CHILD PROTECTION ISSUES IN SCHOOLS: THE ROLE OF EDUCATORS*

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The Norwegian Nobel Committee received 278 nominations for the 2014 Nobel Peace Prize, the most in history. Before the decision was announced the media focused on Pope Francis and Edward Snowden, with the Pope the odds-on favorite.

Then the Committee announced that Malala Yousafzai and Kailash Satyarthi won the Prize for their work on the education and protection of children. It was historic because Malala, was 17, the first time that a Nobel Peace Prize has been awarded solely for the protection of children. Both of the recipients have been outspoken, tireless advocates for the education and rescue of Satyarthi in India. To the West, the evil they face is "extremism," but for them it is status quo.

These are true heroes who fought for children's flourishing, and this was an important moment in the civil rights movement for children.

Malala is the first child ever to receive the Nobel Prize. The very fact that she was found worthy of this global award is proof that the civil rights movement for children is maturing. Not long ago, she would have been one of those who is to be "seen and not heard." She is a proud rights-holder fighting for the rights of all children who face extremist and social barriers to education.

About every 90 minutes an honor killing unfolds somewhere in the world. Pakistan alone has more than 1,000 a year, and the killers go unpunished.

Watching the documentary about Saba, "A Girl in the River: The Price of Forgiveness," just as in the 19th century the central moral challenge for the world was slavery, and in the 20th century it was totalitarianism, in this century the foremost moral issue is the abuse and oppression that is the lot of so many women and girls around the world.

I don't know whether "A Girl in the River" will win an Oscar in its category, short subject documentary but it is already making a difference. See Nicholas Kristof, *NY Times*, January 31, 2016.

Chirping away at this broad pattern gender injustice is in the interest of all of us. It is our century's great unfinished business.

Children matter. Children are more than our future, they are our foundation. As a society it is our responsibility to support children as they grow and find their way. Unfortunately, some of our youth get lost along the way. When this happens, it should be our collective responsibility to ensure there is a supportive framework to help them regain their footing. For some of our vulnerable youth, there is no framework and there is often no path forward.

The essential role of teachers and other school personnel is that of protecting children from abuse, neglect, and other harms, including the importance of mandatory reporting legislation that require educators to report suspected abuse in reinforcing those efforts.

As recognized by the United Nations the Convention on the Rights of the Child (1989), children are human beings with rights. Accordingly, children have the right to play, to learn, to be and feel safe and to life "without discrimination of any kind" (United Nations [UN], 1989 Article 2). Children have the right "to a standard of living adequate for the child's physical, mental, spiritual, moral and social development." (UN, 1989, Article 27(1)). They have internationally recognized and ratified rights when it comes to education, alternative care, justice, and incarceration.

As should be obvious from both the legislative objectives of mandatory reporting and the in-school context in which educators work, the overwhelming purpose of an educator's inquiry about possible abuse or neglect is to protect a child, not to apprehend and prosecute the perpetrator.

Reporting is required to ensure that those who may be in the best position to identify signs of abuse will trigger a variety of mostly *civil* investigations and interventions that will help ensure the safety and well-being of children. Mandatory reporters are not charged with investigating or establishing whether, as a matter of fact, abuse has occurred. They must instead report what they reasonably suspect is abuse so that other entities may investigate the report. And, where suspicions of abuse are substantiated through an investigation, the official response is more likely to be the delivery of social services that prioritize family preservation as our provincial legislation provides.

Schools are broadly concerned with the well-being of their students, and educators will therefore inquire about a wide range of behaviors, injuries, or problems that a child presents at school. It may only become apparent after a child has responded to such an inquiry that the underlying issue is one that implicates the educator's mandatory reporting duties (as opposed to one that should be addressed through school discipline or counseling). Educators approach these frequent and often informal interactions with children as educators seeking to foster a positive school environment and to ensure the well-being of students.

Educators do not enforce the law. School personnel do not operate as police officers. They do not require warrants for routine school disciplinary matters.

Statements made to teachers or school personnel are not restricted in a judicial context. Statements made to a teacher often indicate an emergency situation involving a child returning to a potentially dangerous environment. Even in the absence of an emergency, both the informality of the questioning and a child's intent in answering their teacher's questions confirm that the answers elicited by the teacher are not necessarily "testimony" for purposes of potential criminal proceedings.

Acknowledging that the primary purpose of the reporting obligation is protecting children, does <u>not</u> contemplate the possibility of prosecution for reported abuse. Those subject to the reporting requirement are not "agents of law enforcement" when they question children about potential abuse.

Teachers may seek to identify the perpetrator of abuse for many reasons, such as obtaining child protective services or remedying a possible bullying situation.

<u>Hearsay</u>

An out-of-court statement (written, oral or by conduct) tendered for the truth of its content is hearsay and presumptively inadmissible. That same statement tendered simply as proof the statement was made is admissible so long as it is relevant and has some probative value. To be admissible for the proof of its content hearsay must meet the twin tests of reliability and necessity.

Hearsay – Narrative Exception

Evidence that furthers the narrative or puts the matter in context is not really hearsay as it is not tendered for its truth. However, it must not become a guise for permitting highly prejudicial evidence of limited probative value to taint a trial.

Hearsay – Admissions

Statement by a party are admissible against that party as an exception to the hearsay rule. Because admissibility of admissions of a party rests on the theory that a party cannot complain about the reliability of his or her own statements, the accuracy and the circumstances in which the admissions are made is important.

Hearsay – Statements by Children

Hearsay evidence for proof of its content should only be admitted when it meets the twin requirements of necessity and reliability. The fact that a very young child would have to take the stand in open court to testify against his or her parents may well be sufficient to establish trauma such as to satisfy the necessity requirement. As to reliability, the person to whom the statement was made must be called.

Child protection cases are unique. The Societies must meet statutory timelines and therefore must gather evidence quickly and efficiently. The evidence at interim headings, and frequently, as well at protection and disposition headings, is often tendered by way of affidavit. In order for the Society to explain why a particular decision was made, the affidavit often contains details of anonymous reports.

A trial is a search for the truth. The law of evidence as it has been developed and refined over hundreds of years facilitates the search for the truth. It is designed to weed out unreliable evidence so that decisions are based on trustworthy evidence. This, in turn, enhances the faith and trust of litigants, and the public, in the fairness and integrity of the judicial system. A decision to remove a child from the care and custody of its parents, either temporarily or permanently is a serious one, which should only be made on evidence that is trustworthy. Complying with the laws of evidence in child protection cases is not a burden on the parties; it is an obligation.

We are not meant to be critical of the Society workers. Theirs is a difficult lot. They spend their professional lives dealing with families in crisis. They deal on a daily basis with families afflicted with alcohol addiction, drug addiction and mental health issues. They are sometimes threatened. They are sometimes disliked, even hated, by the very people they are attempting to help. Sometimes their clients swear at them. They see more neglect and poverty than any person should ever see. They see an under belly of our province that would shock many people.

Their purpose is to protect children from harm due to abuse and neglect, to preserve the autonomy and integrity of the family whenever possible, and only when necessary to remove children from the care and supervision of their parents. They are educated and trained in the social sciences, not in the law. When there is a decision to apprehend, to seek temporary or permanent custody and guardianship of a child, it is the workers who gather the evidence. The removal of a child from the charge of its parents is a grave and serious matter.

Hearsay may be admitted not for the proof of its contents but to complete the narrative or to put things in context. This exception to the hearsay rule involves a weighing of the probative value of the evidence versus its prejudicial effect.

DYNAMICS

It is important to understand the common dynamics such as:

The parents are usually afraid. Their life as they envisioned it has unravelled, they are afraid of how the separation will affect their children and their relationship with their children. They worry about whether they will be able to financially survive or maintain their previous lifestyle. They face an unknown future and a frightening legal process.

Many parents are emotionally vulnerable.

Many of the parents are confused, overwhelmed or paralyzed by the process. These feelings can be compounded where English is not their first language or where they have mental health or personality challenges.

KEEPING PRIVATE NOTES

It can be helpful to keep a short private summary of each case. These summaries can be kept in separate word files on your computer or in a binder separated with alphabetical tabs. Make the summaries brief, not more than a page or two, so you don't feel that the task is overwhelming. The summaries should include the names of the parties, the issues, expectations of the parties and any personal observations that can assist you in managing future dialogue Advantages of doing this include:

1. Having a better grasp of the facts and the issues of the case.
2. Having a better understanding of the family dynamics.
3. Alerting you to any power imbalance between the parties.
4. Alerting you to any potential land-mines (for example, one party has anger issues).

Be aware of third parties who might be influencing the parents (the cheerleaders) and determine if they should be part of any process or excluded. These are usually grandparents and new partners. Again, this is where keeping notes helps. You want transparency about what you say to each parent.

Parents often have no experience about how to behave and will usually take their cues from how you behave. The objective should be to set up a calm and supportive environment. Suggestion on how to create this environment are as follows:

1. Maintain a structured setting. This creates predictability and reduces fear.
2. Keep the process formal
3. Non-verbal messages are very important. Make eye contact, smile when appropriate, maintain comfortable body language (avoid rigidity, crossed-arms, scowls). You want to communicate that you are confident, in charge, kind, fair and want to help. This reduces the parents' fear and facilitates their ability to listen to you.
4. Have control of your emotions. You are modelling how to problem-solve. If you are going to show any anger, it should be strategic, not real anger.
5. You should be consistently respectful and avoid sarcasm.

6. The more anxious and excitable the parent is, the calmer you should be. Talk slowly, calmly and even more quietly with parents. There is a psychological term called "isopraxism". This is where a person will mimic the behaviour of someone they admire and respect. Try it, it works.

7. When parents get bogged down in accusations against the other, redirect the conversation before the agenda is hijacked.

A parent's right to procedural fairness under section 7 of the Charter, as posited by the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1993] 3 S.C.R. 46 (Quicklaw or CanLii) is not absolute.

Note also Ontario's Limitations Act, 2002 the discoverability rule and the presumptive commencement of the basic two-year limitation period, if not the commencement of the ultimate limitation period. See e.g. *Makowski v. Persaud*, 2015 ONSC 1654, *Demede v. Attorney General of Canada eta al.,* 2015 ONSC 3000, and *Sutton v. Balinsky*, 2015 ONSC 3081.

Further of course Bill 132 amends the Limitations Act to remove the limitation periods for claims based on sexual assault and non-sexual assault depending on the relationship between the claimant and the individual in question. Bill 132 had second reading on December 9, 2015 (titled Sexual Violence and Harassment Act Plant Act, 2015).

STATEMENT BY CHILDREN

The Supreme Court of Canada in *R. v. Khan*, [1990] 2 S.C.R. 531 adopted a flexible approach to the reception of hearsay evidence provided the person tendering the evidence conducts a *voir dire* and establishes that the statements meet the twin requirements of necessity and reliability. As to necessity, in some cases the Society must call evidence as to why the child cannot testify. In a great many cases, however, especially where the child is young (*R. v. P.(J.),* (Que. C.A.), affirmed [1983] 1 SCR 169. The mere fact that a very young child would have to take the stand in open court to testify against the parents may well be sufficient to establish trauma such as to satisfy the necessity requirement.

The purpose of a child abuse investigation by Children's Aid, for example, and reporting statute "is to protect the health and welfare of children" and the questioner's "purpose is to assess whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child. Can the abuse be validated?

The ground-breaking 1962 article, *The Battered-Child Syndrome*, 181 J. AM. Med. Ass'n 17 (1962), by Dr. C. Henry Kempe and other scholars greatly increased public attention to physical child abuse. It has been regarded by many as the direct cause and catalyst for mandatory report laws. See e.g. Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 Ohio N.U. L. Rev. 819, 838 (2010) and Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 Fam. L.Q. 141, 142 (1986).

The next year, after seeking input from professionals in the field, including Dr. Kempe, the U.S. Children's Bureau released a model statue that, among other provisions, required doctors and hospitals to report suspected incidences of child. See U.S. Department of Health & Human Serv., *The Child Abuse Prevention and Treatment Act: 40 Years of Safeguarding America's Children at 3-4* (2014).

MANDATORY REPORTING

When teachers, school administrators, and other school personnel carry out their duties as mandatory reporters of child abuse, they do not do so as agents of law enforcement or for the purpose of creating out-of-court statements for use in a prosecution. As should be obvious from both the legislative objectives of mandatory reporting laws and the in-school context in which educators work, the overwhelming purpose of an educator's inquiry about possible abuse or neglect is to protect a child, not to apprehend and prosecute the perpetrator. That being so, an educator's inquiry into possible child abuse will not normally, if ever, qualify as the kind of purposeful solicitation of out-of-court statements for use in a prosecution that triggers concerns under our *Charter*.

Mandatory reporters are not charged with investigating or establishing whether, as a matter of fact, abuse has occurred; they must instead report what they reasonably suspect or believe is abuse so that other entities (such as Child

Protective Services) may investigate the report. And, where suspicions of abuse are substantiated through an investigation, the official response is more likely to be the delivery of social services that prioritize family preservation, not a criminal prosecution.

Schools are broadly concerned with the well-being of their students, and educators will therefore inquire about a wide range of behaviors, injuries, or problems that a child presents at school. It may only become apparent after a child has responded to such an inquiry that the underlying issue is one that implicates the educator's mandatory reporting duties (as opposed to one that should be addressed through school discipline or counseling).

The history of mandatory reporting laws makes clear they are intended to protect children from potential abuse and neglect, and generally are not intended to further criminal prosecutions. The laws are designed to handle most substantiated abuse and neglect cases civilly, with a goal of family reunification, and any criminal justice involvement is unusual.

As Douglas Besharov, the first Director of the U.S. National Center on Child Abuse and Neglect, noted, "[t]he purpose of reporting is to foster the protection of children—not to punish those who maltreat them. Hence, child protective laws have no provisions for criminal court prosecution because, in most situations, criminal intent is absent." Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VIL. L. REV. 458, 464 (1978). See also Richard Wexler, Take the Child and Run: Tales from the Age of ASFA, 36 NEW ENG. L. REV. 129, 131-32 (2001).

This primary emphasis on identifying maltreatment and protecting children from abuse through a variety of civil interventions is also well founded, considering the significant psychosocial and economic damages to both the child victim and to society, once maltreatment occurs:

Child abuse and neglect have known detrimental effects on the physical, psychological, cognitive, and behavioral development of children. These consequences … include physical injuries, brain damage, chronic low self-esteem, problems with bonding and forming relationships, developmental delays, learning disorders, and aggressive behavior. Clinical conditions associated with abuse and

neglect include depression, post-traumatic stress disorder, and conduct disorders. Beyond the trauma inflicted on individual children, child maltreatment also has been linked with long-term, negative societal consequences. For example, studies associate child maltreatment with increased risk of low academic achievement, drug use, teen pregnancy, juvenile delinquency, and adult criminality. Further, these consequences cost society by expanding the need for mental health and substance abuse treatment programs, police and court interventions, correctional facilities, and public assistance programs, and by causing losses in productivity. Calculation of the total financial cost of child maltreatment must account for both the direct costs as well as the indirect costs of its long-term consequences. See NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT INFO., Prevention Pays: The Costs of Not Preventing Child Abuse and Neglect (2001) (internal citations omitted).

School authorities have an "obvious concern" with protecting the children entrusted to their care. Teachers' and other school officials' frequent interactions with students lead to familiarity that allows them to detect subtle changes in a child's mood, behavior, or appearance. Such changes put educators on alert that a situation may exist that demands their attention. This is especially true where the change is dramatic or negative. Teachers' and other educators' natural reaction when these situations arise is to talk with the student about what led to the change.

In a school setting, numerous factors or causes having nothing to do with abuse might prompt these kinds of inquiries. For example, a drastic mood or behavior change from a student may indicate something as minor as a tiff between friends or as serious as suicidal depression. Similarly, a change of appearance or injury can signify a variety of problems, which demand a variety of situation- and context-dependent solutions. For instance, a teacher or education support professional may notice that a student appears to have a series of scratches on his arm. While the marks could be the result of abuse, they might also be the result of bullying, nonsuicidal self-injury, rough-housing with a sibling or friend, or simply playing in some woods near the student's home. Similarly, a student who for weeks has arrived at school looking gaunt and tired could be suffering from severe neglect at home, but she might just as easily be suffering from drug addiction, an eating disorder, depression, or another medical condition, or from disruption in the wake of her parents' divorce or job loss.

Of particular note, a student's injury, unusual mood, or behavior may relate to an altercation between students or an incidence of bullying. In recent years, in response to the Columbine shootings and other tragic events, teachers, school officials, and policy makers have paid increasing attention to the issue of peer bullying within schools. *See, e.g.*, Susan M. Swearer et al., *Bullying Prevention and Intervention: Realistic Strategies for Schools* at 53 (2009). Virtually all school employees agree that they have a responsibility to intervene when they see bullying occur. *See, e.g.*, National Education Association, *Bully Free: It Starts with Me*, "How to Identify Bullying," *available at* http://www.nea.org/home/53359.htm.

Early reporting to a "Society" is to prevent injury or further injury or harm to a child. It is not up to a school employee to determine if abuse or neglect is in fact occurring or if any of the circumstances surrounding suspected incidents of abuse or neglect actually happened. Making this determination is the legally mandated function of the Society.

The purpose of reporting is to foster the protection of children, not to punish those who maltreat them. See Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 Vill. L. Rev. 458, 464 (1978).

Each day in 2012, 1,825 children in the United States were confirmed victims of child abuse and neglect, amounting to a yearly total exceeding 67,000 maltreated children. These statistics represent immeasurable harms in lost lives, significant physical, emotional, and mental damage to children and families and economic and social costs of more than $80 billion a year. A substantial majority of these cases were detected because someone reported her suspicions to law enforcement or child protect services in keeping with mandatory child abuse reporting laws or her own conscience. Mandatory reporters form a critical first line of defense for abused children.

Reporter immunity is crucial to encourage reporting without fear of legal repercussions for complying with a statutory duty. "Immunity helps to promote the gravity and necessity of ensuring that children are protected and provided a safe foundation for growth into adulthood. See Jon M. Hogelin, *To Prevent and to*

Protect: The Reporting of Child Abuse by Educators, 2013 BYU EDUC. & L.J. 225, 243 (2013), available at http://digitalcommons.law.byu.edu/elj/vol2013/iss2/3**.**

In *Liedtke v. Carrington*, the court of appeals found it "clear that the legislature believed that the societal benefits of preventing child abuse outweigh the individual that might arise from the filing of a false report. See 763 N.E. 2(d) 213, 216 (Ohio Ct. App. 2001). Similarly, in *Walters v. The Enrichment Center of Wishing Well, Inc., t*he appeals court stated:

> the societal benefits of preventing child abuse outweigh the individual harm which might arise from the filing of an occasional false report. The grant of immunity […] for those persons reporting under the mandatory provisions […] similarly promotes the public policy goal of protecting children from physical and mental abuse by ensuring that those persons who are required by law to report such abuse are not deterred from this duty by the daunting prospect of expensive and time-consuming litigation. 726 N.E. 2d 1058, 1063 (Ohio Ct., App. 1999).

This primary emphasis on identifying maltreatment and protecting children from abuse through a variety of civil interventions is well founded, considering the significant and often permanent psychosocial and economic damages to both the child victim and to the society, once maltreatment occurs:

> Child abuse and neglect have known detrimental effects on the physical, psychological, cognitive, and behavioral development of children. These consequences … include physical injuries, brain damage, chronic low self-esteem, problems with bonding and forming relationships, development delays, learning disorders, and aggressive behavior. Clinical conditions associated with abuse and neglect include depression, post-traumatic stress disorder, and conduct disorders. Beyond the trauma inflicted on individual children, child maltreatment also has been linked with long-term, negative societal consequences. For example, studies associate child maltreatment with increased risk of low academic achievement, drug use, teen pregnancy, juvenile delinquency, and adult criminality. Further, these consequences cost society by

> expanding the need for mental health and substance abuse treatment programs, police and court interventions, correctional facilities, and public assistance programs, and by causing losses in productivity. Calculation of the total financial cost of child maltreatment must account for both the direct costs as well as the indirect costs of its long-term consequences (National Clearinghouse on Child Abuse and Neglect Info., *Prevention Pays: The Cost of Not preventing Child Abuse and Neglect* (2001).

Teachers and other education professional must pay close attention to the children entrusted into their care, monitoring their ever changing moods, dispositions, behaviors and actions so as to tailor their instruction and guidance to them accordingly.

Teachers' and other school officials' frequent interactions with students lead to familiarity that allows them to detect subtle changes in a child's mood, behavior, or appearance. Such changes put educators on alert that a situation may exist that demands their attention. This is especially true where the change is dramatic or negative. Teachers' and other educators' natural reaction when these situations arise is to talk with the student about what led to the change.

In a school setting, numerous factors or causes having nothing to do with abuse might prompt these kinds of inquiries. For example, a drastic mood or behavior change from a student may indicate something as minor as an argument between friends or as serious as suicidal depression. Similarly, a change of appearance or injury can signify a variety of problems, which demand a variety of situation and context dependent solutions.

For instance, a teacher or education support worker may notice that a student appears to have a series of scratches on her arm. While the marks could be the result of abuse, they might also be the result of bullying, non-suicidal self-injury, rough-housing with a sibling or friend, or simply playing in some woods near the student's home. Similarly, a student who for weeks has arrived at school looking gaunt and tired could be suffering from severe neglect at home, but she might just as easily be suffering from drug addiction, an eating disorder, depression, or another medical condition, or from disruption in the wake of a separation, divorce or job loss.

Of particular note, a student's injury, unusual mood, or behavior may relate to an altercation between students or and incidence of bullying. In recent years, in response to the Columbine shootings and other tragic events, teachers, school officials, and policy makers have paid increasing attention to the issue of peer bullying within schools. See, e.g., *Intervention: Realistic Strategies for Schools at 53* (2009). Virtually all school employees agree that they have a responsibility to intervene when they see bullying occur. See, e.g., National Education Association, *Bully Free: It Starts with Me*, "How to Identify Bullying," available at http://www.nea.org/home/53359.htm

School officials investigate children's injuries to address a myriad of problems, frequently including violence among students rather than child abuse, so their inquiries cannot be assumed to be related to mandatory child abuse reporting obligations. Teachers' and other school officials' ability to respond to the situation and recommend appropriate remedies or coping mechanisms hinges upon their ability to freely and informally engage the student in dialogue about the challenged that student is facing.

Teachers should receive extensive training both to earn their teaching credentials, and to continue to master their subject areas and new instructional and classroom management techniques as they progress as professionals. That training should cover subjects including instructional methods, curriculum content, classroom management techniques, data and assessment techniques for reaching struggling student or those who need special education services, cultural competence, anti-bullying, and school safety. Training must be intended to assist teachers in creating an environment that is safe for students, orderly, and conducive to learning.

The special responsibility of teachers to care for students and provide for their safety is not one to be taken lightly. Preserving the flexible and supportive relationships teachers have with their students is essential to accomplishing those goals and ensures that teachers can continue to focus on protecting and nurturing each child. Respecting those relationships is important to continue to allow teachers to reach children where they are, even when doing so requires that teachers take on roles above and beyond their duties as counselors, friends, mentors, and surrogate parents to their students.

Educators are arguably the most likely people to detect and report abuse. Children have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. This fact is especially true of young children. One must also look to the primary purpose of the victim, and our Courts have intimated that the condition or competency of the victim is relevant to that determination.

Interestingly the Office of Special Commissioner of Investigation for the New York City School District monitors police investigations involving misconduct which may impact the Department of Education. If a criminal investigation fails, SCI may open an investigation of possible administrative violations. See www.NYCSI.org.

I would strongly recommend at the beginning of every school year, along with a copy of any staff handbook, staff be provided with a letter which they must sign and return indicating that they understand when "incidents" must be reported. These letters would be maintained in a file at the school, and every so often, "reminders" regarding the importance of reporting be included in daily written morning minutes. When a staff member, guidance counselor receives a complaint, this individual should immediately inform someone from the administrative staff. Once a complaint is received, a preliminary investigation should be conducted, which entails speaking with the students, collecting statements, contacting the parents of all the students involved, depending of course, on the circumstances and fact of each case.

The Supreme Court of Canada has recognized that delay in reporting in cases of sexual abuse is common. In *R. v. L.(W.K.)*, [1991] 1 S.C.R. 1091 the issue was whether charges of sexual assault should be stayed on the ground that a thirty year delay in advancing a complaint resulted in a denial of fundamental justice.

The accused in that case had made a motion at trial to stay proceedings related to charges of sexual abuse of his daughter and step-daughters stemming back to 1957. The trial judge granted the stay but this was set aside on appeal and a new trial was ordered. The Supreme Court of Canada dismissed a further appeal. Stevenson J. writing for the court stated:

> It is well documented that non-reporting, incomplete reporting, and delay in reporting are common in cases of sexual abuse. The

1984 *Report of the Committee on Sexual Offences Against Children and Youths* (the "Badgley Report"), vol. 1..explained at p. 187 that:

> "Most of these incidents were not reported by victims because they felt that these matters were too personal or sensitive to divulge to others and because many of them were too ashamed of what had happened."

AUTOMATIC STAY OF CUSTODY CLAIM IN FACE OF CHILD PROTECTION CASE

Does an automatic stay arise against custody claims under our federal *Divorce Act*? In the midst of custody dispute between divorcing parents, local children's aid society apprehended children and launched child protection case? If custody dispute had arisen under provincial *Children's Law Reform Ac*t, section 57.2 of Child and Family Services Act, would have automatically stayed that Divorce Act order, and, in face of federal paramountcy doctrine, it is readily apparent whether provincial law such as Child and Family Services Act could achieve such stay. The Court of Appeal declined to decide matter and preferred to assume that court has jurisdiction to decide custody issue but also directed that child protection proceedings could and should continue. See *D.D. v. H.D.*, (8 June 2015), 2015 ONCA 409, [2015].

Whether a child protection order can trump a divorce court's custody or access order is an issue that was thought to have been settled in *Dredl v. Attorney General for Québec*, [1966] S.C.R. 320, 1966 CanLII 80, [1966]. See *Re Jason Michael D. (An Infant),* 1978 CanLII 219 (Ont. Prov. Ct. Fam. Div.), per Provincial Judge F. Stewart Fisher. *Kredl v. Attorney General for Québec* was decided at a time when residents of Quebec could only get Parliamentary divorces, which were silent on corollary relief matters (such as custody and access). Thus, the paramountcy doctrine was never really engaged in that Supreme Court of Canada judgment and technically remains open with potentially unpleasant results.

MEMBERS ATTESTATION

I strongly believe that the Ontario College of Teachers should implement at attestation WITH an associated compliance. There are no drawbacks, how can there be. It is about OUR CHILDREN. The attestation should be completed by all members of the College and it should be nothing less than mandatory. The attestation can be communication by email or otherwise, yearly OR at Least every other year BUT capturing new graduates each year.

MY experience again as someone who has taught graduate students for the past 35 years is that very, very few know anything about the laws that govern them as teachers and for those who are not graduates of Faculties of Education who teach in the “private system”, they know even less.

Each day in 2012, 1825 children in the US were confirmed victims of child abuse and neglect, or 670,000 yearly. Most of these cases were detected because someone reported their suspicions to child protective services (children’s aid societies) or to the police in keeping with mandatory child reporting laws. MANDATORY REPORTERS again form a CRITICAL FIRST LINE of defense for abused children. See Children’s Def. Fund, The State of America’s Children 2014 36, 74 (2014).

It is very important to note that the CFSA includes a very important section, section 72(7) which grants or provides IMMUNITY from protection of those persons who make good faith reports of suspected or known child abuse. Reporter immunity is crucial to encourage reporting with fear of legal repercussions for simply complying with a statutory duty. "Immunity helps to promote the gravity and necessity of ensuring that our children are protected and provided a safe foundation for growth into adulthood." See Jon M. Hagelin, *To Prevent and to Protect: The Reporting of Child Abuse by Educators*, 2013 BYU Educ @ L.J. 225, 243 (2013). We should presume that all child abuse reports are made in good faith and NOT out of a desire to punish the suspected abuser.

See *Ohio v. Clark* (a recent decision of the US Supreme Court), 135 S. Ct. 2173, 2183 (2015).

Simply put, the failure to report diminishes the opportunity that the suspected abuse will be uncovered and stopped, thus INCREASING even more potential harm to children. It is OUR SOCIETAL obligation to establish policies that protect children from further abuse at the earliest point possible.

MECHANISMS

One possibility is to create an on-line tutorial. This could be done through an IT office. Other communication possibilities (webcast and, or podcast, no guarantees).

ON-LINE TUTORIAL FOR DUTY TO REPORT

1) OCT can establish a website called xxxxxxxxxxxxxxxxx

2) This website would have the names and information relating to the schools, school boards and all the teachers in its database.

3) Teachers could log into the website using their name, matched with the database, and start the tutorial.

4) The tutorial should take 5-10 minutes. It should illustrate the objectives of the tutorial, explain how the policy, advisory, laws works in Ontario, how teachers should respond to various-examples (situations) and there would be a small quiz at the end to see if they understand the material.

5) At the end of the tutorial, when teachers have 80% correct, the website could generate a certificate with the name of the teachers to verify he or she completed the training. Teachers could print out the certificate or email it to the school (board).

GOVERNING STATUTES

The governing statute for child protection cases is the Child and Family Services Act, *R.S.O. 1990, c.11* ("*CFSA"). Procedural issues are addressed in the *Family Law Rules* (Ont.Reg.114/99) ("*FLR"*). In addition to governing child protection law in Ontario, the *CFSA* includes provisions for voluntary access to services (including, for example, "temporary care agreements" wherein parents agree to place their children in care for a short term on a voluntary basis), sets out the rights of children involved with children's aid societies, provides for secure treatment of children who are at risk of harming themselves and/or others, and covers the process for adoption in Ontario.

The paramount purpose of the *CFSA*, and therefore one of the governing principles of child protection law in Ontario, is "to promote the best interests, protection and well being of children": *CFSA,* s.1(1). Additional purposes, so long as they are consistent with the best interests, protection and well being of children are as follows.

1. To recognize that while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent.
2. To recognize that the least disruptive course of action that is available and is appropriate in a particular case to help a child should be considered.
3. To recognize that children's services should be provided in a manner that:

    i. respects a child's need for continuity of care and for stable relationships within a family and cultural environment;

ii. takes into account physical, cultural, emotional, spiritual, mental and developmental needs and differences among children;
iii. provides early assessment, planning and decision-making to achieve permanent plans for children in accordance with their best interests; and

iv. includes the participation of a child, his or her parents and relatives and the members of the child's extended family and community, where appropriate.

4. To recognize that, wherever possible, services to children and their families should be provided in a manner that respects cultural, religious and regional differences.

5. To recognize that Indian and native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family.

CFSA, s.1(2)

WHO ARE THE PLAYERS?

CHILDREN'S AID SOCIETIES

In almost every child protection case that comes before the court, the applicant at the first instance will be a local children's aid society (CAS). These are agencies created under Part I of the *CFSA* who have responsibility for the investigation and prevention of abuse and neglect of children in their jurisdiction. There are 53 children's aid societies in Ontario.

In larger jurisdictions, there may be more than one Society. For example, Toronto has the *Children's Aid Society of Toronto*, the *Catholic Children's Aid Society of Toronto, Jewish Child and Family Services*, and *Native Child and Family Services*. Smaller jurisdictions will typically have one agency which services all the communities in the jurisdiction. Some may have specialized branches to address particular communities; for example, the *Children's Aid Society of Brant* has a Native Services Branch.

Children's aid societies are authorized to apply to the court to determine whether a child is in need of protection under s.40(1) of the *CFSA*. This proceeding is called a "protection application."

INVESTIGATION

Cases coming into the agency are investigated by "intake workers". An intake worker may determine that the child in question does not meet the requirements for intervention and close the file; may refer the case to the family service team for continuing service on a voluntary basis; or may determine that immediate intervention such as an apprehension (forcible removal of the child to a place of safety) is required. Where immediate court involvement is necessary, the intake worker will instruct counsel and will be the Society's primary witness at the initial stage of the case.

Cases determined to be appropriate for ongoing service (including cases where children have been apprehended) are assigned to "family service workers" who are responsible for determining whether, in the Society's view, a child continues to be in need of protection, working with the family to develop a service plan, determining what intervention is appropriate to protect the child and ensure the child's best interests are met, and instructing counsel where legal intervention is sought. The family service worker is typically the main Society witness following the intake stage.

Where a child is brought into the Society's care (either through a voluntary arrangement or apprehension and court order), a worker known as a "children's service worker" is assigned to work directly with the children, communicate with the foster home, ensure that the child's medical and educational needs are met,

and work with the family service worker to plan and provide services to the family.

DUTIES OF CHILDREN'S AID SOCIETIES

Children's aid societies are required by the *CFSA* to investigate child abuse and neglect, provide services to families (including placement outside the home where necessary), provide care for children placed in agency care or under the supervision of the agency, and place children for adoption. Workers must follow specific steps set out by the Ministry for determining the speed of the investigation, whether intervention is required, and the type of intervention required. They must also document every contact with the family, child, service providers, community members and foster parents.

Recent changes to the provincial approach to child welfare require workers to engage in more extensive up-front work with families and consider alternatives to court involvement and apprehension. According to the Ontario Association of Children's Aid Societies, this has resulted in a reduction in the number of children coming into care. Ontario Association of Children's Aid Societies. *Your Children's Aid: Child Welfare Report 2009/10* at p.40 (available at http://www.oacas.org/pubs/oacas/papers/oacaschildwelfarereport2010.pdf).

Societies are required to present all the relevant evidence to the court, "including that which may not support its claim in the proceeding": *Children's Aid Society of Algoma v. R.M.* (2001) 18 R.F.L. (5th) 36 (per Kukurin J. at par. 64). However, their evidence is often criticized for being unduly focused on the negative and demonstrating an adversarial approach which is "inappropriate for a Children's Aid Society, even though it is a litigant." Children's Aid Society of Ottawa v. M.B., [2007] O.J. No. 1054 (Sup. Ct. J.) (per Mackinnon J. at par. 92). See also *Children's Aid Society of London and Middlesex v. F.S.,* 2004 CanLII 34346 (S.C.J.).

Considerable judicial effort has been directed toward reminding children's aid societies of their duties to: act fairly toward families, actively promote reintegration wherever possible, rely only on admissible, relevant evidence, and refrain from contributing to delay and wasting judicial and other resources. See, for example: *Children's Aid Society of Huron County v. R.G.* [2003] O.J. No. 3104

(O.C.J.); *Children's Aid Society of Ottawa* v. *C.W.*, 2008 CanLII 13181 (O.N.S.C.) at para. 23 (Mackinnon J.); *Children's Aid Society of Toronto* v. *K.B.* [2007] O.J. No. 5090 (O.C.J.); *Children's Aid Society of Hamilton* v. *E.O*. [2009] O.J. No. 5534 (Sup. Ct.). It has been noted that the dual purpose of children's aid societies – protecting children and supporting families – creates a conflict of interest for the Societies: *Children's Aid Society of Hamilton* v. *E.O*. [2009] O.J. No. 5534 (Sup. Ct.).

Different agencies may have markedly different approaches to similar issues. For example, since 2006 the Children's Aid Society of Toronto has radically altered its approach to cases involving domestic violence. That agency now focuses on engaging the alleged offender, and works toward allowing the parents to stay together (if that is their wish), instead of working only with the non-abusive parent (usually the mother) with the goal that she separate from the abuser, which has been the traditional approach of most agencies.

OFFICE OF THE CHILDREN'S LAWEYR

The *CFSA* provides for representation for a child (*CFSA*, s.38). Children (including minor parents) are represented through the Office of the Children's Lawyer, which is a division of the Ministry of the Attorney General. This Office has a number of in-house lawyers who represent children in the Toronto area, and a panel of lawyers across the province who have training in representing children. They appear regularly in child protection cases as well as custody and access cases in Ontario.

PUBLIC GUARDIAN AND TRUSTEE

The office of the Public Guardian and Trustee represents parents who are incapable of instructing counsel: *FLR* R.4(3)*, Rules of Civil Procedure* R.R.O. 1990, Reg. 194, R.7. The office has in-house counsel as well as a roster of lawyers who will represent it in proceedings. See *Representation for special parties* for the procedure to appoint the Public Guardian and Trustee.

COURT'S JURISDICTION

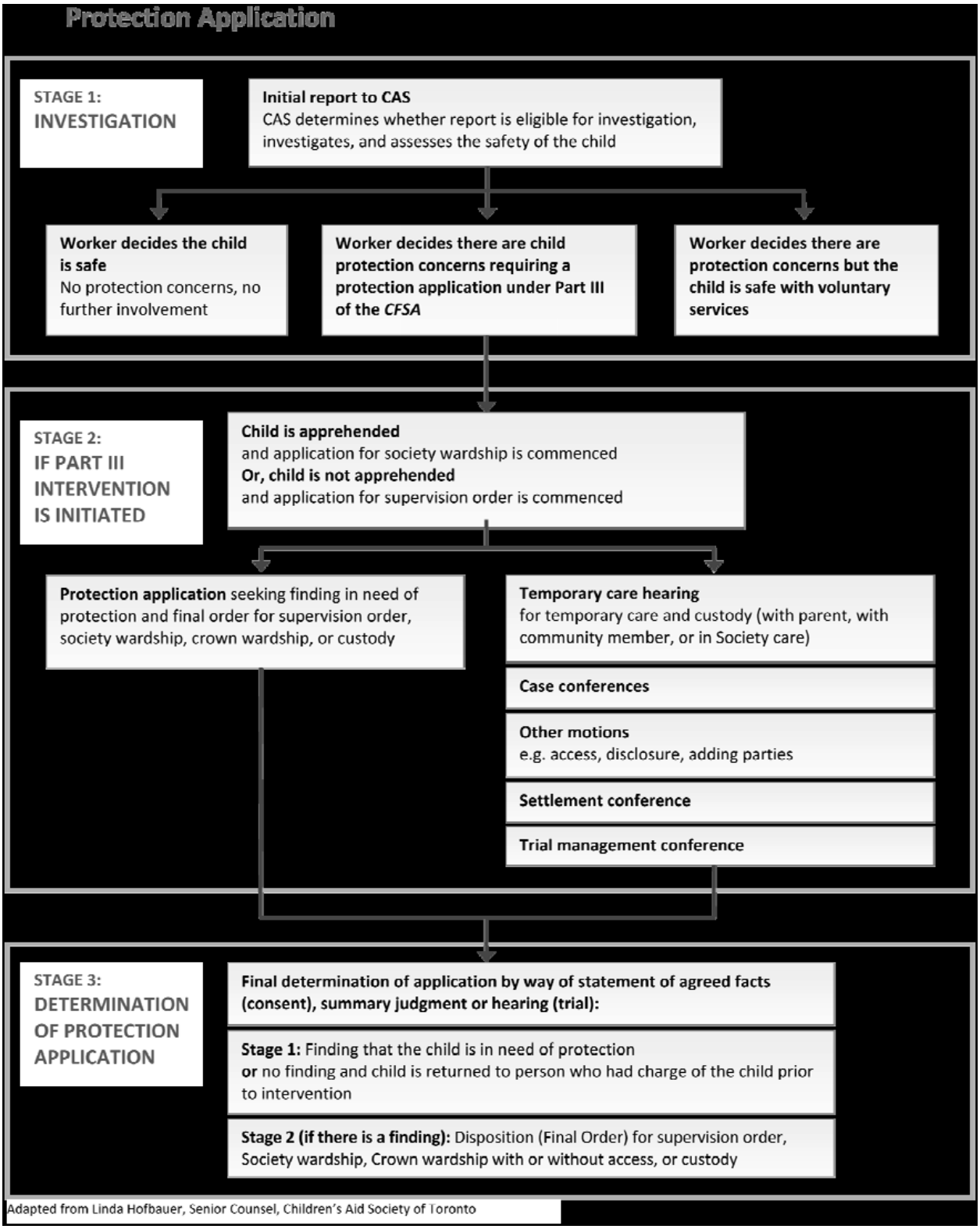
The court has jurisdiction over children up to age 16 for the commencement of the case and age 18 for dispositions. In other words, if a child is over the age of 16 on the date of the initial Society protection application, the court has no jurisdiction to make any order. If, however, a protection or status review application is brought before the court prior to the child turning 16, a child who then turns 16 stays within the court's jurisdiction. For this reason, Societies often bring protection applications seeking wardship orders for children who are about to turn 16 and who are in the Society's care under a temporary care agreement (out-of-court contracts between parents and Societies which place children in the care of the Society). Those agreements also cease to operate after the child has been in care for one year. Therefore, both children over the age of 16 and children who need to remain in care for longer than one year must be the subject of a protection application, regardless of whether they and their parents would consent to an out-of-court agreement.

Once the child turns 18, all court orders cease to operate: *CFSA,* s.71(1)(a). At that point, a child who is not in foster care will no longer be able to receive services from the Society, even on a voluntary basis. Crown wards and Indian or native children in customary care arrangements (in which they are placed with members of their communities) sometimes negotiate "extended care and maintenance" arrangements with the local children's aid society which provide some financial assistance until they attain age 21 (*CFSA,* s.71.1).

STEPS IN THE PROCEEDING

The essential steps in a child protection proceeding, and timelines for completion as required by Rule 33(1), are as follows.

Step in the case	Maximum time for


Protection Application
STAGE 1:
INVESTIGATION
Initial report to CAS
CAS determines whether report is eligible for investigation, investigates, and assesses the safety of the child
Worker decides the child is safe
No protection concerns, no further involvement
Worker decides there are child protection concerns requiring a protection application under Part III of the CFSA
Worker decides there are protection concerns but the child is safe with voluntary services
STAGE 2:
IF PART III INTERVENTION IS INITIATED
Child is apprehended
and application for society wardship is commenced
Or, child is not apprehended
and application for supervision order is commenced
Protection application seeking finding in need of protection and final order for supervision order, society wardship, crown wardship, or custody
Temporary care hearing
for temporary care and custody (with parent, with community member, or in Society care)
Case conferences
Other motions
e.g. access, disclosure, adding parties
Settlement conference
Trial management conference
STAGE 3:
DETERMINATION OF PROTECTION APPLICATION
Final determination of application by way of statement of agreed facts (consent), summary judgment or hearing (trial):
Stage 1: Finding that the child is in need of protection
or no finding and child is returned to person who had charge of the child prior to intervention
Stage 2 (if there is a finding): Disposition (Final Order) for supervision order, Society wardship, Crown wardship with or without access, or custody
Adapted from Linda Hofbauer, Senior Counsel, Children's Aid Society of Toronto

Where a parent of the child is a minor, the Children's Lawyer must represent the parent unless the court orders otherwise (s.38(5)).

If the court makes a s.38 order, the clerk will ask the Society counsel to fill out a form that day and the Office of the Children's Lawyer (OCL) will be informed of the order. The OCL must accept the appointment. The Office will then assign the case to an in-house or panel lawyer who will meet with the child at least twice, usually speak with the child's parents, teachers, foster parents, and review the Society files. The case will typically be adjourned for several weeks so that the child's lawyer can make these consultations and then advise the court as to the child's wishes and preferences. There is no statutory mechanism for a court to order the children's lawyer to expedite this process.

APPOINTMENT OF COUNSEL FOR PARENT

The Supreme Court has ruled that child protection proceedings trigger s.7 rights under the *Charter of Rights and Freedoms*. This requires the state to provide state-funded counsel for parents who cannot afford counsel, depending on the complexity of the case; most child protection cases would be considered sufficiently complex to require counsel: *New Brunswick (Minister of Health and Community Services)* v. *G.(J.),* [1999] 3 S.C.R. 46. Legal aid funding is available in child protection cases in Ontario, but there have been several instances where a parent has not qualified for legal aid due to their incomes or assets and have sought to have the court appoint counsel. (This occurs rarely, perhaps because most parents do qualify for legal aid, or because few parents would be aware that they may have a right to state-funded counsel).

The test in *G.(J.)* requires state-funded counsel where the parent is "unable to afford" a lawyer (par. 104). This has been interpreted to require the parent to prove they are indigent, and further: that their financial circumstances are extraordinary; that they have made serious efforts to save and borrow money, obtain employment and exhaust their assets; and they must be prudent with their finances. *Huron-Perth Children's Aid Society* v. *J.(J.),* [2006] O.J. No. 5372. The judge in that case also expressed concern about second-guessing the eligibility criteria for Ontario's legal aid plan.

However, in *British Columbia (Director of Child, Family and Community Service)* v. *T.L.*, (2010) BCSC 105, both the trial judge (Provincial Court) and Superior Court judge on appeal held that the province should pay the parents' legal fees in a case where the parents earned more than $40,000.00 a year, an amount which exceeded the legal aid cut off. This decision includes a thorough review of the jurisprudence on appointment of counsel in child protection orders.

Note that the Ontario Court of Appeal has taken a markedly different approach in the context of applications for state-funded counsel in criminal proceedings ("*Rowbotham* orders") than was taken in *Huron-Perth Children's Aid Society* v. *J.(J.), supra*. In *R. v. Rushlow*, decided after *Huron-Perth*, the Court observed that the applicant "could have made further attempts to privately retain counsel and he may have made some poor financial decisions", but noted the Crown's concession that there was no evidence the applicant could have retained counsel and made a calculated decision not to. The Court of Appeal concluded that the appellant likely lacked the financial resources to retain counsel, and the appellant's failure to make wiser financial decisions did not affect the court's determination as to whether or not counsel should be appointed. The Court also held that it is not appropriate for courts hearing *Rowbotham* applications to consider how their decisions would affect the administration of the legal aid plan. The Court of Appeal in *Rushlow* also did not consider it fatal to the application that the applicant had not exhausted his appeals of legal aid's refusal to fund counsel, noting that since his financial position had not changed, it was unlikely such an appeal would succeed.

REPRESENTATION FOR SPECIAL PARTIES

A special party is defined in Rule 2 as a person who is or appears to be mentally incapable for the purposes of the *Substitute Decisions Act*, *1992* in respect of an issue in the case and who as a result requires legal representation. That has been held to mean that the person "is not able to understand information that is relevant to making a decision regarding the issue or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision regarding the issue." *Children's Aid Society of the Niagara Region* v. *D.(W.),* 2003 CanLII 2293 (Ont. S.C.J.) per Quinn J.

Although Rule 4 does not speak to the process for appointment of representation for a special party, other than allowing the court to authorize private or public representation of a special party, it has been held by analogy to Rule 7.03(5) that such an appointment is mandatory. Where it appears that the parent is a special party, the Society is required to bring a motion under Rule 4 for the appointment of representation for the parent, with notice to the parent and the Public Guardian and Trustee. If the issue is not canvassed in court, the proceedings may be a nullity: *Children's Aid Society of Hamilton* v. *M.N*., 2007 CanLII 13503 (ON. S.C.).

DECISION AT THE FIRST APPEARANCE ("WITHOUT PREJUDICE" ORDERS)

At the first appearance, the protection application will be adjourned for a trial/hearing except in the rare situation where there is an agreement to a final order at the first appearance. This sometimes happens where a child has been in care under a temporary care agreement and all parties recognize that the child needs to be made a Society or Crown ward.

As indicated above, the Society will almost always bring a temporary care and custody motion on the first appearance seeking an order placing the child with the parent under supervision, with another person under supervision, or in the Society's temporary care. This motion will usually be adjourned to permit the parents to retain and instruct counsel, file responding affidavit material, and for other actions (such as appointment of child's counsel or assessment of a proposed caregiver). Sometimes parents will request an oral hearing on the first appearance; practice varies across the province and within jurisdictions. On occasion, parents will be ready with responding material and the full temporary care and custody hearing can proceed on the first appearance.

At the first and all subsequent appearances prior to the resolution of the protection application, the court is required to make an order for the interim placement of the child (*CFSA,* s.51(2)) . Until a full temporary care and custody motion is held (usually within a few weeks of the first appearance), any such order will be "without prejudice." The evidence on any interim motion, including temporary care and custody hearings, is provided by affidavit, unless the court orders otherwise (Rule 33(6)). This has the result that in almost all cases, the only

evidence before the court on a first appearance will be the Society evidence. The court will then be considering whether, on a *prima facie* basis, the Society has met the legal test that there are reasonable grounds to believe the child is at risk of likely harm, and if so, what order is required.

When determining the date for the full temporary care and custody hearing, the court should be mindful that the timetable set out in the *CFSA* requires the hearing to be held within 35 days of the start of the case. As well, the court cannot adjourn a hearing for more than 30 days if any of the parties or the person caring for the child during the adjournment object: *CFSA,* s.51(1). In practice, these provisions are rarely applied due to limited resources.

RISK OF VIOLENCE AND LETHALITY AT THE EARLY STATES OF A CASE

In many protection cases, a parent will have recently separated from an abusive spouse and the Society will seek a supervision order placing the child with the targeted parent, with restrictions on the alleged abusive partner's contact with the child. Where there is a history of serious domestic violence, the fact that the victim has recently separated from the abuser might, on a common-sense view, remove the risk – that is, the child may appear to be safe in the victim's care. However, separation can often be the riskiest time for a victim, and therefore, for a child who stays with the victim or has access to the victim.

Factors associated with lethality in domestic violence cases, such as:

- monitoring or stalking
- former attempts to choke or strangle
- death threats
- threatened or attempted suicide
- intimidation or harm using a weapon (or threats of use of a weapon)
- sexual abuse or violence
- violence during pregnancy
- obsessive attachment (perceptions of being unable to live without the other)
- unstable lifestyle, lack of employment

- victim's fear of being killed by the violator (though absence of fear does not necessarily indicate low risk)
- pending or actual separation.

AUTHORITY AND TRUST

Teachers are not according to law in a position of trust or authority towards their students. They are, however, in such a position, in fact, in most cases. Absent evidence that raised a reasonable doubt in the mind of the trier of fact of the existence of a relationship of trust/authority, a teacher is in such a relationship.

A position of trust or authority must be founded on an assessment of all relevant facts, not upon a policy directive created or negotiated by a school board or provincial department of education The Criminal Code does not create a de jure relationship of trust or authority, rather requires a case-by-case inquiry into the nature of the relationship. See *R. v. S. (J.S.)* (2010), 257 C.C.C. (3d) 403 (N.B. C.A.).

ELEMENTS OF OFFENCE: POSITION OF TRUST OR AUTHORITY

A dance instructor in a program taught at a high school to teenagers under the auspices of the local parks and recreation department may be in a position of trust in relation to a fourteen old registrant. Relevant factors include, but are not limited to the fact that:

i. A branch of local government sponsored the program;

ii. The class took place at a local school; and

iii. D was significantly older than V., and had the position of instructor in the municipally-sponsored program.

See *R. v. Edwards* (2003), 172 C.C.C. (3d) 313 (B.C. C.A.).

A "relationship of dependency" is a relationship in which there is a de facto reliance by a young person on a figure who has assumed a position of power, such

as trust or authority, over the young person, along non-traditional lines. The category is ejusdem generis to the other categories of the section, positions of trust or authority. Whether such a relationship exists in any case is a question of fact decided after consideration of all the circumstances. See *R. v. Galbraith* (1994), 30 C.R. (4th) 230, 90 C.C. (3d) 76 (Ont. C.A.); leave to appeal refused [1994] 3 S.C.R. ix.

Our Supreme Court has long recognized that Parliament may use reasonable age criteria to implement policy: see e.g. *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, at para. 110, per Abella J.

There are a number of contexts in which legislatures use age-based criteria to achieve their interest in protecting children. The need for society, through government and the courts, to protect children is recognized, not only through the criminal law, but in the family context and is manifested in a number of laws and doctrines. In custody and child support matters, courts are to be guided by the best interest of the child, while child protection orders under child welfare legislation are based on whether a child is found to be in need of protection. In both cases, the applicable legislation define a "child" in terms of age: see e.g. Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 18(2); Child and Family Services Act, R.S.O. 1990, c. C.11, s.3(1). The applicability of these doctrines and laws does not depend on the attributes of a particular child, such as maturity or independence.

Protecting children through the "best interests of the child" principle is widely understood and accepted in Canada's legal system: A.B. v. Bragg Communications Inc., [2012] 2 S.C.R. 567, at para. 17. It means "[d]eciding what … appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention": *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (C.A.), at p. 489.

International human rights instruments to which Canada is a signatory, including the Convention on the Rights of the Child, also stress the centrality of the best interests of a child: Can. T.S. 1992 No. 3; Article 3(1) of the Convention in particular confirms the primacy of the best interests principle:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

EFFECT OF CRIMINAL CONVICTION

A criminal conviction is *prima facie* proof of the underlying facts, but it can be rebutted with evidence that was not available at the criminal trial. *W.H. v. H.C.A.,* 2006 CanLII 27865.

CHILDREN'S EVIDENCE

Parents, particularly unrepresented parents, often seek to have their child give evidence in child protection proceedings. Courts are almost universally reluctant to have a child testify in proceedings that are designed to promote their own protection and best interests. Hearsay evidence of children usually passes the "necessity" threshold without the requirement for expert evidence that the child will be traumatized by testifying. See *Children's Aid Society of Ottawa* v. *L.(L.)*, [2001] O.J. No. 4587 (S.C.) for a discussion of the principles relevant to determining the reliability of children's hearsay statements; see also *Huron-Perth Children's Aid Society* v. *J.(J.),* 2006 ONCJ 505 (O.C.J.) for a review of the caselaw on children's testimony in child protection matters.

The court has the power to vacate or set aside a subpoena to a child witness, or to refuse a subpoena: *Dudman* v. *Dudman,* [1990] O.J. No. 3246 (C.J.).

A court has inherent power to exclude children from the courtroom. Affidavits sworn by the child may be rejected as an abuse of process by the parent. *S.(M.E.)* v. *S.(D.A.)*, 2001 A.J. No. 1521 (Q.B.).

In cases where a child has made an allegation of a criminal act by a parent, Societies and local police agencies often conduct joint video recorded interviews of the child. The Society may tender the video as evidence of the events reported by the child. A video of an older child (age 10) was admitted at the disposition

phase of a trial. The recording took place in an environment that was not intimidating, the statements in question were open and spontaneous, there was no indication of coaching, and the child appeared to understand the obligation to be truthful. *Huron-Perth Children's Aid Society* v. *J.(J.)*, 2006 ONCJ 505 (O.C.J.).

BUSINESS RECORDS

Police records can be admissible as business records. However, material which contains third-party complaints and opinions such as supplementary arrest records, documents not made contemporaneously, and the synopsis where the facts aren't admitted, should be excluded. *Catholic Children's Aid Society of Toronto* v. *J.L.*, [2003] O.J. No. 1722.

EXPERT EVIDENCE: CRITERIA

The criteria governing admissibility of expert evidence in child protection cases is that set out in *R.* v. *Mohan*, [1994] 2 S.C.R. 9: relevance; necessity in assisting the trier of fact; absence of any exclusionary rule; and a properly qualified expert.

Relevance:

Evidence that is otherwise logically relevant can nonetheless be excluded if:

i. its probative value is overborne by its prejudicial effect;
ii. it involves an inordinate amount of time which is not commensurate with its value; or
iii. it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.

NECESSITY IN ASSISTING THE TRIER OF FACT

The opinion must be necessary in the sense that it provides information likely to be outside the experience and knowledge of a judge or jury.

Every CAS has a review team that recommends how a child can be protected. Despite the provisions of any other act, a person may disclose to a review team information reasonably required by the team for this purpose.

A person's ability to disclose such information to a review team applies even if the information is confidential or privileged.

No action for disclosing the information can be instituted against the person unless the person acts maliciously or without reasonable grounds to suspect that a child is in need of protection.

PRIVACY LEGISLATION

FIPPA and *MFIPPA* govern the collection, use and disclosure of personal information by institutions under those acts. *PHIPA* governs the collection, use and disclosure of personal health information by health information custodians (custodians).

Municipal police services, school boards and municipalities are institutions under *MFIPPA*. The Ontario Provincial Police is an institution under *FIPPA*.

Hospitals are custodians under *PHIPA*. Physicians and other health care practitioners may also be custodians under *PHIPA*.

Ontario's 47 CASs are not governed by *FIPPA* and *MFIPPA*.

Under *FIPPA* and *MFIPPA*, personal information may be disclosed in various circumstances including:

- to comply with a law,
- in compelling circumstances affecting the health or safety of an individual8 and
- in compassionate circumstances to facilitate contact.

These provisions enable the disclosure of personal information by an institution and its employees to a CAS worker to comply with the *CFSA*'s duty to report. They also permit the disclosure of personal information to a CAS review team.
Custodians and their agents may disclose personal health information to CASs so they can carry out their statutory functions, including the conduct of investigations and reviews under the *CFSA*.10 *PHIPA* also recognizes that CASs may be lawfully entitled, in the place of the parent, to give or refuse consent to disclosures by a custodian of the child's personal health information.

Nothing in Ontario's privacy legislation prevents teachers or other school staff from disclosing personal information to a CAS to comply with a duty to report. Nor does the legislation prevent disclosing personal information to a CAS review team.

Even if the school staff did not provide the initial report that the child may be in need of protection, teachers and other school staff can provide information to a CAS worker conducting a child protection investigation or review. Again, Ontario's privacy legislation is not a barrier to such disclosure.

Health care practitioners who may be either health information custodians or agents of custodians under *PHIPA* may disclose personal health information so CASs can carry out their statutory functions. This includes the duty to report if they have reasonable grounds to suspect that a child is in need of protection, in which case they must immediately report the suspicion and information on which it is based.

Police officers who accompany a CAS worker on a call for safety reasons and who have reasonable grounds to suspect that a child is in need of protection must immediately report the suspicion and the information on which it is based to the CAS worker.

In addition, there is nothing in Ontario's privacy laws that would prohibit police officers from making disclosures to a CAS worker who is conducting an investigation or a review under the *CFSA*.

Police officers may also disclose personal information under the *Police Services Act* and its regulations.

CASs are not limited by *FIPPA* and *MFIPPA* in what they can disclose to police, because they are not subject to those laws.

Police officers who have reasonable grounds to suspect that a child is in need of protection must immediately report the suspicion and the information on which it is based to the CAS worker.

If the officer believes a child is at risk due to an individual, then the officer must disclose that suspicion and the information it is based on. In addition to information disclosed to comply with the duty to report, police officers may disclose personal information under the *Police Services Act* and its regulations.

Police officers can provide information to a CAS worker conducting a child protection investigation or a review under the *CFSA*. Ontario's privacy legislation is not a barrier to such disclosure.

Nothing in Ontario's privacy legislation interferes with social services staff disclosing personal information to a CAS to comply with the duty to report or disclosing personal information to a CAS review team. Even if the social services staff did not provide the initial report that the child may be in need of protection, if there are reasonable grounds to suspect that a child is in need of protection, there remains the duty to immediately report the suspicion and the information on which it is based. Again, Ontario's privacy legislation is not a barrier to such disclosure. See Dispelling The Myths About Sharing Information with Children's Aid Societies, Resource Booklet (2016).

DUTY TO REPORT

Under the Child and Family Services Act of Ontario:

> 72. DUTY TO REPORT CHILD IN NEED OF PROTECTION – (1) Despite the provisions of any other Act, if a person, including a person who performs professional or official duties with respect to children, has reasonable grounds to suspect on of the following, the person shall forthwith report the suspicion and the information on which it is based to a society:

1. The child has suffered physical harm, inflicted by the person having charge of the child or caused by or resulting from that person's,

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

    ii. pattern of neglect in caring for, providing for, supervising or protecting the child.

2. There is a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child or caused by or resulting from that person's,

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

    ii. pattern of neglect in caring for, providing for, supervising or protecting the child.

3. The child has been sexually molested or sexually exploited, by the person having charge of the child or another person where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child.
4. There is a risk the child is likely to be sexually molested or sexually exploited as described in paragraph 3.

5. The child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable to consent to, the treatment.

6. The child has suffered emotional harm, demonstrated

by serious,

i. anxiety,
ii. depression,
iii withdrawal,
iv. self-destructive or aggressive behaviour, or
v. delayed development.

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

7. The child has suffered emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm.

8. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 resulting from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.

9. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 and that the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to prevent the harm.

10. The child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's

parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the condition.

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

12. The child is less than 12 years old and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, those services or treatment.

13. The child is less than 12 years old and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately.

(2) ONGOING DUTY TO REPORT – A person who has additional reasonable grounds to suspect one of the matters set out in subsection (1) shall make a further report under subsection (1) even if he or she has made previous reports with respect to the same child.

(3) PERSON MUST REPORT DIRECTLY – A person who has a duty to report a matter under subsection (1) or (2) shall make the report directly to the society and shall not rely on any other person to report on his or her behalf.

(4) OFFENCE – A person referred to in subsection (5) is guilty of an offence if,

(a) he or she contravenes subsection (1) or (2) by not reporting a suspicion; and
(b) the information on which it was based was obtained in the course of his or her professional or official duties.

(5) SAME – Subsection (4) applies to every person who performs professional or official duties with respect to the child including,

(a) a health care professional, including a physician, nurse, dentist, pharmacist and psychologist;

(b) a teacher, person appointed to a position designated by a board of education as requiring an early childhood educator, school principal, social worker, family counsellor, operator or employee of a day nursery and youth and recreation worker;

(b.1) religious official, including a priest, rabbi and a member of the clergy;

(b.2) a mediator and an arbitrator;

(c) a peace officer and a coroner;

(d) a solicitor; and

(e) a service provider and an employee of a service provider.

(6) SAME – In clause (5)(b),
"youth and recreation worker" does not include a volunteer.

(6.1) SAME – A director, officer or employee of a corporation who authorizes, permits or concurs in a contravention of an offence under subsection (4) by an employee of the corporation is guilty of an offence.

(6.2) SAME – A person convicted of an offence under subsection (4) or (6.1) is liable to a fine of not more than $1,000.

(7) SECTION OVERRIDES PRIVILEGE – This section applies although the information reported may be confidential or privileged, and no action for making the report shall be instituted against a person who acts in accordance with this section unless the person acts maliciously or without reasonable grounds for suspicion.

(8) EXCEPTION: SOLICITOR CLIENT PRIVILEGE – Nothing in this section abrogates any privilege that may exist between a solicitor and his or her client.

(9) CONFLICT – This section prevails despite anything in the Personal Health Information Protection Act, 2004.

In recent decades, our society has undergone significant shifts towards improving child welfare. The use of punitive discipline to control and correct a child's behaviour is now widely accepted as abuse. In 1961 the 'battered child syndrome' revealed the profound effects of physical and emotional abuse and how maltreatment severely impairs a child's development. As a result, medical and other professionals raised the issue of child abuse as a growing concern and, "hundreds of articles appeared in medical, legal, social scientific, and lay literature.

Our legal framework today reflects our historical understanding that the rights of the child are synonymous with autonomy and participation in society. With this sentiment, professionals who work with children are responsible for the child's best interest and their well-being. An essential element to child protection is the cognizant position of medical professionals, teachers, and other professionals who are required by law to know the rights of the child and report child maltreatment, *inter alia*.

MEDICIAL MARIHUANA

Risk of harm if you provide it? Risk of harm if you don't. In Oregon, for example, minors (under 21) can lose an affirmative defence if they use in a "public place" including schools BUT what about students that need medicinal marihuana as a required medication such as being able to go from hundreds of seizures a day to about one large grand mal a day. See *Student with a Disability*, 103 LRP 57786 (SEA NM 05/1303) and 103 LRP 57802 (SEA NM 11/19/02). Keep in mind it is now legal for individuals to use both marihuana leaves and cannabis oil. See *R. v. Smith*, [2015] 2 SCR 602.

The *Child and Family Services Act (CFSA)* was enacted in Ontario in 1984 with the goal to consolidate all previous legislation affecting children and provide clear directions and principles for child welfare under one act. The *CFSA* legislation focused on child abuse, the rights of the child, and child protection, all the while preserving the family unit. The concept that a child's rights were tenable while maintaining the integrity of the family cause significant confusion for Children's Aid investigation. Child welfare workers interpreted the 'the best interests of the child' to be synonymous with a family focus in which, "the goals of the Act were often in opposition with another, with the interests of the child's safety competing with the importance of the family, along with a preference for the 'least restrictive alternative'". These competing principles made it difficult for welfare workers to take a course of action on how a child should be protected.

On the one hand, the family unit is the optimal environment for child development, but child abuse suffered directly or witnessed in the home, may relinquish the typical care, development and protection subsumed by parents or guardians. Section 72(1) of the *CFSA* stipulates that situation where a teacher has a duty to report.

In the summer of 2005, Leslie Welsh and Kristen Ross, both Durham teachers at Adelaide McLaughlin Public School, took two student on an overnight shopping trip. Signed consent forms were received from both the parents. It was not known to the parents that Welsh's husband would be staying in the hotel room as well. One of the students, under the age of 16 at the time, later told Welsh and Ross that Mr. Welsh had sexually touched her at the hotel.

The panel at the Ontario College of Teachers at a public hearing were made aware that Ross did not report the student sexual allegation the first time and again, the second time 10 days following the initial disclosure. According to Professionally Speaking (2010) "although Ross was charged with failing to report, contrary to the Child and Family Services Act, the Provincial Offences Court dismissed the charge and the Ontario Court of Justice upheld the decision on appeal". The conditions for Ross' professional misconduct in failing to report to the student's parents, Children's Aid Society and school board; she was "ordered to complete a course in professional ethics at her own expense within 60 days of the date of the order".

On the other hand, Ross' colleague Welsh receive a more significant reproach from the panel. The panel heard that from 2003-2005 Welsh had been sending inappropriate emails and letters to the student. The communication from Welsh referred to the student as "my butterfly or my angel and told the student she was her special or best friend and in emails told the girl they were kindred spirits" (Professionally Speaking, 2010). Welsh told the panel that she did not believe the students allegations about her husband's sexual misconduct and therefore, did not inform the student's parents, Children's Aid Society or the school board. However, after the allegations were made Welsh continued to send personal emails and letters stating, "Not laughing," "Feel your pain," "Let's carry on as we always have … no changes," "No more tears … life is too short," and "Deep breath … Smile … Hug …" (Professionally Speaking, 2010).

Although Welsh failed to report as alleged in a criminal context, criminal charges were dismissed by a Provincial Offences Court and this decision was upheld on appeal by the Ontario Court of Justice. Welsh was found guilty for professional misconduct, her qualifications suspended for three months and she was directed to complete a course in professional ethics 60 days after the date of her order at their own expense (Professionally Speaking, 2010). Welsh also stated in a letter to the student she knew her communication with the student, if found out, would result in her losing her job. Yet she continued to violate her professional practice for two years.

In *R. v. Kaija*, 2006 before Justice G. Mark Hornblower, the accused was charged with failure to report abuse. The accused, Peter Kaija, was a high school teacher at St. Clair High School where he coached the senior boys basketball team. On his

own time, Kaija coached the boys elementary school basketball team called the St. Clair Mini-Colts.

On the weekend of February 20, 2005 the Mini-Colts went to Peterborough for a tournament. Upon return, one of the mothers informed Kaija that her son had witnessed another coach of the Mini-Colts, Jim Miller, sexually assault another team player and also saw Miller masturbate in his bed. As a result of this information, Kaija called several meeting with the parents to discuss the allegations against Miller

Kaija was charged with failing to report the sexual assault to a children's aid society as required by the *CFSA*. Since he had a reasonable suspicion that a child had been sexually assault, he allegedly failed to report that suspicion and protect the child.

However, the defence moved for a non-suit stating, firstly, there was no evidence that Kaija did not report to a children's aid society. Secondly, whether that the evidence of the sexual assault came to him in his capacity as a teacher in the course of exercising his professional duty?

During meetings with the parents there was evidence that Kaija did not want to involve the police. Kaija told the parents if the police became involved he would disband the team. In addition, Kaija discharged Miller from his coaching position and took over his duties. There was arguably a reasonable inference here that Kaija dealt with the matter on his own and did not involve the police, therefore, would not involve CAS.

The second ground was that there was no evidence that Kaija obtained the information regarding the sexual abuse while he was performing his professional duty. The principle Mr. Keane of St. Clair High School attested that Kaija's duties with the Mini-Colts, were outside of his duties as a high school teacher and the operation of the Mini-Colts, were outside of his duties as a high school teacher.

On the other hand, the operation of the Mini-Colts gave the perception of being affiliated with the High School since it shared the same team name, the uniforms were identical, it was a feeder program into the High School team, practices took place at the High School, the contact number for Kaija was the High School

number and enrollment took place at St. Clair High School. As a result, the parents of the Mini-Colts players believed the operation of the basketball team was sanctioned by the school board and that it fell under Kaija's professional duties.

In the case of *R. v. Newton-Thompson* (2009) the accused were charged with failing to report suspicion of harm to a child. The accuseds were the principal and vice-principal of C.W. Jefferys who did not report their knowledge of a female student's sexual assault in 2006. In 2007, police found out about her assault and charged the defendants with failing to report "forthwith" a suspicion of harm to a child, contrary to S.72(1) of the *Child and Family Services Act*.

Justice of the Peace John found that the charge was outside the six month limitation period set out in S.76(1) of the *Provincial Offences Act*, and therefore; granted the motion for dismissal. On the other hand, the Crown appealed before Croll J. stating that the offence is a continuing offence until the report is made. However, Croll J. agreed with the Justice of the Peace. This is not a continuing offence.

Young v. Bella

Professionals have a responsibility to report suspected child abuse. Yet, "informants are <u>not</u> required to have reasonable cause to believe abuse has in fact occurred before making a report. They are, however, obliged to have reasonable cause to make a report to CPS" (See *Young v. Bella*, 2006, SCC 3). In this case a civil jury found that there was not reasonable cause and thus, the University et al, acted negligently.

Negligence was demonstrated by the University on the failure to review the validity of a student's paper. Actions were taken based on speculation. The University argued that s. 38(6) of the Child Welfare Act stipulates that information of child abuse must be reported; while, s. 38(6) also states that reporting is not done maliciously or without reasonable cause.

Educators are in a unique position to influence the lives of children around them. The availability of one adult to a child with whom they share a positive

relationship may be a predictor of psychological resilience. Due to teachers extensive and frequent interaction with children, there MUST be increased efforts to improve teacher training to identify child abuse. In addition, the duty to report should be successfully integrated into the educational teacher training program.

Teachers failure to report should not be out of fear of the legal ramifications or the feeling that a child's case is not severe enough to report. The professional duty of a teacher is to effectively protect children. This is exemplified in the *Child and Family Services Act* s. 72(1) Duty to Report legislation. This law requires teachers to be knowledgeable on their duty to report to Societies AND of course, there is no distinction between private and public schools, whether teachers are members of the OCT or not.

RELIGIOUS ACCOMMODATION AND CHILD PROTECTION

VACCINATION AND RELIGIOUS EXEMPTIONS

Accommodation of religious practice has long been recognized as essential. When specific religious practices are unduly burdened by laws, it often falls on the government to carve out narrowly construed exemptions or accommodations. Religious accommodations have protected segments of the population that might otherwise have been denied the right to practice their faith.

Questions arise when religious claims are weighed against state interests. On issues ranging from Native free-exercise rights to parent requests for curricular opt-outs in public or separate schools on religious grounds, the government has claimed important and overriding interests in denying accommodations. The issue of religious exemptions to state-compelled vaccinations is an example of such a close question.

Inextricably linked to such vital and occasionally competing interests as free exercise of religion, parental rights, public health, bodily autonomy and compulsory education, religious claims for exemptions to state-compelled vaccinations demonstrate the difficult challenge of balancing competing claims. Are government interests in protecting public health sufficiently compelling to override the free-exercise rights of children and parents who are religiously

opposed to some or all vaccinations? How do the rights of parents and the bodily autonomy of children factor into the debate? In what ways does granting religious exemptions complicate our system of compulsory education? These questions form the heart of this difficult controversy.

Many advocates for exemptions claim that protected parental rights give parents the choice of whether or not to vaccinate. Parents, they argue, have a fundamental right to determine the education and upbringing of their children. See Rebecca E. Skov, *Examining Mandatory HPV Vaccination for All School-Aged Children*, 62 Food Drug L.J. 805, (2007).

Opponents of religious exemptions to vaccination requirements argue that we Constitution recognizes the state's compelling interest in protecting and regulating the health of the people (see Alicia Novak, The Religious and Philosophical Exemptions to State-Compelled Vaccination: *Constitutional and Other Challenges*, 7 U. Pa. J. Const. L. 1101 (April 2005), at 1121-1123) This interest justifies requiring vaccinations for schoolchildren without exemptions.

Most public health arguments rest on the danger religious exemptions pose to the population as a whole. The second argument posed by exemption opponents focuses solely on the unvaccinated population. Critics of religious exemptions claim that such exemptions for young children endanger the children by making them potential martyrs for their parents' faith (see Nova, *The Religious*), at 1118-1119).

As the U.S. Supreme Court has ruled: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves" (*Prince v. Massachusetts*, (1944)). These exemption opponents argue that religious exemptions follow this same logic, unconstitutionally forcing young children to become martyrs for a faith they can neither accept nor deny.

The Ontario Ministry of Health and Long-Term Care advises that Ontario is "toughened" its vaccine requirements for students. Children attending primary or secondary school need proof of immunization against:

- Meningococcal disease
- Whooping cough
- Chicken pox (for children born in 2010 or later)

See *Immunization of School Pupils Act* and Designated Diseases, Ontario Regulation 261/13.

Children and adolescents attending primary or secondary school in Ontario must have proof of immunization against the following diseases

- Diphtheria
- Tetanus
- Polio
- Measles
- Mumps
- Rubella
- Meningococcal Disease – NEW requirement for 2014/15 school year
- Pertussis (whooping cough) – NEW requirement for 2014/15 school year
- Varicella (chickenpox) – NEW requirement for 2014/15 school year, for children born in 2010 or later.

The Supreme Court of Canada has considered the issue of cognitive dissonance between messages students may hear or see at home, at school, and in the broader community. In *S. L. v. Commission scholaire des Chenes*, the appellants had sought to exempt their children from the program on the basis of their claim that the religious relativism of the program would interfere with their ability to pass their faith on to their children. *L.(S.) c. Des Chênes (Commission scolaire),* 2012 SCC 7, 2012.

The Supreme Court of Canada found that "the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society." That there might be some "cognitive dissonance" between what children may encounter at school and at home is not only common place, but entirely acceptable.

In *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, the Court had an opportunity to consider the cognitive dissonance that may be encountered by

children growing up in a diverse society. The Chief Justice made the following comments (paras. 65-66):

> Children encounter [some cognitive dissonance] every day in the public school system as members of a diverse student body. They see their classmates, and perhaps also their teachers, eating foods at lunch that they themselves are not permitted to eat, whether because of their parents' religious strictures or because of other moral beliefs. They see their classmates wearing clothing with features or brand labels which their parents have forbidden them to wear. And they see their classmates engaging in behaviour on the playground that their parents have told them not to engage in. The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children some to realize that not all of their values are shared by others.
>
> Exposure to some cognitive dissonance is arguable necessary if children are to be taught what tolerance itself involves.

SCHOOL RESOURCE OFFICERS

Schools are complex, fast-paced environments that require quick decision-making by administrators, particularly when school safety is involved. Preserving an environment that is safe, secure, and, therefore, conducive to learning is paramount to our schools. School leaders' appropriate judgments on such matters must be preserved. Our Courts have specifically acknowledged the difficulty and importance of the school administrator's role when quick decisions need to be made, particularly when the danger is "serious and palpable," such as when drugs or other dangerous elements are present.

School staff must have the ability to discuss disciplinary concerns informally and quickly with students so that they can respond immediately, knowledgeably, and effectively to ensure student and staff safety. In contrast, the formal and intimidating posture of being "read your rights" when meeting with school

officials and SROs creates a dynamic that may undermine a free flow of often important information that school officials may need to respond to dangerous conditions and is likely to produce a chilling effect on student's willingness to cooperate with school staff. Students are typically the source of information for school administrators, and unnecessary barriers to student cooperation, may substantially impede school staff members' ability to obtain the information necessary to taking effective action when addressing issues of student safety and discipline.

Arguably, school staff must be permitted to apply their unique, specialized knowledge to fluid situations involving student discipline or safety, rather than being required to determine whether including an SRO in a conversation with a student (often a judgment made in a matter of minutes, based on developing circumstances) will have implications for a subsequent juvenile action.

An SRO's roles and responsibilities are a complex mixture of formal and informal duties that are described as a "trial" model; the SRO has public safety and law enforcement related duties, but also serves as an educator and informal counselor. See *National Association of School Resource Officers, To Protect & Educate*: The School Resource Officer and the Prevention of Violence in Schools 21 (2012).

Schools in the U.S., began using School Resources Officers (SROs) as a visible and essential safety measure in the 1990s, in the wake of 15 highly publicized school shootings and an increased demand for maintaining student safety. See National Associate of School Resource Officers, *To Protect and Educate*, at 18; Susan Black, Security and the SRO, 196 AM. School Board J. 30 (2009). Their presence in schools was part of interagency collaboration efforts that emerged at that time around child and youth safety issues. By the 2009-2010 school year, 43 percent of public schools reported utilizing security personnel, including SROs. See Nation Centre for Education Statistics and Bureau of Justice Statistics, Indicators of School Crime and Safety: 2012 86 (2013).

For instance, SROs listen to student concerns about bullying (not traditionally a criminal or law enforcement concern) and take these concerns to school administration for resolution. They serve as Liaisons among parents, community

members, teachers, school officials, and students to identify the roots of problems at schools and to seek out collaborative solution.

A holistic approach has emerged as a response to the complex problem of school safety and child welfare. Rather than allowing individual agencies to pursue separate strategies for different aspects of these problems, groups of child-centered agencies established collaborative, interdisciplinary strategies to help improved outcomes for at risk children and provide comprehensive solutions for improving communities.

In carrying out many of these functions, SROs will necessarily interact with students and have conversations in which students may divulge information that could be relevant to a subsequent investigation or court proceeding. SROs have had a demonstrably positive impact on schools. Studies suggest that the presence of an SRO in a public school can lead to a significant reduction in the number of students arrested for criminal behavior by deterring it.

Recognizing the unique role of the SRO as distinct and separate from traditional law enforcement, many courts in the U.S. have ruled that SROs are "school officials" central to the education mission of the school and not police officers. As such, they are not required to show "probable cause" when searching a student only "reasonable suspicion", the standard established for a school official's search by the Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

A Florida District Court of Appeals found that "school resource officers should be treated as part of the school administrative team and not as outside police officers entering school grounds to conduct an investigation." *M.D. v. State*, 65 So.3d 563, 565 (Fla. Dist. Ct. App. 2011). See also *Wilson v. Cahokia Sch. Dist. # 187*, 470 F. Supp. 2d 897 (S.D. III. 2007) (search of student on school grounds by an SRO at the request of school officials should be deemed a search by a school employee and thus subject to the reasonableness standard, rather than probable cause standard); *D.J. v. State*, 877 N.E. 2d 500 (Ind. App. Ct. 2007) (SRO's pat-down search of student analyzed under "reasonableness" standard); In re William V., 111 Cal. App. 4th 1464 (Cal. Ct. App. 2003) (SRO identified as a "school official" for purposes of Fourth Amendment and thus held to "reasonableness" standard); *Russell v. State*, 74 S.W. 3d 887 (Tex. App. 2002) (SRO's search of student analyzed under "reasonableness" standard); In re Josue T., 989 P.2d 431 (N.M. Ct.

App. 1999) (reasonableness standard applied to an SRO who searched a student at the request of another school official because the SRO was present at school in furtherance of school's objective to maintain safe proper educational environment); *State v. Angela D.B.*, 564 N.W. 2d 682 (Wis. 1997) (search of student by SRO, at request of and in conjunction with other school officials, subject to reasonableness standard, rather than probable cause standard); but see *State v. Meneese*, 282 P.3d 83 (Wash. 2012); *State v. Scott*, 630 S.E.2d 563 (Ga. App. Ct. 2006).

One of the most frequent, and most confusing questions encountered by schools is what information can be provided to law enforcement officials when they seek information on students and student records. Schools always want to be cooperative with law enforcement when possible. Schools want to develop and build strong relationships with law enforcement, not only to held their communities but to obtain assistance from law enforcement agencies when necessary. The issue of what the MFOIPP Act allows or restricts schools from giving to law enforcement is therefore a question that requires advanced thought, careful planning, and careful implementation. The CFSA requires reporting by school authorities of known or suspected abuse, even if such reporting requires a disclosure of education records.

There remains an issue concerning requests for access to child abuse reports <u>if</u> they are somehow found in the education records of the school. The school may have an obligation to comply when a request for such records are made by parents. Although the parents might have a right to review such records, arguably, although not yet tested, redaction <u>may</u> be necessary to maintain the confidentiality of the party who reported child abuse to authorities.

If the requestor is a non-parent, withholding of all such records may be appropriate. If the requestor is a parent, and the parent has not been named as a suspect, redactions governing confidentiality of materials in a child abuse report may require submission to legal authorities for pre-approval to make redactions or withhold documents.

Generally, law enforcement agencies unconnected to the school have no authority to review student records. Schools can obviously provide student information to police with consent or if any of the exceptions under the MFOIPP

Act apply to the request. If there is a health or safety emergency such records may be released although there are many restrictions on such releases of information.

Law enforcement agencies do not like to be told that records will not be released without a subpoena, court order, or search warrant. Stonewalling police efforts or obstructing justice, may be upsetting with those that deal with schools that refuse to comply with their requests. Whenever possible, it is best for school officials to proactively meet with law enforcement agencies within their jurisdiction to plan ahead on how schools can cooperate with police during police investigations, so that police will understand the school's desire to cooperate yet remain in compliance with the laws. Some agencies are obviously more willing to cooperate and are more understanding than others. However, it should be the goal to not create an antagonistic relationship.

CHILD WITNESSES

School personnel often face situations requiring them to question children during investigations, administrative hearings or litigation. Child witnesses present many challenges due to differences in language, their ability to remember and explain events accurately, their susceptibility to suggestion or desire for attention and their emotional responses to questioning. It is best to avoid reliance on testimony of children <u>if</u> possible, but when such testimony is necessary, questioning should be done by professionals trained to understand children's linguistic and cognitive abilities. Remember, documentation, documentation, documentation.

Written consent should be obtained from a parent or guardian prior to the interview process. What about an "<u>opt-out</u>" practice whereby a general notice is sent home stating that interviews are to take place? Unless a parent returns the form "opting out," children may be subject to interview.

Arguably parental consent may not be necessary when the questions are of a general nature, not related to any specific events in which the minor was involved, and there are no records kept to identify the student. Where parents or guardians refuse to allow a child to be interviewed, you might try to obtain

parental consent by inviting the parent to be present. When interviews do take place, proceed with caution.

School personnel need to be prepared to immediately investigate reports of in-school bullying by students or parents and to make appropriate responses. Such internal investigations inevitably involve forensic interviews of students of various ages. Prior to the initiation of an internal investigation, students may have been questioned by parents or other adults, and may have been exposed to media coverage regarding allegations of bullying and harassment in their own or other schools. These students are often emotional, frustrated and confused. Those involved in such investigations need to be sensitive both to the best methods for obtaining reliable information from students and to the possible contamination of student perceptions or memories.

School personnel need to be prepared to investigate student reports of sexual harassment or abuse by school personnel or by other students at school and to make appropriate responses. Internal investigations may trigger requirements that school personnel notify the police. Allegations of sexual abuse or harassment often lead to civil actions complaining of sexual harassment or abuse by school personnel as well as complaining that school districts were deliberately indifferent to sexual harassment or abuse of students by other student.

Suggestions for reducing suggestibility and false memories whether by school personnel, professional or otherwise.

1. Conduct interview as soon as possible after the event.
2. Use a neutral interviewer.
3. Prior to the interview, instruct the child that “I don’t know” or “I don’t understand the question” are acceptable responses.
4. Begin the interview with open questions and move on to more specific questions.
5. Do not repeat specific questions.
6. Do not give verbal or emotional praise or punishment based on the answer.
7. Do not invite the child to speculate.
8. Do not offer the child possible answers.

EMERGING TRENDS

While knowledge of the basics is critical, it is no longer enough to be knowledgeable only about the basics. The issues now range from the traditional problems of reporting possible abuse by a parent, school supervisor or teacher; to concerns about volunteers, teacher suicide over false reporting, slander actions for false reporting, personal protective orders (PPOs), MFOIPPA questions, and the acquitted abuser.

School officials may interview students to investigate suspected child abuse, including abuse that may be occurring at home. "When a parent sends her child to school, she delegates some of her parenting responsibilities to school official … [and] should reasonably expect that school officials will speak with her child if the child raises serious concerns about her home life." Interviewing possible child abuse is tricky business. Once child abuse is suspected, school officials should not interview or question the child further. Instead, report it to law enforcement and child protection services and let their child abuse interviewer experts do the interviewing, in the case of the police usually by video.

A parent's access to a child when there is suspected child abuse contributes to tension in interviewing possible child abuse victims. It should never happen. School officials should carefully examine the circumstances surrounding an interview occurring at school for determining whether child abuse has occurred.

The trickiness is that "child suggestibility" may be inferred if the interview is not videotaped or if the questioning is inappropriate for any of number of reasons, including asking leading or respective questions, conducting repeated interviews, the interview's suggestive body language, etc. Inevitably the individual(s) to whom disclosure was.

CRIMINAL BACKGROUND CHECKS

When a student is the victim of child abuse at the hands of a school employee or school volunteer, the school may be held responsible on the basis of a "negligent hiring" theory. See *supra*. School boards may be vicariously liable for negligence in supervision of employees who commit abuse. A public school district may be

vicariously liable for the negligence of administrations or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student. See e.g. *C.A. v. Williams S. Hart Union Sch. Dist.*, 2012 Cal. Lexis 2185, 35 (2012). Note also Bill 113, Police Record Checks Reform Act, 2015 (Royal Assent December 3, 2015).

Because of a school Board's and it employees' special relationship with the district's students arising from the mandatory character of school attendance and comprehensive control over student exercised by school personnel, […} the duty of care owed by school personnel includes the duty to use reasonable measures to protect students from foreseeable injury at the hand of third parties acting negligently or intentionally. Avoidance of potential claims for negligent hiring provide a firm basis for conducting criminal background checks and obtaining and issuing accurate reference for potential employees.

AT THE END OF THE DAY

There are many specific procedures and useful behaviors that contribute to a safe school environment for children and some are as follows.

1. Know the cluster of indicators of abuse and train others who have a duty to report suspected abuse. Indicators that occur repeatedly and/or in combination with each other should be red flags to the educator.

2. Maintain a clear policy on the principal's role and the teacher's role in reporting. Teachers, especially beginning teachers, say they are not always certain about the expectations of the principal regarding procedures. They need to know where and whom to call or submit written reports to if they are required.

3. Collaborate with local child protection services. Use them to train staff and to work with the school in the interest of high-risk children. Also, to ensure that everyone understand the proper process for and consequences of child abuse

> reporting, offer comprehensive training. It should be annual training of all school employees on how to recognize symptoms of abuse and their obligation to make a prompt report to school principals or other appropriate parties of all facts know to them.

Be safe, not sorry. READ the legislation. Don't think abuse may be occurring. Report concerns and allow an investigator to take a closer look at the case.

You should also let your staff know they are not responsible for "investigating" suspected incidents of abuse. They should, however, rely on red flags they have observed or head when working with the child.

Share the promise of anonymity. It's important to make sure your staff members understand that if they report suspected abuse through the proper channels, their names will not likely be mentioned as the source of the report, but of course may be called to give evidence.

The single most important change I have seen over the last forty plus years is the need to know so much more about so many things in order to make informed decisions. The Cleavers Have Left the Building.

At the end of the day don't feel too badly.

RECENT EXAMPLES

EXAMPLE #1

"Alex" is 15 years of age. Alex has seldom attended school in the past three years. He and his mother, say this is because of his serious medical problems and the school board's failure to accommodate those problems. The Society thinks that the Board has offered reasonable accommodation, and that Mother is acting in a way that is injurious to Alex's mental and emotional health in not sending him to school.

Is Alex a child in need of protection pursuant to s. 37(2) (f.1) and (g.1) of the CFSA?

The grounds alleged require evidence that:

1. Alex has suffered or is likely to suffer emotional harm, demonstrated by serious,
    - (i) anxiety,
    - (ii) depression,
    - (iii) withdrawal,
    - (iv) self-destructive or aggressive behaviour, or
    - (v) delayed development

2. and that Mother neglects or refuses to provide "services or treatment to remedy or alleviate" the harm or to prevent the harm.

The Society is asking for a temporary supervision order with a number of conditions, including conditions that Mother consent to Alex's participation in psychological and psycho-educational assessments and that she follow any resulting professional recommendations. She indicated that while she welcomed the suggested psycho-educational and psychological assessment, that she opposed any order requiring her to follow the recommendation made in those assessments.

The Society asks:

- Mother shall consent to a release of information from the child's family doctor to the Society;

- Alex shall attend a special education program at E. Y. C. I. daily, and Mother will insure that he attend. Although Alex's attendance can be graduated, it is expected that he will attend for a full day every day within one month.

Mother and Alex voiced opposition to the order sought. Her lawyer commenced a motion in Superior Court seeking a dismissal of the Society's action on the

grounds that the Charter rights of herself and the child were violated by the Society.

Evidence includes reports from the SCAN team at HSC from the TDSB psycho-educational assessment of Alex.

1. Alex has been absent from school most of the time since he began Grade 7. In Grade 7 he was absent 133 days, and in Grade 8 he was absent 167 days. It is not clear from the evidence whether Alex has attended any days of school in Grade 9, which he was scheduled to begin at E.Y.C.I. in September 2014.

2. Alex began to have problems attending school regularly in Grade 6, when he missed 51.5 days.

3. Mother attributes Alex's attendance problems to serious health problems which started when he was in Grade 6. Mother and Alex report that the child suffers from urgent, frequent, and painful urination, vomiting and diarrhea on a chronic basis.

4. This condition causes Alex to get little rest at night. Mother and Alex report that most—about 75 % -- of his nights, Alex is up most of the night, having to urinate every 15-20 minutes. Alex is then fatigued during the days. He has tried sleep aids, such as melatonin, without effect.

5. Mother and Alex report that when urination is painful, which is often, Alex screams.

6. Alex reports that this condition has caused him to be embarrassed and bullied at school. The child told the SCAN team that when he attempted to go to school last year that other students were cruel to him in the bathroom, and that those students were not disciplined by the school.

7. Mother takes Alex regularly to the family doctor, Dr. Irina Lam, and Alex is under the care of a nephrologist and urologist. He takes medication prescribed by these doctors to try to alleviate his symptoms, and follows recommended exercises and dietary rules. Mother has also taken the child to other specialists.
8. At various times, Dr. Lam has provided reports to the Board indicating that Alex should not attend school for health reasons for certain periods of time.

9. Alex told the SCAN team that he missed going to school, and he particularly regretted that he was now unable to participate in sports. He also missed his friends, although he said that he was able to keep in touch with them by Facebook.

10. Society workers say that Mother told them that Alex is "3 years behind" academically. In her Answer, Mother denies this statement.

11. Mother believes that the best way to deal with Alex's health problems and educate him is through home schooling. Alex shares this belief. There is no evidence that Mother is actually home schooling the child.

12. Mother has applied to the Board for leave to home school Alex. Her application has been rejected, as she did not submit a curriculum.

13. The SCAN team reports that Mother and Alex appear to understand the secondary benefits of school attendance (e.g., socialization), but are both committed to a plan for home schooling.

14. The SCAN team considered and rejected a theory that Alex was a case of Munchausen's syndrome by proxy. The team was of the view that Mother sincerely believes that Alex is ill, and that Alex is of the same opinion.

15. After a review of Alex's medical records, the SCAN team reported that they could find no medical explanation for Alex's symptoms. In the team's opinion, there was no medical reason why Alex should not return to school. They made a number of recommendations, which include the following:

    1) A pediatrician be secured to manage Alex's health needs. Mother has consulted a pediatrician.

    2) Alex continue with his exercises, increase his water intake, and continue to follow recommendations from his doctors.

    3) Alex gradually return to school, with the school providing the accommodation necessary to meet his health and learning needs. That accommodation would include an individualized education plan, 1-to-1 assistance, individual help from an education assistant, time outside the regular class for special education, and modified programming.

    4) Alex should have a comprehensive psychological assessment to deal with psycho-educational and emotional issues. The team referred Mother to Hincks-Dellcrest for this assessment.

    5) The Society should assist the family in dealing with the school and obtaining psychological services.

16. The TDSB psychologist reported as follows:

    1) Alex and Mother cooperated in the assessment.

    2) An extended period was required to complete the assessment; Alex had to attend six 2-hour sessions for the testing and interviews. The assessment was

conducted in a quiet room with access to a private bathroom which allowed Alex to take frequent bathroom breaks.

3) Alex told the interviewer on several occasions during the testing that he was tired because he had been up (in and out of the bathroom) most of the night before. The assessor observed that the child was fatigued.

4) Alex has average cognitive functioning, but his academic performance does not match his cognitive potential.

5) Specifically, Alex shows strong reasoning and reading skills, but is "weak" in math and writing skills.

6) Alex has a learning disability. Specifically, he has weaknesses in processing speed, fine motor control, and visual memory.

7) Alex's learning disability as well as his absenteeism contributes to his academic underachievement. In explaining this view, the assessor noted that the Alex's difficulties in math and writing pre-dated his illness and absenteeism.

8) The psychologist made recommendations about learning strategies that would be helpful for teachers to employ with Alex, but did not make specific recommendations as to, for example, whether 1-to-1 work was needed.

17. The TDSB, after assessing Alex at an individual placement and review committee, offered him a spot at E.Y.C.I. in a classroom with a 1:5 ratio, with 10 students and two teachers trained in special education. The classroom has a bathroom

nearby. At times, Alex would occasionally be able to get 1-to-1 attention (when one of the teachers is dealing with the rest of the students in a group).

18. More recently, the TDSB advised that Alex could be in a classroom with 5 students and one teacher.

18. Mother and Alex have advised the Board that they believe Alex could attempt a return to school if he could receive instruction on a 1-to-1 basis. Otherwise, they feel that home schooling is in his best interests.

19. The TDSB last year charged Mother and Alex under the Education Act because of Alex's truancy. Recently the Board has decided to move the matter on to trial. The trial date has not been set.

There is no evidence that Alex suffers or is at likely risk of suffering emotional harm demonstrated by serious "anxiety, depression, withdrawal, or self-destructive or aggressive behavior". The Society submits, however, that the fact that Alex is behind in his academic achievement establishes that there are reasonable grounds to believe that Alex suffers from serious "delayed development", or at least a risk of serious delayed development.

"Delayed development" is not defined in the Act. *Durham Children's Aid Society v. B.P.*, (2007) O.J. 4183 (S.C.). That case involved children whose parents refused to send them to school; the parents were facing both prosecution under the *Education Act* for the children's truancy and a child protection proceeding based on the children's failure to attend school regularly. The parents argued that while previous legislation (the *Child Welfare Act*) had provided that a child's habitual absence from school was a ground for a protection finding, that the removal of this provision in the 1984 *Child and Family Services Act* meant that a failure to insure that the children attend school was not in itself a protection ground. They said that the children's absence from school was properly dealt with only under the *Education Act*. The Society brought a summary judgment motion on a question of law, asking that the court find that "neglect of education" was an available protection ground. Justice Shaughnessy noted the allegations that the

subject children were unable to read, and found that neglect of education could constitute a case of "serious delayed development" under the Act.

The evidence does not establish the degree or the cause of Alex's academic delay.

The TDSB assessment suggests that part of the cause is Alex's learning disability.

Order sought by Society declined for the following reasons:

1. The new condition of supervision requested — that Alex attend school full time — is not proportionate to any increase in risk. The Society's protection concern has not changed since the beginning of the case: it alleges that Alex is or will suffer serious delayed development because Mother refuses to send him to school. There is no evidence that this risk has increased, or of any emergency requiring immediate action to protect Alex from harm. There is no evidence, if the requested condition is not imposed prior to a trial, that Alex will suffer damage now that cannot be dealt with by later remedial action.

2. Alex described to SCAN the pain caused him from the treatment he received from unkind fellow students because of his health problems. Alex's distress at the prospect of the court forcing him to attend school was obvious during the argument of this motion—he sat in court with his head in his hands. I have no psychological assessment of Alex which could be helpful in understanding the problems Alex may have in interacting with other students and how those problems might be dealt with.

Society's motion to compel Alex's school attendance at this time.

EXAMPLE #2

A Secure Treatment Application brought by the Society in which it sought an order committing the child K.R. born […], 2003 to the secure treatment program at Syl Apps Youth Centre.

Application was brought pursuant to the *Child and Family Services Act*, R.S.O. 1990, c C.11 (CFSA). The relevant provisions of the legislation are set out as follows:

> **Commitment to secure treatment: criteria**
>
> 117. (1) The court may order that a child be committed to a secure treatment program only where the court is satisfied that,
>
> (a) the child has a mental disorder;
>
> (b) the child has, as a result of the mental disorder, within the forty-five days immediately preceding,
>
> (i) the application under subsection 114 (1),
>
> (ii) the child's detention or custody under the *Young Offenders Act (Canada)*, under the *Youth Criminal Justice Act (Canada)* or under the *Provincial Offences Act*, or
>
> (iii) the child's admission to a psychiatric facility under the *Mental Health Act* as an involuntary patient, caused or attempted to cause serious bodily harm to himself, herself or another person;
>
> (c) the child has,
>
> (i) within the twelve months immediately preceding the application, but on another occasion than that referred to in clause (b), caused, attempted to cause or by words or conduct made a substantial threat to cause serious bodily harm to himself, herself or another person, or
>
> (ii) in committing the act or attempt referred to in clause (b), caused or attempted to cause a person's death;

(d) the secure treatment program would be effective to prevent the child from causing or attempting to cause serious bodily harm to himself, herself or another person;

(e) treatment appropriate for the child's mental disorder is available at the place of secure treatment to which the application relates; and

(f) no less restrictive method of providing treatment appropriate for the child's mental disorder is appropriate in the circumstances. R.S.O. 1990, c. C.11, s. 117 (1); 2006, c. 19, Sched. D, s. 2 (35).

Where child under twelve

(2) Where the child is less than twelve years old, the court shall not make an order under subsection (1) unless the Minister consents to the child's commitment. R.S.O. 1990, c. C.11, s. 117 (2).

Period of commitment

118.(1) The court shall specify in an order under subsection 117 (1) the period not exceeding 180 days for which the child shall be committed to the secure treatment program.

Where society is applicant

(2) Where a child is committed to a secure treatment program on a society's application and the period specified in the court's order is greater than sixty days, the child shall be released on a day sixty days after the child's admission to the secure treatment program unless before that day,

(a) the child's parent consents to the child's commitment for a longer period; or

(b) the child is made a Crown or society ward under Part III (Child Protection),

but in no case shall the child be committed to the secure treatment program for longer than the period specified under subsection (1). R.S.O. 1990, c. C.11, s. 118 (1, 2).

ANALYSIS

Mental disorder s. 117 (1) a)

All parties conceded that the 11 year old child was suffering from a mental disorder. Dr. Soliman's evidence was that the child had a dual diagnosis of Oppositional Defiant Disorder (ODD) and Child Onset-Conduct Disorder (CD). He said that his patient met the criteria for these disorders as set out in the DSM V. Briefly stated he said that ODD meant that K.R. would not follow instructions and would not take no for an answer.

The doctor said that a CD diagnosis required aggressive behaviour causing bodily harm while using a weapon. If this type of behaviour occurs before the age of ten a patient meets the child onset criteria. There was evidence that K.R. had stabbed his older brother in the leg when K.R. was just 8.

Mental disorder causing bodily harm s. 117 (1) b)

There was no dispute as to the evidence that the child had caused serious bodily harm within the 45 days prior to his hospitalization. On November 10, 2014 K.R. had returned from a family outing, taken a steak knife, gone upstairs to the bedroom of his 18 year old brother and stabbed his brother in the chest. The brother sustained a collapsed lung and was rushed to hospital. The police took K.R. to hospital where he was admitted to a psychiatric unit. He remained there until the time of this hearing. The police report of the incident was filed. The parents who were home at the time of the stabbing did not dispute what had occurred.

Other incidents of threats or actual serious bodily s. 117(1) (c)

The Society filed evidence that addressed a number of aggressive incidents that had required that K.R. be restrained while in hospital. The evidence of Dr. Soliman, Ms. McClean and Ms. Thompson was to the effect that K.R.'s behaviour was completely unpredictable and that he could go from being pleasant and compliant one minute to being very aggressive the next. Ms. Thompson a psychiatric nurse with 25 years of experience stated that K.R. tried to bite, kick, spit, punch and was also verbally aggressive on many occasions.

The Society relied upon two incidents that Mr. Sider said met the criteria set out in subsection 1 c). The first occurred on March 2 and the second on March 29, 2015.

Ms. McClean said that she worked with K.R. daily and while she had heard reports from other staff of his physical aggression she had not seen it personally between his admission on November 10 and an incident on March 2. She felt she had developed a rapport with K.R.

On Mar. 2, 2015 there was a code white which meant there was an aggressive or violent patient on the ward. There was a lot of security staff on the ward. When another code white was called some 20 minutes later she was talking with her manager. Out of the corner of her eye she saw K.R. coming towards her with both fists clenched. The next thing she knew her glasses fell to the ground and she fell on the manager. That manager then whisked her into the nursing station where she quickly realized that she had been hit on the head by K.R. She said there was a big bump on her right temple and felt really shook up. She went to the ER and was told there to put ice on the swelling and she was given information on concussions. She found the incident traumatizing. She suffered from headaches and missed two days of work. She said that on a scale of 1 to 10 the pain she suffered from the blow was an 8.

Dr. Soliman witnessed this incident. He saw K.R. approach with clenched fists, jump in the air and strike Ms. McClean. The incident was completely unprovoked. K.R. had not expressed any regret or remorse for his actions.

The second incident relied upon was March 29. Ms. Thompson observed it. She had been working on the ward from the date that K.R. was admitted and she was able to give evidence of how quickly he could become enraged. She said that despite his slight stature K.R. was capable of really hurting people when he became angry as he had nearly broken her nose with his knee during one restraint. In fact she said that in her 25 years of experience as a psychiatric nurse some of the most difficult restraints she had ever seen on aggressive and completely out of control patient were ones involving K.R.

Ms. Thompson was in the nursing station during a family visit in K.R.'s room. There are cameras above each of the doors in the 4 room unit and she was observing a screen split into quarters. She clearly saw on the camera K.R. punching and kicking his mother who flinched in pain. She then put the view of his room on the full screen. The father was on the bed as K.R. attacked his mother but he did not intervene. Security was called and the assault was stopped.

It is only necessary for me to find that one incident of serious bodily harm, or the threat of same, occurred in addition to the precipitating occurrence in which the older brother was stabbed. I find that both the March 2 and 29 assaults would meet the criteria. They were completely unprovoked and due to the nature of the assaults with closed fists to the head and kicking to the body serious bodily harm could have resulted.

Effectiveness of secure treatment program s. 117 (1) (d)

Dr. Hawes provided a letter dated April 23, 2015 which was attached to Ms. Plummer's affidavit. She said that her team felt that the secure treatment program at Syl Apps would be effective to prevent K.R. from causing or attempting to cause serious bodily harm to himself, herself or another person.
Dr. Hawes said that Syl Apps specializes in treating young people with serious mental disorders and behavioural problems. While the approach would have to be somewhat different for an 11 year old child than for a 16 year old young offender there was no other facility that could meet K.R.'s needs and Syl Apps now had the Ministry funding to tailor a program for K.R.

Appropriate treatment available s. 117 (1) (e)

Dr. Hawes' evidence was that there was a bed available at Syl Apps and that the child could be transported there immediately upon a court order being made. She filed a treatment plan. It included the creation of a separate unit in which to house K.R. as an 11 year old patient. He would have 2 staff attending him and providing treatment during daytime hours and one staff person dedicated to him overnight. There would be an initial thirty day assessment period. He would receive an individualized treatment program specific to this youth's unique needs. K.R.'s family would be involved in the family therapy. The Halton school board on site will provide an elementary school program.

The plan also involved community services in the Peel region too in order to provide for a timely transfer back to the community. Peel CAS would be the lead service. It was noted that if Peel CAS did not obtain an order for Society wardship within 60 days of K.R.'s admission the child would be discharged to their care under the temporary care order pursuant to the provisions of s. 118 (2).

No less restrictive method of providing treatment appropriate 117 (1) (e)

The Society held a community case conference on January 8 2015 to explore possible placements for K.R. There were representatives from a number of treatment and care providers. The goal was to plan for K.R.'s safe discharge from hospital as he had already been at Brampton Civic hospital for 2 months. Following the meeting the Society undertook an exhaustive search of the possible options. They spoke to the following agencies; CARS Toronto, Youthdale, residential and crisis bed, Hinks-Dellcrest, George Hull, Kinark Services which operates the program at Syl Apps, Vanier, Peel Children's Centre, CPRI London, CAMH, Robert Smart and Ontario Shores. It is not necessary to set out why each program did not consider K.R. to be suitable for their program. Many of them stated that the best option would be Syl Apps.

I am satisfied that there is not a less restrictive program that could provide safe and effective treatment for K.R.

Minister's consent s. 117 (2)

The consent of the Minister was received on April 21, 2015. By that time K.R. had been on the psychiatric unit of an acute care hospital for over 6 months. Dr. Soliman stated that the initial assessment at the hospital took about three weeks. At that time the doctor's opinion was that K.R.'s CD required specialized treatment before the child could go home. K.R. has received no treatment.

[24] Dr. Soliman said that the hospital could not treat K.R. In their psychiatric ward patients are in a locked unit for acute psychotic disorders. The psychiatrists and nurses there are not equipped to provide long term therapy for this type of disorder. The doctor said that he was in charge of the patient's overall care and he saw him daily. He was also assessed by two other psychiatrists. K.R. was constantly observed and assessed but he was not treated. The doctor conceded that it was not fair to the patient or his family that he stayed in the hospital any longer than the time period necessary for the initial assessment to be done. He said that the hospital was very motivated to have some other treatment setting take K.R.

[25] Dr. Soliman said that Syl Apps was identified early on a possible place for treatment. Dr. Hawes confirmed that the parents did sign a consent for the file to be sent to Syl Apps in November 2014. She also said that after visiting Syl Apps the parents did not want to send their son there. However, it is clear from the evidence that even if the parents had consented to treatment at Syl Apps back in November or December of 2014 that the child would not have been sent there. This was because he was too young for the facility to accept him. They had to wait not only for the Minister's delegate to sign the consent form but for the Ministry to approve the funding proposal for the separate unit, the staff and the program. While there was evidence that the parents withdrew any consent to a placement at Syl Apps in December 2014 due to their concerns about K.R. being housed in an institution with 16 and 17 year old young offenders, their consent was really meaningless until the Minister signed the consent on April 21, 2015. The only delay in treatment that the parents are arguably responsible for is the period from April 21 until the time of this hearing.

It is true that a secure treatment order could not have been obtained without evidence of a second incident involving serious bodily harm. Although there was other evidence of physical aggression the earliest incident that the Society relied upon, and I accepted as meeting the criteria, occurred on March 2, 2015.

The *CFSA* contemplates the secure treatment of children under 12. The legislation quite properly sets out specific criteria to ensure that this very restrictive plan is reserved for only the clearest of cases where there is no other option. The evidence was that there may have only have been one other child under 12 that had ever been in secure treatment at Syl Apps. There are only three secure treatment facilities in the entire province. These cases are, and should be, unique. Nevertheless, the legislation contemplated a need for secure treatment of children under 12. In this case well before February 18, 2015 (the day of the last treatment case conference) it was clear that Syl Apps was the only option. More than two months went by before the Minister was in a position to authorize the transfer of K.R. to a place where he might begin to be treated for his serious mental disorders. This 11 year old child has not been off the locked ward of an acute care hospital since November 10, 2014. This is not acceptable.

Dr. Hawes said the length of time required for treatment was a minimum of 180 days and that is the maximum amount of time for which a secure treatment order can be made although a renewal of same can be sought. She said that most children with K.R.'s level of aggression requires stays of up to a year.

ORDER

The child K.R. born […], 2003 shall be committed to the secure treatment program at Syl Apps Youth Kinark Child and Family Services for a period of 180 days.

EXAMPLE #3

The society issued the protection application on February 11, 2015, seeking a finding that the children are in need of protection because there is a risk that they are likely to suffer emotional harm while in the care of their mother, pursuant to

section 37 (2) (g) of the Child and Family Services Act, R.S.O. 1990, c. C. 11, as amended, ("the Act").

The society submits that the older child S. (a boy), made disclosures to the investigating worker that demonstrate that the mother may be forcing him to be a girl against his wishes while he is in her care and that the mother has hit him and physically disciplined him when he does not act like a girl, or dress like a girl. According to the society, the mother is unwilling or unable to accept that S. does not want to be a girl and at this age and stage of his development (age 4) he is not able to develop a female (or any) gender identity nor should this be imposed upon him.

The society is further concerned that the mother is refusing to follow the recommendations of Dr. Bonafacio, the gender specialist jointly retained by the parents regarding the older child's gender expressions or gender variance. Specifically, the mother was continuing to refer to S. with female pronouns or as a girl and that the mother is "socially transitioning" the child to be a girl, contrary to Dr. Bonafacio's recommendations, and thereby placing him at risk of emotional harm.

The Father's Position:

It is the father's position that the mother is forcing S., to be a girl contrary to S.'s wishes and that this is emotional abuse. The father submits that he learned that the mother was forcing S. to dress like a girl and sending him to school dressed in girl's clothing, which was causing him to be bullied and beaten up by other children. The father further submits that the mother actively hid this from him for almost two years and that she is emotionally harming S.

According to the father, S. is nothing other than "a normal boy" who likes stereotypical male things. In the father's view, as set out at paragraph 108 of his Affidavit, sworn February 24, 2015, "[the mother] has fabricated the entire thing because…she has always wanted to have a girl and during our relationship remarked to a family friend that S. would have made such a pretty girl."
The father also agrees with the society that the mother is refusing to comply with the recommendations of Dr. Bonifacio.

The Mother's Position:

It is the mother's position that she has not caused emotional harm to the children nor are the children at risk of emotional harm in her care. She submits that she has never forced S. to be a girl, to act like a girl or to dress in girl's clothing. She has never hit her children, and in particular S., to coerce him to act like a girl.

The mother submits that she noticed S.'s gender variant expressions over a significant period of time and that S. was seeking out and choosing girl clothes and girl activities on his own, including "sparkly pink shoes" and pink clothing. She submits that she actively sought out assistance and information with respect to S.'s gender identity issues and that she has tried to respect his choices and be supportive of his gender creative behaviors and expressions in a safe and age-appropriate manner. She submits that she tried to discuss this with the father in her emails to him and his reaction was hostile and adversarial.

The mother further submits that it is not in the children's best interest to be placed in the care of the father at this time. She submits that the father does not support S.'s wishes to be a girl or S.'s desire to express gender variant behavior. She submits that S's gender expression requires the support of both parents and that the father is attempting to actively suppress S.'s gender expression through coercive means.

EXAMPLE #4

The family's first involvement with the CCAS began in October 1999, when M.B. was in a primary caregiving role to the children. A.B., seven years old at the time, was attending St. Brigid's Catholic School, and a resource teacher, Ms. Jill Lyons, reported to the CCAS on October 5, 1999 that A.B. had disclosed that her father had hit her on the head with a hammer. A.B. later told her teacher that her father had hit her head with a hairbrush. The CCAS investigated and concluded that M.B. accidentally hit A.B. with a hairbrush after throwing it to her so that she could brush her hair. However, the Society verified the concerns about A.B.'s school absences, inadequate supervision in the home, and the parents' difficulties in managing A.B.'s behaviours. The file was transferred to ongoing services for

monitoring because of these protection concerns. The CCAS eventually closed the file on November 22, 2000.

The CCAS became involved with the family again on March 8, 2004, when Mr. Dave Hansen, principal of St. Brigid's Catholic School, called to report concerns about six year old M.B. Jr. Specifically, the concerns related to general neglect of M.B. Jr., numerous bruises and marks on the child which raised questions about the quality of the supervision in the home, frequent school absences, late arrivals, and the child's academic delays. School officials also had concerns that the parents were not working cooperatively to address the issues that had been identified. The Society concluded that the injuries which M.B. Jr. had sustained were accidental in nature. However, the file remained open until July 20, 2004 for ongoing monitoring due to the other concerns outlined above.

The parents' fourth child, M., was born on […], 2006. The CCAS became involved with the family again shortly after M.'s birth, on February 26, 2006, after the agency received a report from the children's school about ongoing concerns regarding truancy by A.B. and M.B. Jr., serious physical neglect, and injuries to the child M.B. Jr. which raised ongoing questions about the quality of supervision in the home.

Section 37(3) does not refer specifically to the existence of domestic conflict within the family environment and the exposure of children to that conflict. However, domestic conflict within the home is a significant consideration in carrying out the best interests analysis. The child protection case-law recognizes the multitude of potential negative repercussions that exposure to domestic violence can have on children, including:

a) Risk of direct physical harm if the child attempts to protect a parent, or the child is being held by a parent;
b) Fear of being harmed or a parent being harmed;
c) Feelings of guilt for failing to assist a parent who is being harmed;
d) Feelings of insecurity and low self-esteem; and
e) A sense of emotional confusion due to their inability to understand why the conflict and violence have occurred.

(see Children's Aid Society of Toronto v. S.A.C., 2005 ONCJ 274 (CanLII), [2005] O.J. No. 2154 (O.C.J.); Children's Aid Society of Hamilton v. P.B. and K.O. Sr., (December 8, 2008), Hamilton C3-07, (S.C.J.)).

In considering the appropriate disposition on a Status Review Application, the court must keep in mind the purposes of the CFSA, which are set out in section 1 of the Act. Section 1(1) of the CFSA stipulates that the primary purpose of the Act is "to promote the best interests, protection and well-being of children." The court is required to advance this primary purpose taking into consideration the other purposes of the Act, which are set out in section 1(2) as follows:

Other purposes

1(2)The additional purposes of this Act, so long as they are consistent with the best interests, protection and well-being of children, are:

1. To recognize that while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent.

2. To recognize that the least disruptive course of action that is available and is appropriate in a particular case to help a child should be considered.

3. To recognize that children's services should be provided in a manner that,
    i. respects a child's need for continuity of care and for stable relationships within a family and cultural environment,
    ii. takes into account physical, cultural, emotional, spiritual, mental and developmental needs and differences among children,
    iii. provides early assessment, planning and decision-making to achieve permanent plans for children in accordance with their best interests, and

iv. includes the participation of a child, his or her parents and relatives and the members of the child's extended family and community, where appropriate.

4. To recognize that, wherever possible, services to children and their families should be provided in a manner that respects cultural, religious and regional differences.

5. To recognize that Indian and native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family.

These other purposes set out in section 1(2) indicate that in carrying out its duties under the CFSA, the court is required to analyze the best interests of the child with an eye to the importance of supporting the family, maintaining the family intact if possible, and accessing community supports if appropriate to promote the best interests of the child and the integrity of the family unit (Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)., 1994 CanLII 83 (SCC), [1994] S.C.J. No. 37, 2 R.F.L. (4th) 313, 18 O.R. (3d) 160n., 165 N.R. 161, 113 D.L.R. (4th) 321 (S.C.C.) (hereinafter referred to as "M.C."). The non-interventionist principles set out in section 1(2) are not aimed at strengthening the rights of parents, but rather are founded on the importance of keeping the family intact if this is consistent with advancing the child's best interests (M.(C.), Ibid.; Catholic Children's Aid Society of Hamilton v. M. (M.A.), 2003 CarswellOnt 1122 (Ont. S.C.J.)).

The unboundling of legal services has created a whole new ball game for the legal profession, like *We the People* more than 25 years ago and 15 years ago such internet – based legal services as Legal Zooms.

Finally although not yet totally upon us, is our being outsourced, something to strive for perhaps? Maybe joining Pangea 3?

In any event I am happy to note we are all actually in this room, today and no disconnection. Thank you very much.

There is a book by Will Meyerhofer who went from being a lawyer to a clinical social worker. It is called, “Way Worse Than Being a Dentist: The Lawyer’s Quest for Meaning”. Our two best character traits, perfectionism and pessimism. Optimism, of course, outperforms pessimism, except in the legal profession. We are hired to always look out for what can go wrong. Sound familiar?