

**Office of the Children's Lawyer
Written Submissions to the Committee
Bill 207: Moving Ontario Family Law Forward Act**

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Marian Jacko, Children's Lawyer for Ontario
Office of the Children's Lawyer
393 University Avenue, 14th Floor
Toronto, ON M5G 1W9

Marian.Jacko@ontario.ca

OFFICE OF THE CHILDREN'S LAWYER PROPOSALS FOR APPEAL ROUTES

Pursuant to s. 89 of the *Courts of Justice Act*¹ (CJA) the Children's Lawyer for Ontario is appointed by the Lieutenant Governor in Council, on the recommendation of the Attorney General. The Children's Lawyer represents children and young people in child protection and custody/access matters before the courts through the Office of the Children's Lawyer (OCL). The OCL has legal and clinical fee-for-service panel members across the province who represent children on behalf of the Children's Lawyer.

Bill 207: *Moving Ontario Family Law Forward Act, 2020*, (Bill 207) includes proposed amendments to the appeal routes set out in the *Courts of Justice Act* (CJA). Of interest to the OCL are the provisions that would affect cases under the *Child, Youth and Family Services Act, 2017* (CYFSA) and the *Children's Law Reform Act* (CLRA).

The OCL proposes that instead of amending the appeal routes to allow appeals to the Superior Court of Justice (SCJ) or Divisional Court with a requirement that parties be granted leave to appeal to the Court of Appeal, **all appeals of final family law orders should be directly to the Court of Appeal as of right.**

The OCL also submits that **specific reference should be made to the *United Nations Convention on the Rights of the Child* (UNCRC) in the CLRA.**

¹ [Courts of Justice Act](#), R.S.O. 1990 Chap. C.43

Background Regarding Appeals

It has long been acknowledged by lawyers and the courts that appeal routes in family law cases in Ontario are confusing and inconsistent.²

In child protection cases and custody/access cases brought under the CLRA, the appeal routes currently differ depending on whether the case started in the Ontario Court of Justice (OCJ) or Superior Court of Justice Family Division³ (for ease of reference these Superior Courts will be referred to as Family Courts).

In non-Family Court locations, child protection proceedings are heard by the OCJ. Appeals of an OCJ order are to the SCJ and are heard by a single judge. Parties have a second appeal as of right to the Court of Appeal in regard to final orders.⁴

In Family Court locations, child protection proceedings are heard in the Family Court and appeals are heard by a panel of three SCJ judges in the Divisional Court. If a party wishes to appeal the Divisional Court's decision, they must seek leave to appeal to the Court of Appeal.

² See *Mattina v Mattina*, [2018 ONCA 867](#), where the Court of Appeal wrote: "This court has repeatedly commented on the fact that this province's family law appeal routes are confusing for the public, counsel, and institutional litigants."

³ There are 25 Family Court of the Superior Court of Justice locations in Ontario: Barrie, Belleville, Bracebridge, Brockville, Cayuga, Cobourg, Cornwall, Hamilton, Kingston, Kitchener, Lindsay, London, L'Original, Napanee, Newmarket, Oshawa/Whitby, Ottawa, Pembroke, Perth, Peterborough, Picton, Simcoe, St. Catharines, St. Thomas and Welland.

⁴ Under [s. 19\(4\) of the CJA](#), no appeal lies from an interlocutory order of a judge of the SCJ made on an appeal from an interlocutory order of the OCJ.

In either scenario, if a party wishes to appeal a decision of the Court of Appeal, they must seek leave to appeal to the Supreme Court of Canada.

Although custody/access cases can be heard in the OCJ, SCJ and Family Court, appeal routes are different depending on whether the claims are brought under the *CLRA* or the *Divorce Act*. Custody/access cases in the OCJ are always brought under the *CLRA* because only the Superior Court can hear cases brought under the *Divorce Act*. This means that custody/access cases started in the OCJ follow the same appeal routes as child protection cases.

If the SCJ hears a custody/access case under the *CLRA*, the appeal goes to the Divisional Court, with leave needed to appeal further to the Court of Appeal. In contrast, if the SCJ hears a custody/access case under the *Divorce Act*, the case is appealed directly to the Court of Appeal as of right.⁵

Urgency in Cases Dealing with Children's Futures

In most child protection and custody/access cases, the children who are the subject of the proceedings need a final resolution of the issues surrounding their care in a timely

⁵To further complicate matters, appeal routes are also determined by the amount of money at issue in the proceeding. If the final order is for an amount over \$50,000, the case may be appealed directly to the Court of Appeal; if it is for less than \$50,000, the appeal lies to the Divisional Court. The implication is that cases dealing with a lot of money or custody cases dealing with married people's children are more worthy of consideration by the higher court and that they are more likely to be determined on a final basis after one appeal because leave to appeal to the Supreme Court of Canada are rarely granted.

manner. Many courts have expressed concern about the negative effects of delay on children.⁶

Similarly, the UN Committee on the Rights of the Child has indicated that “[d]elays in or prolonged decision-making have particularly adverse effects on children as they evolve” and has advised States Parties to the Convention on the Rights of the Child that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible.⁷

The paramount purpose of the *CYFSA* is to “promote the best interests, protection and well-being of children” and one of the other purposes is to recognize that services to children and young persons should be provided in a manner that “provides early assessment, planning and decision-making to achieve permanent plans for children and young persons in accordance with their best interests”.⁸ Furthermore, “the effects on the child of delay in the disposition of the case” is a statutory consideration in the determination of the best interests of the child.⁹

There are also several statutory timelines intended to move matters along for children. For example, the courts are directed not to make orders resulting in children under the

⁶ *Catholic Children’s Aid Society of Metropolitan Toronto v. M.(C.)*, [1994 CanLII 83 \(SCC\)](#), [1994] 2 SCR 165, at para. 44; *Children’s Aid Society of Toronto v. L.T.*, [2016 ONCA 146](#), at paras. 7 and 24; *L. (R.) v. Children’s Aid Society of the Niagara Region*, [2002 CanLII 41858 \(ONCA\)](#), [2002] 34 R.F.L. (5th) 44 (Ont. C.A.), at para. 44; *Children’s Aid Society of Oxford County v. W.T.C.*, [2014 ONCA 540](#), paras 10-13 and 27

⁷ UN Committee on the Rights of the Child, [General Comment No. 14 \(2013\) on the right of the child to have his or her best interests taken as a primary consideration](#) (art. 3, para. 1), UN Doc. CRC/C/GC/14 (2013), at para. 93.

⁸ [Child, Youth and Family Services Act](#), 2017 S.O. 2017, c. 14, Sched. 1, ss. 1(1) and (2)(3)(v)

⁹ *Ibid.*, at s. 74(3)(c)(ix).

age of six being in care for more than twelve months before either returning the child to a family or community member or placing them in extended society care. For children six and over, the limit is twenty-four months.¹⁰

It is unusual, however, particularly for children under six, that a trial or motion for summary judgment would be concluded by the twelve-month mark. At that point, if there is not a plan to return them to a parent or prior caregiver or place them with a family or community member, the court is likely to order the child into the extended care of the society.

Children's aid societies have a statutory obligation to make all reasonable efforts to assist the child to develop a positive, secure and enduring relationship within a family through adoption, a custody order or a plan for customary care in the case a First Nations, Inuk or Métis child.¹¹ Appeals delay permanency planning for children.

The first appeal is often delayed for a significant amount of time while transcripts are ordered and prepared. When parents are appellants, there are often funding issues to be sorted out before transcripts can be ordered.¹² Once the transcripts are obtained,

¹⁰ *Ibid.*, s. 122, although of note, the court can extend the period for six months if it is in the best interests of the child.

¹¹ *Ibid.*, s. 112.

¹² Many child protection trials can be quite lengthy, taking many days or weeks to complete. The cost of transcripts is often many thousands of dollars. Unless the parent can afford to pay for the transcripts, s/he must wait for permission from Legal Aid before ordering the transcripts or seek government funding through a JG application (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999 CanLII 653 \(SCC\)](#), [1999] 3 S.C.R. 46).

the appellant has thirty days to perfect the appeal. The respondents then have an additional thirty days to respond.

In some locations, such as Toronto, the SCJ case manages appeals by holding regular status hearings to determine what steps are outstanding and to schedule timelines for filing and hearing the appeal. The OCL is not aware of similar appeal management safeguards in other SCJ locations hearing appeals and there is no case management of appeals in the Divisional Court. If a party wishes to move along an appeal in Divisional Court, it usually involves one party bringing a motion to dismiss the appeal for delay and/or for directions to set timelines.

Outside of Toronto, the Divisional Court sits for one or two weeks, two or three times a year, which means there can be long delays before an appeal can be heard after it is perfected. It is possible for parties to request that the case be heard by the Divisional Court in Toronto, if the matter is urgent, but this can be challenging for self-represented litigants.

If a party wishes to appeal a Divisional Court decision, they must seek leave to appeal, which requires them and the responding party or parties to prepare *facta* indicating why the case should or should not be granted leave to appeal. If the Court of Appeal grants leave to appeal, the appellant must then perfect their appeal, requiring drafting yet another factum, and again the responding parties are given time to respond. Typically, this takes several months and can be very daunting for self-represented parties.

In contrast, it has been the OCL experience that the Court of Appeal does a very good job of case managing their appeals, particularly child protection appeals and appeals involving alleged cross-border abduction. Parties are given strict timelines and cases are administratively dismissed if parties do not comply with the court's directions.

The reality for children (and the parties) is that for an appeal to get to the Court of Appeal, at least a year, and often significantly longer, passes between the trial or motion for summary judgment and the appeal. For very young children, this results in them being in litigation limbo for much longer than twelve months. Older children are also negatively impacted by the uncertainty caused by a delay in the final resolution of their status. It is not uncommon for children to be before the courts for several years.

Unless children are already placed in the prospective adoptive home or custodial or customary care arrangement where they will remain, appeals can lead to lengthy delays and potentially multiple disruptions before a permanent plan can be implemented. This is clearly contrary to the purposes of the *CYFSA*.

In high-conflict custody/access cases, it can be emotionally damaging for children to have their parents engage in protracted litigation that involves multiple levels of appeal. A good example of appeal routes contributing to delays is the *OCL v Balev*¹³ case, which was a *Hague Convention* case. The case started in a Family Court, where the

¹³ *Office of the Children's Lawyer v. Balev*, [2018 SCC 16](#), [2018] 1 S.C.R. 398

children were ordered back to Germany. On the first appeal, the Divisional Court, ordered that the habitual residence was Ontario. The case went to the Court of Appeal, which ordered the children back to Germany. Although the case became moot as the German courts ultimately determined that the children's habitual residence was Ontario and they were permitted to return, the Supreme Court of Canada heard the appeal and commented on the troubling delay in hearing these important issues.¹⁴

Delay in any case where a child's future is uncertain should be avoided where possible and has implications for their security of the person interests under the *Charter*.

Rationale for Limiting Family Appeals to One Appeal

Given that it can sometimes take over a year to have an appeal heard, there would be timelier resolutions and more certainty for children and families if cases were restricted to one appeal, instead of one appeal as of right and then the ability to seek leave to appeal and, if granted, a further appeal. A simplified process also enhances access to justice for all family justice participants and would be more cost-efficient for Ontarians by streamlining the appeal routes.

Presumably the rationale for needing leave to appeal to the Court of Appeal is that the Court would be able to "weed out" frivolous appeals. However, there is still some delay for the Court of Appeal to decide the leave applications. The OCL submits that it is hard

¹⁴ *Ibid*, at paras. 88 and 89

to justify giving litigants a direct route to the Court of Appeal in family cases involving more than \$50,000 or under the *Divorce Act*, while adding a step for child protection cases or *CLRA* custody applications. This suggests a resource-based differentiation in access to justice with disproportionate impacts on the most vulnerable and marginalized members of society.

The Court of Appeal, in one central location, has a much greater ability to manage its proceedings and prioritize cases involving children than regional Divisional Courts and individual SCJs. The OCL's experience is that appeals to the Divisional Court and to the Superior Court outside of Toronto are often significantly delayed because of a lack of case management system. Although the Divisional Court will hear cases in Toronto if there is some urgency, there is often a disadvantage because of delay to parties and children outside of the Greater Toronto Area in having the Divisional Court hear their cases "locally".

For those concerned about parties and counsel being required to travel to Toronto for Court of Appeal proceedings, the use of virtual hearings during the current pandemic have demonstrated that parties and lawyers may not always have to travel to Toronto to have their appeals heard in the Court of Appeal.

If all child protection and custody/access appeals are heard by the Court of Appeal, there will be more consistency in how important issues relating to children are decided. Further, it will avoid diverging lines of appellate authority in lower courts. Recently, there

has been significant case law coming from the Court of Appeal relating to child protection matters.¹⁵ These cases have set important precedents on issues such as appropriate evidence to be heard on motions for summary judgment and the test for access for children placed in extended society care.

Finally, assuming that the Family Court continues to expand across the province, more cases will be appealed to the Divisional Court. To members of the public and the Bar, having a panel that consists of peers of the trial judge raises concerns about lack of fairness and neutrality.

Inclusion of mention of the *UNCRC* in the CLRA

Although the *UNCRC* is referenced in other legislation,¹⁶ it is not referenced in the forthcoming *Divorce Act* or Bill 207. Various organizations strongly advocated for its inclusion in the House of Commons and Senate.¹⁷ Justice Canada took the position at Parliamentary hearings that the Act does not need to include a reference to the

¹⁵ See: *Kawartha-Haliburton CAS v M.W.* [2019 ONCA 316](#), *L.M. v Peel CAS* [2019 ONCA 841](#), *CAST v J.G.* [2020 ONCA 415](#)

¹⁶ See preamble to the [Youth Criminal Justice Act](#), S.C. 2002, c. 1; s. 3(3)(f) of the [Immigration and Refugee Protection Act](#), S.C. 2001, c. 27, which indicates that the Act must be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory; the preamble to [An Act respecting First Nations, Inuit and Métis children, youth and families](#), S.C. 2019, c. 24; and the preamble to the [Child, Youth and Family Services Act](#), 2017, S.O. 2017, c. 14, Sched. 1.

¹⁷ Canadian Bar Association submission on [Bill C-78, Divorce Act amendments](#) (November 2018), at p. 2, <https://www.cba.org/CMSPages/GetFile.aspx?guid=eca537fe-0ee4-405d-99b7-e3b5e3acd1ad>; see also submissions of the [Canadian Coalition on the Rights of Children](#) (June 5, 2019), <http://rightsofchildren.ca/wp-content/uploads/2016/01/CCRC-report-on-rights-of-children-in-Canada.pdf>; and [Evidence of John-Paul E. Boyd, Principal, John-Paul Boyd Arbitration Chambers](#) (June 6, 2019), <https://sencanada.ca/en/Content/SEN/Committee/421/lcjc/54873-e>.

UNCRC, as its provisions conform with *UNCRC*.¹⁸ When judges and lawyers lack the necessary child rights knowledge or willingness to implement the *UNCRC* in the absence of explicit incorporation, this approach is problematic.

The OCL submits that incorporation of the *UNCRC* into the *CLRA* remains one of the unimplemented recommendations arising from the Inquest into the Death of Katelynn Sampson.¹⁹ Another unrealized recommendation is the failure to implement a Child Rights Impact Assessment (CRIA) process in the development of the Bill to screen for the impact on children's rights.²⁰ Ontario is urged to implement the recommendations from the Inquest regarding amendments to the *CLRA*.

Conclusion

The OCL submits that children, particularly those who are the subject of child protection proceedings, need to have final decisions made in their best interests in a timely manner. Allowing all final child protection and custody/access orders to be appealed directly to the Court of Appeal would be the best way to accomplish this goal.

The incorporation of reference to the *UNCRC* would ensure that courts and lawyers keep these principles in mind when litigating cases involving children.

¹⁸ More generally, it has stated that it is not the practice of the federal government to reference international treaties in domestic legislation. This does not reflect the reality that it has done so in various instances. See *supra* note 1.

¹⁹ Jury Verdict and Recommendations, Inquest Touching the Death of Katelynn Sampson, April 2016, Recommendation 74. See also Katelynn's Principle, Recommendations 1, 3 and 68-81: <http://www.mcscs.jus.gov.on.ca/english/Deathinvestigations/Inquests/Verdictsandrecommendations/OCInquestsSampson2016.html>

²⁰ *Ibid.*, Recommendation 3.