s. 6 (1).

Rights of communication, etc.
10 (1) A child in care has a right,

(a) to speak in private with, visit and receive visits from members of their family or extended family regularly, subject to subsection (2);

(b) without unreasonable delay, to speak in private with and receive visits from,

(i) their lawyer,
(ii) another person representing the child or young person,
(iii) the Ombudsman appointed under the *Ombudsman Act* and members of the Ombudsman's staff, and
(iv) a member of the Legislative Assembly of Ontario or of the Parliament of Canada; and

(c) to send and receive written communications that are not read, examined or censored by another person, subject to subsections (3) and (4). 2017, c. 14, Sched. 1, s. 10 (1); 2018, c. 17, Sched. 34, s. 6 (2).

Opening, etc., of young person's written communications
(4) Written communications to and from a young person who is detained in a place of temporary detention or held in a place of secure custody or of open custody,

(a) may be opened by the service provider or a member of the service provider's staff in the young person's presence and may be inspected for articles prohibited by the service provider;

(b) may be examined or read by the service provider or a member of the service provider's staff and may be withheld from the recipient in whole or in part where the service provider or the member of their staff believes on reasonable grounds that the contents of the written communications,

(i) may be prejudicial to the best interests of the young person, the public safety or the safety or security of the place of detention or custody, or

(ii) may contain communications that are prohibited under the *Youth Criminal Justice Act* (Canada) or by court order;

(c) shall not be examined or read under clause (b) if it is to or from the young person's lawyer; and

(d) shall not be opened and inspected under clause (a) or examined or read under clause (b) if it is to or from a person described in subclause (1) (b) (ii), (iii) or (iv).

Parental consent, etc.
14 Subject to subsection 94 (7) and sections 110 and 111 (custody during adjournment, interim and extended society care), the parent of a child in care retains any right that the parent may have,

(a) to direct the child's or young person's education and upbringing, in accordance with the child's or young person's creed, community identity and cultural identity; and

(b) to consent to treatment on behalf of an incapable child or young person, if the parent is the child's or young person's substitute decision-maker in accordance with section 20 of the Health Care Consent Act, 1996.

Children's, young persons' rights to respectful services

15 (1) Service providers shall respect the rights of children and young persons as set out in this Act.

Counselling service: child 12 or older
23 (1) A service provider may provide a counselling service to a child who is 12 or older with the child's consent, and no other person's consent is required, but if the child is younger than 16, the service provider shall discuss with the child at the earliest appropriate opportunity the desirability of involving the child's parent.

Application of *Health Care Consent Act, 1996*
(2) If the counselling service being provided is a treatment to which the *Health Care Consent Act, 1996* applies, the consent provisions of that Act apply instead of subsection (1).

Review by Board
Child may request review
66 (1) A child who is in a residential placement to which the child objects may apply to the Board for a determination of where the child should remain or be placed, if the residential placement has been reviewed by an advisory committee under section 64 and,

(a) the child is dissatisfied with the advisory committee's recommendations; or

(b) the advisory committee's recommendations are not followed.

Board to conduct review
(2) The Board shall conduct a review with respect to an application made under subsection (1) and may do so by holding a hearing.

Notice to child of hearing
(3) The Board shall advise the child whether it intends to hold a hearing or not within 10 days of receiving the child's application.

Parties
(4) The parties to a hearing under this section are,

(a) the child;

(b) the child's parent or, where the child is in a society's lawful custody, the society;

(c) in the case of a First Nations, Inuk or Métis child, the persons described in clauses (a) and (b) and a representative chosen by each of the child's bands and First Nations, Inuit or Métis communities; and

(d) any other persons that the Board specifies.

Time for determination
(5) The Board shall complete its review and make a determination within 30 days of receiving a child's application, unless,

(a) the Board holds a hearing with respect to the application; and

(b) the parties consent to a longer period for the Board's determination.

Board's order
(6) After conducting a review under subsection (2), the Board may,

(a) order that the child be transferred to another residential placement, if the Board is satisfied that the other residential placement is available;

(b) order that the child be discharged from the residential placement; or

(c) confirm the existing residential placement.

INTERPRETATION
Definitions
74 (1) In this Part,

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

(c) the child has been sexually abused 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 abuse or sexual exploitation and fails to protect the child;

Temporary care agreement
75 (1) A person who is temporarily unable to care adequately for a child in the person's custody, and the society having jurisdiction where the person resides, may make a written agreement for the society's care and custody of the child.
Older child to be party to agreement

(2) No temporary care agreement shall be made in respect of a child who is 12 or older unless the child is a party to the agreement.

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

Parties
79 (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. In the case of a First Nations, Inuk or Métis child, the persons described in paragraphs 1, 2 and 3 and a representative chosen by each of the child's bands and First Nations, Inuit or Métis communities.

Child 12 or older
(4) A child 12 or older 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

Warrants, orders, etc.
Application
81 (1) A society may apply to the court to determine whether a child is in need of protection.

Order to produce child or bring child to place of safety
(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 brought the child to a place of safety 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 the child before the court at the time and place named in the order for a hearing under subsection 90 (1) to determine whether the child 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.

Status review
113 (1) This section applies where a child is the subject of an order made under paragraph 1 or 4 of subsection 101 (1) for society supervision or under paragraph 2 of subsection 101 (1) for interim society care.

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;

(b) a parent of the child;

(c) the person with whom the child was placed under an order for society supervision; or

(d) in the case of a First Nations, Inuk or Métis child, a person described in clause (a), (b) or (c) or a representative chosen by each of the child's bands and First Nations, Inuit or Métis communities.

Status review for children in, or formerly in, extended society care
115 (1) This section applies where a child is in extended society care under an order made under paragraph 3 of subsection 101 (1) or clause 116 (1) (c), or is subject to an order for society supervision made under clause 116 (1) (a) or for custody made under clause 116 (1) (b).

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;

(b) a parent of the child;

(c) the person with whom the child was placed under an order for society supervision described in clause 116 (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 116 (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) in the case of a First Nations, Inuk or Métis child, a person described in clause (a), (b), (c), (d) or (e) or a representative chosen by each of the child's bands and First Nations, Inuit or Métis communities.

Complaint to Board
120 (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 119 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 119, submit the complaint to the Board before the society's complaint review procedure is completed.

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 119, the Board shall give the society notice of that fact and the society may terminate or stay its review, as it considers appropriate.

Complaint to Board
(3) A complaint to the Board under this section shall be made in accordance with the regulations.

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 119 (1) as required under subsection 119 (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 subsection 15 (2).
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.

Review by Board
(5) Upon receipt of a complaint under this section, the Board shall conduct a review of the matter.

Application
(6) Subsections 119 (7), (8) and (9) apply with necessary modification to a review of a complaint made under this section.

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.

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*.

Restraining order	
***Child, Youth and Family Services Act,* 2017, SO 2017, c 14, Sched 1**	***Child and Family Services Act,* RSO, 1990, c C 11**
Restraining order **137** (1) Instead of making an order under subsection 101 (1) or section 116 or in addition to making a temporary order under subsection 94 (2) or an order under subsection 101 (1) or section 116, 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	**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 made under subsection 94 (2) or an order made under subsection 101 (1) or clause 116 (1) (a) or (b). **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. **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 made under subsection 94 (2) or an order made under subsection 101 (1) or clause 116 (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 made under subsection 94 (2) or the order made under subsection 101 (1) or clause 116 (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 101 (1) or clause 116 (1) (a), (b) or (c) or if the order is made in addition to an order under clause 116 (1) (d), the order may provide that it continues in force until it is varied or terminated by the court.	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).

Application for extension, variation or 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) in the case of a First Nations, Inuk or Métis child, a person described in clause (a), (b), (c), (d) or (e) or a representative chosen by each of the child's bands and First Nations, Inuit or Métis communities. **Order for extension, variation or termination** (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. **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.	**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).

Application for order for child's commitment
161 (1) Any one of the following persons may, with the administrator's written consent, apply to the court for an order for the child's commitment to a secure treatment program:

1. Where the child is younger than 16,
    i. the child's parent,
    ii. a person other than an administrator who is caring for the child, if the child's parent consents to the application, or
    iii. a society that has custody of the child under an order made under Part V (Child Protection).

2. Where the child is 16 or older,
    i. the child,
    ii. the child's parent, if the child consents to the application,
    iii. a society that has custody of the child under an order made under Part V (Child Protection), if the child consents to the application, or
    iv. a physician.

Legal representation of child
(6) Where an application is made under subsection (1) in respect of a child who does not have legal representation, the court shall, as soon as practicable and in any event before the hearing of the application, direct that legal representation be provided for the child.

Emergency admission
171 (1) Any one of the following persons may apply to the administrator for the emergency admission of a child to a secure treatment program:

1. Where the child is younger than 16,
    i. the child's parent,
    ii. a person who is caring for the child with a parent's consent,
    iii. a child protection worker who brought the child to a place of safety under section 81, or
    iv. a society that has custody of the child under an order made under Part V (Child Protection).

2. Where the child is 16 or older,
    i. the child,
    ii. the child's parent, if the child consents to the application,
    iii. a society that has custody of the child under an order made under Part V (Child Protection), if the child consents to the application, or
    iv. a physician

Notices required
(6) The administrator shall ensure that within 24 hours after a child is admitted to a secure treatment program under subsection (2),

(a) the child is given written notice of the child's right to a review under subsection (9); and

(b) the Children's Lawyer and the prescribed person, if any, are given notice of the admission. 2017, c. 14, Sched. 1, s. 171 (6); 2018, c. 17, Sched. 34, s. 6 (6).

Consent of person to be adopted
180 (6) An order for the adoption of a person who is seven or older shall not be made without the person's written consent.

Courts of Justice Act, RSO 1990, c C43

Court of Appeal jurisdiction
6 (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;

(d) an order made under section 137.1. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17); 2015, c. 23, s. 1.

Divisional Court jurisdiction
19 (1) An appeal lies to the Divisional Court from,

(a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);

(b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;

(c) a final order of a master or case management master. 2006, c. 21, Sched. A, s. 3.

Proceedings in Family Court
21.8 (1) In the parts of Ontario where the Family Court has jurisdiction, proceedings referred to in the Schedule to this section, except appeals and prosecutions, shall be commenced, heard and determined in the Family Court. 1994, c. 12, s. 8.

Other jurisdiction
21.9 Where a proceeding referred to in the Schedule to section 21.8 is commenced in the Family Court and is combined with a related matter that is in the judge's jurisdiction but is not referred to in the Schedule, the court may, with leave of the judge, hear and determine the combined matters. 1994, c. 12, s. 8.

Certain Appeals
21.9.1 A statutory provision referred to in the Schedule to section 21.8 or in section 21.12 that provides for appeals from decisions of the Ontario Court of Justice to the Superior Court of Justice shall be deemed to provide for appeals from decisions of the Family Court to the Divisional Court. 1996, c. 25, ss. 1 (4), 9 (17, 18); 1998, c. 20, Sched. A, s. 6.

Children's lawyer
89 (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint a Children's Lawyer for Ontario. 1994, c. 27, s. 43 (1).

Duties
(3) Where required to do so by an Act or the rules of court, the Children's Lawyer shall act as litigation guardian of a minor or other person who is a party to a proceeding. 1994, c. 12, s. 37; 1994, c. 27, s. 43 (2).

Same
(3.1) At the request of a court, the Children's Lawyer may act as the legal representative of a minor or other person who is not a party to a proceeding. 1994, c. 12, s. 37; 1999, c. 12, Sched. B, s. 4 (1).

Children's Lawyer

89 (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint a Children's Lawyer for Ontario. 1994, c. 27, s. 43 (1).
Qualification

(2) No person shall be appointed as Children's Lawyer unless he or she has been a member of the bar of one of the provinces or territories of Canada for at least ten years or, for an aggregate of at least ten years, has been a member of such a bar or served as a judge anywhere in Canada after being a member of such a bar. 1994, c. 12, s. 37; 1994, c. 27, s. 43 (2).

Duties

(3) Where required to do so by an Act or the rules of court, the Children's Lawyer shall act as litigation guardian of a minor or other person who is a party to a proceeding. 1994, c. 12, s. 37; 1994, c. 27, s. 43 (2).

Same

(3.1) At the request of a court, the Children's Lawyer may act as the legal representative of a minor or other person who is not a party to a proceeding. 1994, c. 12, s. 37; 1999, c. 12, Sched. B, s. 4 (1).

Family Law Rules, O Reg 114/99

Rule 4: Representation
Definition
4. (0.1) In this rule,
"limited scope retainer" means the provision of legal services by a lawyer for part, but not all, of a party's case by agreement between the lawyer and the party. O. Reg. 322/13, s. 2 (1).

Representation for a party
(1) A party may,
(a) act in person;
(b) be represented by a lawyer; or

(c) be represented by a person who is not a lawyer, but only if the court gives permission in advance. O. Reg. 114/99, r. 4 (1); O. Reg. 322/13, s. 2 (2).

Lawyer for child

(7) In a case that involves a child who is not a party, the court may authorize a lawyer to represent the child, and then the child has the rights of a party, unless the court orders otherwise. O. Reg. 114/99, r. 4 (7).

Rule 14: Motions For Temporary Orders

Motion With Notice

(11) A party making a motion with notice shall,

(a) serve the documents mentioned in subrule (9) or (10) on all other parties, not later than six days before the motion date;

(b) file the documents as soon as possible after service, but not later than four days before the motion date;

(c) confer or attempt to confer orally or in writing with every other party about the issues that are in dispute in the motion, subject to a party being prohibited from such communication by court order;

(d) before giving the clerk confirmation of the motion in Form 14C under clause (e), give a copy of the confirmation of motion to every other party using mail, fax, email or any other method, except in a child protection case; and

(e) not later than 2 p.m. three days before the motion date, give the clerk the confirmation of motion (Form 14C) by,

(i) delivering it to the court office, or

(ii) if available in the court office, sending it by fax or by email. O. Reg. 298/18, s. 10 (2).

Rule 38: Appeals

Appeal of temporary order in CYFSA case

(3) In an appeal of a temporary order made in a case under the *Child, Youth and Family Services Act, 2017* and brought to the Divisional Court under clause 19 (1) (b) of the *Courts of Justice Act*, the motion for leave to appeal shall be combined with the notice of appeal and heard together with the appeal. O. Reg. 89/04, s. 13; O. Reg. 298/18, s. 20 (3).

Appeals to the Superior Court of Justice

(4) Subrules (5) to (45) apply to an appeal from an order of the Ontario Court of Justice to the Superior Court of Justice under,

(a) section 48 of the *Family Law Act*;

(b) section 73 of the *Children's Law Reform Act*;

(c) sections 121 and 215 of the *Child, Youth and Family Services Act, 2017*;

(d) section 40 of the *Interjurisdictional Support Orders Act, 2002*;

(e) section 40 of the *Courts of Justice Act*; and

(f) any other statute to which these rules apply, unless the statute provides for another procedure. O. Reg. 89/04, s. 13; O. Reg. 298/18, s. 20 (4).

***Rules of Civil Procedure*, RRO 1990, Reg 194**

RULE 40 INTERLOCUTORY INJUNCTION OR MANDATORY ORDER
How Obtained
40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding. R.R.O. 1990, Reg. 194, r. 40.01.

Motion for Leave to Appeal
62.02 (1) Leave to appeal to the Divisional Court from any of the following orders shall be obtained from a panel of that court in accordance with this rule:

1. An interlocutory order of a judge of the Superior Court of Justice, under clause 19 (1) (b) of the Courts of Justice Act.

2. A final order of a judge of the Superior Court of Justice for costs, under clauses 19 (1) (a) and 133 (b) of the Courts of Justice Act. O. Reg. 536/18, s. 4 (1).
(1.1) Revoked: O. Reg. 82/17, s. 14 (1).

Motion in Writing
(2) The motion for leave to appeal shall be heard in writing, without the attendance of parties or lawyers. O. Reg. 170/14, s. 22 (2).

Notice of Motion
(3) Subrules 61.03.1 (2) and (3) apply, with necessary modifications, to the notice of motion for leave. O. Reg. 170/14, s. 22 (2).

Grounds on Which Leave May Be Granted
(4) Leave to appeal from an interlocutory order shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the panel hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the panel hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in the panel's opinion, leave to appeal should be granted. R.R.O. 1990, Reg. 194, r. 62.02 (4); O. Reg. 82/17, s. 14 (2, 3); O. Reg. 536/18, s. 4 (2).

Procedures
(5) Subrules 61.03.1 (4) to (19) (motion for leave to appeal to Court of Appeal) apply, with the following and any other necessary modifications, to the motion for leave to appeal:

1. References in those subrules to the Court of Appeal shall be read as references to the Divisional Court.

2. For the purposes of subrule 61.03.1 (4),

i. the moving party's factum shall be limited to those facts, issues, statements of law and authorities that are relevant to a ground on which leave to appeal may be granted, and

ii. the motion record served by the moving party shall include a document or portion of a document, including a transcript of evidence, only if the document or portion of a document is relevant to a ground on which leave to appeal may be granted and is referred to in the moving party's factum.

3. For the purposes of subrules 61.03.1 (7) and (8),

i. the responding party's factum shall be limited to those facts, issues, statements of law and authorities that are relevant to a ground on which leave to appeal may be granted, and

ii. any motion record served by the responding party shall include a document or portion of a document, including a transcript of evidence, only if the document or portion of a document is relevant to a ground on which leave to appeal may be granted and is referred to in the responding party's factum. O. Reg. 455/19, s. 1.

(6), (6.1), (6.2) Revoked: O. Reg. 170/14, s. 22 (3).
(6.3) Revoked: O. Reg. 394/09, s. 30 (3).
(7) Revoked: O. Reg. 82/17, s. 14 (5).

Subsequent Procedure Where Leave Granted
(8) Where leave is granted, the notice of appeal required by rule 61.04, together with the appellant's certificate respecting evidence required by subrule 61.05 (1), shall be delivered within seven days after the granting of leave, and thereafter Rule 61 applies to the appeal. R.R.O. 1990, Reg. 194, r. 62.02 (8).

***Law Society Act,* RSO 1990, c L.8**

Function of the Society
4.1 It is a function of the Society to ensure that,

(a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
(b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario. 2006, c. 21, Sched. C, s. 7.

Principles to be applied by the Society
4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

1. The Society has a duty to maintain and advance the cause of justice and the rule of law.

2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.

3. The Society has a duty to protect the public interest.

4. The Society has a duty to act in a timely, open and efficient manner.

5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized. 2006, c. 21, Sched. C, s. 7.

***Youth Criminal Justice Act,* SC 2002, c 1**

Definitions
2 (1) The definitions in this subsection apply in this Act.

> ***child*** means a person who is or, in the absence of evidence to the contrary, appears to be less than twelve years old. (*enfant*)
>
> ***young person*** means a person who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old and, if the context requires, includes any person who is charged under this Act with having committed an offence while he or she was a young person or who is found guilty of an offence under this Act. (*adolescent*)

Right to counsel
25 (1) A young person has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person and before and during any consideration of whether, instead of starting or continuing judicial proceedings against the young person under this Act, to use an extrajudicial sanction to deal with the young person.

Arresting officer to advise young person of right to counsel
(2) Every young person who is arrested or detained shall, on being arrested or detained, be advised without delay by the arresting officer of the right to retain and instruct counsel, and be given an opportunity to obtain counsel.

Justice, youth justice court or review board to advise young person of right to counsel
(3) When a young person is not represented by counsel

(a) at a hearing at which it will be determined whether to release the young person or detain the young person in custody,
(a.1) at a hearing held in relation to an order referred to in subsection 14(2) or 20(2),
(b) at a hearing held under section 71 (hearing — adult sentences),
(c) at trial,
(d) at any proceedings held under subsection 98(3) (continuation of custody), 103(1) (review by youth justice court), 104(1) (continuation of custody), 105(1) (conditional supervision) or 109(1) (review of decision),
(e) at a review of a youth sentence held before a youth justice court under this Act, or
(f) at a review of the level of custody under section 87,

the justice or youth justice court before which the hearing, trial or review is held, or the review board before which the review is held, shall advise the young person of the right to retain and instruct counsel and shall give the young person a reasonable opportunity to obtain counsel.

Trial, hearing or review before youth justice court or review board
(4) When a young person at trial or at a hearing or review referred to in subsection (3) wishes to obtain counsel but is unable to do so, the youth justice court before which the hearing, trial or review is held or the review board before which the review is held

(a) shall, if there is a legal aid program or an assistance program available in the province where the hearing, trial or review is held, refer the young person to that program for the appointment of counsel; or

(b) if no legal aid program or assistance program is available or the young person is unable to obtain counsel through the program, may, and on the request of the young person shall, direct that the young person be represented by counsel.

Appointment of counsel
(5) When a direction is made under paragraph (4)(b) in respect of a young person, the Attorney General shall appoint counsel, or cause counsel to be appointed, to represent the young person.

Application by Attorney General
64 (1) The Attorney General may, before evidence is called as to sentence or, if no evidence is called, before submissions are made as to sentence, make an application to the youth justice court for an order that a young person is liable to an adult sentence if the young person is or has been found guilty of an offence for which an adult is liable to imprisonment for a term of more than two years and that was committed after the young person attained the age of 14 years.
(1.1) [Repealed, 2019, c. 25, s. 376]
(1.2) [Repealed, 2019, c. 25, s. 376]

Notice of intention to seek adult sentence
(2) If the Attorney General intends to seek an adult sentence for an offence by making an application under subsection (1), the Attorney General shall, before the young person enters a plea or with leave of the youth justice court before the commencement of the trial, give notice to the young person and the youth justice court of the intention to seek an adult sentence.

Included offences
(3) A notice of intention to seek an adult sentence given in respect of an offence is notice in respect of any included offence of which the young person is found guilty for which an adult is liable to imprisonment for a term of more than two years.

(4) and (5) [Repealed, 2012, c. 1, s. 176], 2002, c. 1, s. 64, 2012, c. 1, s. 176, 2019, c. 25, s. 376

Immigration and Refugee Protection Act, SC 2001, c 27

Right to counsel
167 (1) A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel.

Representation
(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.

Citizenship Act, RSC 185, c C-29

Grant of citizenship
5 (1) The Minister shall grant citizenship to any person who

> **(a)** makes application for citizenship;
> **(b)** [Repealed, 2017, c. 14, s. 1]
> **(c)** is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, has, subject to the regulations, no unfulfilled conditions under that Act relating to his or her status as a permanent resident and has
>
> > **(i)** been physically present in Canada for at least 1,095 days during the five years immediately before the date of his or her application, and
> > **(ii)** [Repealed, 2017, c. 14, s. 1]
> > **(iii)** met any applicable requirement under the *Income Tax Act* to file a return of income in respect of three taxation years that are fully or partially within the five years immediately before the date of his or her application;
>
> **(c.1)** [Repealed, 2017, c. 14, s. 1]
> **(d)** if 18 years of age or more but less than 55 years of age at the date of his or her application, has an adequate knowledge of one of the official languages of Canada;
> **(e)** if 18 years of age or more but less than 55 years of age at the date of his or her application, demonstrates in one of the official languages of Canada that he or she has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and
> **(f)** is not under a removal order and is not the subject of a declaration by the Governor in Council made pursuant to section 20.

Application — minor
(1.04) When the application referred to in paragraph (1)(a) is in respect of a minor, it must be

> **(a)** made by a person who has custody of the minor or who is empowered to act on their behalf by virtue of a court order or written agreement or by operation of law, unless otherwise ordered by a court; and

(b) countersigned by the minor, if the minor has attained the age of 14 years on or before the day on which the application is made and is not prevented from understanding the significance of the application because of a mental disability.

Application made by minor
(1.05) If the Minister waives the requirement set out in paragraph (1.04)(a) under subparagraph (3)(b)(v), the application referred to in paragraph (1)(a) may be made by the minor.

Health Care and Consent Act, 1996, SO 1996, c 2, Sch A

CONSENT TO TREATMENT
No Treatment without Consent
10 (1) A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,

(a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or

(b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person's substitute decision-maker has given consent on the person's behalf in accordance with this Act. 1996, c. 2, Sched. A, s. 10 (1).

Opinion of Board or court governs
(2) If the health practitioner is of the opinion that the person is incapable with respect to the treatment, but the person is found to be capable with respect to the treatment by the Board on an application for review of the health practitioner's finding, or by a court on an appeal of the Board's decision, the health practitioner shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless the person has given consent. 1996, c. 2, Sched. A, s. 10 (2).

Elements of consent
11 (1) The following are the elements required for consent to treatment:
1. The consent must relate to the treatment.
2. The consent must be informed.
3. The consent must be given voluntarily.
4. The consent must not be obtained through misrepresentation or fraud. 1996, c. 2, Sched. A, s. 11 (1).

Informed consent
(2) A consent to treatment is informed if, before giving it,

(a) the person received the information about the matters set out in subsection (3) that a reasonable person in the same circumstances would require in order to make a decision about the treatment; and
(b) the person received responses to his or her requests for additional information about those matters. 1996, c. 2, Sched. A, s. 11 (2).

Same
(3) The matters referred to in subsection (2) are:

1. The nature of the treatment.
2. The expected benefits of the treatment.
3. The material risks of the treatment.
4. The material side effects of the treatment.
5. Alternative courses of action.
6. The likely consequences of not having the treatment. 1996, c. 2, Sched. A, s. 11 (3).

Express or implied
(4) Consent to treatment may be express or implied. 1996, c. 2, Sched. A, s. 11 (4).

No treatment contrary to wishes
26 A health practitioner shall not administer a treatment under section 25 if the health practitioner has reasonable grounds to believe that the person, while capable and after attaining 16 years of age, expressed a wish applicable to the circumstances to refuse consent to the treatment. 1996, c. 2, Sched. A, s. 26.

Counsel for incapable person
81 (1) If a person who is or may be incapable with respect to a treatment, managing property, admission to a care facility or a personal assistance service is a party to a proceeding before the Board and does not have legal representation,

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 81 (1) of the Act is amended by striking out "admission to a care facility" in the portion before clause (a) and substituting "admission to or confining in a care facility". (See: 2017, c. 25, Sched. 5, s. 62)

(a) the Board may direct Legal Aid Ontario to arrange for legal representation to be provided for the person; and
(b) the person shall be deemed to have capacity to retain and instruct counsel. 1996, c. 2, Sched. A, s. 81 (1); 2009, c. 33, Sched. 18, ss. 10 (3, 4).

Responsibility for legal fees
(2) If legal representation is provided for a person in accordance with clause (1) (a) and no certificate is issued under the Legal Aid Services Act, 1998 in connection with the proceeding, the person is responsible for the legal fees. 1996, c. 2, Sched. A, s. 81 (2); 1998, c. 26, s. 104.

Same
(2.1) Nothing in subsection (2) affects any right of the person to an assessment of a solicitor's bill under the Solicitors Act or other review of the legal fees and, if it is determined that the person is incapable of managing property, the assessment or other review may be sought on behalf of the person by,
(a) the person's guardian of property appointed under the Substitute Decisions Act, 1992; or
(b) the person's attorney under a continuing power of attorney for property given under the Substitute Decisions Act, 1992. 2009, c. 33, Sched. 18, s. 10 (5).

Child in secure treatment program
(3) If a child who has been admitted to a secure treatment program under section 171 of the Child, Youth and Family Services Act, 2017 is a party to a proceeding before the Board, the Children's Lawyer shall provide legal representation for the child unless the Children's Lawyer is satisfied that another person will provide legal representation for the child. 1996, c. 2, Sched. A, s. 81 (3); 2017, c. 14, Sched. 4, s. 16 (2).

***Rules of Professional Conduct*, Law Society of Ontario (22 June 2000; amendments 24 October 2013)**

SECTION 2.1 INTEGRITY

2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Language Rights

3.2-2A A lawyer shall, when appropriate, advise a client of the client's language rights, including the right to use.

(i) the official language of the client's choice; and

(ii) a language recognized in provincial or territorial legislation as a language in which a matter may be pursued, including, where applicable, aboriginal languages.

3.2-2B If a client proposes to use a language of his or her choice, and the lawyer is not competent in that language to provide the required services, the lawyer shall not undertake the matter unless he or she is otherwise able to competently provide those services and the client consents in writing.

Client with Diminished Capacity

3.2-9 When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about their legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as their age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time.

[1.1] When a client is or comes to be under a disability that impairs their ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

[2] [FLSC - not in use]

[3] A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

[4] [FLSC - not in use]

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances. (See Commentary under rule 3.3-1 (Confidentiality) for a discussion of the relevant factors). If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

SECTION 3.3 CONFIDENTIALITY

Confidential Information

3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless

(a) expressly or impliedly authorized by the client;
(b) required by law or by order of a tribunal of competent jurisdiction to do so;
(c) required to provide the information to the Law Society; or
(d) otherwise permitted by rules 3.3-2 to 3.3-6.

Justified or Permitted Disclosure

3.3-1.1 When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.

SECTION 3.4 CONFLICTS

Duty to Avoid Conflicts of Interest

3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

SECTION 3.7 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

3.7-1 A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.

SECTION 5.1 THE LAWYER AS ADVOCATE

Advocacy

5.1-1 When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary

[1] **Role in Adversarial Proceedings** - In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

[2] This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.

[3] The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.
[4] In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client.
[5] A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal.
[6] When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

[7] The lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent.
[8] In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.
[9] **Duty as Defence Counsel -** When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.
[10] Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

Interpretation Act, RSO 1990, c I.11

Words and terms
29. (1) In every Act, unless the context otherwise requires,

"person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law; ("personne")

Court File No. DC1212/20

AG (THE CHILD)
JUSTICE FOR CHILDREN AND YOUTH

Appellants

-and-

J.G., L.L. and
CHILDREN AND FAMILY
SERVICES OF YORK REGION

Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

APPELLANT'S FACTUM

Justice for Children and Youth
Samira Ahmed & Mary Birdsell
1500 – 55 University Avenue
Toronto, Ontario
M5J 2H7
Tel. (416) 920-1633
Fax (416) 920-5855
Email: ahmeds@lao.on.ca
birdsem@lao.on.ca

Counsel for the Appellants