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• The Secret Life of Tax Returns: Part 2 — Personal Income Tax Returns •

Richard E. Davies and Antonina Wasowska

In Part 1 of this article (published in the May 2018 issue of the *Ontario Family Law Reporter*), we provided a roadmap for navigating corporate income tax returns, discussed some common questions relating to a spouse's corporate holdings, and identified where the answers can be found on a corporate income tax return. Continuing here in Part II, we provide a roadmap for navigating personal income tax returns, and highlight some key information therein.

Personal income tax returns are one of the first items requested in a matrimonial dispute as they form the basis, or starting point, for calculating a spouse's income for support purposes under the Federal Child Support Guidelines (the "CSG"). Personal income tax returns for the three most recent years are required to be produced by each spouse.

While most people are somewhat familiar with personal income tax returns, we still find that many family law practitioners do not fully utilize the information that a spouse's personal income tax returns can often provide for family law purposes.

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What should a personal income tax return look like?

Before we dive into the details, it is important to understand the core elements of the full personal income tax return.

Similar to corporate income tax returns, a personal income tax return (or "T1") is comprised of a T1 jacket (first four to five pages) and supporting schedules. The T1 jacket includes general identifying information about the taxpayer, as well as summary calculations of their income sources and deductions, and the taxpayer's total refund or balance owing for the particular year under review (more details below). However, unlike a corporate income tax return which relies on a company's financial statements as the starting point for calculating taxable income, personal income tax returns should include all of the taxpayer's underlying income tax slips (*i.e.*, T4, T3, T5, *etc*.).

It is common for clients to provide only the T1 jacket, a condensed T1 return, or sometimes even just a one-page T183 — "Information Return for Electronic Filing of an Individual's Income Tax and Benefit Return" in response to a request for their personal income tax returns. However, all three of these scenarios are inadequate and fail to provide a complete picture of the taxpayer's income.

Do I really need to request a taxpayer's Notices of Assessment and Reassessment?

For each year in which a taxpayer files a personal income tax return, they will receive a Notice of Assessment ("NOA"), and sometimes a Notice of Reassessment ("NORA") once the return has been reviewed and assessed by the Canada Revenue Agency ("CRA"). We often see situations where taxpayers' returns are adjusted by the CRA for missed income amounts, or deductions which are disallowed; therefore, it is good practice to request NOAs and NORAs for all years in which a spouse's income is being calculated.

Further, in situations where the authenticity of the taxpayer's personal income tax returns is being called into question, NOAs and NORAs provide third-party confirmation which can be used to verify the accuracy of the tax returns provided.

Why should I review the T1 Jacket in detail?

The first page of the T1 jacket includes basic information such as the taxpayer's name, social insurance number, and address, as well as the year for which the return was prepared. The first page also includes a "marital status" check box which will identify when your client and their spouse first started filing as separated.

For years in which your client filed as married, their spouse's net income should be listed just below the marital status. Therefore, a quick look at the first page of the jacket for years prior to separation can give you a rough idea of what your client's spouse's income may be, and how that might impact your client's support entitlement or obligation.

Page one of the T1 jacket also indicates the taxpayer's province of residence. This is important where the calculations of a spouse's income for support purposes include income tax gross-ups, as personal income tax rates vary depending on the taxpayer's province of residence.

Will a spouse's Canadian personal income tax return include all of their income?

Under the Canadian *Income Tax Act* ("ITA"), Canadian residents are taxed on their worldwide income, therefore a taxpayer's T1 *should* include

all of their reportable income sources, regardless of where they were earned. However, we often see situations where taxpayers who earn significant income in foreign jurisdictions do not report such income, either by mistake or in order to reduce their taxes payable in Canada.

In situations where unreported foreign income is suspected, you may wish to consider retaining a forensic expert who can assist in determining whether a taxpayer is underreporting their income (*e.g.*, through tracing, source and use of funds, and/or lifestyle analyses). In order to investigate this however, further documents need to be obtained.

In all cases where a taxpayer has foreign income, an additional request should be made for any personal income tax returns filed in other jurisdictions.

What is Line 150 and where do I find it?

Section 16 of the CSG specifies that "*Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III*".

On a taxpayer's personal income tax return, their "Total Income" is calculated at Line 150, and as such, is often referred to in matrimonial matters simply as "Line 150 income". The calculation of Line 150 income, which is the starting point of most calculations of income for support purposes, shows the breakdown of all of the taxpayer's reported sources of income, including references to the underlying schedules and slips where these amounts are calculated. Line 150 income can be found at the bottom of page 2 of the T1 jacket.

Can I find required Schedule III Adjustments on a taxpayer's personal income tax return?

Schedule III of the CSG outlines required adjustments to a taxpayer's Line 150. Certain of these adjustments can be found on page 3 of the T1 jacket, which shows the calculation of a taxpayer's net income at line 236. For example, annual union, professional, and like dues are deducted at line 212, carrying charges and interest expenses are deducted at line 221 (with supporting detail provided on Schedule 4 of the personal income tax return, as discussed below), and other employment expenses are deducted at line 229.

Where can I find other information required to adjust a client's Line 150 income?

As noted, a taxpayer's personal income tax return should include all of the underlying schedules. While not an exhaustive list, some of the most common schedules which include useful information for calculating a spouse's income for support purposes are outlined below.

Adjustment for Actual Capital Gains/Losses

Line 150 income includes taxable capital gains earned by a taxpayer during the year. However, the CSG require that taxable capital gains be adjusted to actual capital gains (in excess of any actual capital losses) realized by the spouse during the year. Schedule 3 of the personal income tax return — "Capital Gains (or Losses)" can be used to identify your client's actual capital gains.

With respect to losses, we note that the CSG only address actual capital losses where actual capital gains are "in excess". Where a spouse is in a net loss position, the CSG are silent on whether actual capital losses over and above any actual capital gains should be included in the calculation of a

spouse's income. This is a point of much discussion and dispute.

Adjustment for Actual Dividends

Schedule III of the CSG also indicates that taxable dividends from Canadian companies should be replaced by the actual amount of dividends received. However, unlike capital gains (or losses), the actual amount of dividends received is not reported on the underlying schedules. As such, the underlying tax slips need to be reviewed in order to determine the actual amounts received. In some cases, a tax slip summary schedule may be included with the personal income tax return, which would also show the actual amounts received.

Adjustment for Carrying Charges and Interest Expense

The CSG allow for the deduction of certain carrying charges and interest expenses in calculating a spouse's income. The amounts actually deducted by a taxpayer in a given year can be found on Schedule 4 — "Statement of Investment Income"; however, carrying charges and interest expenses need to be incurred for the purpose of earning taxable income in order to be deductible. From time to time, we have found that taxpayers will report carrying charges and interest expenses that do not meet the deductibility criteria.

For example, in a recent case in which we were engaged to calculate income, a client's accountant was writing off the same amount of interest expense every year, as the client had instructed them that the amount that had initially been borrowed to invest in a business had not changed. However, the business in which the client invested was wound down long ago, and as such, the interest paid by the taxpayer no longer met the criteria for deductibility.

More commonly, clients will claim the full amount of interest paid on a line of credit as a deduction, even where part of the funds were used for personal reasons instead of for the purpose of earning taxable income. Therefore, we recommend that any time you see significant carrying charges and interest expenses being deducted on a taxpayer's Schedule 4, you investigate in order to fully understand the nature of the expense, and whether it is a reasonable expense to be deducting. If there is no link to any income earning potential, the carrying charges and interest expenses should not be deducted in calculating the spouse's income for support purposes.

Personal Expenses Deducted from Business Earnings and Capital Cost Allowance Claimed on Real Property

Where a taxpayer is self-employed, their business or professional earnings will be reported on Schedule T2125 — "Statement of Business or Professional Activities". Schedule T2125 includes a breakdown of the different types of expenses claimed by the business during the year, which should be reviewed in order to identify possible personal expenses (*e.g.*, meals and entertainment, automotive expenses, travel, home office, payments to related parties, *etc*.) which need to be added back, and possibly grossed-up, when calculating a spouse's income for support purposes.

Schedule T776 — "Statement of Real Estate Rentals" calculates a taxpayer's income from any personally held real estate. Included are lists of the addresses of all rental properties, as well as the names of any co-owners and the ownership percentage held by each. As such, it can provide a useful reference for identifying assets to be included on a client's statement of Net Family Property ("NFP").

Further, if a taxpayer reports income from real estate, the expenses on Schedule T776 should be reviewed to identify potential adjustments required to Line 150 income in order to calculate the spouse's income for support purposes. Specifically, Schedule III of the CSG indicates that the deduction for any allowable capital cost allowances with respect to real property claimed by the spouse should be included in the spouse's income. It is also good practice to review the other expenses being claimed on Schedule T776 (in addition to any claimed on Schedule T2125) in order to identify any amounts that may be personal in nature which should be added back, and possibly grossed-up, when calculating a spouse's income for support purposes.

How can a client's personal income tax returns help in identifying assets and liabilities to be included on a statement of net family property?

While family lawyers primarily rely on personal income tax returns as a tool for determining a spouse's income for support purposes, personal income tax returns can also provide a useful check to confirm that all of the assets and liabilities have been included on a client's NFP as at the marriage and separation dates.

One often overlooked property item is a client's tax balance owing or receivable, which can be found on the bottom of page 4 of the T1 jacket. Particularly, where a taxpayer is self-employed or earns the majority of their income from investments (and therefore no tax amounts are withheld at source), the year-end balances owing may be significant.

As tax returns for a given year are filed the following year (*e.g.*, personal income tax returns are required to be filed on April 30th, except for self-employed individuals and their spouses which must be filed by June 15th), you should always request the parties' personal income tax returns for the year before the separation date. If there is a balance at year-end, you will need to confirm either with your client, or by reviewing statements from the CRA, whether it was outstanding at the date of separation.

As income taxes are payable by April 30th of the following year, separation dates between April and June are the most likely to have tax balances owing which may need to be included for NFP purposes. Depending on the date of marriage or date of separation, income tax instalments also need to be considered in determining NFP.

Foreign Assets

Where a taxpayer has foreign property with a cost base of over $100,000 at any time in a given year, they need to file Form T1135 — "Foreign Income Verification Statement" with their personal income tax return. If your client has checked off "yes" to the foreign property question on page 2 of the jacket, you will want to ensure that they have also provided a copy of the completed Form T1135 for each year in question.

Form T1135 was revamped by the CRA in 2015 such that the information disclosed is now more detailed. Effective for 2015 and later tax years, where a client has foreign property with a cost base of between $100,000 and $250,000 they can choose to report under the simplified reporting method (part A of the form).[1] The simplified reporting method indicates the type of foreign property owned (*e.g.*, funds held outside Canada, indebtedness owed by non-residents, *etc*.), and the top three countries where the assets are held.

[1] The simplified method is similar to the disclosure that was required prior to 2015 for all foreign property with a cost base of over $100,000.

Under the detailed reporting method (part B of the form), the taxpayer needs to individually list each asset held under the relevant categories. For example, for the category "Funds held outside Canada", the taxpayer would need to list each bank where funds are held, the maximum funds held during the year, the funds held at year-end, and the total amount of income earned.

Whether the simplified or detailed reporting method is used, Form T1135 provides a useful check, and can indicate that there are foreign assets missing from a client's NFP statement. Note that certain foreign property such as property used to carry on an active business, and shares of a foreign affiliate, do not need to be reported on Form T1135.

Other Assets and Liabilities

As discussed above, Schedule 3 of the personal income tax return lists any capital gains or losses arising from asset sales in the given year. Where the separation date was a number of years ago, reviewing Schedule 3 for subsequent years can be helpful to identify assets that were owned at the separation date but subsequently disposed of. Similarly, a review of Schedule 3 for the personal income tax returns of a spouse in the years following the date of marriage can help identify which assets were owned at that time.

Schedule 4 of the personal income tax return, "Statement of Investment Income" shows a breakdown of the sources of a client's investment income, including banking institutions, and sometimes also account numbers. As such, a review of the detailed income sources for the years around the date of separation is another useful completeness check to identify a spouse's income-generating assets for inclusion on their NFP statement.

As discussed earlier, Schedule 4 also lists any carrying charges and interest expenses incurred during the year to earn income. The carrying charges and interest expense details often list the bank or broker names as well as account numbers; therefore a review of this section can also help identify assets (*e.g.*, broker accounts) or liabilities (*e.g.*, lines of credit) which should be included on a client's NFP Statement.

Where are Carryforward Balances recorded?

Where a taxpayer has personal loss carryforward balances, they are often summarized on a carryforward summary schedule, and are broken down by the type of loss incurred (*i.e.*, net capital losses, non-capital losses, *etc.*). While these amounts would typically not be relevant for determining income for support purposes, we note that they may be relevant where a spouse owns an interest in a corporate entity. In such cases the losses may be relevant when calculating contingent income taxes on eventual disposition of the property for NFP purposes.

Similarly, the summary schedule may also include the spouse's remaining lifetime capital gains exemption available, which again may be relevant when calculating contingent income taxes on disposition for NFP purposes. Where applicable, this amount should be confirmed with your client or their accountant.

What if my client no longer has copies of their old personal income tax returns?

Where access to historical personal income tax returns is an issue, we note that the Government of Canada has a website where individual taxpayers can access historical personal tax information. Once registered, an individual can retrieve data relating to their personal income tax

returns going back many years, including but not limited to, NOAs, NORAs, and income tax slips (*i.e.*, T4s, T3s, T5s, *etc*.). This government service can be a valuable information resource for you and your clients.

Conclusion

In Part I of this series we delved into the secret life of corporate tax returns and highlighted some key areas of importance with respect to matrimonial engagements. In Part II we provided a thorough review of the key sources within personal income tax returns that can assist a family law practitioner in assessing and verifying a spouse's income and their net family property position. While many matrimonial cases benefit from the financial valuations and income determination expertise of a dedicated Chartered Business Valuator, we hope this two-part series gives family law practitioners a good starting point for accessing the rich information available in client returns.

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• Proceed with Caution: Summary Judgment in Child Protection Cases •

Stephanie Giannandrea and Jonathan Robinson

Introduction

Chid protection law is different from other forms of civil or family law disputes because every case assesses the appropriate limits of government interference in private lives. By issuing a child protection application, children's aid societies can remove children from the care of their parents, sometimes permanently, and without any ongoing contact between parent and child. In most cases, the respondent parents in these cases are extremely vulnerable, and have few resources. In some cases, Societies can proceed on a summary judgment basis without a trial. To do that, Societies rely on Rule 16 of the Family Law Rules,[1] and on the Supreme Court's direction in *Hryniak v. Maudlin*.[2] Summary judgment started in the civil context and was subsequently applied to child protection matters. Continuing in that tradition, *Hryniak* was a case about an action for civil fraud in a commercial context. Nobody's s. 7 Charter[3] rights were engaged. Now, the principles outlined in *Hryniak* and the amended Rule 16 are used to allow provincial governments to permanently sever parent-child relationships. How, can we ensure that parents receive adequate procedural fairness in these circumstances?

This article explores how the Report of the Motherisk Commission can inform our understanding of summary judgment motions in child protection and offers some examples of how counsel can and should ensure that parents' Charter rights are protected in a system that allows profound government intervention to be adjudicated in summary judgment motions.

Expanded Availability of Summary Judgment

This debate is not new. Courts have become busier, processes costlier, and over time most stakeholders in the civil justice system have promoted various ways to make dispute resolution move more quickly, including use of the summary judgment motion. There has been ongoing discussion as to whether it is fair to apply this dispute resolution mechanism to child protection cases, and in particular those involving permanent removal of children.

In this article, we look mostly at motions in which Societies sought orders for Crown wardship under the former *Child and Family Services Act* — the equivalent of orders placing children in extended society care under s. 101 of the *Child, Youth and Family Services Act, 2017*.[4]

In its earlier incarnation, the summary judgment power did not allow courts to assess credibility, weigh evidence, or make findings of facts, and was found not to violate parents' Charter rights.[5] The powers of the court on a motion for summary judgment were expanded first in the civil context, with amendments to the Rules of Civil

1 Family Law Rules, O. Reg. 114/99 ["Rules"].
2 [2014] S.C.J. No. 7, 2014 SCC 7 ["*Hryniak*"].
3 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*.
4 S.O. 2017, c. 14, Sched. 1.
5 *Children's Aid Society of Hamilton v. M.W.*, [2003] O.J. No. 220 (S.C.J.).

Procedure,[6] and there was divergent jurisprudence at the time as to whether the same expanded powers should be adopted in family law disputes.[7] Rule 16 was amended effective May 2, 2015.[8] It is now consistent with the expanded powers in the Rules of Civil Procedure, as interpreted by *Hryniak*, and clearly applies to family law cases including child protection.

Some cases will require a trial, and some will not. Whether the issue at stake is a purported breach of a commercial contract, a disputed obligation to pay child support, or the state's permanent removal of a child from his or her family of origin, courts are called on to assess the need for a trial using the same test. That test enables courts to weigh evidence, evaluate credibility, draw inferences and order oral evidence to assist in determining whether there is a genuine issue requiring a trial.[9]

Test for a Summary Judgment Motion

Summary judgment is mandatory where there is no genuine issue requiring a trial. In *Hryniak*, the Court set out a two-step approach for deciding whether a genuine issue requiring trial exists under a summary judgment motion, and when to exercise the expanded powers afforded to the courts under the Rules of Civil Procedure.

1. The motions judge should take a liberal approach only on the evidence before her, without using the new fact-finding powers. If the summary judgment process provides the motions judge with the evidence required to fairly and justly determine the issue and is a timely, affordable and proportionate procedure, it will be held that there is no genuine issue requiring a trial; and
2. If there appears to be a genuine issue requiring a trial, the motions judge is entitled, at her discretion, to weigh evidence, evaluate credibility and draw reasonable inferences, to determine if the need for a trial can be avoided by using these new tools to come to a fair and just result.[10]

The enhanced fact-finding powers granted to motion judges may be employed on a motion for summary judgment unless it is in the interests of justice for them to be exercised only at trial. To determine whether the interests of justice permit the use of the expanded fact-finding powers, a court should ask itself: "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?".[11]

On a summary judgment motion, the evidence need not be equivalent to that at trial but must be such that the judge is confident that he or she can fairly resolve the dispute.[12]

Judges hearing summary judgment motions must compare the advantages of proceeding by way of summary judgment motion against proceeding by way of trial. This includes an examination of the relative cost and speed of each medium, the evidence to be presented, and the opportunity to properly examine that evidence. This inquiry must consider the consequences of the motion in the context of the litigation as a whole. Further,

6 R.R.O. 1990, Reg. 194.
7 See, for example, *Starr v. Gordon*, [2010] O.J. No. 3223, 2010 ONSC 4167 (Rule 20 amendments should not be applied in family law proceedings) and *Steine v. Steine*, [2010] O.J. No. 3331, 2010 ONSC 4289 (judges may rely on the new tools available under Rule 20).
8 See O. Reg. 16/15.
9 Rules of Civil Procedure, rr. 16(6.1) and (6.2); the equivalent in the Rules of Civil Procedure is r. 20.04(2.1); *Hryniak*, *supra*, note 2, at para. 44.
10 *Hryniak*, *ibid.*, at para. 66.
11 *Hryniak*, *ibid*., at paras. 52-53.
12 *Hryniak*, *ibid*., at paras. 56-58.

the court must give a "good hard look" at the full evidentiary record that is before it. The court may even find that "there are triable issues on matters not raised by the parties".[13]

In the family law context, summary judgment must be contemplated in the context of the primary objective of the Rules themselves, which is to enable the courts to deal with cases justly, which includes ensuring that the procedure is fair to all parties, saving time and expense, dealing with the case in ways that are appropriate to its importance and complexity, and giving appropriate court resources to the case while taking account of the need to give resources to other cases. Courts are obliged to promote the primary objective wherever possible.[14]

Fair Process and Section 7

Throughout the test on a summary judgment motion, the court is asked to assess whether the dispute can be fairly determined without a trial. It includes a balancing of expediency and process, preferring a motion where a trial is not required to ensure a "fair and just" result. In the child protection context, there can be no fair and just result if a parent's s. 7 Charter rights are infringed.

Moreover, the respondent parents in child protection litigation are not the only participants whose s. 7 rights deserve protection. Children are at the centre of these cases. They are our most vulnerable citizens, and they deserve full participation and fair procedure in any litigation affecting their long-term family bonds and personal identities.

The Supreme Court recognizes that removal of a child from parental custody constitutes a serious interference with the psychological integrity of the parent:

> I have little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 83, "an individual interest of fundamental importance in our society." Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.[15]

Given these serious consequences, Chief Justice Lamer, added that "[t]he state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination".[16]

Lessons from Motherisk Commission Report

We know that we have failed families in the past, and that we should not be complacent in assuming that the s. 7 rights of parents and children will be properly safeguarded in child

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13 *Isaac Estate v. Matuszynska*, [2016] O.J. No. 4886, 2016 ONSC 3617 at para. 31.

14 Rules 2(2)-(4). See *Serafini v. Serafini*, [2015] O.J. No. 2723, 2015 ONSC 3391 at para. 11.

15 *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 at paras. 60-61 ["*New Brunswick*"]. See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, 2000 SCC 44 at para. 86, and *R. v. Charles*, [2008] S.J. No. 351, 2008 SKQB 206 at para. 7.

16 *New Brunswick*, *ibid.*, at para. 70.

protection litigation. Most recently in Ontario, the report of the Motherisk Commission serves as a tragic example of the consequences of this failure. The Commission identified systemic failures of the legal system to ensure that families have proper procedural protections when litigating against the Children's Aid Society and described the manner in which such failures resulted in miscarriages of justice.

Counsel and judges called upon to assess the adequacy of the summary judgment process in child protection cases should keep the following lessons from the Motherisk experience in mind:

Lesson 1: Charter challenges are rare

The Motherisk Commission found that "the Charter is rarely invoked in child protection cases".[17] Counsel are reluctant to bring Charter challenges because of the pressure to avoid any added delay in permanency planning for children, and "fear that the court may view them as focussing on the rights of the parents as opposed to the safety of the children".[18] Counsel are often funded by Legal Aid, without resources to pursue Charter challenges. In contrast with the criminal context, where evidence obtained in breach of Charter rights can be excluded, or proceedings can be stayed, appropriate remedies in child protection cases are less clear, given the importance of ensuring that children are safe.[19] Requiring a trial of a case instead of a motion, however, is a clear way to safeguard if not strengthen Charter rights without comprising children's safety.

Lesson 2: Disparity in litigation resources

The Motherisk Commission commented on the significant disparity in resources between publicly funded children's aid societies and parents living in poverty, funding their litigation on legal aid certificates. Limited funding is available for counsel defending summary judgment motions or seeking to dispute expert opinions, let alone pursuing Charter challenges. The Motherisk Commission found few cases in which parents obtained their own testing to refute Motherisk results.[20] Parents likely could not afford additional testing, nor formal interpretation of hair test results. Similar financial restraints make it prohibitive for lawyers to cross-examine experts out of court. This resource disparity is extremely significant on a summary judgment motion, where it is not sufficient for parents to "baldly deny" the allegations against them. Moreover, representing vulnerable clientele often requires lawyers to spend time on non-legal support, or requires more time reviewing documents and ensuring that clients understand the process and the case to be met.[21]

Lesson 3: Vulnerable population

The Motherisk Commission describes families affected by hair strand testing as poor, and often affected by physical or mental health issues.[22] Child protection disproportionately affects women, who are very often the primary caregivers of children. The "vast majority" of individuals tested were mothers,[23] which is to be expected given that child protection litigation is often centered on the relationship between a

17 The Honourable Judith C. Beaman, *Harmful Impacts: The Reliance on Hair Testing in Child Protection*, Report of the Motherisk Commission (Toronto, 26 February 2018), online: <https://motheriskcommission.ca/en/> at 38.

18 *Ibid.*, at 38.

19 For some of the ways the Charter intersects with child protection proceedings, see D.A. Rollie Thompson, "The Cheshire Cat, or Just his Smile? Evidence Law in Child Protection" (2003) 21 Can. Fam. L.Q. 319.

20 Beaman, *supra*, note 17, at 61.

21 *Ibid.*, at 114.

22 *Ibid.*, at 55.

23 *Ibid.*, at 45.

mother and her child. The Motherisk Commission Report also discusses the unique experiences of racialized and indigenous families in the child protection system. A disproportionately large number (14.9 per cent) of the cases reviewed by the Motherisk Commission involved indigenous families.[24] The *Child, Youth and Family Services Act, 2017*, now requires that the system address systemic racism and honour the unique experience of First Nations, Inuit, and Metis families in the child welfare system.[25]

The Commission found that bodily samples were routinely taken from vulnerable individuals without informed consent. In fact, they did not find "a single reference in which a CAS worker either advised parents that they did not have to provide a hair sample or told them that they had the right to seek legal advice before being tested".[26]

There is an enormous imbalance of power between children's aid societies and parents.[27] The Society is a well-funded state agency that is empowered to enter our homes and remove our children from our care. In my own practice, I have found that even parents who are relatively wealthy or educated believe that they must follow the direction of a children's aid worker without question, even when there is no application before the court. This imbalance of power is only made worse by the added vulnerabilities of the parents who are often involved in this system.[28]

As counsel, we can take steps to ensure that the litigation system corrects this imbalance rather than entrenching it.

Lesson 4: Credibility biases and improper weighing of the evidence

The Motherisk experience should make us very reluctant to encourage courts to assess credibility in child protection matters without the benefit of cross-examination. Credibility issues were central to the procedural failures caused by overreliance on Motherisk hair strand testing. When pitted against Society workers or scientific "experts" parents' evidence was not believed. We should be especially cautions about assessing credibility under a legislative framework that requires us to address systemic racism, given the risk that negative biases against racialized people may influence such assessments.

As stated by the Commission, "parents and others who disputed their test results were simply not believed… With the influence of the assurances of Laboratory staff and the stature of the Laboratory through its location in a world-renowned hospital, the court and CASs gave little credence to caregivers' assertions that test results were incorrect".[29] Parents who did not accept the test results were seen by Societies and courts as "lacking in credibility" or lacking "the judgment and personal insight necessary for good parenting".[30]

These hair strand tests were also given disproportionate weight by Societies and the courts, which should cause us to be very careful in applying the expanded power to weigh evidence on a summary judgment motion. The

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24 *Ibid.*, at 55.

25 *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Schedule 1, preamble.

26 Beaman, *supra*, note 17, at 61.

27 *Ibid.*, at 121.

28 In their recent submissions to the Family Law Rules Committee, the Ontario Association of Child Protection Lawyers thoughtfully described the practical ways that such vulnerabilities affect parents' ability to meaningfully participate in litigation. [Submissions of Ontario Association of Child Protection Lawyers re Amendments to the Family Law Rules that apply in child protection proceedings, April 3, 2018].

29 Beaman, *supra*, note 17, at 62.

30 *Ibid.*

Motherisk Commission Report gave the following example:

> For example, in one case, the society's materials described a parent as having excellent parenting skills and reported that she consistently attended for access. Notwithstanding this encouraging evidence, when a positive Motherisk test appeared to show low levels of cocaine and marijuana, the court made the child a Crown ward, without access, after a summary judgment hearing.[31]

Reconciling Summary Judgment and Fair Process

How do we reconcile permanently removing a person's child from her care without giving her a right to cross-examination? The expansion of summary judgment in the civil context has permeated child protection litigation, resulting in a system in which the same parent may have a right to trial when charged with theft, but does not have that right when defending her relationship with her children.

A trial not only offers the best tools at our disposal for properly testing evidence and revealing an accurate understanding of a child's experience, it also allows parents to be heard. A trial, unlike a motion, gives parents a literal voice in the process. This is especially significant where a parent lacks English language skills, literacy skills, or cognitive or other capacity to navigate a process based solely on written words. A document-heavy process also favours the Society as the more powerful and better funded institutional litigant. Societies can and do produce voluminous affidavit evidence in support of summary judgment motions, which are difficult for many parents to read and understand, let alone properly review and refute with the funding available through Legal Aid. Cross-examination, while imperfect, is also our method for properly testing credibility, and we should be extremely cautious of assessing credibility without cross-examination of Society workers in a system that has been observed to unfairly discredit parents in favour of institutional litigants and flawed "science".

The Motherisk Commission made specific recommendations about summary judgment motions because of the problems they observed. Specifically, the Commission "saw a troubling tendency for the court to make orders on these motions based on evidence that would not be admissible at trial".[32] The report further notes that although the amendments to the Family Law Rules make it possible to hear oral evidence and conduct cross-examination within the summary judgment process, such cross-examination is not available as of right.[33]

Courts are applying the summary judgment test with full knowledge of the miscarriages of justice that have been revealed by the Motherisk Commission and by the 2008 Report of the Inquiry into Pediatric Forensic Pathology in Ontario, led by Commissioner Stephen Goudge,[34] which came before it. Some, such as the Ontario Association of Child Protection Lawyers, have understandably advocated for a right to a trial in cases where the Society seeks to place a child in extended society care.[35] The Motherisk Commission did not go that far, but did make the following recommendations to the Family Rules

[31] *Ibid.*, at 63.

[32] *Ibid.*, at 112.

[33] *Ibid.*

[34] See The Honourable Stephen T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Toronto: Ministry of the Attorney General, 2008).

[35] Submissions of Ontario Association of Child Protection Lawyers re Amendments to the Family Law Rules that apply in child protection proceedings, April 3, 2018.

Committee regarding amendments to the Family Law Rules:[36]

a) permit only evidence that would be admissible at trial, and in particular, to prohibit hearsay evidence that does not meet the common law tests for admissibility;
b) require all expert evidence tendered at a summary judgment motion to comply with the Rule regarding experts and expert reports (as amended by these Recommendations);
c) require the court to conduct a *voir dire* before admitting any expert evidence; and
d) permit deviation from these requirements only where the parent expressly acknowledges to the court that the findings of the expert are correct, and the court is satisfied that the parent adequately understands the expert opinion and the consequences of such an acknowledgement.

We can expect that summary judgment is probably here to stay in child protection. All of us, including Society counsel, should be mindful of how we might ensure that summary judgment is a truly fair and balanced process, and one that protects the Charter rights of the families involved.

Tools for Fair(er) Process in Summary Judgment

In the following section we have provided examples of common procedural issues on summary judgment motions that highlight tools at our disposal to advocate for more procedural fairness for families litigating against children's aid societies and thereby correct, to some extent, the imbalance of power that favours Societies.

[36] Beaman, *supra*, note 17, at 113.

Proceed with caution

Courts have fairly wide discretion as to whether or not to use the expanded powers available under the new summary judgment framework. If it is clear that there is no genuine issue for trial without resorting to the expanded powers, then the court must make a final order. However, even at the first stage of that analysis, proportionality forms part of the test. Where the stakes are as high as those in many child protection cases, proportionality arguments will often favour more thorough litigation processes. At the second stage, courts have discretion as to whether to weigh evidence, evaluate credibility, or draw inferences, and there is existing jurisprudence that is helpful in arguing that such discretion should be declined in favour of a trial for cases involving permanent removal without access.

Courts are aware that although summary judgments are permitted under Rule 16 (except in divorce claims), courts should use such motions with caution. Justice Rosenberg of the Court of the Appeal stated the matter eloquently

> ... I am mindful of the huge caseload facing the trial courts of this province in respect of child protection matters. Thus, nothing said here should be taken as an attempt to limit the courts' attempts to expedite these difficult cases in appropriate circumstances. However, I adopt the comments of Himel J. in *F.B. v. S.G.*, *supra*. In that case, Justice Himel outlined the history of the use of summary judgment in child protection motions culminating in the enactment of Rule 16 of the *Family Court Rules*. I agree with her that this jurisdiction must be exercised with caution. As Himel J. wrote at para. 23, "Considering the jurisprudence both before and since the enactment of Rule 16, it is clear that it remains appropriate that summary judgment jurisdiction be exercised cautiously since that is consistent with the principles of justice and the best interests of children." Further, Himel J. wrote at para. 40: "Effective parental participation at the child protection hearing is essential to determine the best interests of the child in circumstances

> where the parent seeks to maintain custody of the child".[37]

One of the things the Court of Appeal wanted to see was some certainty that parents would be able to participate meaningfully in the process. Here, the appeal centered on procedural complaints about the judge and the legal counsel they received, both regarding a written agreement between the parents and the Society. The motion judge had framed the issue in terms of whether the agreement that the parents would be bound by the recommendations of a parenting assessment was enforceable. The Court of Appeal held that the main issue was whether the application for Crown wardship without access raised any triable issues. The trial judge deprived the parents "of their right to effective to effective participation".[38] Unrepresented clients require an even greater degree of caution.[39] Courts, meanwhile, have a duty to self-represented litigants to make sure they have every opportunity to advance their case and get their evidence into the record.[40]

Counsel should consider whether parents have the ability to meaningfully participate in the process in an individualized and contextual way, given that we know parents involved in the child protection system often face systemic barriers to such participation.

More recently, in *Children's Aid Society of Hamilton v. J.M. and C.W.*, the court commented on the use of summary judgment motions in child protection proceedings:

> The case-law decided prior to *Hryniak* held that summary judgment in the Family Law and Child Protection contexts was no longer an extraordinary remedy limited to only the "clearest of cases." … The amendments to Rule 16 and the *Hryniak* decision reinforce this point. The traditional trial is no longer the default procedure in Family Law and Child Protection proceedings. The summary judgment route has been transformed from a means of weeding out clearly unmeritorious claims and defences to a significant and legitimate alternative model of adjudication.
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> Notwithstanding the foregoing comments, the importance of the issues to be decided in a case is one of the major factors to be considered in carrying out the proportionality analysis and deciding on the adjudication process and procedures that are appropriate to the case in question. … [W]hen the relief requested has a highly intrusive impact on the parent-child relationship, it is appropriate for the court dealing with a summary judgment motion to proceed with caution (*B. (F.) v. G. (S.)*, [2001] O.J. No. 1586 (Ont. S.C.J.); *Children's Aid Society of Halton (Region) v. A. (K.L.)*; *Children's Aid Society of Toronto v. P. (C.)*).[41]

Test admissibility and conclusions of expert reports

The Motherisk Commission heard from judges that processes relying on affidavit evidence, including summary judgment motions, "creates the potential to admit untested evidence too easily".[42] There are rules of evidence governing the admissibility of expert evidence, and at trial such admissibility is tested in a *voir dire*.[43] The Commission recommends that the Family Law Rules require a *voir dire* before admitting an expert report. Counsel should avoid allowing any expert evidence to be submitted on consent by Societies and should take steps to ensure that such evidence would be admissible at trial.

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37 *Children's Aid Society of Halton Region v. K.L.A.*, [2006] O.J. No. 3958 at para. 25, 2006 CanLII 33538.

38 *Ibid.*, at para. 26.

39 *Children's Aid Society of Toronto v. P.M.*, [2002] O.J. No. 2321 (C.J.).

40 *Ibid*., at para. 8.

41 *Children's Aid Society of Hamilton v. J.M. and C.W.*, [2017] O.J. No. 5126, 2017 ONSC 5869 at paras. 69-70.

42 Beaman, *supra*, note 17, at 102.

43 See D.A. Rollie Thompson, "The Ten Evidence 'Rules' That Every Family Law Lawyer Needs to Know" (2016) 35 Can. Fam. L.Q. 285 at 287-92.

For example, in *Durham Children's Aid Society v. L.(J.)*,[44] the court found that the parents minimized or avoided accepting any blame for their shortcomings or failures, and the mother downplayed her mental health problems. There was also evidence that the parents did not follow through on (or perhaps understand) the help they were offered regarding feeding. The court granted summary judgment on the issue of a continuing need for protection. As to disposition, however, the court found that there was a genuine issue for trial, particularly in light of "the importance and finality of a Crown Wardship order".[45] As Justice Timms noted, there was a "very real connection between the determination of disputed facts and the outcome of the trial", particularly with respect to the Parenting Capacity Assessment report, which was at odds with a letter from the mother's psychiatrist. The opinions of the expert in that report were "fundamental to the Society's position" and therefore merit careful examination by the court.[46]

In *Children's Aid Society of Ottawa of Ottawa v. S. (S.)*,[47] a parenting capacity assessment was also at issue. Largely as a result of the abusive relationship the mother had with the father, the 28-month-old child was found to be at risk of physical and emotional harm. At the time of the trial, the child was placed with the paternal uncle, who had adopted the father's three older children after they were made Crown wards. Summary judgment was granted regarding the on-going need of protection. Besides other general concerns about the mother's parenting abilities, the pattern of breakup and reconciliation and the mother's admission that she and the father were trying to reconcile put the child at risk of physical and emotional harm. Justice Shelston held, however, that disposition remained a genuine issue for trial. There was evidence that the mother was making efforts to remedy the shortcomings the Society had identified and was attending counselling and parenting courses. She was willing to consent to a supervision order. Significantly, she had also raised issues with respect to the parenting capacity assessment, arguing it was improper for the assessor to draw "conclusions where the psychometric tests result indicates unscorable responses and underreporting on the validity of the protocol" and a lack of corroboration between "his direct observations" and the personality conclusions included in the report.[48] Finally, the fact that the trial was scheduled to occur within a month's time allowed the court to dispense with the concern that the child had been in care past the allowable time limits.

Introduce oral evidence or require focused hearings

Where a court may not be prepared to dismiss a motion for summary judgment in its entirety in favour of ordering a trial, counsel should emphasize the court's discretion to allow oral evidence and cross-examination within the summary judgment motion, and the availability of focused or streamlined hearings on more limited issues under Rule 1 of the Family Law Rules. Courts have used these tools in order to strengthen procedural fairness in deciding child protection cases. Even where a finding in need of protection may be a foregone conclusion, for example, a trial may be required on the issues of disposition, or access.

44 [2017] O.J. No. 330, 2016 ONSC 7947.
45 *Ibid*., at para. 50.
46 *Ibid*., at para. 47.
47 [2016] O.J. No. 1353, 2016 ONSC 1747.
48 *Ibid*., at paras. 60-61.

In *Children's Aid Society of Toronto v. G. (A.)*,[49] summary judgment was granted for Crown wardship of three children, but further evidence was required on the issue of access. Justice Zisman noted that, according to the doctrine in *Hryniak*, when there are concerns about credibility or evidence stands in need of clarification, oral evidence may need to be called on the motion itself. Subrules 16(6.1) and (6.2) of the Rules grant these expanded fact-finding powers. In line with the stress on proportionality found in *Hryniak*, Justice Zisman noted that these expanded powers may result in the conclusion that a trial is still required; thus, relying on subrules 2 and 1(7.2), Justice Zisman determined that a focused trial with tight limits on evidence and the time for cross-examination, was the "most appropriate process to fairly, justly and expediently determine if the mother should be granted access to the children.[50]

In *Children's Aid Society of Toronto v. L.S.*,[51] the court ordered a mini trial where there was a motion for Crown wardship without access for a two-year-old child. The mother had seemingly made great strides from her earlier lifestyle, which had been unstable and involved a long history of drug addition. Since February 2015, she had begun treatment, terminated an abusive relationship, and found stable housing. Her access visits with her child had gone well and demonstrated "more than adequate parenting" to her child.[52] Justice Jones found herself unable to conclude that there was no genuine issue requiring a trial or that the Society's application was certain to succeed and felt that she needed to learn how the mother had been doing in the two months between the motion and the release of her reasons. The updated situation of the mother, in short, was a material fact that would affect the disposition.[53] In keeping with the principles of proportionality, timeliness, and affordability, Justice Jones determined that a mini trial (as circumscribed by *Hryniak*) would allow the court to hear from the mother and other witnesses and determine whether a full trial would be necessary.[54]

In *Children's Aid Society of Ottawa v. C.I.*,[55] Justice Mackinnon determined the issue of Crown wardship for two children (aged 13 and 20 months) in a process ordered on consent by Justice Shelston two months earlier. There was a timetable for affidavits; the Society was required to deliver its case by affidavit evidence; the mother also delivered affidavit evidence but had to provide oral testimony as well; and the expert who authored the Family Court Clinic Assessment was required to provide oral testimony and be subject to cross-examination.[56] Justice Mackinnon determined that there was no genuine issue for trial regarding a protection finding or a disposition of Crown wardship: the older child was at risk of emotional harm and the younger child was at risk of physical harm. The mother, who had a diagnosis of "PTSD with some element of psychotic features" from each of her previous psychiatrists,[57] lacked insight into her problems, exhibited a pattern of not adhering to a treatment plan, and was unco-operative with the Society. On the matter of access, the mother

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49 [2015] O.J. No. 3142, 2015 ONCJ 331, rev'd in part, [2015] O.J. No. 5633, 2015 ONSC 6638.

50 *Ibid.*, at para. 146. On appeal (2015 ONSC 6638), Justice Horkins upheld the description of the two-step test for access, but reversed on the disposition, holding that there should be no order for access.

51 [2015] O.J. No. 5017, 2015 ONCJ 527.

52 *Ibid*., at para. 66.

53 *Ibid*., at paras. 71-74.

54 *Ibid*., at para. 75.

55 [2016] O.J. No. 4120, 2016 ONSC 4792.

56 *Ibid*., at para. 2.

57 *Ibid*., at para. 10.

was granted none with the younger child, but supervised access with the older one.

Apply the rules of evidence, and limit hearsay

The rules of evidence apply on motions for summary judgment, and we should be vigilant in raising objections when Societies attempt to introduce hearsay or other inadmissible evidence in affidavit evidence.

In *Children's Aid Society of Ottawa v. B. (J.)*,[58] Justice Mackinnon dismissed an application for summary judgment and required a trial where the Society sought to admit hearsay evidence through affidavits. The Society was seeking an order for Crown Wardship, without access. Although *Hryniak* allows that the evidence on a summary judgment motion "need not be equivalent to that of a trial", the starting point in addressing the admissibility of hearsay evidence is that it is excluded unless it satisfies the tests of necessity and reliability.[59] Justice Mackinnon emphatically denied that *Hryniak* stood for the principle that "the rules of evidence were no longer applicable to motions for summary judgment".[60] Here, Justice Mackinnon reminds us that the mother would be denied the ability to cross-examine the numerous hearsay statements, which included out of court statements from educators, a therapist, doctors, health services administrators, police, the maternal grandmother, and the foster mother, as well as various letters and reports,[61] since they were not sworn or affirmed to be true.[62] Although it was not necessary for the disposition of the case, Justice Mackinnon went on to discuss how many of these would-be pieces of evidence exemplify typical hearsay dangers.[63] It makes for salutary reading. In the end, Justice Mackinnon concluded that although the "child protection worker's affidavit did contain first-hand knowledge" and the Society did tender other proper affidavit evidence,

> That said, I am not confident that I can fairly resolve this dispute on the record before me. The Society did not attempt to show me that its motion could or should succeed were I to exclude the inadmissible hearsay. Were I to endeavor to weed out all of the inadmissible hearsay and to consider the remaining portion of the record, I would be considering a substantially different case than the one argued before me in court during the oral hearing.
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> In my view, proceeding in that fashion would not be in the interests of justice. The motion that was presented was replete with hearsay with no attempt made to demonstrate the necessity of admitting it. Accordingly, the motion for summary judgment is dismissed.[64]

In *Catholic Children's Aid Society of Toronto v. C.G.*,[65] Justice Sherr was rightly critical of the Society for attempting to introduce extensive hearsay evidence in a summary judgment motion against a self-represented mother. The hearsay included double and triple hearsay, hearsay statements from medical professionals that should have been introduced by way of medical reports or business records, and hearsay statements of the children that were deposed without any corresponding evidence that such hearsay was either necessary or reliable. Justice Sherr cited not only the Motherisk Commission for its recommendation to amend the Family Law Rules to require that evidence on a summary judgment motion should only be permitted where it would otherwise be admissible at trial, but also *Gray v. Gray*,[66] in which Justice Fryer adopted the *Statement of Principles on Self-represented*

58 [2016] O.J. No. 2532, 2016 ONSC 2757.
59 *Ibid*., at paras. 6 and 13.
60 *Ibid*., at para. 7.
61 *Ibid*., at paras. 23-28.
62 *Ibid*., at para. 30.
63 *Ibid*., at paras. 31-45.
64 *Ibid*., at paras. 47-48.
65 [2018] O.J. No. 1612, 2018 ONCJ 193 ["*CCAST v. C.G.*"].
66 [2017] O.J. No. 4413, 2017 ONSC 5028.

Litigants and Accused Persons (2006).[67] Like Justice Mackinnon in *Children's Aid Society of Ottawa v. B. (J.)*, Justice Sherr held that the "inadmissible evidence was so pervasive and intertwined with the admissible evidence that the court was not confident that the summary judgment process was just".[68]

While the extent to which the Society's evidence was inadmissible in the above decision may seem extreme, hearsay evidence is frequently included in affidavits for summary judgment and should be routinely identified and disputed.

Both of the above two cases cite Justice Sherr's earlier decision where he stated in *Children's Aid Society of Toronto v. B. (B.)*:[69]

> My view is that the court should not give weight to evidence on a summary judgment motion that would be inadmissible at trial. I see no justification for a lower evidentiary standard for these motions. The consequences of the orders sought at summary judgment motions on families in child protection cases are profound. These important decisions should not be made on flawed evidence. The summary judgment procedure is designed to winnow out cases that have no chance of success. It is not an invitation to water down the rules of evidence in order to make that determination.

R. v. Jordan and the need for a timely trial where a trial is warranted

The summary judgment test inherently balances expediency with process. In the context of child protection, statutory timelines and the desire to ensure permanency for children and avoid litigation drift also favour expedient and streamlined processes, but where parents' and children's Charter rights must be protected, process cannot be overlooked. If a matter requires a trial, we cannot rely on the availability of summary judgment motions to solve a problem of access to justice, or of under-funded courts.

The right to be tried within a reasonable time under s. 11 of the Charter specifically applies in the penal context. Still, family law cases — in which children's lives hang in the balance — should also be heard within a reasonable time. The Supreme Court has reminded "legislators and ministers that unreasonable delay in bringing accused persons to trial is not merely contrary to the public interest: it is constitutionally impermissible".[70]

The maxim, "Justice delayed is justice denied" also applies in child protection law. Parents and children suffer profound psychological harms through institutional shortcomings in the family justice system. As the Supreme Court of Canada stated: "Canadians … rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner. Fairness and timeliness are sometimes thought to be in mutual tension, but this is not so".[71]

Given the imperative for timely decision-making in child protection matters, courts have held that summary judgment can and should be used to expedite permanency for children. As stated by Justice Pazaratz:

> Summary judgment is a tool to control a child's drift in litigation and allow for a permanent home for the child within a time-frame that is sensitive to the child's needs. The legal process should not be used to "buy" a parent time to develop the ability to parent. (*Children's Aid Society of Toronto v. H. (R.)*, 2000 CanLII 3158 (ON CJ), [2000] O.J. No. 5853 (O.C.J.), paragraph 15)). In child protection proceedings, there is an overriding statutory imperative to

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67 *Ibid*., at para. 31. These principles were established by the Canadian Judicial Council and endorsed by the Supreme Court of Canada in *Pintea v. Johns*, [2017] S.C.J. No. 23, 2017 SCC 23 at para. 4.

68 *CCAST v. C.G.*, *supra*, note 65, at para. 27.

69 [2012] O.J. No. 4855, 2012 ONCJ 646.

70 *R. v. Jordan*, [2016] S.C.J. No. 27, 2016 SCC 27 at para. 117 ["*Jordan*"].

71 *Jordan*, *ibid.*, at para. 27.

> ensure that the commencement of permanency planning for children is done in a timely fashion (*Children's Aid Society of Ottawa v. C. (S.)*, 2003 CarswellOnt 9373 (S.C.J.).[72]

Children should not wait for parents to rehabilitate themselves where it is not in their best interests to wait, or where such rehabilitation is clearly not a realistic possibility. However, as unfortunate and unfair as it is for children to wait, it is also unfair to deny them a process that allows their parents to fully and forcefully seek to maintain the parent-child relationship.

Courts have adopted this reasoning in child protection cases, signalling to the legislature that children deserve timely trials. In *Children's Aid Society of Ottawa v. H. (B.)*, Justice Phillips cited *Jordan* and concluded his decision to make the child a Crown Ward with the following comment,

> … it is worth considering that while not a constitutional imperative, a trial without delay is an important feature of a child protection application since passage of time has a real and meaningful negative impact on a child caught up in this context. The same attention and energy now being directed toward lowering time to trial in the criminal sphere should also be turned to this sort of case.[73]

The Supreme Court of Canada has also recently cited *Jordan* in finding that Hague Convention cases cannot tolerate judicial delay and should be expedited.[74]

It may only be a matter of time before we have the child protection equivalent of *Jordan* and with it clear demands that the justice system make timely trials available to parents responding to child protection applications. In the meantime, we should be requesting expedited trials and focused hearings with the availability of cross-examination, where summary judgment is not sufficient for the meaningful participation of parents and children. We should be insisting that children's aid societies wield their extraordinary power in a manner that upholds families' Charter rights, including ensuring that affidavit evidence is fair, balanced, and in compliance with the rules of evidence. In all cases, where we cannot be confident that the summary judgment process is fair to parents, we should require a trial.

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72 *Children's Aid Society of Hamilton v. M. (A.)*, [2012] O.J. No. 5700, 2012 ONSC 6828 at para. 37.

73 *Children's Aid Society of Ottawa v. H. (B.)*, [2017] O.J. No. 1435, 2017 ONSC 1335 at para. 74.

74 *Office of the Children's Lawyer v. Balev*, [2018] S.C.J. No. 16, 2018 SCC 16 at para. 82.