MRC | MOTHERISK COMMISSION

Harmful Impacts:

The Reliance on Hair Testing in Child Protection

Report of the Motherisk Commission

The Honourable Judith C. Beaman
Commissioner

February 2018

This Report is available at Motherisk Commission (https://motheriskcommission.ca).

ISBN 978-1-4868-1372-8. Print. [English].
ISBN 978-1-4868-1373-5. PDF. [English].

ISBN 978-1-4868-1374-2. Print. [French].
ISBN 978-1-4868-1375-9. PDF. [French].

ISBN 978-1-4868-1376-6. Print. [Mohawk].
ISBN 978-1-4868-1377-3. PDF. [Mohawk].

ISBN 978-1-4868-1378-0. Print. [Cree].
ISBN 978-1-4868-1379-7. PDF. [Cree].

ISBN 978-1-4868-1380-3. Print. [Oji-Cree].
ISBN 978-1-4868-1381-0. PDF. [Oji-Cree].

ISBN 978-1-4868-1382-7. Print. [Ojibway].
ISBN 978-1-4868-1383-4. PDF. [Ojibway].

Harmful Impacts:

The Reliance on Hair Testing in Child Protection

Report of the Motherisk Commission

To recognize the broad harm caused by the unreliable Motherisk hair testing, the Commission considered “affected persons” to include children, siblings, biological parents, adoptive parents, foster parents, extended families, and the bands or communities of Indigenous children.

This Report is dedicated to everyone who was affected by the testing.

MRC | MOTHERISK COMMISSION

The Honourable Judith C. Beaman,
Commissioner

CMR | COMMISSION MOTHERISK

L'honorable Judith C. Beaman,
Commissaire

February 26, 2018

The Honourable Yasir Naqvi
Attorney General of Ontario
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

Re: Motherisk Commission

Dear Minister:

With this letter, I am delivering the Report of the Motherisk Commission, *Harmful Impacts: The Reliance on Hair Testing in Child Protection*.

Establishing the Motherisk Commission served as public acknowledgement that the unreliable hair testing by the Motherisk Drug Testing Laboratory deeply affected Ontario families. It is my sincere hope that the services and support the Commission offered have provided some measure of relief to the families who were affected. In this Report, with the input of many partners, I make a number of recommendations to help ensure that no other family experiences similar harm in the future.

It has been a privilege to serve as the Commissioner. I appreciate the support for the Commission from your Ministry and the Ministry of Children and Youth Services.

Yours very truly,

Judith C. Beaman
Commissioner

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Contents

Acronyms and short forms in this Report

Child and Family Services Act	*CFSA*
Child, Youth and Family Services Act	*CYFSA*
Children's aid society	CAS, society
Law Society of Ontario (formerly known as the Law Society of Upper Canada)	Law Society
Legal Aid Ontario	LAO
Ministry of Children and Youth Services	MCYS
Ministry of the Attorney General	MAG
Motherisk Drug Testing Laboratory	Laboratory, Motherisk Laboratory
Office of the Children's Lawyer	OCL
Ontario Association of Children's Aid Societies	OACAS
The Hospital for Sick Children	SickKids

Note regarding child welfare legislation

At the time of writing this Report, the *Child and Family Services Act* (*CFSA*) governs child protection in Ontario. A new Act, the *Child, Youth and Family Services Act* (*CYFSA*), which will replace the *CFSA*, has received Royal Assent, but only the provisions for the protection of 16- and 17-year-olds have come into force. The remainder of the *CYFSA* is expected to come into force in spring 2018. Throughout this Report, we cite the Act presently in force as well as the new Act wherever applicable.

Executive Summary

Between 2005 and 2015, the Motherisk Laboratory at the Hospital for Sick Children in Toronto tested more than 24,000 hair samples for drugs and alcohol, from over 16,000 different individuals, for child protection purposes.[1] The Honourable Susan E. Lang's Independent Review in 2015 found that this testing was "inadequate and unreliable for use in child protection and criminal proceedings" and that the use of this evidence had "serious implications for the fairness of those proceedings."[2]

In response to Justice Lang's report, in January 2016, the Ontario government asked me to establish a Review and Resource Centre (the Motherisk Commission) to assist people whose lives had been affected by the testing. Our role was to review individual child protection cases and to provide information and referrals to counselling services and legal advice.[3] During our two-year mandate, we reviewed 1,271 cases[4] from children's aid societies (CASs) across Ontario. We made every effort to identify and review all of the cases involving Motherisk testing where children were permanently removed from their families and were still under the age of 18 at the time of our review.

My thinking about our role as a Commission evolved over the first year of our mandate. Only after we had reviewed several hundred cases and talked with many people who were affected by the testing did we begin to understand the full extent of the harm it had caused. Our increasing insight led us to undertake a restorative process to examine, with many partners, the systemic issues that contributed to the extensive use of the testing.

Reliance on hair testing in child protection work and legal proceedings, which went on for about 20 years, was manifestly unfair and harmful—whether or not it substantially affected the outcome of individual cases. The testing was imposed on people who were among the poorest and most vulnerable members of our society, with scant regard for due process or their rights to privacy and bodily integrity. Many people experienced the testing, particularly when it was done repeatedly, as intrusive and stigmatizing.

CASs used the testing to determine parents' credibility and to monitor them for abstinence from drugs or alcohol. This practice damaged the important relationships between parents and their workers—relationships that are essential to the societies' ability to support families. The discovery that unreliable test results were used as expert evidence in child protection proceedings for so many years undermines the public's confidence in the fairness of our justice system, particularly with respect to how it treats vulnerable people.

Connecting with people and communities

We undertook outreach to connect directly with parents and other people who were affected by the testing. We also reached out to organizations that could help us raise awareness of our services among their participants and clients. We distributed posters and other materials, in English and

[1] The Honourable Susan E. Lang, *Report of the Motherisk Hair Analysis Independent Review* (Toronto: Ministry of the Attorney General, 2015), 209 at para 1.
[2] *Ibid*, 4.
[3] My mandate did not include reviewing criminal cases, commenting on the potential civil or criminal liability of any person or organization, or making recommendations about financial compensation.
[4] This number is approximate. At the time of writing this Report, the Commission is still reviewing cases.

French, used social media, and advertised on radio and in print and online media. We met with and made presentations to legal, child welfare, education, advocacy, community, government, and other organizations.

Connecting with people affected by the testing proved challenging. There was no central database containing their names and contact information. Even where we had contact information, it was often out of date. Our review period covered decades and many of the families involved had not had stable housing.

Parents who come into contact with CASs are often living in poverty and facing many other difficult life circumstances. Dealing with another painful issue, such as the discredited Motherisk testing, may not have been possible or desirable for them. People often told us that their involvement with the child protection system had been traumatic and they did not want to reopen that chapter of their lives.

The Commission's guiding principles included working with children and youth to ensure that their voices were heard. The young people we met with impressed and inspired us. They had a deep understanding of the complex conditions that brought them into care. Many of them described how their parents, particularly their mothers, struggled with poverty, racism, stress, mental health issues and substance use. We met with government and advocacy organizations dedicated to children and youth, including the Office of the Children's Lawyer, the Office of the Provincial Advocate for Children and Youth, the Children in Limbo Task Force, Defence for Children International-Canada and Justice for Children and Youth. We also met with many youth advocates and Youth in Transition workers in community organizations and Indigenous Friendship Centres across Ontario.

Our guiding principles required us to ensure meaningful participation by Indigenous and racialized communities. We travelled across the province to meet with Chiefs, band councils, First Nations child and family service agencies, Indigenous Friendship Centres, and other Indigenous organizations, communities, and leaders. Our discussions, and the work of the Truth and Reconciliation Commission,[5] helped us understand the Motherisk testing issue in the context of Indigenous peoples' distinct history and experiences. This context includes residential schools and the "Sixties Scoop,"[6] which removed children from their families and communities. Today, Indigenous children continue to be overrepresented in the child protection system.

We met members of racialized groups and their advocates in community settings such as recreation centres and social housing. We made special efforts to engage African Canadian communities because they, too, are overrepresented in Ontario's child protection system. We met with organizations and advocates working in African Canadian communities on child welfare, legal, and

[5] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).

[6] *Ibid*, *Executive Summary*, 138. The "Sixties Scoop" was "the wide-scale national apprehension of Aboriginal children by child-welfare agencies. Child welfare authorities removed thousands of Aboriginal children from their families and communities and placed them in non-Aboriginal homes without taking steps to preserve their culture and identity. Children were placed in homes across Canada, in the United States, and even overseas. This practice actually extended well beyond the 1960s, until at least the mid- to late 1980s."

health issues. We learned a great deal from the work of One Vision One Voice,[7] which calls for fundamental changes to the child welfare system to address systemic racism and improve outcomes for African Canadian children and families.

Reviewing cases and offering services

The Commission reviewed individual child protection cases involving Motherisk testing occurring between 1990 and 2015. Our aim was to determine whether the testing had a substantial impact on the CAS and court decisions. If so, it was possible that the child, parent or other caregiver might have a legal remedy.

We reviewed the legal record—the evidence placed before the court by all of the parties, including CASs, parents and children. The record typically included lengthy and detailed affidavits, copies of test results, Parenting Capacity Assessments, other documents, and the judge's decision. A CAS, or anyone affected by the testing, could file additional materials with the Commission as part of a request that I reconsider my determination on the impact of the testing in an individual case.

We conducted comprehensive reviews of cases in two phases:

- Phase 1: High priority cases where final decisions about the future of children, such as custody orders, Crown wardships,8 or adoptions, had recently been made or were pending; and
- Phase 2: Cases we identified through the Ontario Court Case Tracking System (FRANK) where adoption orders had been made and Motherisk testing was a factor. In most of these cases, the children were older and had been adopted some time earlier.

Of the 1,271 cases we reviewed, I found that Motherisk test results had a substantial impact on the outcome of 56 of them. In the large majority of cases, there was other evidence (e.g. domestic violence, mental health issues, neglect of children) to support the CAS and court decisions. Behind every one of the 56 "cases," families were broken apart and relationships among children, siblings, parents, and extended families and communities were damaged or lost.

The overrepresentation of Indigenous families in the child protection system generally was reflected in our file reviews. Of the 1,271 cases, 189 (14.9 per cent) involved Indigenous families. Of the 56 substantial impact cases, 7 (12.5 per cent) involved Indigenous families. Indigenous peoples make up only 2.8 per cent of Ontario's population (as of the 2016 census).[9]

We were not able to identify the number of African Canadian families or other racialized groups in the cases we reviewed. CASs are in the early stages of collecting this data on a province-wide level.

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[7] One Vision One Voice Steering Committee, *One Vision One Voice: Changing the Ontario Child Welfare System to Better Serve African Canadians, Practice Framework Part 1, Research Report,* and *Practice Framework Part 2, Race Equity Practices* (Toronto: Ontario Association of Children's Aid Societies, 2016).

[8] "Crown ward: In child protection cases, a child who has been placed permanently in the care of a children's aid society. The state or Crown becomes the child's legal parent and has the rights and responsibilities of a parent." "Glossary of Terms," Ministry of the Attorney General, accessed at MAG Legal Definitions.

[9] "2016 Census Highlights, Factsheet 10: Aboriginal Peoples of Ontario," Ministry of Finance, November 2017, accessed at Aboriginal Peoples of Ontario 2016.

Notifying people about our reviews

In cases where the Motherisk testing had a substantial impact, I notified all of the people who were affected, including biological and adoptive parents. I shared the names of the children in these cases with the Office of the Children's Lawyer.

One of the most difficult questions we faced as a Commission was how to inform children who were affected by the Motherisk testing about the results of their families' file reviews. We felt that we had a responsibility to share this information with them before our mandate ended. We also understood that children needed to receive this information in a way that was appropriate for their ages, stages of development, and circumstances.

We sought the advice of youth involved in the child welfare system, as well as advocates, social workers, and lawyers working with and for children and youth. They emphasized to us how important it is that children and young adults know their full histories, including the role of the Motherisk testing in decisions about their families. I decided to write letters to the children in every case we reviewed. The letter explained the role of the Commission, our review of their families' files and what I had found about the impact of the Motherisk testing on their families. I sent these letters to CASs to put in the children's files so that they will see them if they choose to look at their files at any time in the future.

Referral to legal services

Where we found that the Motherisk testing had a substantial impact on a case, we offered all of the people affected a referral to an outside lawyer. The Commission covered the costs. We also provided access to alternative dispute resolution services such as mediation.

At the beginning of our mandate, Commission counsel and I considered the potential legal remedies that might be available to people who were substantially affected by the Motherisk testing. With the support of a researcher, we created a resource binder to explain the potential legal remedies, along with a summary of the law and key cases in each area. When we knew that a person who had been affected had hired a lawyer, we sent that lawyer a copy of the binder.

The cases we reviewed were sometimes in the early stages of the court process, sometimes in the later stages, and sometimes the decisions had been made many years before—including decisions to place a child for adoption. The legal options available to people affected depended on the stage the case had reached. Cases in which the children have not yet been placed permanently afford the greatest chance of success for parents seeking either custody of their children or greater access to them.

The laws and rules place limits on the ability of biological parents and other family members to appeal or challenge final orders about children. Even where an appeal or challenge is possible, the court may decide that it is not in the children's best interests to alter their living or access arrangements. This means that even where the discredited Motherisk testing substantially affected the outcome of cases, the families will likely have difficulty bringing about a change in the children's situations. These cases are likely to be very difficult and stressful to litigate and challenging for the courts to consider.

At the time of writing this Report, seven families have already achieved a legal remedy. In four of them, children have been returned to their parents' care. Most of the other substantial impact cases are still ongoing.

Referral to counselling services

The Commission provided referrals to counselling services to anyone affected by the Motherisk hair testing, regardless of whether the testing had a substantial impact on the outcome of their cases. The Commission covered the costs for up to two years from the date of the first counselling session. Counselling was completely voluntary, and it was separate from the legal file review process.

Most people who sought counselling were in considerable distress. The impacts of the hair testing had left them with profound feelings of uncertainty, mistrust, grief and anger. Many were vulnerable because of poverty, physical or mental health issues, or other difficult life circumstances even before the testing. The feedback we received showed that people who participated in counselling did find some measure of relief and healing.

The two-year term of the Commission may not have been sufficient time for all of the people who wished to do so to seek counselling. For this reason, I have recommended that the government make counselling services available, upon request, for three more years.

Identifying and addressing systemic issues

Observations from the review of individual cases

Commission counsel and I documented the recurring patterns we were seeing in the cases we reviewed. We realized that our work gave us unique insight into some of the broader systemic issues that may have contributed to the reliance on hair testing and to the failure of CASs and the court to recognize that the testing was flawed.

We developed a short list of key observations that all of us agreed encapsulated, across all of the files we reviewed, how the testing was used and its impacts on people:

1. The Motherisk hair testing was imposed on vulnerable parents with little regard for due process or their rights to privacy and bodily integrity.
2. CASs and the courts often drew negative inferences about parents who did not go for testing or disputed the results.
3. CASs and the courts often used hair test results as a proxy for assessing parenting.
4. The use of testing generally reflected a narrow approach to substance use, focussed on abstinence.
5. Test results were often admitted into evidence without the usual checks and balances of the legal system and given excessive weight by CASs and the court.

The restorative process

My team and I wanted to find a way to enable people who were affected by the testing to tell their stories. As well as helping them, we felt that giving them a voice would begin to restore the relationships between families and the people working in the child protection and legal systems.

We sought to engage everyone involved in child protection in a dialogue about making changes to prevent another problem like the Motherisk testing. We believed that in this way, we could most meaningfully address the issues we were identifying in the file reviews. We hoped that the discussion would continue after the end of our mandate.

We looked to restorative justice as a model because it recognizes harm without focussing on individual wrongdoing. This allowed us to work with many others to investigate the systemic issues we had identified, share our perspectives and together develop solutions.

We organized the restorative process in four stages:

- First, we interviewed people about how the testing had affected them and their families. We made a video of the interviews and showed it at our meetings.
- Second, we met with the groups and communities affected by the Motherisk testing issue or closely involved in the use of the testing. These included Indigenous communities, youth and child/youth advocates, African Canadian communities, biological and adoptive parents and their advocates, parents' counsel, CASs (including management, counsel and frontline workers), and judges from the Ontario Court of Justice and the Superior Court of Justice.
- Third, we held multi-sector meetings organized by topics related to the use of the testing: legislation, procedures and justice system, scientific evidence in child protection, substance use and parenting, child protection legal practice, and social work practice.
- Fourth, we held a Symposium, which brought together many of the people from our earlier meetings as well as new participants. The themes focused on ensuring the reliability of scientific evidence in child protection, supporting and empowering families, and sustaining and enhancing collaboration across sectors.

My Recommendations were informed by these discussions, our file review observations and further research.

Recommendations for change

My Recommendations centre on helping to ensure the reliability of expert evidence, strengthening families and communities, and promoting education and collaboration.

Ensuring the reliability of expert evidence

CASs offered Motherisk test results as expert evidence in the legal proceedings to determine whether children were in need of protection and if so, who should care for them. Child protection law has special rules of evidence that recognize the need to protect children and to make decisions about their care as quickly as possible. However, the relaxed approach to admitting the test results in the cases we reviewed pushed these less rigorous standards of evidence beyond what could reasonably be considered necessary or fair.

I have recommended a number of amendments to the legislation and rules governing the use of expert evidence in child protection, as well as changes to strengthen the representation of parents. I have also recommended enhanced education for judges on their important role as gatekeepers for expert evidence in the child protection context.

Strengthening families and communities

There is an enormous power imbalance between the families involved in the child protection system and CASs. This was obvious in many ways in the cases we reviewed. Parents were under pressure to go for testing, and compared with the CASs' evidence, far fewer materials were filed with the court on the parents' behalf and fewer experts were called. CASs will always have more resources than

parents do, but I believe that the child protection system can only operate fairly, and in the best interests of children and families, if parents have greater power to advocate for themselves and their children.

I have called on the federal government to immediately provide adequate funding to First Nations for band representatives. I know of no better example in Ontario where workers strive to meet the holistic needs of parents and families in their communities. I have made recommendations to provide better information and supports to parents, including system navigators, peer mentors and social workers to assist parents' counsel. I have also made recommendations to help parents dealing with substance use issues, including enhancing family-inclusive treatment options and strengthening partnerships and education. Finally, I have recommended that CASs continue to involve parents and youth in dialogue and decision making, and that they continue to work toward achieving equity in the child welfare system.

Promoting education and collaboration

In all of our discussions, participants emphasized the need for enhanced education in child protection for everyone involved in the system, including social workers, counsel and judges.

Many participants also highlighted the need for ongoing opportunities for collaboration, much like the Motherisk Symposium offered. The Symposium brought together people affected by the testing, child welfare workers, lawyers, academics, scientists, community workers, and many others interested in the welfare of children and their families. Preventing problems similar to the Motherisk testing will require reflection and action from all of these individuals and sectors.

I have made recommendations to strengthen the practice of social work and the practice of child protection law. I have also recommended that a stakeholder advisory committee be established to advise the government on the implementation of the Recommendations in this Report and to organize an annual child protection summit.

Implementing these Recommendations

I believe that my Recommendations should be further developed and implemented in consultation with the people they will affect most, including children and youth, parents, and Indigenous and racialized communities. They have direct experience with the child protection and legal systems and important knowledge to share. CASs, advocacy and peer support organizations, parents' counsel, and many others who work in child protection will also have specific expertise to contribute to the implementation process.

I recognize that implementing some of these changes will add pressures and new procedures to our already busy child protection and legal systems, and it will require additional funding. However, I believe these changes are vital given the harm the Motherisk hair testing caused to families and the damage it did to the credibility of our child protection and legal systems.

There is no certainty in child protection. The Motherisk hair testing seemed to offer that certainty, but it failed us. It showed us that we must be much more careful in how we use expert evidence and that we must provide more support to child protection and legal partners to challenge its reliability. We must also listen more carefully to children, youth, and parents about what they need and want. It is my hope that through the counselling and legal services the Commission offered, and through our restorative process, some of the families harmed by the Motherisk testing will begin to find

peace and healing. I propose my Recommendations as steps toward ensuring that no family will experience similar harm in the future.

Summary of Recommendations

Extension of Counselling Services

1. The Ministry of Children and Youth Services should make free counselling services available to all affected persons,[10] whether children, youth, or adults, upon request, for three more years from the date the Commission ceased to offer services (January 15, 2018).

Ensuring the Reliability of Expert Evidence

Bodily samples

2. The Ministry of Children and Youth Services should direct children's aid societies to ensure that all child protection workers meet the requirements for obtaining valid written consent, in accordance with s 4(2) of the *Child and Family Services Act* (s 21(2) of the *Child, Youth and Family Services Act*), in every situation where a parent is asked to provide a bodily sample. The directive should require workers to document the steps they took to obtain consent and should require workers to obtain confirmation signed by the parent acknowledging that the requirements for valid consent were met.

3. The Ontario government should amend the *Child, Youth and Family Services Act* to

    a. require courts to exclude evidence of tests of parents' bodily samples unless the court is satisfied that the parent provided valid consent, or that the sample was obtained by order under the Act. The only exception should be situations where the introduction of the evidence is critical to protecting a child's immediate safety. The provision should require the court to consider the parent's right to privacy and security of the person before making this exception;

    b. prohibit courts from admitting evidence of a person's failure or refusal to voluntarily provide a bodily sample for testing where the evidence is being introduced in order to demonstrate that the person is less worthy of belief, is or has been engaging in substance use, or is being uncooperative; and

    c. provide specific criteria for judicial orders that require a person to provide a bodily sample, with those criteria relating to the safety of a child.

[10] We considered "affected persons" broadly to include the following:

- Children whose families were involved with CASs in part because of concerns arising from positive Motherisk hair testing, as well as their siblings, biological parents, adoptive parents, and foster parents;
- Family members, such as grandparents, aunts and uncles;
- Any other person who offered a plan for the children;
- Individuals caring for the children under a customary care agreement, kinship arrangement or a custody order; and
- The bands or communities of Indigenous children.

Expert reports

4. The Family Rules Committee should amend the *Family Law Rules* to

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

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

Temporary proceedings

5. The Family Rules Committee should amend the *Family Law Rules* to require courts to assess the necessity for and reliability of any expert evidence through a *voir dire* before admitting that expert's report into evidence on any motion in a child protection proceeding, except at the first appearance. Deviation from this requirement should only be permitted where the parent expressly acknowledges to the court that the findings of the expert are correct and the court is satisfied that the parent adequately understands the expert opinion and the consequences of such an acknowledgement.

6. The Ontario government should amend the *Child, Youth and Family Services Act* to prohibit the admission of hearsay evidence of expert opinion, including test results and the interpretation of those results, at any stage of a child protection proceeding other than the first appearance. Deviation from this requirement should only be permitted where the parent expressly acknowledges to the court that the findings of the expert are correct and the court is satisfied that the parent adequately understands the expert opinion and the consequences of such an acknowledgement.

Summary judgment motions

7. The Family Rules Committee should amend the *Family Law Rule* relating to summary judgment motions to

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

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

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

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

Accessibility of Legal Aid funds

8. Legal Aid Ontario should

    a. in authorizing disbursements to parents' counsel related to expert evidence, consider the complexity of child protection cases and the miscarriages of justice that could result from failing to vigorously challenge expert evidence;

    b. expand its Big Case Management program to child protection cases; and

    c. expand its Complex Case Rate policy to child protection counsel.

9. The Ministry of the Attorney General should ensure that the total funding available to Legal Aid Ontario is sufficient to enable the Recommendations in this Report to be implemented.

Specialty legal clinic for child protection

10. Legal Aid Ontario should establish an independent specialty legal clinic focused on child protection that could accept "hard to serve" clients, provide research and mentoring for private practitioners, engage in advocacy, and bring test case litigation to protect and enhance the rights of parents in child protection proceedings.

Disclosure

11. The Family Rules Committee should amend the *Family Law Rules* to require children's aid societies to provide automatic, ongoing, thorough and timely disclosure to parents.

Education for judges on gatekeeping role in child protection

12. The National Judicial Institute, the Superior Court of Justice in Ontario, and the Ontario Court of Justice should enhance their efforts to provide education programs and resources on expert evidence in child protection proceedings. Education should emphasize the skills judges need in order to perform their gatekeeper function in the unique context of child protection.

Strengthening Families and Communities

Funding for band representatives

13. The federal government should immediately provide adequate funding for First Nations band representatives. The Ontario government should help to support their ongoing training needs. The Ontario government should also move quickly, in consultation with Métis and Inuit peoples, to determine how representatives from these communities will be identified and funded to participate in child protection proceedings under the *Child, Youth and Family Services Act*.

Support to parents

14. Legal Aid Ontario should undertake and evaluate a pilot project to provide funding for social workers to assist parents' counsel and provide direct support to parents involved in child protection proceedings. This project should be developed in consultation with parents' counsel and parents who have experience with the child protection system.

15. The Ministry of Children and Youth Services, with partner ministries such as the Ministry of Health and Long-Term Care and the Ministry of Community and Social Services, and in consultation with parents who have experience with the child protection system, should

undertake and evaluate a pilot project to provide navigators for parents in community-based settings in three different parts of the province, including the North.

16. The Ministry of Children and Youth Services should develop a permanent, application-based funding program to support peer mentorship for parents who are involved in the child protection system. This program should be developed in consultation with parents who have experience with the system.

Information for parents

17. The Ministry of Children and Youth Services should fund the development of a comprehensive, plain-language guide on the child protection system for parents who are involved with a children's aid society. The Ministry should require that societies provide a copy of this guide to all parents at the time of their first interaction with them.

Family-inclusive substance use treatment programs

18. The Ministry of Health and Long-Term Care should support the development of more substance use treatment programs that are family-inclusive, and should address the systemic barriers that parents and other caregivers face in accessing and completing these programs.

CAS and substance use treatment provider partnerships

19. The Ministry of Children and Youth Services should consult with children's aid societies and substance use treatment providers to develop a program, similar to the former Children Affected by Substance Abuse program, to support partnerships between these two sectors. The program should provide for substance use treatment providers working alongside society staff. It should be funded on a permanent basis and expanded across the province.

Education on substance use and impact on parenting

20. The Ministry of Children and Youth Services, the Ontario Association of Children's Aid Societies, and the Office of the Children's Lawyer should ensure that child protection workers, children's aid society counsel, and children's counsel respectively receive ongoing education about substance use issues and their impact on parenting.

21. The Law Society of Ontario, and other continuing legal education partners such as the Ontario Bar Association and Legal Aid Ontario, should ensure that lawyers representing parents and other caregivers have access to ongoing education on substance use issues and their impact on parenting.

22. The National Judicial Institute, in collaboration with the Superior Court of Justice in Ontario and the Ontario Court of Justice, should design and deliver education for judges that addresses substance use issues and their impact on parenting.

Parent and youth advisory committees

23. Every children's aid society in Ontario should establish a parent advisory committee and a youth advisory committee and should engage these committees in meaningful dialogue about the society's policies, services, and engagement with the community.

Equity of Ontario's child welfare system

24. The Ontario Association of Children's Aid Societies should continue to work with Indigenous and African Canadian communities to identify and address systemic racism to achieve better outcomes for children, youth, and families from these communities.

25. The Ministry of Children and Youth Services should provide the Ontario Association of Children's Aid Societies with adequate resources to undertake the work described in Recommendation 24, including funding a permanent Director of Equity position (similar to the permanent Director of Aboriginal Services) to work with children's aid societies across the province to implement the One Vision One Voice Race Equity Practices and to continue to address systemic racism beyond these practices.

Promoting Education and Collaboration

Child welfare education for social workers

26. All social work schools in Ontario that do not already do so should offer a specialized child welfare program, which should include placements in children's aid societies or related agencies serving parents and children. These programs should be developed with the input of parents and youth who have experience with the child welfare system. Social work schools should also ensure that their students are taught about the legal framework and social context for child protection work, including training on systemic racism.

Child welfare education for law students and child protection lawyers

27. All Ontario law schools that have not already done so should develop and promote at least one course on child welfare, including experiential learning opportunities. Children's aid societies, the Office of the Children's Lawyer and Legal Aid Ontario should help facilitate these opportunities. Law schools should also incorporate child welfare content into other courses, such as Evidence, Constitutional Law and Indigenous Law.

28. The Law Society of Ontario, the Ontario Bar Association and other continuing legal education providers should offer regular continuing education opportunities for both new and more experienced child protection lawyers, including enhanced online learning and other resources, at a reasonable cost.

Policy guidance for CAS counsel

29. The Ministry of Children and Youth Services should lead the development and publication of a policy manual for children's aid society lawyers, modelled on the Crown Prosecution Manual. The manual should be developed in consultation with the Organization of Counsel to Children's Aid Societies, the Ontario Association of Children's Aid Societies and the Law Society of Ontario.

Certified Specialist designation in child protection

30. The Law Society of Ontario should create a Certified Specialist designation in child protection law for lawyers practising in this area.

Stakeholder advisory committee and annual child protection summit

31. The Ministry of Children and Youth Services and the Ministry of the Attorney General should establish, as soon as practically possible, a committee to provide advice to them on the

implementation of the Recommendations in this Report. The committee should be made up of key stakeholders, including youth and parents who have experience with the child welfare system, children's aid society workers and counsel, parents' counsel, community workers, academics, and others involved in the child protection and legal systems. Indigenous and African Canadian communities should be meaningfully represented on the committee.

32. The advisory committee described in Recommendation 31 should be supported to organize an annual multidisciplinary child protection summit, beginning in 2019. The Ministry of Children and Youth Services and the Ministry of the Attorney General should report annually to the summit on the progress of the implementation of the Recommendations in this Report.

Introduction

> *Dangle the carrot, make you jump a bit higher. I'm thinking if I do this, if I appease them* [the children's aid society] *again, do this and do that, that maybe, maybe we'll get him back. I'm battle weary but I'll never give up.*
>
> —A parent affected by the Motherisk hair testing

> *I received a voicemail message from the mother stating that she had not attended her scheduled visit that day because she was 'giving up.' She stated in her voicemail message that she had 'no way to fight you guys on this cocaine bit and I haven't done it so I'm calling to let you know that I am giving up.'*
>
> —From a children's aid society affidavit

In January 2016, the Ontario government asked me to establish a Review and Resource Centre (the Motherisk Commission) to assist people whose lives had been affected by the hair testing conducted by the Motherisk Laboratory at The Hospital for Sick Children in Toronto. My mandate was a response to The Honourable Susan E. Lang's Independent Review, which found that the hair strand drug and alcohol testing conducted by the Laboratory was "inadequate and unreliable for use in child protection and criminal proceedings" and that the use of this evidence had "serious implications for the fairness of those proceedings."[11]

The Motherisk Commission's role was to review individual child protection cases (my mandate did not include criminal cases) and to provide information and referrals to counselling services and legal advice. Over the past two years, we reviewed 1,271 cases[12] from children's aid societies across the province. We made every effort to identify and review all cases involving Motherisk hair testing (between 1990 and 2015) where children were permanently removed from their families and were under the age of 18 at the time of our review.

To my knowledge, this was the first review of its kind in Ontario. As I considered these cases to determine what role the testing had played, and met with youth, parents, and other caregivers who had been affected by the testing, it became clear to me that what happened to them could only be properly understood and addressed within the broader context of our child welfare and legal systems.

In any configuration, families are the most fundamental unit of society. They nurture their members, especially children, physically and emotionally, supporting their well-being and growth. The rights of children to know and to be cared for by their parents, and the corresponding rights and duties of parents, are enshrined in the United Nations *Convention on the Rights of the Child*.[13] The

[11] The Honourable Susan E. Lang, *Report of the Motherisk Hair Analysis Independent Review* (Toronto: Ministry of the Attorney General, 2015), 2 at para 4.
[12] This number is approximate. At the time of writing this Report, the Commission is still reviewing cases.
[13] United Nations, *Convention on the Rights of the Child* (New York: United Nations, September 2, 1990), Articles 3, 5 and 7, accessed at UN Convention on the Rights of the Child.

Supreme Court of Canada has recognized the seriousness of state interference in the relationship between parent and child:

> [D]irect state interference with the parent-child relationship … is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as 'unfit' when relieved of custody...
>
> […]
>
> The state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination.
>
> […]
>
> Few state actions can have a more profound effect on the lives of both parent and child….[14]

Ontario's child welfare legislation recognizes the need to promote the best interests, protection and well-being of children The *Child and Family Services Act*[15] acknowledges that parents may need help in caring for their children, and that children's aid societies, on behalf of the state, must remove children from their parents' care if (and only if) it is necessary to protect the children from neglect or harm. As the Supreme Court has asserted, the procedure for making this determination must be fair.

Reliance on hair testing in child protection work and legal proceedings, which went on for about 20 years, was manifestly unfair and harmful—whether or not it substantially affected the outcome of individual cases. The testing was imposed on parents and other caregivers, who were among the poorest and most vulnerable members of our society, with scant regard for due process or their rights to privacy and bodily integrity. The people affected included Indigenous and African Canadian families, who are overrepresented in Ontario's child protection system. The Truth and Reconciliation Commission of Canada[16] and One Vision One Voice[17] in Ontario have illuminated for all of us the history and legacy of colonialism and systemic racism in child welfare.

Most of the parents who were tested were powerless to resist. They told us that they submitted to the testing under duress, in fear of losing custody of or access to their children. In some of the cases we reviewed, parents were told explicitly that this would be the consequence if they did not submit to testing. If they disputed the results, they were reproached (or, from their perspective, penalized) for arguing with the science of the testing. Counsellors who supported people affected by the testing described clients who felt that they had "lost their voice and credibility" and who were "crushed" by the testing and its repercussions.

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[14] *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 1999 CanLII 653 (SCC) at paras 61, 76, 70.

[15] *Child and Family Services Act,* RSO 1990, c C 11.

[16] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).

[17] One Vision One Voice Steering Committee, *One Vision One Voice: Changing the Ontario Child Welfare System to Better Serve African Canadians, Practice Framework Part 1, Research Report,* and *Practice Framework Part 2, Race Equity Practices* (Toronto: Ontario Association of Children's Aid Societies, 2016).

People who were affected experienced the testing, particularly repeated testing, as intrusive, stigmatizing, demoralizing and demeaning. As one mother who was tested said to us,

> *When you are subjected to this kind of scrutiny, anything you do is wrong. You are treated without respect and what happens is, over the years, you stop having self respect.*

Children's aid society workers play a sensitive dual role. They help parents to develop their strengths to improve their parenting, and at the same time, they monitor them to ensure that they are adequately caring for their children. To do this, workers need to build trusting relationships with the families they work with. The use of the testing to investigate suspicions of substance use, and the insistence by many societies that parents achieve abstinence, tipped the scales heavily toward the societies' monitoring role. It damaged these important relationships and made parents dealing with substance use issues reluctant to reach out to their workers for help. It put parents and their children at potentially greater risk of harm and undermined the ability of the child welfare system to support and strengthen families.

The child welfare system is vitally important to children and families, but it is a system under pressure. Child protection workers bear a heavy burden of responsibility for the safety of children. They must assess risk and make difficult decisions about what would be in a child's best interests. The Ontario Association of Children's Aid Societies noted in their submission to us that the Motherisk hair testing seemed like a "quick, trustworthy solution" to these pressures:

> *Through increased administrative expectations, child protection workers have had less time with caregivers and children in their homes and communities. The use of a forensic tool, understood to be credible and reliable, and promoted through a division of a world renowned medical facility such as The Hospital for Sick Children, was seen as a way to effectively expedite the assessment process, and provide a quick, trustworthy solution to ensuring child safety. The forensic tool was described as 'hard evidence,' considered by the legal and justice systems as providing far more reliable and credible information than a child welfare worker's clinical assessment and analysis.*

In April 2015, the Ministry of Children and Youth Services directed children's aid societies to stop using hair testing and The Hospital for Sick Children shut down the Motherisk Laboratory. Some societies continue to use other kinds of testing in child protection work. In our discussions with parents' counsel, we heard that since the Motherisk hair testing was discredited, there has been an increase in urine testing for drug and alcohol use. Like the Motherisk testing, by and large these tests are being admitted into evidence without proper scrutiny.

Children's aid societies offered the testing as expert evidence in legal proceedings to determine whether children were in need of protection. Child protection law has special rules of evidence that recognize the urgency of protecting children and making decisions about their care as quickly as possible. However, the relaxed approach to admitting the Motherisk test results in the cases we reviewed pushed these less rigorous standards of evidence beyond what could reasonably be considered necessary or fair. We saw numerous examples of double hearsay, reports of test results

without the actual results, raw test results (i.e. numbers) without interpretations, and many inconsistencies and apparent anomalies in the information provided by the Motherisk Laboratory. With few exceptions, the court did not adequately perform its crucial gatekeeper role to ensure that only reliable evidence was admitted at various stages of child protection proceedings.

Our adversarial legal system presumes a level playing field for opposing parties and there are mechanisms in place to ensure that vulnerable people are represented. For example, Legal Aid Ontario provides legal assistance for people whose incomes fall below a certain threshold. Nevertheless, in the cases we reviewed, few documents were filed on behalf of children, youth and parents. They told us that they felt disregarded in the decisions made about them.

When parents challenged the Motherisk Laboratory test results, they were often labelled "uncooperative." Only very rarely did someone speak up to question the reliability of the test results on their behalf. In a few cases, the court strongly discouraged parents' counsel from challenging the testing. The test results may or may not have been accurate in any particular case. We have no way of knowing given the flawed testing methodology. However, the discovery that unreliable test results were used as expert evidence in child protection proceedings for so many years undermines the public's confidence in the fairness of our justice system, particularly with respect to how it treats vulnerable people.

In this Report, I sometimes contrast child protection law with criminal law. In both areas of law, the goal is to protect the public. Both areas engage the rights of individuals under the *Canadian Charter of Rights and Freedoms*,[18] as well. Both contend with resource pressures and concerns about potential miscarriages of justice. However, in criminal law, the requirements are much more stringent when it comes to taking and testing bodily samples and scrutinizing and admitting expert evidence. There are also significant differences in culture between the two areas of law. In criminal cases, defence counsel are expected to fight hard for their clients. In child protection cases, parents' counsel who advocate too vigorously for their clients can be seen as lacking concern for the best interests of the children. Perhaps it is not surprising that it was a criminal case that exposed the potential unreliability of the Motherisk testing, even though it was used in only a handful of criminal cases—but in thousands of child protection cases.

As we reviewed individual cases, we identified and documented recurring patterns that revealed how the laws and rules in child protection functioned to permit the flawed testing to be used for so long. We also saw how parents lacked the information and support they needed to advocate more strongly for themselves and their families. In the second year of our mandate, we undertook a restorative process to investigate, with others, why the Motherisk testing issue happened and how a similar failure could be prevented. People and communities affected by the testing and diverse partners involved in the child protection and legal systems were part of this process. Many of the Recommendations in this Report evolved from the restorative process. I recognize that implementing some of the changes I recommend will add pressures and new procedures to our already busy child protection and legal systems, and it will require additional funding. However, I believe these changes are vital given the harm the Motherisk hair testing caused to families and the damage it caused to the credibility of those systems.

[18] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

Justice Lang has called Crown wardship, losing your child, the "capital punishment" of child protection law.[19] In their submission to us, Defence for Children International-Canada added that "[f]or children, losing one's family is often the beginning of a life sentence." In some of the cases we reviewed, overreliance on the Motherisk hair testing broke families apart. Relationships with children, siblings, parents and extended family members were damaged or lost, and the children were removed from their communities. Parents in these cases will find it difficult to obtain a remedy through the courts that would give them access or greater access to their children. Even if they are successful, they will have lost precious years with them. The decisions we make in child protection are often devastating and irrevocable. It is critical that only reliable evidence and a fair process be used in the service of making those decisions.

Many of my Recommendations focus on encouraging partnerships and dialogue among the people and sectors involved in child protection. All of them are essential in developing solutions to the systemic issues that led to the reliance on the Motherisk hair testing. Through our restorative process, I saw genuine commitment to the sustained collaboration needed to bring about the changes I have proposed.

[19] See the joint investigation by the *Toronto Star*, CBC's *The Fifth Estate* and CBC Radio's *The Current*. See Rachel Mendleson, "Separated by a Hair," *Toronto Star*, October 19, 2017, accessed at Separated by a Hair; Canadian Broadcasting Corporation "Motherisk: Tainted Tests and Broken Families," *The Fifth Estate*, October 20, 2017, accessed at "The Fifth Estate" Motherisk episode; and CBC Radio, "Motherisk investigation reveals concerns over 'unreliable' tests long before lab shut down," *The Current*, October 20, 2017, accessed at "The Current" Transcript.

PART 1:
Establishing the Commission and Reaching Out

1. Background to the Establishment of the Commission

The Motherisk Drug Testing Laboratory

Located in The Hospital for Sick Children (SickKids), the Motherisk Drug Testing Laboratory (the Laboratory) was part of the hospital's Motherisk Program. The program provides information, guidance, and support about the risks of drug and chemical exposure during pregnancy and breastfeeding.[20]

The Laboratory began as a research facility, doing research into (among other things) the detection and analysis of various compounds in hair. The analysis was assumed to reveal substances consumed by the individual tested. By the late 1990s, the Laboratory was increasingly receiving requests from children's aid societies (CASs) to test hair samples for drug and alcohol use. In 2001, the Laboratory began promoting its hair testing services to CASs for use in child protection cases.[21] Between 2005 and 2015 alone, the Laboratory tested more than 24,000 hair samples from over 16,000 different individuals for child protection purposes. The samples from more than 9,000 of those individuals tested positive.[22]

The testing was used in thousands of child protection cases, but only in a handful of criminal cases.[23] Yet it was one of those criminal cases that exposed the potential unreliability of the testing.

The case of *R v Broomfield*[24]

On August 1, 2005, Tamara Broomfield took her two-year-old son to the emergency room at her local hospital. He was having seizures and was transferred to SickKids. Doctors identified a potentially lethal dose of cocaine in the child's blood and urine. X-rays showed that his wrist had been broken twice and he had eight fractured ribs at various stages of healing.[25]

The Laboratory tested the child's hair at the request of his doctors at SickKids and the CAS. The director and other Laboratory staff who testified at Ms. Broomfield's trial said that these tests showed that the child must have ingested substantial amounts of cocaine over the preceding 14 months.[26]

On April 1, 2009, Ms. Broomfield was convicted of aggravated assault and failure to provide the necessaries of life. She was also convicted of two counts related to giving substantial amounts of

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[20] SickKids shut down the Laboratory permanently in April 2015, but the information and education program continues to operate. See "MOTHERISK - Treating the mother - Protecting the unborn," SickKids, accessed at SickKids Motherisk.

[21] The Honourable Susan E. Lang, *Report of the Motherisk Hair Analysis Independent Review* (Toronto: Ministry of the Attorney General, 2015), 2.

[22] *Ibid*, 209 at para 1 and 222 at para 37.

[23] *Ibid*, 237, note 10. Justice Lang notes that there were six criminal cases in which the Crown used Motherisk Laboratory evidence and which resulted in convictions.

[24] *R v Broomfield*, 2014 ONCA 725 (CanLII).

[25] Lang*, Independent Review*, 22-23 at para 3 and *ibid* at para 3.

[26] Lang*, Independent Review,* 23 at para 5.

cocaine to her son over a 14-month period. Her conviction was based, in part, on the Laboratory's hair testing evidence.[27]

Ms. Broomfield appealed her convictions related to cocaine. The Court of Appeal for Ontario gave her permission to submit new evidence from Dr. Craig Chatterton, the Deputy Chief Toxicologist in the Office of the Chief Medical Examiner in Edmonton, Alberta. Dr. Chatterton challenged the techniques the Laboratory used to test hair, criticized the Laboratory's analysis of the hair sample and questioned the validity of the results given in evidence at trial.

On October 14, 2014, the Court of Appeal released its decision. The court noted that the "trial judge made her decision unaware of the genuine controversy among the experts about the use of the testing methods relied upon by the Crown expert at trial"[28] and quashed the cocaine-related convictions.

The Independent Review

Mandate

In the wake of the Court of Appeal decision, on November 26, 2014, the Ontario government established an Independent Review of the Laboratory and appointed The Honourable Susan E. Lang as the Independent Reviewer. Her mandate was to conduct a review and report her findings and recommendations on the following:

> a. the adequacy and reliability of the hair-strand drug and alcohol testing methodology utilized by Motherisk between 2005 and 2015 for use as evidence in child protection and criminal proceedings;
>
> b. the extent to which the operation of the Motherisk laboratory between 2005 and 2015 was consistent with internationally recognized forensic standards;
>
> c. other matters related to the operation of the Motherisk laboratory that the Independent Reviewer considers necessary and appropriate to address as a result of her review; and
>
> d. whether the use of evidence derived from Motherisk's hair-strand drug and alcohol testing in criminal and child protection proceedings has implications warranting an additional review or process with respect to specific cases or classes of cases and, if so, the nature and extent of any such review or process.[29]

Justice Lang was asked to investigate "systemic problems, largely of a scientific nature."[30] She was not mandated to report on individual cases, but she did review reported decisions from the Ontario

[27] *Ibid,* 23 at para 6.
[28] *R v Broomfield*, *supra* note 24 at para 12. For a more detailed account of this case, see Lang*, Independent Review*, 224-27 at paras 5-17.
[29] Lang*, Independent Review*, *Order in Council*, Appendix 2, 249-50.
[30] *Ibid*, 26 at para 17.

Court of Justice and the Superior Court of Justice in which a CAS or a criminal court relied on the Laboratory's evidence.[31]

Over the year of her investigation, Justice Lang reviewed thousands of documents, including sample case files from the Laboratory, interviewed current and former Laboratory staff, consulted with child protection, legal and other organizations, and reviewed submissions to the Independent Review. She engaged two international experts in forensic toxicology and convened two roundtables of experts in child protection and family law to assist her.[32]

Justice Lang submitted her report to the Attorney General of Ontario on December 15, 2015.

Findings

> The controversy about the reliability of forensic evidence was reminiscent of issues raised in the 2008 Report of the Inquiry into Pediatric Forensic Pathology in Ontario,[33] led by Commissioner Stephen Goudge. In both the Goudge Inquiry and this Independent Review, the challenged experts were part of the Hospital for Sick Children. In both cases, the experts' association with a world-class hospital undoubtedly provided users with assurance about the reliability of their opinions. The Goudge Report highlighted the tragedy caused by flawed forensic pathology evidence. This Review identifies flawed forensic toxicology evidence, this time emanating from the Hospital's Motherisk Laboratory.[34]
>
> —The Honourable Susan E. Lang, Independent Reviewer

The following were Justice Lang's findings:

1. The hair-strand drug and alcohol testing used by the Motherisk Drug Testing Laboratory (MDTL or the Laboratory) between 2005 and 2015 was inadequate and unreliable for use in child protection and criminal proceedings.

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

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

[31] *Ibid*, 32 at para 39.
[32] *Ibid*, 27-34.
[33] The Ontario government established Justice Goudge's inquiry, to which Justice Lang refers above, following a coroner's review of the work of Dr. Charles Smith who worked as a pediatric pathologist at SickKids. The review questioned Dr. Smith's opinion in 20 out of 45 criminal cases. In 12 of these cases, parents or caregivers had been found guilty based on Dr. Smith's unreliable forensic pathology evidence. See The Honourable Stephen T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Toronto: Ministry of the Attorney General, 2008).
[34] The Honourable Susan E. Lang, "Independent Reviewer's Statement on Release of the Report" (Toronto: The Motherisk Hair Analysis Independent Review, December 17, 2015).

4. The use of MDTL hair-testing evidence in child protection and criminal proceedings has serious implications for the fairness of those proceedings and warrants an additional review.[35]

> *I think that especially in child welfare the testing provides some assistance to cases. But one wrong, misinterpreted case by somebody who doesn't have the competencies to be interpreting it is one too many.*
>
> —A parent affected by the testing

Recommendations for a Second Review[36]

Given these findings and the many cases potentially affected, Justice Lang recommended that the Ontario government establish a "Second Review" of individual cases. The Second Review would determine the extent to which the testing may have affected child protection decisions.

Justice Lang recommended that an independent commissioner lead a Review and Resource Centre to help people who may have been affected by the testing, including parents, children, young adults, siblings, adoptive parents, and wider families. The centre would provide access to information, child protection file review, legal advice, counselling assistance and alternative dispute resolution services such as mediation.

Justice Lang recommended that the commissioner be appointed under the *Public Inquiries Act*[37] and have access to court files, child protection files, exhibits, transcripts and other materials in order to assess individual cases.[38] She specified that the "Commissioner must be, and must be seen to be, independent of the Province and all participants in the child protection system."[39]

Government of Ontario actions arising from the Independent Review

The Ministry of Child and Youth Services (MCYS) was aware that CASs often relied on Motherisk hair testing in their work with families. On April 22, 2015, while the Independent Review was still under way, MCYS issued a policy directive to CASs to stop using or relying on hair strand drug and alcohol testing in the course of providing child protection services.[40] CASs were required to confirm in writing to the Ministry by April 30, 2015 that they had complied with the directive.

> *I feel like if somebody was to not take care of their child, CAS would step in, and I'm grateful for that. However, I feel like there are standards for everything … so how did something so severe* [Motherisk hair testing] *get so messed up?*
>
> —A parent affected by the testing

[35] Lang*, Independent Review*, 228-29 at para 2.
[36] For the full text of Justice Lang's recommendations on the Second Review, see Lang*, Independent Review*, 229-37 at paras 4-35. For her complete set of recommendations, see 228-41.
[37] *Public Inquiries Act*, SO 2009, c 33, Sched 6.
[38] Lang*, Independent Review*, 230 at paras 6 and 8.
[39] *Ibid*, 230 at para 7.
[40] See Appendix 1a for this policy directive.

On December 17, 2015, the day Justice Lang's report was released to the public, the Ontario government announced that it would appoint an independent commissioner to help people who may have been affected by the Laboratory's hair testing. A toll-free number would provide immediate information and counselling referrals pending the establishment of the commission. The Attorney General announced on December 22, 2015 that I had been appointed Commissioner.[41]

Based on Justice Lang's recommendations concerning "high priority cases,"[42] MCYS issued another policy directive to CASs on December 17, 2015 to take immediate action to identify all open cases involving a positive Motherisk test.[43] Open cases were those in which a CAS intended to place a child for adoption, or in which a child had been placed for adoption but an adoption order had not yet been made. CASs were directed to notify the affected parents about the flawed testing, assess the cases in light of Justice Lang's findings and prepare copies of the files for the Commission.

[41] See Appendix 1b for this announcement.

[42] Lang*, Independent Review*, 235-36 at paras 28 and 29.

[43] See Appendix 1c for this policy directive. See also Appendix 1d for the MCYS memo to CASs indicating that the directive was no longer in effect now that the Motherisk Commission had been established. The memo reinforced the need for CASs to continue to cooperate with the Commission and reminded them that they were not to rely on hair strand testing in the course of providing child protection services. It also directed them to provide adoption documents in cases involving Motherisk hair testing to the Commission for review before submitting them to the ministry for finalization. Packages submitted were to include written confirmation from the CAS that the Commission had finished its review and had provided the opinion that the case could proceed to be finalized.

Timeline Leading to the Establishment of the Commission

October 14, 2014—The Court of Appeal for Ontario quashes Tamara Broomfield's convictions related to her child's ingestion of cocaine due to conflicting evidence about the reliability of the hair testing methods of the Motherisk Laboratory.

November 26, 2014—The Ontario government appoints former Ontario Court of Appeal Justice, The Honourable Susan E. Lang, to lead an Independent Review of the Laboratory.

March 5, 2015—SickKids announces that it is suspending all non-research activities at its Laboratory.

April 17, 2015—SickKids announces that it will close the Laboratory permanently.

April 22, 2015—MCYS directs CASs to stop using or relying on hair-strand drug and alcohol testing.

December 15, 2015—Justice Lang submits *Report of the Motherisk Hair Analysis Independent Review* to the Attorney General. She finds that the hair-strand drug and alcohol testing used by the Laboratory was inadequate and unreliable for use in child protection and criminal proceedings.

December 17, 2015—The Ontario government releases Justice Lang's report and announces that it will appoint an independent commissioner to help people who may have been affected by the Laboratory's hair testing. It provides immediate access to information and counselling through a toll-free number. MCYS directs CASs to identify all open cases involving a positive hair test and notify the parties involved.

December 22, 2015—The Attorney General announces that The Honourable Judith C. Beaman, Ontario Court of Justice, will lead an independent commission to provide support to people affected by the testing.

January 15, 2016—The Ontario government establishes the Motherisk Commission and appoints Justice Beaman to be the Commissioner.

2. Mandate and Principles

Mandate of the Commission

> *It* [Motherisk test] *tore our life. It took 10 years away I'll never have back with my kids. Never. They're gone. And those are the times I wanted. I wanted my kids. I wanted to raise them. That's gone and all I have is from here on in.*
>
> —A parent affected by the testing

Justice Lang recommended that the Ontario government establish a "Second Review" to examine individual cases that may have been affected by the flawed hair-testing methodology.[44] The Commission's mandate began where the Independent Review's ended.

On January 15, 2016, under section 3 of the *Public Inquiries Act*, the Ontario government established the Motherisk Commission by Order in Council (Terms of Reference).[45] The purpose of the *Public Inquiries Act* is to "establish an effective and accountable process for public inquiries where there is a public interest to independently inquire into facts or matters; [and] make recommendations regarding those facts or matters."[46] Section 3 of the Act enables the government to establish a commission and appoint commissioners.

The Motherisk Commission operated independently of government and was not in any way associated with CASs or SickKids.

Every commission formed under the Act has had a unique context and set of circumstances to address, yet there are broad categories of commissions that share certain procedural and mandate-related characteristics.[47] This Commission did not fall squarely into any of those categories. We could find no precedent for a commission established as a Review and Resource Centre with a mandate to assist people affected by an issue. This, combined with the urgency to start reviewing open child protection cases, meant that we had to quickly design new processes that were appropriate for our unique mandate. We listened to feedback and revised and refined our policies and procedures as needed.

The Terms of Reference set out my mandate:

1. In consultation with the Attorney General, establish and lead a Review and Resource Centre which will offer appropriate support and assistance to persons

[44] Lang*, Independent Review*, 229 at para 4.
[45] See Appendix 2a for the Order in Council establishing the Commission.
[46] *Public Inquiries Act*, s 1.
[47] See, for example, Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law, 2009), 34-35. To help orient the reader, Ratushny divides public inquiries into five broad categories by function: Investigative Inquiries, Policy/Advisory Commissions, Wrongful-Conviction Inquiries, Inquiries Investigating Crimes and Ongoing Inquiry Bodies. The Motherisk Commission was none of these, although our restorative process addressed policy issues and produced recommendations.

affected by the Motherisk test results, including information, counselling assistance, legal advice and alternative dispute resolution;

2. Design and implement a process to identify and notify affected persons so that they may have access to the services and support offered by the Review and Resource Centre and ensure a process to allow for meaningful participation by Indigenous and racialized communities;
3. Offer early advice or guidance on high priority cases, including those cases identified as high priority by children's aid societies, and review individual child protection cases that may have been affected by Motherisk hair tests between 1990 and 2015, on request or on her own initiative;
4. Determine the eligibility criteria for and the level and type of services to be made available to affected persons based on the circumstances of the particular case; and
5. Engage, as may be appropriate, with parties and stakeholders who would have an interest in the effective operation of the Review and Resource Centre and the completion of the Commissioner's mandate.

My mandate did not include the following:

- Conducting public hearings;
- Reviewing child protection cases involving Motherisk hair testing that originated outside of Ontario;[48]
- Reviewing criminal cases that may have been affected by the Laboratory hair testing;
- Commenting on the potential civil or criminal liability of any person or organization, or interfering or conflicting with any related ongoing investigation or proceeding; and
- Making any recommendations about financial compensation.

The Terms of Reference directed me to endeavour to conclude my mandate and deliver a final report to the Attorney General within 24 months.[49] The report had to be translated into French, Cree, Ojibway, Oji-Cree and Mohawk. The Terms of Reference directed the Attorney General to make my report available to the public as soon as practicable after receiving it.

My thinking about our role as a Commission evolved over the first year of our mandate. Only after we had reviewed several hundred child protection cases and talked with many people who were affected by the testing did we begin to understand the full extent of the harm it had caused to individuals and communities. Our greater insight led us to undertake a restorative process to examine and address the issues leading to the extensive use of the Motherisk hair testing.

[48] The Commission received a few telephone inquiries from people outside the province who had undergone hair testing. In these cases, we referred them to the ministry or department with responsibility for child welfare in their jurisdiction.

[49] On December 14, 2017, the Commission received an extension to February 28, 2018 to complete this Report. We were not permitted to accept any requests for services after January 15, 2018. See Appendix 2b for the Order in Council extending the Commission.

Definition of "affected persons"

> *Each person in the environment believes that they're doing what is appropriate. You've got adoptive parents, birth parents and children and what's sad is that each group believes that they have the answer. It's only when you begin to think about the important issues that need to be considered in the best interests of the children that you realize that each person is a victim.*
>
> —A parent affected by the testing

The use of unreliable hair testing for child protection purposes harmed the children and parents who were directly affected, and the impacts extended to their wider families and communities as well.

We learned through our discussions with people who were tested that they found the testing itself harmful, whether or not it substantially affected the outcome of their cases. They experienced the testing as intrusive, demeaning and stigmatizing. They felt that a positive test result undermined their credibility and even their worth in the eyes of CAS workers, their lawyers, and the court.

For these reasons, we considered "affected persons" broadly to include the following:

- Children whose families were involved with CASs in part because of concerns arising from positive Motherisk hair testing, as well as their
  - Siblings;
  - Biological parents;
  - Adoptive parents; and
  - Foster parents;
- Family members, such as grandparents, aunts and uncles;
- Any other person who offered a plan for the children, in court or through an alternative dispute resolution process;
- Individuals caring for the children under a customary care agreement, kinship arrangement[50] or a custody order; and
- The band or community of Indigenous children.

[50] Section 208 of the *CFSA* (see note 51) defines "customary care" as "the care and supervision of an Indian or Native child by a person who is not the child's parent, according to the custom of the child's band or native community." Section 2(1) of the *CYFSA* (see note 51) defines "customary care" as "the care and supervision of a First Nations, Inuk or Métis child by a person who is not the child's parent, according to the custom of the child's band or First Nations, Inuit or Métis community." The Ontario Association of Children's Aid Societies (OACAS) defines kinship care as follows: "Kinship care refers to the day-to-day care and nurturing of children by relatives or others described as family by a child's immediate family members for children who are in need of protection. It can include an approved family member, godparent, stepparent, familiar friend, or community member who has a blood or existing relationship with a child or youth in care." "Children's Aid and Child Protection: Permanency," Ontario Association of Children's Aid Societies, accessed at OACAS Definition of Kinship care.

> *Losing a sibling is a very painful thing. Not only for myself, but for them; they lost a sibling, too. So they're causing the pain not only to the parent because we as parents, we've already experienced a lot of things, but for them, it's just that innocent heart going through all these painful situations.*
>
> —A parent affected by the testing

Fundamental principles

The Terms of Reference directed me to be guided by five fundamental principles in carrying out my mandate:

1. The current best interests of any affected children and youth must be taken into account.

The paramount purpose of Ontario's child protection legislation, the *Child and Family Services Act* (*CFSA*), is "to promote the best interests, protection and well-being of children."[51] This principle is the foundation of the child protection system in Ontario and is consistent with the United Nations *Convention on the Rights of the Child*.[52] Our Terms of Reference required the Commission to consider the *current* best interests of children and youth affected by the hair testing. Their circumstances and best interests may have changed considerably since the testing was done and decisions were made about them. For example, they may have been adopted and formed strong bonds with their adoptive parents and family. I discuss how we took the current best interests of children and youth into consideration in the section "Notifying children" in Chapter 5: Review of Individual Cases.

2. In so far as practicable, the Commissioner should work to maintain and ensure the confidentiality of records relating to child protection proceedings, including court files, exhibits, court transcripts, child protection files, and adoption records.

Child protection cases involve deeply personal and private issues. Consistent with the *Public Inquiries Act*, the Terms of Reference allowed me to obtain any records necessary to perform my duties. These included court files, CAS files and adoption records. We developed procedures and put safeguards in place to ensure the confidentiality of all records that identified children, biological parents, adoptive parents, or any other family members. I discuss this further in the section on Confidentiality, below.

3. The Commissioner should discharge her duties efficiently and in a manner consistent with the need to pursue an expeditious and just resolution of the serious concerns associated with the reliance on Motherisk evidence in child protection proceedings.

Efficiency and promptness were critical to our work as a Commission. We were keenly aware that our mandate was time-limited and we were committed to concluding our work as expeditiously as possible. This commitment underpinned the decisions I made about the scope of our work and about our staffing resources.

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[51] *Child and Family Services Act,* RSO 1990, c C 11 (*CFSA*) and *Child, Youth and Family Services Act,* SO 2017, c 14, Sched 1 (*CYFSA*), s 1(1).

[52] United Nations, *Convention on the Rights of the Child* (New York: United Nations, September 2, 1990), Article 3, accessed at UN Convention on the Rights of the Child.

Justice Lang recognized in her report that some high priority cases needed to be reviewed immediately and could not wait for the "thoughtful and deliberate construction"[53] of the Commission. High priority cases included those where applications were pending to make children Crown wards,[54] grant custody or finalize adoptions. Children, biological parents and adoptive parents were in limbo, waiting to hear whether the Motherisk test results had substantially impacted decisions about their families. Chapter 5: Review of Individual Cases details how we prioritized our review of files so that we could provide answers as soon as possible.

4. The Commissioner should work with children and youth to ensure that their voices, both individually and collectively, are heard.

This principle, like the principle of the best interests of children, is consistent with the United Nations *Convention on the Rights of the Child*[55] and the Preamble to the new *Child, Youth and Family Services Act* (*CYFSA*), which recognizes that "children are individuals with rights to be respected and voices to be heard."[56] We made special efforts to connect with children and youth and their advocates throughout our mandate.

5. The Commission should give particular consideration as to the outreach and notification necessary to allow meaningful participation by Indigenous and racialized communities.

Indigenous families are overrepresented in child protection systems across Canada, including Ontario. In 2011, Indigenous children represented 25.5 per cent of children in foster care, yet they made up only 3.4 per cent of the total number of children in Ontario.[57]

African Canadian families are also overrepresented in Canada's child protection systems. For example, in 2015, the Children's Aid Society of Toronto reported that African Canadian children represented 40.8 per cent of children in its care, yet African Canadians make up only 8.5 per cent of Toronto's population.[58]

Failure on the part of the Laboratory to account for "hair colour bias" may have exacerbated the representation of Indigenous and racialized communities among people affected by the Motherisk hair testing. Justice Lang explained in her report that some drugs have been found to incorporate more readily into dark hair, leading to bias in the test results:

> [I]f two people used the same amount of cocaine … the person with black hair would be expected to have a higher concentration of cocaine in her or his hair than the

[53] Lang*, Independent Review*, 235 at para 28.
[54] "Crown ward: In child protection cases, a child who has been placed permanently in the care of a children's aid society. The state or Crown becomes the child's legal parent and has the rights and responsibilities of a parent." "Glossary of Terms," Ministry of the Attorney General, accessed at MAG Legal Definitions.
[55] United Nations, Rights of the Child, Articles 12 and 13.
[56] *CYFSA,* Preamble.
[57] Ontario Human Rights Commission, *Under Suspicion: Research and consultation report on racial profiling in Ontario* (Toronto: Ontario Human Rights Commission, 2017), 53. See also Aboriginal Children in Care Working Group, *Report to Canada's Premiers* (Ottawa: The Council of the Federation, 2015), accessed at Aboriginal Children in Care and Statistics Canada, *Insights on Canadian Society – Living arrangements of Aboriginal children aged 14 and under* (Ottawa: Government of Canada, 2016).
[58] Ontario Human Rights Commission, *Under Suspicion*, 53. See also One Vision One Voice Steering Committee, *One Vision One Voice: Changing the Child Welfare System to Better Serve African Canadians (Practice Framework Part 1, Research Report)* (Toronto: Ontario Association of Children's Aid Societies, 2016a), discussion starting at 19, accessed at One Vision One Voice Part 1.

> person with blond hair. In fact, as early as 2000, studies have shown that the difference can be substantial, with black-haired individuals showing up to 10 times the drug concentration as people with lighter-coloured hair.[59]

As with children and youth, we made special efforts to reach out to Indigenous and racialized communities, particularly African Canadian communities, throughout our mandate.

Confidentiality

Maintaining the confidentiality of records containing the names of children and their families was one of the fundamental principles guiding the Commission. The *CFSA* prohibits identifying children, their parents or family members.[60] The contact form on the Commission's website and all of our outreach materials provided the assurance of confidentiality. Commission staff and contractors signed confidentiality agreements.

The Terms of Reference permitted me to obtain confidential information where necessary to perform my duties. They also required me to ensure that the disclosure of records and other materials balanced the public interest and the privacy interests of children and families affected by the Motherisk hair testing.

On April 11, 2016, I issued an order[61] to protect the following from disclosure:

- All records relating to child protection proceedings, including court files, exhibits, transcripts, society files and adoption records reviewed by the Motherisk Commission; and
- All documents and digital, photographic and audio records created by the Motherisk Commission in its review of child protection cases.

Consistent with the *CFSA*, the order prohibited the publication of any information that would identify a child or a child's family.

Over the course of my mandate, I issued a number of orders to CASs, the court, and government ministries to release confidential records to help us identify, locate, or offer assistance to people who were affected by the testing. The following are examples of these records:

- Child protection legal files from CASs for review to identify whether the testing had a substantial impact on the outcome of the case;
- Additional material from CASs or the court to help me make a determination on the impact of the Motherisk hair testing. This included court transcripts and information such as the current situations of children, siblings and parents, terms of access, and plans for children;
- Information about the adoptive placement and post-adoption circumstances of children where the Motherisk hair testing had a substantial impact on the decisions

[59] Lang*, Independent Review*, 55-56 at para 74, and 145 at para 15.
[60] *CFSA*, s 45(8): "No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family." (*CYFSA*, s 87(8)).
[61] See Appendix 2c for the non-disclosure order.

about their lives. In these cases, the Commission needed to notify all parties affected, including the adoptive parents; and

- The last known addresses of people we needed to notify about the results of file reviews involving them. For example, I issued orders to the Ministry of Community Safety and Correctional Services for the last known addresses of offenders and to the Ministry of Community and Social Services for the last known addresses of people receiving income support from Ontario Works.

Soon after the Commission was established, we sought the advice of the Information, Privacy and Archives (IPA) Division of the Ministry of Government and Consumer Services on our recordkeeping responsibilities. In the second year of my mandate, we met again with a representative from IPA to develop appropriate records schedules and to plan for the disposition of records at the end of the Commission's mandate. All confidential records will be destroyed when the Commission closes. In April 2017, we also sought an external legal opinion on the confidentiality of information and materials shared as part of our restorative process.

Establishing the Motherisk Commission team[62]

One of the first steps I took as Commissioner was to assemble a core team of professionals to help me set up the Commission and carry out its mandate. I was very fortunate to quickly retain three senior people to lead the Commission's legal file review process, counselling program and administrative functions:

Lorne Glass, Lead Commission Counsel. Mr. Glass is a well-known and respected family law lawyer, practising mainly in the area of child protection. He has represented CASs, parents, grandparents, foster parents and children involved in family court proceedings. Mr. Glass has been a panel lawyer for the Office of the Children's Lawyer since 1979. He also provided advice on child protection law to Justice Lang's Independent Review.

Celia Denov, Director of Counselling. Trained as a social worker, Ms. Denov has worked in the fields of social services, health and women's issues. She has 25 years' experience in the Ontario Public Service, including as Assistant Deputy Minister with the Ministry of Community and Social Services. She has been a member of the Child and Family Services Review Board and the Health Professions Appeal and Review Board. Ms. Denov worked with the Cornwall Public Inquiry and the Inquiry into Pediatric Forensic Pathology in Ontario assisting individuals who had been harmed.

Suzanne Labbé, Executive Director. In the federal public service, Ms. Labbé worked extensively on judicial matters, including as Deputy Commissioner for Federal Judicial Affairs. She joined the Courts Administration Service in 2005 and was appointed Acting Chief Administrator in 2010. In 2011, she was appointed Executive Director of the Judicial Compensation and Benefits Commission. Later, she was Executive Director of the Elliot Lake Commission of Inquiry. More recently, Ms. Labbé coordinated the translation of Justice Lang's report.

[62] See page 157, Commissioner and Commission Team.

My Lead Commission Counsel and I engaged a team of full-time and part-time legal counsel.[63] They undertook legal file reviews and assisted with many other aspects of the Commission's work, including outreach, research, the restorative process and the development of recommendations.

Members of our legal team had public policy development experience, extensive experience in child protection law, or both. We made sure that the team had a balance of lawyers with experience acting for CASs, acting for parents and acting for children. Some of our lawyers had experience in representing all three groups.

A small number of additional staff[64] and consultants provided support in administration, finance, communications, policy development, and report writing and production.

I sought the advice of external experts where needed to complement staff knowledge and experience. We consulted with many other partners and stakeholders to seek their views on systemic and institutional problems and solutions related to the Motherisk hair testing.

[63] The number of lawyers varied at the different stages of the Commission's mandate, but in addition to the Lead Commission Counsel, the maximum number at any one time was six full-time and four part-time.
[64] Additional staff numbered six full-time and five part-time, at the maximum.

3. Information, Outreach and Communications

Providing information and inviting input

Responding to inquiries and requests

When the Commission was established on January 15, 2016, we began operating our own toll-free number. We developed procedures for responding to inquiries and requests over the telephone and through email. An administrative staff member picked up messages daily, documented them and sent them to the Director of Counselling. The Director of Counselling responded to all calls and emails within 48 hours. As a trained social worker with experience as a counselling advisor to previous commissions, she was able to reassure people and assess their needs.

If the caller or writer wanted the Commission to review their legal file or asked for a referral to counselling, we sent them a package of materials that included authorization forms for these services. The Director of Counselling called them to share the results of their file reviews before I informed them in writing. In complex cases, she would often bring the lawyer who had reviewed the file in on the call to answer questions about the review.

Inquiries to the Commission

241 people called the Commission. Of those,

- 78 requested information only;
- 79 were interested in file reviews only;
- 15 were interested in counselling only; and
- 69 were interested in both file reviews and counselling.

Motherisk Commission website

The Commission's website (motheriskcommission.ca) was an important source of information about our services and the progress of our work. We set up a very basic website soon after the Commission was established to provide our contact information. Over the first year, we improved the website's appearance and functionality and added new content about our services and work. Once complete, the website provided the following information:

- The Commission's purpose, mandate and guiding principles;
- A brief history of the Laboratory and the *R v Broomfield* case;
- An overview of Justice Lang's Independent Review of the Laboratory with a link to her report;
- An overview of our work and more detailed information on the file review process and counselling services we offered;
- Our outreach activities and restorative process;

- Key resources, such as the Commission's Terms of Reference, Rules of Procedure and my orders;
- Frequently asked questions; and
- Short biographies of the Commission team.

The website emphasized the Commission's independence from any other body, including government, CASs and SickKids.

We created a number of short videos for the website, in which I presented information or was interviewed:

- A welcome video in March 2016 to explain why the Commission was set up and the services and supports we provided;
- A video in January 2017 to update the public on the Commission's progress and to provide information on the restorative process;
- An interview with Andrea Delvaille, an African Canadian community volunteer; and
- An interview with Steve Teekens, Executive Director of NA-ME-RES (Native Men's Residence).

We videoed the two interviews so that community organizations could show them as part of their own meetings and outreach. We provided them on USB flash drives on request.

We also used Twitter and Facebook to keep the broader public informed of developments in our work and our outreach efforts in a more immediate way. We updated both social media platforms regularly and repeated these posts on our website.

Inviting written submissions

We invited written submissions from interested parties and stakeholders on the website and through our presentations and outreach activities. We believed this was important because our Terms of Reference did not mandate the Commission to hold public hearings. The Terms of Reference specifically permitted us to invite written submissions from First Nations, Métis, and Inuit organizations and members about our services and supports. We received valuable input and advice from many individuals and organizations through meetings, events, and email, but we did not receive any formal written submissions in our first year.

In the Commission's second year, we received a small number of written submissions and obtained the input of over 250 participants through our restorative process.

Mass mailing

We developed outreach materials in English and French, including posters and information cards and sheets.[65] In late 2016 and early 2017, we did a mass mailing of these materials. Several Ontario ministries and other organizations agreed to distribute our materials for us to the organizations below:

- CASs;
- Drug and alcohol treatment centres;

[65] See Appendix 3a for a few samples.

- Ontario Addiction Treatment Centres;
- Community Health Centres, Aboriginal Health Access Centres, Community Family Health Teams and Nurse Practitioner-Led Clinics (under the umbrella of the Association of Ontario Health Centres);
- Ontario Works and Ontario Disability Support Program offices;
- Emergency shelters and other programs and services helping women and children live free of violence;
- Ontario secondary schools, serving grades 9 to 12; and
- Ontario hospitals.

We sent materials directly to a number of Indigenous organizations, including the following:

- First Nations bands;
- Indigenous Friendship Centres;
- Métis Nation of Ontario;
- Ottawa Inuit Children's Centre; and
- Tungasuvvingat Inuit.

In some cases (e.g. schools and hospitals), we provided sample cover emails and text that could be cut and pasted into various formats such as newsletters or bulletins. The organizations assisting us could then distribute our information through their regular communication channels.

Outreach focus and challenges

Focus

Raising awareness

The Commission undertook outreach throughout our mandate to connect directly with people who were affected by the testing. We wanted to reach parents and others who had been affected so that we could offer them information, a file review, and counselling assistance, and so that we could better understand the impact of the testing on them. We also conducted outreach to organizations that could help us raise awareness of the Motherisk hair testing issue and our services among their participants and clients.

In our first year, our primary goal was to make people aware of the Commission and our services. We met with and made presentations to legal, child welfare, educational, advocacy, community, government and other organizations.[66] In our second year, we concentrated on encouraging participation in our restorative process.

Children and youth

One of our guiding principles was to work with children and youth to ensure that their voices would be heard. The Children's Aid Society of Toronto's youth advisory group gave us advice on connecting with youth. We also met with government and advocacy organizations dedicated to children and

[66] See Appendix 3b for a list of the individuals and organizations we met with or presented to regarding the Commission's services.

youth, including the Office of the Children's Lawyer (OCL), the Office of the Provincial Advocate for Children and Youth, the Children in Limbo Task Force, Defence for Children International-Canada, and Justice for Children and Youth. They helped us to better understand the impacts of child protection decisions on children and youth. We also sought their views on how to involve young people directly in our work.

In addition, two of the Commission's counsel focused on outreach to youth and met with many youth advocates and Youth in Transition workers in community organizations and Indigenous Friendship Centres across Ontario.

Indigenous and racialized communities

The Commission's guiding principles also included giving particular consideration to the outreach and notification necessary to allow meaningful participation by Indigenous and racialized communities. Throughout our outreach activities and our restorative process, we made special efforts to reach these communities.

One of the lawyers who worked as counsel for the Commission in our first year advised us on Indigenous issues and helped us develop an outreach plan for Indigenous communities.[67] After sending out letters of introduction and materials, we travelled across the province to meet with Chiefs, band councils, Indigenous child and family service agencies, Indigenous Friendship Centres, and other Indigenous organizations, communities, and leaders. In our second year, another lawyer[68] and a consultant[69] assisted us with outreach to Indigenous communities.

The Commission enlisted the support of two consultants to help us develop an outreach plan for racialized communities.[70] Again, after sending out introductory materials, we held meetings in community settings such as recreation centres and social housing. We met with community members and provided information on the Motherisk hair testing issue and the supports we could offer people who were affected.

Challenges

Connecting with the people who were affected

Connecting with people who were affected by the testing was a challenging aspect of the Commission's work. There was no central database that could provide the names and contact information of all of the people who were tested by the Laboratory for child protection purposes so that we could reach them. Even where we had contact information, it was often out of date given the decades-long period of the cases we reviewed and the fact that many of the families did not have stable housing.

Parents who come into contact with CASs are often struggling with poverty, marginalization, mental health issues, substance use and many other difficulties. Dealing with another painful issue, such as the discredited Motherisk hair testing, may not have been possible or desirable for them. People often told us that their involvement with the child protection system had been traumatic and they did not want to reopen that chapter of their lives. Some parents who had been tested by the

[67] Marian Jacko served as counsel for the Commission until she was appointed Ontario's Children's Lawyer on November 28, 2016.
[68] Crystal George.
[69] Bob Watts, Adjunct Professor, Queen's University School of Policy Studies.
[70] Winston Tiglin and Peter Clutterbuck.

Motherisk Laboratory in relation to one child had since had other children and feared that they would draw the CAS's attention to their family again if they came forward about the testing. Others told us they needed more time to process the knowledge that the testing had not been reliable, think about what that might mean for them, and decide what they wanted to do (such as whether they wanted us to review their child protection file).

Developing trust and building relationships takes time. Gaining the trust of people who were affected by the testing in the relatively short time we had was inevitably challenging. Some people thought the Motherisk Commission was linked to the Motherisk Laboratory because of the similarity of names. Some thought it was part of the government or the CAS, which they associated with negative experiences—in many cases, over multiple generations. Not surprisingly, given the disproportionate intervention of the child protection system in Indigenous and African Canadian families, lack of trust was particularly evident in our outreach to these communities.

Right up to the end of the Commission's mandate, we continued to reach out to and meet with community organizations working with children, youth, parents, and families who might have been affected by the Motherisk hair testing. We were very fortunate that some organizations reached out to us and asked to meet. We also followed up on many contacts made through our restorative process meetings.

Controversy over outreach in schools

Through our discussions with individuals and organizations working with children and youth, we were persuaded that the best way to connect with young people was through the school system. We consulted with youth and youth workers on the language and design for a poster to send out to secondary schools.

Once displayed in schools, the youth poster quickly stirred controversy. We heard from people who objected to our conducting outreach in schools, people who objected to the poster's language[71] and people who supported our approach. The range and force of the reactions underscored the complexity and sensitivity around the Motherisk hair testing issue.

Communications

The Commission advertised in the fall of 2016 and in the spring of 2017 on radio and in print and online media, mainly targeted for Indigenous and multicultural audiences.[72]

In our 2016 radio advertisements, I recorded the message. In 2017, we supplied text to the stations and local announcers recorded the message in Indigenous languages and English. The 2017 campaign was targeted to Indigenous communities as part of our efforts to increase awareness of the Motherisk hair testing issue and the Commission's services.

With few exceptions, the print and online advertisements were the same as the general posters we distributed at meetings and sent out to organizations. A typical advertisement said, "Do you know someone whose hair was tested for drugs and/or alcohol and used by the Children's Aid Society? If

[71] The youth poster included this text: "Were you taken from your parent by the Children's Aid Society?" In many of our meetings with youth, they typically referred to "being taken" from their parents. We requested the Ministry of Education to distribute the poster to secondary schools only, but it was inadvertently shared with elementary schools. The ministry decided to remove the posters from all schools.

[72] See Appendix 3c for a list of the publications and radio stations.

yes, we may be able to help and it's completely CONFIDENTIAL." In an earlier version, the advertisement began with "Was your hair tested for drugs or alcohol…." We revised the language to make it less direct and stigmatizing.

PART 2:
Reviewing Cases and Offering Services

4. Background to Child Protection in Ontario

> When considering an intervention to help a family, a worker needs to make sure they're not just behaving in an expedient way, but are being more future oriented and thinking long term. If you remove someone's child from their home, will you be knocking the parent down six more rungs? We can send in respite care or a nurse instead. Child welfare likes to think it's making a short-term intervention, but if you remove the one reason that the family gets up in the morning, you really are jeopardizing that family's well-being.
>
> —Karen Hill, Director of Aboriginal Services, the OACAS, speaking on the subject of reconciliation with Indigenous families and communities, 2016

This chapter provides an overview of how the child protection system works and how the rules of expert evidence apply within it. Since the Motherisk hair testing was used as expert evidence in child protection proceedings, I provide this background to help readers understand what we found in the cases we reviewed and to provide context for the changes I recommend. Child protection law is complex, and I have left out some details and exceptions where I felt that they were not important to my findings and Recommendations.

At the time of writing this Report, the *Child and Family Services Act* governs child protection in Ontario. A new Act, the *Child, Youth and Family Services Act,* which will replace the *CFSA*, has received Royal Assent but has only partially come into force.[73] We have noted the corresponding section numbers for the *CYFSA*, usually in footnotes, where the content addresses the same or similar points. However, there are often differences in terminology or content between the two Acts.

The relationship between child and parent is safeguarded from state interference, except when necessary to protect the child. The courts have recognized this principle for over a hundred years.[74] It is grounded in beliefs about the value of family and community, and it reflects a concern that removing children from their families can harm them.[75] The state, represented in Ontario by CASs, must prove that the child is in need of protection before the court is permitted to make any permanent order interfering with the parent-child relationship. If a CAS proves that a child is in need of protection, then it must also prove that the court order sought is the least intrusive order that is in the best interests of the child.

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[73] Royal Assent is the final stage in the legislative process. An Act becomes law when it comes into force, which may happen immediately or at a later date (specified in the Act or by proclamation). The *CYFSA*'s new provisions for the protection of 16- and 17-year-olds came into force on January 1, 2018. The remainder of the *CYFSA* is expected to come into force in spring 2018.

[74] For example, in *Re McGrath*, [1893] 1 Ch. 143, Lord Justice Lindley said, "The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course shall be taken." See also *Hepton et al. v Maat et al.* [1957] SCR 606, 1957 CanLII 18 (SCC) and *Mugford (Re)*, 1969 CanLII 34 (ON CA).

[75] See, for example, *Mugford (Re), ibid at para* 18.

It takes time to resolve a case and children need to be kept safe in the interim. The law therefore allows for temporary care and custody orders (sometimes called "interim orders"). The court will only grant a temporary care and custody order for a child, pending a trial, if the CAS proves that there is a risk that the child is likely to suffer harm and if the CAS also proves that no other arrangements would keep the child safe.

At both the temporary stage and at trial, the CAS must prove its case on a balance of probabilities. The judge must be satisfied that the CAS version of events is more likely than not to be true. The evidence the CAS relies on to prove its case must be clear, cogent and convincing in order to meet the balance of probabilities test.[76]

The *Child and Family Services Act*

Best interests of children[77]

The paramount purpose of the *CFSA* is to promote the best interests, protection and well-being of children.[78]

The *CFSA* identifies a number of other purposes to guide the delivery of child welfare services, but they must be consistent with the best interests of children.[79] For example, the *CFSA* recognizes that parents may need help in caring for their children, but it specifies that this help should support the autonomy and integrity of the family and be provided by mutual consent where possible. The Act also notes that CASs should consider the least disruptive course of action available and appropriate to help a child.

Among other factors, child protection decisions must take into account children's views and wishes and their relationships and emotional ties with parents, family, and community. Continuity of care and the impact of disruption on the children should be considered. The merits of a proposed Plan of Care must be weighed against the merits of leaving the children with the parents (or returning the children to them).[80]

The *CFSA* recognizes that "Indian and native" people[81] should be entitled to provide their own child and family services wherever possible, and that all services to "Indian and native" children and families should recognize their culture, heritage, traditions, and the concept of the extended family.[82] Where a protection order or decision is made in the best interests of an Indigenous child, the importance of preserving the child's unique cultural identity must be considered.[83]

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[76] *FH* v *McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII).
[77] *See* Appendix 4a for a list of the circumstances that need to be considered when determining the best interests of a child under the *CFSA* and *CYFSA*. Under both Acts, a child is defined as a person under the age of 18. Under the *CFSA*, CASs are not able, in most cases, to bring Protection Applications for children over the age of 16. Under the *CYFSA*, CASs may bring Protection Applications for children under the age of 18.
[78] *CFSA* and *CYFSA,* s 1(1). See *Winnipeg Child and Family Services v KLW*, [2000] 2 SCR 519 at para 9.
[79] *CFSA* and *CYFSA*, s 1(2).
[80] *CFSA*, s 37(3) and *CYFSA,* s 74(3).
[81] The *CYFSA* updates this language to "First Nations, Inuit and Métis peoples."
[82] *CFSA,* s 1(2)(5) and *CYFSA,* s 1(2)(6). The *CYFSA* indicates that services should also recognize Indigenous peoples' "connection to their communities."
[83] *CFSA*, s 37(4) and *CYFSA,* s 74(3)(b).

Protecting children

Ontario's child welfare legislation recognizes that children need protection from neglect and physical, sexual, or emotional harm.[84] All Ontarians have a duty to report directly to a CAS if they suspect that a child under the age of 16 is in need of protection.[85] They may do so anonymously. In practice, the police and schools make most such reports.

Ontario's 48 CASs[86] are responsible for investigating these reports and taking steps to protect children when needed. They follow comprehensive standards and guidelines to assess the degree of risk to children and the appropriate intervention and services to assist families.[87] In the large majority of cases, CASs will support parents to continue to care for their children in their own homes.

In a small minority of the cases they investigate, CASs determine that there is a risk that children are likely to suffer harm that cannot be mitigated while in their parents' care. They must then remove or "apprehend"[88] them from the care of their parents. The children are usually placed in foster homes, although in some cases they go to family members or other people in their communities. When children are apprehended, CASs must initiate court proceedings.[89] CASs can also initiate court proceedings when they do not apprehend children but deem it necessary to monitor the parents' care of the children. It was legal cases (from 1990 to 2015), where CASs initiated court proceedings, that the Commission was mandated to review if they involved Motherisk hair testing.[90]

Parties to a child protection proceeding are the applicant (usually the CAS), the parents,[91] and in the case of "Indian or native" children, a representative chosen by the child's band or native community.[92] The court can direct that a lawyer be provided for children (by the OCL) to represent their interests.[93]

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[84] See *CFSA,* s 37(2) and *CYFSA,* s 74(2) for the full list of circumstances under which a child is in need of protection.

[85] *CFSA,* s 72 and *CYFSA,* s 125.

[86] See "Locate a Children's Aid Society," Ontario Association of Children's Aid Societies, accessed at List of CASs. Ten are designated Indigenous societies and three serve religious communities (two Catholic and one Jewish). CASs also provide guidance, counselling and other services to families, look after children who come under their care or supervision, and place children for adoption. The Ontario government, through MCYS, funds and oversees CASs and develops legislation, regulations, and policies for child welfare in the province. Each society is either an independent, non-profit organization run by a board of directors elected from the local community or a First Nation operating under the *Indian Act* R.S.C., 1985, c. 1-5. Societies vary in size and serve urban, rural, and remote communities.

[87] See Ministry of Children and Youth Services, *Ontario Child Protection Standards (2016)* (Toronto: Government of Ontario, 2016), and Ontario Association of Children's Aid Societies, *Ontario Child Welfare Eligibility Spectrum* (Toronto: Ontario Association of Children's Aid Societies, 2016c) for standards and guidelines.

[88] This term is not used in the *CYFSA*. Instead, the Act refers to "bringing children to a place of safety."

[89] CASs initiate proceedings under Part III (Child Protection) of the *CFSA* (Part V of the *CYFSA*).

[90] In the large majority of cases the Commission reviewed, the children had been apprehended. However, there were some cases where the children were still living at home with their parents with CAS involvement (e.g. with a supervision order).

[91] "Parents" include biological or adoptive parents or any other person with legal custody of the child, but not foster parents. See s 37(1) of the *CFSA* (s 74(1) of the *CYFSA*) for the full definition.

[92] *CFSA,* s 39(1) and *CYFSA,* s 79(1).

[93] *CFSA,* s 38(3) and *CYFSA,* s 78(3).

The child protection process

Protection Applications

Within five days after a CAS apprehends a child, the child must be returned to a parent (or other caregiver), a temporary care agreement must be made with the parent, or the matter must be brought to court.[94] If it is brought to court, the CAS will file a Protection Application asking the court to find that the child is in need of protection and to make an order placing the child in the care of the society, the parent, or another person. The CAS will request that the order set out certain conditions, which will depend on the circumstances.

The society may also bring a Protection Application without apprehending a child. For example, the CAS may wish to have the court place the child with a family member, or ask that the child remain with the parent but only under certain conditions.

Unless all of the parties agree, the court must hold a final hearing to determine whether the child is in need of protection, and if so, whether the order the society is requesting in the Protection Application is in the child's best interests. In almost all cases, the hearing is adjourned while the parties prepare their legal cases. The court cannot adjourn a hearing for more than 30 days unless all of the parties and the person who will be caring for the child during the adjournment agree.[95] At any time, the court, in the best interests of the child and with the consent of all of the parties, can adjourn the proceedings so that the parties can attempt to resolve issues through an alternative dispute resolution process such as mediation.[96]

Adjournments and temporary care and custody orders

When a hearing is adjourned, the court must make an order for the temporary care and custody of the child.[97] This is known as a "temporary order," as distinct from the "final order" at the end of the proceeding. The child may be returned to a parent (with or without society supervision), placed with someone else, or remain or be placed in CAS care. The court can only place the child with someone other than the parent if it is satisfied, on the evidence submitted by the CAS, that there are reasonable grounds to believe that the child is likely to suffer harm and that the child cannot be adequately protected if returned to the parent.[98] The court usually relies on written evidence only, in the form of affidavits[99] sworn by CAS workers and the parents. This practice developed to ensure that decisions about the care of children can be made as quickly as possible, and also to save the court the time and resources involved in lengthy oral hearings at the temporary stage.

Before deciding to place a child in the temporary care of a CAS, the court must consider whether it is in the child's best interests to be placed with a relative or community member instead. The temporary care and custody order may include terms and conditions under which the parents may have access to the child.

The first court date (also known as the "first appearance") takes place within five days after the apprehension. The judge must review the CAS's affidavit to ensure that there is a reasonable basis

[94] *CFSA,* s 46(1) and *CYFSA,* s 88.
[95] *CFSA,* s 51(1) and *CYFSA,* s 94(1).
[96] *CFSA,* s 51.1 and *CYFSA,* s 95.
[97] *CFSA,* s 51(2) and *CYFSA,* s 94(2).
[98] *CFSA,* s 51(3) and *CYFSA,* s 94(4).
[99] An affidavit is a written statement, confirmed by oath or affirmation, for use as evidence in court.

for keeping the child in care or for imposing the requested conditions on the parents until the temporary care and custody hearing can be properly argued. There is no cross-examination of the CAS worker. The parents usually do not provide any evidence since, in most cases, they do not yet have a lawyer and have not had the opportunity to prepare affidavits of their own. In some cases, parents are not served with court documents until the day of the first appearance.

When judges are satisfied that there is a reasonable basis for it, they will make the temporary care and custody order. If that order places the child with a caregiver other than the parents (e.g. grandparent, family friend, foster parents), the court will usually also make an order permitting the parents to have access to the child and may appoint a lawyer for the child. The court will then adjourn the case to allow the parents to get a lawyer and prepare their responding court papers, to allow the children's lawyer to meet with the child, and in some cases, to allow the CAS to investigate a possible family placement for the child.

The *CFSA* contemplates that the court will hold a full temporary care and custody hearing, with evidence from the parents as well as the CAS, soon after the first appearance.[100] This hearing is held in order to decide the temporary living arrangements for the child.

In practice, for a number of reasons (such as overburdened court schedules, the inability to find lawyers, or delays in obtaining disclosure), temporary hearings often do not happen for many months after the first appearance. Children who were apprehended will have been away from their homes during this period. After the temporary hearing, many more months and possibly years may elapse before the matter reaches the final hearing. By then, the children may have settled into a new home and bonded with new caregivers. In these situations, a status quo has been created and it becomes even more difficult for parents to persuade the court to return the children to their care.

Summary judgment motions

A summary judgment motion is a hearing to determine whether a final order can be made without the need for a trial. The judge has to determine whether there is a genuine issue requiring a trial, and if there is not, make a final order following the motion. CASs seek summary judgment hearings in cases where the evidence is overwhelming against the parents and they believe there is no need to have a full trial. Under Rule 1 of the *Family Law Rules*,[101] there is broad judicial discretion allowing a judge to admit oral evidence and cross-examination at a summary judgment motion. In 2015, the *Family Law Rules* were revised to provide judges with the specific discretion to permit oral evidence on summary judgment motions.[102] However, as most child protection cases involving Motherisk testing occurred before 2015, summary judgment motions related to these cases were generally decided based entirely on affidavit evidence.

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[100] *CFSA,* s 51(1) and *CYFSA,* s 94(1).

[101] Section 68 of the *Courts of Justice Act* provides for the Family Rules Committee to make rules for the courts in Ontario relating to the courts' practice and procedures in family law proceedings, including child protection. (*Family Law Rules*, O Reg 114/99, made under the *Courts of Justice Act*, R.S.O. 1990, c C. 43.) Most of the *Family Law Rules* relate to family law cases that do not involve child protection. However, Rule 33(1) provides a timetable for child protection proceedings, including Status Review Applications, from the first hearing in five days to the final order in 120 days. These timelines can be extended in the child's best interests. In reality, proceedings often take much longer. Some of the lawyers who participated in our restorative process proposed that developing separate rules for child protection proceedings should be considered.

[102] Rule 16(6.2), *Family Law Rules*.

Final hearings

The final hearing is usually the first opportunity for the witnesses to take the stand to testify. CAS workers, parents, and any other witnesses (such as family members, doctors, and foster parents) testify and are cross-examined. In reality, a very small percentage of child protection cases are decided following a trial. If a matter does proceed to trial, the court must first determine if the child is in need of protection. The legislation sets out specified grounds for this finding. The grounds include evidence that the child has been physically harmed, sexually molested or exploited, or emotionally harmed, and that the parent or caregiver either caused the harm or neglected to prevent it. Children may also be found in need of protection if there is a risk that they are likely to suffer harm.[103]

If the court finds that a child is in need of protection, it can make one of four orders:[104]

1. *Supervision order* placing the child in the care and custody of a parent (or another caregiver), subject to supervision by the society with reasonable terms and conditions, for three months to one year.
2. *Society wardship*[105] placing the child in the society's care and custody for no more than one year.
3. *Crown wardship*[106] placing the child in the society's care; the child may stay in foster care, or may be placed for adoption or in a customary care arrangement.[107]
4. Consecutive orders of society wardship and supervision.

The court can also make no order, effectively returning the child to the care of the parent without any conditions.[108] In the child's best interests, the court may issue new or revised orders about who can have access to the child, including terms and conditions.[109]

The court is required to provide reasons for its decisions following a trial. Often, the reasons are in writing. In many cases, however, judges simply deliver their reasons orally without a written judgment. If the judge gives reasons orally, the parties can ask for a written transcript, but they must pay for the copy.

Consent findings and orders

Most child protection cases are concluded without a trial. Where the parents and CASs come to an agreement, they file a document with the court to record their consent. In a few court locations in Ontario, the consent is in the form of a Statement of Agreed Facts setting out the facts supporting the findings and orders they are asking the court to make. In most court locations, the parties file Minutes of Settlement, likewise setting out the findings and orders they are asking the court to make but without any agreed statement of the underlying facts.

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[103] *CFSA,* s 37(2) and *CYFSA,* s 74(2).
[104] *CFSA,* s 57(1) and *CYFSA,* s 101(1).
[105] Instead of "society ward," the *CYFSA* refers to a child who is in "interim society care."
[106] Instead of "Crown ward," the *CYFSA* refers to a child who is in "extended society care."
[107] See note 50 for a definition of "customary care."
[108] *CFSA*, s 57(9) and *CYFSA,* s 101(8).
[109] *CFSA,* s 58(1) and *CYFSA,* s 104.

Status Review Applications

At the expiry of a time-limited supervision order or a society wardship order, the CAS must bring a Status Review Application to the court setting out what has happened since the last order and asking the court to either terminate the existing order or grant a new order. Parents may also request a review of orders for supervision or society wardship. Crown wardship orders can also be reviewed, but if the child has been in the continuous care of the same person for at least two years, parents must get the court's permission to request a review. If a child has been placed for adoption and still lives with the prospective adoptive parents, the *CFSA* provides that this order cannot be reviewed.[110] The process for a Status Review Application is similar to the process for a Protection Application.

Time limits

A child can only remain in CAS temporary care (on a temporary care agreement, a temporary care and custody order, or a society wardship order) for a combined total of one year in the case of a child under the age of six and two years in the case of a child over the age of six. At that point, the CAS must bring an application for Crown wardship or return the child to the parent or a member of the family or community.[111] However, for many different reasons, such as the circumstances of the parties or overburdened courts, these time limits are frequently exceeded.

Family Law Rules

In addition to the procedures set out in the *CFSA*, there are *Family Law Rules* created by the Family Rules Committee and authorized by the *Courts of Justice Act*.[112] These Rules set out a number of specific procedural requirements for both child protection and family law (custody and access) proceedings.

Evidence

General rules of evidence

All court proceedings are governed by rules of evidence. Most rules of evidence come from the common law (past decisions of appeal courts and the Supreme Court), but some come from the *Evidence Act*[113] or other statutes. The primary rule of evidence in all court proceedings is that evidence must be material (related to an issue in the case) and relevant (tending to prove or disprove a fact being disputed in the case). As well, judges must always consider whether the value of the evidence is worth any possible confusion or prejudice it may cause and the time it will take to introduce it.[114] When judges decide not to admit certain evidence, they cannot consider it when deciding the case before them. If they admit the evidence, they must decide how much weight to give that evidence by determining, for example, the degree of reliability and whether it is contradicted by other evidence. In addition to the primary rule of evidence, there are additional rules governing particular kinds of evidence, including expert evidence.

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[110] *CFSA,* ss 64-65.1 and *CYFSA,* ss 113-115.
[111] *CFSA,* s 70 and *CYFSA,* s 122. The best interests of children in child protection decisions include consideration of the effects on the child of delay in the disposition of the case.
[112] See note 101.
[113] *Evidence Act*, RSO 1990, c E23.
[114] This is known as the "probative value" of the evidence.

The expert evidence rule

Under the normal rules of evidence, witnesses are only permitted to give evidence about what they actually observed or did. They are not usually permitted to give their opinions about the facts before the court. The law makes an exception for the opinions of experts, recognizing that sometimes courts need specialized assistance to understand the evidence or its implications. The Motherisk test results and the testimony of Laboratory staff about the interpretation of those results are both examples of expert evidence.

Criteria for admissibility

Expert evidence is evidence of a person's opinion where that opinion is based on the person's special training or experience. This can include evidence from professionals such as scientists, doctors, psychologists, sociologists or accountants. Expert evidence cannot be admitted into court unless it meets a two-stage test:[115]

First stage: Threshold criteria

At the first stage, the party who wishes to introduce the evidence must prove that it meets certain criteria:

- It must be relevant;
- It must be necessary to assist the judge (in other words, the evidence must offer knowledge that the judge would not already have);
- There must not be any other rule excluding this kind of evidence; and
- The expert must be properly qualified to give the evidence.[116]

In certain cases involving scientific evidence, there is an additional requirement if

- the science involved is novel;
- the science involved is not novel, but it is being used in a novel way;
- the technique is controversial or contested within the expert community; or
- the technique is being contested in the case itself.

[115] The original test for the admissibility of expert evidence was set out in *R v Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC). That case provided the first stage of the current test, and the four criteria assessed in the first stage are often referred to as "Mohan factors." The second stage of the test, the gatekeeping stage, was clarified by the Supreme Court in *White Burgess Langille Inman v Abbott and Haliburton Co*, [2015] 2 SCR 182, 2015 SCC 23 (CanLII) (*White Burgess*).

[116] In order to be properly qualified, the expert must have "acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify." *R v Mohan*, *ibid.* The Supreme Court of Canada has held that the expert's qualifications include his or her ability to provide an impartial, independent and unbiased opinion: "The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her." *White Burgess*, *ibid* at para 32. See also the section "The expert's duty to the court," below.

In such cases, the party introducing the expert evidence must demonstrate the reliability of the underlying scientific methodology.[117]

If the expert evidence meets the first stage of the test, the judge goes on to the second stage.

Second stage: Gatekeeping

At the second stage, the judge must weigh the benefit or value of the expert evidence against the costs of admitting it, taking into account its relevance and reliability. In terms of costs, the judge will consider the time it will take to understand the evidence and the potential for the evidence to cause confusion or be taken as more significant than it really is. The judge must be particularly concerned about this last issue. Experience has shown that the use of scientific terms and the presentation of complex scientific concepts can lead the court to apply too little scrutiny to an expert's opinion.

> There is a danger that expert evidence will be misused and will distort the fact finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.[118]

In some cases, the danger of misuse may be so significant that the judge will not admit the expert evidence or will limit it carefully.

This cost-benefit analysis is known as the "gatekeeping" function. The judge must conduct the two-stage admissibility test whenever a concern is raised about the expert evidence, even if that evidence is routine.[119] The courts have not gone so far as to explicitly require judges to take all of the steps in the two-stage admissibility test in every case, and even where there is no objection to the evidence.[120] However, Justice Cromwell has noted that "the unmistakable overall trend of the

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[117] *White Burgess*, *supra* note 115 at para 23.

[118] *R v Mohan, supra* note 115 at para 22.

[119] In *R v Trochym*, [2007] 1 SCR 239, 2007 SCC 6 (CanLII) at paras 31-32, Justice Deschamps noted that, "[n]ot all scientific evidence, or evidence that results from the use of a scientific technique, must be screened before being introduced into evidence. In some cases, the science in question is so well established that judges can rely on the fact that the admissibility of evidence based on it has been clearly recognized by the courts in the past. Other cases may not be so clear…. While some forms of scientific evidence become more reliable over time, others may become less so as further studies reveal concerns. Thus, a technique that was once admissible may subsequently be found to be inadmissible…. Therefore, even if it has received judicial recognition in the past, a technique or science whose underlying assumptions are challenged should not be admitted into evidence without first confirming the validity of those assumptions."

[120] Professor Nicholas Bala and Jane Thomson have argued that "the trial judge's role as 'gatekeeper' arises even if opposing counsel does not object to the admission of the expert testimony." Nicholas Bala and Jane Thomson, "Expert Evidence and Assessments in Child Welfare Cases" (December 8, 2015): 7. Queen's University Legal Research Paper No. 063, available at Bala and Thomson Abstract. For a contrary view, see Emma Cunliffe, "A New Canadian Paradigm? Judicial Gatekeeping and the Reliability of Expert Evidence," in *Forensic Science Evidence and Expert Witness Testimony: Reliability Through Reform?* by Paul Roberts and Michael Stockdale (Cheltenham, UK: Edward Elgar, forthcoming 2018). In his report, Justice Goudge noted that the trial judge has the responsibility to determine the admissibility of expert scientific evidence, even when there is no objection, but he noted that counsel may have tactical reasons for not objecting to the admission of the evidence, which should be respected. Goudge, *Pediatric Forensic Pathology*, vol. 3, 496.

jurisprudence … has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role."[121]

The reliability of the evidence is an essential component of the admissibility test and the judge must consider it at a number of stages in the admissibility analysis. For example, reliability will affect whether the evidence is necessary (unreliable evidence is never necessary) and relevant (unreliable evidence cannot support or negate a fact in issue).[122] Reliability is central to the cost-benefit analysis at the gatekeeping stage (unreliable evidence will never be worth the time and cost involved in introducing it).[123]

A hearing called a "*voir dire*" is used to determine whether evidence meets the two-stage admissibility test. Experts usually file reports setting out the proposed evidence before a *voir dire* is held. During a *voir dire*, experts testify and may be cross-examined on their personal expertise, methods and techniques, assumptions, knowledge of the facts of the case, and impartiality. If a judge allows the evidence into the trial following the *voir dire*, the experts will testify and will again be cross-examined. The judge must ensure that experts do not stray beyond the boundaries of their expertise while they are giving evidence in the trial.[124] The court must still eventually decide whether it accepts an expert's opinion and what weight, if any, it should give the expert's evidence considering all of the other evidence in the trial.[125]

The expert's duty to the court

Experts' opinions are allowed in court because they provide independent assistance to help the court to understand the evidence. Experts have a duty to provide objective and non-partisan evidence. That duty applies even if the expert witness is employed by one of the parties.[126] The Supreme Court has said that the evidence of an expert who is not able or willing to abide by this duty must not be admitted.[127] Under the *Family Law Rules*, experts also have a duty to ensure that their evidence does not go beyond the range of their expertise.[128]

Evidence in child protection proceedings

Most of the general rules of evidence apply in child protection proceedings. However, some do not apply or apply differently because of the need to ensure that children are protected. The following are examples of exceptions to the rules:

Hearsay

"Hearsay" is when a person testifies in court about what another person said and asks the court to believe that what that person said is true. Except in exceptional circumstances, the normal rules of evidence prohibit hearsay in all stages of a case.[129] However, the *CFSA* allows the court to rely on hearsay evidence when making a temporary care and custody order, provided that the evidence is

[121] *White Burgess, supra* note 115 at para 20.
[122] Goudge, *Pediatric Forensic Pathology*, vol. 3, 477-79.
[123] *White Burgess, supra* note 115 at para 49 and *R v Abbey* 2017 ONCA 640 (CanLII) ("Abbey II") at para 121.
[124] *R v Sekhon,* 2014 SCC 15 (CanLII).
[125] *R v Awer*, 2017 SCC 2 (CanLII).
[126] *White Burgess, supra* note 115 at para 49.
[127] *White Burgess*, *supra* note 115 at paras 46-51.
[128] Rule 20.1(1)(b), *Family Law Rules*.
[129] Hearsay is generally only admissible when it is necessary; that is, the evidence is not available any other way and it is reliable. *R v Khan*, [1990] 2 SCR 531, 1990 CanLII 77 (SCC).

"credible and trustworthy."[130] This provision allows child protection workers to give evidence about what someone told them, and it allows the court to accept that what the other person is reported to have said is true. For example, a CAS worker's affidavit might say that a mother's neighbour told the worker that she had seen the mother stumbling and incoherent while a child was in her care. The neighbour is not giving this evidence and the court cannot directly assess her credibility and motivations. Nevertheless, the court may consider this information to be "credible and trustworthy" and accept it.

Propensity

The *CFSA* also allows societies to introduce evidence of parenting history. The court can use that evidence to predict how a person is likely to parent in the future.[131] That type of evidence about a propensity to act in a certain way is usually prohibited in criminal cases.[132]

Prior statements and documents

The *CFSA* provides that "[d]espite anything in the *Evidence Act* … any oral or written statement or report that the court considers relevant to the proceeding … is admissible into evidence."[133] This allows the court to admit documents that might be inadmissible under the *Evidence Act*, such as hospital records, transcripts of evidence in criminal proceedings, or the Reasons for Judgment in a previous case involving the same parent.[134]

Expert evidence in child protection proceedings

The expert evidence rule does apply in child protection proceedings. However, as with other evidence rules, it tends to be applied differently. The differences are the result of specific legislative provisions, the *Family Law Rules*, and the tendency to relax admissibility standards in order to protect children and reduce delay.

Temporary proceedings

There is no provision in the *Family Law Rules* or in the *CFSA* governing the admissibility of expert evidence at a temporary hearing. Expert evidence, such as medical reports, is usually attached to the society worker's affidavit. This is permitted under the "credible and trustworthy" rule for temporary hearings. The court does not hear directly from the expert at this stage. This approach allows for quick decision making, which is considered to be in the child's best interests. However, it also means that the court relies on expert evidence with little scrutiny at this stage. The trial could take place months or even years later.

The court may permit an opposing party to question an expert at the temporary stage, outside of court, under oath or affirmation.[135] There is no automatic right to question an expert at this stage. If the court permits it, the questioning takes place at an official examiner's office and is recorded and

[130] *CFSA,* s 51(7) and *CYFSA,* s 94(10).
[131] *CFSA,* s 50(1)(a) and *CYFSA,* s 93(1)(a).
[132] See *R v Handy* [2002] 2 SCR 908, 2002 SCC 56 (CanLII) for an explanation of the rule against character or propensity evidence.
[133] *CFSA,* s 50(1)(b) and *CYFSA,* s 93(1)(b).
[134] It has been noted, however, that there are limits to this admissibility and that this rule does not "sweep aside all of the rules of evidence." See, for example, *The Children's Aid Society of Ottawa v JB and HH*, 2016 ONSC 2757 (CanLII) at para 20.
[135] Rule 20(5), *Family Law Rules*.

transcribed. The transcript is filed with the court. We heard from parents' counsel that this questioning rarely occurs in the child protection context in Ontario because the Legal Aid tariff is not sufficient to cover this additional work.

Use of expert evidence in final decisions on consent

Where Statements of Agreed Facts are filed in support of a consent finding, an order, or both, they may briefly summarize test results or an expert's opinion. They will rarely include the expert's report, the actual medical tests, the expert's qualifications, or any other information that would assist the court in determining whether the evidence meets the two-stage admissibility test for expert evidence. Minutes of Settlement do not include any of this information. Courts do not typically request this material.

Summary judgment motions

Some courts have held that evidence that is not admissible at trial should not be admitted in a summary judgment motion.[136] However, more frequently, courts have admitted evidence on summary judgment motions that would not have been admissible had the matter proceeded to trial. Courts have often admitted expert reports as attachments to CAS workers' affidavits and without testimony or cross-examination of the expert. In this respect, although it results in a final order, the summary judgment motion often proceeds in a way that is similar to a temporary hearing. In a notable exception, a court recently hearing a summary judgment motion did allow the parents' counsel to cross-examine a psychologist who had conducted a Parenting Capacity Assessment to assist the court in determining whether there was a genuine issue for trial.[137]

Trials

The expert evidence rule applies in child protection trials. The expert must prepare a written report, which is provided to the parties in advance.[138] The *Family Law Rules* specify the information that must be included in the report. They also require experts to certify that they are providing fair, objective evidence that is not affected by their affiliation with the hiring party.[139] Experts'

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[136] See, for example, *Children's Aid Society of Toronto v BB*, 2012 ONCJ 646 (CanLII) at para 25. Justice Sherr stated that "[my] view is that the court should not give weight to evidence on a summary judgment motion that would be inadmissible at trial. I see no justification for a lower evidentiary standard for these motions. The consequences of the orders sought at summary judgment motions on families in child protection cases are profound. These important decisions should not be made based on flawed evidence. The summary judgment procedure is designed to winnow out cases that have no chance of success. It is not an invitation to water down the rules of evidence in order to make that determination." The admissibility of expert evidence on a summary judgment motion was also an issue in the Supreme Court decision in *White Burgess, supra* note 115 at para 55. The court there noted that the motion judge could only consider admissible evidence.

[137] *The Children's Aid Society of the Districts of Sudbury and Manitoulin v VT*, 2017 ONCJ 846 (CanLII).

[138] Rule 20.1(10.7), *Family Law Rules*.

[139] A 2015 decision of the Ontario Court of Appeal in *Westerhof v Gee Estate*, 2015 ONCA 206 (CanLII), which has been followed in a number of child protection cases, makes a distinction between "litigation experts" (experts who have been hired by a party for the purpose of giving an expert opinion to the court) and "participant experts" (doctors and other experts who provided treatment or testing to a person in the course of their regular work and who have been brought to court to explain their observations, the test results, or their recommendations for treatment). The Court of Appeal decided that participant experts did not have to fulfil the requirements of the Rules regarding experts. As well, s 54 of the *CFSA* (s 98 of the *CYFSA*) provides for the court to appoint its own experts to conduct assessments of the parents in certain circumstances. Those

qualifications should be demonstrated to the court in a *voir dire*, and the judge is required under common law to apply the two-stage admissibility test. However, the requirement to hold a *voir dire* and apply the two-stage test is not set out in the *Family Law Rules* or the *CFSA*.

If an expert's evidence is admitted after the *voir dire*, the expert will then testify and be cross-examined at the trial.

In some cases, CASs will ask parents' lawyers to agree, prior to the summary judgment motion or trial, that the test results or other expert findings are accurate. This is known as a "request to admit." If the parents or their lawyers agree, then the court will consider that evidence in the summary judgment motion or the trial.

The *Canadian Charter of Rights and Freedoms*

> *There is so much at risk and the stakes are so high to protect the fundamental rights of parents and to protect the fundamental rights of our vulnerable children. We have a moral obligation and inherent duty to get this right.*
>
> —A parent affected by the testing

The *Canadian Charter of Rights and Freedoms*[140] (the *Charter*) is part of Canada's Constitution. It places limits on government actions, including provincial laws and the actions of provincial government workers, where they interfere with the rights and freedoms of people in Canada. The Supreme Court has recognized that state interference in the relationship between a parent and child infringes on the security of the person, which is protected by s 7 of the *Charter*.[141] Any CAS action that interferes with the parent-child relationship must conform to the principles of fundamental justice.[142] Moreover, the Supreme Court has stated that "[t]he state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination."[143]

This recognition of the *Charter* rights of families is reflected in the fact that Legal Aid Ontario (LAO) funding is available for most child protection proceedings. It can also be ordered by the court if the parent's income is above the LAO cut-off but the parent cannot afford a lawyer.[144] The *Charter* has also been held to limit the powers of CASs to, for example, conduct searches of a child's home for

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experts also do not need to meet the requirements of Rule 20.1 regarding expert reports (see Rule 20.1(13), *Family Law Rules*). However, in all cases, the court should still carefully evaluate the evidence provided by these experts to ensure it meets the two-stage test of admissibility (*Westerhof*, at para 64).

[140] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

[141] *Ibid,* s 7. "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[142] Fundamental justice includes the duty to act fairly. The principles of fundamental justice embrace the "basic tenets and principles, not only of our judicial process, but also of other components of our legal system." *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81 (SCC) at para 64.

[143] *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 1999 CanLII 653 (SCC) at para 70.

[144] See *Catholic Children's Aid Society of Toronto v JRC,* 2015 ONCJ 729 (CanLII).

investigative purposes.[145] Many of the issues that arise in child protection have led to significant litigation and strict rules in the criminal law context because they engage *Charter* rights. Examples include the use of bodily samples (hair and urine) and delays in providing disclosure to the opposing party. However, the *Charter* is rarely invoked in child protection cases.

Raising *Charter* issues is time consuming. It is seldom successful in child protection proceedings because of the need to make permanent decisions about the care of children as expeditiously as possible. The culture of child protection law can also discourage parents' lawyers from raising *Charter* issues. Parents' counsel told us that they rarely do so because they fear that the court may view them as focussing on the rights of the parents as opposed to the safety of the children. This should not be the case given the rights enshrined in the *Charter.* It is the appropriate role of parent's counsel to raise every applicable argument to defend their clients.

Challenges to the use of evidence obtained in breach of the *Charter*, which are common in criminal proceedings, have rarely been attempted in child protection cases. When they are attempted, they are seldom successful. A breach of the *Charter* in a criminal proceeding often leads to excluding the evidence obtained by the breach (which can lead to an acquittal), or a stay of proceedings (meaning the case is suspended, usually permanently). However, because of the importance of protecting children, evidence obtained by a CAS in breach of the *Charter* will rarely be excluded and a stay of proceedings will not be considered appropriate.[146] An appropriate remedy to a *Charter* breach in child protection remains to be litigated.

Finally, most parents in child protection cases receive LAO support and do not have the resources to pursue prolonged *Charter* challenges. We heard from some parents' counsel that LAO does not currently fund them when they wish to bring *Charter* applications, which limits their ability to develop the law in this area.

[145] *Chatham-Kent Children's Services v K(J)*, 2009 ONCJ 589 (CanLII).

[146] See, for example, *Family and Children's Services of St. Thomas and Elgin County v F(W)*, (2003) 36 RFL (5th) 310; 2003 CanLII 54117 (ON CJ), where the parents alleged that the CAS had violated the *Charter* and that either a stay of proceedings should be ordered or the evidence obtained as a result of the *Charter* breach should be excluded. The court stated at para 392: "[T]o allow the claims of the parents and either order a stay [of proceedings], or exclude the evidence would result in punishing the children for the misdeeds of the society or the child protection worker. In child protection proceedings, the children are the innocent focus of the hearing; they cannot be used as pawns in a procedural gambit between the parents and the society that could result in harm accruing to them." For a contrary view, see *ibid*.

5. Review of Individual Cases

Information on who was tested

The Commission was set up as a Review and Resource Centre to examine child protection cases between 1990 and 2015 where Motherisk hair testing played a role, and to offer support such as counselling. Our information on who was tested at the Laboratory in child protection cases came from SickKids. When the Commission was established, SickKids provided us with the Laboratory data divided into three sets, each of which provided names and dates of birth:

- A small dataset entitled "1998," which contained data up to 2007. The data was sorted by year and contained Motherisk hair testing results for CASs as well as other requestors such as individuals and hospitals from Ontario and out of the province. It contained very few test results before 1998;
- The main dataset that covered from about 2005 to 2015, sorted by CAS, which had some overlap with the first dataset; and
- Data that seemed to begin around 2007, also sorted by CAS but organized differently from the second set (e.g. using different columns of information). This set (like the first one) also included testing results for other requestors such as individuals and hospitals. Some lines or segments of this data were unintelligible.

The majority of the test results in the data we received pertained to 2000 onward. The data sets contained errors, including misspelled names, incorrect birthdates, and missing information (e.g. birthdates and testing dates). There were tests referred to in court documents that we could not find in the data from the Laboratory. There were also inconsistencies between the test results we found in files and those in the data.

Before fall 2016, if counsel reviewing a file found that tests were referred to but not included in the materials, counsel and administrative staff would check to see if they were in the data from SickKids. Starting in fall 2016, a Data Coordinator searched the data sets to find all test results associated with every case we reviewed. She provided this information to the counsel reviewing the file to ensure that the number of tests and results matched those in the legal documents.

Purpose of reviewing cases

CASs and the court consider and weigh many different factors in making decisions about families. We investigated just one of those factors: the Motherisk hair testing. We reviewed files to determine whether the testing had a substantial impact on and was the primary reason behind CAS and court decisions. Our sole purpose in doing so was to identify cases where a parent, child, or other person affected by the decisions might have a legal remedy because of CAS or court overreliance on the flawed testing.

It was not the purpose of the file reviews to establish the accuracy of the Motherisk test results. Justice Lang found that the testing was inadequate and unreliable for legal purposes, but neither the Independent Review nor the Commission was tasked to discover whether the results were right or wrong in individual cases. There would have been no way to do so in any event since the testing methodology was unreliable.

Definition of "substantial impact"

We defined "substantial impact" to mean a Motherisk test that materially affected the outcome of the case, having regard to one or more of the following factors:

- The creation of a status quo with respect to the child's living arrangements;
- The position of the CAS respecting the direction of the case; and
- The decision of the court.[147]

The importance of the legal record

Our mandate required us to look at the use of the Motherisk hair testing for forensic[148] (or legal) purposes in child protection cases. Our reviews focused on the legal record—the evidence placed before the court by all of the parties, together with the judge's decision—rather than on CAS workers' notes and other materials that the judge would not have seen.[149] (An exception was customary care agreements described on pages 43-44.) The legal record typically included lengthy and detailed affidavits, along with copies of test results, Parenting Capacity Assessments, and other documentary evidence. We also read the Reasons for Judgment in cases where the court had issued them.

In a number of cases, we requested further information from the parties for clarification. Occasionally, I ordered transcripts to learn what the parties, their counsel, witnesses and the judge said in court. We contacted CASs for updates in cases where the matter was ongoing and a final order had not yet been made or where we had questions about the children's status (e.g. whether they had been adopted) and their current contact with parents and siblings.

A CAS, or anyone affected by the testing, had the option of filing additional materials as part of a request that I reconsider my determination. (See the section "Reconsideration of determinations," below.)

On November 14, 2016, three individuals brought a Judicial Review Application[150] against the Commission. They objected to our file review process, including the fact that I did not receive written and oral submissions before making a determination on the role of the Motherisk hair testing in a case. The court dismissed all three applications and made no findings on their merits.

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[147] See Appendix 5a, Rules of Procedure, 5.

[148] Lang*, Independent Review*, 4. Justice Lang provided the following definition of the forensic nature of the Motherisk hair tests: "MDTL's [Motherisk Drug Testing Laboratory's] hair tests were forensic in nature, and the service it offered to child protection agencies and law enforcement was a forensic one. A hair test can be forensic even if it is never tendered as evidence and even if no court proceeding is ever initiated. What distinguishes a clinical test from a forensic test is the purpose behind the test. If the test is either carried out or used for a legal purpose, it is a forensic test."

[149] CASs typically generate thousands of pages of notes and other documents per family. For example, every phone call between child protection staff and a foster home must be documented. Reviewing the legal record not only allowed us to focus on the information that would have made a difference in the case, but it was also the most expeditious way to learn about the case.

[150] *YM v Commissioner Judith Beaman; CT v Commissioner Judith Beaman; and CR v Commissioner Judith Beaman*, 2016 ONSC 7118 (CanLII). Readers are encouraged to read the entire document (Appendix 5b) for a full understanding of the decision.

Materials in the files

An average legal record we reviewed contained about 750 pages. Some were smaller (around 300 pages) and some larger (around 2,000 pages). A few were closer to or even exceeded 4,000 pages. We received most files from CASs electronically, but a few sent the Commission boxes of paper files.

In a typical file, the bulk of the documents filed with the court came from CASs. Parents generally filed fewer documents. One reason for this is that it is the CAS's responsibility to prove the case. The majority of affidavits in the file were from CAS workers, often from a number of individuals involved in the same case (e.g. Family Services Workers working with the parents and family and Children's Services Workers working with children in CAS care). We saw few documents filed by the OCL on behalf of the children they represented. Among other reasons for this, OCL lawyers do not often ask their child clients to swear affidavits.

In cases where a CAS initiated a Protection Application under the *CFSA*, we reviewed the materials filed with the court that led to the final outcome, including the following:

- Applications, including Protection Applications filed by the CAS and Status Review Applications filed by the CAS, parents or children;
- Plans of Care filed by the CAS;
- Answers and Plans of Care filed by the parents or other caregivers;
- Conference Briefs;
- Notices of Motions;
- Affidavits from all parties;
- Minutes of Settlement or Consents;
- Statement of Agreed Facts;
- Summary judgment motion materials of all parties; and
- Endorsements, orders and Reasons for Judgment.

In addition, we reviewed the Laboratory tests results and interpretation reports, Parenting Capacity Assessments, and psychological assessments. These were usually appended to the CASs' affidavits. Where they were included in the file, we also read police and hospital records. In the very few cases we reviewed that went to trial, we read the trial affidavits and any other documents that were sent to us.

In some cases, CASs resolved a matter through a customary care agreement without commencing a Protection Application. In other cases, they started an application but withdraw it to pursue customary care. In both situations, we reviewed the information leading to the CAS's involvement, including the following:

- The intake file compiled by the CAS;
- The family services file, if any, compiled by the CAS; and
- A copy of the agreement between the CAS and the parent or parents, where provided.

Scope of the file reviews

Justice Lang reported that between 2005 and 2015 (the period examined in her review), the Laboratory tested more than 24,000 hair samples from 16,000 different individuals for child

protection purposes.[151] More than 9,000 of these individuals tested positive.[152] Given the volume of the testing, Justice Lang concluded as follows:

> Unravelling how important the test result or interpretation report was in any particular proceeding would be a complicated forensic exercise. Embarking on this exercise for every one of the thousands of cases with an MDTL [Motherisk Drug Testing Laboratory] hair test result between 2005 and 2015 would be a formidable, time-consuming, expensive, and impractical exercise that would not achieve the desired expeditious and just result.
>
> […]
>
> I am not recommending that the Second Review [i.e. the Motherisk Commission] examine every child protection proceeding where an MDTL test result was obtained.[153]

Guided by Justice Lang's advice and the mandate set out in our Terms of Reference to "offer early advice or guidance on high priority cases,"[154] we did not set out to review every individual case involving Motherisk hair testing. Instead, we sought to review every case in Ontario (between 1990 and 2015) where children were permanently removed from their families and were under the age of 18 at the time of our review.

We defined the scope of the task in two phases:

Phase 1: Review of high priority files. Generally, high priority cases were those where final decisions about the future of children such as a custody order, Crown wardship, or adoption had recently been made or were pending.

Phase 2: Review of Ontario Court Case Tracking System (FRANK) files. These were cases where adoption orders had been made and Motherisk hair testing was a factor. In most of these cases, the children were older and had been adopted for some time.

In total, we reviewed 1,271 individual cases.[155] Of these, we found that positive Motherisk test results had a substantial impact on the outcome of 56 cases. In the large majority of cases, there was other evidence (e.g. domestic violence, mental health issues, neglect of children) to support the CAS and court decisions. In those cases, we concluded that the outcome would have been the same without any Motherisk hair testing.

The overrepresentation of Indigenous families in the child welfare system generally was reflected in our file reviews. Of the 1,271 cases, 189 (14.9 per cent) involved Indigenous families. Of the 56 substantial impact cases, 7 (12.5 per cent) involved Indigenous families. Indigenous peoples make up only 2.8 per cent of Ontario's population (as of the 2016 census).[156]

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[151] Lang, *Independent Review*, 209 at para 1.
[152] *Ibid*, 222 at para 37.
[153] *Ibid*, 234 at paras 21 and 23.
[154] Appendix 2a at para 2c.
[155] This number is approximate. At the time of writing this Report, the Commission is still reviewing cases.
[156] "2016 Census Highlights, Factsheet 10: Aboriginal Peoples of Ontario," Ministry of Finance, November 2017, accessed at Aboriginal Peoples of Ontario 2016.

We were not able to identify the number of African Canadian families or other racialized groups in the cases we reviewed. CASs are in the early stages of collecting this data on a province-wide level.[157]

Chapter 6: Observations from the Review of Individual Cases provides a summary of our key observations from the file reviews.

Phase 1: High priority files

Definition of "high priority files"

We defined "high priority cases" as those falling into one of the following categories:[158]

- A child was placed for adoption and the adoption was finalized between December 17, 2015 (the date the Ontario government released Justice Lang's report) and February 22, 2016 (the date of my first order to CASs to release high priority cases);
- A child was placed for adoption but the adoption was not finalized;
- A custody order was made under section 57.1 of the *CFSA*[159] between December 17, 2015 and February 22, 2016;
- A child was made a Crown ward but had not yet been placed for adoption;[160]
- A child was a Crown ward and an application for a custody order under section 65.2 of the *CFSA*[161] was pending;
- An application to the court was pending to make a child a Crown ward or for a custody order under section 57.1 of the *CFSA*; and
- A customary care or kinship arrangement was made and Motherisk hair test results were relied upon.

Initially, we defined "high priority" as including the first six categories listed above. Through our outreach to Indigenous partners, we came to understand the importance of reviewing customary care cases involving Motherisk hair testing. On June 3, 2016, I wrote to CASs, including Indigenous child and family service agencies, to request files in which customary care agreements had been made, based in whole or in part on positive Motherisk hair test results.[162] In cases where a customary care agreement was established as part of a court proceeding, I requested the legal file, as I did for all high priority cases. If the agreement was reached outside of any court proceeding, I requested the society's file so that we could understand why the CAS considered the customary

[157] See One Vision One Voice 2016b, 3-4 and 9-10 for recommendations on collecting and reporting on data to measure racial disproportionality and disparities. See also "Count me in! Collecting human rights-based data," Ontario Human Rights Commission, accessed at OHRC Count Me In!. In September 2016, The Honourable Michael Coteau, Minister of Children and Youth Services and Minister Responsible for Anti-Racism, announced that he would be mandating all CASs to begin collecting disaggregated race-based data. Accessed at OACAS - Minister's Announcement Launching Practice Framework. The OACAS is actively working to achieve this.
[158] See Appendix 5a, Rules of Procedure.
[159] *CYFSA*, s 102.
[160] Lead Commission Counsel wrote to CASs on July 18, 2016 (see Appendix 5c) clarifying that this category included children who had been made Crown wards, even if there was no plan to place them for adoption.
[161] *CYFSA*, s 116.
[162] See Appendix 5d for the letter regarding customary care files.

care agreement necessary and then determine the role of the Motherisk hair testing in that decision.

Obtaining high priority files from CASs

Justice Lang had noted that some high priority cases could not wait to be reviewed until the Commission was fully operational.[163] On December 17, 2015, MCYS directed CASs to immediately identify all open cases involving a positive Motherisk test. This was an interim measure pending establishment of the Commission.

On February 24, 2016, I issued an order to CASs to release to the Commission as soon as possible (but no more than 14 days later) electronic or paper copies of the unredacted case files identified by CASs or by me as "high priority cases."[164] My order to release the case files had the effect of suspending the planning for the children involved in these cases while the Commission reviewed their files. This added to the stress these children and their prospective adoptive parents faced and created an even greater sense of urgency to the Commission's work.

> *Motherisk has impacted us greatly by delaying our adoption by more than a year and a half. Permanency is so important to our child. Our child has been impacted by this long process. Feeling secure with us and being part of a family has been put on hold for too long.*
>
> —A parent affected by the testing

Complying with the order entailed a great deal of work by CASs across the province and it made significant and unforeseen demands on their time and resources. MCYS provided some funding to assist CASs with this work, but we were advised that it did not fully cover the additional burden on them.

Phase 2: FRANK files

Through our outreach activities in the first year of our mandate, we spoke to advocates for children and youth and many others. They all encouraged us to widen the scope of our file reviews to capture more Motherisk cases and to inform as many young people as possible about our findings concerning the impact of the testing on their families.

In Phase 2, our specific goal was to identify children and youth whose cases had involved Motherisk hair testing and who had been adopted before December 17, 2015 (those adopted after December 17, 2015 were already included in the high priority categories in Phase 1). To achieve our goal, we needed to find a way to identify more files involving Motherisk hair testing, beyond the high priority cases provided by CASs and the small number of file reviews requested by callers to the Commission. We turned to FRANK, a provincial database that provides automated information on court cases, including child protection matters,[165] to help us find such files.

We understood that it would be very difficult for the biological families involved to successfully pursue legal remedies. Most of the children were older and had been adopted some time earlier.

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[163] Lang, *Independent Review*, 235 at para 27.

[164] A previous order issued on February 22, 2016 (Appendix 5e) inadvertently omitted the requirement to release high priority files I had identified. My February 24, 2016 order (Appendix 5f) clarified this requirement.

[165] "FRANK – Court Case Tracking System," Government of Ontario Data Catalogue, accessed at FRANK.

Nevertheless, we wanted to document our file review findings as a record for the children and youth who were affected.

Cross-referencing databases

By our calculation, there were more than 30,000 test results in the Laboratory database we received from SickKids.[166] The database contained names and birth dates of the people tested and the name of the CAS that requested the testing. Since many people were tested more than once, we engaged an Information Technology firm to determine the number of unique surnames. The firm estimated that there were 9,700.

Through discussions with the IT firm, and with the Ministry of the Attorney General (MAG), which operates FRANK, we devised a process to cross-reference the Laboratory database with the FRANK database. As the two databases served very different purposes and were not designed to interact, this was a labour-intensive and imperfect process.

With the approval of the Superior Court of Justice and the Ontario Court of Justice, and working closely with MAG, we received the confidential data we needed from FRANK. MAG cross-referenced the FRANK data with the Laboratory data and gave us a list of children's names and birth dates. These were children involved in cases under the *CFSA* where a court had made a final order of Crown wardship between January 2004 (the starting year of the FRANK data) and December 31, 2015 (the year the Laboratory was shut down). These children had also been named in an adoption order.[167]

New files for review

The cross-referencing process produced a list of about 2,760 children's names. We removed the names of children who were now over the age of 18 because we did not wish to disturb them when there was no legal remedy available for them, as adults, from the family court. As well, we assumed that adults were more likely to learn about the Motherisk hair testing and the work of the Commission through our media and outreach campaigns. This left us with about 2,130 names. We then compared the list with the names in the cases we had already received. The comparison revealed that we had about 1,600 new names from the FRANK database.[168] The new cases included

[166] This number was higher than the 24,000 reported by Justice Lang since the period of her review began in 2005. Although my mandate required me to review cases as far back as 1990, the oldest hair test contained in the database provided by SickKids was in 1998. It is likely that very few hair tests were completed for CASs before this date. If there were any, we were unable to obtain a record of them.

[167] Early on in our development of the FRANK exercise, we contemplated also reviewing cases where the court made a final order awarding custody under s 57.1 or s 65.2 of the *CFSA* (s 102 and s 116 of the *CYFSA*), between January 2004 and December 31, 2015. However, we did not pursue this avenue. It yielded too high a volume of cases for the Commission to review within its mandate, and in most cases, custody was awarded to one of the biological parents. We did not review cases where a young person was over the age of 18, except on request, for the reasons noted. However, we did include some young people over 18 if we reviewed files involving their younger siblings. In these cases, we also wrote letters to the young adults for placement in their CAS files.

[168] We received and reviewed 544 FRANK case files, far fewer than the 1,600 names. There were a few reasons for this. Multiple names (i.e. siblings) were often involved in a single case. Many names we sent to CASs did not yield new cases for us to review because Motherisk hair testing was not involved or the CAS had no record of the name, likely because the FRANK data was sorted by courthouse. In some cases, the same name (but a different date of birth) was mistakenly flagged.

some that should have been sent to us as high priority files, so the exercise served as a valuable check on the thoroughness of Phase 1 of our work.

We divided up the FRANK data by courthouses, since that is how the locations of the cases are identified. Then we matched the courthouse locations to the CASs operating in those jurisdictions. On December 22, 2016, Lead Commission Counsel wrote to CASs with a list of new case files we were seeking.[169] To expedite the review process, he asked societies to highlight where the Motherisk hair testing was referenced in the files.[170]

Given the data sets we had to work from, the process of identifying these new cases was not always smooth. In some situations, CASs indicated that they did not have a file or that there was no Motherisk hair testing in a file. We then searched the databases to try to resolve the discrepancies. In some cases, we found that families had moved from one jurisdiction to another, or that legal proceedings had started in one location and continued in another.

The Commission received inquiries from several CASs about the need to provide us with files where the children had been adopted. On April 3, 2017, I wrote to CASs to clarify that we wished to review these files so that we could provide information to the children and families who were affected.[171] I also issued an order, on the same date, formally requiring the production of these files.[172] My intention was to allay the concerns of some CASs about the legality of releasing the FRANK files to the Commission without a court order.

Additional files I requested

In addition to the files identified by CASs and the FRANK files, I identified and requested for review a handful of other CAS files (in both Phase 1 and Phase 2). These files came to my attention in a variety of ways:

- Individuals calling the Commission and asking us to review their cases;
- Discovering through the review of a file provided by a CAS that other children had been born to the parent or parents (e.g. where the children were the subject of a separate application or were receiving support from a different CAS);
- Discovering test results in the Laboratory database for siblings or other family members related to a case we were reviewing;
- Reviewing reported court decisions in which Motherisk hair testing was referenced and relied on;
- Lawyers bringing cases to our attention; and
- Media reports.

[169] See Appendix 5g for this letter.
[170] The letter indicated that "it would be helpful if [CASs] would identify the paragraphs in the pleadings where the testing is referred to, whether the evidence is an exhibit to an affidavit and, where there are Reasons, whether the judge referred to the testing."
[171] See Appendix 5h for this letter.
[172] See Appendix 5i for this order.

The file review process

Commission counsel carried out the file reviews. To avoid any conflict of interest, counsel did not review a file if in previous work they had represented any one of the CAS, parents or children in the case.

Information related to Motherisk hair testing

In reviewing the legal files, counsel looked for information related specifically to the use of the Motherisk hair testing. Below are some examples:

- Who was tested and when? In many files, more than one child, parent or other caregiver (or potential caregiver) was tested.
- Was there other evidence confirming alcohol or drug use that was affecting parenting ability?
- What was happening with the family before the testing and what happened after (e.g. did the society retreat from their previous position, such as ending supervision or increasing access because of the test results)?
- Did the worker question the parent's credibility about other issues because of test results or because of the parent's refusal to be tested?
- What other evidence, in addition to the Motherisk test results, was submitted in court to support the CAS's overall position?
- Was this evidence compelling enough to have resulted in the finding or the order if the Motherisk test results had not been included?
- Was there information to suggest that parents accepted a test result only because they believed it would be difficult or impossible to challenge its accuracy?

Case reports and recommendations

Counsel prepared a report for me of each case which included the following:

- Basic information (e.g. names, birthdates) about the child, siblings, parents and others involved in the case and whether they were represented by a lawyer;
- Where relevant, information about the child's and other family members' Indigenous status and community, band council involvement and any customary care agreement;
- Details about the court finding in need of protection,[173] the current court order and prior orders;
- Information about adoptions, where relevant;
- All Motherisk hair testing found in the file, including who was tested, dates of testing and results;
- A list of all documents counsel reviewed;
- An extensive narrative of the case, illustrating how the Motherisk hair testing contributed to the CAS and court decisions; and
- A recommendation to me, with reasons, on whether the Motherisk hair testing had a substantial impact on the case.

[173] *CFSA*, s 37(2) and *CYFSA*, s 74(2).

Counsel considered three main questions in making recommendations to me:

- Did CAS decisions rely on the Motherisk test results?
- Was the Motherisk test relied on to establish the status quo?
- Did the court rely on the Motherisk test in making its final decision, and if so, how much weight did the court give it?

Review of reports and determination

Counsel submitted their detailed file reports to the Lead Commission Counsel for review. He referred to the original legal documents if there was any lack of clarity in the report. If he still had questions or disagreed with the recommendation, he discussed the file with the reviewer. In some cases, they sought additional information from the CAS or ordered court transcripts to clarify key points. On files where he and the reviewing counsel could not agree on a recommendation, counsel presented the case at a meeting.

I had biweekly meetings with all counsel to discuss file reviews. We shared what we were learning through the reviews, both about the process of doing the reviews and the substantive issues of the cases. This was particularly important in the first year of the Commission because we were able to refine the review process to help ensure consistency. The meetings were also opportunities to analyze as a team the more complex cases where it was difficult to tease out what role the Motherisk hair testing had played among many other factors.

I read every report and reviewed the original documents, where necessary for clarification, before making one of three determinations: [174]

- The Motherisk hair testing did not have a substantial impact;
- The testing did have a substantial impact; or
- The role of the testing in the outcome of the case was still unclear and additional information was required (e.g. case notes, reports, assessments, court transcripts).

I read any additional materials and discussed them with the reviewing counsel and the Lead Commission Counsel. I was able to make a determination in every case we reviewed.

[174] See Appendix 5a, Rules of Procedure, 8.

Overview of Cases Reviewed*

- High priority cases reviewed: 662
- FRANK cases reviewed: 544
- Other cases reviewed (e.g. callers to Commission): 65
- Total number of cases reviewed: 1,271
- Cases involving Indigenous families: 189
- Cases where Motherisk hair testing had a substantial impact: 56
- Cases of substantial impact involving Indigenous peoples: 7
- Cases where at least one child had a lawyer: 459
- Cases where at least one parent or other caregiver had a lawyer: 840

* The numbers are approximate. At the time of writing this Report, the Commission is still reviewing cases.

Reconsideration of determinations

If a CAS or a person who had sought a file review disagreed with my determination regarding the impact of the testing on a case, they had the option of asking me to reconsider the matter. Our Rules of Procedure provided a thirty-day limit, starting from when they were advised of my determination. We waived the time limit every time we were asked to do so and were always prepared to accommodate such requests.

Those requesting reconsideration had the opportunity to provide further material to support their requests. Where feasible, we provided this material to the other parties to the original court case and invited them to respond.

Commission counsel and the Director of Counselling met with a number of people to discuss their file reviews and the reconsiderations.

Counsel who completed the original review never worked on the reconsideration of that case. The counsel working on the reconsideration was not given a copy of the original file review. I made the final decision on reconsiderations.

Overview of Reconsiderations

- Total requests for reconsideration: 14
- Requests from individuals: 12
- Requests from societies: 2
- Requests for reconsideration of substantial impact decisions: 3
- Requests for reconsideration of non-substantial impact decisions: 11
- Files where reconsideration resulted in a different decision: 1

Notifications following file reviews

In all of the cases we reviewed, I notified the relevant CAS of the findings.

Our policy for notifying people who were affected depended on whether or not I found that the Motherisk hair testing had a substantial impact on the case.

Substantial impact cases

In cases where the Motherisk hair testing played a substantial role, I gave the names of the children who were affected to the OCL,[175] along with copies of our correspondence to the families. The OCL requested this information so that it could follow up with children it had represented or with children it might wish to represent if a parent took legal action. I also took steps to notify all of the people who were affected.[176] Locating caregivers to advise them of my findings was not always easy. The addresses in the files were often years out of date. To find up-to-date information, we sought the assistance of CASs and used social media. I issued orders to government ministries such as the Ministry of Community and Social Services and the Ministry of Community Safety and Correctional Services to release addresses they might have in their systems.

My letter to the individuals affected gave the following information:

- An explanation of my determination that the society and court substantially relied on the Motherisk hair testing;
- An offer to help them find and retain a lawyer (who would be paid for by the Commission) to advise them; and
- An offer to refer them to free counselling.

If we did not hear back, we followed up—often several times.

In cases where children had been adopted, we requested that CASs give us the names and last known addresses of the adoptive parents as well as the children's post-adoption names.[177] The adoptive parents' contact information and their children's names were kept strictly confidential, like all information identifying anyone involved in a child protection case.

The sole purpose for obtaining this information was to inform the adoptive parents about my findings. I did so because it was possible that the biological parents or others affected would seek to change the adoption order or establish contact with the children. I advised adoptive parents that we had taken steps to notify the biological parent or parents and, if we had made contact, had referred them to legal counsel for advice. I also offered to refer the adoptive parents to legal counsel.

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[175] "The Office of the Children's Lawyer," Ministry of the Attorney General, accessed at OCL.

[176] Correspondence was a significant part of the Commission's work, in terms of both importance and volume. We customized the letters to all parties who were substantially affected by the testing to reflect their unique family situations and to sensitively and clearly explain our findings and their implications. The letters I wrote to children for their CAS files numbered in the thousands. We revised the template for that letter several times to improve it and we sought the advice of a plain-language editor.

[177] In a few cases, CASs would not give us this information, citing s 165 of the *CFSA* (s 227 of *CYFSA*), which protects the confidentiality of adoption information. In these situations, I issued orders to the CAS and to the court to obtain this information.

Non-substantial impact cases

In cases where I determined that the Motherisk hair testing did not have a substantial impact, I wrote to the CASs involved and advised them that they were now free to take any steps they deemed to be in the children's best interests. If the adults who were affected had contacted the Commission and requested that we review their files, the Director of Counselling or the counsel who had conducted the review called them back to inform them of the results. We followed up the phone calls with letters.

We carefully weighed the pros and cons of informing adults who had not requested file reviews and in whose cases I had determined that the Motherisk hair testing had not played a substantial role. Our outreach campaign provided information about the Commission and our services, including the availability of file reviews. We hoped that adults who wanted their files reviewed would contact us. Unlike their children, they knew the facts around their child protection proceedings. We had to balance the emotional cost of reopening old wounds, where there was virtually no possibility of a legal remedy, against informing parents of the fact that we had reviewed their files. I decided that the least harm would come from supplying information only to those parents who asked for it.

Notifying children

> *CAS has been stuck in my head since I was six. It was just a horrid situation, and they believed what they wanted to believe. I remember my one worker (she is retired now), she was just so set on, 'Your dad is not a good parent, like you don't know half the story.' And I told her, 'If I don't know half the story, then tell me that story.'*
>
> —A young person affected by the testing

One of the most difficult questions we faced as a Commission was how to tell children who were affected by the Motherisk hair testing about the results of their families' file reviews. We recognized the Commission's responsibility to share this information with them before our mandate ended. We also understood that children could be confused and distressed if they did not have the right supports or if they received the information in a way that was not appropriate for their ages, stages of development, and circumstances.

We sought the advice of youth involved in the child welfare system, as well as advocates, social workers, and lawyers working with and for children and youth. They emphasized to us the importance of children and young adults knowing their full histories, including the role of the Motherisk hair testing in decisions about their relationships with their parents.[178]

Most young people we talked with felt that children and youth should be told if the CAS or the court had relied too heavily on the Motherisk hair testing in their cases, but they were divided about whether they should be told even if the testing had not materially affected the outcome of their

[178] We learned a great deal from Dr. James Wilkes, an eminent child psychiatrist, and others appearing in the film *Truth or Consequences: Information Sharing in Child Welfare* (2013). The film may be ordered from the Children in Limbo Task Force of the Children's Aid Society of Toronto Child Welfare Institute. See Children in Limbo Task Force for more information.

cases. Generally, they said that children should hear the information from someone they trusted, like a foster parent or social worker.

Many of them felt that learning the details of the Motherisk hair testing should be their choice. As one youth put it,

> *All children should have the choice to know their past. It should be like giving a child an envelope and then letting them decide to open it.*
>
> —A young person involved in the child welfare system

The young people we talked to felt that the impact of knowing their stories depended on when they came into care. If they came into care as infants, they probably had no relationship with their biological parents and knew very little about why they were in care. The older they were when they came into care, the more likely it was that they knew about their biological parents' circumstances.

Our many discussions and the valuable advice we received influenced my decision to write a carefully worded letter to each child affected by the testing. We asked the CASs to put the letters in the children's files so that they could read them if they chose to look at their files.[179] In only a few cases, where the testing had a substantial impact on the decisions made in the case, I decided that it was warranted to write directly to the children about the Motherisk hair testing.

Substantial impact cases

In cases where the testing had a substantial impact, the letters were tailored to the unique circumstances of the children and to my findings.[180] I requested that the CASs, the adoptive parents (if the children were adopted) and the OCL refrain from communicating the information in my letters to the children unless and until the parents (or other caregivers) decided to pursue a legal remedy. We asked these parties to confer and to agree on the most sensitive way to tell the children if a proceeding was begun. We believed that this was the best way to minimize distress to the children.

Non-substantial impact cases

In cases where the Motherisk hair testing had no substantial impact on the outcome, the letter to the children explained the following points:[181]

- The Commission was set up to offer legal and counselling support to people affected by the hair testing done at the Motherisk Laboratory at SickKids;
- The hair testing was unreliable and it was impossible to know whether the test results were right or wrong (I provided a link to Justice Lang's report);

[179] Children who have been the subjects of child welfare cases may, if they wish to see their files, ask the CAS to provide access to them. We understand that the age at which individuals can review their files and the procedures for review vary across CASs. The Commission originally sent the children's letters to CASs in sealed envelopes addressed to the children. However, feedback from a number of societies revealed that they had transferred their paper records to the digital Child Protection Information Network. In my letter to the CASs of April 3, 2017 (Appendix 5h), I gave them permission to scan the letters and save them in the children's electronic files. We also stopped sealing the children's letters at that time.

[180] See Appendix 5j for a sample letter.

[181] See Appendix 5k for this letter.

- My job was to review cases where the hair tests were used as evidence and to determine whether the tests had a major impact on the decisions of the CASs or the court;
- My determination was that the Motherisk hair testing did not have a substantial impact on the outcome of their families' cases because there were other reasons for the decisions; and
- I asked the CAS to put this letter in their files so that they would have the information if they chose to look at their records.

Sharing children's letters with parents

We received requests from groups representing adoptive parents that we send those parents copies of their children's letters. They felt that this would help them know what to expect and to be prepared to assist their children in processing the information. We agreed and asked the CASs to forward copies of the children's letters to the last known addresses of the adoptive parents on our behalf. We felt that it was only fair that we also send copies of the children's letters to the biological parents, to keep on their children's behalf, where we found that the testing had a substantial impact.

After only a few letters had gone out, we learned that reading one of our letters had caused emotional harm to a child.[182] We sought further advice and decided not to continue to share copies of the children's letters with any of the parents. We felt that the safest course was to put the letters in the CAS files only. CASs preserve these records, and the children would be more likely to find my letter if they chose to access their files. On reflection, we also thought it would be better for children to read their letters in the context of the other materials in their files rather than as an isolated piece of information. We continued to inform parents of the existence, purpose and content of the letters.

On June 7, 2017, I wrote to CASs to inform them of this new direction and explain why it was necessary.[183] I included (and provided electronically) a template letter for societies to use to inform adoptive parents of our findings in cases of non-substantial impact. The letter indicated that we had reviewed the files concerning their children, found that the CAS and the court had not substantially relied on the Laboratory test results in their cases, and had written a letter to be inserted in the children's CAS files explaining this to them.

In cases of substantial impact, I wrote to the parents myself to inform them about the letter I had asked the CAS to put in their children's files.

Services offered by the Commission

Regardless of whether the testing had a substantial impact on the outcome of their case, we offered the following services to anyone affected by the Motherisk hair testing:[184]

- Counselling services (see Chapter 8: Counselling Services);

[182] The Commission was able to assist this child and other family members by providing access to free and timely counselling.
[183] See Appendix 5l for this letter.
[184] See Appendix 5a, Rules of Procedure, 15-17.

- A meeting with me and/or the counsel who reviewed their files to discuss the outcome;
- Reconsideration of my determination following a file review; and
- Any other appropriate services (e.g. we covered the cost of a Behaviour Management Consultant to assist children whose parents were involved in litigation as a result of my finding that the Motherisk hair testing substantially affected their case).

Where we found that the Motherisk hair testing had a substantial impact on a case, we offered all of the people affected a referral to an outside lawyer if they wished to have legal advice. We informed them that the Commission would pay for it. We also provided access to alternative dispute resolution services, such as mediation, to parties who wished to work together to resolve any issues arising from my determination.

Overview of Substantial Impact Cases

- People referred to outside legal counsel: 23
- People referred to counselling: 21
- People referred to alternative dispute resolution: 2

6. Observations from the Review of Individual Cases

Over the two-year mandate of the Commission, we reviewed a total of 1,271 child protection cases from which we gathered information about the Motherisk hair testing. In the course of that work, we made some key observations on how the testing was used in child protection and the impact it had on the parents and others who were tested.

CASs requested the overwhelming majority of tests, but the volume of testing varied greatly from one society to the next. A few did not use hair testing at all, but used other methods for detecting substance use, such as more frequent visits to the home or early morning access visits for parents of non-school-aged children. While these require resources, we learned that the testing was itself expensive.

In some cases, parents asked for hair tests from the Motherisk Laboratory or another facility to prove that they were not abusing drugs or alcohol. Where a Laboratory test came back positive, some parents asked for another test in an attempt to show that the first result was wrong.

Circumstances related to testing

Who was tested

The vast majority of the families whose cases we reviewed were poor.[185] We saw this in the descriptions of parents having difficulty providing food and safe shelter for their children. We know from our reviews and from the social determinants of health research that many parents were also dealing with high stress and physical or mental health issues.[186] For Indigenous and racialized

[185] Barbara Fallon, Melissa Van Wert, Nico Trocmé, Bruce MacLaurin, Vandna Sinha, Rachael Lafebvre, Kate Allan, et al., *Ontario Incidence Study of Reported Child Abuse and Neglect – 2013* (Canadian Child Welfare Research Portal, 2015), accessed at Ontario Incidence Study. This study examines the characteristics of children and families investigated by CASs, including household source of income, but does not report on income levels. For a discussion of the relationship between poverty and ethno-racial status in decisions to bring children into care, see Kofi Antwi-Boasiako, Bryn King, Tara Black, Barbara Fallon, Nico Trocmé, and Deborah Goodman, *Ethno-racial Categories and Child Welfare Decisions: Exploring the Relationship with Poverty* (Canadian Child Welfare Research Portal, 2016), accessed at Poverty and Ethno-racial Status. For research on the intersection of race, poverty and child welfare, see One Vision One Voice 2016a, 28-30.

[186] Living conditions have been shown to directly affect health. The "social determinants of health" include Indigenous status, disability, early life, education, employment and working conditions, food insecurity, health services, gender, housing, income and income distribution, race, social exclusion, social safety net, unemployment and job security. "Each of these social determinants of health has been shown to have strong effects upon the health of Canadians. Their effects are actually much stronger than the ones associated with behaviours such as diet, physical activity, and even tobacco and excessive alcohol use." Juha Mikkonen and Dennis Raphael, *The Canadian Facts: Social Determinants of Health* (Toronto: York University School of Health Policy and Management, 2010), 9. The Commission received a written submission recommending that the Ontario government link child protection data to routinely collected, de-identified health and other data on Ontarians. This would allow us to learn more about the effects of the child protection system on families' well-being over time and plan appropriate policy responses. The submission notes the Manitoba Centre for Health Policy as a model to learn from. See University of Manitoba, "Manitoba Centre for Health Policy," accessed at Manitoba Centre for Health Policy.

families, these issues were likely compounded by personal experiences of discrimination and racism, as well as by the systemic impacts that include higher rates of poverty, unemployment, and underemployment.[187]

In the older cases we reviewed, we saw little to suggest that CASs or the court considered the historic treatment of these communities by the child welfare system as a contributing factor in a parent's reluctance to engage with the CAS or be tested. Where CAS affidavits referred to a family's difficult history with the system, it was to suggest a parent's unsuitability, not to acknowledge intergenerational trauma. In the materials we reviewed (e.g. in society Plans of Care), there were only cursory references, if any, to the importance of culture and community. CASs are considerably more aware of these considerations now, as we saw in the more recent files involving Indigenous families.

Out of the 1,271 cases we reviewed, 189 (14.9 per cent) involved Indigenous families, the vast majority of which were First Nations. We reviewed only a few cases involving Métis and Inuit families.

We were not able to identify the number of African Canadian families or other racialized groups in the cases we reviewed. CASs are in the early stages of collecting this data on a province-wide level.

The vast majority of tests were conducted on mothers. They are most likely to be the primary caregivers of children.

In the files we reviewed, the children who were tested were often tested after they were apprehended—without parental consent or judicial authority. In a few cases, newborns who had hair were tested. In many cases, there was no information in the file to suggest that the parents were advised that their children were being tested to determine if they had been exposed to drugs.[188] Many of the parents and others in the cases we reviewed were tested multiple times. In one case, we counted more than 20 Motherisk hair tests on the family members involved in a single case. In another case, the court ordered that the parent undergo monthly hair testing for the duration of a temporary care and custody order.

The total number of Motherisk hair tests (both positive and negative results) in all the cases we reviewed was approximately 2,811.

In addition to hair testing, the cases we reviewed often included results of tests on meconium[189] and urine. Our reviews focused on hair testing only, but we did notice examples of unreliable urine

[187] For statistics on poverty in Canada, see "Just the Facts," Canada Without Poverty, accessed at Just the Facts. For information on employment, see Sheila Block and Grace-Edward Galabuzi, *Canada's Colour Coded Labour Market: The Gap for Racialized Workers* (Toronto: Wellesley Institute and Canadian Centre for Policy Alternatives, 2011), accessed at Colour Coded Labour Market.

[188] Section 40(9) of the *CFSA* (s 81(9) of *CYFSA*) permits a child protection worker to authorize a medical examination of a child who is in need of protection without a parent's consent. It is not clear whether this authorization would encompass the taking of a bodily sample from a child as evidence of a parent's substance use.

[189] Meconium is the first fecal excretion of a newborn child.

screens.[190] There were also test results and reports from laboratories other than Motherisk in the files. We did not include non-hair tests or tests from other laboratories in our total number of tests.

Number of Tests*

- Mothers: 1,646
- Fathers: 710
- Children: 363
- Grandmothers: 26
- Grandfathers: 7
- Others (e.g. boyfriends, partners): 59

*Includes all hair tests, positive and negative results.

Reasons for testing

We found that CASs used testing for many different reasons, including to:

- Confirm the CAS's suspicions that parents had substance use issues (and the level of use) or confirm that children were being exposed to drugs;
- Inform decisions regarding access, levels of supervision and termination of involvement with a family;
- Establish that a parent was no longer using drugs or alcohol before returning a child to the home;
- Establish a baseline to identify changes in a parent's use and monitor compliance with substance use treatment programs;
- Determine parents' credibility, including verifying that their acknowledgement of substance use was accurate (e.g. type of drug, quantity, period of use);
- Test fathers who had previously been unknown to the CAS and had come forward with a plan to care for a child;
- Test kin who were presenting a plan to care for a child;
- See if drug or alcohol use was the reason for unexplained problems in the home or for a parent simply "not doing well;" and
- Comply with a judge's order to conduct testing.

When judges requested testing, it was often as a requirement before the judge decided whether to return a child to a parent. The test results were used at both temporary and final stages of child protection proceedings, including temporary care and custody hearings, summary judgment

[190] For example, in one case, a parent's urine tested positive for drugs. The laboratory sent it out for "more sophisticated analysis" and it came back negative. The parent's child had been apprehended and was returned upon the discovery of the error.

motions, trials, and status review hearings. We saw examples of positive test results used, at all stages, to exert pressure on parents to agree to a settlement.

Collection of hair samples

Hair samples were collected in various ways. Where distance was not an issue, people went to the Laboratory at SickKids. In other cases, other laboratories collected the samples on behalf of CASs at clients' homes and then sent them to the Laboratory. Some CAS workers, particularly outside of Toronto, collected the samples themselves and sent them to the Laboratory.[191] In one case, the court told the parent he could cut his own hair and provide it to the Laboratory.

Interpretations of test results

Often, the CAS affidavits contained test results without any interpretation. For drugs, where the tests results were interpreted, the interpretations were usually based on one of the Laboratory's tables that defined concentration ranges. In the earliest version of the tables, these ranges were described as "trace," "low," "medium," "high" or "very high."[192] There were separate interpretation tables for adults and for infants and children, but apart from that distinction, the concentration ranges were applied universally, without regard to factors such as hair colour, gender, or body weight.[193] For alcohol, where interpreted, the results were usually classified as "non-drinker (abstainer)," "moderate/non-drinker," and "chronic alcohol abuser." This last classification included two different concentration ranges.

There were apparent anomalies in the Motherisk hair test results in some of the cases we reviewed. The following are a few examples:

- A newborn's hair sample revealed high quantities of a drug and its metabolite,[194] which could only have resulted from the mother's consumption during pregnancy, but her own hair test was negative.

[191] Justice Lang reported that "one of the benefits of hair testing is that samples do not need to be collected in specialized facilities and the collector need not have special qualifications. However, to minimize the risk of contamination and ensure that best practices are followed, the collector should be trained in sample collection." Lang*, Independent Review*, 41 at para 21. See also her discussion of chain of custody in chapter 5, especially section 3.5 starting on 109.

[192] See Lang*, Independent Review*, 140-63 and the Appendix 8a-e for an extensive discussion about the Laboratory's interpretation practices and the various versions of the tables it used to define concentration ranges.

[193] A recent family court decision in the United Kingdom dealing with hair strand testing commented on the use of concentration ranges in test results: "The danger is that the report is too easily taken to be conclusive proof of high/medium/low use, when in fact the actual level of use may be lower or higher than the description. You cannot read back from the result to the suspected use. Two people can consume the same amount of cocaine and give quite different test results. This is the consequence of physiology: there are variables in relation to hair colour, race, hair condition (bleaching and straightening damages hair), pregnancy and body size." *H (A Child: Hair Strand Testing)* [2017] EWFC 64 (29 September 2017) at para 41. The case did not call into question the underlying science of the hair testing but did note that "a test result is only part of the evidence" (at para 40).

[194] When the body metabolizes a drug, it can leave traces in modified forms known as "metabolites." Metabolites continue to produce effects in the body, usually similar to the effects of the original drug but weaker. The effects can still be significant.

- A mother's hair test showed high levels of cocaine and benzoylecgonine (its metabolite). She denied use and a second sample was tested (the hair segment was from the same time period). It showed no cocaine or benzoylecgonine.
- The test results of children living in the same home revealed different drugs, or children tested positive while their parents tested negative;
- People tested negative for drugs they admitted to using and tested positive for drugs they adamantly denied using.
- Motherisk results were often different from results from other hair testing laboratories.
- The results of urine screens conducted by methadone clinics as part of their treatment programs were often inconsistent with the Motherisk hair test results for the same time periods.

When questioned about these anomalies, Laboratory staff almost always offered some explanation that avoided casting doubt on the Laboratory's own results. Sometimes they called into question other clinics' practices. Laboratory staff did, however, acknowledge the limitations of their test results for alcohol in a few letters and transcripts of testimony. For example, in one case, the Laboratory manager cautioned the court that "toxicology evidence should not be used in isolation to assess whether an individual uses alcohol to excess. The issue should be considered in light of other evidence concerning behaviour and context." There was no such acknowledgment of the limitations of their testing for drugs. In some files, the manager stated that he could not comment on parenting capacity, particularly when pressed on the issue. However, he also occasionally expressed opinions about home environments based on test results. For example, he advised CAS workers that the drug concentration levels in children's hair indicated that they were living in "drug houses."

In spite of these apparent anomalies, there was little indication in the files we reviewed that the results were questioned by CASs, parents' counsel or judges. Even when child protection workers thought a parent was doing well, the Laboratory's high level of certainty often caused them to doubt their own conclusions or to alter their perceptions of the parent. However, we did see a few cases where the workers trusted their favourable observations of parents and returned children to their care in spite of positive hair test results.

Cost of testing

We heard in our discussions with CASs that, owing to the high expense, some of them had reduced the use of Motherisk hair testing before MCYS directed them to stop using the testing in April 2015. We found a few references to the cost of testing in the files we reviewed, including the following:

- Two invoices from 2010, one for $150.00 for an FAEE[195] test (for alcohol), and the other for $175.00, which included $75.00 for cocaine, $50.00 for methamphetamine and MDMA (known as "ecstasy"), and $50 for opiates.[196]
- One email from the Laboratory to an individual who was tested in November 2011 indicated that "the total cost for your request is $450.00. Each drug is $150.00 and

[195] FAEE stands for "fatty acid ethyl esters," which are the main alcohol markers tested in hair.
[196] See Appendix 6a for these sample invoices.

your request is for cocaine, opiates and benzodiazepines." The email referred to a price list, but we could not find one in any of the files we examined.

- A 2014 invoice for $675.00 from the Laboratory showed various test costs, including $50.00 (barbiturates, benzodiazepines, cannabinoids, phencyclidine, methadone), $75.00 (cocaine), $100.00 (amphetamines – screen, opioids – screen) and $150.00 (FAEE – alcohol).

> *Testing plays a role in the whole assessment piece but it's not the be all and end all. In fact, sometimes the testing can take you off the mark. And so getting an assessment of the person's capability both in real life as well as in whatever test you're using becomes really important to understanding the nature of the problem the person has.*
>
> —A parent affected by the testing

Observations from file reviews

As we reviewed the case files, we had the luxury of hindsight. Unlike the parents, societies, counsel and judges, we were able to look at cases over an arc of often several years from first order to final order. The people working in child protection do not often have the same opportunity for reflection. They have to make difficult decisions about the care of children under tight deadlines, which are often specified by legislation.

As I have explained, our file reviews examined the legal record only. The CAS affidavits we read were generally set out in black and white terms for maximum persuasive effect. They rarely highlighted the grey areas so often found in child protection cases. Nevertheless, looking beyond the adversarial nature of many of these cases, we did see numerous examples of excellent social work, skillful legal work and thoughtful decision making.

As we examined the many files from across Ontario, we could see patterns emerging and systemic factors became apparent. I believe this was the first review exercise of its kind in the province, and the systemic issues we identified may not have been discernable in any other way.

Over a series of meetings, my team and I discussed and analyzed all of the issues emerging from the cases we reviewed. We developed a short list of key observations that all of us agreed encapsulated, across all of the files we reviewed, how the testing was used and its impacts on people:

1. **The Motherisk hair testing was imposed on vulnerable parents with little regard for due process or their rights to privacy and bodily integrity.**

In the overwhelming majority of cases we reviewed, people submitted hair samples at the request of the CAS without a court order. They were told explicitly, or it was implied, that if they did not submit to testing, then their cases would not go well for them. They would risk losing their children or access to their children.

In any of the cases we reviewed, if a parent had refused to consent to provide a bodily sample, the CAS could have asked the court to order testing as a condition of allowing the parent to care for or have access to children.

The *Charter* protects our right to privacy (including information about us that can be discovered through testing bodily samples) and the right to bodily integrity (the ability to control who touches

our bodies and when).[197] In criminal cases, courts have determined that these rights prohibit police and other authorities from taking bodily samples such as blood, urine, breath, or hair unless the person has consented to provide the sample. The only exception is where a court makes an order requiring the person to produce the bodily sample.

Without a court order, the consent must be free and informed.[198] People who provide samples must know the purpose for which the samples will be used and the potential consequence of providing a sample. They must know they have the right to refuse to provide a bodily sample, and they must have an opportunity to obtain legal advice. They cannot be coerced into consenting.[199] The *CFSA* and the *CYFSA* impose similar requirements for parents entering into or terminating consents or agreements,[200] but these elements of valid consent have not been used to obtain bodily samples.

In a criminal context, if any of these requirements is not met, the consent is not valid and the test results might be excluded from the court case. In the cases we reviewed, there was no evidence that the parents provided free and informed consent to having their hair tested.

We did not come across a single reference in which a CAS worker either advised parents that they did not have to provide a hair sample or told them that they had the right to seek legal advice before being tested. In one case, the individual tested was a member of a First Nations band. A band representative wrote to the society to object to the testing because the member did not provide informed consent. Nevertheless, the CAS introduced the test into evidence and the court accepted it without question.

To our knowledge, the courts have not decided what would happen to test results flowing from failure to obtain a valid consent in a child protection case.[201]

Testing was expensive. We saw only a few cases of parents who paid for additional testing to try to refute positive Motherisk test results. This was not surprising, given that the majority of cases we reviewed involved families who were living in poverty. In a number of cases, parents asked a CAS to retest them. The societies typically refused and relied on the first test result.[202] In one case, a mother sought a formal interpretation of her test results. She asked the society to get it for her as it had used the test results as evidence against her. The CAS told her to obtain it herself. She attempted to do so but was unsuccessful. In its affidavit, the CAS relied on hearsay evidence from the Laboratory manager rather than a formal interpretation.

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[197] These rights are part of the broader right to security of the person (protected by s 7 of the *Charter*) and the right to be free from unreasonable search and seizure (protected by s 8 of the *Charter*).

[198] See, for example, *R v Borden*, 1994 CanLII 63 (SCC), *R v Stillman*, 1997 CanLII 384 (SCC), *R v Shoker,* [2006] 2 SCR 399.

[199] See, for example, *R v Wills*, 1992 CanLII 2780 (ON CA).

[200] *CFSA,* s 4(2) and *CYFSA*, s 21(2).

[201] We are not aware of any case in which the validity of the parents' consent to hair testing has been challenged. The only case we are aware of related to hair testing and the *Charter* in the child protection context involves the court's authority to order testing where the parent has refused to be tested. *Children's Aid Society of Halton Region v ZI*, 2010 ONCJ 617 (CanLII).

[202] By way of contrast, in the Toronto and Ottawa Drug Treatment Courts for people charged with criminal offences, if an accused person challenges the results of a urine screen, he or she is automatically entitled to one retest.

2. CASs and the courts often drew negative inferences about parents who did not go for testing[203] or disputed the results.

Parents who refused to go for testing or failed to go (after agreeing to do so) were almost always presumed to be hiding drug use. This was true even in the few cases where parents asked for time to consult with their lawyers first. In one case we reviewed, the CAS worker told a father that a failure to attend for testing "would result in an automatic positive result." In another case, a worker documented her threat to ask the court to draw a negative inference about a father if he refused to go for testing. In several cases, we read transcripts where judges stated that they were drawing negative inferences about parents for the same reason.

Those who did not go for testing were seen as untrustworthy. In some cases, the CAS would not place a child with her mother because her new partner refused to take a test. In another case, the society viewed a father's refusal to take a hair test as an indication that he was unlikely to comply with a supervision order.

Parents who would not get tested or argued with their worker about the need for testing were labeled "uncooperative," regardless of the reason given. This label came up repeatedly in the societies' documents, even though failure to cooperate is not a listed ground for protection under child welfare legislation. The lack of cooperation frequently overshadowed minor parenting concerns or positive gains that a parent had made. It created an impasse between parents and workers and tainted their relationship.

The court and CASs often saw a parent's ability or willingness to cooperate with a CAS as necessary for a supervision order (as opposed to an order for wardship). Conflict over the testing could make a CAS believe that a parent was not cooperative, and by extension, not a good candidate for a supervision order. In such cases, the only other options for the children were society wardship or Crown wardship. For parents, therefore, being seen as uncooperative could have very serious consequences for them and for their children.

Parents and others who disputed their test results were simply not believed. For example, in one case, a grandmother's plan for her son's child was rejected, in part because (to paraphrase the court) she chose to disregard the science behind the Motherisk hair testing. In that case, the grandmother herself was not tested, but she disputed her son's Motherisk results. They conflicted with the results of urine samples he gave at a methadone clinic and also with her own observations of his behaviour, which did not suggest drug use. With the influence of the assurances of Laboratory staff and the stature of the Laboratory through its location in a world-renowned hospital, the court and CASs gave little credence to caregivers' assertions that test results were incorrect.

In many of the files we reviewed, CASs and the court saw parents who disagreed with test results as lacking in credibility. Sometimes, they told parents that their inability to accept the results showed a lack of the judgment and personal insight necessary for good parenting. They also regarded with suspicion parents who went to a different laboratory for additional tests after disputing Motherisk test results.

[203] The Commission only reviewed cases which included Motherisk test results. However, within these cases, a person who had been tested in the past might refuse to be tested again, or one person in the family would go for testing (e.g. the mother) and another would refuse to go (e.g. the father). This is how we came to see cases where people refused to be tested. We suspect that there were other cases we did not see at all where a parent never went for testing and there were negative consequences.

3. CASs and the courts often used hair test results as a proxy for assessing parenting.[204]

In many of the cases we reviewed, when a Motherisk hair test came back positive, CAS workers focused solely on the apparent substance use instead of considering any actual effect on parenting. With the seemingly incontrovertible proof in hand, workers tended to use test numbers to form their impressions of how well the family was functioning. The test results shifted workers' attention away from the family's parenting strengths to concentrate on apparent deficits, and workers seemed to link substance use with inability to parent. In some cases, they equated substance use of any kind to addiction. They sometimes characterized parents who were indeed struggling with addiction as having "chosen" substance use over their children.

In a number of cases, positive test results, without any other meaningful evidence, led societies to change course. This happened even when there was positive evidence supporting capacity to parent. Instead of seeking the return of children to their parents, they favoured placing the children with kin or in foster care.

We saw that the reliance on testing adversely affected the relationships between parents and their workers. Parents commented on workers' biases and inflexibility related to substance use and some asked for new workers. Child protection workers have two sometimes competing roles. They must monitor parenting skills to protect children from harm and also support parents to become better caregivers. In many cases, we observed that the workers' role in supporting parents was diminished by their focus on investigating suspicions of substance use.

In a number of the court decisions we reviewed, judges also gave excessive weight to Motherisk hair testing evidence despite favourable evidence of capacity to parent. For example, in one case, the society's materials described a parent as having excellent parenting skills and reported that she consistently attended for access. Notwithstanding this encouraging evidence, when a positive Motherisk test appeared to show low levels of cocaine and marijuana, the court made the child a Crown ward, without access, after a summary judgment hearing.

4. The use of testing generally reflected a narrow approach to substance use, focused on abstinence.

In most of cases we reviewed, CASs and the courts used hair testing with the explicit or implicit goal of getting parents to achieve complete abstinence, especially as a precondition to having a child returned home. In most cases, they saw a positive test result, even after an extended period of abstinence, as a failure. In court documents, CAS workers sometimes described parents in stigmatizing and judgmental terms, such as "chronic drug abusers" or "addicts," based on positive Motherisk test results and with little or no other evidence of chronic use.

Generally, CAS workers and the court seemed to lack understanding of the complexity and context for substance use issues, such as the social determinants of health, the time needed for treatment, the waiting lists for treatment programs, the role of stress, and the frequency of relapse. Mental health issues, which can go hand in hand with substance use, often appeared to be unidentified,

[204] Some decisions have highlighted the problem with this approach. For example, in *Children's Aid Society of Toronto v YB*, 2008 ONCJ 800 (CanLII) at paras 82-83, the CAS took the position that the child should be made a Crown ward because the parents were struggling with addiction, notwithstanding their strengths as parents. In deciding to return the children to their parents, Justice Murray observed that the use of drugs in and of itself is not a protection concern. Rather, what matters is the impact of the substance use on the ability to parent.

undertreated, or not treated at all.[205] Generally, the oversimplified view was that a positive test meant substance use, substance use meant addiction, and addiction meant inadequate parenting. It seemed to follow that addiction demanded treatment with the goal of achieving abstinence. In almost all cases, CASs recommended that parents attend residential treatment and did not appreciate that this might not have been the treatment they needed.

We could see that this "all or nothing" abstinence approach to substance use proved daunting for many parents who were obviously struggling to care for their children with few supports. The threat of losing their children if they relapsed created tension and mistrust between them and their workers.

In some of the later cases over the time period we reviewed, we saw examples where some societies were implementing a harm reduction approach.[206] In contrast to the abstinence approach, the harm reduction model rarely relied on hair testing. As a result, we reviewed far fewer files from CASs that were implementing this model.

5. Test results were often admitted into evidence without the usual checks and balances of the legal system and given excessive weight by CASs and the court.

Reliance on test results at the beginning of the child protection process was particularly harmful. Positive results undermined parents' credibility and tainted their relationships with CASs, the court, and often their own counsel and families. In most of the cases we reviewed, the court first learned of hair test results through CAS affidavits in support of temporary care and custody hearings.

As discussed in Chapter 4: Background to Child Protection in Ontario, the court can admit evidence at the temporary stage that it considers "credible and trustworthy." It does not hear directly from the source of the evidence at this stage. This relaxed approach to evidence is arguably necessary at the start of a proceeding when a child may be in urgent need of protection. Nevertheless, the way some of this evidence was admitted in the cases we reviewed often did not appear to meet the "credible and trustworthy" test. The following are some examples:

- In many cases, the CAS worker swore an affidavit stating that the parent was tested at the Laboratory and stated the tests results, but the affidavit included no copy of the results and no letter interpreting the results. Workers often provided their own explanations of the meaning of the results based on the Laboratory's concentration tables.
- Where the Laboratory test results were attached, the summary in the affidavit was not always consistent with those results. In one particularly egregious case, the affidavit stated that the test result was positive but the test result showed that it was negative.

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[205] "People with a mental illness are twice as likely to have a substance use problem compared to the general population. At least 20% of people with a mental illness have a co-occurring substance use problem. For people with schizophrenia, the number may be as high as 50%. Similarly, people with substance use problems are up to 3 times more likely to have a mental illness. More than 15% of people with a substance use problem have a co-occurring mental illness." "Mental Illness and Addictions: Facts and Statistics," Centre for Addiction and Mental Health (CAMH), accessed at CAMH Mental Health Statistics.

[206] CAMH Special Ad Hoc Committee on Harm Reduction, *CAMH and Harm Reduction: A Background Paper on its Meaning and Application for Substance Use Issues* (Toronto: CAMH, May 2002), 1. Definition: "Harm reduction is any program or policy designed to reduce drug-related harm without requiring the cessation of drug use." Accessed at CAMH definition of "harm reduction".

- In many cases, CAS protection workers or other staff members (e.g. a CAS legal assistant) swore affidavits that they spoke to someone at the Laboratory who told them that a parent's hair tested positive for a certain substance or substances. Typically, the person they spoke to was identified by first name only and without a job title.
- In some cases, workers stated in their affidavits that they asked Laboratory staff to interpret test results conducted by other laboratories. In a few cases, workers asked parents' family doctors to interpret the Laboratory's results and reported the doctors' opinions in their affidavits.

We did not see any examples where a CAS replaced hearsay evidence related to the Motherisk test results with firsthand evidence at a later stage in the proceedings unless the matter went to trial. We saw only one or two cases where a parent's lawyer or a court asked the CAS to produce more direct evidence after the temporary care and custody order was made. In many cases, the Motherisk hair testing and interpretation chart were admitted on consent at trial with no cross-examination. In a few cases that went to trial, a senior Laboratory staff member appeared as a witness for the CAS and was cross-examined by parents' counsel.

CAS affidavits commonly made repeated references to positive test results and other information related to a parent's substance use, no matter how far in the past the results were obtained. We came to refer to this as the "cut and paste" approach. Even where substance use no longer seemed to be an issue affecting parenting (e.g. the parents had received treatment), and even if the children had been returned to the parents, the CAS continued to mention the positive test results in every subsequent affidavit. Often, they did not mention the parents' corresponding denials or objectively and fairly describe the improvements in their lives. Persistent repetition of the positive test results lent greater authority to that evidence, making it appear more factual. It also conveyed and then reinforced a negative impression of the parents. As one person who was affected by the testing said to us, "It [a test result] was always in the judge's head."

In many of the files we reviewed, the cases were resolved through a summary judgment motion. Counsel for parents rarely challenged the Laboratory test results and the court did not scrutinize them. In one notable exception, in a summary judgment case we reviewed, a parent's lawyer did argue forcefully that the Motherisk Laboratory experts should be cross-examined at a trial. She also argued that there had been no opportunity for the parent to get an expert to refute the test. She asked for the CAS to arrange for a retest and pay for it since the parent could not afford to do so. The court refused to allow the cross-examination of the expert and did not permit a retest. The court ordered that the child be made a Crown ward.

By law, the burden is on CASs to prove to the court's satisfaction that a child is in need of protection.[207] The Laboratory's reputation made the hair testing results a very powerful piece of evidence toward discharging the CASs' burden of proof. In a few cases, we saw the court strongly discourage parents or their counsel from challenging test results. The system-wide respect for the testing, coupled with the relaxed standards for evidence in child protection cases, made positive results virtually impossible to refute.

[207] Burden of proof is the duty placed on a party to establish that an assertion is true (such as that a child is in need of protection). In child welfare cases, the CAS need only show that it is more probable than not that it is true.

7. Legal Referrals and Remedies

> *Not only does it* [a positive Motherisk hair test] *risk our child being removed from our home, or from our care, but for me, it was really important to have the label removed because it was untruthful. And because I already had a negative association with alcohol, I didn't want to be that person that my daughter said, 'Oh, everyone else is an alcoholic, so of course my mom's going to be an alcoholic.'*
>
> —A parent affected by the testing

The challenge of obtaining legal remedies[208]

We heard from parents who were substantially affected by the Motherisk hair testing that it is extremely difficult for them to accept the injustice that happened to them. Some have had no contact with their children for many years. Not only has their own bond with their children been severed, but in many situations, the children's relationships with siblings and extended family and community have also been broken.

In criminal cases where unreliable scientific evidence leads to a wrongful conviction, the convicted person can appeal. Even if many years have passed, a court can hear a criminal appeal if there is strong evidence of a miscarriage of justice.[209] The court can acquit and release the wrongfully convicted person from prison or order a new trial. This process is not easy, and wrongfully convicted people may wait many years before their appeals are heard—if they are heard at all. The results are not guaranteed, but the legal process provides a way to correct mistakes.[210]

Dealing with a miscarriage of justice in child welfare cases is even more complicated. Decisions directly affect the children who are the subjects of the Protection Applications as well as their parents and family members. It is the vulnerability and needs of children that make the process of obtaining a legal remedy for people who were substantially affected by the Motherisk hair testing so complex.

Children's best interests are a key consideration in child protection cases. An important element of the best interests test is permanence and stability.[211] When children have been in the same home

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[208] Our Term of Reference did not permit me to consider financial compensation for people affected by the Motherisk hair testing. Therefore, this chapter does not address financial compensation as a legal remedy. I use "legal remedy" to mean getting a court order to right a wrong.

[209] Kent Roach, "Wrongful Convictions in Canada," *University of Cincinnati Law Review* vol. 80, no. 4 (2012): article 19 at 7. Professor Roach notes that "Canadian appellate courts can overturn convictions on a number of grounds, including not only error of law, but also that the guilty verdict is unreasonable, that it cannot be supported by the evidence, or that 'on any ground there was a miscarriage of justice.' In addition, the federal Minister of Justice can re-open convictions after appeals have been exhausted on the ground that 'there is a reasonable basis to conclude that a miscarriage of justice likely occurred.'" Professor Roach is quoting s 686(1) and s 696.3(3)(a) of the *Criminal Code of Canada*, R.S.C. 1985, c C-46, respectively.

[210] Bringing such appeals can be a costly, lengthy, and time-consuming process, and obtaining permission to bring an appeal, years after a conviction, is itself difficult. It is far from easy to have a wrongful conviction overturned, but the legal mechanisms for doing so are less complex than they are in child protection cases.

[211] *CFSA,* s 1(2)(3)(i) and (iii) and *CYFSA*, s 1(2)(3)(i) and (v).

for many years, moving them may cause emotional harm, even if the move is to the home of a biological parent. The children may not have a close relationship with their biological parents or other caregivers who were substantially affected by the hair testing while they may have very strong ties to their foster families, custodial parents, or adoptive families.

The laws and rules place limits on the legal ability of biological parents and other family members to appeal or challenge final orders about children. Even where a court has the legal ability, it may decide that it is not in the children's best interests to change their living situations or change who has access to them. This means that even where the discredited Motherisk hair testing substantially affected the outcome of a case, the family will likely have difficulty bringing about a change in the children's living arrangements.

Cases still in the system, where the children are not yet settled into placements, afford the greatest chance of success for parents seeking either custody of their children or greater access to them.

Offering legal support

To help us offer legal support, we negotiated an agreement with LAO. Under this agreement, LAO administered the Commission's funding for lawyers for people who were substantially affected by the testing, including biological parents, grandparents, other family members and adoptive parents. LAO managed the cases as it would any other Legal Aid matter and invoiced the Commission for the legal services. They will continue to cover these costs for people we referred to a lawyer after the Commission ends, but they will then be reimbursed by MAG.

I wrote to LAO about each case where I found that the Motherisk hair testing had a substantial impact. I included a summary of the file and an explanation of my decision and asked LAO to pay for a lawyer, on the Commission's behalf, for the person who was affected.

We found the lawyers through our own contacts and through the rosters LAO and the OCL maintain for the different areas of Ontario. We looked for lawyers who were skilled in child protection work, had experience with openness arrangements and were prepared to take on tough cases. We usually provided people with a list of three local lawyers to choose from. In some areas, such as the North and in some small communities, there was a shortage of appropriate lawyers. To meet the needs of people in these areas, the Commission occasionally covered the transportation costs for lawyers from other communities (e.g. Toronto).

I also wrote to the OCL, which represents children in child protection proceedings, in every case where the Motherisk hair testing had a substantial impact. The OCL informed us that, if the children were of sufficient age and maturity, it would be possible to ascertain their views and wishes. For example, the OCL could find out if the children wished to ask the court to make a change to their living situations or their access to family members.

The Commission referred 23 people to lawyers. Their cases are in various stages of the legal process, and a few have been completed. In two cases, at the request of a person who was affected, the Commission funded mediation services to assist the parties to achieve a resolution of their case.

Potential legal remedies

At the beginning of our mandate, Commission counsel and I considered the potential legal remedies available to people who were substantially affected by the Motherisk hair testing. I engaged outside

counsel to research these options.[212] With the benefit of her work, we created a resource binder[213] to explain the potential legal remedies, along with a summary of the law and key cases in each area. When we knew that a person who had been affected had hired a lawyer, we sent that lawyer a copy of the binder.

In cases where a child had been found to be in need of protection based on the Motherisk hair testing, the parents could ask the court to overturn the finding, even if they did not wish to ask the court to alter the child's circumstances.[214] However, our research focused primarily on ways for parents to ask a court to make a change in the child's living arrangements, such as gaining custody or obtaining access.

My determination that a case had been substantially affected by the Motherisk hair testing could not, on its own, create a remedy or reverse a court's findings or orders about children.[215] In every case, the court would first need to consider whether the unreliable testing meant that the original decision could no longer be considered the correct decision. In this regard, the court would consider Justice Lang's findings about the Motherisk hair testing. Then it would consider the current situation of the family and the child to decide whether it would be in the child's best interests to change that situation. In such cases, the court would hear from the CASs, the people who were affected, the children and adoptive parents.

The cases we reviewed were sometimes in the early stages of the court process, sometimes in the later stages, and sometimes the decisions had been made many years before—including decisions to place a child for adoption. The legal options available to people affected depended on the stage the case had reached, as outlined below.

I wish to emphasize that some of these possible legal remedies are untested. These cases are likely to be very difficult and stressful to litigate and challenging for the courts to consider.

Legal options by stages of the case

1. Cases still before the court

Where a CAS had asked the court to make an order about a child (e.g. that the child be made a Crown ward or placed with a family member), but the court had not yet made a final order, the

[212] Maryellen Symons conducted this research for us. She is an independent legal consultant and research lawyer with extensive experience in child protection and family law.
[213] The information in this binder will be available electronically from LAO after the Commission closes.
[214] The court must make a finding that children are in need of protection before making a final order. If the court decides that children are not in need of protection, they will remain with their parents or caregivers with no further intervention by the CAS. The finding is roughly similar to the conviction in criminal proceedings in that, without a conviction, there can be no sentence. Some wrongly convicted people, such as Steven Truscott, have fought to have convictions overturned decades after they were released from prison. See *Truscott (Re)*, 2007 ONCA 575 (CanLII). They are often motivated by a desire to clear their names. In child protection cases, a finding that a child is in need of protection is not made public. However, we repeatedly heard from people affected by the Motherisk hair testing that it was devastating for them that their children were found to be in need of protection and they expressed a desire to have the record set straight.
[215] My decisions about which cases had been substantially affected by the Motherisk hair testing were based on a review of the materials originally filed in court and the court's decisions in each case. Decisions to change a court's finding or order can only be made by a judge, and only after all parties have had a chance to call evidence and make submissions to the court.

person substantially affected could ask the court to disregard the evidence of Motherisk hair testing. In April 2015, MCYS directed societies not to use or rely on hair testing in the course of providing child protection services.[216] If the court had already made a finding that the child was in need of protection, and had relied on the flawed Motherisk test results as part of that finding, the substantially affected person could ask the court to reconsider the finding.

2. Cases where a child has been made a Crown ward but has not yet been placed for adoption

A person who was substantially affected could, depending on the circumstances, bring a Status Review Application seeking a change in the Crown wardship order with the aim of having the child placed with them or obtaining more access. This option is increasingly less available the longer the child has been a Crown ward or out of contact with the biological family. The person could also seek the court's permission to appeal the Crown wardship order, or possibly bring a motion to set aside the order.

3. Cases where a child has been placed in the long-term custody of someone other than the parent, including kinship care and customary care arrangements

In these cases, a person who was substantially affected could bring an application to change the custody or access order. Again, the likelihood of success would depend in large part on the length of time the child has been out of contact with the person making the application and the degree to which the child has settled into the home of the current caregiver.

4. Cases where a child has been placed for adoption but the adoption is not yet finalized

The options in these cases are more limited. Historically, adoption placements have been interrupted in only a handful of cases, usually because a biological parent was not notified of the protection proceedings. To our knowledge, adoption placements have not been changed due to concerns about the reliability of evidence used in the protection proceedings.

5. Cases where a child has been adopted

A person who was substantially affected could ask the court to set aside an adoption order while also appealing or seeking to set aside the underlying Crown wardship order. However, adoption orders are intended to be permanent. Convincing a court to set aside or reopen an adoption order would be very difficult.

Constitutional challenge

A person who was substantially affected could bring a constitutional challenge to the laws limiting the court's power to interrupt an adoption order. The person could argue either that this breaches the *Charter* or that it violates the division of powers set out in the Constitution by restricting the Superior Court's powers to hear an appeal of the adoption order. Again, to succeed, the substantially affected person would have to convince the court not only that the division of powers or a *Charter* right had been breached, but also that a change to the child's permanent living situation would be in the child's best interests.

[216] See Appendix 1a for this directive.

Openness arrangements

In recent years, it has become possible for children and the people with whom they have beneficial and meaningful relationships[217] to continue to have contact after an adoption. This may be accomplished through voluntary openness agreements with the adoptive parents or through court-ordered arrangements. In cases where the child has been placed for adoption, or where the adoption order has been finalized, the most attainable option for a person who has been substantially affected is likely to be an openness agreement negotiated with the adoptive parents. Court orders for openness can only be made at the time of the adoption.

In my Conclusion (page 145), I provide a few examples of parents and others in whose cases I determined that the Motherisk hair testing had a substantial impact on the decisions made about their children or families. At the time of writing this Report, seven families have already achieved a legal remedy. In four of them, children have been returned to their parents' care. Most of the other substantial impact cases are still ongoing.

Status of Substantial Impact Cases

- Legal remedy obtained: 7
- Application for remedy in progress: 11
- Parents or other caregivers undecided or only recently notified: 2
- Parents chose not to act or did not advise the Commission of their plans: 22
- No legal remedy available under *CFSA*: 14

[217] *CFSA,* s 145.1(3)(b) and *CYFSA,* s 194(4)(b).

8. Counselling Services

The need for counselling

The Commission's role as a Review and Resource Centre was to review individual child protection cases involving Motherisk hair testing, and also provide information and offer counselling services to people affected by the testing.

In her Independent Review of the Laboratory Justice Lang foresaw the emotional impact on people who might learn, through her report or the work of the Commission, that the hair testing had been discredited:

> It will be extremely difficult for affected individuals to learn how MDTL's [Motherisk Drug Testing Laboratory's] inadequacies may have altered their family relationships. Regardless of whether a hair test result played a material role in the outcome of their proceedings, I anticipate that the information in [my] Report will cause emotional challenges, particularly for individuals in a vulnerable position. In addition, it will take the Commissioner some time to assess all the cases, some of which will be extremely complex.... [My] Report, and the Second Review, will cause difficult and painful issues to resurface.[218]

Counselling proved to be vitally important. Most people who sought counselling through the Commission were in considerable distress. The impacts of the hair testing had left them with profound feelings of uncertainty, mistrust, grief and anger. Many were vulnerable because of poverty, physical or mental health issues, or other difficult life circumstances even before the testing.

Importantly, the offer of counselling served as public recognition that the Motherisk hair testing had caused parents and others harm, regardless of whether it had affected the outcomes of their cases. The feedback we received showed that people who participated in counselling did find some measure of relief and healing.

> *The counselling has been a lifeline for me.*
>
> —A parent affected by the testing

Offering access to counselling

In the month between the release of Justice Lang's report on December 17, 2015 and the Commission's establishment on January 15, 2016, the Ontario government provided information and counselling referrals through a toll-free telephone number. In this period, 23 people called the helpline. Of those, seven people obtained referrals to counselling services through a program provider and five of the seven went on to attend counselling. The Commission assumed responsibility for referrals to counselling as soon as it opened its doors.

[218] Lang, *Independent Review*, 232 at para 13.

To put together a list of qualified counsellors, the Commission's Director of Counselling (the Director) conducted outreach to identify suitable social workers and psychologists.[219] The OCL assisted by notifying its roster of independent social workers, located across the province, about the Commission's need for counsellors. In the end, the Commission compiled a roster of about 60 counsellors who were not currently employed by or connected to CASs. As a group, they had extensive experience in the following:

- Child protection issues and the court process;
- Serving vulnerable populations;
- Serving people from Indigenous communities; and
- Serving people from racialized groups, particularly African Canadian communities.

The Commission offered counselling to anyone affected by the Motherisk hair testing, regardless of whether the testing had a substantial impact on the outcome of a case. As discussed in Chapter 4: Review of Individual Cases, the Commission considered "affected persons" broadly to include children, siblings, biological parents, adoptive parents, foster parents, others caring for children (e.g. through a customary care agreement or kinship placement) and a child's band or Indigenous community where relevant.

Counselling requests came to us by telephone, email or through our website. All of the Commission's presentations and materials promoted the availability of counselling support.

Counselling was free to clients. The Commission covered the costs and most participants could not have afforded counselling if the Commission had not done so. Two clients were homeless, but nevertheless managed to attend their counselling sessions. The Commission covered counselling for up to two years from the date of a client's first session. This means that some people are continuing in counselling after the end of the Commission's mandate.

> *My counsellor is awesome. She has helped and supported me. I travel four hours each way to see her because of her specialty.*
>
> —A parent affected by the testing

Counselling was completely voluntary and it was separate from the legal file review process. In other words, participating in counselling was not a requirement for obtaining a file review or vice versa.

The process for referrals

The Commission's Director, an experienced social worker, responded to every inquiry to the Commission within 48 hours. She answered questions, listened to clients' concerns and needs, and explained the services the Commission offered. If they wished to request a file review or a referral to counselling, she sent them a package, which included information about the Motherisk Commission and a form authorizing us to undertake a file review or referral to counselling. A stamped, self-addressed envelope was provided for returning the signed form.

[219] The social workers and psychologists were registered with the Ontario College of Social Workers and Social Service Workers and the College of Psychologists of Ontario respectively.

If the client did not return the authorization form within a few weeks, the Director followed up to address any additional questions or concerns and often sent out a second package of information. She emphasized that the Commission staff were available to help them if they still wished to pursue a file review or counselling.

Before referring people to a counsellor, the Director talked with them to help her understand their goals, needs and the complexity of their situations. She found out if they preferred a male or female counsellor and if they wished to see a counsellor from an Indigenous[220] or racialized community. She also asked them if they had a particular counsellor in mind. For some people, this was their first experience with counselling. Others had been in counselling before. In some cases, the client had been working with someone but could not afford to continue. The Director followed up to find out if that counsellor was available to resume counselling. In most cases, people were matched with new counsellors. We made every effort to match clients with counsellors of their choice close to where they lived. The Commission referred people to both individual and family counselling, including counselling for children.

Clients had the opportunity to see a counsellor for initial sessions of up to three hours to discover whether the referral was a good fit. At the start of the client-counsellor relationship, the Director sent a confirmation letter to both the client and the counsellor, along with information about counselling and a set of frequently asked questions and answers. Each counsellor completed a Service Provider Report form to submit to the Commission. The form gathered information about his or her practice and about the proposed counselling plan, including the type of counselling (individual or group), the likely frequency of sessions, and the recommended number of sessions. The Director followed up with letters to the clients and the counsellors to let them know that the counselling plans were approved.[221]

Counselling arranged through the Commission was completely confidential. Confidentiality encompassed the clients' choice to participate in counselling as well as their discussions with their counsellors. Counselling was kept completely separate from the file review process. Throughout, the Director was available for continued support to clients and counsellors, but she did not monitor their work together.

[220] During our outreach to Indigenous communities, we advised people that they could seek counselling from an Elder or anyone else they chose and we would assist them.
[221] See Appendix 8a-g for counselling program materials.

Counselling at a Glance

- 49 people participated in counselling.
- 18 people completed their planned number of counselling sessions or decided to stop going.
- 31 people, including 12 children, are still in counselling at the end of the Commission's mandate.
- 21 clients in counselling were involved in cases where the Motherisk hair testing had a substantial impact.

Counsellors' views on testing and counselling

Impacts of testing

In August 2017, we met with nine counsellors from around Ontario who were working with Motherisk Commission clients. We wanted to hear their views on the impacts of the testing based on their experiences in supporting their clients.

We protected clients' privacy at the meeting and we did not refer to them by name. Some of the counsellors had told their clients about the meeting and had received their consent to talk to us about their experiences with the testing.

A number of counsellors described judgmental attitudes toward substance use, harsh responses to positive test results, and the damaging effects of such viewpoints on their clients. These attitudes "spilled over into lawyers' attitudes toward clients." In some cases, parents' counsel helped convince their clients to undergo testing to further their aims, such as increased access to children, but it sometimes had the opposite result. One counsellor told us that when her client "was accused of using, [on the basis of Motherisk hair testing], she was just left to the side because she was 'found guilty'":

> *She was now judged. She was an incompetent mother and couldn't parent her children. She was from a very small town and felt no one believed her that the test was wrong.*

A counsellor from rural Ontario pointed out that "scientific evidence from Toronto was hard to dispute" and her client felt it was the "final slam dunk against her":

> *At her last court appearance, no one explained the gravity of the situation to her. She didn't have legal counsel. It was absolutely devastating to her. She didn't know it would be the last time she would see her kids.*

There was considerable discussion about how the testing created a breakdown in trust between clients and CASs:

> *If the test is administered by a person who is supposed to be your helper and then used as evidence, the relationship isn't right.*

One counsellor said that her client thought the testing would

> *…validate that she wasn't using during her pregnancy, but it didn't and it broke trust.*

Another counsellor said it took her a long time to gain her client's trust:

> *I had to work hard to ensure that I wasn't perceived as part of the* [child protection] *system.*

Clients generally felt powerless against the testing. One counsellor shared his client's "sense of feeling coerced" into being tested:

> *His gut told him not to go for testing but his worker told him it was the only way he would get his kids back.*

The counsellors described clients who had "lost their voice and credibility" and were "crushed" by the testing and its repercussions. They also told us about the long-term impacts of the testing on their clients. It took one client "two and half years to level out again," emotionally and financially, after the testing.

A counsellor pointed out that the testing was used in disputes between parents:

> *The testing supported the other parent's allegations against my client and permeated the whole conflict that went on for years.*

Many counsellors talked about the "ripple effect" of the testing, its impacts spreading to siblings and extended family, and they noted the difficulty of measuring this wider effect.

Counsellors also shared the impacts of the testing on adoptive parents and prospective adoptive parents. One of them described an adoption that had been put on hold while the Commission reviewed the file and the case went back to court. (In this case, we found that the Motherisk hair testing had a substantial impact.) The delay and not knowing what the outcome of the case would be caused the adoptive mother considerable stress.

The value of providing access to counselling

We were also interested in the counsellors' views on the value of offering counselling services to people affected by an issue that is the subject of a commission such as ours. These are some of their responses:

> *The mere fact that the Commission existed and counselling was offered is hugely empowering.*

> *Counselling is absolutely essential; doing an investigation and not providing support leaves people in pain.*
>
> *Counselling is playing a role in addressing trauma, both individual and collective* [e.g. in racialized communities]*. It is an opportunity to address the trauma of the experience of testing or other trauma resurfacing as a result of the testing.*
>
> *It helped my client think rationally and put her thoughts in order.*
>
> *This is the first time that someone has expressed meaningful and tangible support for her.*
>
> *My client is not feeling entirely powerless any more.*
>
> *It has had a life-changing effect.*

It is clear to me that offering counselling services was an important and necessary role for this Commission. The Motherisk hair testing had far-reaching impacts on individuals, families and communities. I hope that receiving counselling, or perhaps even being offered the opportunity, has provided some support and comfort to the people affected.

Extension of counselling services

Right up to the end of our mandate, we received requests for information about our services and referrals to counselling. The two-year term of the Commission may not have been sufficient time to enable people who wished to do so to seek counselling. The extensive media coverage[222] of the Motherisk hair testing issue in October 2017 may have also alerted more people who were affected by the testing to its unreliability. With the release of this Report, still more people who were affected may wish to seek counselling. For these reasons, I am recommending that the government extend counselling services for three years.

Recommendation:

1. The Ministry of Children and Youth Services should make free counselling services available to all affected persons, whether children, youth, or adults, upon request, for three more years from the date the Commission ceased to offer services (January 15, 2018).

[222] See the joint investigation by the *Toronto Star*, CBC's *The Fifth Estate* and CBC Radio's *The Current*. See Rachel Mendleson, "Separated by a Hair," *Toronto Star*, October 19, 2017, accessed at Separated by a Hair; Canadian Broadcasting Corporation "Motherisk: Tainted Tests and Broken Families," *The Fifth Estate*, October 20, 2017, accessed at "The Fifth Estate" Motherisk episode; and CBC Radio, "Motherisk investigation reveals concerns over 'unreliable' tests long before lab shut down," *The Current*, October 20, 2017, accessed at "The Current" Transcript.

PART 3:
Identifying and Addressing Systemic Issues

9. The Restorative Process

Evolution of the restorative process

The restorative process evolved from our role as a Review and Resource Centre, and from our discussions with parents and others who were affected by the Motherisk hair testing. Throughout 2016, the first year of our work, we focused entirely on reviewing individual cases and conducting outreach to connect with people who had been tested and to raise awareness of our services. We continued to review cases and make legal and counselling referrals right up until the end of our mandate.

After reviewing hundreds of cases in our first year, we began to document the recurring patterns we were seeing in the files. We realized that our work gave us unique insight into some of the broader systemic issues that may have contributed to the frequent use of hair testing, and the failure of CASs and the court to recognize that the testing was flawed.

We began to see that even where the impact of the testing was substantial, the people affected had only a remote chance of achieving a satisfactory legal remedy. (I explain why this was the case in Chapter 7: Legal Referrals and Remedies.) This fact was deeply troubling to us as our mandate was to help the individuals and families who were affected by the testing. The lack of legal recourse demonstrated a deep divide between the harm caused and the legal tools available to help alleviate it. It also reinforced for us that the people who were tested for child protection purposes were among the most vulnerable in our society, without the power or financial resources to resist the testing or challenge it in court.

Through our meetings with Indigenous and racialized communities and our discussions with young people, parents, and others who were affected, we came to understand that people felt deeply harmed by the hair testing itself, regardless of the impact of the results on the outcome of their cases. Many people experienced the testing, particularly when it was repeated, as intrusive and stigmatizing. The persistent testing broke trust, where it existed, between families and societies and made parents reluctant or afraid to reach out to their CAS workers for help.

Child welfare workers and lawyers also felt betrayed. Many of them told us that they had worked on cases involving Motherisk hair testing and had made decisions based on its results. They felt that they had let their clients down. Some of the child protection counsel on the Commission team had firsthand experience as they themselves had been involved in such cases.

More broadly, the discovery that the flawed evidence was used for about 20 years undermined the public's confidence in the fairness of the child protection and legal systems.

The Motherisk hair testing issue comes at a time when there is increasing recognition of the history and legacy of colonialism and racism in the child protection system. The invaluable work of the Truth and Reconciliation Commission and One Vision One Voice[223] helped us to put the Motherisk hair testing in this broader context and to better understand its impacts on Indigenous and African Canadian communities.

[223] See Truth and Reconciliation Commission of Canada, *Honouring the Truth,* and One Vision One Voice 2016a and 2016b.

My team and I wanted to find a way to acknowledge this context, and the widespread harm, and enable people who were affected to tell their stories. As well as helping them, we felt that giving them a voice would begin to restore the relationships between families and people working in the child protection and legal systems and help to rebuild public confidence in these systems. We sought to engage everyone involved in a dialogue about making changes to prevent another problem like Motherisk. We hoped that the dialogue would continue after the end of our mandate. We believed that such a dialogue could meaningfully address the issues we were identifying in the file reviews and fulfil our mandate to help people affected by the testing.

We looked to restorative justice as a model for our process because it recognizes harm without focussing on individual wrongdoing. It allowed us to work with others to investigate the systemic issues we had identified, share our perspectives and together develop solutions.

Our Restorative Process Goals

Through the participation of many voices, we hoped to develop a better understanding of the answers to these questions:

- What happened and to whom?
- Why did it happen?
- Why should it matter to everyone who is concerned about the well-being of children and families?
- What changes are needed to prevent it from happening again?

Laying the groundwork

Restorative justice staff workshop

In December 2016, we invited Professor Jennifer Llewellyn[224] to lead a full-day workshop with the Motherisk Commission team to help us gain a better understanding of the restorative justice process and principles.[225] We learned that an issue like the flawed Motherisk hair testing does not happen in isolation, but rather within the broader context of interconnected systems and relationships. With that in mind, we considered how we could use restorative justice principles to

[224] Jennifer Llewellyn is Viscount Professor of Law at Schulich School of Law, Dalhousie University. She teaches restorative justice and has researched and written extensively on restorative justice in Canada and internationally. See, for example, Jennifer J. Llewellyn, "From Truth to Reconciliation: Reflections on Reconciliation and Residential Schools," in *Bridging the Gap between Truth and Reconciliation: Restorative Justice and the Indian Residential Schools Truth and Reconciliation Commission* by Jonathan Dewar, Mike DeGagné and Shelagh Rogers (Ottawa: Aboriginal Healing Foundation, 2014), accessed at Speaking My Truth.

[225] We called our work a "restorative process," as opposed to "restorative justice," because the latter has specific meanings for Indigenous communities and in the criminal justice system. See *ibid* for a discussion of restorative justice and restorative justice principles.

facilitate dialogue about the harm done by the testing and about how to prevent it from happening again.

Professor Llewellyn gave us feedback as we designed our process and was a mentor to us and to our facilitators. She also facilitated one of our restorative process meetings and provided input into the "Our Restorative Process" information sheet we developed to explain why we were undertaking the process and what it would involve. We posted it on our website and shared it with everyone we invited to participate in the process.[226]

Restorative process outreach[227]

We sent letters enclosing the information sheet to legal, child welfare and community partners, saying that we would be following up to request a teleconference or meeting.[228] Our Director of Counselling made telephone calls to people who were personally affected by the testing. In our letters and calls, we described the Commission's work over our first year and the goals and format of our restorative process. Commission counsel and I followed up with everyone we wrote to.

Stages of the restorative process

We organized the restorative process much like stages in a journey. We acquired knowledge at each stage and carried it with us to the next stage to move the discussion forward.

Stage 1: Video interviews with people who were affected

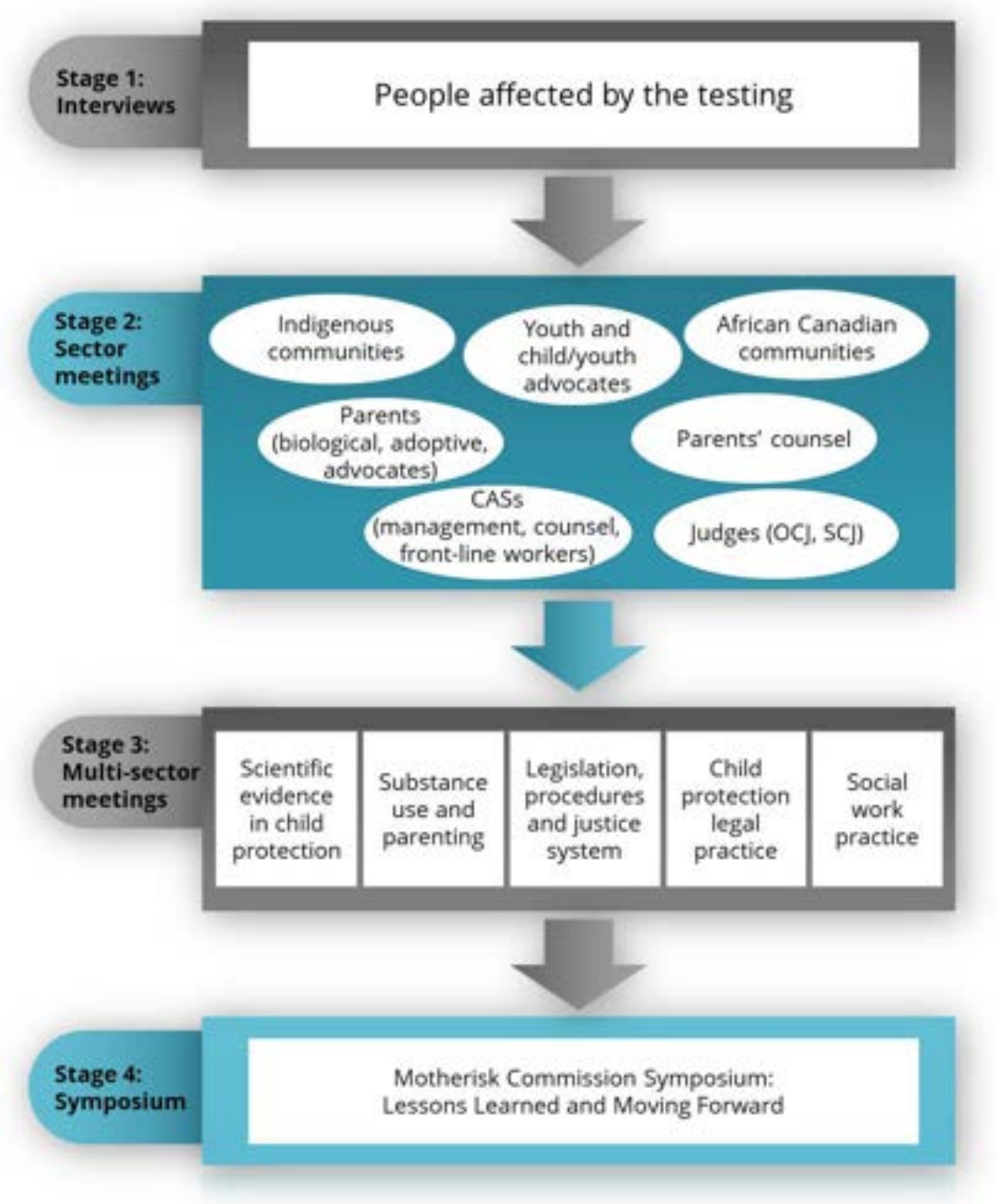
The idea of interviewing people who were affected by the testing evolved from many discussions with my team about how to enable people to tell their stories in a safe way. We wanted to learn from them and share what we learned with others in order to help avoid a similar tragedy in the future. We hoped that enabling people to tell their stories and to be part of a process to improve the child protection system would be empowering and healing, if even in a small way.

We knew that for some people, talking about their experience with the Motherisk hair testing and its impact was very painful. Many were still processing the information that the testing had been unreliable and were trying to determine what that meant for them. Some were already participating in counselling organized by the Commission. We were also mindful of the very different life experiences of many of the people who were affected compared with the child welfare, legal and other professionals we would be inviting to our meetings.

Making a video seemed to offer the most sensitive and effective way to bring the voices of people who were affected into our meetings without causing them further pain.

[226] See Appendix 9a for this information sheet.
[227] See Appendix 9b for a list of individuals and organizations we reached out to for our restorative process. See also page 149 for a list of the people who participated.
[228] See Appendix 9c for this letter.

Restorative Process Discussions



Note: Each of the ovals represents one or more meetings with participants (e.g. we had multiple meetings with youth and parents). Each of the squares was one meeting. This diagram has been revised from a draft version provided to the participants in our restorative process meetings.

Identifying interviewees

Our Director of Counselling contacted potential interviewees to identify people who would represent a wide spectrum of perspectives:

- Youth;
- Biological and adoptive parents;
- People from Indigenous and racialized communities;
- People from various parts of the province (with a specific effort to identify people in Northern and rural Ontario); and
- People whose file reviews had resulted in different determinations (i.e. substantial impact, no substantial impact).

The Director of Counselling explained the restorative process, why we were making the video and how it would be used. Most people had never been asked about their experience with the Motherisk hair testing before. Some readily agreed to be interviewed. A few had already mentioned to her that they wanted to tell their stories. Many who agreed were motivated by the desire to share their experiences with people working in the child welfare and legal systems in the hope that doing so might help others in the future. Some declined because they could not face reliving their experiences.

In the end, we interviewed and videoed 15 people, including biological and adoptive mothers and fathers, a stepfather, young people, and grandparents. There were participants from Indigenous and racialized communities as well as from many different parts of the province.

The interview process

Participants signed a consent form agreeing to be interviewed and videoed. The form stated that the Commission would not identify the participants or their children,[229] and that in editing the interviews, we would "not alter the basic meaning of the words spoken."

We developed sample interview questions, to be used depending on the person's experience (e.g. whether they had undergone testing themselves, whether they were a biological or adoptive parent, etc.). One of our legal counsel who had a background in media conducted the interviews.

The interviews were conducted at the Commission's office. The Director of Counselling met with the interviewees beforehand to explain to them what to expect and to provide support if needed. She was present at all times during the interviews. After the interviews, she spent time with each participant discussing the interview and the issues that arose. A number of people were very upset and required her support. The Director called each person afterward to see how they were doing and to thank them again. The feedback she received was positive. They appreciated the opportunity to tell their stories.

The Commission paid for travel and accommodation, where required, and provided a small honorarium to everyone we interviewed to show our appreciation.

We videotaped about eight hours of interviews and edited them down to about 20 minutes. The video was in four parts:

[229] The video will be treated like all other confidential records of the Commission and will be destroyed.

- Telling their Stories;
- Getting Tested;
- Impacts of Testing; and
- Effects Beyond the Biological Family.

I briefly introduced the video before we showed it at the beginning of all of our Stage 3 multi-sector meetings. There was often silence after the viewing as people absorbed the content of what they had heard. A number of participants told us they found the stories compelling and insightful.

Stage 2: Sector-specific meetings

We met with the groups and communities affected by the Motherisk hair testing issue or closely involved in the use of the testing:

- Indigenous communities;
- Youth and child/youth advocates;
- African Canadian communities;
- Biological and adoptive parents, and their advocates;
- Counsel who represent parents;
- Children's aid societies, including management, counsel and frontline workers; and
- Judges from the Ontario Court of Justice and the Superior Court of Justice.

We held most of the sector-specific meetings first so that participants could discuss issues with their own colleagues with utmost frankness. We hoped this approach would build their trust in our process before they met in multi-sector groups. (We did hold a few of these meetings later, at the same time as Stage 3, because of scheduling constraints.)

In addition to the groups listed above, representatives from SickKids participated in a number of restorative process meetings, our Symposium, and additional meetings with the Commission.

Stage 3: Multi-sector meetings

Our multi-sector meetings were organized around topics:

- Legislation, procedures and justice system;
- Scientific evidence in child protection;
- Substance use and parenting;
- Child protection legal practice; and
- Social work practice.

We chose the topics based on the issues we were seeing in our file reviews and on what we had already learned from previous meetings. Through exploring these topics, the Commission team and participants were able to view the Motherisk hair testing problem from different angles. This gave all of us a clearer picture of what happened and what should change.

We planned a certain set of meetings, but we added many others as we went along, based on what we were learning. For example, issues arose that we wanted to explore in greater depth or we heard of organizations we wanted to meet with. We learned a great deal from these additional

opportunities and I believe our process benefitted from having the flexibility to pursue new and valuable lines of inquiry.

Organizing Stage 2 and Stage 3 meetings

Planning

We held over 30 meetings between April and June 2017, with more than 250 people attending in total. We invited people to our meetings rather than issuing a general call for participants. (Holding public consultations or hearings was not in my mandate.) An advantage of this was that our meetings were small enough to allow for substantive dialogue. We invited people we had met or identified in the course of our work over the first year—people with diverse perspectives, experience, and expertise. As a group, they represented many different communities, sectors and parts of Ontario.

Most of the meetings were scheduled for half a day. We developed the agendas based on what had emerged from previous meetings and on the recurring issues we were seeing in our file reviews. We sent out the agenda, information about the background to the process, and our confidentiality policy along with the invitations. We covered travel and accommodation expenses according to Ontario government guidelines.

Holding the meetings

Locations

Most of the meetings were in a boardroom near the Commission's office, but there were a few exceptions. We held a day-long meeting at the Six Nations of the Grand River Community Hall.[230] We met with youth in the comfortable environment of the organizations serving them, like Dixon Hall Neighbourhood Services and PARC (Pape Adolescent Resource Centre) in Toronto and Dennis Franklin Cromarty First Nations High School in Thunder Bay. Youth workers were included in the meetings to provide support. We provided food for youth participants and a small honorarium for each of them. One of our meetings with parents involved with the child welfare system (and their advocates) took place at a drop-in program in Toronto. We also met with a group of mothers in Thunder Bay.

Facilitation

Counsel who were on staff and I facilitated some of the Stage 2 meetings. For other Stage 2 meetings and for all of the Stage 3 meetings, we hired experienced facilitators.[231] Most of the meetings had one facilitator but several had co-facilitators because of the size of the group, the format of the meeting, or the need for joint expertise. We chose the facilitators based on their knowledge of the subject area. We met with them before the meetings to share the goals of our restorative process and the purpose of the meeting. We also discussed the agenda and format with them.

Format

The format of the meetings varied depending on the number of participants, the nature of the agendas and the style of the facilitators. Some meetings had just one group and others used

[230] With the permission of Chief Ava Hill, we co-hosted the meeting with Larry Longboat, Manager, Child and Family Services for Six Nations. Bob Watts, Adjunct Professor, Queen's University, School of Policy Studies, and a member of Six Nations, facilitated the meeting.
[231] See page 154 for a list of facilitators.

breakout discussions and report-backs to the full group. Meeting formats were sometimes conventional, with tables arranged in a rectangle. Other meetings were held in a circle. For example, Jennifer Llewellyn led a meeting of youth advocates in a "talking circle" using a special object to encourage respectful and inclusive dialogue.[232]

At the end of each meeting, we invited participants to follow up with us if they had additional thoughts to share and we welcomed written comments as well.

Ensuring confidentiality

We wanted to encourage all participants to express themselves as freely and frankly as they wished, as individuals or as representatives of their organizations. We sought advice from outside legal counsel on how we could reassure participants that they could do so without repercussions or criticism. Based on this advice, I issued an order[233] allowing participants to use the information from the meetings if they did not identify the speakers or other participants. It also stated that the Commission would report on the meetings (for example, in this Report), but without attribution.

We also developed a confidentiality policy,[234] which we shared with all participants. The policy refined the confidentiality requirement in my order by indicating that the meetings would be subject to the Chatham House Rule.[235] This rule allows participants to openly discuss what they hear in meetings as long as they do not reveal the identity or affiliation of the speaker or any other participant. This fit with our hope that, through the restorative process, participants would continue to expand the dialogue on ways to bring about systemic change after the Commission's mandate ended.

Follow-up

Commission counsel and other staff took detailed notes at every meeting. We reviewed and analyzed them later. The Commission team and I also met regularly to discuss the input we were receiving and to consider the following:

- Common themes;
- Points we needed to discuss further with participants to understand them better;
- Areas we needed to research (e.g. to learn more about programs or practices, in Ontario or in other jurisdictions, identified in meetings); and
- People or organizations we wanted to contact and involve in our process, including inviting them to upcoming meetings or the Symposium.

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[232] Talking circles originated with Indigenous cultures. A sacred object, often a carved "talking stick," is passed from person to person and only the person holding the object may speak.

[233] See Appendix 9d for this order.

[234] See Appendix 9e for this policy. We discussed but rejected the idea of having participants sign a confidentiality agreement. This approach seemed too formal for our process, which encouraged people to engage voluntarily and with goodwill and commitment to child welfare.

[235] "When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed." "Chatham House Rule," The Royal Institute for International Affairs, accessed at Chatham House Rule.

Stage 4: The Motherisk Symposium

Early on in our planning for the restorative process, we envisioned organizing a larger gathering of people committed to learning from the Motherisk hair testing issue and helping to bring about changes in the legal and child protection systems. We saw it both as the culmination of all of our previous discussions and as a way to work together to set a course for the future. We held the "Motherisk Symposium: Lessons Learned and Moving Forward" in Toronto on September 12 (full day) and September 13 (half day), 2017.

Participants

To prepare for the Symposium, we created a map of the child welfare system to identify as many partners and communities as we could and to ensure that they were represented among the participants. The map illustrated the complexity of the system and the interrelationships of all those who play a role in child welfare.

We invited people and communities affected by the testing, as well as representatives of key sectors,[236] institutions, and grassroots organizations.[237] We also invited people based on their experience and area of expertise. Most invitees had participated in previous meetings.

Our Director of Counselling invited people who were affected by the testing and one was able to attend. Two participants from a meeting I had with a group of parents involved in the child protection system also attended, along with support people from their advocacy program.

We contacted the youth organizations we had met with to find out if any of their clients would be interested in attending. They suggested several names, but due to scheduling conflicts, only one young person was able to attend. One of the Commission's counsel met with him ahead of time to discuss the agenda and the Commission provided him with a small honorarium and transit tokens. He contributed great insight and creativity to the discussions on both days.

At the start of the Symposium, the facilitators pointed out our Director of Counselling and invited anyone who felt they needed support during the Symposium to seek her out.

In all, about 100 people from across Ontario participated, including 30 from outside the Greater Toronto Area (10 from the North).

Discussion topics at the Symposium

We developed an agenda and short paper, "Background and Symposium Overview," both of which we sent out to participants in advance.[238]

The Symposium had four key themes:

- Ensuring the reliability of scientific evidence in child protection;
- Supporting and empowering families: Access to legal information and independent support;
- Supporting and empowering families: Enhanced substance use treatment options; and

[236] Key sectors included legal, child welfare, social work, substance use treatment, academia, the scientific community and government.
[237] See Appendix 9f for the invitation.
[238] See Appendix 9g for the agenda and background paper.

- Sustaining and enhancing collaboration across sectors.

The aim of the backgrounder was to help prepare attendees to participate in the discussion. It included the following content:

- Update on the Commission's work;
- Report-back on the common themes emerging from our meetings;
- Brief discussion of each of the four themes for the Symposium, including issues identified through our files reviews and meetings, and descriptions of promising practices or ideas recommended by participants or identified through our own research; and
- Suggested discussion questions for each theme.

The areas we chose for discussion at the Symposium were the ones we considered the most challenging to address. They involved complex policy issues, or required the collaboration of many different partners to address them, or both. Examples included:

- Facilitating collaboration between the legal and scientific communities to help ensure the reliability of evidence;
- Changing the culture in child protection to encourage all parties to more carefully scrutinize scientific evidence;
- Providing additional supports to parents, for example through system navigators and peer mentors;
- Increasing access to family-centred, substance use treatment options; and
- Building and sustaining the broad collaboration demonstrated at the Symposium beyond the Commission's mandate.

We invited participants to raise issues or proposals of their own, noting that any proposed solutions would have to be critically assessed from the perspectives of children and youth as well as Indigenous and racialized communities.

The Symposium facilitators[239] led the participants through a variety of plenary and small group discussions. Summaries of both days were emailed to all participants the day after the Symposium ended.[240] Volunteers, mostly law students, took detailed notes of the proceedings.

Reflecting on the restorative process

When I was appointed in January 2016, I did not foresee the necessity for the restorative process we were to begin a year later. It was through the course of reviewing individual cases and meeting with people who were deeply affected by the testing that my team and I began to identify systemic problems, like spotting cracks in a foundation. We knew we needed to work with others to try and repair these cracks.

Without the benefit of the knowledge of those who were affected and many other individuals and organizations involved in the child welfare and legal systems, we would not have been able to understand the complex issues that played a role in the Motherisk hair testing problem. The wisdom

[239] George Thomson, who volunteered his time, and Karen Cohl facilitated the Symposium.
[240] See Appendix 9h for the summary notes.

of participants in our restorative process contributed greatly to my Recommendations in this Report.

I believe that the restorative process was also valuable in two other important ways. First, it encouraged dialogue among participants rather than the more formal question and answer process that would have been the case in a public hearing. Second, it facilitated this dialogue among people with diverse experiences and perspectives who seldom meet. All of the participants will continue to be essential to developing solutions to the systemic issues that led to the reliance on the Motherisk hair testing.

At the conclusion of the process, we learned that some participants had already formed alliances at the meetings or at the Symposium to work together on issues of mutual concern that were raised and discussed. We feel that this demonstrated a genuine commitment to the kind of sustained collaboration needed to bring about the change identified through the restorative process and discussed in this Report.

10. What We Heard

Through our outreach and restorative process discussions, we gained meaningful insights into the use of the Motherisk hair testing and its impact on families and communities. People who were affected by the testing are quoted in this Report. Some of their experiences are also reflected in this chapter in the summaries of what we heard from youth, parents (biological and adoptive), Indigenous communities, and African Canadian communities.

We also heard the thoughtful perspectives of many different partners on the broader child protection and legal issues that contributed to the reliance on the Motherisk hair testing. We benefitted, too, from the advice shared with us through a small number of written submissions.

The depth and volume of the input we gathered could not be conveyed in a short chapter such as this. We have done our best to summarize the most frequently expressed ideas of each group. Their comments reflect their personal experiences and views. Although we edited their comments for brevity, we tried not to alter their meaning.

Common themes

From our file reviews and our many discussions, we identified themes about the use of the flawed Motherisk hair testing and the child protection system as a whole. These themes were the starting points for our discussions about lessons learned and moving forward at the Motherisk Symposium:

- There are factors unique to child welfare cases that inhibit the ability to challenge expert evidence (e.g. timelines, lack of resources);
- The law and rules governing child protection are challenging for parents, particularly those who are trying to address substance use issues;
- The lack of ongoing training and support for lawyers who practise in this area makes it difficult for them to gain the expertise to deal with challenging cultural, legal, and evidentiary issues;
- The court tended to prefer scientific evidence over the clinical observations of CAS workers and treatment providers;
- Child protection workers and the court often made negative assumptions about the parenting capacity of caregivers whose hair tested positive;
- There is an inherent conflict in the dual role that CASs play in supporting and monitoring families;
- There is a lack of coordination between CASs and supportive services for parents, such as substance use treatment;
- There are biases in the system that lead to over-monitoring of Indigenous and African Canadian families;
- Parents and children's voices and perspectives are often left out of decision making; and
- Collaboration is essential to improve the child protection system.

Perspectives shared with us

Youth[241] and youth advocates

Young people were acutely aware that poverty and stress contributed to their parents' substance use issues. They felt that if the CAS workers could have helped reduce that stress, their parents would have been better able to cope with parenting.

> *If your fridge is empty, you think that is the norm. The worker needs to explain to the child what addictions are and what it means if a parent has an addiction. They need to explain what the norm could be.*
>
> —A young person involved in the child welfare system

Several young people pointed out that drug use affected people differently, so that the Motherisk hair testing could not predict a person's specific reaction to a drug or its effect on their parenting skills. They said that the CAS should talk to the family and its support system to really understand the impact of drug use on the family.

> *When the society uses drug testing, they look at parents with less empathy. The people that are using drugs often live in poor communities and have many problems with racism, money, and difficult family histories. People need support for all of their problems, not just for drugs.*
>
> —A young person involved in the child welfare system

Young people suggested a variety of supports that could help families stay together:

- Help with basics like groceries and babysitting;
- Mental health supports;
- Residential treatment that allows children access to their parents;
- Aftercare programs to continue to support parents and children; and
- Support groups for parents and youth led by others who have already gone through the system.

Youth told us that supports should be offered in their own communities, delivered by "people who understand where they come from."

Most of the young people we spoke with said they understood why the CAS became involved with their families, but some felt that the reasons they were removed from their parents' care were not adequately explained to them. They told us they might have felt less angry toward their parents if they had understood the reasons behind their decisions.

Youth participants felt that the system did not give them enough opportunity to have their say about their situations. They wanted to be meaningfully involved in decisions that affected them. Many said that their experiences were largely dependent on their relationships with their workers.

[241] We heard from youth who were affected by the Motherisk hair testing, as well as from youth who had been or were still involved with the child protection system but not directly affected by the testing.

Those who liked and trusted their workers felt better served. In general, they said that workers should talk to them at their level.

The Indigenous youth we met with in northern Ontario expressed significant concern for their personal safety. They told us that non-Indigenous people often targeted them for harassment. When they were brought into care, they were often moved far away from their First Nations communities, which made it very difficult for them to visit their families and stay connected to their culture and heritage.

Advocates for children and youth stressed the importance of talking to young people directly, noting a general lack of respect for their views. They told us that openness is almost always desirable, as many children who have been in care end up reaching out to their biological families when they become young adults.

Indigenous communities[242]

Indigenous community members viewed the Motherisk hair testing issue in the context of residential schools and the "Sixties Scoop."[243] The forced separation of children and parents, and the loss of culture and language as a result of these government policies, still affect the relationships between Indigenous communities and CASs today. Participants highlighted the Truth and Reconciliation Commission's reports and the *United Nations Declaration on the Rights of Indigenous Peoples*[244] as foundational documents to help people understand this history and the rights of Indigenous peoples to maintain their own institutions, cultures, and traditions.

Representatives from Indigenous-led agencies said they had used hair testing infrequently, if at all. Cutting hair strands is disrespectful of Indigenous spiritual beliefs and it shamed some of the people who were tested. We heard that many non-Indigenous services are not culturally relevant and fail to consider the impact of multigenerational trauma. We also heard about the benefits of holistic approaches to working with families and parents dealing with substance use. These approaches build on their strengths and incorporate traditional and spiritual elements that are important for treatment and healing.

> *Child welfare workers have become more sophisticated, but the system has not.*
>
> —A meeting participant

[242] Participants included representatives from Chiefs of Ontario and Provincial Territorial Organizations, Indigenous child welfare agencies, Ministry of Indigenous Relations and Reconciliation, Ontario Federation of Indigenous Friendship Centres, Ontario Native Women's Association, Ontario Native Welfare Administrators Association, and Indigenous health, legal, community, and social service providers.

[243] Truth and Reconciliation Commission of Canada, *Honouring the Truth*, Executive Summary, 138. The "Sixties Scoop" was "the wide-scale national apprehension of Aboriginal children by child-welfare agencies. Child welfare authorities removed thousands of Aboriginal children from their families and communities and placed them in non-Aboriginal homes without taking steps to preserve their culture and identity. Children were placed in homes across Canada, in the United States, and even overseas. This practice actually extended well beyond the 1960s, until at least the mid- to late 1980s."

[244] United Nations, *United Nations Declaration on the Rights of Indigenous Peoples* (New York: United Nations, 2008). Accessed at UN Declaration on the Rights of Indigenous Peoples.

Participants said that their relationships with non-Indigenous CASs vary greatly. An Indigenous social service provider told us about a mutual mentoring relationship she had developed with a non-Indigenous worker at the CAS in her region. However, another participant reported that the local CAS had three teams working with Indigenous families, none of which included any Indigenous workers. We heard that non-Indigenous CASs sometimes lacked knowledge about the specific communities they were working with or about the resources that might already be available on reserve to assist families. Participants highlighted promising education programs, such as the Master of Social Work Indigenous Field of Study at Wilfred Laurier University and the Master in Social Work, Indigenous Trauma and Resiliency at the University of Toronto.

Participants who had worked in the judicial system, including lawyers, social workers and band representatives, talked about the challenges for Indigenous families in court proceedings. They said that, generally, the court had a limited understanding of the history and social context of Indigenous peoples, and that funding is inadequate to allow Indigenous families to participate fully in the legal system. Many participants stressed the need to reinstate funding for band representatives who support members of their communities in child protection proceedings and also help families to access many other services.

> *Band reps are our moms and grandmas when our own moms are struggling.*
>
> —A meeting participant

African Canadian communities[245]

Members of African Canadian communities emphasized the need to examine the use and impact of Motherisk hair testing in the context of anti-Black racism. They described the testing as yet another form of the over-monitoring of their communities and families and referred to it as a "violation of bodily integrity."

> *Racialized communities are over-policed, not over-using.*
>
> —A meeting participant

They highlighted the disproportionate representation of African Canadian families in the child protection system and suggested that racist stereotypes about drug use may have contributed to the use of testing on African Canadian parents and other caregivers.

[245] Participants included community organizations, advocates and researchers working with African Canadian clients and communities on issues related to the intersection of race and child welfare, mental health, or substance use. We met with African Canadian communities specifically because we wanted to explore the factors that contribute to their overrepresentation in the child welfare system.

> *CAS risk assessment tools should have elements that factor race in. They should not be colour blind.*
>
> —A meeting participant

Participants pointed out the need to look at substance use within the broad spectrum of the social determinants of health.[246] They said that monitoring parents through hair testing did little to address the underlying stressors that contribute to substance use. They told us about the need for enhanced community services to support parents to continue to care for their children. In particular, they noted the lack of culturally appropriate substance use treatment options.

Several community health care providers said they had helped mothers to obtain Motherisk hair testing to fulfil conditions imposed by CASs. When it was discovered that the testing was unreliable, parents lost trust in them and they had to work to repair those relationships. We heard that mistrust of the many systems involved in child protection because of systemic racism can keep African Canadian families from seeking help, including substance use treatment and legal counsel. It can also keep kin from coming forward to care for children because they are apprehensive about the CAS becoming involved in their lives.

Participants stressed the need for CASs to build relationships with African Canadian communities before a crisis happens such as the society's intervention in a family. They recommended that CASs engage with groups that work with racialized communities, emphasizing that prevention and early-stage work must be done in partnership with the community.

> *Not to us, or for us, but work with us.*
>
> —A meeting participant

Parents[247] and parents' advocates

The biological parents we heard from felt that they had been judged by the testing and could not escape its consequences. It affected their relationships with their families and communities, both immediately and over the long term. One participant told us that her drug test results were read out in front of her mother and how this had harmed their relationship.

> *Once you're labelled as a user or alcoholic, any behaviour out of the ordinary brings everyone back to 'you're drunk.'*
>
> —A parent affected by the testing

Parents felt that there was inadequate understanding of substance use and the different treatment approaches. They also cited a lack of treatment programs. Mothers felt that they had to choose between parenting and treatment because programs did not allow their children to stay with them. They believed that most child protection workers viewed any substance use as having a negative effect on their parenting, which was not always the case. Parents who were dealing with mental

[246] See note 186 for an explanation of the social determinants of health.

[247] We heard from biological parents, adoptive parents and parent advocates. Some of the parents we met with had been directly affected by the Motherisk hair testing; others had not been affected but had been or were still involved with the child protection system.

health issues said they did not receive the support they needed. They felt that CAS workers expected substance use treatment to solve all of their problems.

Parents saw a conflict in the CAS workers' role of both supporting and investigating families. Some said the CAS presence in their lives felt like monitoring and policing. This made it hard for them to trust their workers and ask for help. They wanted peer or other support, outside of the CAS, to help them navigate the child welfare system and refer them to services.

Parents agreed that their children need to know their own stories, and they wanted to be a part of telling them. They deeply regretted not having the opportunity to talk to their children about why they were apprehended and to help them understand the circumstances from their perspective.

Some adoptive parents told us they felt as though they were being kept in the dark while the Commission reviewed their children's files to determine whether the biological parents had been substantially affected by Motherisk hair testing. They felt powerless and anxious while waiting for this information and for the adoption process to be completed.

Some of the adoptive parents were in favour of open adoption arrangements. However, they were worried that openness orders did not allow for flexibility to respond to a child's changing circumstances. Adoptive parents also felt that biological parents should receive more support after their children were made Crown wards. They encouraged a process that would help adoptive and biological parents deal with access issues together.

Parents' counsel[248]

Parents' counsel told us about some of the challenges they face in representing their clients. They described long delays in getting disclosure of CAS files and reports from other service providers such as hospitals. They said that much of their time, particularly in the early stages of a case, is focused on helping parents access services and develop a strong plan to care for their children. This shifts their attention away from building their case, which could possibly include contesting the expert evidence.

We heard that if a family is working well with the CAS, bringing a motion in court about the admissibility of any drug or alcohol testing would probably not be helpful to the overall case. Once a test result is presented to the court, even a skillful cross-examination might be unable to challenge the reliability of the testing. Also, although the *Family Law Rules* provide for questioning expert evidence in child protection cases, parents' counsel said that the LAO funding to cover this work was not adequate.

Counsel told us that they cannot get adequate funding from LAO for a second expert opinion, especially someone from outside Ontario. They also said that the hours granted on LAO appeal certificates are insufficient to permit counsel to mount a proper appeal and be paid for their work.

Counsel were concerned about the practice of admitting hearsay evidence early in child protection proceedings. They said that even if the evidence is ultimately ruled inadmissible at trial, the damage has been done and it has already prejudiced the parent's case. Counsel contrasted the strictness around admitting breath-testing evidence in criminal cases to the lax admission of substance-use evidence in child protection cases. They pointed out that the focus on court efficiency can lead to

[248] Parents' counsel represent parents and other caregivers in child protection proceedings. Many are sole practitioners and almost all of them rely on funding from LAO to represent their clients.

truncated trials that do not permit them to call and cross-examine all of the relevant witnesses. Counsel told us that, in some cases, summary judgment hearings are held in cases that merit full trials.

We heard from counsel that, since hair testing was discredited, there has been an increase in CAS reliance on urine screens for drugs and alcohol. Counsel told us that, in most cases, urine screens are being admitted without scrutiny by anyone. They also noted the recent use of fingernail testing for substance use and ankle bracelets for alcohol monitoring in some jurisdictions.

Counsel working with parents served by Indigenous agencies reported much less use of testing to guide decisions. These agencies focus on how the community could help the child, for example through a customary care agreement.

We heard that better training and continuing education and networking opportunities are needed. A best practice mentioned was the annual conference "Child Protection Hustle" held in Ottawa (and webcast) for CAS, OCL and parents' counsel.

Children's aid societies[249]

Participants told us about the enormous pressure on CASs to assess child safety quickly and accurately whenever it is called into question. When the worst happens, and a child dies, media reports intensify the pressure on them. Team-based decision making was supported as a way to reduce the personal toll on workers.

We heard that some judges asked CASs for Motherisk hair testing as "hard evidence" to support returning children to their parents. The workers felt that the judges viewed their clinical evidence as subjective and therefore less reliable. We heard from them that judges have varying responses to a parent's relapse. Some take a harm reduction approach and will still consider returning a child to the home while others have zero tolerance for substance use.

Even before the directive to CASs to stop using Motherisk hair testing, some had stopped or cut down on using it because it was too expensive or because it was taking the focus off parenting issues and creating conflict with parents. CAS frontline workers said that the Motherisk hair testing often ruined their rapport with families. CAS representatives agreed that it was important to focus on a family's supports and to use case conferencing to develop safety plans. Many CASs have adopted the "Signs of Safety" approach, where workers and families explore the family's strengths and risk factors together.[250] They said that going to court can be very hard on a family and can exacerbate the underlying problems.

Participants told us that the underlying issue in many child protection cases before the court is poverty. They pointed out the double standard related to economic status and CAS involvement. Wealthier parents who use alcohol and drugs are much less likely to encounter CAS intervention. We heard that most of the parents CASs worked with had experienced childhood trauma, but there is virtually no trauma counselling available, particularly for people who are poor. They also

[249] We heard from CAS administrators, supervisors, frontline workers and counsel. CAS counsel are mostly in-house lawyers employed by the CAS. Some CASs also engage external counsel from private firms on a fee-for-service basis.

[250] Government of Western Australia Department for Child Protection, *The Signs of Safety Child Protection Practice Framework* (East Perth: Government of Western Australia Department for Child Protection, 2010), accessed at Signs of Safety.

recognized that racism causes trauma. There was a general consensus on the importance of anti-oppression practices and of promoting diversity at all levels of the organization.[251]

We heard from some of the frontline workers about holistic approaches to working with families in Indigenous communities. These approaches include spiritual and cultural supports such as sweat lodges, meeting with Elders, and healing circles to work with families in a compassionate way.

Some participants felt that the legislated timelines for child protection proceedings do not correspond to the time needed for substance use treatment. Treatment options are limited, especially for mothers and their children. Some CAS workers had worked in partnership with Jean Tweed, a community-based organization in Toronto providing services for women with substance use, mental health or gambling problems.[252] This partnership had proved invaluable in helping to assess the risk from substance use and its impact on parenting.

Some CAS counsel were concerned about extending statutory timelines for child protection proceedings involving substance use because of the delay in permanently settling a child. They described long-term foster care as a very negative outcome for children.

Social work educators and administrators[253]

Participants told us about the complex and sometimes conflicting role of child protection workers in supporting parents while advocating for their children. Assessing risk to children is vital and it underpins social workers' decisions. Their relationships with families carry authority, and that power imbalance can be difficult for them and for the families they work with. We heard about the problems CAS workers face in working in child protection, including heavy caseloads and increasing administrative duties that take time away from directly helping families. This creates stress and contributes to high turnover of staff.

Child protection work encompasses many critical family issues, such as poverty, domestic violence, substance use and mental health. Social workers underscored the need to work across sectors to help families address these interconnected issues. They highlighted the value of multi-service agencies or community hub models that work with families in an integrated way.

Some participants felt that workers new to the profession do not have sufficient life experience or knowledge to understand the families they work with. For that reason, they said child protection work should not be an entry-level position.

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[251] "Anti-oppression can be defined as the lens through which one understands how 'race, gender, sexual orientation and identity, ability, age, class, occupation and social service usage' (AOR, 2) can result in systemic inequalities for particular groups." Ontario Association of Children's Aid Societies, *An Anti-Oppression Framework for Child Welfare in Ontario* (Toronto: Ontario Association of Children's Aid Societies, 2010), 6, accessed at Anti-Oppression Framework.

[252] "The Jean Tweed Centre for Women and Their Families," accessed at The Jean Tweed Centre.

[253] We heard from social workers from community agencies, academic social workers, and representatives from the Ontario College of Social Workers and Social Service Workers and the Ontario Association of Social Workers.

Social workers recommended that students should be educated in trauma-informed[254] approaches to their work, such as the Master in Social Work program at the University of Toronto, mentioned above. They also called for more education and ongoing training on the histories of marginalized communities and systemic biases, as well as training that includes cultural, spiritual, and ceremonial components to working with families and communities.

Most CAS child protection workers are social workers, but not all of them are. Some come from the related fields of sociology, counselling, or child and youth studies. We heard mixed views on whether membership in the Ontario College of Social Workers and Social Service Workers should be a requirement.

Substance use treatment providers

We heard that substance use is often a coping strategy for parents and other caregivers, giving them temporary relief from poverty, racism, mental health problems, violence, and many other harsh realities in their lives. Drug testing may be helpful as just one piece of information, but it is not the whole story. Treatment providers said that the first step in assisting their clients was to do a trauma-informed substance use assessment to understand the underlying and often intergenerational issues that lead to substance use.

> *I have never met a parent who doesn't want the best for their child.*
>
> —A meeting participant

> *People say, 'she can't stop using even for the sake of her kids.' Instead, we should flip this and say, 'her pain is so deep, she can't stop.'*
>
> —A meeting participant

Providers felt that the incidence of actual addiction among parents involved with the child protection system may be overstated. They were concerned that some CAS workers may have viewed any substance use as addiction and that the reliance on Motherisk hair testing helped to reinforce this view. They emphasized that an abstinence approach was unrealistic for many of the people they work with.

The stigma around substance use means that it is often equated with inadequate parenting, particularly among people who are poor. There is a sense of shame, which isolates people and can keep them from seeking treatment. Participants told us that parents, particularly from Indigenous or

[254] Chadwick Trauma-Informed Systems Dissemination and Implementation Project, *Using a Trauma-Informed Lens to Help Transform the Child Welfare System* (2017), accessed at Chadwick. "A trauma-informed child welfare system is one in which all parties involved recognize and respond to the varying impact of traumatic stress on children, caregivers, families, and those who have contact with the system. Programs and organizations within the system infuse this knowledge, awareness, and skills into their organizational cultures, policies, and practices. They act in collaboration, using the best available science, to facilitate and support resiliency and recovery." See also Canadian Centre on Substance Abuse, *Trauma-informed Care Toolkit*, accessed at CCSA Trauma-Informed Care.

African Canadian communities, were reluctant to seek treatment for fear of being reported to a CAS.[255] In fact, too often, their clients perceived the CAS as an adversary.

We heard that this lack of trust sometimes creates tension between treatment providers and CAS workers themselves. On the other hand, treatment providers also told us about examples of cooperative relationships they had with their local CASs, which resulted in better supports for parents.

We heard repeatedly that treatment services are woefully underfunded. When parents do make the decision to seek treatment, they are often met with long waiting lists before they can even begin.

Most residential treatment facilities do not allow parents to keep their children with them. This has an unintended domino effect, where parents lose government benefits[256] and their housing. Once discharged from treatment, they may be left with nothing and the ensuing despair can drive them back to substance use.

Judges[257]

The judges we spoke with expressed great concern that the Motherisk hair testing was unreliable and could have wrongly influenced decision making in past child protection cases. They emphasized that the underlying issues around expert opinion evidence extend beyond this one flawed testing issue. Expert evidence, particularly where it involves novel science, should be subject to more rigorous scrutiny. As one participant stressed, even the accepted scientific evidence of today should be re-examined in light of evolving science and technology. As well, judges must be careful not to give test results more weight than is justified.

> [The court must be as] *cautious as in a criminal trial given the enormous potential impact of child protection decisions.*
>
> —A meeting participant

The judges also discussed the vital gatekeeping role they perform when they are asked to admit expert opinion evidence. They said that this function is especially important where parents' counsel do not have funding to adequately challenge the evidence or where parents do not have lawyers.

We heard that the frequent use of affidavit evidence, including in summary judgment motions, creates the potential to admit untested evidence too easily. Expert opinion evidence should be tested as early as possible in a proceeding to determine its reliability and admissibility—through a

[255] Section 72 of the *CFSA* (s 125 of the *CYFSA*) requires professionals working with children to report to a CAS any suspicions that a child may be in need of protection.

[256] In March 2017, the Ministry of Community and Social Services made a policy change allowing parents on social assistance to keep their full benefits when their children are taken into temporary care. The benefits would only be reduced if the children are made Crown wards. However, parents could have their Canada Child Benefit/Ontario Child Benefit suspended while their children are in temporary care, depending on the circumstances. "Ontario Works Directives, Directive 3.9 - Dependent Children," Ministry of Community and Social Services, March 2017, accessed at MCCS Directive.

[257] We met with judges from the Ontario Court of Justice and the Superior Court of Justice. Both courts hear child protection proceedings. The court hearing a case depends on the area of the province.

voir dire,[258] for example. Some judges now use a "focus hearing"[259] (like a mini-trial) to determine the reliability of expert evidence well before trial, but the workload pressures in some courts restrict their ability to use this tool more often.

> *The Motherisk test never showed whether someone could parent.*
>
> —A meeting participant

Ideas from the judges to help improve the reliability of expert evidence included the following:

- A statutory guideline for those seeking to present expert evidence;
- A checklist of questions for judges to consider when assessing the evidence;
- An independent body to provide CASs, parents and others with an objective analysis of emerging forensic evidence before it is presented in court;
- Strengthening recent efforts to provide greater support and education to counsel involved in child protection cases; and
- A specialty Legal Aid clinic for child protection.

We heard mixed views on whether the timelines in the *CFSA* made it difficult for the court to adequately assess expert evidence. Some judges said that the timelines could be addressed through innovative case management and prioritizing urgent cases. Others thought that allowing the court greater flexibility to extend timelines might be helpful, and that this should be based on set criteria and a child's best interests. Generally, the judges agreed that the timelines worked against people struggling with substance use. They noted the long waiting lists for appropriate treatment services, particularly in underserved parts of Ontario.

We heard positive views about the education opportunities now being offered to judges to help them perform their essential gatekeeper role with regard to expert evidence. The judges agreed that more skills-based training on this role in the child protection context, and more education in scientific methodology, would be helpful to them.

[258] See page 34 for a discussion of the *voir dire*.
[259] Rule 1(7.2), *Family Law Rules*.

11. Ensuring the Reliability of Expert Evidence

CASs and the court must make decisions about the risks to children and the living situations that are in the children's best interests. In doing so, they frequently rely on expert evidence such as urine screens, medical and psychiatric reports, and Parenting Capacity Assessments. The court typically gives this evidence significant weight because of the need to protect children from harm. The certainty and authority this evidence appears to provide are influential in these decisions.

CASs and the court used the Motherisk testing to help assess parenting ability as well as credibility. They often interpreted parents' failure or refusal to be tested as a tacit admission of substance use and a demonstration of non-cooperation in supporting their children's well-being. They tended to see parents who refuted positive test results as lacking insight into their substance use problem, which called their parenting into question.

Given the traumatic and often irrevocable impact expert evidence can have in a child protection case, such as a decision to remove children from their parents' care, it is critical that the court only rely on it if it has been proven to be reliable in every case in which it is tendered. However, despite Justice Goudge's recommendations in the *Report of the Inquiry into Pediatric Forensic Pathology in Ontario*[260] and the findings of Justice Lang's Independent Review, many CASs and the court continue to rely on expert evidence such as urine screens and Parenting Capacity Assessments with little or no scrutiny.[261]

Justice Lang reported that the Motherisk Laboratory was not accredited as a forensic laboratory to carry out testing for legal purposes and that accreditation was not a requirement in Ontario.[262] There have been promising developments in this respect. The Ontario government has recently introduced legislation that, if enacted, would set mandatory accreditation standards for forensic laboratories.[263] SickKids has also been taking steps to respond to Justice Lang's broad findings. These include monitoring interactions between hospital staff and the legal system, providing training for staff who interact with the legal system, and strengthening oversight of clinical and research laboratories.[264]

In my view, partners within the legal system must take additional steps to ensure that test results are reliable before CASs and the court use them to make decisions about children and their families. In this chapter, I recommend a number of amendments to the legislation and rules governing the use of expert evidence in child protection, as well as changes to strengthen the representation of parents. I also discuss the important role that judges play as gatekeepers and recommend enhanced judicial education on this role in the child protection context.

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[260] Goudge, *Pediatric Forensic Pathology*, vol. 3, ch. 18, 475-98. See Justice Goudge's discussion on expert evidence and gatekeeping, and related recommendations.

[261] The recent decision of Justice Sherr requiring a *voir dire* before admitting urine screens into evidence at a temporary care and custody hearing is a notable exception. See *Catholic Children's Aid Society of Toronto v RM*, 2017 ONCJ 762 (CanLII).

[262] Lang, *Independent Review*, 178-80.

[263] Bill 175, *Safer Ontario Act, 2017*, Schedule 8, *Forensic Laboratories Act, 2017*, accessed at Bill 175.

[264] See "Update to 90-Day Status Report Following the Lang Review of the Motherisk Drug Testing Laboratory," The Hospital for Sick Children, accessed at SickKids Status Report Update.

Strengthening the legal framework

Bodily samples

In most of the cases we reviewed, the parents provided a hair sample at the request of a society worker. As I noted in Chapter 6: Observations from the Review of Individual Cases, we saw no information in the CAS affidavits to indicate that workers explained to parents either how the test results could be used in court or that they had the option to decline to provide a hair sample. Parents may not have understood that the test results could be used against them in an adversarial legal proceeding. We saw no indication that CAS workers ever advised parents that they could seek legal advice before deciding whether to agree to provide a hair sample.

In criminal law, there are far more stringent requirements related to testing. Canadian courts have held that sections 7 and 8 of the *Charter* place limitations on the use of bodily samples such as blood, urine, breath, or hair for testing. These sections provide that "[e]veryone has the right to be secure against unreasonable search or seizure" and "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[265] Courts have held that taking a bodily sample without valid consent constitutes a breach of *Charter* rights and the results of any associated testing could be excluded from evidence.[266]

Criminal courts can only rely on the results of tests of bodily samples where the Crown has proven that the person provided the sample with free and informed consent, or where the bodily sample was provided pursuant to a valid warrant or court order.[267] Consent to provide a bodily sample is only valid if, among other criteria, the person knew the purpose for which it would be used and the potential consequence of providing the sample, knew they had the power to refuse to provide the bodily sample, had an opportunity to obtain legal advice, and was not coerced into consenting.[268]

These requirements for valid consent are mirrored in the provision regarding consent agreements in the *CFSA*. The Act provides that a person's consent to participate in an agreement is only valid if the person

(a) has capacity;

(b) is reasonably informed as to the nature and consequences of the consent or agreement, and of alternatives to it;

(c) gives or revokes the consent or executes the agreement or notice of termination voluntarily, without coercion or undue influence; and

(d) has had a reasonable opportunity to obtain independent advice.[269]

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[265] *Canadian Charter of Rights and Freedoms*, ss 7 and 8, *supra* note 140.
[266] Under s 24(2) of the *Charter*, evidence obtained through a breach of the *Charter* may be excluded if its admission would "bring the administration of justice into disrepute." The test for exclusion of evidence is found in the Supreme Court of Canada's decision in *R v Grant*, [2009] SCR 253, 2009 SCC 32 (CanLII). Section 24(2) has been considered in a number of child protection cases. See, for example, *Children's Aid Society of London and Middlesex v H(T)*, 1992 CanLII 4042 (ON CJ) (CanLII), *Children's Aid Society of Oxford County v AG*, 2014 ONCJ 539 (CanLII); *Chatham-Kent Children's Services v K(J)*, *supra* note 145.
[267] *R v Borden*, *R v Stillman*, *R v Shoker, supra* note 198.
[268] *R v Wills, supra* note 199.
[269] *CFSA*, s 4(2) and *CYFSA*, s 21(2).

It could be argued that taking a bodily sample without valid consent constitutes a breach of section 4(2) of the *CFSA*.

It has been held that courts and police are not permitted to compel an accused or convicted person to provide bodily samples unless there is specific authority for the order in legislation.[270] This is because taking and using a person's bodily samples without consent is considered so intrusive that it can only be done where Parliament has clearly and specifically permitted it in legislation. The legislative provisions that do authorize the taking of bodily samples explain the specific circumstances in which the samples can be taken.[271] For example, the legislation governing prisons provides that urine samples can only be taken from an inmate if certain conditions are met. These conditions include approval by the head of the institution and reason to believe, on the part of the staff member taking the sample, that the inmate has committed a specific offence.[272] In the criminal context, the Supreme Court has held that legislative provisions permitting the court to include "reasonable" conditions in an order, but not explicitly permitting the testing of bodily samples, are not sufficiently specific to permit orders requiring the testing of bodily samples.[273]

Thus far, there are no similar protections related to taking bodily samples in child protection proceedings. Ontario courts routinely order parents to provide bodily samples for testing, for example as a condition of a supervision or an access order. In the cases we reviewed, the court most often ordered testing before deciding whether to return children to their parents. However, there is no specific wording in the *CFSA* providing authority for these orders.[274]

Given the harm caused by the testing, I believe that any similar testing should only be undertaken where parents are fully informed about the potential consequences and clearly consent to it, or where the court has authorized it pursuant to specific language and criteria in a statute. No parent should be explicitly or implicitly threatened with the apprehension of a child or the commencement of a Protection Application if they refuse to provide a bodily sample or if they ask for more information before they agree.

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[270] *R v Shoker, supra* note 198.

[271] Examples of these provisions can be found in *R v Shoker, supra* note 198 at para 23.

[272] These conditions are set out in s 54 of the *Corrections and Conditional Release Act*, SC 1992, c 20.

[273] *R v Stillman* and *R v Shoker, supra* note 198. The Saskatchewan Provincial Court has also held that a court cannot make such an order even where the accused consents, since the court simply has no authority to make the order at all: *R v Unruh*, 2012 SKPC 51 (CanLII).

[274] A challenge to the practice of court-ordered hair tests was brought in *Children's Aid Society of Halton Region v ZI*, *supra* note 201. The society had asked the court to order the parents to provide a hair sample for drug testing. The parents challenged the judge's authority to make this order in part because there was no legislative authority for it, referring to *R v Shoker, supra* note 198. The trial judge held that the *CFSA* did provide the legislative authority to make the order. He noted that the test is minimally invasive, and found that although the order could violate sections 7 and 8 of the *Charter*, such a violation would be in accordance with the principles of fundamental justice and would be justified as a reasonable limit on the parents' *Charter* rights. Of particular importance to the court was the need to balance the parents' rights with the children's rights – rights to be protected and to have their best interests considered. (The full reasons for this decision were not released.) This decision was not appealed and is not binding on other courts. See also *Winnipeg Child and Family Services v KLW*, *supra* note 78 at para 98, where the Supreme Court noted that sections 7 and 8 rights may apply differently in the child protection context.

Recommendations:

2. The Ministry of Children and Youth Services should direct children's aid societies to ensure that all child protection workers meet the requirements for obtaining valid written consent, in accordance with s 4(2) of the *Child and Family Services Act* (s 21(2) of the *Child, Youth and Family Services Act*), in every situation where a parent is asked to provide a bodily sample. The directive should require workers to document the steps they took to obtain consent and should require workers to obtain confirmation signed by the parent acknowledging that the requirements for valid consent were met.

3. The Ontario government should amend the *Child, Youth and Family Services Act* to

    a. require courts to exclude evidence of tests of parents' bodily samples unless the court is satisfied that the parent provided valid consent, or that the sample was obtained by order under the Act. The only exception should be situations where the introduction of the evidence is critical to protecting a child's immediate safety. The provision should require the court to consider the parent's right to privacy and security of the person before making this exception;

    b. prohibit courts from admitting evidence of a person's failure or refusal to voluntarily provide a bodily sample for testing where the evidence is being introduced in order to demonstrate that the person is less worthy of belief, is or has been engaging in substance use, or is being uncooperative; and

    c. provide specific criteria for judicial orders that require a person to provide a bodily sample, with those criteria relating to the safety of a child.

Expert reports

> *Many of the litigants don't understand the import of expert opinion. It is too complex and too full of language that is not understandable to a lay person.*
>
> —Written submission

In most of the cases we reviewed, the Motherisk test results were introduced into evidence through the affidavit of a CAS worker. Sometimes, the affidavit only appended the test results; other times, a generic chart from the Laboratory labelling concentration ranges (e.g. from "trace" to "very high") was also appended. Many times, the affidavit included test results without a letter or report explaining the science behind the testing and the interpretation of the results. Raw test results and generic charts should never have been allowed, on their own, to form the basis for determining the drug or alcohol use of parents or other caregivers.

We also saw in our file reviews that the Laboratory often presented the test results as infallible, even when there was contradictory evidence, such as test results from other laboratories, that should have raised questions about the Motherisk evidence. In her report, Justice Lang pointed out that "hair colour bias" and other factors can impact test results.[275] This bias may have affected the test results of Indigenous and racialized parents because the rate of absorption of certain drugs is

[275] Lang*, Independent Review*, 55 at para 74.

higher in dark hair. Other factors may also affect test results, such as hair condition, pregnancy and body size.[276] Courts should be made aware of the impact of such factors on the validity of test results and assessments.

Justice Lang also reported on the failure of the Laboratory to adequately communicate the limitations in hair analysis. An example of such a limitation is that there is no "dose-response relationship across individuals." This means that two people who consume the same amount of a drug or alcohol may have different concentrations in their hair.[277]

The *Family Law Rules* set out the duty of experts who provide evidence to be impartial.[278] The Rules also require their reports to include certain information, including their qualifications, the instructions they received, and their opinions and reasons. The experts' opinions should include the assumptions on which they based their opinions and the research and documents they considered.[279] The Rules do not require experts to include any information about the scientific limits of the method they are using, the possibility of contamination, or other issues that could affect the reliability of the opinions or test results. Had these requirements been in place, lawyers and judges may have been alerted to the need to probe the reliability of the Motherisk testing.

Other court rules do impose such requirements. Experts appearing in the Federal Courts (which do not hear child protection proceedings) are required to abide by a Code of Conduct. This Code of Conduct requires their reports to include "any caveats or qualifications necessary to render the report complete and accurate, including those relating to any insufficiency of data or research and an indication of any matters that fall outside the expert's field of expertise."[280]

In the state of Victoria, Australia, the court requires experts to set out any limitation or uncertainty affecting the reliability of the methods, techniques, or data they relied on, and any limitations or uncertainty affecting the reliability of their opinions due to insufficient research or data. The experts must also disclose any significant and recognized disagreement or controversy in the field that is relevant to the expert's technique, ability, or opinion.[281]

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[276] *H (A Child: Hair Strand Testing)*, *supra* note 193. See also *Canada v Ewert*, 2016 FCA 203 (CanLII), in which the plaintiff argued that psychological tests for recidivism and psychopathy among inmates were unreliable when used to assess Indigenous inmates.

[277] Lang, *Independent Review*, 156 at para 51.

[278] Rule 20.1(1), *Family Law Rules*. Rule 20.1(10)(7) requires that the expert file a form indicating compliance with this duty.

[279] Rule 20.1(10), *Family Law Rules*.

[280] *Federal Courts Rules*, Schedule to Rule 52.2, "Code of Conduct for Expert Witnesses," accessed at Federal Courts Rules. This Rule also addresses an issue relating to the distinction made by the Court of Appeal for Ontario in the case of *Westerhof v Gee Estate*, *supra* note 139, between "participant" or "fact" experts, who treated or tested someone involved in the case, and "litigation" experts, retained by counsel, who were not otherwise involved in the case. As discussed in note 139, the court determined that the Rule of Civil Procedure on experts did not apply to participant or fact experts but they were permitted to provide opinion evidence while testifying. This distinction has been adopted in child protection proceedings. Rule 52.3, *Federal Courts Rules* explicitly provides that participant or fact experts must abide by the Rule unless they are only giving evidence regarding the results of examinations they conducted or treatment or advice they provided.

[281] Forensic Evidence Working Group, *Practice Note: Expert Evidence in Criminal Trials* (County Court of Victoria, updated June 24, 2014), accessed at Forensic Evidence Practice Note. Thanks to Dr. Emma Cunliffe and Professor Gary Edmond for bringing this practice to our attention.

The Family Rules Committee should consider these models in making the amendments I recommend to the *Family Law Rules* concerning expert reports in child protection proceedings.

Recommendation:

4. The Family Rules Committee should amend the *Family Law Rules* to

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

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

Temporary proceedings

Decisions made at the temporary stage in child protection proceedings can have profound impacts. A decision at a temporary stage will often determine where a child lives and with whom a child has access for months, or sometimes years, until the case is determined. That decision can change the relationship between a child and a parent in ways that may be difficult to overcome. The temporary decision, therefore, is often the key decision in the case. However, the child's placement at this temporary stage is rarely litigated. The order made at the first appearance can often be carried through to the final order.

The Family Lawyers Association noted in their submission to Justice Lang's Independent Review that in a temporary care and custody hearing after an apprehension, a positive hair test may "be a significant and almost incontrovertible piece of evidence," in part because "it affects the tenor and trajectory of the case." A child may remain in foster care for some time, and at the next hearing the parent will also be faced with a "disadvantageous status quo." [282]

Expert evidence is admitted at the temporary stage of child protection proceedings under the provision of the *CFSA* permitting evidence that is "credible and trustworthy in the circumstances." In virtually every case we reviewed, the Motherisk test results were admitted into evidence in the form of hearsay statements by workers or raw test results appended to their affidavits. The court accepted this evidence as credible and trustworthy without question. This gave CASs tacit permission to continue relying on the test results throughout the entire proceeding and to continue requesting more testing.

I believe courts should be much more vigilant in screening and evaluating the reliability of such evidence, including at the early stage of proceedings, than they were with the Motherisk testing.

I was pleased to see the recent decision of Justice Sherr of the Ontario Court of Justice, in which he noted that a *voir dire* was necessary in order for him to determine whether to admit urine screens into evidence at a temporary care and custody hearing.[283] The decision has persuasive value, but it

[282] Lang*, Independent Review*, 219 at para 31, quoting the Family Lawyers Association.
[283] *Catholic Children's Aid Society of Toronto, supra* note 261.

is not binding on other Ontario courts. I therefore recommend changes to ensure proper evaluation of expert evidence at the temporary stage.

Recommendations:

5. The Family Rules Committee should amend the *Family Law Rules* to require courts to assess the necessity for and reliability of any expert evidence through a *voir dire* before admitting that expert's report into evidence on any motion in a child protection proceeding, except at the first appearance. Deviation from this requirement should only be permitted where the parent expressly acknowledges to the court that the findings of the expert are correct and the court is satisfied that the parent adequately understands the expert opinion and the consequences of such an acknowledgement.
6. The Ontario government should amend the *Child, Youth and Family Services Act* to prohibit the admission of hearsay evidence of expert opinion, including test results and the interpretation of those results, at any stage of a child protection proceeding other than the first appearance. Deviation from this requirement should only be permitted where the parent expressly acknowledges to the court that the findings of the expert are correct and the court is satisfied that the parent adequately understands the expert opinion and the consequences of such an acknowledgement.

Summary judgment

Since 1999, the *Family Law Rules* have permitted CASs to bring summary judgment motions. These motions allow a judge to make a finding or final order in a case without a trial, provided that the CAS demonstrates in its evidence that there is no "genuine issue requiring a trial."[284] The judge is required to take a "hard look"[285] at the evidence to see if the case can be decided justly without a trial.

Summary judgment motions were created in the context of civil (private) litigation. They were considered exceptional in the child protection context, permissible in only the clearest of cases. They were typically brought when the undisputed facts in the case were sufficient to justify the finding or order the society was requesting.

In 2003, an Ontario court confirmed that the summary judgment procedure at the time, which did not permit the court to make findings of fact or assess credibility, did not violate the parents' rights under the *Charter*.[286] However, the Court of Appeal noted in 2006 that summary judgment jurisdiction should be "exercised cautiously since that is consistent with the principles of justice and the best interests of the child."[287]

In 2015, the *Family Law Rules* were amended to permit judges hearing summary judgment motions broader powers to assess credibility, weigh evidence and make findings of fact.[288] In making that

[284] Rule 16(6), *Family Law Rules*.
[285] This standard is referred to repeatedly in the case law. See, for example, *Children's Aid Society of Toronto v OM*, 2017 ONCJ 779 (CanLII) at para 6.
[286] *Children's Aid Society of Hamilton v MW*, 2003 CanLII 2309 (ON SC).
[287] *Children's Aid Society Region of Halton v KLA*, 2006 CanLII 33538 (ON CA) at para 25.
[288] These changes mirrored amendments made to the Rules of Civil Procedure in 2010. The changes in the Rules of Civil Procedure were upheld by the Supreme Court of Canada in 2014. *Hryniak v Mauldin*, [2014] 1 SCR 87, 2014 SCC 7 (CanLII).

assessment, the court may also hear oral evidence. These new powers were originally developed in the context of private matters between individuals in which *Charter* rights are not affected and where the state is not involved. To my knowledge, there has not been a challenge to these powers under the *Charter*.

At a summary judgment motion, a CAS provides evidence in an affidavit asserting that there is no genuine issue requiring a trial. The parent is required to respond to the society's evidence with an affidavit setting out the specific facts that establish a genuine issue for trial. "Mere allegations or denials" of the society's evidence by the parent are not sufficient to defeat a summary judgment motion.[289]

The requirement that the parents set out specific facts demonstrating a genuine issue for trial places parents in a very difficult position if the society's evidence includes positive drug or alcohol tests. Parents' assertions that they did not consume drugs or alcohol during the period covered by the test would amount to mere denial of the CAS's evidence and would not be sufficient to justify a trial.[290] This has the effect of requiring parents to prove the unreliability of the testing rather than requiring the CAS to prove its reliability, thus shifting the onus of proof to the parents.

A substantial number of the files we reviewed involved summary judgment motions brought by CASs. It has been held repeatedly that evidence that is not admissible at trial should not be admitted at a summary judgment motion,[291] although not all courts agree.[292] We saw a troubling tendency for the court to make orders on these motions based on evidence that would not be admissible at trial. For example, the societies' affidavits often included hearsay statements by workers about the results of Motherisk tests without any direct evidence from Motherisk Laboratory staff. Most importantly, Laboratory staff were rarely cross-examined on the test results, interpretation letter or reports filed in these motions. The court therefore had no opportunity to exercise its gatekeeping role or properly assess the reliability of the Motherisk evidence.

These summary judgment motions were heard before the *Family Law Rules* were amended in 2015.[293] Before the amendments, the *Family Law Rules* did not allow for oral evidence, including cross-examination, at these motions. The 2015 amendments permit the court to assess credibility, weigh evidence and make findings of fact, and hear oral evidence, but only at the court's discretion. Parents therefore do not have the *right* to have any evidence, including expert evidence, tested by cross-examination at a summary judgment hearing, despite the profound consequences of these motions.

Changes to the summary judgment rule would assist all parties in using this rule fairly in cases involving expert evidence.

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[289] *Catholic Children's Aid Society of Hamilton v TB (mother) and BS (father)*, 2013 ONSC 6300 (CanLII) at para 34; Rule 16(4.1), *Family Law Rules* specifically states that the respondent in a summary judgment motion "may not rest on mere allegations or denials but shall set out, in an affidavit or other evidence, specific facts showing that there is a genuine issue for trial."

[290] Justice Kukurin expressed the opinion in a 2001 case that some fact situations do not permit the parent to do anything more than deny the facts alleged by the society: *Children's Aid Society of Algoma v W(E) et al.,* 2001 CanLII 37515 (ON CJ).

[291] *Children's Aid Society of Toronto v BB, supra* note 136 at para 25.

[292] *Nogdawindamin Family and Community Services v PM et al.*, 2018 ONSC 34 (from CanLII)].

[293] Despite these limitations, in a number of cases we reviewed, the court did appear to weigh evidence and make findings.

Recommendation:

7. The Family Rules Committee should amend the *Family Law Rule* relating to summary judgment motions to

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

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

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

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

Ensuring a full answer and defence

> *The judge never looked at my lawyer or talked. It was always, 'Well, what does the society want?' I never had a judge ask me, 'What do you think, how do you feel, what are you wanting to see out of this?' Nothing. No voice, even with legal representation.*
>
> —A parent affected by the testing

The state may only remove a child from a parent when it is necessary to protect the best interests of the child and where there is a fair procedure, involving a fair hearing, where the parents have an opportunity to present their case effectively.[294] In the vast majority of situations, the parents will not be able to do this without a lawyer.[295]

LAO provides certificates to fund counsel where the parent's income is below a certain threshold. This ensures that most parents have representation in child protection proceedings involving them. However, a number of parents whose incomes are above the LAO threshold but too low to afford counsel are forced to represent themselves.[296] In any event, the presence of counsel alone will not protect the parents' and children's rights to a fair hearing. Counsel must also be supported to provide effective advocacy for their clients.

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[294] *New Brunswick (Minister of Health and Community Services) v G(J), supra* note 143 at paras 70-74.
[295] *Ibid*, at para 80. The Supreme Court held that "In proceedings as serious and complex as [child protection proceedings], an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case."
[296] Parents who have been denied Legal Aid can bring a motion asking the court to order the state to pay for counsel. These motions, common in the criminal context, are rare in the child protection context. See, for example, Kate Kehoe and David Wiseman, "Reclaiming a contextualized approach to the right to state-funded counsel in child protection cases," *University of New Brunswick Law Journal* (2012), accessed at State-Funded Counsel in Child Protection.

Accessibility of Legal Aid funds

There is a great disparity between the resources of publicly funded CASs and the resources available to the parents, usually living in poverty, who are caught up in child protection proceedings. Not surprisingly, most representation for parents in child protection cases is funded through LAO.

Parents' counsel who accept LAO certificates are permitted a set number of paid hours for a case and each stage of a case. They must seek approval for extra hours. We heard from many parents' counsel that the hours currently funded for certain stages, such as summary judgment motions and appeals, are not sufficient. The same is true of expenses such as expert fees.[297] Parents' counsel must apply in writing for authorization for case-related expenses such as consulting experts, bringing motions on behalf of parents and hiring interpreters to assist during client interviews. They said that the time it takes to seek approval for funding is often prohibitive and that their requests are often funded inadequately or denied.

In some areas of Ontario, there are few child protection counsel and those who do practise often carry heavy caseloads. In addition, parents' counsel typically spend considerable time on non-legal support for their clients such as searching for appropriate community programs and services. We also heard that law students and junior lawyers hoping to represent parents in child protection face many obstacles to pursuing a career in this area of the law, including low remuneration and a lack of mentoring opportunities.

The funding available through LAO has increased in recent years.[298] Promising programs have been launched as well. For example, LAO's "second chair" program allows for a junior and senior lawyer to work together on certain cases. It offers mentoring for the junior and assistance for the senior on complex cases. LAO's support would be further strengthened if it expanded two of its services, currently only available in criminal matters, to child protection.

The first service is the Big Case Management program,[299] which sets individualized budgets and provides other assistance in costly and complex criminal trial defences funded by LAO. The program includes an Exceptions Committee, made up of LAO staff and highly respected lawyers from the private bar with expertise in conducting large cases. The Committee makes recommendations for budgets on these cases and each case receives individual consideration. A similar committee, which included parents' lawyers, would be very beneficial to address complex child protection cases.

The second service is the Complex Case Rate policy,[300] which provides higher fees for lawyers acting in complex criminal cases. This helps to retain high-quality representation for clients and improves access to justice. In his *Inquiry into Pediatric Forensic Pathology in Ontario* report, Justice Goudge recommended that LAO increase the tariff for counsel who litigate child protection proceedings in

[297] Professor Nicholas Bala and Jane Thomson have argued that s 7 of the *Charter* may in some cases require legal aid funding of experts hired by parents' counsel. Nicholas Bala and Jane Thomson, "Motherisk and *Charter* Orders for Experts for Parents in Child Welfare Cases," *Canadian Family Law Quarterly* vol. 35, no. 2 (May 2016): 199.
[298] "LAO increases hours available for child protection cases," Legal Aid Ontario "Newsroom," October 20, 2014, accessed at Hours available for child protection cases.
[299] "Big Case Management," Legal Aid Ontario, accessed at Big Case Management.
[300] "Complex Case Rate: Policy," Legal Aid Ontario, accessed at Complex Case Rate.

which pediatric forensic pathology plays an important role. The purpose of the recommendation was to create incentives for experienced and specially trained lawyers to take on Legal Aid cases.[301]

I met with LAO officials while preparing this Report. I was encouraged by their openness to improving communication so that parents' counsel would be more fully aware of their services. They were also open to considering enhancements to those services to improve support to parents involved in the child protection system.

In his report, Justice Goudge also urged LAO to take into consideration the findings of that inquiry when exercising its discretion to approve funding and disbursement requests relating to forensic expert evidence.[302] He recommended that the funding for LAO should be sufficient to permit his recommendations to be implemented. I echo his recommendations in the context of child protection.

Recommendations:

8. Legal Aid Ontario should
    a. in authorizing disbursements to parents' counsel related to expert evidence, consider the complexity of child protection cases and the miscarriages of justice that could result from failing to vigorously challenge expert evidence;
    b. expand its Big Case Management program to child protection cases; and
    c. expand its Complex Case Rate policy to child protection counsel.
9. The Ministry of the Attorney General should ensure that the total funding available to Legal Aid Ontario is sufficient to enable the Recommendations in this Report to be implemented.

Specialty legal clinic for child protection

LAO funds the 17 specialty legal clinics in Ontario. They are independent from government and governed by community boards of directors. The clinics represent individuals who are often marginalized and vulnerable (e.g. seniors, people with disabilities), or they deal with specific areas of law (e.g. workers' health and safety, affordable housing). Examples of specialty clinics are Justice for Children and Youth, Aboriginal Legal Services of Toronto and Community Legal Education Ontario.[303]

There is currently no specialty clinic in Ontario focused on child protection. The private bar is the foundation for providing legal representation in child protection,[304] but its work would be complemented by a clinic specializing in this area of law. Such a clinic, if staffed by experienced counsel, could support parents' counsel (particularly new lawyers) by providing mentoring and research. It could also represent "hard to serve" clients with complex needs and address systemic issues through test cases and advocacy.

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[301] Goudge, *Pediatric Forensic Pathology*, vol. 3, ch. 22, 586, recommendation 169.
[302] *Ibid*, vol. 3, ch. 22, 618, recommendation 122.
[303] "Specialty Clinics," Legal Aid Ontario, accessed at LAO Specialty Clinics.
[304] The *Legal Aid Services Act*, *1998*, SO 1998, c.26, s 14(2) provides that "[t]he Corporation shall provide legal aid services in the areas of criminal and family law having regard to the fact that the private bar is the foundation for the provision of Legal Aid services in those areas."

Clinics representing parents in child protection are common in some jurisdictions in the United States.[305] They have done significant advocacy work while also representing individual clients. Some have developed multidisciplinary teams made up of attorneys, social workers, and parent advocates to support the legal and non-legal needs of parents and families.

Recommendation:

10. Legal Aid Ontario should establish an independent specialty legal clinic focused on child protection that could accept "hard to serve" clients, provide research and mentoring for private practitioners, engage in advocacy, and bring test case litigation to protect and enhance the rights of parents in child protection proceedings.

Disclosure

In litigation, disclosure is fundamental to ensuring a full answer and defence. It allows the parties to know the case they have to meet. The *Family Law Rules* do not require CASs to automatically disclose the contents of their files to parents. Typically, a parent's lawyer will request disclosure and then either receive a package or go to the CAS office to review the file and get copies of relevant material. Parents' counsel told us that it can take considerable time and several requests to accomplish this.[306] If the CAS fails or refuses to comply with a request for disclosure, a party may bring a motion to the court for an order requiring the society to do so.[307] However, bringing this motion takes time. If a parent is receiving Legal Aid, it reduces the number of hours available to their counsel to focus on substantive work. Parents who are not represented may not realize that they have a right to obtain disclosure or to apply to the court if a CAS does not comply with their request.

A CAS's failure to provide disclosure early on can severely impair the parents' ability to respond to the case. There are strict time limits for parents to file their Answers, Plans of Care and affidavits in response to temporary care and custody motions. Disclosure is essential to parents' ability to prepare these documents effectively.

The CASs' disclosure obligation under the *Charter*[308] has been compared to the Crown's disclosure obligation to accused persons in criminal proceedings.[309] The Crown must provide ongoing disclosure by delivering all relevant information obtained in the course of an investigation, whether it is positive, negative or neutral. Disclosure is seen as a fundamental right of an accused person and failure to provide proper disclosure can lead to significant consequences for the Crown. Disclosure requirements can be onerous and time consuming in both the criminal and child protection

[305] See, for example, "Changing the System," Center for Family Representation (New York City), accessed at Center for Family Representation.
[306] See, for example, *Children and Family Services of York Region v GH and RH*, [2017] O.J. No. 2664.
[307] Rule 20(5), *Family Law Rules*.
[308] The obligation for the state to provide full disclosure in proceedings involving the *Charter* rights of individuals was set out by the Supreme Court of Canada in the criminal case of *R v Stinchcombe*, [1991] 3 SCR 326, 1991 CanLII 45 (SCC). In that case, the court noted that "the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done."
[309] *Children's Aid Society of Hamilton v EO*, 2009 CanLII 72087 (ON SC); *Children's Aid Society of Toronto v F D-S*, 2016 ONCJ 520 (CanLII); *Chatham-Kent Children's Services v RT and HDC*, 2014 ONSC 789 (CanLII).

contexts. However, I can see no principled reason for different disclosure standards. The current process is inadequate for ensuring that CASs meet their disclosure obligation.

Recommendation:

11. The Family Rules Committee should amend the *Family Law Rules* to require children's aid societies to provide automatic, ongoing, thorough and timely disclosure to parents.

Supporting the gatekeeping role of the judiciary

The child protection process has evolved over time. The law has responded to tragic cases where children at risk were not adequately protected. Some changes added protections for children in the care of CASs. Others adjusted the rules of evidence to ensure that CASs and the court have all of the information they need to make the best possible decisions. Examples include admitting evidence of past parenting and at times, hearsay. Newer provisions sought to ensure early decision making, sensitive to a child's sense of time and to the potential damage to a child if a case drags on.

Our review of the Motherisk cases left little doubt that a casualty of these changes was impairment of the court's essential gatekeeper role with respect to expert evidence. There were other contributing factors to the reduced scrutiny. The court was under pressure, the timelines were very tight, and the parties and their representatives did not often press or assist the court to perform its gatekeeping function. Some judges did attempt to ensure that the Motherisk evidence was properly before them, but that was rare. In almost all cases, the court admitted the Motherisk test results without question.

Justice Goudge emphasized that the judiciary's gatekeeping role is crucial to ensuring that only reliable expert evidence is admitted and relied on in court:

> Judges play an important role in protecting the legal system from the effects of flawed scientific evidence. Although this objective will be greatly assisted by the use of rigorous quality assurance processes in preparing expert opinions, by the integrity and candour of expert witnesses, and by vigorous testing of expert evidence by skilled and informed counsel, the judge must bear the heavy burden of being the ultimate gatekeeper in protecting the system from unreliable expert evidence.[310]

Justice Goudge addressed the concern that more rigorous gatekeeping could lengthen already long proceedings. He noted that mechanisms such as written summaries of the anticipated evidence can simplify the gatekeeping process.[311] I would add that in child protection cases, proper scrutiny of expert evidence early on, at the temporary care and custody stage, may encourage early agreement on crucial facts and settlement of the case well before a trial.

In recent years, the National Judicial Institute, the Canadian Institute for the Administration of Justice, the Superior Court of Justice in Ontario, and the Education Secretariat of the Ontario Court of Justice have provided Ontario's judges with considerable education and resources on expert

[310] Goudge, *Pediatric Forensic Pathology*, vol. 3, ch. 18, 470.
[311] *Ibid*, vol. 3, ch. 18, 497.

evidence, including the Science Manual for Canadian Judges (which is being updated).[312] With the support of judicial leadership, efforts are under way to develop a joint education program for the members of the Superior Court of Justice in Ontario and the Ontario Court of Justice that focuses on expert evidence in child protection cases.

In her report, Justice Lang noted the National Judicial Institute's education programs and recommended "ongoing and expanded judicial education regarding expert evidence, particularly expert scientific evidence."[313] I echo her recommendation.

Recommendation:

12. The National Judicial Institute, the Superior Court of Justice in Ontario, and the Ontario Court of Justice should enhance their efforts to provide education programs and resources on expert evidence in child protection proceedings. Education should emphasize the skills judges need in order to perform their gatekeeper function in the unique context of child protection.

The justice system and science

My Recommendations in this section are designed to reduce the likelihood that the court will rely on flawed expert evidence in future child protection cases. I focus on enhancing the ability of the court and lawyers to screen out suspect or unproven testing methods and to ensure that the court is aware of the possibility of false positives, bias, or other problems with evidence. My Recommendations are based on a case-by-case approach to ensuring scientific reliability, not on a broad inquiry into the reliability of particular types of evidence.

During our restorative process, we spoke to Dr. Emma Cunliffe and Professor Gary Edmond about their research into how the Canadian legal system deals with expert evidence. They have documented patterns in the findings of commissions of inquiry regarding expert evidence in wrongful convictions.[314] Acknowledging the difficulties of grappling with the reliability of expert evidence "within the high volume, under-resourced run of ordinary cases," they concluded that "the Canadian justice system is not yet adequately recognizing, let alone addressing, the patterns within such failures."[315] Their work shows that these issues are not unique to Canada. Other jurisdictions, including the United States and the United Kingdom, have also experienced miscarriages of justice and have taken steps in recent years to investigate and improve the quality of forensic science.

Recognizing the challenges of limited LAO funding, time pressures in individual cases, and the difficulties non-scientists such as judges and lawyers have when assessing scientific claims, Cunliffe and Edmond propose a Canadian "Justice and Science Commission" to study the reliability of forensic tests and techniques.[316] This body would be led by a team of respected scientists and

[312] Justice Goudge was a key member of the team that created the manual. Courses include the National Judicial Institute's annual Evidence Workshop, and specific sessions on expert evidence and the gatekeeping role at court-requested programs for the Ontario Court of Justice and Superior Court of Justice.
[313] Lang, *Independent Review*, 240 at para 47.
[314] Emma Cunliffe and Gary Edmond, "What Have We Learned? Lessons from Wrongful Convictions in Canada," in *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg*, by Benjamin L. Berger, Emma Cunliffe, and James Stribopoulos (Toronto: Thomson Reuters, 2017), 129-47.
[315] *Ibid*, 138-39.
[316] Emma Cunliffe and Gary Edmond, "Reviewing Wrongful Convictions in Canada," *Criminal Law Quarterly* vol. 64, nos. 2 & 3 (2017): 475-88.

statisticians and would be governed by an advisory council that would include legal academics and scientific research academics. Its key functions would be to evaluate the reliability of existing and novel forensic scientific methods, publish reports explaining its findings, and issue guidelines on the use of these methods in legal cases. The results of the body's research would be available to all parties to an action.

We raised this proposal at our Symposium. Some participants saw it as a promising idea, but many were concerned that, if poorly designed, this body could have the unintended effect of putting a stamp of approval on unreliable techniques. We also heard understandable skepticism about creating a new state institution in response to the issues raised by the reliance on Motherisk testing. The fact is that respected existing institutions (SickKids, CASs and the court) all failed to detect and respond to the problems at the Laboratory.

In the United States, national government bodies have conducted extensive reviews of forensic scientific methods and their accuracy. The research arm of The National Academies of Sciences, Engineering, and Medicine wrote a significant report in 2009 documenting a lack of empirical basis for many of the claims made about routine forensic science techniques.[317] A follow-up report in 2016 by the President's Council of Advisors on Science and Technology contained an exhaustive analysis of research into comparison-based techniques such as fingerprint identification and bite-mark analysis. The conclusion was that many techniques had never been scientifically validated and others had error rates much higher than were widely understood.[318] The report recommended that the National Institutes of Standards and Technology "perform evaluations, on an ongoing basis, of the scientific validity of current and newly developed forensic feature-matching technologies,"[319] with annual reports on the results.

Science academies in the United Kingdom have recently launched a series of easy-to-understand "science primers" to assist judges dealing with scientific evidence in the courtroom.[320] The project is an initiative of the Royal Society of the United Kingdom and the Royal Society of Edinburgh. A steering group chaired by a Supreme Court judge leads the project. Leading scientists and members of the judiciary write the guides, which are then reviewed by practitioners and approved by the councils of the two Royal Societies.[321] This seems like a promising project, but it is important to note that Canadian law places limits on the ability of judges to rely on materials that have not been testified to under oath and tested through cross-examination.

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[317] Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (Washington: The National Academies Press, 2009), accessed at Strengthening Forensic Science.

[318] President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Models* (Washington: Executive Office of the President, September 20, 2016), accessed at Forensic Science in Criminal Courts. See "Scientific Criteria for Validity and Reliability of Forensic Feature-Comparison Methods," beginning at 5.

[319] "Summary: President's Council of Advisors on Science and Technology recommends actions to strengthen forensic science and promote its more rigorous use in the courtroom," President's Council of Advisors on Science and Technology, The White House (President Barack Obama), September 20, 2016, accessed at Summary on Release of Report.

[320] "Courtroom science primers launched today," Royal Society, November 22, 2017, accessed at Courtroom Science Primers Launched.

[321] Royal Society and Royal Society of Edinburgh, *Forensic Gait Analysis: A Primer for Courts* (London and Edinburgh: Royal Society and Royal Society of Edinburgh, 2017), 5, accessed at Forensic Gait Analysis Primer.

These initiatives are examples of much-needed institutional responses to assist the justice system in making better use of scientific evidence. They are mostly designed to help address potential miscarriages of justice arising from the use of scientific evidence in the criminal justice system, but the Motherisk experience showed us that there are similar problems arising from the use of such evidence in the child protection system.

Given the concerns raised at our Symposium and the national scope of these initiatives, I am not making a recommendation to implement similar projects at this time. However, I hope that legal, science, community and other partners will continue to engage in the discussion we began about how to bridge the gap between the law and science. Building on what we have learned from the findings of Justice Goudge and Justice Lang, Ontario has an opportunity to be a leader in addressing these issues and mobilizing other provinces to do so.

12. Strengthening Families and Communities

> *We are at a crucial stage in CAS work. Poverty is a silent destroyer of families. The differential treatment of the poor is palpable. We need to push for treatment and services for unhealthy families rather than destroying families that are capable of becoming healthy. The vast majority of Motherisk clients were simply poor and many were not addicts.*
>
> —Hamoody Hassan, Hassan Law

> [Tikinagan Child and Family Services'] *philosophy is summed up by the words 'should it not be through relationship building with your client, bringing the resources together to support the individual and family, training of workers to recognize the signs and symptoms of drug dependency, and the ability to help those with a problem, rather than relying on a drug test?'*
>
> —The Honourable Peter T. Bishop, Ontario Court of Justice, written submission, quoting Rachel Tinney, Director of Services, Tikinagan Child and Family Services

The focus on alcohol and drug testing impaired relationships between CAS workers and parents. It took attention and resources (testing was costly) away from working with families to help them with many other issues. Most of the families involved in the cases we reviewed were living in poverty and dealing with substance use, mental health issues, domestic violence, or other complex situations. Sometimes we saw the effects of poverty, such as unstable housing, expressed as child protection concerns or as the personal failings of parents. We know that child welfare involvement usually results from multiple and often intergenerational factors. These need to be understood and addressed holistically to meaningfully support a family.

We read hundreds of affidavits from CASs that began with statements about how long the family had been involved with the CAS or about how the mother had herself been a Crown ward. These narratives immediately drew the court's attention to the family's history, suggesting that the mother did not have the background to be a good parent. They did not provide the context necessary to understand the difficulties the family was facing or the systemic issues that may have contributed to their problems.

There is an enormous power imbalance between the families involved in the child protection system and CASs.[322] This was obvious in the cases we reviewed, in the many ways I have already discussed such as the pressure on parents to go for testing and the few materials filed with the court on the parents' behalf compared with the materials filed by CASs. Parents and their counsel were simply overpowered. Although CASs will always have more resources than parents do, I believe that the

[322] For a discussion of the power imbalance between parents and workers, and a potential solution, see Gary C. Dumbrill, "Power and Child Protection: The Need for a Child Welfare Service Users' Union or Association," *Australian Social Work* vol. 63, no. 2 (2010): 194-206, available at Power and Child Protection - Abstract.

child protection system can only operate fairly, and in the best interests of children and families, if parents have greater power to advocate for themselves and their children.

> *I'm educated. What about good parents who haven't finished high school? What did they do? Because I could do nothing.*
>
> —A parent affected by the testing

Perhaps more often than any other issue arising in our discussions, we heard about the problems stemming from the dual role of CAS workers. They are entrusted with supporting parents to improve their parenting, but at the same time, they must monitor the quality of parenting to ensure the children's safety. From the perspectives of both workers and parents, we heard how difficult it can be for workers to balance these two roles. For example, because of the CAS workers' monitoring role, parents with substance use issues might not acknowledge them to their workers or seek treatment because they fear losing their children.[323] This was evident in some of the cases we reviewed. Parents told us that they need someone "on their side" (in addition to their counsel) who is not affiliated with a CAS. Through our research, we found that in many other jurisdictions, parents who are involved in the child welfare system also receive support from social workers, peer mentors, or others who are not child protection workers.

In this chapter, I make recommendations to provide better information and support to parents, including properly funding the band representative program. I know of no better example in Ontario where workers strive to meet the holistic needs of parents and families in their communities. I also make Recommendations to help parents dealing with substance use issues, including enhancing family-inclusive treatment options and strengthening partnerships and education. Finally, I recommend that CASs continue to involve parents and youth in dialogue and decision making, and work toward achieving equity in the child welfare system.

Funding band representatives

> *You need to invest a lot in a person, like you would do for someone in your own family.*
>
> —Participant in our meeting with band representatives

The *CFSA* recognizes that Indigenous peoples have an interest in decisions affecting the well-being and future of children from their communities, and that the children also have a right to know about and to be a part of those communities. If a child is "an Indian or a native person, a representative chosen by the child's band or native community"[324] must be notified and has the right to participate in child protection legal proceedings with the parent and CAS. These representatives are commonly

[323] This was one of the findings of community-driven research undertaken by the WHAI. Women & HIV/Aids Initiative (WHAI), *Collective Action, Community Change: A Provincial Situational Analysis* (Toronto: WHAI, 2017), 18, accessed at WHAI report.

[324] *CFSA,* s 39(1)(4). The *CYFSA* s 79(1)(4) updates this language and extends this provision as follows: "In the case of a First Nations, Inuk or Métis child … a representative chosen by each of the child's bands and First Nations, Inuit or Métis communities."

known as "band representatives." The *CYFSA* will give Métis and Inuit communities the same rights respecting notification and representation that the *CFSA* currently provides for First Nations.

Through our discussions with First Nations as part of our mandate, we gained a greater understanding of the multifaceted role of band representatives and the holistic support they provide, including the following:

- Helping parents and others to access many kinds of services;
- Providing crisis support;
- Participating in interactions between families and CASs, such as:
    - Providing input into the development of Plans of Care;
    - Ensuring that children's cultural needs are being met;
    - Monitoring temporary care and other agreements; and
    - Attending school and home visits with societies;
- Finding homes for children in their communities and negotiating customary care agreements;
- Supporting and advocating for families throughout often lengthy child protection proceedings (e.g. advising parents of their rights, preparing and filing documents, attending court); and
- Educating CAS workers and the court about their community's history and culture.

In April 2017, we co-hosted with the Association of Iroquois and Allied Indians a meeting of band representatives. We heard about the enormous pressure they are under as they manage a wide scope of duties and heavy workloads (one participant had 70 cases, 17 of them in court). They emphasized the need for ongoing training to help them perform their role.

Most band representatives are not lawyers, but they assist people in their communities to navigate the legal system and participate in legal proceedings. Some band representatives singlehandedly represent vast territories that may contain several CAS catchment areas. They struggle to meet the complex needs of families who may be dealing with intergenerational trauma and a legacy of involvement with CASs. With little time for self care, the people (predominately women) doing this work experience high stress levels and burnout rates.

Until 2003, the federal government funded First Nations to hire band representatives.[325] We heard in our meetings that even this funding was inadequate to cover the actual work they did. Since 2003, there has been no dedicated funding. Some First Nations have child and youth workers, funded through other programs, who fulfill some of the functions of band representatives. Others, particularly smaller communities, do not have band representatives at all.

In 2007, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations filed a complaint under the *Canadian Human Rights Act*[326] against the Department of Aboriginal Affairs and Northern Development Canada.[327] The complaint alleged that the federal government's funding and delivery of First Nations child and family services on reserves was discriminatory. On January 26, 2016, the Canadian Human Rights Tribunal ruled in their favour and

[325] *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (INAC)*, 2016 CHRT 2 at para 230.
[326] *Canadian Human Rights Act* R.S.C., 1985, c. H-6.
[327] The department is now known as the Department of Indigenous and Northern Affairs Canada (INAC).

ordered the Government of Canada to "[c]ease the discriminatory practice and take measures to redress and prevent it."[328]

The Tribunal made clear the federal government's responsibility for supporting child and family services to First Nations peoples living on reserve.[329] It noted that denying funding for band representatives is a "glaring example" of the federal government's failure to put into action its guiding principle to support culturally appropriate services in First Nations communities.[330]

In March 2016, the Chiefs of Ontario brought a motion to enforce the Tribunal's ruling. The motion sought an order requiring that "INAC [Indigenous and Northern Affairs Canada] immediately fund Band Representative services for Ontario First Nations, at the level of actual costs incurred by First Nations."[331] On February 1, 2018, the Tribunal released its decision on the motion. It ordered the federal government to fund band representatives (retroactive to January 26, 2016) by February 15, 2018 at the actual cost of providing those services.[332]

In 2011, John Beaucage, Aboriginal Advisor to the then Minister of Children and Youth Services, recommended that "every effort should be made by all levels of government to re-institute the Band Representative program."[333] Adequately funding band representatives is essential to allowing First Nations to fulfill their statutory role under Ontario's child welfare legislation and to moving forward toward achieving the Truth and Reconciliation Commission's Calls to Action on child welfare.[334]

Recommendation:

13. The federal government should immediately provide adequate funding for First Nations band representatives. The Ontario government should help to support their ongoing training needs. The Ontario government should also move quickly, in consultation with Métis and Inuit peoples, to determine how representatives from these communities will be identified and funded to participate in child protection proceedings under the *Child, Youth and Family Services Act*.

Support to parents

With the input of participants in our restorative process and our research into best practices in other jurisdictions, we have identified three promising forms of support that would assist parents

[328] *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (INAC)*, *supra* note 325 at s 7B.
[329] *Ibid* at paras 78-110.
[330] *Ibid* at para 425.
[331] Notice of Motion of the Interested Party Chiefs of Ontario returnable March 22, 2016, filed in *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (INAC)*, Docket No. T1340/7008 at para 4. Notice of Motion of the Interested Party Chiefs of Ontario.
[332] *First Nations Child and Family Caring Society of Canada et al.* v *Attorney General of Canada (INAC)*, 2018 CHRT 4.
[333] John Beaucage, *The Aboriginal Advisor's Report on the Status of Aboriginal Child Welfare in Ontario* (Toronto: Ministry of Children and Youth Services, 2011), Recommendation 8, accessed at Status of Aboriginal Child Welfare in Ontario.
[334] Truth and Reconciliation Commission of Canada, *Honouring the Truth*, Calls to Action, Call to Action 1. 1, accessed at TRC Calls to Action.

involved in the child protection system: social workers to assist parents' counsel, navigators for parents and peer mentors. All of these supports would be provided independently of CASs.

Social workers to assist parents' counsel

We learned that parents' counsel, in addition to representing their clients in court, often help them (and sometimes their families) to access community services and supports. Doing so puts counsel in a difficult position. They do not always have complete knowledge of the community resources available, and in any event, they need to focus on the legal process. They do not receive funding from LAO to cover non-legal work.

Social workers, funded by LAO, could provide this important support to parents, working alongside parents' counsel as a "social work assist." The parents' lawyers would consult with the social workers as needed, for example to evaluate plans for clients and to obtain information on substance use treatment or other services in the community. The social workers would also directly assist and advocate for parents, for example by providing information, helping them to access services, and supporting them at meetings and court hearings.[335]

As part of the parents' legal teams, the social workers would be bound by solicitor-client privilege. Parents could be open about their situations and share their concerns without fear that they would be reported to the CAS.[336] This service would only be available in cases where a legal proceeding has begun. It would not be available to parents working voluntarily with a CAS.

Recommendation:

14. Legal Aid Ontario should undertake and evaluate a pilot project to provide funding for social workers to assist parents' counsel and provide direct support to parents involved in child protection proceedings. This project should be developed in consultation with parents' counsel and parents who have experience with the child protection system.

Navigators for parents

A second way of enhancing support for parents, whether or not legal proceedings are under way, would be to provide navigators for parents. Navigators would actually be most beneficial to parents at the first instance of CAS involvement with a family. They would assist parents or other caregivers to connect to community services and support, and help them steer through the child welfare and legal systems. For example, they could explain the child protection and court processes, accompany parents to appointments with the CAS or to court appearances, assist them to communicate their needs to the CAS, and provide emotional support and encouragement. A variety of practitioners could fill this role, including social workers, social service workers or community workers.

[335] For an example of social workers assisting parents' counsel, see Washington State Office of Public Defense (OPD), *Parents Representation Program Social Worker Practice Standards* (Olympia: OPD, 2008), accessed at Social Workers Assisting Parents' Counsel.

[336] The Supreme Court of Canada and most law society codes of conduct recognize a public safety exception that may allow or require disclosure in cases where there is impending harm to a person.

MAG already provides a similar service for women involved in family law cases in which there are allegations of domestic violence. The Family Court Support Worker Program,[337] which exists in every court location in Ontario, matches women with workers who provide them with information and referrals, helps them prepare for court proceedings, and provides other supports. Many of the women who receive assistance from these workers also have legal counsel.

Most of the Family Court Support Workers work in women's shelters or other community programs serving women who are victims of violence. Similarly, navigators for parents would be ideally placed in existing community-based settings such as Community Health Centres, Indigenous Friendship Centres, Youth Wellness Hubs,[338] or Early Childhood Development Addiction Initiative programs. These provide welcoming, non-judgmental environments, integrated care and access to a wide range of supports.

Recommendation:

15. The Ministry of Children and Youth Services, with partner ministries such as the Ministry of Health and Long-Term Care and the Ministry of Community and Social Services, and in consultation with parents who have experience with the child protection system, should undertake and evaluate a pilot project to provide navigators for parents in community-based settings in three different parts of the province, including the North.

Peer mentors

> *You need to have some kind of advocate for people who is not biased. I think you need a grandmother—maybe find a 92-year-old who just has common sense.*
>
> —A parent affected by the testing

In our discussions with parents who were affected by the testing or involved generally in the child protection system, we heard about the importance of receiving support from other parents who had "been through the system." They emphasized that peer support was vital to helping them cope day to day and to their success over the long term in continuing to care for their children. Peers have experience to share and can offer insight and support without pressure or judgement.

We learned about promising initiatives in Ontario that are already providing this kind of support, but they require secure funding to be sustainable and to grow. Community Action for Families,[339] a

[337] For more information on this program, see "Family Court Support Worker Program," Ministry of the Attorney General, accessed at Family Court Support Worker Program. For an infographic on the program, see "Getting Help from a Family Court Support Worker," Legal Aid Ontario, 2017, accessed at Getting Help from a Family Court Support Worker.

[338] Youth Wellness Hubs provide walk-in mental health and substance use services, as well as other health, social, and employment supports, for youth up to 25 years old. The program is likely to include young parents with CAS involvement. The hubs also provide care navigation and peer support. See Evidence Exchange Network for Mental Health and Addictions (Eenet), *Youth Wellness Hubs Ontario Initiative* (September 27, 2017), accessed at Youth Wellness Hubs.

[339] "Community Action for Families," accessed at Community Action for Families.

community of "mothers and allies," offers a weekly support group for mothers. They support mothers to attend CAS meetings and court, provide resources, and share knowledge and skills.

Parents Anonymous® provides a different support model. Family and Children's Services of Renfrew County and the Algonquins of Pikwàkanagàn offer this program.[340] It includes a weekly support group for parents and caregivers with a separate group for children and youth, parent mentors, and a helpline staffed by trained group facilitators and leaders who are parents.

Ontario lags behind other jurisdictions, including the United States, Australia and the United Kingdom, in providing peer mentors (often called "parent partners") for parents involved in the child protection system. In many of the jurisdictions we looked at, these are structured programs where parents apply for the position of peer mentor and receive training and ongoing support.[341]

A number of programs have been evaluated and show positive outcomes. For example, an independent evaluation of the Parents Helping Parents program in Contra Costa, California found that mentoring by a parent partner resulted in significant improvement in the rate of parent-child reunification.[342] An evaluation of the Child Welfare Organizing Project in East Harlem, New York City found that fewer children came into care after trained parent mentors began attending child safety conferences to support the parents involved. The evaluation found that involving parents as peers is "undoubtedly a step forward towards building a family-centered practice in a highly adversarial and legal environment."[343] The American Bar Association Center on Children and the Law is a leader in promoting parent representation through a multidisciplinary team approach where parents are supported by a lawyer, social worker, and parent mentor. This approach has shown significantly better results in keeping children out of foster care.[344]

Recommendation:

16. The Ministry of Children and Youth Services should develop a permanent, application-based funding program to support peer mentorship for parents who are involved in the child protection system. This program should be developed in consultation with parents who have experience with the system.

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[340] "Parents Anonymous"® is a network of parent mentoring groups based in the United States. Accessed at Parents Anonymous. The Family and Children's Services of Renfrew County program, operating in partnership with the Algonquins of Pikwàkanagàn, is accredited by Parents Anonymous Inc.® and is the first of its kind in Canada. Accessed at Parents Anonymous of Renfrew County.

[341] For information on developing such programs, see U.S. Department of Health and Human Services, Child Welfare Capacity Building Cooperative, *Parent Partner Program Navigator: Designing and Implementing Parent Partner Programs*, accessed at Parent Program Navigator. See also Maureen Marcenko, Ross Brown, Peggy R. DeVoy, and Debbie Conway, "Engaging Parents: Innovative Approaches in Child Welfare," *American Humane* vol. 25, no. 1 (2010): 23-24, accessed at Engaging Parents.

[342] "Family Engagement: Partnering with Families to Improve Child Welfare Outcomes," Children's Bureau, September 2016, accessed at Family Engagement - Partnering with Families. See 9, "Engaging parents as peer mentors at the program level."

[343] Marina Lalayants, *Child Welfare Organizing Project: Community Connections: Program Evaluation Final Report* (New York: Hunter College, City University of New York, 2012), 9, accessed at Program Evaluation Report.

[344] For examples of this approach and outcomes in New York, Detroit, and Washington State, see American Bar Association Center on Children and the Law, *ABA National Project to Improve Representation for Parents: Investment that Works*, accessed at Representation for Parents.

Parents' guide to child protection

> *We started using Motherisk* [the clinic] *right away. I used to be a drug addict but I stopped when I found out I was pregnant. And I was upfront with the hospital. They called children's aid and they came in and started speaking to me and I was so vulnerable at that point. I didn't know what was going on. I was very honest with them but they kept using my history of drug abuse—I'm guessing to scare me.*
>
> —A parent affected by the testing

Many parents who were affected by the Motherisk testing told us that they did not know their rights. They said they went for testing because they thought it was what they had to do to either keep their children or work with the CAS toward regaining custody of their children. We heard from many parents who found the child protection system intimidating and confusing.

Although it would not be a substitute for personal supports, a guide to child protection would help parents better understand their rights and how the child protection system works. It would help empower parents with information to participate in the decision making in their own cases and to recognize when they may need legal assistance. The guide could provide information on the following:

- The child protection system, including principles and key provisions of the *CFSA/CYFSA* and the role of CASs;
- Legal proceedings, including the purpose of various applications and motions, the parties to a proceeding, what to expect, and the possible outcomes;
- Legal rights, such as the right to seek legal advice before consenting to testing, and other suggestions on when to consult a lawyer and apply for Legal Aid; and
- Community resources, like crisis support, health services, peer support, and organizations serving Indigenous, African Canadian, or other communities.

There are some excellent sources of plain language information on legal rights and the parents' guide could build on or be modelled after them. Examples include Community Legal Education of Ontario's Steps to Justice initiative[345] and Justice for Children and Youth's online information and publications on the legal rights of children and youth. The latter includes a guide to child welfare court for young people aged 12 or older.[346] Other jurisdictions, such as British Columbia[347] and Australia,[348] have developed comprehensive guides for parents involved in the child welfare system.

The parents' guide should be translated into multiple languages and be available in alternative formats.

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[345] Steps to Justice: Your Guide to Law in Ontario, *About Steps to Justice*, accessed at Steps to Justice.
[346] "Going to Court," Justice for Children and Youth, 2006, accessed at Going to Court.
[347] "Parents' Rights, Kids' Rights: A Parent's Guide to Child Protection Law in BC," Legal Services Society, British Columbia, 2015, accessed at Guide to Child Protection Law in BC.
[348] Western Suburbs Legal Service Inc., *Child Protection: A Guide for Parents and Family Members* (Newport, Victoria, Australia: Western Suburbs Legal Service Inc., 2008), accessed at Child Protection Guide.

Recommendation:

17. The Ministry of Children and Youth Services should fund the development of a comprehensive, plain-language guide on the child protection system for parents who are involved with a children's aid society. The Ministry should require that societies provide a copy of this guide to all parents at the time of their first interaction with them.

Support to address substance use issues

The challenge of legislated timelines

We saw in our file reviews and heard from parents affected by the testing that the legislated timelines are very challenging for people dealing with substance use issues. The *CFSA* prohibits children under six from being placed in temporary care for more than a year. The limit for children over six is two years.[349] The timelines are important for achieving permanent placements for children, but they do not fit the treatment process. Treatment is often lengthy and, with the potential for relapses, rarely linear. Accepting the need to seek treatment, finding an appropriate treatment provider (many have long waiting lists), attending treatment, and demonstrating a period of abstinence long enough to satisfy the CAS's and the court's expectations can often take many months.

The legislation does permit the court to extend the temporary care and custody time limits by six months if it is in the child's best interests to do so.[350] This provision can only be used in exceptional circumstances, but the courts have held that it can be used to help families who are working on overcoming substance use issues.[351] I strongly urge judges to consider parents' genuine efforts to address substance use issues and the barriers to accessing appropriate treatment when assessing whether to extend the statutory timelines.

Enhanced substance use treatment options for families

Parents can be afraid to admit that they have substance use issues for fear of losing custody of or access to their children. Some of the parents we spoke to who were affected by the Motherisk testing said they felt they had to choose between being a parent and seeking treatment. In the cases we reviewed, referrals to residential treatment were common, but parents could only attend if they gave up their children to temporary care. We learned through our discussions with substance use treatment providers that most individuals do not need residential care. They can receive treatment and continue to care for their children through the support of programs in the community.

We heard consistently that the shortage of treatment options that include children and families is a major obstacle for parents involved in the child protection system. Relationships, especially with family and children, play an important role in women's substance use, treatment, relapse, and recovery. Treatment that does not take into account relationships and include children is not as effective as family-inclusive treatment.[352] Mothers are typically the primary caregivers, but we also

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[349] *CFSA*, s 70(1) and *CYFSA,* s 122(1).
[350] *CFSA,* s 70(4) and *CYFSA,* s 122(5).
[351] *Kawartha Haliburton Children's Aid Society v KM and DT, (*2001), 110 ACWS (3d) 491 at para 77.
[352] Mothercraft/Breaking the Cycle, *The Mother-Child Study: Evaluating Treatments for Substance-Using Women: A Focus on Relationships* (Toronto: Mothercraft Press, 2014), accessed at A Focus on Relationships. See especially 31-35.

heard about shortages of treatment options for fathers. The severe lack of options in rural and remote parts of the province was particularly noted, as was the lack of culturally appropriate, anti-racist, and trauma-informed programs.

We learned of programs in Ontario that support parents to address substance use issues while continuing to care for their children and families. I highlight a few of them below. These types of programs would have to be scaled up in order to meet the needs of parents and children involved in the child welfare system throughout Ontario. Barriers to accessing these programs would also have to be identified and removed.

Rooming-in programs

> *We need to treat maternal substance use as a health issue for both the mother and the child.*
>
> —The Kingston House of Recovery for Women and Children, written submission

The Kingston General Hospital and Belleville General Hospital both have rooming-in-programs for new mothers and their infants who are born opioid dependent. The infants stay with their mothers to promote uninterrupted bonding instead of being moved to intensive care units. Mothers and infants are assessed by a multidisciplinary team. The mothers receive education and support through partnerships with community-based substance use treatment services. These programs have resulted in shorter hospital stays and improved outcomes for infants and mothers.[353]

Early Childhood Development Addiction Initiative

Through the Early Childhood Development Addiction Initiative, funded by the Ministry of Health and Long-Term Care, over 30 programs have been developed in Ontario specifically to meet the unique needs of women with problematic substance use who are pregnant or parenting young children. These predominantly outpatient-based programs attend to the needs of women holistically, addressing substance use in the context of other areas of mother and child well-being, including parenting, mental health, housing, and food security. The programs also actively support women in working with child welfare authorities. They sometimes offer child care and transportation services to support participation, but dedicated funding for this assistance is needed. Lack of child care and transportation are significant barriers to mothers' access to programming.[354] Despite the success of

[353] For a discussion of these programs, see Jessica Leeder, "Born addicted to opioids," *Today's Parent*, September 16, 2017, posted at *Macleans*, "Editor's Picks," accessed at Born Addicted to Opioids. For a description and evaluation of Kingston's program, see Adam Newman, Gregory A. Davies, Kimberly Dow, Belinda Holmes, Jessica Macdonald, Sarah McKnight and Lynn Newton, "Rooming-in care for infants of opioid-dependent mothers: Implementation and evaluation at a tertiary care hospital," *Canadian Family Physician* vol 61, no. 12 (December 2015): e555-61, accessed at Rooming-In Care. For an article on Belleville's program, see Sarah Bridge, "Opioid-dependent babies: How an Ontario hospital is helping newborns cope," *CBC News*, December 17, 2016, accessed at Opioid-Dependent Babies.

[354] We spoke to two researchers, Dr. Karen Milligan and Dr. Karen Urbanoski, about their work on substance use treatment programs for women. In addition to the need to address systemic barriers to women's participation in these programs, they emphasized how important it is that such programs develop a community of practice to share information that would help them evaluate and improve their programs. They

these programs in promoting the well-being of both women and children,[355] this form of treatment is not available in many Ontario communities.

Residential treatment programs

There are almost no residential treatment programs in Ontario that include children and families. One rare example is The Rev. Tommy Beardy Memorial Wee Che He Wayo-Gamik Family Treatment Centre, which serves Indigenous communities in the Sioux Lookout area. A six-week residential program for whole families is followed by a one-year after-care plan.[356] The Centre can accommodate five or six families at a time, who typically wait six months to a year to be accommodated. A team in Kingston, including some of the people behind the hospital's rooming-in program, is raising funds to build The Kingston House of Recovery for Women and Children that would accommodate 24 women with up to two children each for a minimum of six months.[357]

Recommendation:

18. The Ministry of Health and Long-Term Care should support the development of more substance use treatment programs that are family-inclusive, and should address the systemic barriers that parents and other caregivers face in accessing and completing these programs.

CAS and substance use treatment provider partnerships

In our meetings with CASs and substance use treatment providers, they strongly recommended collaboration to increase learning and understanding between the two sectors and to improve support to parents. A general lack of knowledge about substance use and a focus on abstinence contributed to the CASs' frequent use of Motherisk testing. At the same time, substance use treatment providers do not always fully appreciate the pressures CAS workers are under to support parents and families, assess risk, and protect children from harm.

We learned of a partnership between CASs and substance use treatment providers that was extremely successful in improving outcomes for parents. From 2009 to 2011, the CAS of Toronto (CAST) received a grant from MCYS for a program known as "Children Affected by Substance Abuse" (CASA). The program was a collaboration between child welfare (CAST and the OACAS), substance use treatment (Jean Tweed) and mental health (Centre for Addiction and Mental Health) service providers.

The program had three goals:

1. Improve the knowledge and skills of child welfare workers serving families with substance use issues. A consultant from Jean Tweed worked with CAS intake staff, including attending home visits, and provided comprehensive training to staff;

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recommended that mechanisms for systematic evaluation be integrated into programs at the local and provincial level.

[355] For the findings of a three-year assessment of the program, see Ontario's Early Childhood Development Addiction Initiative (ECDAI), *Reaching Women, Reaching Children* (Toronto: Jean Tweed Centre, 2008), accessed at ECDAI Program Evaluation.

[356] "The Rev. Tommy Beardy Memorial Wee Che He Wayo-Gamik Family Treatment Centre," accessed at Family Treatment Centre.

[357] Wency Leung, "How family ties help moms unbind from addiction," *The Globe and Mail*, December 3, 2017, accessed at Unbinding from Addiction.

2. Develop an online curriculum on substance use, available to all child welfare workers in the province; and
3. Develop best practice guidelines for intake workers involved with families with substance use issues. (The Catholic Children's Aid Society of Toronto was also a partner on this component.)

A second phase of the project, also funded by MCYS, was undertaken from 2011 to 2012 to expand the program to the Catholic Children's Aid Society of Toronto, Native Child and Family Services of Toronto, and Jewish Family and Child Services. Evaluations of the project found significant improvements in the CAS workers' understanding of substance use issues and better outcomes for families.[358]

This program assisted families where a parent was struggling with substance use. In particular, the participation of a substance use treatment provider as part of the CAS team was critical to assessing a parent's strengths and needs as soon as a family came to the attention of a CAS. I believe it is an example of the kind of prevention and early intervention services envisaged by the Preamble to *CYFSA*.

Recommendation:

19. The Ministry of Children and Youth Services should consult with children's aid societies and substance use treatment providers to develop a program, similar to the former Children Affected by Substance Abuse program, to support partnerships between these two sectors. The program should provide for substance use treatment providers working alongside society staff. It should be funded on a permanent basis and expanded across the province.

Ongoing education about substance use and parenting

> *When you look at somebody that has an alcoholic problem, you're looking at them like, 'Okay, they're not able to function, they can't do anything.' And, at that time, I was at college and I was keeping up with everything. I had a three-bedroom townhouse and I was making sure that I was making all my payments and doing everything accurately.*
>
> —A parent affected by the testing

Substance use affects many of us,[359] but few of us fully understand it. We often heard through our restorative process that the Laboratory seemed to fill that knowledge gap for CASs and for society generally. However, even if the testing had been reliable, it offered an oversimplified solution to a complex problem. I believe everyone who plays a role in making child protection decisions should

[358] For the evaluation of the second phase of the project, see CAS Toronto, Jean Tweed, and Child Welfare Institute, *Children Affected by Substance Abuse (CASA), Phase 2 (2011): Impact of CASA-2 Training & Consultations on Toronto Child Welfare Workers' Knowledge, Skills & Confidence in Serving Families with Substance Misuse* (Toronto: Child Welfare Institute, March 2012), accessed at CASA Phase 2 Evaluation.

[359] "It is estimated that four out of every 10 people in Ontario have or have had a family member or a friend who has experienced a problem related to substance use." "Resources for Teachers and Schools: Educating Students about Drug Use and Mental Health - Building Teacher Confidence and Comfort about Substance Use and Abuse: Grades 1-10," Centre for Addiction and Mental Health, accessed at Educating Students about Drugs.

have the opportunity to learn more about substance use and its effect on parenting and on children. This education must be informed by an anti-racist and anti-oppression framework. Learning must be ongoing to keep up with changing patterns in substance use and with the evolution of our perceptions and understanding of substance use and treatment approaches.

Recommendations:

20. The Ministry of Children and Youth Services, the Ontario Association of Children's Aid Societies, and the Office of the Children's Lawyer should ensure that child protection workers, children's aid society counsel, and children's counsel respectively receive ongoing education about substance use issues and their impact on parenting.
21. The Law Society of Ontario, and other continuing legal education partners such as the Ontario Bar Association and Legal Aid Ontario, should ensure that lawyers representing parents and other caregivers have access to ongoing education on substance use issues and their impact on parenting.
22. The National Judicial Institute, in collaboration with the Superior Court of Justice in Ontario and the Ontario Court of Justice, should design and deliver education for judges that addresses substance use issues and their impact on parenting.

Parent and youth advisory committees

Through our restorative process, we heard about how important it is for parents and youth to have a voice in their CAS services.[360] A number of CASs already have youth advisory committees and some involve parents in consultations and other initiatives. Youth and parents with experience in the child protection system have valuable knowledge to share. They can help shape, evaluate, and improve policies and practices to make them more successful. When they are equipped and supported to give feedback on services or to help deliver them, they also gain confidence and skills they can share in their communities. Involving youth and parents empowers individuals and contributes to stronger communities.

A number of American child welfare agencies involve people who have experience with the system in decision making (e.g. serving on hiring committees for child protection staff), training, and creating resource materials for their peers. To successfully engage youth and parents would require careful consideration of factors such as compensation, transportation, child care, and scheduling. For example, one study we looked at reported that participants had to take time off work to attend committee meetings during the work day, which many people would not be able to afford to do.[361]

[360] On the importance of including parents and youth in child welfare decision making, see Gary Dumbrill and Winnie Lo, "There is No Anti-Oppression Without Service Users' Voice," in *Walking This Path Together: Anti-Racist and Anti-Oppressive Child Welfare Practice*, 2nd edition, eds. Jeannine Carrière and Susan Strega (Halifax: Fernwood Publishing, 2015), 16-19.

[361] National Technical Assistance and Evaluation Center for Systems of Care, *Family Involvement in the "Improving Child Welfare Outcomes through Systems of Care" Initiative* (Washington, DC: U.S. Government Printing Office, 2010), accessed at Improving Child Welfare Outcomes. See section 5.3, 32-35, "Systems-Level Family Involvement."

I am aware that One Vision One Voice recommends that CASs establish African Canadian Advisory Committees.[362] Advisory committees must also include Indigenous parents and youth, particularly where Indigenous communities are overrepresented among the families served by a CAS. The OACAS and individual CASs are in the best position to decide how to establish advisory bodies so that African Canadians, Indigenous peoples, youth, and parents are all meaningfully involved.

Recommendation:

23. Every children's aid society in Ontario should establish a parent advisory committee and a youth advisory committee and should engage these committees in meaningful dialogue about the society's policies, services, and engagement with the community.

Equity of Ontario's child welfare system

> 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.
>
> 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.
>
> —From the Preamble to the *Child, Youth and Family Services Act*

Over the past two years, I have had the privilege of meeting with and learning from many people from Indigenous and African Canadian communities. One of the fundamental principles of my Terms of Reference was to promote meaningful participation by these communities, which are overrepresented in the child protection system. As a province that strives for equity and as a society that cares about the well-being of children and families, we must continue our efforts to identify and address longstanding injustices that have contributed to this overrepresentation.

With the new *CYFSA*, One Vision One Voice, the work of the Ontario Human Rights Commission on racial profiling,[363] the Ontario government's anti-racism legislation and strategy,[364] and the tireless efforts of a great many community organizations over many decades, I believe there is strong momentum toward addressing systemic racism in the child welfare system.

The child welfare system is complex. It interacts with many other systems (e.g. the legal system, policing, education, health care) and involves many different partners. Removing systemic barriers is a shared responsibility and cannot be shouldered by a single organization. However, given the

[362] "Establish an African Canadian Advisory Committee that includes former African Canadian youth in care, other service users, and community partners to advise the board, identify issues, and provide insights into opportunities to reduce disproportionalities and better serve African Canadian children, youth and families." One Vision One Voice 2016b, 8, "Practice 1: Commit to Courageous Leadership," Activity 1.8.
[363] Ontario Human Rights Commission 2017.
[364] "Ontario Passes Anti-Racism Legislation: Historic Legislation Promotes Equity for Racialized and Indigenous Peoples," Anti-Racism Directorate, Government of Ontario, "Newsroom," June 1, 2017, accessed at Ontario Anti-Racism Legislation.

central role of CASs in assisting and intervening in families, my Recommendations focus on the OACAS.

In my discussions with the OACAS and many CAS workers, I observed a strong commitment to improving outcomes for Indigenous and African Canadian children and families. The OACAS has taken important steps toward addressing systemic racism and achieving reconciliation with Indigenous peoples.[365] However, getting to the root of discrimination and making real change requires strong leadership, sustained focus, and dedicated resources. Systemic change cannot be achieved through a special project or one-time initiative, no matter how effective. I strongly believe that the OACAS must continue to make this work a priority and that MCYS must support the OACAS to do this.

Recommendations:

24. The Ontario Association of Children's Aid Societies should continue to work with Indigenous and African Canadian communities to identify and address systemic racism to achieve better outcomes for children, youth, and families from these communities.
25. The Ministry of Children and Youth Services should provide the Ontario Association of Children's Aid Societies with adequate resources to undertake the work described in Recommendation 24, including funding a permanent Director of Equity position (similar to the permanent Director of Aboriginal Services) to work with children's aid societies across the province to implement the One Vision One Voice Race Equity Practices and to continue to address systemic racism beyond these practices.

[365] In October 2017, the OACAS hosted a gathering to acknowledge and apologize for the harmful role child welfare has played historically, and continues to play, in the lives of Ontario's Indigenous children, families, and communities. For more information, see "Child Welfare Apologizes to Indigenous Families and Communities," Ontario Association of Children's Aid Societies, October 30, 2017, accessed at Apology to Indigenous Families and Communities.

13. Promoting Education and Collaboration

In all of our discussions, participants emphasized the need for enhanced education on child protection for everyone involved in the system, including social workers, counsel and judges. We also heard clearly that as important as it is, education alone will not bring about fundamental changes to the system. Other measures are also necessary to ensure accountability for removing systemic barriers. Youth, parents, and members of Indigenous and racialized communities must also have meaningful input into the development of child welfare policy and services, and they must be represented on boards of directors, in senior management, and in other positions of power. I am recommending the creation of parent and youth advisory committees and a permanent Director of Equity position at the OACAS as steps toward these goals.

Many participants highlighted the need for ongoing opportunities for collaboration, much like the Motherisk Symposium. The Symposium brought together people affected by the testing, child welfare workers, lawyers, academics, scientists, community workers and others. Preventing problems similar to the Motherisk testing will require reflection and action from all of these individuals and sectors.

In this chapter, I make recommendations to strengthen the practice of social work and child protection law. I also recommend that a stakeholder advisory committee be established to provide input into the implementation of the Recommendations in this Report and to organize an annual child protection summit.

Enhancing social work education on child welfare

As we saw in the cases we reviewed, child protection workers play a critical role in supporting families. They carry a heavy burden of responsibility for the safety of children and work under enormous pressure. In our discussions with workers, we heard how they fear “making a mistake” that would lead to the harm or death of a child. That fear is especially acute following an inquest into a child’s death. Their work always involves a level of risk, and the associated stress contributes to a high staff turnover. We also heard from workers, as well as parents, about the difficulties workers face in balancing their often conflicting roles of both supporting and monitoring parents.

Child protection workers are usually the first point of contact between families and the child welfare system. They must use their skills to assess and draw conclusions about complex family and parenting issues. They must be supported to do this important work and to have confidence in their judgement through appropriate education and experiential learning opportunities.

Most child protection workers have a degree or diploma in social work or a related field. However, not all social work schools offer a child welfare program. I believe they should, in the interest of promoting the well-being of Ontario’s children and their families. We spoke with professors responsible for the development of the child protection stream at McMaster University’s School of Social Work and were impressed with their approach. To create their program, they partnered with the local CAS and actively involved parents who had experience with the child protection system in program development and delivery.

The OACAS provides ongoing training for child protection workers in general areas such as human rights and accommodation, changes to legislation, and more specific issues arising in the course of a CAS worker’s responsibilities such as caseload management. I am very encouraged by the OACAS’s

new curriculum and ongoing professional development for child protection workers (the Child Welfare Pathway to Authorization Series),[366] launched in January 2017. It includes training on equity, human rights, and anti-racism, with a focus on Indigenous peoples. Workers must complete the required courses within the first six months of being hired and pass an exam. During this period, the scope of their work with families is limited. As they gain knowledge and experience, they take on additional responsibilities.

Given the overrepresentation of Indigenous and African Canadian families in the child protection system, anti-racism training is vital. The Truth and Reconciliation Commission's Calls to Action include ensuring that social workers, lawyers, and law students receive appropriate education on the history and legacy of residential schools and the rights of Indigenous peoples.[367] One Vision One Voice calls for mandatory and ongoing anti-racism training and other tools such as the development of a resource and reference manual for workers to assist them in delivering effective services to African Canadian families.[368]

Recommendation:

26. All social work schools in Ontario that do not already do so should offer a specialized child welfare program, which should include placements in children's aid societies or related agencies serving parents and children. These programs should be developed with the input of parents and youth who have experience with the child welfare system. Social work schools should also ensure that their students are taught about the legal framework and social context for child protection work, including training on systemic racism.

Increasing education opportunities for law students and child protection lawyers

I made recommendations in Chapter 11 to help ensure the reliability of expert evidence and to strengthen the role of parents' counsel. However, I think more can be done to train and prepare young lawyers to practise child protection law. There is a shortage of lawyers with child protection experience in many areas of Ontario. In a number of instances where we referred people who were substantially affected by the Motherisk testing to a lawyer, we had difficulty finding a local lawyer to take their cases.

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[366] See "Revamped curriculum launched for Ontario's child protection workers," Ontario Association of Children's Aid Societies, 2017a, accessed at New Curriculum.

[367] Truth and Reconciliation Commission, *Honouring the Truth*. The report's "Calls to Action" urge all levels of government to commit to reducing the number of Aboriginal children in care, in part through providing education for child protection workers, lawyers and law students. The report notes that all of them should learn the history and impacts of the residential schools. Social workers should also learn about the "potential for Aboriginal communities and families to provide more appropriate solutions to family healing." (Call to Action 1iii and iv). Cultural competency training for lawyers and law students should also include "the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations." They should also receive "skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism." (Calls to Action 27 and 28). Accessed at TRC Calls to Action.

[368] See One Vision One Voice 2016b, in particular, Practice 8 (Activities 4, 5 and 7) and Practice 9 (Activity 2), 16-17.

We heard repeatedly from lawyers that they face barriers to practising in child protection, including a lack of strong mentors and few continuing education opportunities. Child protection work tends to be undervalued in the legal profession, despite its importance and complexity.

Many law schools offer only one optional course on child protection, one module in courses focused more broadly on family law or children and the law, or nothing at all. This is in contrast to the numerous courses on criminal, civil and business law.

Against this background, it is encouraging to see that some law schools are offering specific courses focused on child welfare, and several have been developing ways for law students to get hands-on experience:

- Professor Shelley Kierstead of Osgoode Hall Law School developed an externship in collaboration with LAO, the four Toronto CASs and OCL. Participants take a course in child protection law in their first term. In their second term externship, LAO gives them some training on drafting documents and then they spend a few weeks with a parent's lawyer, a CAS, and the OCL.
- Students taking Professor Nicholas Bala's course at Queen's Law are placed with a professional or agency in the family and children's law field. They may do some research, document drafting, or client interviewing, but the primary focus is on learning from observing, reviewing files, and discussion in class and with the placement supervision. Placements include CASs, Family Court duty counsel, Family Court judges, Frontenac Youth Diversion, the Victim Witness Program and family law lawyers.
- Under Professor Gemma Smyth, Windsor Law offers an externship program for second and third year students that includes child welfare placements.
- The Bora Laskin Faculty of Law at Lakehead University offers a focus on Northern Ontario, including Aboriginal and Indigenous Law. Every course has a practical component and third year students are given a 15-week practice placement.

Evidence courses, which are not mandatory but are well subscribed, rarely if ever discuss evidence in the child protection context. I believe that if such courses incorporated a discussion of relevant principles within the context of child protection, and if more law schools offered focussed courses and clinical opportunities in the field of child welfare, it would raise the profile of this area of practice and would better equip future lawyers to meet the needs of children, parents, and families.

There are relatively few continuing legal education opportunities for child welfare lawyers. Notable exceptions are programs held in Ottawa and Toronto each year. In Ottawa, the CFSA Defence Bar of Ottawa and LAO present the "Child Protection Hustle," a two-day in-person and webcast event providing training and education for lawyers working in child protection in Ontario. In Toronto, the Law Society offers "The Intensive Child Protection Primer."

A very positive recent development is the creation of the Ontario Association of Child Protection Lawyers for parents' counsel.[369] (CAS lawyers are already represented by the Organization of

[369] "Ontario Association of Child Protection Lawyers," accessed at OACPL. David A. Sandor, a child protection lawyer in Windsor, Ontario, is the founder and the Acting Director.

Counsel to Children's Aid Societies.) This new association will provide public and professional education on child welfare, as well as advocacy for parents involved in the system.

Recommendations:

27. All Ontario law schools that have not already done so should develop and promote at least one course on child welfare, including experiential learning opportunities. Children's aid societies, the Office of the Children's Lawyer and Legal Aid Ontario should help facilitate these opportunities. Law schools should also incorporate child welfare content into other courses, such as Evidence, Constitutional Law and Indigenous Law.

28. The Law Society of Ontario, the Ontario Bar Association and other continuing legal education providers should offer regular continuing education opportunities for both new and more experienced child protection lawyers, including enhanced online learning and other resources, at a reasonable cost.

Policy guidance for CAS counsel

CAS lawyers are either in-house counsel or they are retained from private firms on a fee-for-service basis, and they have the usual solicitor-client relationship with the CASs. They take instructions from the client (usually the Family Services Worker) and do not generally have discretion to make the decision to withdraw applications or change the CAS position.

Crown attorneys[370] are employed by MAG, not the police. They have broad discretion in the prosecution of most of their criminal cases, including decisions to withdraw or reduce charges. They are governed by a special rule of the Law Society's Rules of Professional Conduct relating to prosecutors. The rule specifies that their prime duty is not to seek to convict but to see that justice is done through a fair trial on the merits.[371]

CASs have been given broad statutory power to act on behalf of the state to protect children at risk. Their actions are subject to *Charter* scrutiny. They have the authority to take steps not available to others, often with implications of great significance. However, their counsel do not have the discretionary powers of Crown attorneys, nor are they subject to the same special rules of professional practice. Nevertheless, I believe that CASs' unique status does suggest that their counsel have a special public interest responsibility, extending beyond that of counsel in other civil proceedings and closer to that of Crown attorneys in criminal matters. At a minimum, CAS counsel can play an important role in helping to ensure that child protection proceedings are fair, such as raising questions about the reliability of expert evidence. This, in turn, means they should be helped to recognize how to do so and be assisted in building their capacity to carry out their responsibilities.

Crown attorneys (or Prosecutors) are guided by the Crown Prosecution Manual developed by MAG. It provides guidance on a range of issues arising in criminal prosecutions. The manual's directive on expert evidence includes the following requirements that are relevant to the use of the Motherisk testing evidence:

> In preparing experts for their testimony, Prosecutors should ascertain from the expert the limitations on the expert opinion including their qualifications and any

[370] Crown attorneys prosecute the criminal charges laid by police officers.
[371] Rules of Professional Conduct, *Law Society Act*, Rule 5.1-3 and Commentary, accessed at Rule 5.1-3.

> limitations on the inferences that can be reliably drawn from the expert evidence. When presenting the expert evidence in court, Prosecutors should make every effort to ensure that those limitations are fully impressed upon the court.
>
> Where an expert expresses to the Prosecutor a concern that their evidence has left a misleading or inaccurate impression with the Court, the Prosecutor must immediately disclose this to the defence and in circumstances where the concerns are justified, it must be conveyed to the Court.
>
> A Prosecutor must report to her Crown Attorney adverse judicial findings or comments about an expert or her own concerns about an expert's participation in the criminal justice system.[372]

The manual also sets out the duties of Crown attorneys with respect to Indigenous communities, noting that widespread racism toward Indigenous peoples has led to systematic discrimination in the criminal justice system.[373]

There is no equivalent manual for CAS counsel. Creating such a resource document, tailored to child protection, would be helpful to CAS counsel and would provide consistency across societies in addressing common issues arising in their work. Along with other policies, it would provide clear guidance on the obligations of CAS counsel to verify to their satisfaction the reliability of expert evidence and to report any concerns they or the court might raise about scientific methods or specific experts. The manual should also recognize the particular context of child protection, including the impact of racism on Indigenous peoples and racialized communities and the importance of hearing the voices of children, youth, and parents.

Recommendation:

29. The Ministry of Children and Youth Services should lead the development and publication of a policy manual for children's aid society lawyers, modelled on the Crown Prosecution Manual. The manual should be developed in consultation with the Organization of Counsel to Children's Aid Societies, the Ontario Association of Children's Aid Societies and the Law Society of Ontario.

Certified Specialist designation in child protection

Lawyers can apply to the Law Society of Ontario for a Certified Specialist designation in about 15 practice areas such as criminal law, civil litigation, labour law, real estate law and family law.[374] To qualify as a Certified Specialist in any of those fields, lawyers must submit an application demonstrating that they have the required knowledge, skills and experience. Certification gives lawyers recognition in their fields and assures the public that they have met certain professional standards in the relevant field.

Family law is a recognized specialty area and lawyers can point to some aspects of child protection work when applying for specialist status, but they are not required to do so. Child protection is distinct from family law, which involves disputes between private individuals regarding rights to property and support, as well as the living and care arrangements for their children. As in criminal

[372] Ministry of the Attorney General, *Crown Prosecution Manual*, D. 12, Expert Evidence, accessed at Crown Prosecution Manual.
[373] *Ibid*, D. 20, Indigenous Peoples.
[374] "About the certified specialist program," Law Society of Ontario, accessed at Certified Specialist Program.

law, child protection involves the state as a party (represented by the CAS) and engages *Charter* rights.

Specialist certification in child protection (separate from general family law) would be a simple but effective way to raise the profile of child protection law and to acknowledge, within the legal community and for the public, the complexity and importance of this practice area.

Recommendation:

30. The Law Society of Ontario should create a Certified Specialist designation in child protection law for lawyers practising in this area.

Stakeholder advisory committee and annual child protection summit

To prepare for our Symposium during our restorative process, we created a system map to illustrate how many different sectors are involved in child protection. As we learned from participants, however, the vast and detailed map nevertheless inadvertently left out a number of organizations and some important context. This underscored for us the complexity of the child protection system and the need for the experience, knowledge, perspectives, and creativity of every group or community with a stake in the system. Diversity of input was crucial to getting to the root of the Motherisk testing issue. It will be equally important to improving child protection in Ontario for the future.

> *The Motherisk crisis can be seen as an opportunity to improve child welfare practice.*
>
> —Children in Limbo Task Force, written submission

Among the participants in our process, there was a strong commitment to continuing to collaborate. I am hopeful that the meetings we organized will be a catalyst for further dialogue, sharing best practices, exploring new ideas, and forging partnerships and networks. I am recommending an annual summit as a dedicated forum to facilitate this collaboration. The summit would provide an opportunity for the government to report on the progress in implementing the Recommendations in this Report and to seek input. In addition to being tasked with organizing the annual summit, a multi-stakeholder committee could also assist the government with advice on the implementation of the Recommendations.

Recommendations:

31. The Ministry of Children and Youth Services and the Ministry of the Attorney General should establish, as soon as practically possible, a committee to provide advice to them on the implementation of the Recommendations in this Report. The committee should be made up of key stakeholders, including youth and parents who have experience with the child welfare system, children's aid society workers and counsel, parents' counsel, community workers, academics, and others involved in the child protection and legal systems. Indigenous and African Canadian communities should be meaningfully represented on the committee.

32. The advisory committee described in Recommendation 31 should be supported to organize an annual multidisciplinary child protection summit, beginning in 2019. The

Ministry of Children and Youth Services and the Ministry of the Attorney General should report annually to the summit on the progress of the implementation of the Recommendations in this Report.

Conclusion

> *I'm battle weary but I'll never give up. I've succeeded, that's number one. And my message to anybody else is, even though the odds are stacked against you, you only lose if you quit. God gives us some kind of resolve and strength, if you make that commitment and you really mean it, to follow things through—and I did. About the only thing I'm really proud of myself for. The only reason or purpose for being here is that.*
>
> —A parent affected by the testing

> *Even to this day, there's that shadow and there's a rift.*
>
> —A parent taking about the long-term impacts of the testing

The Ontario government created this Commission recognizing that a review of individual cases affected by the Motherisk hair testing was necessary. In reviewing these cases, we came to see and understand the underlying issues that made possible the decades-long use of this unreliable evidence in child protection. My Recommendations are aimed at addressing these systemic issues. I hope that decision makers will consider them carefully and implement them expeditiously to help ensure that no family suffers a similar injustice in the future.

I believe that the Recommendations should be developed and implemented in consultation with the people they will affect most, including children and youth, parents, and Indigenous and racialized communities. They have direct experience with the child protection and legal systems and important knowledge to share. CASs, advocacy and peer support organizations, parents' counsel, and many others who work in child protection will also have specific expertise to contribute to the implementation process.

Even in cases where I found that the Motherisk testing had a substantial impact on the decisions made by societies and the court, it will be difficult for the parents and other caregivers who were affected to right these wrongs. In some cases, they cannot take legal action owing to family circumstances or the passage of time. For example, in one case, a mother whose children had been removed from her care and placed with kin had since died. In several cases, the children were already over 18 by the time we reviewed their cases.

In other cases, the parents could have sought a legal remedy to have contact with their children but decided against it. When we contacted one mother to tell her that we found that the testing had substantially affected the decision to remove her three children from her care, she said that she was not doing well and did not feel able to look after them. Another mother whose two children were adopted by a family member also decided not to act. She said she knew her children were happy and she did not want to disrupt their lives.

In reviewing individual cases, we were always acutely aware that there were real families involved. Behind every "case," we knew there were children, siblings, parents, extended families and sometimes wider communities—all forever changed. Each of their stories is unique and important. I would like to close my Report by talking about just a few of the families I determined were substantially affected by the Motherisk testing.

A paternal grandmother was developing a plan, with the support of her First Nation band, to care for her grandchild. The CAS ultimately rejected the plan because a single Motherisk hair test seemed to indicate that she was a chronic abuser of alcohol, which she denied. The child was made a Crown ward. The grandmother is now seeking legal advice to determine her future relationship with the child.

—

A newborn was placed in CAS care after the mother confirmed that she had a history of drug use. She participated in treatment and the CAS was working with her to reintegrate her child into her care. When her Motherisk hair test came back positive for cocaine use, the CAS retained care of the child and eventually sought an order for Crown wardship, with no access to the child, so that the child could be adopted. The mother consented because she did not believe she could win against the CAS and she did not want her baby to remain in limbo. By the time we advised her that the testing had a substantial impact on her case, the child had been with a foster mother for several years but she had not yet adopted her. The mother and foster mother agreed on an arrangement and the court issued an openness order along with the adoption order.

—

Three out of four siblings had already been adopted when we advised their parents that they had been substantially affected. They did not wish to take any action, but the children's paternal grandfather, who lives in another province, contacted the Commission. He did not want to disrupt the adoptions, but he did want to know about his grandchildren. He also wanted to learn more about his fourth grandchild who had special needs and had not been adopted. We helped him retain a lawyer who is working with him to determine what kind of access he might have to that grandchild.

—

The parents of two children were involved in a contentious separation. They reported each other to the CAS for substance abuse. After concerns that the mother was intoxicated in public and in conflict with her older child, the CAS apprehended the younger child and placed her with her father. The mother's access was initially supervised and she was required to go for drug and alcohol testing at the discretion of the society. Her access was later expanded, but when a Motherisk test indicated frequent heavy alcohol use, her access was again restricted. She obtained a test at a laboratory in the United States for the same time period as the Motherisk test. In its interpretation of this test, the US laboratory stated that "it is not possible to ascertain a pattern of use or diagnose alcohol abuse based solely on chemical testing of hair…. [T]hese results should not be used as an indication of alcohol abuse on the part of the subject." Nevertheless, on a summary judgment motion, the society obtained a custody order in favour of the father. After our finding of substantial impact, the mother retained a lawyer and was able to negotiate a 50-50 custody arrangement with the father.

—

The CAS became involved with a mother and her young child because of concerns about alcohol abuse, domestic violence, and transience. Her child was placed in care, then with kin, and then again in care when the kin placement fell through. The society requested that the mother do a Motherisk test. She disputed the results and refused to go for subsequent testing. The foster parents expressed a desire to adopt the child,

who now felt torn between them and her mother. The society required the mother to go for further hair testing to increase her access to her child. The mother refused because she did not think the testing was reliable. Her child was made a Crown ward, with access. Following our finding of substantial impact, the mother worked with the society to reintegrate her child into her life.

—

Two children were made Crown wards about six years ago and placed with their grandparents. The father's access to them was supervised, almost exclusively because he continued to question his Motherisk test results and was seen as combative and uncooperative. When we notified the CAS that decisions in his case had been substantially affected by the testing, the society worked with the family to increase the father's access to his children. The children were returned to their father on an extended visit, and there is now a court order placing them in their father's care subject to supervision. The children had spent about half of their lives out of their father's care.

These stories highlight how important it is that everyone who plays a role in the child protection system act extremely cautiously in making decisions to remove children from their parents' care, away from their families and their communities.

There is no certainty in child protection. The Motherisk hair testing seemed to offer that certainty, but it failed us. These stories show us that we must be much more careful in how we use expert evidence and that we must provide more support to child protection and legal partners to challenge its reliability. We must also listen more carefully to children, youth, and parents about what they need and want. It is my hope that through the counselling and legal services the Commission offered, and through our restorative process, some of the families harmed by the Motherisk testing will begin to find peace and healing. I propose my Recommendations as steps toward ensuring that no family will experience similar harm in the future.

Acknowledgements

Participants in our restorative process

My team and I would like to thank everyone who contributed to our restorative process by attending meetings and the Symposium, sending us written comments, and sharing information and advice with us on the Motherisk testing and broader child welfare issues. We sincerely apologize if we have missed anyone.

We have not included the names of people who were affected by the testing out of respect for their privacy and that of their children.

Idil Abdillahi
Grand Chief Joel Abram
Beatrice Abule
Gina Alexandris
D'Adrian Allen
O'Neil Allen
Rui Alves
Brad Bain
Rose Bakke
Professor Nicholas Bala
Molly Bannerman
Kelly Barbour
Emma Barz
Shawn Batise
Kaygon Beardy
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Alex Benn
Audra Bennett
Lisa Bernstein
Anne Bester
Mary Birdsell
The Honourable Peter T. Bishop
Jeff Blayways
The Honourable Jennifer A. Blishen
Michael Blugerman
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Mara Clarke
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Kathy Colakic
Pat Convery
Tanja Corovic
Dr. Emma Cory
Sandra Costain
Mary Ann Costea
Robin Cuff
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The Honourable George Czutrin
Paula David
Lori Davies
Donna Day
Sabreena Delhon
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Michael Denissov
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Contributors to the Commission's work

Thanks to all of the individuals and organizations who generously contributed to the Motherisk Commission's work over the past two years. Their thoughtful ideas and advice made our work better and their commitment to improving the child welfare system reinforced our optimism that positive change could result from the Motherisk testing tragedy.

Thanks to all of the people who were affected by the Motherisk testing who shared their stories with us and with the participants in our restorative process. We learned so much from them about how the Motherisk testing affected families. We were inspired by their courage and resilience.

Thanks to the Ontario Association of Children's Aid Societies and their members across the province. Without the cooperation and dedication of children's aid societies, we could not have carried out our mandate to help people affected by the Motherisk testing.

Thanks to The Honourable Susan E. Lang and The Honourable Stephen T. Goudge for their advice and support. Their investigations into the Motherisk Drug Testing Laboratory and pediatric forensic pathology respectively had great relevance to the Commission's work. We turned to their reports time and time again to remind ourselves of context and to understand specific issues.

Thanks to the Ministry of the Attorney General (MAG), particularly Irwin Glasberg and Laureen Moran, and to the Ministry of Children and Youth Services, particularly Rachel Kampus and Jennifer Morris, for their unstinting operational and other support to the Commission.

Thanks, too, to the Court Services Division of MAG, particularly Gerard Lee Chong, Maretta Miranda, Paul Valenti and Katie Wood, and to Legal Aid Ontario, particularly Shalini Kanendran, Tom Kelsey, David McKillop, Marcus Pratt and Amy Shoemaker.

Thanks to Irwin Elman, the Provincial Advocate for Children and Youth, and the Office of the Children's Lawyer, for their support for the Commission's work in our efforts to connect with children and youth.

Thanks to the following people who are leaders in their fields and who provided invaluable advice to the Commission:

- Professor Nicholas Bala, for sharing his knowledge of child welfare law;
- Michael Blugerman, for sharing his knowledge of child welfare and adoption;
- Dr. Emma Cunliffe and Professor Gary Edmond, for sharing their knowledge of expert opinion evidence;
- Professor Shelley Kierstead, for sharing her knowledge of legal education and contributing so much to our restorative process; and
- Professor Jennifer Llewellyn, for sharing her knowledge of restorative justice and helping us to design our restorative process.

People and organizations who assisted with our restorative process

Thanks to The Honourable Mary Lou Benotto, The Honourable George Czutrin, The Honourable Lise Maisonneuve and The Honourable Wendy Malcolm for helping us to engage judges in our restorative process.

Thanks to the facilitators of our meetings and the Symposium:

- Karen Cohl (Crystal Resolution Inc.);
- Christine Kim (Christine Kim Mediation);
- Janet Leiper;
- Professor Jennifer Llewellyn;
- Joan Ruzsa;
- Carol Lee Smith
- George Thomson (volunteer);
- Tana Turner (Turner Consulting Group Inc.);
- Bob Watts; and
- Bo Yih Thom.

Thanks to those who informed and inspired us with their presentations at our Symposium: Dr. Emma Cunliffe, Suzanne Fish, Dr. Adam Newman, Lesley Shoefly and Caroline Ussher.

Thanks to Legal Aid Ontario, the Office of the Children's Lawyer and Professor Shelley Kierstead of Osgoode Hall Law School for lending us their staff and students to take notes at the Symposium.

Thanks to our tireless volunteer note-takers:

- Nora Ben Abdallah;
- Alex Beatty;
- Rachel Berinstein;
- Batya Berman;
- Peter-John Bragg;
- Michael Cheung;
- Bonnie Greenaway;
- Margarit Jo;
- Shalini Kanendran;
- Grace Karunanithy;
- Sunny Kim;
- Dorothy Kuczynski;
- Symone Marlowe;
- Julia McArthur;
- Sydney Osmar;
- Iqra Rafique;
- Dave Robinson; and
- Vanessa Sidwell.

People and organizations who helped us with outreach

Thanks to Andrea Delvaille and Steve Teekens for interviewing me and allowing the video to be shared on our website and with community organizations.

Thanks to Winston Tinglin and Peter Clutterbuck for their assistance with outreach to racialized communities.

Thanks also to the following for helping us to distribute our materials:

- Association of Ontario Health Centres;
- ConnexOntario;
- Ministry of Children and Youth Services
- Ministry of Community and Social Services;
- Ministry of Education; and
- Ministry of Health and Long-Term Care.

People and organizations who provided report production and technical support

Thanks to everyone who assisted us with various aspects of report production:

- Larrass Translations, French translation;
- wintranslation, Indigenous translations; and
- Laura Brady, Rebecca Langstaff and Agnes Vanya for design assistance.

Thanks to Clinton Chau (Windsongs Technologies Ltd.) for assistance with social media and the FRANK data exercise.

Thanks to Mike Duhamel and Hong Dang of Dominatum for website design and management.

Thanks to the video production team Massey Bros. Films: Yale Massey and Hart Massey (camera) and James Bond (editor).

Outside counsel

Thanks to the outside counsel who advised us on various aspects of our work:

- Chloe Boubalos, Articling Student, Lenczner Slaght;
- William McDowell, Lenczner Slaght;
- Mariam Moktar, Lenczner Slaght;
- Scott Rollwagen. Lenczner Slaght; and
- Maryellen Symons.

Former staff

Thanks to former Commission staff Crystal George, Liliana George, Frances Gregory and Susan Sullivan.

Special thanks

Special thanks to my extraordinary staff team (see page 157) for their talent, hard work, creativity and compassion. Their unfailing support and dedication were essential as we worked on very difficult and heartrending issues each day.

And finally, I thank my husband, George Thomson, who not only gave me advice and support throughout the Commission, but also volunteered his time and experience to facilitate restorative process meetings and co-facilitate the Symposium.

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Appendix

Appendix to Chapter 1:
Background to the Establishment of the Commission
Appendix 1a:
MCYS directive to CASs to stop using hair testing, April 22, 2015

MINISTRY OF CHILDREN AND YOUTH SERVICES

POLICY DIRECTIVE: CW001-15 Use of and Reliance on Hair-Strand Drug and Alcohol Testing

This policy directive is issued under s. 20.1 of the *Child and Family Services Act* (CFSA) to provide direction to children's aid societies (CASs) on the use of and reliance on hair-strand drug and alcohol testing in the course of providing child protection services.

EFFECTIVE DATE:

This policy directive will come into effect on the date of its issuance.

INTRODUCTION:

By Order in Council 143/2014 dated November 26, 2014, the Lieutenant Governor in Council appointed the Honourable Susan Lang to undertake a review of the adequacy and reliability of the immunoassay hair-testing methodology utilized by the Motherisk laboratory at the Hospital for Sick Children between 2005 and 2010 for use as evidence in child protection and criminal proceedings.

In response to a recommendation from the Honourable Susan Lang, the government of Ontario has determined that it is desirable to expand the mandate of the independent review and extend the review until December 15, 2015.

The intent of this policy directive is to provide direction to CASs on the use of and reliance on hair-strand drug and alcohol testing.

REQUIREMENTS:

1. CASs shall not use or rely on hair-strand drug and alcohol testing in the course of providing child protection services.

Reporting

2. By April 30, 2015, each CAS shall confirm in writing to the ministry that upon issuance of this directive it ceased use of and reliance on hair-strand drug and alcohol testing in the course of providing child protection services.

MINISTRY OF CHILDREN AND YOUTH SERVICES

ISSUANCE OF POLICY DIRECTIVE CW001-15: April 22, 2015

Aryeh Gitterman
Assistant Deputy Minister
Policy Development and Program Design Division
Ministry of Children and Youth Services

Rachel Kampus
Assistant Deputy Minister
Service Delivery Division
Ministry of Children and Youth Services

Appendix 1b:
Statement announcing Commissioner's appointment, December 22, 2015

Ontario

NEWS

Ministry of the Attorney General

Statement from Attorney General on Next Steps in Response to Motherisk Report

December 22, 2015 2:00 P.M.

Today Attorney General Madeleine Meilleur made the following statement regarding the selection of an independent commissioner to assist individuals who may have been affected by Motherisk's flawed hair testing methodology:

"Our government continues to be deeply concerned by the Honourable Susan Lang's findings regarding the adequacy and reliability of hair tests conducted at the Motherisk laboratory.

We are committed to moving as quickly as possible to help those who may have been impacted by the laboratory's flawed testing practices. That's why I wish to announce that the Honourable Justice Judith C. Beaman has agreed to lead an independent commission that will provide support to people who have been affected by a Motherisk hair test.

Justice Beaman was first appointed to the bench of the Ontario Court of Justice in 1998 and has led a distinguished career presiding over Ontario's criminal and family courts in the Toronto and Ottawa areas. Rising to the rank of Regional Senior Justice for Eastern Ontario in 2008, she has served as a per diem judge since January 2014.

Over the coming weeks, my ministry will work with Justice Beaman to finalize the commission's mandate and the resources needed to support its work. These details will be set out in an Order in Council, which will be made available to the public.

I would like to take this opportunity to thank Justice Beaman for agreeing to take on this challenging role. I am confident that the families impacted by Motherisk's flawed testing practices will get the support they need and deserve under her leadership.

In the meantime, we recognize that many potentially impacted people will have questions. Anyone who believes that they may have been impacted by a Motherisk test can call 1-855-235-

8932 for short-term counselling assistance and to request that their name be provided to the commissioner."

LEARN MORE

- Read the Province's response upon receiving the final report of the Motherisk Hair Analysis Review
- See a timeline of events related to the Honourable Susan Lang's independent review into the Motherisk laboratory
- Learn more about interim services available to those who believe they were impacted by a flawed Motherisk hair test

---

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Available Online
Disponible en Français

Appendix 1c:
MCYS directive to CASs to identify high priority cases, December 17, 2015

MINISTRY OF CHILDREN AND YOUTH SERVICES

POLICY DIRECTIVE: CW004-15 Directions Related to Certain High Priority Cases Involving Motherisk Drug Testing Laboratory (MDTL) Hair Testing

Following the release of the Lang Report and pending the government's appointment of an Independent Commissioner recommended in that report, this policy directive is issued under s. 20.1 of the *Child and Family Services Act* (CFSA) to direct Children's Aid Societies (CASs) in the interim to take certain immediate actions relating to recommendations addressed to CASs in the Lang Report.

EFFECTIVE DATE:

This policy directive will come into effect on the date of its issuance.

INTRODUCTION:

On December 17, 2015, the Honourable Susan Lang's review of the Motherisk hair analysis program at the Hospital for Sick Children (Lang Report) was released to the public.

The findings included the following:

- The hair-strand drug and alcohol testing used by MDTL between 2005 and 2015 was inadequate and unreliable for use in child protection and criminal proceedings.
- Between 2005 and 2015, MDTL operated in a manner that did not meet internationally recognized forensic standards.
- The Hospital for Sick Children did not provide meaningful oversight over MDTL.
- The use of MDTL hair-testing evidence in child protection and criminal proceedings has serious implications for the fairness of those proceedings and warrants an additional review.

The report made a number of recommendations relating to child protection cases where individuals and their families were potentially affected by flawed Motherisk hair-strand test results. The recommendations include the appointment of an Independent Commissioner to assist individuals who may have been affected by Motherisk's flawed hair testing methodology.

The report provided recommendations to children's aid societies (CASs) relating to immediate actions they should take on certain high-priority cases. In relation to these high-priority cases, paragraph 29 of Chapter 11 on "Recommendations" states:

> … [W]ith the support of the Ministry of Children and Youth Services, child protection agencies should immediately identify any cases involving MDTL [Motherisk Drug

Testing Laboratory] hair-testing results that remain open and where the child has not yet been placed for adoption. In such circumstances, child protection agencies should contact the parents or their lawyers to advise them of the potentially flawed hair test results and the creation of the Second Review. Child protection agencies should also assess these cases without regard to MDTL test results unless and until those results are confirmed, if they can be. In addition, child protection agencies should provide a complete copy of the unredacted file to the RRC [Review and Resource Centre] as soon as possible. This process must be expedited and be given the highest priority following the release of this Report.

The purpose of this Directive is to address high priority cases requiring immediate action by CASs prior to the appointment of an Independent Commissioner.

Nothing in this Directive prevents CASs from taking other immediate actions as they consider necessary to address the recommendations affecting child protection cases in the Lang Report.

REQUIREMENTS:

1. CASs shall immediately identify all open cases involving a positive MDTL hair-strand test, regardless of the date or subject of the test, in which a CAS intends to place a child for adoption or in which a child has been placed for adoption but an adoption order has not yet been made.

2. In those cases, CASs shall notify, in writing, the affected parent(s) and/or their counsel and advise them of:

    i) the Lang Report and how to access it (where appropriate provide a copy);
    ii) the potentially flawed hair test result(s) by MDTL; and
    iii) that the government will be appointing an Independent Commissioner.

    Where the child is an Indian or a native person, CASs shall also notify a representative chosen by the child's band or native community.

3. CASs shall assess the identified cases in light of concerns raised by flawed MDTL test results as described in the Lang Report. For example, MDTL test results may have been used not only as evidence of alcohol or drug use, but also as evidence of a parent's credibility. Paragraphs 30 and 31 in Chapter 9 of the Lang Report on "MDTL and Child Protection" provide the following examples of how MDTL tests were used at various stages of the proceedings:

    - To confirm suspicions of drug and alcohol use;
    - To obtain an accurate level of use;
    - To test a caregiver's credibility;

- To monitor levels of drug and alcohol use over time and assess a parent's compliance with terms and conditions for access to a child;
- As a term of a court order;
- As significant evidence of a caregiver's drug or alcohol use, or the exposure of children to drug use;
- To encourage a parent or caregiver to consent to agency intervention, including a temporary care order; and
- As evidence in temporary care hearings held after an apprehension.

4. After assessing each file and considering any responses received from the parties that had been notified, CASs shall inform the notified parties of the status of the file and plan for the child. The CASs shall also consider the need for notification of any other affected or interested parties, including the child and/or the Office of the Children's Lawyer, concerning the status of the file and plan for the child.

5. CASs shall prepare a copy of the identified case files for submission to the Independent Commissioner as contemplated by the Lang Report.

Reporting

6. Please confirm in writing to your Program Supervisor by January 15, 2016 that your society is meeting the requirements of this directive and is addressing the high priority cases.

ISSUANCE OF POLICY DIRECTIVE CW004-15: December 17, 2015

Jennifer Morris
Assistant Deputy Minister/A
Policy Development and Program Design Division
Ministry of Children and Youth Services

Rachel Kampus
Assistant Deputy Minister
Service Delivery Division
Ministry of Children and Youth Services

Appendix 1d:
MCYS memorandum to CASs re: Motherisk policy update, May 18, 2016

Ministry of Children and Youth Services

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Ontario

DATE: **May 18, 2016**

MEMORANDUM TO: **Children's Aid Society Board Chairs**
Children's Aid Society Executive Directors

FROM: **Rachel Kampus**
Assistant Deputy Minister, Service Delivery Division

Jennifer Morris
A/Assistant Deputy Minister, Policy Development and Program Design Division

SUBJECT: **Motherisk Policy Directive CW004-15 Update and Expectations for Submission of Adoption Finalization Documentation**

This memorandum is to provide an update on Policy Directive CW004-15 as well as to outline the ministry's expectations regarding the submission of adoption finalization documentation to the regional office for sign-off where a positive Motherisk hair strand test has been noted.

Policy Directive CW004-15

Effective immediately, the interim Policy Directive CW004-15 *Directions Related to Certain High Priority Cases Involving Motherisk Drug Testing Laboratory (MDTL) Hair Testing*, is no longer in effect now that the independent Commissioner has been appointed and has begun her own communications with children's aid societies (CASs).

On December 17, 2015, in response to the Lang Report and pending the government's appointment of an independent Commissioner, the MCYS issued policy directive CW004-15 as

an interim measure to direct CASs to take immediate actions relating to certain high-priority cases as recommended in the Lang Report.

Effective January 15, 2015, by Order in Council 4/2016, the Lieutenant Governor in Council established a Commission (the "Motherisk Commission") and appointed Justice Judith Beaman as an independent Commissioner to support and assist persons affected by the flawed Motherisk test results.

As part of her mandate, the Commissioner is authorized to,

> *offer early advice or guidance on high priority cases, including those cases identified as high priority by children's aid societies, and review individual child protection cases that may have been affected by Motherisk hair tests between 1990 and 2015, on request or on her own initiative.*

The Motherisk Commission has now established its operations and is carrying out its mandate. The Commissioner is engaging with CASs regarding the types of cases and documents she requires from CASs. On February 24, 2016, the Commissioner issued an order requiring CASs to "release complete electronic or paper copies of the unredacted case files, which have been identified by herself and by the Children's Aid Societies as high priority cases, to the Motherisk Commission as soon as possible." This order includes files identified in accordance with policy directive CW004-15.

As the Commissioner has also asked the Ministry to restate her list of high priority cases:

1. Cases where a child had been placed for adoption and the adoption was finalized during the period December 17, 2015 to today;
2. Cases where a child has been placed for adoption but the adoption has not yet been finalized;
3. Cases where a custody order under section 57.1 was made during the period December 17, 2015 to today;
4. Cases where a child has been made a crown ward and is in the care of a society but has not yet been placed for adoption;
5. Cases where a child is a crown ward and is in the care of a society and an application for a custody order under section 65.2 is pending; and
6. Cases where an application is pending in court to make a child a crown ward or for a custody order under section 57.1.

the ministry understands that CASs are providing the requested files to the Commission.

In light of the above, the interim period the Directive was intended to bridge has passed, and Directive CW004-15 is no longer in effect.

In support of the Motherisk Commission's work, the ministry reinforces the need for CASs to continue their cooperation with the Commission.

As custodians of child protection case files that may be required by the Motherisk Commission, it is the ministry's expectation that CASs will continue to comply with the directions provided to them by the Motherisk Commission during the course of its mandate.

Policy Directive CW001-15 (issued April 22, 2015) continues to be in effect and CASs are not to use or rely on hair-strand drug and alcohol testing in the course of providing child protection services.

Submission of Adoption Finalization Documents to the Regional Office

It has come to the ministry's attention that adoption documents have been submitted to the ministry for finalization that include notes of a positive Motherisk hair-strand test result. It is the ministry's expectation that prior to the submission of these documents to the ministry that CASs have submitted these cases to the Motherisk Commission for their review, per the Commission's February 24, 2016 order.

Following the Motherisk Commission's review of these cases, adoption finalization documents that note a Motherisk hair strand test may be submitted to the ministry. Submitted packages must include written confirmation from the CAS that the Motherisk Commission has concluded its review and provided the opinion that the case can proceed towards finalization.

Thank you for your due diligence in this matter. Should you have any questions or concerns, please contact your regional Program Supervisor.

Rachel Kampus
Assistant Deputy Minister
Service Delivery

Jennifer Morris
A/Assistant Deputy Minister
Policy Development and Program Design

Appendix to Chapter 2: Mandate and Principles

Appendix 2a:
Commission Order in Council (Terms of Reference), January 13, 2016

Ontario

Executive Council
Conseil exécutif

Order in Council
Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

Sur la recommandation de la personne soussignée, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil exécutif, décrète ce qui suit :

WHEREAS the Honourable Susan Lang was appointed by Orders in Council1543/2014 dated November 26, 2014 and 449/2015 dated April 22, 2015 to undertake an independent review into the adequacy and reliability of the hair-strand drug and alcohol testing utilized by the Motherisk laboratory at the Hospital for Sick Children ("Motherisk") between 2005 and 2015;

WHEREAS one of the matters that she was asked to consider was the possible need for an additional review or process with respect to specific cases or classes of cases;

WHEREAS the Honourable Susan Lang delivered her final report to the Attorney General on December 15, 2015;

WHEREAS she concluded that the hair-strand drug and alcohol testing utilized by the Motherisk laboratory was inadequate and unreliable for use as evidence in child protection and criminal proceedings;

WHEREAS she recommended that a commissioner be appointed to lead a Review and Resource Centre to provide comprehensive support and services to persons who were potentially affected in past child protection proceedings by a Motherisk hair test;

WHEREAS it is considered desirable and in the public interest for the Ontario Government to assist individuals who may have been affected by Motherisk's flawed hair testing methodology in proceedings under Part III of the *Child and Family Services Act,* R.S.O. 1990, c.C11;

WHEREAS section 3 of the *Public Inquiries Act, 2009,* S.O. 2009, c. 33, Sched. 6 (the *"Public Inquiries Acf')* authorizes the Lieutenant Governor in Council to appoint a commissioner to inquire into any matter of public interest;

.. ./2

AND WHEREAS it is considered advisable to set out the terms of reference for such process and advice;

THEREFORE it is ordered as follows:

Commission

1. A Commission is established and Justice Judith C. Beaman is appointed as a commissioner under section 3 of the *Public Inquiries Act* (the "Commissioner"), effective as of January 15, 2016;

Mandate

2. The Commissioner shall:

    a. in consultation with the Attorney General, establish and lead a Review and Resource Centre which will offer appropriate support and assistance to persons affected by the Motherisk test results, including information, counselling assistance, legal advice and alternative dispute resolution;

    b. design and implement a process to identify and notify affected persons so that they may have access to the services and support offered by the Review and Resource Centre and ensure a process to allow for meaningful participation by Indigenous and racialized communities;

    c. offer early advice or guidance on high priority cases, including those cases identified as high priority by children's aid societies, and review individual child protection cases that may have been affected by Motherisk hair tests between 1990 and 2015, on request or on her own initiative;

    d. determine the eligibility criteria for and the level and type of services to be made available to affected persons based on the circumstances of the particular case; and,

    e. engage, as may be appropriate, with parties and stakeholders who would have an interest in the effective operation of the Review and Resource Centre and the completion of the Commissioner's mandate.

3. The Commissioner shall endeavor to conclude her mandate and deliver a final report to the Attorney General summarizing her activities within 24 months after the establishment of the Commission.

./3

4. In discharging her mandate, the Commissioner will be guided by the following fundamental principles:

    a. the current best interests of any affected children and youth must be taken into account; · ·

    b. in so far as practicable, the Commissioner should work to maintain and ensure the confidentiality of records relating to child protection proceedings, including court files, exhibits, court transcripts, child protection files, and adoption records;

    c. the Commissioner should discharge her duties efficiently and in a manner consistent with the need to pursue an expeditious and just resolution of the serious concerns associated with the reliance on Motherisk evidence in child protection proceedings;

    d. the Commissioner should work with children and youth to ensure that their voices, both individually and collectively, are heard; and

    e. the Commissioner should give particular consideration as to the outreach and notification necessary to allow meaningful participation by Indigenous and racialized communities.

5. The Commissioner shall perform her duties without expressing any conclusion or recommendations regarding the potential civil or criminal liability of any person or organization. The Commissioner shall further ensure that the conduct of the review does not in any way interfere or conflict with any ongoing investigation or proceeding related to these matters.

6. In accordance with the *Public Inquiries Act, 2009,* the Commissioner shall obtain all records necessary to perform her duties and, for that purpose, may require the production of information that is confidential or inadmissible under any Act or regulation.

7. The Commissioner shall ensure that any disclosure of records and other materials balances the public interest and the privacy interests of affected children and families.

8. Where the Commissioner considers it necessary, she shall impose conditions on the production of information in order to protect the confidentiality and privacy interests of any affected persons.

.../4

9. The Commissioner shall follow Management Board of Cabinet directives and guidelines and other applicable government policies unless, in the Commissioner's view and having regard to her mandate, it is not possible to follow them.

1O. In delivering her final report to the Attorney General, the Commissioner shall ensure, in so far as practicable, that it is in a form appropriate for public release, consistent with the requirements of the *Freedom of Information and Protection of Privacy Act* and other applicable legislation.

11. The Commission may invite and review submissions in writing from any First Nations, Metis and/or Inuit organizations or members respecting the services and support of the Review and Resource Centre.

12. The Commissioner shall be responsible for translation and printing and shall ensure that her final report is delivered in English, French, Cree, Ojibway, Oji-Cree and Mohawk at the same time, in electronic and printed versions.

The Ontario Government

13. The Attorney General shall, in consultation with the Commissioner, set a budget for the fulfillment of her mandate.

14. All ministries and all boards, agencies, and commissions of the government of Ontario shall, subject to any privilege or other legal restrictions, assist the Commission to the fullest extent possible, including producing documents in a timely manner, so that the Commission may carry·out its duties.

15. The Attorney General shall make the Commissioner's final report available to the public as soon as practicable after receiving it.

Recommended _____ Concurred _____
Attorney General Chair of Cabinet

Approved and Ordered JAN 1 3 2016 _____
Date Administrator of the Government

Appendix 2b:
Order in Council granting extension to the Commission, December 17, 2017

Ontario

Executive Council of Ontario
Order in Council

On the recommendation of the undersigned, the Lieutenant Governor of Ontario, by and with the advice and concurrence of the Executive Council of Ontario, orders that:

Conseil exécutif de l'Ontario
Décret

Sur la recommandation de la personne soussignée, la lieutenante-gouverneure de l'Ontario, sur l'avis et avec le consentement du Conseil exécutif de l'Ontario, décrète ce qui suit :

WHEREAS the mandate originally set out in English in Order in Council number O.C. 4/2016 dated January 13, 2016, and in French in Order in Council number O.C.1194/2016 dated August 4, 2016, and pursuant to which Justice Judith C. Beaman was appointed as a commissioner under section 3 of the *Public Inquiries Act, 2009*, has been completed except for the reporting requirements thereunder and the winding up of the Review and Resource Centre;

AND WHEREAS the Commissioner has requested an extension in order to complete the translation and printing of her final report;

NOW THEREFORE it is ordered that O.C. 4/2016 and O.C.1194/2016 be amended effective the date this Order in Council is approved and ordered by replacing paragraphs 3 and 12 as follows:

3. The Commissioner shall deliver a final report summarizing her activities in English and French as well as an executive summary of her final report in Cree, Ojibway, Oji-Cree and Mohawk, to the Attorney General, no later than February 28, 2018. The Commissioner shall deliver the full report in Cree, Ojibway, Oji-Cree and Mohawk as soon as practicable thereafter. The Commissioner shall not accept any requests for services beyond January 15, 2018.

12. The Commissioner shall be responsible for translation and printing and shall ensure that the executive summary of her final report is delivered in Cree, Ojibway, Oji-Cree and Mohawk at the same time as the English and French report, in electronic and printed versions, with the full report in Cree, Ojibway, Oji-Cree and Mohawk to follow as soon as practicable thereafter.

- - - - - - -

ATTENDU QUE le mandat initialement établi en anglais dans le décret numéro 4/2016, daté du 13 janvier 2016, et en français dans le décret numéro 1194/2016, daté du 4 août 2016, aux termes duquel la juge Judith C. Beaman a été nommée commissaire en vertu de l'article 3 de la *Loi de 2009 sur les enquêtes publiques*, a été accompli, sauf en ce qui a trait aux exigences en matière de rapport qui y sont prévues et à la dissolution du Centre d'examen et de ressources;

ATTENDU QUE la commissaire a demandé une prorogation de délai afin de terminer la traduction et l'impression de son rapport final;

O.C./Décret: 2429/2017 **1**

EN CONSÉQUENCE, il est ordonné que les décrets numéros 4/2016 et 1194/2016 soient modifiés, les modifications prenant effet le jour où le présent décret est approuvé et pris, par le remplacement des paragraphes 3 et 12 par ce qui suit :

3. La commissaire remettra au procureur général, au plus tard le 28 février 2018, un rapport final résumant ses activités, en français et en anglais, ainsi qu'un résumé de son rapport final, en cri, en ojibway, en oji-cri et en mohawk. La commissaire produira ensuite, le plus tôt possible, le rapport complet en cri, en ojibway, en oji-cri et en mohawk. La commissaire n'acceptera aucune demande de services après le 15 janvier 2018.

12. La commissaire sera responsable de la traduction et de l'impression. Elle veillera à ce que le résumé de son rapport final soit produit en cri, en ojibway, en oji-cri et en mohawk en même temps que les versions française et anglaise du rapport, sur support électronique et papier, et à ce que le rapport complet soit, le plus tôt possible par la suite, produit en cri, en ojibway, en oji-cri et en mohawk.

Recommended: Attorney General
Recommandé par : Le procureur général

Deb Matthews

Concurred: Chair of Cabinet
Appuyé par : Le président/la présidente du Conseil des ministres

Approved and Ordered: DEC 14 2017
Approuvé et décrété le :

Lieutenant Governor
La lieutenante-gouverneure

Appendix 2c:
Commissioner's order on confidentiality and non-disclosure, April 11, 2016

THE MOTHERISK COMMISSION

The Honourable Judith C. Beaman, Commissioner

Ontario

LA COMMISSION MOTHERISK

L'honorable Judith C. Beaman, Commissaire

ORDER

WHEREAS, as per the *Public Inquiries Act,* the Order in Council 4/2016, dated January 13, 2016, established the Motherisk Commission and provided for the appointment of Justice Judith C. Beaman as the Commissioner, effective January 15, 2016;

AND WHEREAS, the individuals and their families potentially affected by the flawed Motherisk Drug Testing Laboratory hair strand test results were the subjects of or parties to *Child and Family Services Act* proceedings;

AND WHEREAS, as per Commissioner Beaman's order, dated February 24, 2016, Children's Aid Societies of Ontario were ordered to release complete electronic or paper copies of the unredacted case files that were identified as high priority cases by herself and by the Children's Aid Societies of Ontario;

AND WHEREAS, paragraph 4b of the Order in Council 4/2016 states:

> In discharging her mandate, the Commissioner will be guided by the following fundamental principles:
> ...
> b. in so far as practicable, the Commissioner shall work to maintain and ensure the confidentiality of records relating to child protection proceedings, including court files, exhibits, court transcripts, child protection files, and adoption records;
> ...

AND WHEREAS, paragraph 8 of the Order in Council 4/2016 states:

> Where the Commissioner considers it necessary, she shall impose conditions on the production of information in order to protect the confidentiality and privacy interests of any affected persons;

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AND WHEREAS, subsection 45(8) of the *Child and Family Services Act*, (R.S.O. 1990, c. C.11 as am.) prohibits the direct or indirect identification of a child in proceedings under the Act:

> 45(8) PROHIBITION: IDENTIFYING CHILD – No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

THIS COMMISSION ORDERS THAT:

The following are protected from disclosure:

i) All records relating to child protection proceedings, including court files, exhibits, transcripts, agency files, and adoption records reviewed by the Motherisk Commission; and
ii) All documents and digital, photographic, and audio records created by the Motherisk Commission in their review of the child protection cases.

Publication of any information that would identify the child or the child's family is prohibited.

ORDERED at Toronto, Ontario, this 11th day of April, 2016

The Honourable Judith C. Beaman
Commissioner

Appendix to Chapter 3: Information, Outreach and Communications

Appendix 3a: Sample outreach materials

Post card (front)

Post card (back)

One-pager for youth

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman, Commissioner

L'honorable Judith C. Beaman, Commissaire

What is the Motherisk Commission?

The Commission is an office set up by the government of Ontario. Its job is to help people who were affected by the hair testing done by the Motherisk Lab at SickKids hospital in Toronto. The office was set up in January 2016 and will be closed down in January 2018.

What was wrong with the testing?

The hair tests were supposed to tell children's aid societies, lawyers and judges whether a person had used drugs or alcohol. The problem was that these tests were not done properly. An investigation in 2015 found that the tests were inadequate and unreliable.

Who was affected by the hair testing?

Many people were affected by the testing, including children, youth, biological parents, adoptive parents, wider families and communities. It is very likely that Indigenous and African-Canadian people were most affected because they are overrepresented in the child welfare system.

What is the Motherisk Commission doing?

The Commission is reviewing individual child protection cases that involved Motherisk Lab testing to see if the tests had a major impact on the decisions made by children's aid societies and the court. If they did, the Commission helps the families find a lawyer to see if they can change anything in the situation with their child or children.

The Commission refers people who were affected by the testing to counselling support. Counselling is voluntary, free and available close to where people live.

The Commission is also holding meetings to talk to many different people involved in this issue—youth, children's aid workers, social workers, community organizations, lawyers and others. We want to understand better how the Motherisk testing problem happened and how we can prevent it from happening again. What we learn through these meetings will help us write our final report to the government in January 2018. If you have ideas, please share them with us through our website: www.motheriskcommission.ca.

Appendix 3b: Outreach list for mandate and services

The Commission met with or presented to the following individuals and organizations, primarily in 2016, to share information about our mandate, services, and the status of our work.

42nd Annual all-Ontario Chiefs Conference
360°kids
Aboriginal Justice Advisory Group/Debwewin Jury Review Implementation Committee
Aboriginal Legal Services
The Action Group on Access to Justice
Adopt4Life
Adoption Council of Ontario
Adoption Resource Exchange
Anishinabek Nation 2016 Grand Council Assembly
Anishinabek Nation Child Well-Being Working Group
Association of Iroquois and Allied Indians
The Association of Legal Aid Plans of Canada
Association of Native Child and Family Service Agencies of Ontario
Barrie Native Friendship Centre
Chiefs of Ontario
Chiefs of Ontario Political Confederacy
Child Protection Lawyers' Primer Conference
Children in Limbo Task Force (Sparrow Lake Alliance)
Children's Aid Society of Toronto Youth Advisory Committee
Community Action for Families
Community service providers for racialized communities (Mississauga, Oshawa, Toronto)
Covenant House Toronto
Defence for Children International – Canada
Elevate NWO
Family Lawyers Association, 311 Jarvis Open Bar Series
Ganohkwasra Family Assault Support Services
Hamilton Regional Indian Centre
Chief Ava Hill, Larry Longboat and Council, and band representatives, Six Nations of the Grand River
The Hospital for Sick Children
The Indian Friendship Centre (Sault Ste. Marie)
Ininew Friendship Centre (Cochrane)
Jamaican Canadian Association
Kapuskasing Friendship Centre
Kunuwanimano Child and Family Services 2016 Annual General Meeting
Chief R. Stacey Laforme and Council, Mississaugas of the New Credit First Nation
The Law Society of Upper Canada
Legal Aid Ontario
Grand Council Chief Patrick Wedaseh Madahbee, Anishinabek Nation

Mnaasged Child and Family Services
Nogdawindamin Family and Community Services
N'Swakamok Native Friendship Centre (Sudbury)
Office of the Children's Lawyer
Office of the Provincial Advocate for Children and Youth
Ontario Association of Children's Aid Societies and many individual societies across the province
Ontario Bar Association
Ontario Counsel for Children's Aid Societies
Ontario Court of Justice
Ontario Court of Justice, 2016 Annual Family Law Program
Ontario Federation of Indigenous Friendship Centres 2016 Annual General Meeting
Ontario Ministry of Children and Youth Services
Ontario Ministry of Community Safety and Correctional Services
Ontario Ministry of Indigenous Relations and Reconciliation
Ontario Ministry of the Attorney General
The Ontario Native Welfare Administrators' Association
The Ontario Native Women's Association
The Honourable Debra Paulseth
The Provincial ADR Advisory Committee 2016 Provincial ADR Symposium
Ryerson University Law Practice Program
Chief Dean Sayers, Batchewana First Nation
Elder Gilbert Smith, Aboriginal Justice Elders Council
Superior Court of Justice Family Law Conference
Chief Paul Syrette and Council, Garden River First Nation
Thunder Bay Indigenous Friendship Centre
Timmins Native Friendship Centre
Toronto Aboriginal Agencies Network
Toronto Council Fire Native Cultural Centre
Weechi-it-te-win Family Services
York Region Resiliency Committee
Youth in Transition Program (Hamilton, Guelph, Toronto, Sault Ste. Marie, Simcoe/Muskoka, Sudbury, Waterloo)

Appendix 3c: Advertising campaigns

2016 Advertising campaign

Print

Asian Connections, a weekly newspaper serving the South Asian community (two quarter-page ad insertions in October).

Midweek, a daily newspaper serving the South Asian community based in Brampton (two display insertions in October).

Métis Voyageur, a newspaper published five times a year by the Métis Nation of Ontario (quarter-page ad insertions in October and December).

NOW Magazine, a weekly Toronto news and entertainment print and online magazine (two half-page ad insertions in October).

Share, a weekly community print and online newspaper serving the Black and Caribbean community in the GTA (two one-quarter page insertions).

Sing Tao Daily, the Toronto edition of a Hong Kong-based daily newspaper serving the Chinese community (two large ad insertions).

Toronto Caribbean Newspaper, a biweekly print and online publication serving the Caribbean community in the Greater Toronto Area (two quarter-page ad insertions).

Toronto Sun, a daily Toronto newspaper (classified ad, September).

Turtle Island News, a weekly, mainly online publication serving Ontario's Indigenous communities (two quarter-page ad insertions).

Two Row Times, a print and online publication serving the Six Nations Indigenous community (two half-page ad insertions).

Windspeaker, a mostly digital, nationwide, semi-monthly Indigenous news publication (two three-column ad insertions).

Radio

CFGI-FM, an Indigenous community station based on Georgina Island (October 16).

CHRY-FM, a community station based at York University, popular with African Canadian residents in the Jane-Finch area of Toronto (November 16).

CHRZ-FM, an Indigenous community station known as Rez 91.3 in Wasauksing, near Parry Sound (October 16).

CKFG-FM, a community station serving an urban, adult, Black audience in the Greater Toronto Area.

CKTI-FM, an Indigenous community station known as The Eagle, serving Kettle and Stony Point reserves (October 16).

2017 Advertising campaign

Print (one insertion only, February/March 2017)

Métis Voyageur, a newspaper published five times a year by the Métis Nation of Ontario.

Turtle Island News, a weekly, mainly online publication serving Ontario's Indigenous communities.

Two Row Times, a print and online publication serving the Six Nations Indigenous community.

Windspeaker, a mostly digital, nationwide, semi-monthly Indigenous news publication (leader board/banner ad).

Radio

CHRZ-FM, an Indigenous community station known as Rez 91.3 in Wasauksing, near Parry Sound.

CFGI-FM, an Indigenous community station based on Georgina Island.

CKTI-FM, an Indigenous community station known as The Eagle, serving Kettle and Stony Point reserves.

Appendix to Chapter 4: Background to Child Protection in Ontario

Appendix 4a: "Best interests of child"

"Best interests of child" in the *Child and Family Services Act*

Paramount purpose

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

Best interests of child

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

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

Where child an Indian or native person

(4) Where a person is directed in this Part to make an order or determination in the best interests of a child and the child is an Indian or native person, the person shall take into consideration the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child's cultural identity. R.S.O. 1990, c. C.11, s. 37 (4).

"Best Interests of Child" in the *Child, Youth and Family Services Act*

Paramount purpose

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

Best interests of child

74 (3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall,

(a) consider the child's views and wishes, given due weight in accordance with the child's age and maturity, unless they cannot be ascertained;

(b) in the case of a First Nations, Inuk or Métis child, consider the importance, in recognition of the uniqueness of First Nations, Inuit and Métis cultures, heritages and traditions, of preserving the child's cultural identity and connection to community, in addition to the considerations under clauses (a) and (c); and

(c) consider any other circumstance of the case that the person considers relevant, including,

(i) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs,

(ii) the child's physical, mental and emotional level of development,

(iii) the child's race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression,

(iv) the child's cultural and linguistic heritage,

(v) the importance for the child's development of a positive relationship with a parent and a secure place as a member of a family,

(vi) the child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community,

(vii) the importance of continuity in the child's care and the possible effect on the child of disruption of that continuity,

(viii) the merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent,

(ix) the effects on the child of delay in the disposition of the case,

(x) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent, and

(xi) the degree of risk, if any, that justified the finding that the child is in need of protection.

Appendix to Chapter 5: Review of Individual Cases

Appendix 5a:
Case Review and Remedy Determination Process (Rules of Procedure)

MOTHERISK COMMISSION
Review and Resource Centre
Case Review and Remedy Determination Process

General

1. The Commission shall operate in accordance with the *Public Inquiries Act*, R.S.O., c. P.41 (the "Act") and pursuant to Order in Council 4/2016 (the "Terms of Reference").
2. Subject to the Act and the Terms of Reference, the conduct of and procedure to be followed by the Commission is under the control and discretion of the Honourable Judith C. Beaman (the "Commissioner").
3. The Commissioner may amend these Rules of Procedure ("Rules") or dispense with compliance of these Rules, as she deems necessary.
4. The Commission's activities will be divided into two phases as follows:
    a. **Phase One**: the Commission will focus on reviewing cases which it has identified as high priority cases and those for which a member of the public has sought a review.
    b. **Phase Two**: the Commission will undertake a comprehensive outreach strategy with the objective of inviting affected individuals to apply to the Commission for one or more of the services offered at the Review and Resource Centre. This strategy will include focused outreach to Indigenous and Racialized communities and to children and youth.

Definitions

5. In these rules, "affected persons" refers to the following categories of individuals
    (i) Children whose families were involved with child protection agencies in part because of concerns arising from a positive hair strand drug test result from the Motherisk Drug Testing Lab ("MDTL") operated by the Hospital for Sick Children;
    (ii) The siblings of children referred to in (i) above;
    (iii) The biological parents of the children referred to in (i) above; or,
    (iv) The adoptive parents of any of the children referred to in (i).
    (v) Any other person who offered a plan for the children referred to in (i) above in any court case, or dispute resolution process relating to the children, including, but not limited to:
        a. Negotiation
        b. Mediation
        c. Family Group Conferencing

(vi) Individuals who have one or more of the children referred to in (i) above in their care and custody pursuant to a customary care agreement, a kinship placement or a custody order

(vii) The child's band or native community where a child referred to in (i) is identified as an Indian or native person as defined in the Child and Family Services Act R.S.O. 1990 c. C.11 (the "CFSA")

"file review", in cases where a children's aid society initiated an application under the *Child and Family Services Act* , R,S,O. 1990 c. C.11 (the "CFSA") means the review of the materials that were filed with the court and led to the final outcome in the case, including, but not limited to:

(i) Applications

(ii) Plans of Care

(iii) Answers and Plans of Care

(iv) Conference Briefs

(v) Affidavits

(vi) Minutes of Settlement

(vii) Statements of Agreed Fact

(viii) Endorsements, Reasons for Order/Judgments.

"file review" in cases *where* a matter was resolved by way of an agreement without the initiation of a child protection case means the review of the information which led to children's aid society involvement included in that society's files, including but not limited to:

(i) the intake file compiled by the children's aid society;

(ii) the family services file, if any, compiled by the children's aid society; and,

(iii) a copy of the agreement between the children's aid society and a parent or parents.

"high priority cases" refers to the following categories of cases:

(i) Cases where a child had been placed for adoption and the adoption was finalized during the period December 17, 2015 to February 22, 2016 (the date of the Commissioner's Order to the CASs to release to the Commission all unredacted files related to the high priority cases);

(ii) Cases where a child has been placed for adoption but the adoption has not been finalized;

(iii) Cases where a custody order under section 57.1 of the CFSA was made during the period December 17, 2015 to February 22, 2016 (the date of the Commissioner's Order to the CASs to release all unredacted files related to the high priority cases);

(iv) Cases where a child has been made a Crown ward and is in the care of a society but has not yet been placed for adoption;

(v) Cases where a child is a Crown ward and is in the care of a Society and an application for a custody order under section 65.2 of the CFSA is pending;

(vi) Cases where an application is pending in court to make a child a Crown ward or for a custody order under section 57.1 of the CFSA; and,

(vii) Cases where a customary care or kinship arrangement was made and where Motherisk testing results were relied upon.

"substantial impact" when referring to a positive Motherisk test means that the test materially affected the outcome of the case having regard to one or more of the following factors:

(i) The creation of a status quo with respect to the child's living arrangements;

(ii) The position of the children's aid society respecting the direction of the case;

(iii) The decision of the court.

Review Process

6. Counsel will undertake a file review to determine the role that Motherisk evidence played in the case.
7. Following the review, Counsel will prepare a summary of the case, together with a recommendation as to next steps, for the Commissioner.
8. After reviewing the summary, the Commissioner will make one of the following determinations:
    a. The Motherisk testing did not have a substantial impact. In this case, all parties requesting the review will receive a letter advising them of the findings. In matters where permanency planning has been put on hold, the Commissioner will authorize the children's aid society involved to take whatever future steps are necessary to plan permanently for the child.
    b. The Motherisk testing had a substantial impact. Following this determination, Counsel will ascertain the identity of and take all reasonable steps to locate all affected parties and will make arrangements to notify them.
    c. It remains unclear what role the Motherisk testing played in the outcome. Following this determination, further information will be gathered to help clarify the role that the Motherisk testing played. Such information may include but not be limited to, case notes, reports, assessments and court transcripts.

Reconsideration

9. An affected person or children's aid society who disagrees with the Commissioner's determination may request a reconsideration of the matter within 30 days of being advised of the Commissioner's determination.
10. An affected person or children's aid society seeking a reconsideration may file any further material that they consider appropriate in support of their request for a reconsideration. Such material will be provided to the other parties to the original court case where it is feasible to do so, and those parties will be invited to respond to the additional material within a time frame to be determined by the Commissioner should they wish.

Notification to Affected Persons

11. Where the Commission determines that the Motherisk testing did not have a substantial impact on a case, the Commission will not notify affected persons unless the person has contacted the commission and requested the review of the file.
12. Where the Commission determines that the Motherisk testing did have a substantial impact on a case, the Commission will take steps to notify all affected persons.

13. The Commission may engage mental health professionals or trusted community advisors to assist with this notification.

Determination of Services Offered

14. The Motherisk Commission has established a Review and Resource Centre which has the capacity to provide legal file reviews, counselling assistance, legal referral and alternative dispute resolution services.

Services Offered Where No Substantial Impact

15. Where the Commissioner determines that the Motherisk testing did not have a substantial impact on the outcome of the case affected persons will be offered the following services:
    a. Counselling assistance
    b. A meeting with the Commissioner and/or review counsel to discuss the outcome.
    c. A reconsideration of the file review
    d. Any other services the Commissioner deems appropriate, having regard to the fundamental principles set out in the Terms of Reference.

Services Offered Where Substantial Impact

Where the Commissioner determines that the Motherisk testing did have a substantial impact on the outcome of the case, affected persons will be offered the following services:

a. Counselling assistance
b. A meeting with the Commissioner and/or review counsel to discuss the outcome
c. Legal referral
d. Funding for legal services
e. Any other services the Commissioner deems appropriate, having regard to the fundamental principles set out in the Terms of Reference.

Access to Alternative Dispute Resolution Services

16. Where the Commissioner determines that the Motherisk testing did have a substantial impact on the outcome of a case and one or more affected persons wishes to attempt to resolve any issues arising from this determination with one or more other affected persons, and all parties agree, the parties shall be offered access to a mutually agreeable dispute resolution process.

Appendix 5b: Reasons for decision in Judicial Review

CITATION: Y.M. v. Commissioner Judith Beaman; C.T. v. Commissioner Judith Beaman; and C.R. v. Commissioner Judith Beaman, 2016 ONSC 7118
DIVISIONAL COURT FILE NOs.: 357/16, 358/16 and 359/16
DATE: 20161118

ONTARIO
SUPERIOR COURT OF JUSTICE DIVISIONAL COURT
SHAW R.S.J., MOLLOY and PATTILLO JJ.

BETWEEN Y.M. Applicant **– and –** COMMISSIONER JUDITH BEAMAN Respondent **AND BETWEEN:** C.T. Applicant **– and –** COMMISSIONER JUDITH BEAMAN Respondent **AND BETWEEN:** C.R. Applicant **– and –** COMMISSIONER JUDITH BEAMAN Respondent	)	*Julie M. Kirkpatrick*, for the Applicants *William C. McDowell* and *Mariam Moktar*, for the Respondent **HEARD at Toronto:** November 14, 2016 at **Toronto**

REASONS FOR DECISION

MOLLOY J:

The Application Before the Court

[1] Each of the applicants has brought a judicial review application seeking various forms of relief against Commissioner Judith Beaman. Each of the applicants is a mother and each has lost custody and control of a child or children in proceedings commenced by the Children's Aid Society (C.A.S.) in which, in some measure, one of the factors involved in the case was testing of hair follicles to determine drug use by the Motherisk Drug Testing Laboratory at Toronto's Hospital for Sick Children.

[2] Subsequent to the child protection proceedings in which all three applicants were involved, the validity and reliability of the Motherisk Laboratory testing methods were discredited by court decisions1 as well as by a report by the Honourable Madam Justice Susan Lang, who had been appointed by Order in Council to conduct an Independent Review of the Motherisk Laboratory. Justice Lang's Report was released on December 15, 2016. Among the Report's recommendations was the establishment of a Second Review to examine individual cases that may have been affected by the Motherisk Laboratory's flawed hair testing methodology and to provide resources to those individuals to permit them to make informed decisions about any steps that might be available and appropriate.

[3] Acting on this recommendation, the Government of Ontario, by Order in Council dated January 15, 2016, established the Motherisk Commission and appointed Commissioner Judith Beaman to head the Commission. The mandate of the Motherisk Commission included a review of individual child protection cases that may have been affected by Motherisk hair tests between 1990 and 2015, on request or at the initiative of the Commissioner.

[4] Each of the applicants' cases was considered by the Motherisk Commission. Each of the applicants objects to the extent to which they were involved in or permitted to participate in that process. Each alleges breaches of principles of natural justice and procedural fairness and seeks orders of this Court compelling the Commissioner to do certain things in that regard.

[5] The respondent denies any breach of procedural fairness or natural justice. However, the respondent also argues that this Court ought not to deal with the merits of those arguments at this stage, but rather should dismiss the applications as being either premature or, with respect to C.R., moot.

[6] For the reasons set out below, all three applications are dismissed. The applications by Y.M. and C.T. are premature. They are at liberty to bring a further application after the process before the Commission has been exhausted if they are not successful in obtaining the relief to which they believe they are entitled. The application by C.R. is dismissed as moot.

[1] Notably, *R. v. Broomfield*, 2014 ONCA 725, in which the Ontario Court of Appeal quashed criminal convictions for administering cocaine to a child based on new evidence admitted on the appeal discrediting the methodology and reliability of evidence from the Motherisk Laboratory that was relied upon at trial. 3

Publication of the Names of the Mothers and Children

[7] Each of the applicants, and their children, have been the subject of child protection proceedings to which the provisions of the *Child and Family Services Act*2("CFSA") apply. Section 45(8) of the CFSA provides:

> No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

[8] At the outset of the hearing before this Court, counsel for the Commissioner raised an issue as to whether there should be a publication ban with respect to information that would tend to identify the parents, children or families involved in the child protection proceedings. He noted that there was a reporter present from the Toronto Star who was interested in reporting on the proceedings and who proposed to publish the names of two of the mothers. Both of these mothers had previously given interviews to the Toronto Star and had been the subject of Toronto Star articles about the Motherisk hair testing. Both of these women were also the subject of other media coverage in the past. In these media stories, the names of the two mothers were disclosed, with their consent, but not the names of their children.

[9] The Toronto Star reporter, Ms. Mendleson, was given the opportunity to consult legal counsel on this issue. Although legal counsel was not available to speak to the matter, Ms. Mendleson did get advice and made submissions on the right of the Toronto Star to publish the names of these two mothers based on: (1) the public interest issues involved; (2) the waiver of the two women whose names would be published; and (3) the fact that this information was already in the public domain. She relied on the Supreme Court of Canada's landmark decision in *Dagenais.3*

[10] After considering the matter, we advised Ms. Mendleson that we considered the principles in *Dagenais* did not apply. We further advised that we did not see a need to make a specific non-publication order in this matter as in our view s. 45(8) of the CFSA was mandatory and continued to apply.

[11] On further review, I remain of the view that s. 45(8) of the CFSA is determinative. It is a statutory and mandatory direction that no information can be published that would tend to identify, not just the children, but also the parents and family involved in the child protection proceedings. There is no provision in the legislation for any waiver of that prohibition, whether by the court or any of the individuals involved.

[12] *Dagenais* involved an application by four individuals (who were facing criminal charges for sexual abuse of young boys) seeking an injunction restraining the CBC from publishing a mini-series dealing with similar subject matter. The order was made by a Superior Court judge as an exercise of common law discretion. There was no statutory publication ban involved. That is a very different case from this one.

[2] *Child and Family Services Act*, R.S.O. 1990, c, C.11.
[3] *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835

[13] As far as I have been able to determine, the only case dealing directly with the CFSA publication ban is a decision of Aston J. holding that s. 45(8) cannot be waived. He held, in *P.(R.) v. Children's Aid Society of Lanark (County) & Smiths Falls (Town)*,4 at para. 7:

Section 45(8) of the *Child and Family Services Act*, R.S.O. 1990, c. C.11 [as amended] (and its predecessor), provides "no person shall publish or make public information that has the effect of identifying a child who is ... the subject of a proceeding or the child's parent or foster parent or a member of the child's family." **There is no provision in the *Act* whereby the child, upon attaining the age of majority, or the child's parent, foster parent or other member of the child's family, can waive this legislative provision.** The plaintiff's agent, Ms. Kerr-Hepworth, did not cite any authority that would support the granting of the order sought. These claims are therefore dismissed. [Emphasis added]

Although the Divisional Court reversed Justice Aston's decision on appeal, they did so on other grounds and did not comment on s. 45(8).5

[14] There are a number of other legislative provisions, both provincial and federal, prohibiting publication of information, but typically these allow for waiver in specified circumstances. For example, s. 99(1) of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, prohibits the publication of information tending to identify a young person in a provincial offence hearing. Section 99(3), however, specifically makes an exception for young persons who disclose the information themselves. This indicates that where the Ontario legislature intends to permit waiver, they specifically provide for it in the statute.

[15] Similarly, in the federal context, s. 110(1) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, prohibits the publication of information identifying a young person 'dealt with' under the *Act*, subject to certain exceptions. Section 110(3) specifically allows a young person to publish information that would identify themselves after they reach the age of 18 years. A youth may also apply for an order permitting the publication of identifying information before they reach 18 years of age under s. 110(6). Section 111(1) of the *YCJA* prohibits the publication of information identifying young victims and witnesses. Section 111(2) specifically allows a youth to publish the information themselves once they reach the age of 18, while the parents may publish the information if the youth is deceased. Section 111(3) allows a youth to apply to publish the information before reaching the age of 18.

[16] There are a number of provisions of the *Criminal Code* that provide for publication bans upon the application of a victim, witness, or party, with the issuance of the ban then being subject to the discretion of the judge. However, for child pornography offences, s. 486.4(3) provides for an automatic publication ban for information identifying a victim or witness under the age of 18. Unlike other publication bans in the *Code*, a s. 486.4(3) publication ban is not discretionary, and there are no exceptions. No provision is made for waiver. In this sense, it is similar to s. 45(8) of the *CFSA*.

[4] *P.(R.) v. Children's Aid Society of Lanark (County) & Smiths Falls (Town)*, 2006 CarswellOnt 9830 (S.C.)
[5] see 2008 CarswellOnt 4280 (Div. Ct.)

[17] Section 486.4(3) of the *Criminal Code* was considered by Campbell J. of the Nova Scotia Provincial Court in *R. v. B(K)6*. In that case, media lawyers sought a revocation of a publication ban issued under s. 486.4(3) on the grounds that it conflicted with the *YCJA*, which, as explained above, permits waiver. Justice Campbell commented, at para. 23, "[s]ection 486.4(3) of the *Criminal Code* dealing with the mandatory ban in child pornography cases does not include a provision for a waiver by victims, parents or anyone else." Justice Campbell ultimately concluded that s. 486.4(3) does not conflict with the *YCJA*. Implicit in Justice Campbell's reasons is the assumption that if waiver were permitted under s. 486.4(3), then Parliament would have specifically provided for it, as they did in the *YCJA.*

[18] Although not binding on this Court, I consider the reasoning in these cases to be sound. In my view, the parties are not free to waive s. 45(8) of the CFSA, and this Court has no power to authorize publication that would contravene it. For that reason, the names of the applicants in this decision have been initialized.

The Mandate of the Motherisk Commission

[19] The Order in Council ("OIC") establishing the Motherisk Commission sets out its mandate as being: (a) to establish a Review and Resource Centre to offer "appropriate support and assistance to persons affected by the Motherisk test results, including information, counselling assistance, legal advice and alternative dispute resolution"; (b) to design and implement a process to notify affected persons; (c) to offer early advice and guidance identified by children's aid societies as high priority and review individual child protection cases that may have been affected by Motherisk tests between 1990 and 2015 on request or on the initiative of the Commissioner; (d) to determine eligibility criteria for and the level and type of services to be made available to affected persons; and (e) engage "as may be appropriate" with interested parties and stakeholders.

[20] The OIC specifically provides that the Commissioner shall not express any conclusion or recommendation regarding potential civil or criminal liability of any person.

[21] The Motherisk Commission was established under the *Public Inquiries Act*7 and the Commissioner has the authority to establish rules and guidelines for the Commission. The Process Rules established by the Commission, and published in August 2016, provide for two phases: (1) Reviewing cases identified as high priority and those for which a member of the public has sought a review; and (2) Undertaking outreach inviting affected individuals to apply for resources offered at the Commission's Review and Resource Centre. With respect to the file review process, the OIC directs the Commissioner to determine whether the Motherisk testing had a "substantial impact." This is a defined term in the Process Rules, as follows:

[6] *R. v. B(K)*, 2014 NSPC 24, 345 N.S.R. (2d) 203
[7] *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sch.6

"substantial impact" when referring to a positive Motherisk test means that the test materially affected the outcome of the case having regard to one or more of the following factors:

(i) The creation of a status quo with respect to the child's living arrangements;

(ii) The position of the Children's Aid Society respecting the direction of the case; and

(iii) The decision of the court.

[22] The Process Rules provide that after the file review, the Commissioner will make one of three determinations:

> (1) That the Motherisk testing did not have a substantial impact (in which case all parties requesting the review are to be advised of the finding and, where permanency planning has been put on hold, the Commissioner will authorize the CAS to take whatever further steps are necessary to plan permanency for the child);
>
> (2) That the Motherisk testing did have a substantial impact (whereupon the Commission is to take reasonable steps to locate the parties and notify them); and
>
> (3) Where the role of the Motherisk testing is unclear, further information is to be gathered, including but not limited to case notes, reports, assessments and court transcripts.

[23] The Commissioner, in accordance with her mandate under the OIC, established a Review and Resource Centre, which has the capacity to provide legal file reviews, counselling assistance, legal referral and alternative dispute resolution services. Under the Rules, where it is determined that the Motherisk testing did not have a substantial impact, the services available are counselling assistance, a meeting with the Commissioner and/or review counsel to discuss the outcome, reconsideration of the file review, and any other services the Commissioner deems appropriate having regard to the Terms of Reference in the OIC.

[24] Where the Commissioner determines that the Motherisk testing did have a substantial impact on the outcome of the case, Rule 16 provides for affected persons to be offered the following services:

(a) Counselling assistance;

(b) A meeting with the Commissioner and/or review counsel to discuss the outcome;

(c) Legal referral;

(d) Funding for legal services; and,

(e) Any other services the Commissioner deems appropriate, having regard to the terms of Reference.

[25] Rule 9 provides that an affected person who disagrees with the Commissioner's determination may request reconsideration within 30 days of being advised of the decision. Further, an affected person or children's aid society seeking reconsideration may file further material in support of their request.

C.R.'s Application is Moot

[26] The Commissioner reviewed C.R.'s case and issued a letter dated April 11, 2016 in which she stated that, "Although it was not the only evidence supporting the decision, it is clear the results of the Motherisk testing were a significant factor leading to the decision made in the case involving [C.R.]'s children." The full panoply of resources available from the Review and Resource Centre were made available to C.R., including the opportunity for counselling, legal referral, funding for legal services and alternative dispute resolution.

[27] C.R. objects to the wording of the Commissioner's letter and takes the position that there is no basis for the statement that the Motherisk results were "not the only evidence" supporting the decision. She seeks judicial review on the basis that she was not given the opportunity to make oral and written submissions, was not provided with all of the material upon which the Commissioner relied in reaching her determination, and was denied a hearing.

[28] C.R. was fully successful before the Commissioner. It is not necessary to engage in an analysis of the procedural fairness and natural justice standards required of the Commissioner at the various stages of the Commission's process. Regardless of whether there was a denial of procedural fairness (about which I make no finding), C.R. has obtained everything she could obtain from the Commission within the Commission's mandate. It is only the result of a decision that can be the subject of judicial review, not peripheral words in the reasons that have communicated that result. It is not the function of the reviewing court to rewrite the reasons of the tribunal, nor is judicial review available merely to attack extraneous words in a decision.

[29] I have no doubt that C.R. feels affronted by the reference to there being other factors involved in her losing her children. However, it is clear from the decision of the judge who decided the child protection proceedings that there were, in fact, other things he took into account. In my view, C.R.'s application is moot. She has already obtained a favourable ruling from the Commissioner and has access to all of the resources to which she was entitled. In any event, the remedies sought here are discretionary. I would not exercise my discretion to make any of the orders sought in this situation.

[30] I note that the Commissioner has agreed that C.R. may have 30 days to seek reconsideration of her decision in order to seek to have the language to which she objects removed. I leave that to C.R. and the Commissioner. There is no basis for this Court to intervene.

[31] Accordingly, her application is dismissed.

Y.M.'s Application is Premature 8

[32] Y.M.'s child has been placed in the final custody of her natural father. This occurred after family court proceedings were brought by the father, but in which the C.A.S. was involved. The C.A.S. supported the father's plan and relied upon positive Motherisk tests as evidence that Y.M. was abusing alcohol. Evidence

from Motherisk was introduced in the family court proceedings. When a final custody order was made in favour of the father on August 2, 2013, the C.A.S. withdrew its child protection application. The final custody order stipulated that Y.M. would have unsupervised day time access each Sunday from 12:00 to 5:00 p.m. and each Wednesday from 7:00 to 8:00 p.m. The order further provided that graduated overnight access is to begin at such time as Y.M. provided a Motherisk hair follicle test showing minimal or no alcohol consumption for a three month period, proving that there is no evidence that this would otherwise be contrary to the child's best interests.

[33] To date, Y.M. has not sought an order varying the access terms of the custody order.

[34] Y.M. requested that the Commissioner review her case. The Commissioner obtained the files from the C.A.S. and conducted a file review. The Commissioner determined on September 20, 2016 that further information was required in relation to the court proceeding, including a transcript of a hearing that took place on October 9, 2012, and has requested those documents. The final review has not yet been concluded. No decision has been made as to whether the Motherisk testing was a substantial factor in this case, and no determination has been made as to what resources will or will not be made available to Y.M.

[35] Y.M. seeks judicial review of the Commissioner's decision and seeks relief in the nature of mandamus compelling the Commissioner to receive written and oral submissions from the applicant prior to making a decision. She also originally sought an order compelling the Commissioner to provide her with disclosure of all documents sought and received by the Commissioner and an order compelling the Commissioner to order transcripts of the applicant's proceedings.8

[36] As a general principle, a court will not interfere in ongoing proceedings before an administrative tribunal. Absent exceptional circumstances, parties must exhaust all remedies available in the administrative process before turning to the courts. The rationale for this principle is well-summarized by Stratas J.A. in *C.B. Powell Limited v. Canada (Border Services Agency)*9 as follows (at paras. 31-32):

> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[8] These latter two forms of relief may now be moot as the Commissioner has sought transcripts and provided some materials to the applicant.

[9] *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61

> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 48.

[37] The exceptional situations in which courts will intervene in the midst of an administrative tribunal's process are rare, absent a true issue of jurisdiction (which clearly does not arise here). Typically, concerns about procedural fairness and natural justice are not sufficient to warrant intervention. In *Harelkin v. University of Regina*,10 the Supreme Court of Canada recognized that the manner in which the university dealt with a student breached principles of natural justice, but nevertheless held that the courts were not entitled to intervene until the student had exhausted his internal remedies, which included the right of appeal to the university senate.

[38] Likewise, the Ontario Court of Appeal held in *Volochay v. College of Massage Therapists of Ontario*11 that the Divisional Court was "wrong in principle" in quashing decisions of the College's investigatory bodies prior to Mr. Volochay exhausting his right of appeal to the Health Professions Appeal and Review Board ("HPARB"). This was so notwithstanding findings that the College had breached principles of procedural fairness and natural justice, which the Court of Appeal found did not constitute "exceptional circumstances," particularly in light of the availability of an adequate remedy from HPARB.

[39] In this case, there are no exceptional circumstances warranting intervention at this stage. The Commissioner is still in the process of reviewing the file. It is not for this court to dictate, prior to any decision, how the Commissioner should go about that task. Such an intervention would be completely inconsistent with principles of judicial deference to administrative tribunals. Further, after the Commissioner makes a decision, Y.M. has a right to seek reconsideration and to file any additional materials upon which she relies with the Commissioner for her consideration. It may be the case that, after all avenues before the Commission have been exhausted, Y.M. will have received everything to which she believes she is entitled. If so, that will be the end of the matter. If not, she may then seek judicial review, which can be conducted with the benefit of a full record of all proceedings before the Commission.

[10] *Harelkin v. University of Regina*, [1979] 3 S.C.R. 561

[11] *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541; see also *C.B. Powell*, *supra*, Note 9 at para. 33

[40] Accordingly, this application is dismissed as premature.

C.T.'s Application is Premature

[41] C.T.'s daughter was made a Crown ward without access for purposes of adoption after a child protection trial and pursuant to the Order of Hardman J. dated December 15, 2015. That decision is currently under appeal. It would appear that the child was apprehended by the C.A.S. because of Motherisk hair testing that showed the presence of marijuana and cocaine for both C.T. and her child. C.T. contends this was the only basis upon which the C.A.S. acted. Motherisk results were introduced at the trial. However, in her reasons for decision, the trial judge referred to *R. v. Broomfield*[12] and the Independent Review being conducted by the Honourable Madam Justice Lang and held (at para. 162) that "given the concerns raised by the investigation, it is not possible for the court to rely on any of the tests filed to establish on their own the presence or absence of any drugs in the samples tested."

[42] C.T.'s case was identified by the C.A.S. as being a high priority and the file was sent to the Commission for review. Based on the file review, the Commissioner determined that the Motherisk testing did not have a substantial impact on the outcome of the case and advised the C.A.S. (by letter dated March 31, 2016) that there was "no reasonable basis related to [Motherisk] testing to question the legal process on the existing status quo of the child" and that the C.A.S. was "at liberty to take whatever future steps are deemed to be in the children's best interest."

[43] This letter was not initially provided to C.T., but she was advised of the result in April 2016, both orally and in writing. The Commissioner offered to provide counselling services, but C.T. has not taken advantage of that offer.

[44] Initially, the C.A.S. attached the Commissioner's letter as an exhibit to an affidavit and filed it in the appeal from the wardship Order made by Hardman J. However, upon the objection of counsel for C.T., that affidavit was withdrawn and the Commissioner's letter is now the subject of a motion by C.A.S. to adduce it as fresh evidence on the appeal. It is for the appeal court to determine whether or not the Commissioner's opinion as to the role of the Motherisk testing on the result in the case is relevant and admissible evidence on the appeal. It does not form a basis for judicial review in this court.

[45] C.T. objects to the Commissioner's determination that the Motherisk testing was not a significant factor in her case. She alleges that in reaching that determination the Commissioner failed to properly apply principles of procedural fairness and natural justice. Prior to commencing this judicial review application, C.T., through her counsel, advised the Commissioner of the appeal from the decision of Hardman J. and asked the Commissioner to review the material filed on the appeal, including the transcripts of the trial. The Commission responded that if C.T. requested reconsideration under the Rules, the Commissioner would review that material as part of the reconsideration. Instead, in July 2016, C.T. commenced this judicial review application.

[46] At the present time, the appeal of the wardship order is being held in abeyance while the parties are seeking to resolve the issues through an ADR process external to the Commission. While this is ongoing, C.T. does not want the Commissioner to be involved. Although provided for in the Rules for filing a reconsideration request has expired, the Commissioner, through her counsel, has undertaken to extend the time to 30 days after the outcome of the appeal, although it would also be open to C.T. to file her reconsideration request earlier if she wishes.

[12] *Supra*, Note 1.

[47] C.T. has failed to exhaust all avenues of redress within the Rules of the Commission. That being so, her application is premature and is dismissed.

Conclusion and Order

[48] In the result, all three applications are dismissed. No findings are made with respect to the merits of any of the applications. The respondent does not seek costs, and none are awarded.

MOLLOY J.

I agree:
SHAW R.S.J,

I agree:
PATTILLO J.

Released: November 18, 2016

CITATION: Y.M. v. Commissioner Judith Beaman; C.T. v. Commissioner Judith Beaman; and C.R. v. Commissioner Judith Beaman, 2016 ONSC 7118

DIVISIONAL COURT FILE NOs.: 357/16, 358/16 and 359/16
DATE: 20161118 **ONTARIO**

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

SHAW R.S.J., MOLLOY and PATILLO JJ.

BETWEEN:

Y.M.

Applicant

– and –

COMMISSIONER JUDITH BEAMAN

Respondent

AND BETWEEN:

C.T.

Applicant

– and –

COMMISSIONER JUDITH BEAMAN

Respondent

AND BETWEEN:

C.R.

Applicant

– and –

COMMISSIONER JUDITH BEAMAN

Respondent

REASONS FOR DECISION

MOLLOY J.

Appendix 5c:
Lead Commission Counsel's letter to CASs re: high priority files, July 18, 2016

MOTHERISK COMMISSION

The Honourable Judith C. Beaman,
Commissioner

Ontario

COMMISSION MOTHERISK

L'honorable Judith C. Beaman,
Commissaire

SENT VIA EMAIL AND REGULAR MAIL

July 18, 2016

Dear Executive Directors and Legal Counsel:

I hope that you are all well and that you are enjoying the summer. The Commission staff are busy reviewing files and planning the Commission's outreach campaign which will be in full swing starting in the fall.

It has recently been brought to my attention that some children's aid societies may not be interpreting category 4 of the high priority list in the way that the Commission intended. You will recall that category 4 reads as follows:

> *Cases where a child has been made a Crown ward and is in the care of a society but has not yet been placed for adoption.*

The concern is that some children's aid societies may have interpreted this wording such that only cases where a Crown Ward is being considered for adoption have been sent to the Commission. I wish to clarify that the Commission wishes to see all files which employed Motherisk hair testing involving children who have been made Crown Wards even if there is no plan to place a child for adoption.

In my review of files, it would appear that most children's aid societies have interpreted category 4 correctly but out of an abundance of caution, I would ask that you ensure that all of your staff involved in preparing cases to send to the Commission have an accurate understanding of category 4.

Thank you for your continuing cooperation with and support for the Commission. Please feel free to contact me by telephone (416) 212-0526 or email lorne.glass@motheriskcommission.ca if you have any questions.

Yours very truly,

Lorne Glass
Lead Counsel

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Appendix 5d:
Commissioner's letter to CASs re: customary care files, June 3, 2016

MOTHERISK COMMISSION

The Honourable Judith C. Beaman,
Commissioner

COMMISSION MOTHERISK

L'honorable Judith C. Beaman,
Commissaire

June 3, 2016

Dear Executive Directors and Legal Counsel:

I write to thank you for the work you and the staff at your agencies have done to identify and organize the files that you have sent to the Motherisk Commission for our review. To date we have received files from 37 of the 47 children's aid societies in the Province of Ontario and five other societies have advised us that they have no files that fit the criteria we established for high priority files. There is one agency that has told us that they have files to send to us that we have not yet received but there are still 4 agencies that we have not received replies from.

The Motherisk Commission recognizes the great amount of extra work that is required to identify the files that are considered by us to be high priority. As the Commissioner, I am aware that the Ministry of Children and Youth Services has made some money available to assist your agencies, although I am also aware that the money provided may not be enough to pay for 100% of your extra costs. I hope that this will not stop you from continuing to identify files that fit the criteria we set for high priority files and that you will continue to send these files to us as you become aware of them.

To date we have received approximately 425 files that are considered high priority and we have been able to review and close about one-third of these. In addition, there are another 30 files where some questions have been asked of the agency and once these questions are answered, those files can be closed. There have been 7 files where we have found there to have been a substantial reliance on the Motherisk hair test results and in those cases we are working with the agencies, parents, children and others to move them forward so that the children in these cases are not caught in limbo.

There are two groups of files that we have not been receiving to date and which we believe we should be receiving. These files are those in which customary care agreements have been entered into by parents, children and others that have led to the children being removed from the care of a parent on the basis in whole or in part of Motherisk hair testing results.

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The Motherisk Commission is aware that some of these customary care agreements may have been created and entered into as a resolution of a court proceeding, while others may have been created and entered into prior to or instead of a court proceeding being commenced. In both of these situations, the Motherisk Commission wishes to receive these files.

As you are aware, we have been asking for the legal files so that we are able to review exactly the same documents and see the same information as that of the judge who made the decisions in a case. In cases where a customary care agreement was used as the resolution of a court proceeding, we want the same documents.

In cases where the customary care agreement was entered into prior to or instead of a court proceeding being commenced, we will need to see and review the file of the agency in order to know the basis for the customary care agreement being required and why it was agreed to by the parent(s). In addition, it may be necessary for us to contact the parent(s) and others to get information from them about how and why the customary care agreement was necessary.

We are aware that there may be a great many files that we will now have to review that deal with customary care agreements, but we believe that this is necessary in order to carry out the mandate set out in the Order in Council that established the Motherisk Commission. I believe that in situations where a child has been removed from a parent due to a substantial reliance upon Motherisk hair testing results, then that parent and that child and others deserve to have the case reviewed to see if some action should be recommended, whether that be legal, counselling or some remedy available through the ADR services of the Motherisk Commission.

We are also aware that this request for these files to be provided to the Motherisk Commission may cause you to have questions and if so, I invite you to contact Lorne Glass, Lead Counsel of the Commission, or me.

I again want to thank you for the work you all have been doing and hope that the work of the Commission has not and will not impede in any way the great work you are doing for children in this Province.

Yours very truly,

Judith C. Beaman
Commissioner

Appendix 5e:
Commissioner's order to CASs re: high priority files, February 22, 2016

THE MOTHERISK COMMISSION OF INQUIRY

The Honourable Judith C. Beaman, Commissioner

Ontario

LA COMMISSION D'ENQUÊTE MOTHERISK

L'honorable Judith C. Beaman, Commissaire

ORDER

WHEREAS, as per the *Public Inquiries Act,* the Order in Council 4/2016, dated January 13, 2016, established the Motherisk Commission of Inquiry and provided for the appointment of Justice Judith C. Beaman as the Commissioner, effective January 15, 2016;

AND WHEREAS, paragraph 6 of the Order in Council 4/2016 states:

> In accordance with the *Public Inquiries Act, 2009*, the Commissioner shall obtain all records necessary to perform her duties and, for that purpose may require the production of information that is confidential or inadmissible under any Act or regulation;

AND WHEREAS, the Children's Aid Societies in Ontario are the custodians of the *Child and Family Services Act*, (R.S.O. 1990, c. C.11 as am.) cases files in which individuals and their families were potentially affected by flawed Motherisk Drug Testing Laboratory hair strand test results;

AND WHEREAS, the Ministry of Children and Youth Services released a policy directive: CW004-15 Directions Related to Certain High Priority Cases Involving Motherisk Drug Testing Laboratory (MDTL) Hair Testing to all Children's Aid Societies on December 17, 2015;

AND WHEREAS, as part of the policy directive CW004-15, the Ministry of Children and Youth Services directed the Children's Aid Societies to immediately identify any cases involving MDTL hair testing results that remain open and where the child has not yet been placed for adoption and to contact the parents or their lawyers to advise them of the potentially flawed hair test results and the creation of the Motherisk Commission of Inquiry.

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AND WHEREAS, in order to fulfil the Motherisk Commission's mandate and to perform her duties as per Order in Council 4/2016, Commissioner Judith C. Beaman requires complete copies of the unredacted files that have been identified as high priority cases by the Children's Aid Societies in Ontario;

THIS COMMISSION ORDERS THAT:

The Children's Aid Societies in Ontario shall release complete electronic or paper copies of the unredacted case files, which have been identified by the Children's Aid Societies as high priority cases, to the Motherisk Commission on Inquiry as soon as possible but no later than 14 days following receipt of this Order.

ORDERED at Toronto, Ontario, this 22nd day of February 2016

The Honourable Judith C. Beaman
Commissioner

Appendix 5f:
Commissioner's order to CASs re: high priority files, revised February 24, 2016

THE MOTHERISK COMMISSION

The Honourable Judith C. Beaman, Commissioner

Ontario

LA COMMISSION MOTHERISK

L'honorable Judith C. Beaman, Commissaire

ORDER

WHEREAS, as per the *Public Inquiries Act,* the Order in Council 4/2016, dated January 13, 2016, established the Motherisk Commission and provided for the appointment of Justice Judith C. Beaman as the Commissioner, effective January 15, 2016;

AND WHEREAS, paragraph 6 of the Order in Council 4/2016 states:

> In accordance with the *Public Inquiries Act, 2009*, the Commissioner shall obtain all records necessary to perform her duties and, for that purpose may require the production of information that is confidential or inadmissible under any Act or regulation;

AND WHEREAS, the Children's Aid Societies in Ontario are the custodians of the *Child and Family Services Act*, (R.S.O. 1990, c. C.11 as am.) case files in which individuals and their families were potentially affected by flawed Motherisk Drug Testing Laboratory hair strand test results;

AND WHEREAS, the Ministry of Children and Youth Services released a Policy Directive: CW004-15 Directions Related to Certain High Priority Cases Involving Motherisk Drug Testing Laboratory (MDTL) Hair Testing to all Children's Aid Societies on December 17, 2015;

AND WHEREAS, as part of the Policy Directive CW004-15, the Ministry of Children and Youth Services directed the Children's Aid Societies to immediately 1) identify all cases involving MDTL hair testing results in which a Children's Aid Society intends to place a child for adoption or in which a child has been placed for adoption but an adoption order has not yet been made; and 2) contact the parents or

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their lawyers and advise them of the potentially flawed hair test results and the creation of the Motherisk Commission;

AND WHEREAS, Order in Council 4/2016, authorizes Commissioner Beaman to require all Children Aid Societies in Ontario to release information pertaining to such other high priority case files in which Motherisk hair testing was conducted as she deems appropriate;

AND WHEREAS, in order to fulfil the Motherisk Commission's mandate and to perform her duties as per Order in Council 4/2016, Commissioner Judith C. Beaman requires complete copies of the unredacted files that have been identified as high priority cases by herself and by the Children's Aid Societies in Ontario.

THIS COMMISSION ORDERS THAT:

The Children's Aid Societies in Ontario shall release complete electronic or paper copies of the unredacted case files, which have been identified by herself and by the Children's Aid Societies as high priority cases, to the Motherisk Commission as soon as possible but no later than 14 days following receipt of this Order.

ORDERED at Toronto, Ontario, this 24th day of February 2016

The Honourable Judith C. Beaman
Commissioner

Appendix 5g:
Lead Commission Counsel's letter to CASs re: FRANK files, December 22, 2016

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman,
Commissioner

L'honorable Judith C. Beaman, Commissaire

Executive Directors and Chief Executive Officers

December 22, 2016

Dear Sir/Madam:

I hope that this letter finds you well. I wish to thank you again for working in partnership with the Commission to locate and provide to us all of the files from your agency which fit into our definition of high priority cases. As this year winds down, I am pleased to report that Commission counsel have reviewed nearly all of the more than 500 high priority files received to date.

As you know, the Commission's mandate requires the Commissioner to work with "affected persons". Those specifically identified are children and youth and individuals from Indigenous and racialized communities. The Commission is required to ensure that their voices are heard and that they be granted meaningful participation in the process.

To that end, the Commission conducted an extensive outreach campaign into these communities. The Commissioner has also met with numerous stakeholders to receive input about her mandate and, in addition, has consulted research about the needs of adopted children and those in foster care. From this work, she has learned of how critically important it is, from a psychosocial perspective, for children who have been removed from their families to know their story.

As a result of these efforts, the Commissioner has determined that she must take proactive steps to review the files of children who were made Crown Wards, who are currently under the age of 18 and whose case involved Motherisk testing. She concluded that it was not possible to devise an outreach strategy that would effectively target children, many of whom may not know that substance abuse was a concern in their case or that the Motherisk testing was used as evidence.

Although it is unlikely that there will be a legal remedy for affected persons in these cases, the Commissioner has determined that her remedial scope must include sharing this information with affected children, in a manner that is appropriate to their age, their stage of development and their current circumstances. This sharing of information could range from a letter being placed in the child's file to a meeting with the child and the child's support person.

A number of stakeholders made compelling arguments for reviewing files involving Motherisk testing where children were made Crown Wards but are now over the age of 18. The Commissioner balanced these arguments against the societies' fiscal and workload constraints and the view that the

Commission would come to the attention of these individuals through its outreach and advertising campaigns. She has determined that the Commission will not review these cases unless an individual or group comes forward to ask for a review. In any event, it is the Commissioner's intention to ensure that a letter be placed in every crown ward file where a Motherisk test was used explaining the Motherisk Review and the activities of the Motherisk Commission.

Working closely with the Ministry of the Attorney General and with the approval of the Superior Court of Justice and the Ontario Court of Justice, the Commission was able to cross-reference the data from the Motherisk Lab with the court's data management system for family law cases (the FRANK system). We have now compiled a list of cases from the FRANK system which identify cases by court location, the child's name and in most cases the child's date of birth.

I am enclosing for your review a list of cases where we believe your agency was the Applicant. The list is password protected and we will send the password to you separately. I would ask that you please check your records for these cases and that you provide the legal materials contained in them to the Commission. The case list is attached to the electronic version of this message. You will receive this letter in hardcopy as well.

Given the time constraints on the Commission and the volume of cases that remain to be reviewed, we ask that in preparing these cases to send to the Commission, you highlight where the Motherisk testing is referenced in the file. In particular, it would be helpful if you would identify the paragraphs in the pleadings where the testing is referred to, whether the evidence is an exhibit to an affidavit and, where there are reasons, whether the judge referred to the testing.

Thank you for your anticipated cooperation. Please do not hesitate to contact me if you have any questions or wish to discuss this matter further.

Yours truly,

Lorne Glass
Lead Counsel | 416-212-0526 | lorne.glass@motheriskcommission.ca
c. Senior Counsel, Directors of Services

Appendix 5h:
Commissioner's letter to CASs re: files on adopted children, April 3, 2017

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman,
Commissioner

L'honorable Judith C. Beaman, Commissaire

April 3, 2017

Dear Executive Directors and Chief Executive Officers:

I am writing to clarify and respond to a few issues that have been brought to the Motherisk Commission's attention. I would also like to provide you some new information about sharing children's letters with adoptive parents.

Phase II Files

Since my letter to you dated December 22, 2016, regarding the production of additional files containing Motherisk Laboratory hair testing, the Motherisk Commission has received correspondence from a number of Children's Aid Societies seeking further clarification.

Some agencies have inquired about the necessity of providing the Commission with a copy of court files where the children have been adopted. We made the decision to seek these Phase II files after careful consideration and consultation because we recognized that this new requirement would impose an additional burden on you.

We are reviewing these additional files to determine whether the hair tests were overly relied upon by the agency or the courts, and to provide information to affected children and their families about our findings in their particular cases. We received expert clinical advice that all children, whether they are adopted or not, need to have access to their history. The Motherisk Laboratory hair testing situation is an important part of their story.

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Toronto (Ontario) M7A 2R9
info@motheriskcommission.ca
www.motheriskcommission.ca/fr

Children's Letters
As you know, in my letter dated March 20, 2017, we sought your assistance to place hard copies of letters on the files of the children whose reviews we have conducted. Recently, we have heard from a number of executive directors that agencies' files are now being placed on the CPIN system, and that this will result in the elimination of paper files.

We agree that it makes more sense to have the personal letters from me to the children scanned into the electronic files of children. The important thing is for children to be able to access these letters in the future should they choose to look at their files. Please treat this letter as permission to scan and upload all children's letters sent to your agency, to date and in the future, onto the children's CPIN electronic files. We would ask that this attachment be viewable only by the agency staff who created the digital file.

Sharing Children's Letters with Adoptive Parents
The Motherisk Commission has also had a number of submissions from groups associated with adoptive parents. They have requested that we give these parents a copy of the letter addressed to their child. The adoptive parents believe that this will better enable them to know what to expect and be prepared to assist their child process the information, when they learn about the impact of the hair testing in their case. We agree that this, too, makes good sense.

Where the hair testing did not play a substantial role, we will rely on the societies to place the children's letters on their files. We will not be contacting the children directly. We do not see the need to unsettle children with the information where the hair testing was not determinative, as it would be highly unlikely to lead to any change in their lives.

In situations where the child has been adopted, we ask the agency to forward a copy of the children's letter to the last-known address of the adoptive parents to reassure them that no further action will be taken in regard to their children by the Motherisk Commission.

The need to contact children directly, whether they are in care or in adoptive families, will only arise where the Motherisk Commission has determined that the hair testing played a substantial role in the determination of their case. This represents a tiny minority of the files we have reviewed. The Commission will be guided by the advice of the caregivers or adoptive parents as to how and when it is most appropriate to reveal this information to their children.

Contact Information for Adoptive Parents
Some of you have raised concerns about the legality of releasing to the Motherisk Commission the contents of the Phase II files, and of disclosing identifying information related to adoptive families. In order to assuage your unease about releasing this information to the Commission, I have issued an order, which you will find enclosed, requiring you to provide this information to us.

I would like to emphasize that the Commission is only seeking information pertaining to the names of the adoptive parents, their last known addresses and telephone numbers, together with the children's post-adoption names. The sole purpose for obtaining these details is to inform the children and adoptive parents about the findings of the Commission, where we have

determined that the hair testing played a substantial role in the child's file. Rest assured that these details will be kept strictly confidential.

Once again, please accept my sincere thanks for your ongoing cooperation in assisting me to carry out the mandate of the Motherisk Commission.

Sincerely,

Judith C. Beaman
Commissioner

c. Senior Counsel/Directors of Services

Encl.

Appendix 5i:
Commissioner's order to CASs to produce files on adopted children, April 3, 2017

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman, Commissioner

L'honorable Judith C. Beaman, Commissaire

ORDER

WHEREAS, pursuant to the *Public Inquiries Act,* the Order in Council 4/2016, dated January 13, 2016, established the Motherisk Commission and provided for the appointment of Justice Judith C. Beaman as the Commissioner, effective January 15, 2016;

AND WHEREAS, paragraph 2(a) of Order in Council 4/2016 provides:
The Commissioner shall, in consultation with the Attorney General, establish and lead a Review and Resource Centre which will offer appropriate support and assistance to persons affected by the Motherisk test results, including information, counselling assistance, legal advice and alternative dispute resolution.

AND WHEREAS, paragraph 2(b) of Order in Council 4/2016 provides *inter alia*:
The Commissioner shall design and implement a process to identify and notify affected persons so that they may have access to the services and support offered by the Review and Resource Centre;

AND WHEREAS, paragraph 6 of the Order in Council 4/2016 states:
In accordance with the *Public Inquiries Act, 2009*, the Commissioner shall obtain all records necessary to perform her duties and, for that purpose may require the production of information that is confidential or inadmissible under any Act or regulation;

AND WHEREAS, the Family Court Case Management System operated by the Ministry of the Attorney General for family courts in Ontario (the "FRANK" system) contains information which may assist the Commissioner in identifying affected persons;

AND WHEREAS, in fulfillment of a previous order dated October 25, 2016, the Ministry of the Attorney General provided the following information to the Motherisk Commission:
The names and dates of birth of subject children in cases under the *Child and Family Services Act,* R.S.O., 1990 c. C-11 where a court made a final order of Crown Wardship between January, 1998 and December 31, 2015 and where the children in these cases were subsequently adopted;

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AND WHEREAS the Motherisk Commission compared this information to the information in the database provided by the Motherisk Drug Testing Lab (the "MDTL") for the purpose of locating cases where it is believed that MDTL test results were obtained and children were adopted;

AND WHEREAS the Motherisk Commission has prepared a list of these cases by court location and has disseminated these lists to the children's aid societies in Ontario.

NOW THEREFORE THIS COMMISSION ORDERS THAT:

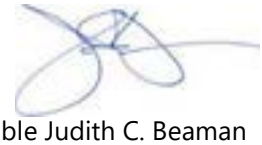
1. Each children's aid society in Ontario review the list it has received and provide, in electronic format, where possible, all files that appear on the list that are in its possession.

2. Each children's aid society report to the Commission any cases that are on the list it has received but are:

    a. not in its possession;
    b. are not believed to involve the use of a hair strand test from the MDTL; or
    c. did not result in the adoption of a subject child or children.

3. Upon request of the Motherisk Commission, each children's aid society in Ontario provide the names and last known addresses of the adoptive parents of the subject children in these files together with the children's post-adoption names.

ORDERED at Toronto, Ontario, this 3rd day of April, 2017



The Honourable Judith C. Beaman
Commissioner

Appendix 5j: Commissioner's letter to children in substantial impact cases

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman,
Commissioner

L'honorable Judith C. Beaman, Commissaire

[date]

Name of child
c/o Name of Executive Director or Chief Executive Officer
Name of Children's Aid Society
Street address
City, ON Postal code

Dear [first name of child],

My name is Judith Beaman and I am the Commissioner of the Motherisk Commission. The Commission was set up by the government of Ontario to review court cases of families that involved hair testing done by the Motherisk Laboratory at the Hospital for Sick Children in Toronto.

These hair tests were intended to tell children's aid societies, lawyers and judges whether a person had used drugs or alcohol. The problem was that these tests were not carried out properly. A review in 2015 found that the tests were inadequate and unreliable. If you want to find out more about the investigation, you can look at the "Report of the Motherisk Hair Analysis Independent Review" by The Honourable Susan E. Lang (http://www.m-hair.ca/).

My job is to review court cases where the hair tests were used as evidence. When I review a case, I have to decide whether the test had a major impact on the decisions made by the children's aid society or the court. In these cases, I contact the family to help them get legal advice or other support.

One of the cases I reviewed was that of your biological family. I looked at all of the documents that were filed with the court, the Children's Aid Society and other parties. I also read carefully and considered the decisions made by the judges who dealt with your case when it was in court.

It is impossible to be sure whether the Motherisk test results were accurate or not because they were unreliable. However, it was clear to me that the hair test results were relied upon too heavily by [name of CAS] and by the court in the decisions made about your care. We reached out to your biological mother and father to offer them information and support.

I am very sorry to give you this information and realize you may find it upsetting, but I thought that you may want to know about this part of your history. I asked [name of CAS] to put this letter in your file so you would have this information if you chose to look at your file one day.

The Commission was set up for a term of only two years. At the beginning of 2018, I will be submitting a report on our work to the government. After that, the Commission will be closed down. Currently our website is www.motheriskcommission.ca, but by the time you read this the website may not be active. However, the Motherisk Commission report will still be available online. I hope it will be helpful to you.

I wish you all the best.

Yours very truly,

Judith Beaman
Commissioner

Appendix 5k:
Commissioner's letter to children in non-substantial impact cases

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman,
Commissioner

L'honorable Judith C. Beaman, Commissaire

[date]
Name of child
c/o Name of Executive Director or Chief Executive Officer
Name of Children's Aid Society
Street address
City, ON Postal code

Dear [first name of child],

My name is Judith Beaman and I am the Commissioner of the Motherisk Commission. The Ontario government set up the Commission to offer legal and counselling support to people affected by the hair testing done at the Motherisk Lab at the SickKids Hospital in Toronto.

The hair tests were supposed to tell children's aid societies, lawyers and judges whether a person had used drugs or alcohol. The problem was that these tests were not done properly. An investigation in 2015 found that the tests were inadequate and unreliable. If you want to find out more about the investigation, you may want to look at the "Report of the Motherisk Hair Analysis Independent Review" by The Honourable Susan E. Lang (http://www.m-hair.ca/).

My job is to review court cases where the hair tests were used as evidence. When I review a case, I have to decide whether the test had a major impact on the decisions made by the children's aid society or the court. In these cases, I contact the family to help them get legal advice or other support.

One of the cases I reviewed was that of your family. I looked at all of the documents that were filed with the court. I also read carefully and thought about the decisions made by the judges who dealt with their case when it was in court.

It is impossible to be sure whether the Motherisk test results were accurate or not because they were unreliable. However, I believe that the court and [name of CAS] did not rely too much on these test results in your family's case because there were other reasons for their decisions.

I thought that you may want to know about this part of your history. I asked the [name of CAS] to put this letter in your file so you would have this information if you chose to look at your file

one day. I wanted you to know that although the Motherisk Lab test results should not have been used, I do not believe they changed the outcome of the case involving your family.

The Commission was set up for a term of only two years. At the beginning of 2018, I will be submitting a report on our work to the government. After that, the Commission will be closed down. Currently our website is www.motheriskcommission.ca, but by the time you read this the website may not be active. However, the Motherisk Commission report will still be available online. I hope it will be helpful to you.

I wish you all the best.

Yours very truly,

Judith Beaman
Commissioner

Appendix 5l:
Commissioner's letter to CASs re: amended children's letter policy, June 7, 2017

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman, Commissioner

L'honorable Judith C. Beaman, Commissaire

June 7, 2017

Dear Executive Directors and Chief Executive Officers:

I am writing to you about our revised process for children's letters.

As you know, the Commission's goal is to inform children and youth who were affected by the Motherisk Laboratory testing about what we found when we reviewed their particular file. In our future correspondence with you, we will continue to include letters to the children involved and request that you place the letters on the electronic or paper file that your agency would produce should a child request to view their records.

We learned recently that one of our letters caused distress to a child, we believe, as a result of the way it was shared by the parent. As far as possible, we want to avoid similar situations from occurring again.

Therefore, we sought further advice and rethought our process for sharing copies of the children's letters with parents, both biological and adoptive. We no longer wish to share actual copies of the children's letters with parents. Instead, we wish to inform parents that the children's letters are on file at the CAS and give them a sense of what the letters contain. We now believe that the safest place for the children's letters is in the CAS file and in the context of all the other documents in the file.

Cases of non-substantial impact

In the large majority of cases, the Motherisk testing did not have a substantial impact on the decision making in the file. In these cases, I previously asked you, in my April 3, 2017 letter, to forward a copy of the children's letter to the last-known address of the adoptive parents. I now request that you **do not** forward copies of the children's letters to the adoptive parents.

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info@motheriskcommission.ca
www.motheriskcommission.ca

Instead, we have drafted a standard letter to the adoptive parents for you to share in situations where the child has been adopted. (Please see enclosed or attached.) We will be providing this letter to you electronically. Could you please fill in the missing information (i.e. child's name/children's names, name of your agency), date and address it, and send it directly from your agency, as the need arises to inform adoptive parents of the Commission's findings.

Cases of substantial impact

In the small minority of files where we found that the Motherisk testing had a substantial impact on the outcome of the case, we will continue to be guided by the advice of the child's caregivers as to how and when to share this information with their child. There is no change in the process for agencies from my letter of April 3, 2017. However, the Commission will not be sending copies of the children's letters to either the adoptive or the biological parents.

Ongoing file reviews

Thank you for all your time and effort in sending us files for review. Please continue to send us your high priority and Phase II files so that we can review them all and let you know our findings, without needing an extension to the Commission's mandate beyond 2017.

Please do not hesitate to contact me if you have questions. I would like to thank you for all your support to the Motherisk Commission and for your flexibility in helping us to change our processes as we learn and respond to feedback.

Sincerely,

Judith C. Beaman
Commissioner

c. Senior Counsel/Directors of Services

Encl.

Template for CASs

Dear Adoptive Parent:

I am sending you this letter on behalf of the Motherisk Commission.

The Ontario government set up the Motherisk Commission to offer legal and counselling support to people affected by the hair testing done by the Motherisk Laboratory at the Hospital for Sick Children in Toronto.

The hair tests were intended to tell children's aid societies, lawyers and judges whether a person had used drugs or alcohol. However, an investigation in 2015 found that the tests were inadequate and unreliable for legal purposes. If you want to find out more about the investigation, you may wish to look at the "Report of the Motherisk Hair Analysis Independent Review" by The Honourable Susan E. Lang (http://www.m-hair.ca/).

The Motherisk Commission's mandate is to review individual child protection cases where the hair tests were used as evidence. The purpose of the review is to determine whether the Motherisk test results had a substantial impact on the decisions made by the children's aid society or the court.

One of the cases the Commission reviewed was that of [name of child or children]. The Commission looked at all of the documents that were filed with the court. They also read carefully and thought about the decisions made by the judges who dealt with the case when it was in court.

It is impossible to be sure whether the Motherisk test results were accurate or not because they were unreliable. However, the Commission believes that the court and [name of CAS] did not rely too heavily on these test results in this case because there were other reasons for their decisions. The Commission now considers this case closed and will be taking no further action.

The Commission received advice from social workers and other professionals who work with children and youth. They emphasized the importance of children and youth knowing their full history. For this reason, the Commission has asked us to put a letter in your [child's/children's] file, explaining that the Motherisk testing was not reliable and that the Commission was set up to help people who were affected by it. The letter informs them that the Commission reviewed their family's file and found that the test results did not play a substantial role in their particular case. This information will be available to your [child/children] if they choose to look at their file in the future.

If you would like more information about the Motherisk Commission, please visit www.motheriskcommission.ca, or contact the Commission by email, at info@motheriskcommission.ca, or by telephone, at 416-212-0560 or toll free 1-844-303-5476.

The Commission was set up for a term of only two years. At the beginning of 2018, it will be submitting a report on its work to the government and will be closed down shortly after that. If you need assistance at any time, please contact [CAS contact info].

Appendix to Chapter 6:
Observations from the Review of Individual Cases
Appendix 6a: Sample Motherisk invoices

SickKids MOTHERISK TREATING THE MOTHER – PROTECTING THE UNBORN
Drug Testing Laboratory

INVOICE

PATIENT NAME: [redacted]
DATE OF BIRTH:
PATIENT ID:

SAMPLE #: [redacted]
INVOICE #: [redacted]
INVOICE DATE: 2010-05-03

[redacted]

DESCRIPTION

AUTHORIZING MD:
EXTERNAL REF#:

SAMPLE RECEIVED: 2010-03-29
SAMPLE COLLECTED: 2010-03-18

MATRIX	DRUG	# TESTS	UNIT PRICE	PRICE
Hair	Cocaine	1	75.00	75.00
Hair	Benzoylecgonine	1	0.00	0.00
Hair	Methamphetamine/MDMA	1	50.00	50.00
Hair	Opiates	1	50.00	50.00

AMOUNT DUE $175.00 CAD

Please forward payment quoting invoice number to:

The Hospital for Sick Children
Attention: Research Accounting
555 University Avenue
Toronto, Ontario M5G 1X8

Please direct invoice inquiries to 416-813-7654 x2674 / Please direct result & interpretation inquiries to 416-813-8572

TERMS Payment due on receipt of this invoice

PAYMENT STUB

Invoice #: [redacted]
Billing Institution: [redacted]

Sample #: [redacted]
Amount Due: $175.00 CAD
Amount Paid:

SickKids

MOTHERISK

TREATING THE MOTHER – PROTECTING THE UNBORN

Drug Testing Laboratory

INVOICE

PATIENT NAME: [redacted]
DATE OF BIRTH:
PATIENT ID:

SAMPLE #: [redacted]
INVOICE #: [redacted]
INVOICE DATE: 2010-04-21

[redacted]

AUTHORIZING MD:
EXTERNAL REF#:

SAMPLE RECEIVED: 2010-03-29
SAMPLE COLLECTED: 2010-03-25

DESCRIPTION				
MATRIX	DRUG	# TESTS	UNIT PRICE	PRICE
Hair	FAEE (alcohol)	1	150.00	150.00

AMOUNT DUE $150.00 CAD

Please forward payment quoting invoice number to:

The Hospital for Sick Children
Attention: Research Accounting
555 University Avenue
Toronto, Ontario M5G 1X8

Please direct invoice inquiries to 416-813-7654 x2674 / Please direct result & interpretation inquiries to 416-813-8572

TERMS Payment due on receipt of this invoice

PAYMENT STUB

Invoice #: [redacted]
Billing Institution: [redacted]

Sample #: [redacted]
Amount Due: $150.00 CAD
Amount Paid:

Appendix to Chapter 8: Counselling Services

Appendix 8a: Client confirmation letter

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman,
Commissioner

L'honorable Judith C. Beaman, Commissaire

[Date]

[Name]
Street Address
City, ON Postal Code

Dear [Name]:

This letter is to confirm that the Motherisk Commission has referred you to counselling services.

Your counsellor's name and address are:

As we discussed, you will have the opportunity to meet with your counsellor to discuss your situation and the time you both believe that counselling will be required. The Commission will provide counselling services to you at no cost, for up to two years.

It is important for you to attend the sessions which you and your counsellor have scheduled. The Motherisk Commission will allow for up to three missed sessions without agreed upon notice during the course of counselling. After that, counselling services will be withdrawn.

Please find enclosed information regarding the Motherisk Commission, including frequently asked Questions and Answers. I hope you find the counselling service of assistance. I am available if you have questions or concerns. Please contact me at 416-212-0524 or 647-286-9246 or email me at Celia.Denov@motheriskcommission.ca.

Yours truly,

Celia Denov
Director of Counselling Services

Appendix 8b: Counsellor confirmation letter

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman, Commissioner

L'honorable Judith C. Beaman, Commissaire

[Date]
[Name]
Street Address
City, ON Postal Code

Dear [Name]:

I am writing regarding the counselling support funding being made available to you by the Motherisk Commission. We are committed to working with you to facilitate access to counselling for those who are affected by the issues raised through the Motherisk Laboratory hair testing.
As background for your counselling work, I am providing some materials related to the kinds of counselling support available and the process to follow. These include:

- a brief overview of the Commission and its mandate;
- responses to some frequently asked questions (FAQ);
- information on the process regarding approval of requests for counselling;
- a discussion of forms; and
- billing information.

Individuals who request counselling support will also receive a package that includes the same overview and FAQ material.

We have tried to design an approach that minimizes administration, while maintaining safeguards for public funds. We very much appreciate your willingness to work with the Commission to provide counselling services to those affected by Motherisk testing concerns. If you have any questions, please do not hesitate to call me at 416-212-0524 or 647-286-9246 or email me at Celia.Denov@motheriskcommission.ca.

Yours truly,

Celia Denov
Director of Counselling Services

Appendix 8c: Information re: counselling

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman, Commissioner

L'honorable Judith C. Beaman, Commissaire

INFORMATION REGARDING COUNSELLING

The Motherisk Commission has made arrangements for those affected by the hair strand testing conducted by the Motherisk Laboratory at the Hospital for Sick Children to have access to counselling support. Counselling support is intended to assist individuals who have reached out to the Motherisk Commission to address their difficulties or concerns. It is understandable, given the issues being addressed at the Motherisk Commission, that some individuals will have need of this counselling support.

One key aspect of counselling support is personal choice. If a person wishes to have counselling, they can choose the type of provider who will offer that service. Ensuring the right relationship in therapy is important, and part of that relationship is allowing a person to select the right counsellor to assist them. As a result, as long as the person providing counselling support is approved by the Commission as qualified, an individual can choose his or her own counsellor. If a person wishes to have counselling support, but does not know how to find that service, the Commission's Director of Counselling Services will provide them with a referral to a suitable counsellor. The Director of Counselling Services will have informed the potential service provider that they may be contacted by someone affected by the Motherisk Commission, so that there will be quick access to help.

Another important part of counselling support through the Motherisk Commission is privacy. The Commission will keep confidential all records related to requests for counselling support. The Commission will not have therapeutic records. The staff of the Commission will not know, for example, what is discussed at counselling support sessions. Every effort will be made to handle requests for counselling support in a way that respects personal privacy and dignity.

The last key element of counselling support through the Motherisk Commission is a straightforward and helpful administration process. Public money will be spent, so there must be some processes to ensure good stewardship. For those seeking counselling, however, the emphasis will always be on helping them to get access to counselling support.

Forms are simple. Providers of counselling will be expected to assist an individual to develop a personal counselling plan, and will provide a report to the Commission about basic matters, such as the number of sessions, or the type of counselling. Once a plan is in place, the Commission will pay approved counselling services directly. Travel to appointments for counselling will be reimbursed within Government of Ontario guidelines, where required and approved.

Anyone who is interested in counselling support from the Motherisk Commission can request a private appointment. Please call the Motherisk Commission at 1-844-303-5476.

Appendix 8d: Questions and answers re: counselling support

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman, Commissioner

L'honorable Judith C. Beaman, Commissaire

COMMONLY ASKED QUESTIONS AND ANSWERS ABOUT COUNSELLING SUPPORT

Who can have counselling support?
Anyone is eligible whose child protection matter may have been affected by hair strand testing by the Motherisk laboratory at The Hospital for Sick Children in Toronto. This may also include immediate family members of those affected, of any age.

What kinds of counselling are available?
Individuals who qualify for counselling support can choose both the type of counselling and the service provider who is right for them, provided that the chosen person is approved by the Commission as a qualified counsellor. Individuals can choose a psychiatrist or psychologist, social worker, therapist, or person with other forms of counselling designation. The Commission's Director of Counselling Services will assist those who are interested in counselling, but are unsure what type of counselling might meet their needs, to find a qualified counsellor.

What will be paid for counselling?
Payments will be made directly to a qualified counsellor for an amount up to $200 for a one-hour session with a psychologist, and up to $150 for other qualified counsellors, depending on their experience in their field. However, if the usual rate charged by the service provider is less, then this lower amount is to be invoiced.

What about travel costs?
Those who need to travel within Ontario to and from counselling are eligible to recover the cost of driving a personal vehicle at provincial government mileage rates. Actual bus, train or taxi costs may be recovered by providing original receipts to the Commission, along with a Travel Expense Claim (Form 5). Only the most economic form of travel will be reimbursed (e.g. bus or driving where possible and not taxi).

How long will counselling be available?
Funding for counselling will be available for up to a two-year period from the time an individual begins.

What is the first step to obtaining counselling?
If you are interested in counselling, please call the Motherisk Commission. The process is straightforward, confidential, and supportive. You will be given a private time to speak with the

Director of Counselling Services, over the phone or in person, at a time convenient to you. You will obtain information about a possible service provider, and the process will be explained to you.

What is the approval process for counselling?
A consent form will be mailed to you which will ask for your consent for referral to counselling. You will be asked to return that form in the stamped self-addressed envelope. Once that is received by the Commission, you will be referred to your chosen service provider to discuss a counselling plan. Your service provider will send the Commission a separate confidential form to report on the estimated time required for counselling. Once approved, individuals and their chosen service provider will receive a written response.

Will the Commission pay for initial meetings to discuss a counselling plan and for a report prepared by a prospective service provider?
Yes. A counsellor or service provider will be paid at their regular rate for three hours of counselling, for the purpose of discussing a personal counselling plan with you and preparing a form for approval by the Commission.

How will payment work? Will there have to payment "up front"?
No. Once an individual's counselling plan has been approved in writing by the Commission, the service provider will bill the Commission directly every month for services provided.

Will anyone know who has accessed counselling support?
An individual's request and/or approval for counselling will be kept strictly confidential at the Commission. No other party, counsel, or member of the public is entitled to any information about who has or has not requested counselling, or who is receiving counselling. No one, other than you and your counsellor, will be provided with any information as to what transpired during any of your private sessions. This information is strictly confidential to you and your counsellor.

Does an individual receiving counselling have to keep it secret?
No. It is his or her decision whether to let others know, or to keep it private. However, the Commission will keep the information confidential.

Will individuals ever be contacted about counselling?
Toward the end of the Commission, individuals and service providers may be contacted and asked for feedback about the process of counselling support throughout this Commission. The details and content of sessions would not be revealed, as that information is strictly confidential between an individual and their counsellor or service provider. However, feedback on whether individuals feel they are benefitting from counselling and whether they would be interested in continuing with counselling may be an important factor for the Commission to consider when it comes to making recommendations as a result of this Commission.

If you are thinking about counselling in relation to the Motherisk Commission, but are uncertain as to who is covered and what is available, please contact the Commission's Director of Counselling Services at 416-212-0524 or 647-286-9246

Celia.Denov@motheriskcommission.ca. Having a telephone conversation does not mean you have to apply for counselling. You can receive information about the process, and can decide if you are interested when you are ready.

Appendix 8e: Counselling service provider report form

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman, Commissioner

L'honorable Judith C. Beaman, Commissaire

FORM 2: SERVICE PROVIDER REPORT

1. Client Information:

Last Name: _____

Given Name: _____

Any other name used: _____

Address: _____

Apt.Suite: _____

City: _____

Province: _____

Postal Code: _____

Telephone: _____

Birthdate (dd/mm/yyyy): _____

2. Service Provider Information:

Name of service provider: _____

Name of any related organization (e.g. hospital, clinic, practice):

_____

Address: _____

Suite: _____

City: _____

Province: _____

Postal Code: _____

Telephone: _____

Email: _____

3. Type of Practice (please check one)

Psychiatrist ___

Psychologist ___

Therapist ___

Counsellor ___

Social Worker ___

Other (specify) ___

4. Please attach a resume or outline of qualifications and/or experience

5. Please describe the type of proposed counselling or therapy to be provided (e.g. group therapy, one-on-one counselling, and combination).

6. Please indicate the likely frequency of therapy or counselling.

7. Please indicate the recommended number of sessions.

8. Please indicate the period of time for therapy or counselling. (At present, the Commission is permitted to provide counselling support for up to 2 years from the date of intake approval.)

9. Please indicate the location of therapy or counselling services.

10. Please indicate the rate per session.

I met with _____ in assessing his/her needs for Counselling Support related to the Commission and prepared this report.

Signature: _____

Date: _____

Client Number: _____

Return to:

400 University, Suite 1800A, Toronto, ON M7A 2R9

Appendix 8f: Letter to clients re: approval for counselling

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman,
Commissioner

L'honorable Judith C. Beaman, Commissaire

[Date]

[Name]
Street Address
City, ON Postal Code
Dear [Name]:

Re: Motherisk Commission Counselling Plan

Thank you for your interest in counselling services offered through the Motherisk Commission.

Your counselling plan report from (Service Provider) was provided to me. Thank you for working with your counsellor to develop this report.

I am enclosing a copy of the plan so that you will have your own copy. Your counsellor has also been advised that this plan is approved.

Please note that it is your responsibility to attend your scheduled counselling sessions. Please note the Motherisk Commission can approve only three missed appointments. After that, unfortunately the Commission cannot continue to pay for counselling sessions.

I wish you the very best in your counselling.

Yours truly,

Celia Denov
Director of Counselling Services

Appendix 8g: Letter to service providers re: approval for counselling

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman,
Commissioner

L'honorable Judith C. Beaman, Commissaire

[Date]

[Name]
Street Address
City, ON Postal Code
Dear [Name]:

Re: Motherisk Commission Counselling Plan

Thank you for forwarding your counselling plan for [initials of client]. Your plan has been approved and we have advised your client as well.

The Motherisk Commission is grateful for your assistance in providing counselling services to our client. Please do not hesitate to contact me at 647 286 9246 or at celia.denov@motheriskcommission.ca if I can be of further assistance to you.

Please be aware of the Commission's policy regarding missed appointments. As indicated in our policy material forwarded to you, the Motherisk Commission can pay its reduced fee for up to three missed appointments where there has not been appropriate notice by the client. After three missed appointments the Commission would unfortunately have to terminate its funding for counselling for that client.

Thank you again for your assistance to your client and to the Motherisk Commission.

Yours truly,

Celia Denov
Director of Counselling Services

Appendix to Chapter 9: The Restorative Process

Appendix 9a: Our Restorative Process

OUR RESTORATIVE PROCESS

The Motherisk Commission has made significant progress since it was established in January 2016. We have identified and reviewed individual child protection cases; undertaken outreach to groups and communities that may have been affected, including children and youth, racialized communities and Indigenous communities; and offered information and counselling to individuals and families affected by flawed hair drug and alcohol testing done by the Motherisk Drug Testing Laboratory.

What we have learned so far

Through our work so far, we have learned that the use of unreliable hair testing for legal purposes has resulted in deeply-felt harms by the children and parents who were directly affected, and has had harmful impacts on wider families and communities. While every situation is different, we have heard from people who feel that pursuing legal remedies is not adequate to express or to address the harms they have experienced, or are continuing to experience.

In our discussions with child protection, legal and community partners, we have recognized that many others who are committed to the safety and wellbeing of children have been affected through their involvement in cases that used hair testing from the laboratory. The discovery that flawed evidence was used for over 20 years has also undermined the public's confidence in the child protection and legal systems.

Our legal review of hundreds of individual child protection cases from across Ontario has given us a unique vantage point to see some of the broader systemic and institutional issues which may have contributed to the reliance on testing done by the laboratory. Indigenous peoples and African-Canadians are overrepresented in the child protection system and are therefore, more likely to have been affected by the Motherisk testing.

Reviewing individual cases is a critical part of the Commission's work and will continue until the end of our mandate. The restorative process described below will help us work with others to address the needs and questions that we are identifying through the reviews.

Restoring relationships and confidence

Building on what we have learned so far, we are undertaking a process to examine and further understand the systemic and institutional issues that led to this problem and identify strategies to overcome them collectively. This process will help us fulfil our mandate to offer support and assistance to people affected by the flawed hair testing and to engage with parties and stakeholders who have an interest in our work.

The purpose of the process is to examine the past, not to lay blame, but to build understanding and lay the foundation for a better future. We hope that it will help strengthen relationships among people working in child protection and begin to restore confidence in the system.

What we are doing

We are providing meaningful opportunities for people who have been affected by flawed hair testing to share their experiences and tell their stories in a safe way. Their knowledge will help us understand better what happened and contribute to making a difference in the future.

We are facilitating dialogue among individuals and organizations that we have identified during the course of our work. They bring diverse experiences and viewpoints and include people and communities who were affected by the testing, and child protection, legal, government and community partners.

We are holding small meetings with specific sectors or communities. These include meetings with youth and youth advocates, Indigenous people and racialized people. What we learn from these meetings will help us develop the agendas for larger meetings. The larger meetings will bring people together from different sectors to share their perspectives, develop mutual understanding and inform how we move forward. Participants from the smaller meetings will also be invited to participate in these meetings.

Discussion themes

We have organized the larger meetings around six key themes that we think are important to understanding the Motherisk testing issue:

- Role of scientific evidence in child protection cases;
- Legislative, procedural and justice system issues;
- Strengthening child protection legal practice;
- Substance use and parenting;
- Strengthening social work practice;
- Systemic issues affecting children's aid societies.

We are also interested in hearing about any other issues related to the Motherisk testing that are important to people.

Developing better understanding

Through the participation of many voices, we hope to develop a better understanding of:

- What happened and to whom?
- Why it happened?
- Why it should matter to everyone concerned about the wellbeing of children and families?
- What changes are needed to prevent it from happening again?

What we learn through this restorative process will form part of the Commission's final report to government.

Appendix 9b: Outreach list for restorative process

The Commission reached out to the following individuals and organizations, primarily in 2017, to discuss our restorative process and to seek input on potential areas for recommendations. Also included are those who sent us written comments.

Aboriginal Legal Services
Across Boundaries
Addiction Service Providers Working Group
Addictions and Mental Health Ontario
Adopt4Life
Adoption Council of Ontario
African Canadian Legal Clinic
Association of Iroquois and Allied Indians
Professor Nicholas Bala, Faculty of Law, Queen's University
The Honourable Justice Peter T. Bishop, Ontario Court of Justice
Floydeen Charles-Fridal
Chiefs of Ontario
Child Welfare Organizing Project, New York City
Children in Limbo Task Force
Community Action for Families
Dr. Emma Cunliffe, Peter A. Allard School of Law, The University of British Columbia
The Honourable George Czutrin, Senior Family Justice, Superior Court of Justice
Defence for Children International – Canada
Dennis Franklin Cromarty High School
Professor Gary Edmond, UNSW Law, Sidney, Australia
Elevate NWO
Factor-Inwentash Faculty of Social Work, University of Toronto
Family Lawyers Association
Fraser Advocacy
Family Rules Committee
Professor Judy Finlay, Faculty of Community Services, Ryerson University
Health Canada
The Hospital for Sick Children
Jamaican Canadian Association
The Jean Tweed Centre
Justice for Children and Youth
Professor Shelley Kierstead, Osgoode Hall Law School
The Kingston House of Recovery for Women and Children
The Law Society of Upper Canada
Professor Jennifer Llewellyn, Schulich School of Law, Dalhousie University
McMaster University School of Social Work
Mothercraft – Breaking the Cycle

The Honourable Lise T. Maisonneuve, Chief Justice, Ontario Court of Justice
The Honourable Wendy B. Malcolm, Senior Family Justice, Ontario Court of Justice
Office of the Children's Lawyer
Office of the Provincial Advocate for Children and Youth
Ontario Association of Child Protection Lawyers
Ontario Association of Children's Aid Societies and many individual societies across the province
Ontario Association of Social Workers
Ontario Bar Association
Ontario College of Social Workers and Social Service Workers
Ontario Human Rights Commission
Ontario Ministry of Children and Youth Services
Ontario Ministry of Indigenous Relations and Reconciliation
Ontario Ministry of the Attorney General, Aboriginal Justice Division
Sally Palmer, Emeritus Faculty, School of Social Work, McMaster University
Ryerson University Law Practice Program
Professor Gemma Smyth, Faculty of Law, University of Windsor
Tabono Institute
Taibu Community Health Centre
Tungasuvvingat Inuit
Ujima House – Young and Potential Fathers
Women & HIV/AIDS Initiative (WHAI)
Women's Health in Women's Hands
Valarie G. Waboose, Faculty of Law, University of Windsor
Youth Wellness Hubs Ontario

Appendix 9c: Letter to introduce the restorative process

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman,
Commissioner

L'honorable Judith C. Beaman, Commissaire

Month date, year

Ms. / Mr. First Name Last name
Address
City, ON Postal Code

Dear Ms. / Mr. Last name:

I am writing to update you on the work of the Motherisk Commission and to ask for your involvement in a restorative process we will be undertaking over the next five months. The enclosure provides more information about this process.

The Ontario government established the Motherisk Commission a year ago to lead a Review and Resource Centre to review individual child protection cases and provide support for people who were affected by flawed hair testing done by the Motherisk Drug Testing Laboratory at the Hospital for Sick Children. In her independent review, released in December 2015, Justice Lang found that the hair strand drug and alcohol testing done by the laboratory was inadequate and unreliable for legal purposes.

Over the past year, we have made significant progress in reviewing individual cases, undertaking outreach, and offering legal referral and counselling to people who have been affected by the flawed hair testing.

Our review of hundreds of child protection cases from across Ontario has given us a unique vantage point to identify some of the broader systemic and institutional issues which may have contributed to the reliance on testing done by the laboratory in child protection social work practice and as evidence before the court.

We are developing a process to share what we have learned, facilitate dialogue on these broader issues from many different perspectives and learn from you. The purpose of the process is to examine the past, not to lay blame, but to build understanding and lay the foundation for a better future. We hope that it will help strengthen relationships among all parties involved in the child protection system and begin to restore confidence in the system.

To begin the process, we will be meeting individually with key legal, child protection, government and community partners to obtain their input. Subsequently, we will bring people together from different sectors or communities to share their perspectives, develop mutual understanding and inform how we move forward.

Staff from the Commission will be in touch with your office shortly to request a meeting. Thank you in advance for your participation in this important work.

Yours very truly,

Judith C. Beaman
Commissioner

Encl.

Appendix 9d:
Commissioner's order re: confidentiality of meetings, April 24, 2017

MRC | MOTHERISK COMMISSION

The Honourable Judith C. Beaman, Commissioner

CMR | COMMISSION MOTHERISK

L'honorable Judith C. Beaman, Commissaire

ORDER

WHEREAS, pursuant to the *Public Inquiries Act,* the Order in Council 4/2016, dated January 13, 2016, established the Motherisk Commission and provided for the appointment of Justice Judith C. Beaman as the Commissioner, effective January 15, 2016;

AND WHEREAS, paragraph 4b of the Order in Council 4/2016 states:

> In discharging her mandate, the Commissioner will be guided by the following fundamental principles:
> ...
> b. in so far as practicable, the Commissioner shall work to maintain and ensure the confidentiality of records relating to child protection proceedings, including court files, exhibits, court transcripts, child protection files, and adoption records;
> ...

AND WHEREAS, paragraph 8 of the Order in Council 4/2016 states:

> Where the Commissioner considers it necessary, she shall impose conditions on the production of information in order to protect the confidentiality and privacy interests of any affected persons;

AND WHEREAS, the Commissioner will be hosting meetings with affected individuals and stakeholders in the child protection system to discuss systemic issues which may have led to the admission of unreliable evidence in child protection cases and to help restore confidence in the child protection legal system (the "Restorative Justice Meetings");

AND WHEREAS, The Commissioner believes that in order for the Restorative Justice Meetings to be productive and meaningful, participants should be able to respectfully and freely offer their comments and insights;

AND WHEREAS confidentiality is necessary to achieve the objectives of the Commission by ensuring and candid participation;

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Suite 1800A
Toronto, Ontario M7A 2R9
info@motheriskcommission.ca
www.motheriskcommission.ca

400 Avenue University
Bureau 1800A
Toronto (Ontario) M7A 2R9
info@motheriskcommission.ca
www.motheriskcommission.ca

THIS COMMISSION ORDERS THAT

1. Participants at the Restorative Justice Meetings are free to use the information received in the meetings but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.

2. The information shared, if reported by the Commission in subsequent communication and in the final report, will be reported without attribution.

ORDERED at Toronto, Ontario, this 24th day of April, 2017.

The Honourable Judith C. Beaman
Commissioner

Appendix 9e: Confidentiality policy for meetings

MRC | MOTHERISK COMMISSION

The Honourable Judith C. Beaman,
Commissioner

CMR | COMMISSION MOTHERISK

L'honorable Judith C. Beaman,
Commissaire

MOTHERISK CONFIDENTIALITY POLICY
RESTORATIVE JUSTICE MEETINGS

1. The Motherisk Commission, led by the Honourable Judith C. Beaman, was established pursuant to Order-in-Council 4/2016 to offer appropriate support and assistance to persons affected by the Motherisk test results.

2. In accordance with the Commission's mandate, Commissioner Beaman is reviewing child protection cases from across the province of Ontario and has met with numerous parties and stakeholders who were impacted by the Motherisk evidence or who have an interest in the effective operation of the Review and Resource Centre and the completion of the Commissioner's mandate.

3. The Commissioner has been guided by the following principles in discharging her mandate:

    a. The current best interests of any children and youth must be taken into account;
    b. In so far as practicable, the Commissioner should work to maintain the confidentiality of records received by the Commission;
    c. That she execute her duties efficiently and in a manner consistent with the need to pursue an expeditious and just resolution of the serious concerns associated with the reliance on the Motherisk evidence in child protection proceedings;
    d. That she work with children and youth to ensure that their voices, both individually and collectively are heard; and
    e. That she give particular consideration as to the outreach and notification necessary to allow meaningful participation by Indigenous and racialized communities.

4. In the course of discharging her duties, the Commissioner has developed an appreciation of the harm caused by the Motherisk evidence to parents, children, extended family members, communities and to the justice system.

5. The Commissioner has concluded that affected individuals and the stakeholders in the justice system may benefit from participating in meetings to discuss systemic issues which may have led to the admission of unreliable evidence in child protection cases and to help restore confidence in the child protection legal system (the "Restorative Justice Meetings").

6. The Commissioner is hosting Restorative Justice Meetings to offer affected persons and stakeholders the opportunity to talk about the harm with one another, to reflect on systemic issues and to offer comments and insights which may assist the Commissioner in developing recommendations for inclusion in her final report.

7. The Commissioner believes that in order for the Restorative Justice Meetings to be productive and meaningful, participants should be able to respectfully and freely offer their comments and insights. Confidentiality is, accordingly, essential to the operation of the Commission's mandate in this respect.

8. In order to ensure the candour necessary for a meaningful discussion while protecting the confidential nature of the communications , the meetings shall be subject to the Chatham House Rule. When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.

9. The Commissioner and her staff will not disseminate the information obtained in these meetings except in follow up meetings that are subject to the obligations set out in this Policy and subject to paragraph 8 above and in the final report.

Commissioner Judith C. Beaman

Appendix 9f: Invitation to the Symposium

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman,
Commissioner

L'honorable Judith C. Beaman, Commissaire

July 17, 2017

Name
Address

Dear X:

I am writing to invite you to the "Motherisk Commission Symposium: Lessons Learned and Moving Forward." The Symposium will be held over one and a half days, on **Tuesday, September 12, 2017 (8:30 am to 5:00 pm) and Wednesday, September 13, 2017 (8:30 am to 1:00 pm)**, in downtown Toronto (DoubleTree by Hilton Hotel, 108 Chestnut Street).

The Symposium is the culmination of the Motherisk Commission's restorative process of reflection and dialogue that we embarked on in early spring. The purpose of this process is to examine the systemic and institutional issues that led to the Motherisk hair testing problem, in order to identify strategies to prevent something similar from happening again in the future.

Over the past few months, we have met with groups and communities who have been most affected by the Motherisk testing—youth, Indigenous peoples and racialized people—as well as parents, youth advocates and children's aid societies. We took what we learned from these important conversations to organize meetings with child protection, legal, government, community and other partners. These meetings were organized around topics, such as the use of scientific evidence, justice system issues, and parenting and substance use. In total, about 250 people participated in these meetings.

The Symposium will bring together a larger group of people, many of whom attended one or more of the earlier meetings. It will be an opportunity to share with you what we have learned through these meetings and to work with you to assess and refine the key ideas we heard for potential recommendations. The Symposium will be focused on solutions, cross-sector collaboration and looking forward beyond the Commission's mandate, which ends in January 2018. Our deliberations will inform my final report and recommendations to the Ontario government.

In choosing participants for the Symposium, we strove to achieve fair and diverse representation of affected communities and sectors (e.g. legal, child protection, social work, treatment, academia, etc.) from different parts of the province. We also wanted to manage the number of participants to ensure that there would be sufficient time to explore ideas in greater depth and hear all perspectives. We are inviting you personally because of your experience, contributions and area of expertise and hope that you will be able to attend. If you cannot attend and wish to suggest an alternate, please give us a call to discuss.

Please **RSVP** to Mathura Karunanithy at 416-212-0560, (toll free 1-844-303-5476) or mathura.karunanithy@motheriskcommission.ca by **Friday, August 4, 2017**, to let us know if you can join us for the Symposium or if you have any questions. In August, we will be sending you an agenda, with location details, and some brief reading material to provide context for our discussions.

The Motherisk Commission is happy to cover your expenses, according to Ontario government guidelines. We have enclosed information on eligible travel and accommodation costs and ask that you provide receipts, where needed, so that we can process your reimbursement quickly. For those coming from out of town, we have reserved 20 rooms for September 11th and 12th at the DoubleTree by Hilton Hotel. We will offer these rooms on a first come, first served basis. Please let us know if you will need hotel accommodation when you RSVP and we will arrange your room on your behalf. Please also let us know if you have any accessibility or special dietary needs.

I am looking forward to the Symposium and very much hope that you will be a part of it.

Yours very truly,

Judith Beaman
Commissioner

Encl.

Appendix 9g: Symposium agenda and backgrounder

MRC | MOTHERISK COMMISSION

CMR | COMMISSION MOTHERISK

The Honourable Judith C. Beaman, Commissioner

L'honorable Judith C. Beaman, Commissaire

Motherisk Commission Symposium: Lessons Learned and Moving Forward

Tuesday, September 12, 2017 (full day) & Wednesday, September 13, 2017 (half day)
DoubleTree by Hilton Hotel, Mandarin Ballroom, Lower Level, 108 Chestnut Street, Toronto

Agenda

DAY 1	*Objective: Discuss the merits and challenges of strategies related to the use of scientific evidence and supporting families, and identify the most promising ideas.*
8:00 - 9:00	BREAKFAST
9:00 - 9:20	**Welcome and Opening Remarks** Commissioner Judith C. Beaman
9:20 - 9:30	Symposium Overview Facilitators
9:30 - 9:45	**Introduction to Theme 1: Ensuring the Reliability of Scientific Evidence in Child Protection**
9:45 - 10:45	Theme 1: Small group discussions
10:45 - 11:00	BREAK
11: 00 - 11:45	Theme 1: Group reports and plenary discussion
11:45 - 12:45	LUNCH
12:45 - 1:00	**Introduction to Theme 2: Supporting and Empowering Families: Access to Legal Information and Independent Support**
1:00 - 1:15	Brief presentations on individual examples of supporting parents and families
1:15 - 2:00	Theme 2: Plenary discussion

2:00 - 2:15	BREAK
2:15 - 2:30	**Introduction to Theme 3: Supporting and Empowering Families: Enhanced Substance Use Treatment Options**
2:30 - 2:45	Brief presentations on individual examples of family-centred treatment
2:45 - 3:30	Theme 3: Small group discussions
3:30 - 4:15	Theme 3: Group reports and plenary discussion
4:15 - 4:30	Wrap-up of Day One
4:30	ADJOURN

Agenda

DAY 2	*Objective: Discuss the merits and challenges of strategies for collaborating across sectors and identify the most promising ideas.*
8:00 - 9:00	BREAKFAST
9:00 - 9:15	Recap of Day 1 and Plan for Day 2 Facilitators
9:15 - 9:30	**Introduction to Theme 4: Sustaining and Enhancing Collaboration Across Sectors**
9:30 - 10:30	Theme 4: Small group discussions
10:30 -10:45	BREAK
10:45 - 11:30	Theme 4: Group reports and plenary discussion
11:30 - 11:45	**Moving Forward** Commissioner Judith C. Beaman
11:45 - 12:00	Wrap-up of Day Two
12:00	ADJOURN

Motherisk Commission Symposium: Lessons Learned and Moving Forward

Background and Symposium Overview

Thank you for agreeing to participate in the Motherisk Commission's Symposium. You and the other participants represent a broad cross-section of young people, parents and others who were affected by the Motherisk testing, child welfare workers, lawyers, academics, scientists, and community workers. All of you share a desire to safeguard children and ensure that families get the help they need.

The Commission has seen the child welfare system in Ontario from the point of view of both individuals and the system itself. At our Symposium, we will share with you what we have learned. We will also discuss how the child protection system could be improved to make it less vulnerable to potential miscarriages of justice. The Symposium will be forward-looking and focused on solutions. We hope the discussion we begin there will continue long after the Commission closes its doors and delivers its report to the government in January 2018.

Establishment and Principles of the Commission

The Ontario government established the Commission following the Independent Review conducted by Justice Susan Lang.

[1] Justice Lang found that the hair testing by the Motherisk Laboratory at the Hospital for Sick Children was inadequate and unreliable for use as evidence in child protection proceedings. She recommended establishing a Commission to act as a Review and Resource Centre to review individual child protection cases and to provide information, counselling assistance, legal referral, and alternative dispute resolution to people affected by the testing.

The Commission's guiding principles include working with children and youth to ensure that their voices are heard. They also include giving particular consideration to the outreach and notification necessary to allow meaningful participation by Indigenous and racialized communities, both of which are overrepresented in the child protection system.

File Reviews

We are reviewing individual child protection cases to determine if the Motherisk hair testing had a substantial impact[2] on their outcome and to assist the people who were affected. In the first

[1] The Honourable Susan E. Lang, *Report of the Motherisk Hair Analysis Independent Review* (2015). Toronto: Ontario Ministry of the Attorney General. The report can be found here: http://m-hair.ca.

[2] "Substantial impact" means that a positive Motherisk test materially affected the outcome of a case having regard to one or more of three factors: the creation of a status quo with respect to the child's living

phase, we reviewed cases that children's aid societies identified as "high priority." These were cases with recent or pending final decisions such as a custody, Crown wardship, or adoption order. We also reviewed cases involving Motherisk testing where the parties entered into a Customary Care agreement.

In the second phase, we are reviewing cases we identified through the Ontario Court Case Tracking System. In these cases, legal remedies are less likely because many of the children are older and have been adopted. We are also reviewing cases that come to our attention through reported court decisions, the media or other sources, and individuals who contact the Commission to request a review.

In total, we have reviewed 936[3] individual cases to date. Of these, Motherisk test results had a substantial impact on the outcome in 46[4] cases. In the large majority of cases, there was other evidence to support the decisions of children's aid societies and the court.

Outreach

In the summer and fall of 2016, we travelled throughout the province to meet with interested groups and raise awareness of the Commission and the support and services we offered. Many of these meetings were with First Nations, racialized communities, youth and their advocacy organizations. We also connected with and sent our posters and other materials to children's aid societies, women's shelters, drug and alcohol treatment centres, community health centres, social assistance offices, hospitals, and the Ministry of Education.

The Restorative Process

The use of unreliable hair testing for legal purposes resulted in harm to children, parents and others who were directly affected. It also had harmful impacts on broader families and communities. In many cases, the pursuit of a legal remedy is inadequate to address these impacts. We developed a restorative process to acknowledge the harm done and to help address the underlying issues that may have contributed to the reliance on testing.

We engaged affected parties and their advocates, child protection workers, lawyers, judges, academics, community workers and others in a dialogue. We held over 30 meetings involving more than 250 people. We organized these meetings around various topics to consider the Motherisk issue from different perspectives:

- Challenges regarding the use of scientific evidence in child protection proceedings;
- Education and professional development opportunities for child protection lawyers;

arrangements; the position of the CAS respecting the direction of the case; and the decisions of the court. (Commission's Rules of Procedure, 5).

[3] As of September 5, 2017

[4] As of September 5, 2017

- Factors relating to the legislation, the rules and the general operation of the justice system, which may have contributed to the problem;
- Support and training for social workers and in particular social workers who work in child welfare;
- Systemic issues affecting children's aid societies; and
- Appropriate and timely supports and services for parents dealing with substance use issues.

What We Heard

Groups who are overrepresented in the child welfare system spoke of how the Motherisk problem made worse an already difficult relationship with children's aid societies. Indigenous groups told us that what happened with the Motherisk testing harkened back to the residential schools era and the Sixties Scoop. African-Canadian community groups told us that it was one example of targeting their community because of racist assumptions about drug use. The children and youth we spoke to, many of whom grew up in care, said that their families of origin were important to them and that they needed to maintain that connection even if their parents could not care for them. Parents said that they felt that they had no other choice but to submit to the hair testing. People who were affected told us that what happened with Motherisk was a violation of trust.

Analyzing the feedback, we found that most people agreed on the following issues:

- There are factors unique to child welfare cases that inhibit vigorous challenging of expert evidence (e.g. timelines, lack of resources);
- The law and rules governing child protection are challenging for parents, particularly those who are trying to address substance use issues;
- The lack of ongoing training and support for lawyers who practise in this area makes it difficult for them to gain the expertise to deal with challenging cultural, legal and evidentiary issues;
- There is a preference both in children's aid society decision-making and in the court for scientific evidence over clinical observations by children's aid society workers;
- Child protection workers and the court frequently use evidence of substance use as a proxy for evidence of parenting capacity;
- There is an inherent conflict in the dual role that children's aid societies play in supporting and monitoring families;
- There is a lack of coordination between children's aid societies and supportive services for parents, such as substance use treatment services;
- There are biases in the system that lead to over-monitoring of Indigenous and African-Canadian families; and
- Children's voices and perspectives are often left out of decision-making.

The Symposium

The ideas we have chosen for discussion at the Symposium are the ones we believe are the most complex and require the diverse input of participants, debate, and refinement. These ideas involve the cooperation of many partners to implement them. However, we encourage you to identify any other proposals or questions that you believe should be raised at the Symposium.

It is important to note that in each of the themes below, a central concern is ensuring that proposed solutions are critically assessed from the perspectives of children and youth and Indigenous and racialized communities.

Theme 1: Ensuring the Reliability of Scientific Evidence in Child Protection

Rules and legislation

Many of the problems with evidence are related to the rules and legislation and the unique context of child protection cases. For example, scientific evidence is frequently used in child protection proceedings well before a matter goes to trial. We saw many examples where the Motherisk test results were appended to a worker's affidavit supporting a temporary care and custody motion or to a summary judgment motion. There is no provision in the rules or legislation that specifically addresses the admissibility of scientific evidence in these motions. We have been following up with government and legal partners about possible changes to the legislation and rules.

Education and training

There is a need for ongoing education on the use of scientific evidence, particularly in child protection. Recommendations from the Inquiry into Pediatric Forensic Pathology in Ontario called for better education, training, and support for lawyers and judges in cases involving scientific evidence.[5] Justice Lang reiterated the importance of these recommendations in her Independent Review. There have been several educational initiatives for the judiciary and legal profession in response. We applaud these initiatives and we are exploring other education and training opportunities.

Building bridges between law and science

In our meetings, science and law were described as separate cultures with too few bridges between them. At the Symposium, we would like to discuss strategies to build bridges to improve the reliability of expert evidence.

In a forthcoming paper, Dr. Emma Cunliffe of the University of British Columbia's Peter A. Allard School of Law and Dr. Gary Edmond of the University of New South Wales School of Law propose a Canadian justice and science commission. It would be an interdisciplinary body incorporating legal, scientific and research expertise. The original proposal is focused on improving the reliability of expert evidence for criminal proceedings, but it could be expanded

[5] The Honourable Stephen T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Toronto: Ministry of the Attorney General, 2008) the report can be found here: https://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v1_en.html.

to include the forms of expert evidence commonly used in child protection proceedings. The proposed commission would publish reports, presumptively admissible in court, reviewing the empirical evidence that underlies forensic science techniques and other expert evidence. It would also suggest standards for the admissibility of new scientific methods, and it would promote and monitor reform in the forensic sciences. Its mandate could extend to investigating the operation of cultural or racial bias in forensic science and expert testimony. The commission could educate legal, law enforcement and child protection professionals, as well as forensic scientists and technicians.

A stepping-stone toward such a commission could be a website or other open access resource centre offering published studies and other information about scientific testing and evidence in child protection cases. All parties could use it to help them understand the reliability and application of scientific methods. It could also include guides for cross-examining experts and other resources for counsel. Although this might provide counsel with some tools and information about potential reliability issues, there are drawbacks. The material would be presumptively inadmissible in court and without assistance from scientists, much of it could be difficult for lay litigants and lawyers to interpret. In addition, such a resource would not help promote the culture change we envision below.

Changing the culture

We believe a culture change is needed to encourage careful scrutiny of scientific evidence by child protection workers and counsel, parents' counsel and the court. Child protection does not have a culture of scrutinizing evidence like the criminal justice system has. There are many reasons for this, including the focus on forward-looking plans of care, the pressures of time and scarce resources, different standards of proof, and the absence of a presumption of innocence.

Child protection is also perceived differently from criminal justice in law school and in the public imagination. Unlike criminal law, there are no mandatory child protection law courses. Miscarriages of justice in child protection do not receive the same attention as wrongful criminal convictions.

Lawyers who represent parents told us that they do not have enough training and mentorship opportunities. They also face the difficulty of having to manage non-legal aspects of cases, such as assisting clients to access housing, health and treatment services, and many other community services and supports.

We would like to discuss options for enhancing the profile of child protection law and encouraging careful examination of scientific evidence in child protection proceedings.

Some promising practices and ideas include an organization of parents' counsel currently being formed (similar to the Criminal Lawyers' Association), enhanced continuing education and resources for child protection counsel, more public legal education on child protection, and joint training on expert evidence and evidence generally (e.g. for CAS, parents' and children's counsel).

Discussion Questions

1(a) How could we help bridge the divide between the law and science?

- What would be the merits of a justice and science commission or a similar body?
- What would be the barriers to establishing it? How could they be overcome?
- What other strategies would facilitate collaboration between the legal and scientific fields to help ensure the reliability of evidence?

1(b) How could we begin to change the culture in child protection to encourage all parties to more carefully scrutinize scientific evidence?

- How can we enhance legal education in child protection?
- How can we raise the profile of child protection and educate the public about the risks and consequences of miscarriages of justice in this area?

Theme 2: Supporting and Empowering Families: Access to Legal Information and Independent Support

The Motherisk laboratory has been closed, but we heard that other testing methods (e.g. urine screening, fingernail testing, ankle bracelet monitoring) are being used or considered. We would like to explore approaches to better assist families struggling with substance use issues and reduce reliance on potentially misused and costly drug and alcohol testing.

<u>Better access to legal information</u>

We heard that parents and other caregivers often have little knowledge of their legal rights and do not typically obtain legal advice early enough in the process to help them make informed choices, including responding to requests for drug and alcohol testing.

Ideas for increasing parents' access to legal information include child protection information centres housed at the courthouses (similar to the Family Law Information Centres[6]), a manual on parents' legal rights,[7] information sessions for parents involved with child protection

[6] More information on these centres can be found here: https://www.attorneygeneral.jus.gov.on.ca/english/family/infoctr.php

[7] Community Legal Education Ontario (CLEO) has a fact sheet for parents about children's aid societies, but no manual about legal rights or the child protection process currently exists for parents.

agencies, and a website with videos and guides for parents, including accessible material for parents whose first language is not English or French or who have low literacy.[8]

Independent support

The dual role of child protection workers—providing support to families and monitoring them—was consistently identified as a challenge both by workers and by parents who were affected by the testing. Many people saw a need for support services for families, independent of children's aid societies. In particular, we clearly heard about the need to enhance the cultural and social context awareness of professionals working with Indigenous and racialized families in order to promote trusting relationships and assist them with the unique challenges they face.

Ideas include system navigators (similar to Family Court Support Workers who assist victims of violence to navigate the family court system[9]) and peer mentors (e.g. parents who have experience with the child protection system). Band representatives provide legal and social work support for parents and families in First Nations communities. They have called on the federal government to reinstate funding for the program.

Discussion Questions

2(a) How can we improve parents' access to legal information and advice?

- How can we ensure that they receive information and advice at their first interaction with a children's aid society?
- How can we ensure that they provide fully informed consent for drug and alcohol screening?

2(b) What is the best way to provide additional support to parents beyond children's aid societies? Specifically, how could a system navigator role and network of peer mentors be established?

- What would be the challenges in implementing them? What would it take to overcome the challenges?
- What other strategies could provide parents with additional support?
- In any strategy, how could we ensure that the unique needs of Indigenous and racialized families are met?

[8] The Justice Education Society of British Columbia has an excellent legal information website, although it does not have material on child protection. http://www.justiceeducation.ca/

[9] A description of the program can be found here: https://www.attorneygeneral.jus.gov.on.ca/english/ovss/family_court_support_worker_program/

Theme 3: Supporting and Empowering Families: Enhanced Substance Use Treatment Options

In our meetings, we heard about the difficulties parents have accessing services to address substance use. In particular:

- The limited availability of appropriate and timely treatment options, especially in rural and remote parts of the province;
- The lack of culturally appropriate services for Indigenous and racialized communities; and
- The shortage of family-centred treatment services that allow children to remain with their parents.

At the Symposium, we would like to explore ways to establish or scale up promising practices and programs that exist in the province or in other jurisdictions.

For example, Kingston General Hospital's Rooming-In Program for infants born to opioid-dependent mothers is a promising program.[10] In other hospitals, infants are admitted to intensive care units and separated from their mothers. In this Kingston project, mothers and their infants receive assessment by a multi-disciplinary team, education, support, and a private room to permit uninterrupted bonding. The program has resulted in shorter hospital stays and improved neonatal and maternal outcomes. Another promising program is Portage Mère-Enfant in Quebec,[11] a residential treatment program that allows pregnant women and mothers to attend residential treatment with their children.

Discussion Questions

3(a) Given the current reality of limited drug and alcohol treatment services, should parents be given priority in accessing services?

3(b) What steps can we recommend to begin to increase family-centred treatment options?

- What other strategies could improve substance use treatment services for parents?
- In any strategy, how could we ensure that the unique needs of Indigenous and racialized families are met?

Theme 4: Sustaining and Enhancing Collaboration across Sectors

Many institutions and organizations play a role in delivering child welfare services. Some of the proposals we are considering require resources that may seem unavailable. However, most organizations have some capital, whether in the form of funding, human resources, or bricks and mortar, that could help achieve some of the proposals we will discuss at the Symposium.

[10] Learn more about this program here: http://www.cfp.ca/content/61/12/e555.
[11] Learn more about this program here: https://portage.ca/en/quebec/mother-child-program/.

Collaboration has long been a key feature of the child protection system. For example, it was the theme of a significant province-wide project of the Ontario Association of Children's Aid Societies in 2005-2006.[12] In our discussions, we heard that there is a need for three types of collaboration in particular: scientists and legal professionals, legal professionals and child protection workers, and child protection workers and substance use treatment providers.

One idea to promote collaboration in child protection is a centre of excellence. This could build on the work of the national Centre of Excellence for Child Welfare, which was funded by the Public Health Agency of Canada from 2000-2010.[13] It could identify and disseminate research, promote promising collaborative practices, and connect individuals and agencies from the many disciplines responsible for assisting and protecting parents and families.

Other interesting collaborative initiatives exist in Ontario and in other jurisdictions, such as the co-location of services to assist families dealing with violence in Waterloo.[14] Through a previous initiative funded by the Ministry of Children and Youth Services (MCYS), substance use treatment experts were embedded in intake and family service teams in Toronto.[15]

At the Symposium, we would like to explore these and other possibilities for collaboration at the service delivery level and at the system level.

Discussion Questions

4(a) How can we build and sustain collaboration, specifically across the child protection, legal and scientific communities, and with groups and communities most affected by the child welfare system?

4(b) What challenges have you experienced in creating and sustaining positive collaborations?

4(c) What opportunities exist in your organization to collaborate with other players in the child welfare system?

4(d) What strategies can we use to help ensure that collaboration continues past the close of the Commission? Would a centre of excellence be helpful? What alternatives might there be to such a centre?

[12] Materials related to this project can be found here: http://www.brantfacs.ca/agency-tools-reference-documents/oacas-collaboration-project/

[13] The final report of the Centre of Excellence for Child Welfare can be found here: http://www.cwlc.ca/en/resources/report/centre-excellence-child-welfare-final-report

[14] Family Violence Project of Waterloo Region (http://fvpwaterloo.ca/)

[15] Through the MCYS-funded Children Affected by Substance Abuse project: http://www.oacas.org/2015/03/evidence-informed-practice-in-intervening-with-children-affected-by-substance-abuse/

Appendix 9h: Symposium summary notes

Motherisk Commission Symposium
RE-CAP OF THEMES FROM DAY 1
September 12, 2017

Theme 1: Ensuring Reliability of Scientific Evidence

General

- Desire for shared access to relevant information
- Take into account special nature of child protection proceedings
- Establish what we mean by science
- Don't let the science overpower the clinical
- Be alert to the interplay between systemic racism and the use of scientific evidence

Justice and Science Commission

- Some support for the concept but proceed with caution
- Could help in standardizing use of testing and scientific evidence
- For it to be trustworthy, must be representative, collaborative, accountable and independent
- Implementation issues: representation of affected parties; cost; equity lens; harm reduction focus
- Concerns to be addressed in developing the commission concept:
    - Could obscure the real issue which is capacity to parent; minimize the importance of other important evidence on that issue; reinforce current child protection culture and overreliance on scientific evidence
    - Lack of trust in institutional solutions. Find human solutions for institutional problems
    - Potential inequitable access to the information
    - Privacy and confidentiality issues
    - Risk of information flowing directly from a third party to the judge without challenge vs need to make the information accessible
    - Diversion of limited resources
    - Status of commission could replicate problems associated with Motherisk testing
    - Risk of a one-dimensional solution to a multi-dimensional problem.
- One suggested alternative: create a broadly accessible website or resource

Changing the culture and raising the profile of child protection

- A fundamental culture shift is required; give equal weight to input from community as well as legal profession, science

- Cultural change should proceed from the perspective of anti-racism along with accountability
- When you get out of school you should be able to work in a culture that values what you learned; culture shift required
- It is not about training, it is about understanding; change the language we use
- Use traditional and social media to communicate accurate information about child protection
- Families most affected should be part of educating professionals and the public

Education and child protection

- Legal education that builds capacity to challenge scientific evidence, that addresses underlying assumptions, and helps people to understand systemic racism and its impact
- Access to mentorship throughout legal careers
- Collaboration with scientific and medical community in legal education
- Compulsory child welfare education for law and social work students and continuing education for child protection lawyers and workers

Theme 2: Supporting and Empowering Families: Access to Legal Information and Independent Support

General

- Clear consensus about need for supports for family and child throughout the process
- Support for reinstating the band rep program
- Focus on early stages of relationship
- Work to make social workers part of collaborative relationship, recognizing power imbalance and dichotomy in role of CAS workers
- Build relationships between CAS and community organizations before crisis; Engage with groups who work with Indigenous and racialized communities.
- Network of parents, children, youth – advocates – online resources
- Increase parental and child voice within CASs, with increased oversight
- Empower people and promote services that are already there, e.g. dispute resolution processes.

Navigators

- All of us in crisis do better when we have supports
- Assign a parental advocate or navigator from the beginning; importance of support from people with similar experience
- Support families and children to navigate the system and access legal information
- Navigators need to be independent of CAS and separately funded

Legal Information and advice

- Large power imbalance between families and CAS; getting people legal information and advice can help to alleviate that
- Greater support needed from Legal Aid Ontario, e.g. certificates, education, mentoring
- Lack of First Nations access to legal representation
- Early access to legal information is important; not necessarily from a lawyer; could be from peer-led organization

Theme 3: Supporting and Empowering Families: Enhanced Substance Use Treatment Options

Focus

- Focus in deciding on approach must be on what builds parental capacity, not just on the substance use
- Emphasis on harm and risk reduction as opposed to abstinence
- Don't focus exclusively on substance use; recognize other strengths and vulnerabilities within the family
- Look at substance abuse through a different lens, medical
- Reassess our belief that treatment is sole means of ensuring child safety; focus on ways to keep families safe without always going to treatment

Keeping families together

- Offer a range of options to keep families together; not just residential treatment
- Ensure ongoing access to the child while parent receives services, as in Kingston program; outcomes usually better if there is bonding and maintenance of relationships
- Focus on family centred treatment and healing, including in-home supports

Indigenous communities

- Respect for Indigenous community processes
- Culturally aligned programs; community delivered and controlled
- Be open to Indigenous approaches that can be highly effective
- "Treatment" is the wrong terminology; it's about healing

Racialized communities

- Avoid ideology, assumptions, stereotypes that affect racialized communities
- Evidence based research that challenges embedded assumptions
- Anti-oppression lens

Approaches

- Multi-disciplinary approaches
- Central access points for services
- Triage and assessment tailored to the needs of individual family; assessment tool.
- Be respectful of informal supports – can be more successful than formal treatment
- Provide practical supports that are needed and that build relationships, with or without treatment
- ADR, healing component as early intervention
- A range of expertise, including cultural competency, should be employed at the time CAS considers what healing is required and what family would benefit from.

Barriers

- Address the tight timelines and waiting lists that are often impediments to effective treatment; adjusting timelines to enable treatment
- Don't force people in remote communities to travel to other communities to get service

Priority access to treatment for parents

- Possibly, but recognize parents have to be ready for treatment which meets their needs
- Risk of perverse incentive to choose treatment option
- Inappropriate to tie return of children to treatment success

Motherisk Commission Symposium
NOTES FROM DAY 2
September 13, 2017

Theme 4: Sustaining and Enhancing Collaboration across Sectors

- Engage child protection in a different way in methadone program. Previously oppositional. Now we encourage clients to speak with CAS directly instead of us doing it. Much more receptive and collaborative approach from the CAS workers. Took 17 years to get it close to perfection.
- Find out who our allies are. Get mothers to report back on their experience with organizations and lawyers. Presented at a harm reduction conference. Connected with organizations starting with a harm reduction philosophy – shared values.
- Colocation of workers. Connectivity tables at various agencies to discuss cases. Facilitators help to identify supports and build support networks. Not the only CAS doing this kind of work.
- Multi-disciplinary players in the county involved re: drug issues.
- Connection between CAS, public health, VAW sector, adult addictions program. Work with moms who have substance use issues. Work together to develop a community plan. Results in not having to bring babies into care on birth.
- A community led project for the first time. Learned to be deferential to will of the community, African Canadian community. Capacity to lead. For communities with dire outcomes in child welfare, oppressive, default practices. Critical that the community endorses One Vision One Voice.
- Mind map: Under child welfare services, there should be a Native organization in Ontario: Association of Native Child and Family Service Agencies of Ontario (ANCFSAO) – they should be recognized in the chart. They are the indigenous equivalent of OACAS.
- Ontario Native Council on Justice. Did work with the legal profession and collaboration with social agencies. Developed Ontario Native Justice of the Peace program. Approved by Chief Judge of Ontario. Role was to hear Aboriginal cases before the court. Travel to remote areas instead of First Nations people coming to urban centres.
- Hustle program. 2-day program, once a year. Available to lawyers. Have had multiple disciplines: sexual assessment doctor, child abuse team in children's hospital, capacity assessment. Children's experiences, children testifying.

- Collaborate with key players in child welfare to provide support. Together, we work in best interests of the child. In regions we become navigator for parents who want support and local community services. We advocate for families at CAS and schools. We are here to build bridges. Strength in partnership. We are a peer model. Adopt for Life.
- Willingness of local CAS to collaborate, Kingston. Planning to establish a treatment centre to allow women to reside for 6 months to a year in a therapeutic setting with their children. Long way to go to make it more than just an idea. Support and openness is there. Funding challenge.
- Medical profession invites judges and lawyers to speak about issues. Can there be a symposium to address the interface of the medical profession in legal system.
- Mind map: Where are the schools as organizations supporting children? School social workers. Collaboration with schools, strong connections to parents and children – need to be part of the thinking.
- Hustle – invited local organizations in for open discussion about what they do in the community and what the lawyers can pull from them. What organizations are the parents involved in? Free flow discussion. Allowed an opening for discussion.
- Obtain a commitment. Not just about making a contact, but have a commitment to maintain open communication.
- Recognize that Indigenous approaches to dispute resolution are based on collaboration. It is at the root of what we do as a community. Everyone in the circle can speak without interruption – equal. In child welfare, our goal is not to go to court, to help the family restore. Indigenous philosophical principles. Work inter-connectedly to support each other. We bring in spirit and ceremony to our work. A common vision, value everyone equally, keep families together, restorative.
- Students Commission of Canada. Four pillars: respect, listen, understand and communicate. Often people speaking with youth don't do that. Second tenet: youth voice must be heard. Important for family welfare. We are supportive of the mother but need more emphasis on what the child wants.
- Struggle with transparency, having the society be open and honest with parents. In 2013, when I gave birth to my daughter, people knew she would be apprehended – except me. Need to be at the table. Get beyond abstinence and treatment for everyone. Who needs to be at the table to support harm reduction efforts? Northern CASs can learn from best practices of other CASs in the province.
- Ontario Association of Child Protection Lawyers; didn't exist before. Hustle works collaboratively with us. Want to see a real effort to collaborate across all the areas

we have discussed over the past two days. We need to learn and to teach each other.

- First Nations should be a category in all of them on mind map. Money goes to other organizations. Indigenous communities should be mentioned in all sections, not just its own capacity. We have the capacity to parent our own children. When I ask to be consulted, CAS doesn't react well. Share their policies and procedures. Make sure that we are recommended in all 13 areas.
- So important to hear the voices of people in the trenches. I heard an Indigenous mother say that I could have a full time person in my home for all the money going to programs.
- Restorative justice process: great concept, we need to do this. Need universal access to preventative programs at early stage, before CAS involved.
- Mind map: Add school board. They should be here. Add doctors. We need to see more doctors and medical. This is a great venue, glad to be here, so glad I came, difficult for me to be here. Like to see more kids too.
- Collaborate with children themselves.
- Caution around people's privacy interests. Cavalier about protecting privacy of children.
- Combined two programs. One is a networking program where community members and families are connected. Combined with family safety initiative: collaboration with service providers, family members. Family-driven solutions to child safety. CAS is a participant and facilitator to bring the system together.
- Opportunity for patients, services for families.
- Experiences of foster children after they are in care. Tried to find my two foster sisters. No help to do that. Collaboration to help children find out about their history.
- Help children to say what they need and want, to facilitate a conversation.
- Brings together judges, lawyers, mental health professionals, professors of law and social science to talk about post-separation and child protection. Annual conference over 2 days. Oct 19 has an item on addiction and family breakdown.
- Legal aid – community led or informed strategies include Aboriginal justice, mental health, racialized communities.

ADVICE TO THE COMMISSION

- Talk about the level and way collaboration operates. Happens at the individual level, front line collaboration, and institutional/formal collaboration, collaboration across professions, and province-wide collaboration.
- To make collaboration work at the local level after people move on or money runs out. How to sustain over time?
- Dual role of protection workers and survivors. Take out policing function from support function? No. CAS has to do both. Figure out how to be collaborative within that model.
- Solution to dual function if impractical to split the two functions: build out two programs across the province. Forever Connections. Working with families to have a fall back support network post-CAS.
- More government money for counselling for kids involved in CAS and to eliminate waiting lists for kids' counselling.
- Government ministries should come together to build a wrap-around approach to services for children. Requires funding.
- In-home supports for kids and families, like tutoring, counselling, parenting. Eliminate group homes entirely. Applause.
- Get ODSP when become involved with CAS – a full-time job.
- Need for oversight. Could be a commission or ombudsman that holds CASs accountable.
- Dual role of the society: you can dissolve the role of the CAS to police and apprehend. Can't be collaborative when they have that role. Families will share more fully.
- Role of band representative, interact with CAS. The CAS has resources; I don't.
- How to take local projects, evaluate and roll them out on a larger scale. Track long-term outcomes. How have we helped children and family over a period of 5 or 10 years? We need to get better at that.
- There is a cost to collaboration, to bring people together.
- Recommend funding reinstatement immediately for band rep program.
- Normalizing the fact that systemic racism, colonialism, oppression are present and real in all of our systems. Collaboration won't work if people are discredited on that basis.
- Engage with provincial advocate's office.
- Ensure that the Commission's report is shared and not forgotten. Lessons learned need to be shared and implemented. It should be a report that people use and take reference from.

- Use the UN's idea of translating UN rights into a child friendly model. Young people need to understand what is happening and how it affects them.
- How to get input from service users and clients into program development? Getting people on the board is not always useful – management level. Treatment and child protection agencies and others need to develop client councils at staff level, and that there is a feedback loop between them and management.
- An annual conference like this would be a good idea. See how we are moving ahead.
- Collaboration is hard to do. Re-examine our collaborative processes to make sure they are working.
- An ombudsman for parents of children in care would be valuable. They currently have no place to go.
- First Nations approach to healing circles. Move that concept into other services for other people.
- Inconsistency in policies among child protection agencies, e.g. re: seeing records.
- Collaboration with community means organizations must rethink themselves. Replace the idea of leadership in organizations with stewardship. Rethink leadership and right use of organizational power. Use it in a loving way with communities. Think more about what an organization stands for as opposed to outcomes and measures. Different responsibility to the communities we serve and how to engage them. Marginalized communities have lack of access to power and don't have the infrastructure or money to get it. Give resources to the community so they can do what they do very well. Trust and honour that they can do it: brilliant, righteous and ready to do it for themselves. Applause.
- Early intervention. Prevention. Cross-section to all sectors. The Commission should ask all sectors to say what they are doing for prevention.
- Least invasive crisis intervention program that is family and child focused and led. Multi-disciplinary team circle modeled on Indigenous healing model. Implement across the board to everyone. A holistic approach.
- Funding collaboration. Scrap the system or work with the system we have?
- There is a lot of community based collaboration – could it be province wide? What do we have in place that we could fund that could implement collaboration to help the system improve? Do we want to create another layer in administration in addition to CAS or fund CAS to implement collaborative approaches that we want? Use what we have and make it better.
- People working with families come to court more widely.
- Require identification of collaterals working with families. Need reasonable caseloads.

- Equity and balance of power – making sure even unrepresented parents have all the information and support.
- Risk that collaboration between organizations and agencies could potentially add to adversarial nature.
- Mandated structural colocation or community hub. Makes collaboration more possible. Focus on front-end solutions and avoid damaging court proceedings, but some cases need court. Bring multi-disciplinary group to address and disseminate information on pitfalls that can lead to miscarriage of justice. Look at preparation of expert witnesses, etc. Not a Toronto-centric initiative.
- ADR is not optional in some jurisdictions. Reason to do that here?
- For experts testifying in court, change the law to let them get access to transcripts of their testimony to learn from it and improve the next time.
- Collaboration works if there is true equity around the table. In family conference, sometimes CAS leaves the room. Role of lawyers and judiciary in balance of power.
- It's about compassion, understanding of the affected person.
- Collaboration is great as an ideal, but shouldn't become a further means of monitoring parents.
- Collaboration does not solve oppressive system we live in.
- Create an independent review commission that assesses any potential protection issues. A preventative initiative so that CAS cases don't go awry or out of control. This commission would help to address a lot of the issues we talked about. Somewhere you could go without being penalized.

SUMMARY

- Costs of collaboration; band rep reinstatement; case loads
- Dual role of social workers
- Income support for families to participate
- Make families and children true partners
- Better evaluation, lessons learned
- Accountability and oversight
- Building the community's capacity to play a role, and trusting them to do it
- Normalizing impact of colonialism, racism, oppression
- Documents child friendly
- Keeping the dialogue going

- Learning from Indigenous models
- Recognize collaboration is at different levels
- Transparency; access policies
- Prevention, in home support, less intrusive
- Northern communities collaboration
- Expanding who is in the room