W A R N I N G

This is a case under the *Child, Youth and Family Services Act, 2017* and subject to subsections 87(8) and 87(9) of this legislation. These subsections and subsection 142(3) of the *Child, Youth and Services Act, 2017*, which deals with the consequences of failure to comply, read as follows:

87(8) *Prohibition re identifying child* — No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

(9) *Prohibition re identifying person charged* — The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.

142(3) *Offences re publication* — A person who contravenes subsection 87(8) or 134(11) (publication of identifying information) or an order prohibiting publication made under clause 87(7)(*c*) or subsection 87(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than three years, or to both.

COURT OF APPEAL FOR ONTARIO

CITATION: Kawartha-Haliburton Children's Aid Society v. M.W., 2019 ONCA 316
DATE: 20190418
DOCKET: C65838

Lauwers, Benotto and Brown JJ.A.

BETWEEN

Kawartha-Haliburton Children's Aid Society

Applicant
(Respondent)

and

M.W., Curve Lake First Nation and Office of the Children's Lawyer

Respondents
(Appellant / Respondents)

Christopher Spear, for the appellant

M. Pilch, for the respondent Kawartha-Haliburton Children's Aid Society

Stephanie Giannandrea and Scott Byers, for the respondent Curve Lake First Nation

Ian Ross, for the respondent Office of the Children's Lawyer

Caitlyn Kasper and Emily Hill, for the intervener Aboriginal Legal Services

Tammy Law and David Miller, for the intervener Ontario Association of Child Protection Lawyers

Kate Kehoe, for the intervener National Self-Represented Litigants Project

Maggie Wente and Leanna Farr, for the intervener Anishinabek Nation

Heard: March 26, 2019

On appeal from the judgment of the Divisional Court (Justices Katherine E. Swinton, David A. Broad and Frederick L. Myers), dated May 7, 2018, with reasons reported at 2018 ONSC 2783, affirming the order of Justice Allan R. Rowsell of the Superior Court of Justice, dated October 13, 2017.

Benotto J.A.:

[1] This appeal arises from a mother's request for access to three of her children in extended care. The appropriateness of the extended care order was not and is not disputed. The appeal raises important issues about major changes to the child protection legislation made in 2018: the transition provisions of the new legislation, the new test for access to children in extended care, the special considerations for Indigenous children, and the proper approach to summary judgment in child protection matters.

[2] The children are three of six siblings apprehended in 2015 by the respondent, Kawartha-Haliburton Children's Aid Society (the "Society"), pursuant to the *Child and Family Services Act*, R.S.O. 1990, c. C.11 ("CFSA").[1] At the time, they ranged in age from one to nine years.

[3] Their mother, M.W. (the "mother" or "appellant") consented to a summary judgment motion seeking Crown wardship, but sought access. The motion judge made the children Crown wards and denied the mother access to them.

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[1] A seventh sibling had been living with her paternal grandparents at this time and thus had not been apprehended.

[4] The mother appealed to the Divisional Court. By this time, the CFSA was about to be replaced with the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 ("CYFSA"). The new Act was significant in at least two respects: it expanded the test for access to children in extended care; and it emphasized the special considerations applicable to children of Indigenous heritage.

[5] The transitional provisions of the CYFSA required that, at the date it came into force, all cases not "concluded" would be considered under the new Act, not the old. The mother's appeal was heard by the Divisional Court one week before the CYFSA was proclaimed. The Divisional Court reserved its decision, and then released it one week after the CYFSA came into effect. The Divisional Court determined that the motion judge had erred but went on to make its own finding about access by applying the old Act. The mother appeals.

[6] As I will explain, the Divisional Court erred by applying the CFSA. Consequently, the wrong framework for access was considered and the court arrived at a determination that was not available on the evidence. It did not apply the expanded provisions with respect to access generally; erred in failing to apply the special considerations for Indigenous children; and misstated the approach to summary judgment in child protection matters.

[7] For the reasons provided below, I would allow the appeal, set aside the motion judge's order and remit the matter to the Superior Court on an expedited basis for a determination of the mother's request for access under the provisions of the CYFSA.

FACTS AND DECISIONS BELOW

[8] The Society became involved with the mother's family in 2007, shortly after her oldest child "X" was born.[2] The Society has been involved ever since.

[9] The appellant had six more children: "C" born 2007, "G" born 2009, "A" born 2010, "L" born 2011, and twins "I" and "E" born 2014.

[10] There were ongoing protection concerns involving violence in the home, health issues and neglect. The children, except for L, were apprehended in 2015.[3] L is in the custody of her paternal grandparents.

[11] I need not articulate the myriad of difficulties experienced by the children. The appellant does not contest that they were all in need of protection.

[12] The children are First Nations as defined in Regulation 155/18 of the CYFSA. They and their family members identify as First Nation and with the Curve Lake First Nation.

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[2] The factual outline in both courts below is wrong. When the Society became involved in 2007, the other children had not yet been born.

[3] The s.54 assessment relied on by the Society has several identifiable factual errors including the date of apprehension. It says that G and A were apprehended in 2008. Neither had been born at that time. It also says that X and C were apprehended in 2008, which is incorrect.

[13] In 2017 the Society brought a motion for summary judgment. The appellant agreed that there should be a declaration of Crown wardship. She did not agree to a no-access provision. The motion judge referred to r. 16 of the *Family Law Rules*, O. Reg. 114/99 (set out below) and *Hryniak v. Mauldin,* 2014 SCC 7, [2014] 1 S.C.R. 87 and stated as follows at para. 43:

> To succeed on a summary judgment motion, an applicant must prove there is no genuine issue requiring a trial on a balance of probabilities. "No genuine issue for trial" has been equated with "no chance of success" and "plain and obvious that the action cannot succeed".

[14] The motion judge then concluded that he could resolve the issues by way of summary judgment. He made all six children Crown wards without ordering that the mother have access to them. On the issue of access, he applied legislation then-in-force, which, at s. 59(2.1) provided:

> (2.1) A court shall not make or vary an access order made under section 58 with respect to a Crown ward unless the court is satisfied that,
>
> (a) the relationship between the person and the child is beneficial and meaningful to the child; and
>
> (b) the ordered access will not impair the child's future opportunities for adoption.

[15] The motion judge concluded, at para. 62:

> I do not find that the children's access to mother (*sic*) is meaningful and beneficial. I do find that access to each other is meaningful and beneficial.

[16] The Act then-in-force required that the motion judge determine whether the children had Indigenous heritage. Section 47(2) of the CFSA provided:

> (2) As soon as practicable, and in any event before determining whether a child is in need of protection, the court shall determine,
>
> (a) the child's name and age;
>
> (b) the religious faith, if any, in which the child is being raised;
>
> (c) whether the child is an Indian or a native person and, if so, the child's band or native community; and
>
> (d) where the child was brought to a place of safety before the hearing, the location of the place from which the child was removed. [Emphasis added.]

[17] The motion judge did not make the required finding under s. 47(2)(c).

[18] At the time the summary judgment motion was argued, the definitions of "Indian", "Native person" and "Native child" in the CFSA had been declared invalid on the basis that they infringed section 15(1) of the *Canadian Charter of Rights and Freedoms*. That declaration of invalidity was suspended to allow the Legislature to take corrective steps*: Catholic Children's Aid Society of Hamilton v. G.H., T.V. and Eastern Woodlands Metis of Nova Scotia*, 2016 ONSC 6287, 83 R.F.L. (7th) 299.

[19] After the motion judge's decision was released on October 13, 2017, the Legislature announced sweeping changes to child protection legislation. The new CYFSA, aimed in part at responding to the decision in *G.H*, was to take effect on

April 30, 2018. Transitional provisions stated that all cases not concluded would be covered by the new legislation.

[20] The mother appealed the motion judge's decision, seeking access to the three oldest children.[4] As noted, the Divisional Court's decision was released on May 7, 2018 – seven days after the CYFSA was proclaimed in force. The Divisional Court concluded that the motion judge erred first by applying the wrong legal test for summary judgment, and then by failing to provide reasons for his conclusion on access.

[21] With respect to the test for summary judgment the Divisional Court said, at paras. 45-47:

> At para. 43 of the decision below, the judge… considered whether it was "plain and obvious that the action cannot succeed" and whether there was "no realistic possibility of an outcome other than that as sought by the applicant." This led the parties before this court into a debate over which party has the burden to prove the likely trial outcome – the society, on which Rule 16 (4) places a burden to show that there is no genuine issue requiring a trial; or M.W. who bears the burden under s. 59 (2.1)(a) of the *CFSA* to prove that she and the children have beneficial and meaningful relationships.
>
> As a result, the judge never asked the key question of whether it was in the interest of justice for him to resolve the case summarily… does the process allow him to

[4] Originally she sought access to the four oldest children, but the OCL advised the Court of separate arrangements for A such that this appeal no longer pertains to A.

> fairly and justly adjudicate the dispute and is it a timely, affordable, and proportionate procedure?
>
> In asking the wrong question, the judge set out the wrong legal test for determining whether there is a serious issue requiring a trial. That is an error of law that is not subject to deference in this court as discussed above.

[22] The Divisional Court further determined that the motion judge did not set out the basis for his conclusion on access but decided that it could nonetheless fairly determine the question. It then applied s. 59(2.1) of the CFSA to conclude that the mother had not met her burden to establish that access was meaningful and beneficial to the children. The Divisional Court concluded at para. 69:

> On the record before the court, without utilizing any of the enhanced fact-finding powers available on summary judgment, it is apparent that [the mother] has not and cannot meet her burden to establish that she has a beneficial and meaningful relationship with any of the three eldest children that is significantly advantageous to him *(sic)*. Accordingly, she is not entitled to access to the children as Crown wards.

[23] Finally, with respect to compliance with s. 47(2) of the old Act and the children's Indigenous heritage, the Divisional Court, by way of a footnote to their biographical details, said:

> I do not accept that the changes to the *Indian Act* (Canada) or the proclamation of the [CYFSA] has (*sic*) any bearing on this issue.

ISSUES

[24] Having been granted leave to appeal to this court, the mother submits that the Divisional Court, in failing to apply the transitional provisions of the CYFSA, applied the wrong test to decide access. She also submits that the Divisional Court erred by changing the long-standing test for summary judgment in child protection matters.

[25] The mother's appeal is supported by the Office of the Children's Lawyer and the Curve Lake First Nation. Four additional parties were granted intervener status: Ontario Association of Child Protection Lawyers; Aboriginal Legal Services; National Self-Represented Litigants Project; and Anishinabek Nation c.o.b. as Union of Ontario Indians Inc. The interveners represent their respective constituents and submit that the Divisional Court erred in failing to apply the CYFSA.

[26] The Aboriginal Legal Services and Anishinabek Nation stressed the comprehensive definition of First Nations children in the new Act and the resulting direction to the court to provide special considerations with respect to Indigenous children. The considerations involve a recognition of the historical context and the ongoing harm suffered as a result and the over-representation of Indigenous children in care. There must be – it is submitted – a need for an

individualized plan that reflects Indigenous culture and values. These considerations must form part of the best interests analysis.

[27] The Ontario Association of Child Protection Lawyers and National Self-Represented Litigants Project submitted that the approach to summary judgment in child protection must be informed by the parties' *Charter* rights, must include effective parental participation and must be based only on evidence that would be admissible at trial.

[28] The respondent Society submits that the Divisional Court was correct in applying the CFSA provisions. In the alternative, it says that, even if the CYFSA should have been applied, the Divisional Court's analysis satisfies the CYFSA's requirements in assessing access.

ANALYSIS

[29] For the reasons set out below, I conclude as follows:

1. The transitional provisions of the CYFSA applied so that the test for access was pursuant to the new Act.
2. The record is insufficient to permit the court to apply the new test.
3. The failure to apply special consideration to these children's Indigenous heritage conflicts with the requirements of the new Act.
4. The Divisional Court misstated the principles of summary judgment in child protection matters.

[30] I will address each of these issues in turn and then articulate guidelines for summary judgment in child protection proceedings.

(1) Under the transitional regulation, the CYFSA applied

[31] The CYFSA was enacted to replace the CFSA. The new Act raised the age for protection and changed what was considered archaic and stigmatizing language. For example, “Crown ward” was replaced with “extended society care”. Most importantly for this case, the new Act changed the criteria for access to children in extended care by removing the presumption against access, making the child’s “best interests” predominant in determining access, and emphasizing the importance of preserving Indigenous children’s cultural identity and connection to community.

[32] A transitional regulation, O. Reg. 157/18, was enacted to provide guidance on transitional matters. That regulation provides at s. 11(1) that “A proceeding commenced under Part III of the old Act but not concluded before the day this section comes into force is continued as a proceeding commenced under Part V of the Act.”

[33] The Society submits that the transitional regulation does not apply here. Thus, it submits, the Divisional Court did not err by applying the old Act. It takes the position that “but not concluded” means that *the evidence* is not concluded.

Under this interpretation, if the evidence was concluded before April 30, 2018, the old Act applies.

[34] The Society relies on *Children's Aid Society of the Regional Municipality of Waterloo v. N.K.*, 2018 ONCJ 696. There, submissions were completed on April 13, 2018, prior to the new Act coming into effect on April 30, 2018, and the court rendered its decision on October 3, 2018 after the new Act came into effect. Oldham J. analyzed the transitional provisions as follows at paras. 14-16:

> [Section11(1)] does not provide a definition of 'concluded'. Therefore, it is not clear whether a matter is considered to be concluded if evidence and submissions are complete, but the decision is on reserve at the time that the *CYFSA* comes into force.
>
> Subsections 11(2) and (3) of the Regulations provide some context for interpretation. These subsections address the issue of parties in proceedings relating to a First Nations, Inuk or Métis child. The subsections specifically distinguish the treatment of a case where a proceeding is not concluded (subsection 11(2)) as contrasted with cases where the hearing is completed, but the court reserved its decision (subsection 11(3)). The clarification under subsection 11(3) supports the interpretation that a decision under reserve does not fall within the definition of 'not concluded' under subsection 11(1) of the *Regulations*.
>
> Given the language of the *Regulations* and the fact that all parties concluded their evidence and submissions under the *CFSA*, I conclude that the determination of the issues before me are to be decided under the *CFSA*.

[35] I do not accept this interpretation of the transitional regulation. The subsections in the transitional regulation referred to by Oldham J., ss. 11(2) and 11(3), read as follows:

> (2) Despite subsection (1), in the case of a proceeding relating to a First Nations, Inuk or Métis child, paragraph 4 of subsection 79 (1) of the Act does not apply if the court is satisfied that it would not be in the child's best interests for that provision to apply and makes an order stating that the parties to the proceeding are those who were parties immediately before this section comes into force.
>
> (3) Despite subsection (2), if a court has completed its hearing of a proceeding in respect of a First Nations, Inuk or Métis child before the day this section comes into force but reserved its decision, the parties to the proceeding are those who were parties immediately before this section comes into force unless the court is satisfied that it would be in the best interests of the child for paragraph 4 of subsection 79 (1) of the Act to apply and makes an order to that effect.

[36] The ordinary sense of the word "concluded" is "finished", "completed", "decided" or "over". A decision under reserve means the case is not concluded.

[37] Had the Legislature intended to capture only proceedings in which the hearing of a proceeding had not concluded, it would have said so. The use of the phrase "hearing of a proceeding" in s. 11(3) but not in s. 11(1) makes this abundantly clear.

[38] The scheme of the Act as a whole also supports this interpretation. First, the Act is remedial legislation and so should be interpreted liberally. It would be inconsistent with the paramount purpose of the Act "to promote the best

interests, protection and well-being of children" not to permit all children to benefit from what the Legislature had clearly decided was a preferable approach.

[39] Second, the Act is particularly remedial for Indigenous children. As will be set out in more detail below, it seeks to remedy past injustices and address the special significance of Indigenous children's connection to their community.

[40] Third, the April 30, 2018 proclamation date for the new Act was the same date that the previous definition of "Indian" and "native person/child" under the CFSA were deemed to be invalid due to a suspended declaration of invalidity issued by the court: *G. H.* By applying the transitional provisions to cases under reserve, these children would not be caught in a legislative void.

[41] Finally, the regulation clarifies that a proceeding is not concluded until a decision is rendered. It does so in two ways: (i) it states that a "proceeding" is not concluded when a decision is on reserve, *except* in relation to the name of a party; and (ii) it distinguishes between the conclusion of a hearing and the conclusion of the proceeding which only occurs when the decision is rendered. These provisions support the plain wording and purpose of the regulation.

[42] Therefore the transitional provisions applied to this case and the incorrect statute was applied by the Divisional Court.

[43] The Society submits that the Divisional Court's analysis nonetheless satisfies the new test. I turn to that issue now.

(2) Insufficient record

[44] The CYFSA changed the considerations for access. A comparison to the CFSA demonstrates this.

[45] The test for access to a Crown ward under the old Act was strict:

> 59(2.1) A court shall not make or vary an access order made under section 58 with respect to a Crown ward unless the court is satisfied that,
>
> (a) the relationship between the person and the child is beneficial and meaningful to the child; and
>
> (b) the ordered access will not impair the child's future opportunities for adoption. [Emphasis added.]

[46] The onus was on the person seeking access (usually the parent) to establish that the relationship was meaningful and beneficial. There was a presumption against access. And opportunities for adoption were prioritized over other considerations.

[47] This changed significantly when the new Act was introduced. The new Act states that the court shall not make the access order unless it is satisfied that it is in the best interests of the child. Section 104(5) provides:

> **When court may order access to child in extended society care**
>
> (5) A court shall not make or vary an access order under section 104 with respect to a child who is in extended society care under an order made under paragraph 3 of subsection 101 (1) or clause 116 (1) (c) unless the court is satisfied that the order or variation would be in the child's best interests.

> **Additional considerations for best interests test**
>
> (6) The court shall consider, as part of its determination of whether an order or variation would be in the child's best interests under subsection (5),
>
> > (a) whether the relationship between the person and the child is beneficial and meaningful to the child; and
> >
> > (b) if the court considers it relevant, whether the ordered access will impair the child's future opportunities for adoption. [Emphasis added].

[48] This change is not just semantics. It represents a significant shift in the approach to access for children in extended care.

[49] The burden is no longer on the person requesting access to demonstrate that the relationship is beneficial and meaningful to the child and will in no way impair the child's future adoption opportunities. Instead, the court is to undertake a best interests analysis, assess whether the relationship is beneficial and meaningful to the child, and consider impairment to future adoption opportunities only as part of this assessment and only where relevant. This means that it is no longer the case that a parent who puts forward no evidence will not gain access. Similarly, while any evidence of possible impairment to adoption opportunities would have thwarted previous requests for access, under the new Act, access is to be ordered for a child with otherwise excellent adoptive prospects if it is in her overall best interests. And, as shown in s. 74(3) of the CYFSA, the best interests analysis is comprehensive:

Best interests of child

74(3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall,

(a) consider the child's views and wishes, given due weight in accordance with the child's age and maturity, unless they cannot be ascertained;

(b) in the case of a First Nations, Inuk or Métis child, consider the importance, in recognition of the uniqueness of First Nations, Inuit and Métis cultures, heritages and traditions, of preserving the child's cultural identity and connection to community, in addition to the considerations under clauses (a) and (c); and

(c) consider any other circumstance of the case that the person considers relevant, including,

(i) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs,

(ii) the child's physical, mental and emotional level of development,

(iii) the child's race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression,

(iv) the child's cultural and linguistic heritage,

(v) the importance for the child's development of a positive relationship with a parent and a secure place as a member of a family,

(vi) the child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community,

(vii) the importance of continuity in the child's care and the possible effect on the child of disruption of that continuity,

(viii) the merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for

> adoption or adopted, compared with the merits of the child remaining with or returning to a parent,
>
> (ix) the effects on the child of delay in the disposition of the case,
>
> (x) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent, and
>
> (xi) the degree of risk, if any, that justified the finding that the child is in need of protection.

[50] As a result of these changes, the test for access to children in extended care was expanded in such a way that the record before this court is insufficient to satisfy its requirements.

[51] The Divisional Court did not properly address the issue of the sufficiency of the record because it applied the old Act. In doing so, the Divisional Court determined, at paras. 66-67, that the record was "complete":

> The issues in this case turn on a single finding of fact for each child as to the nature and strength of the relationship between the child and [their biological mother]. It is not a legally or factually complex case. Moreover, in this case, there is simply no evidence that any of the three eldest children has a beneficial and meaningful relationship with [her] – one that is significantly advantageous to him – to come close to overcoming the statutory presumption that there is to be no access to Crown wards.
>
> …
>
> In this case, s. 59 (2.1)(a) casts the burden on[the mother] to prove on a balance of probabilities that she and the children have existing relationships that are meaningful and beneficial to each child.

[52] Assuming without deciding that the record was “complete” for the purpose of applying the old Act, it is clear that the record could not satisfy the requirements of the new Act.

[53] First, there is no mention of the children’s best interests and no reference to the detail listed in s. 74(3). Instead, the Divisional Court focused solely on the “meaningful and beneficial” consideration without reference to the best interests. Second, the court applied a “presumption against access” to “Crown wards” which no longer exists. Finally, by not applying the new legislation the court failed to outline and take into account the views of the children. In para. 61, the court said that the children’s “views and preferences are before the court”. The evidence before the court regarding the children’s views dated back years and was not capable of providing the information required to comply with the access provisions of the CYFSA.

[54] In considering the question of access, the Divisional Court relied on the “reams of contemporaneous social worker notes of visits” and a single “very complete assessment report”. The focus of both were exclusively on protection issues. Neither were directed at the distinct question of access. A mother who cannot adequately provide primary care may still have a meaningful and beneficial relationship with her children such that access is warranted. An assessment that does not explicitly address access cannot form the sole

evidentiary basis for deciding that issue. I return to this point when I discuss the proper approach to summary judgment in a child protection proceeding.

(3) Indigenous children

[55] The most glaring way in which the record is insufficient to satisfy the new test pertains to the children's Indigenous heritage. The second factor in the best interests considerations states: "in the case of a First Nations, Inuk or Metis child, [the person making an order shall] consider the importance, in recognition of the uniqueness of First Nations, Inuit and Metis cultures, heritages and traditions, of preserving the child's cultural identity and connection to community, in addition to the considerations under clauses (a) and (c)."

[56] After the judicial determination of unconstitutionality in *G.H.*, the CYFSA broadened the definition of who is recognized as an Indigenous child. Any child who identifies as First Nations, Metis or Inuit, has a family member who so identifies or if there is a connection between the child and a band is now recognized as First Nations, Metis or Inuit. The new legislation reflects a commitment to ensuring that these children are connected to their culture.

[57] The children here are Indigenous citizens of Curve Lake First Nation which is part of the Anishinabek Nation. The factors listed under s. 74(3) require the court to consider how to preserve the children's connection to their specific Indigenous community and culture.

[58] Likewise, the preamble section of the CYFSA demonstrates the intent of the Act.

> Further, the Government of Ontario believes the following:
>
> > First Nations, Inuit and Métis children should be happy, healthy, resilient, grounded in their cultures and languages and thriving as individuals and as members of their families, communities and nations.
> >
> > Honouring the connection between First Nations, Inuit and Métis children and their distinct political and cultural communities is essential to helping them thrive and fostering their well-being.
>
> For these reasons, the Government of Ontario is committed, in the spirit of reconciliation, to working with First Nations, Inuit and Métis peoples to help ensure that wherever possible, they care for their children in accordance with their distinct cultures, heritages and traditions.

[59] In making its determination on access, the Divisional Court failed to make a finding as to the children's First Nations status. It consequently failed to consider whether an access order would assist the children in preserving their cultural identity.

[60] When the Legislature expanded the special considerations given to First Nations, Metis or Inuit children, the definitions of "Indian", "native person" and "native child" in the CFSA were removed. Instead, pursuant to s. 90 of the new CYFSA, the court in a child protection proceeding is required to determine if the

child is First Nations, Metis or Inuit. This finding, which must be made *before* the court determines whether the child is in need of protection, is important because it ushers in a series of special considerations including the provision of services and decisions that recognize the importance of the child's culture, heritage, and connection to community.

[61] The Divisional Court failed to make the necessary finding that the children in this case are First Nations, Metis or Inuit. Instead, in a footnote to para. 7 of its reasons, the court included in the "biographical details" an erroneous statement that "the changes to the *Indian Act* (Canada) or the proclamation of the new *Child, Youth and Family Services Act*" had no bearing on the case. It was submitted that this was essentially a finding that the children were "non-status Indians". By stating that their status did not have "any bearing" on the case, it failed to address one of the main purposes of the Act. That is, in perhaps the most obvious possible way, the court failed to address the significance of these children's connection to their Indigenous culture, community and heritage.

(4) Summary Judgment in Child Protection Proceedings

[62] The *Family Law Rules* provide for summary judgment in family law proceedings, including in child protection proceedings. The relevant provisions are as follows:

RULE 16: SUMMARY JUDGMENT

WHEN AVAILABLE

16. (1) After the respondent has served an answer or after the time for serving an answer has expired, a party may make a motion for summary judgment for a final order without a trial on all or part of any claim made or any defence presented in the case.

AVAILABLE IN ANY CASE EXCEPT DIVORCE

(2) A motion for summary judgment under subrule (1) may be made in any case (including a child protection case) that does not include a divorce claim.

EVIDENCE REQUIRED

(4) The party making the motion shall serve an affidavit or other evidence that sets out specific facts showing that there is no genuine issue requiring a trial.

EVIDENCE OF RESPONDING PARTY

(4.1) In response to the affidavit or other evidence served by the party making the motion, the party responding to the motion may not rest on mere allegations or denials but shall set out, in an affidavit or other evidence, specific facts showing that there is a genuine issue for trial.

EVIDENCE NOT FROM PERSONAL KNOWLEDGE

(5) If a party's evidence is not from a person who has personal knowledge of the facts in dispute, the court may draw conclusions unfavourable to the party.

NO GENUINE ISSUE FOR TRIAL

(6) If there is no genuine issue requiring a trial of a claim or defence, the court shall make a final order accordingly.

POWERS

(6.1) In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties,

> and the court may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.
>
> ORAL EVIDENCE (MINI-TRIAL)
>
> (6.2) The court may, for the purposes of exercising any of the powers set out in subrule (6.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.
>
> ORDER GIVING DIRECTIONS
>
> (9) If the court does not make a final order, or makes an order for a trial of an issue, the court may, in addition to exercising a power listed in subrule 1 (7.2),
>
> (a) specify what facts are not in dispute, state the issues and give directions about how and when the case will go to trial (in which case the order governs how the trial proceeds, unless the trial judge orders otherwise);
>
> (b) give directions; and
>
> (c) impose conditions (for example, require a party to pay money into court as security, or limit a party's pretrial disclosure).

[63] The Divisional Court erred by misapplying the key principles regarding the use of summary judgment, as articulated in *Hryniak*, to the specific circumstances of child protection proceedings. The Divisional Court ignored *Hryniak's* direction that no genuine issue requiring a trial will exist only "when the judge is able to reach a fair and just determination on the merits on a motion for

summary judgment": at para. 49. As the Supreme Court stated, at para. 50 of *Hryniak*, "the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute." Decades of jurisprudence – before and after *Hryniak* – have emphasized that fairness in a child protection summary judgment motion necessitates caution and the need for the court to take into account special considerations. The Divisional Court turned its back on that jurisprudence and, in so doing, erred.

[64] I will explain why *Hryniak's* fairness principle requires that exceptional caution is needed for summary judgment in the child protection context by reviewing the *Charter* implications of child protection proceedings; the reality of the litigation for the participants; and the wisdom of the jurisprudence that the Divisional Court overturned. I will then set out the approach that should be taken to summary judgment motions in child protection proceedings.

Charter implications

[65] Child protection litigation engages the *Charter* rights of both parents and children. Twenty years ago the Supreme Court recognized this. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 76, it held as follows:

> The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.

[66] In that case, the Supreme Court required state-funded counsel for the parent because the s. 7 *Charter* rights of the parents and the children were found to be engaged. It held as follows at para. 81:

> Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's s. 7 right to security of the person.

[67] Not only are *Charter* rights engaged, but the participants themselves are unlikely to be able to advance them. Quite regularly, their personal circumstances pose an obstacle.

Reality of the child protection litigant

[68] The courts should be especially mindful of the reality and material circumstances of those subject to child protection proceedings. As Justice L'Heureux-Dubé noted in her concurring reasons in *G. (J.)*, at para. 113, "women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings". She continued at para. 114:

> As well as affecting women in particular, issues of fairness in child protection hearings also have particular importance for the interests of women and men who are members of other disadvantaged and vulnerable groups, particularly visible minorities, Aboriginal people, and the disabled. As noted by the United States Supreme Court in *Santosky v. Kramer*, 455 U.S. 745 (1982), at p. 763:
>
> > Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups…such proceedings are often vulnerable to judgments based on cultural or class bias.
>
> Similarly, Professors Cossman and Rogerson note that "The parents in child protection cases are typically the most disadvantaged and vulnerable within the family law system . . . .": "Case Study in the Provision of Legal Aid: Family Law", in Report of the Ontario Legal Aid Review: A Blueprint of Publicly Funded Legal Services (1997), 773, at p. 787.

[69] Poverty and other forms of marginalization form part of the experience of many parents involved in child protection proceedings. If we do not face up to this reality we risk forgetting the hard-learned lessons of the past by exacerbating pre-existing inequities and harms. The miscarriages of justice outlined in the *Report of the Motherisk Commission* (2018: Ontario Ministry of the Attorney General) speak, by way of example, to the significant imbalance between parents and Children's Aid Societies, noting that parents, even when represented by counsel, were "simply overpowered" (at p. 121). Fairness in the child protection context demands recognition of these dynamics.

Longstanding approach to summary judgment

[70] The cautious approach to summary judgment in child protection has long been recognized by lower courts and by this court: see *Children's Aid Society of Halton (Region) v. A. (K.L.)* (2006), 216 O.A.C. 148 (C.A.).

[71] The child protection jurisprudence has crafted an approach to the fair and just determination of issues using summary judgment motions by recognizing that in child protection proceedings there are *Charter* implications at stake for vulnerable litigants. The jurisprudence reflects an approach to the genuine issue "for trial" or "requiring trial" analysis that incorporates these considerations. Following the release of *Hryniak*, the courts have taken its fairness principles and adapted them to the cautionary approach needed in child protection. As Zisman J. said in *Children's Aid Society of Toronto v C.J.W.*, 2017 ONCJ 212, at paras. 66-67:

> In assessing whether or not a society has met its obligation of showing there is no genuine issue requiring a trial, courts have equated that phrase with "no chance of success", "when the outcome is a foregone conclusion", "plain and obvious that the action cannot succeed", and "where there is no realistic possibility of an outcome other than that sought by the applicant".
>
> Summary judgment should proceed with caution.

[72] McDermot J. made similar comments in *F. v. Simcoe Muskoka Child, Youth & Family Services*, 2017 ONSC 5402, at paras. 21-23:

> In family law matters summary judgment shall be granted under Rule 16(6) of the *Family Law Rules* where there is "no genuine issue requiring a trial of a claim or defence".
>
> …
>
> The test of "no genuine issue for trial" has been referred to in a number of ways. It has been equated with "no chance of success" or that is "plain and obvious that the action cannot succeed". The test has also been enunciated as being when the "outcome is foregone conclusion" or where there is "no realistic possibility of an outcome other than that sought by the applicant".

[73] The Divisional Court decision notes at para. 36 that "[t]he parties placed before the motion judge a number of decisions concerning summary judgment in the child protection context that appear to be premised on a pre-2014 understanding of summary judgment." The reasons go on to discuss the direct application of the principles of *Hryniak* in the child protection context.

[74] The Divisional Court erred in its understanding of the pre-2014 rule and jurisprudence. First, since 1999 the Family Law Rules provided that the test was "no genuine issue requiring a trial". Second, the jurisprudence did not change. In this, the parties made no mistake in referring to pre-2014 jurisprudence. The current correct approach to summary judgment in child protection was and remains highly cautionary.

[75] The Supreme Court in *Hryniak* emphasized, at para. 23, the fair and just approach to summary judgment:

> Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

[76] *Hryniak* emphasizes that there will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment: at para. 49. As applied to child protection proceedings, a fair and just determination on the merits must recognize that such proceedings engage *Charter* rights for a vulnerable segment of our society. Consequently, courts have stressed the need to take a cautious approach to granting summary judgment in child protection proceedings. This cautious approach promotes *Hryniak's* principle of reaching a fair and just determination on the merits. Interestingly, even the case the Divisional Court referred to as "the correct approach", *The Children's Aid Society of Ottawa v. I.C. et al*., 2016 ONSC 4792, aff'd 2017 ONSC 6935, speaks to this point. At para. 64 of *I.C.*, MacKinnon J. said:

> In determining whether there is a genuine issue requiring a trial in this case, I am mindful of the need for the Court to be cautious in granting a summary judgment motion for Crown wardship in line with the principles of justice, fairness and the best interests of the children are at the heart of these proceedings.

[77] Significantly, MacKinnon J. did not alter the considerations for "genuine issue requiring a trial". The cautionary approach applies as do the objectives of the CYFSA. Further, the court has an obligation to carefully assess the evidence.

[78] I adopt the approach taken by Sherr J. in *Children's Aid Society of Toronto v. B.B.*, 2012 ONCJ 646, at para. 25:

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

[79] See also: *C.A.S. v. K.V.*, 2013 ONSC 7480; *Children's Aid Society of Toronto v. C.P.*, 2017 ONCJ 330; *The Children's Aid Society of Ottawa v. J.B. and H.H.*, 2016 ONSC 2757, 80 R.F.L. (7th) 414 ; *CAS v. N.A.-M.*, 2018 ONSC 978; *CAS (Ottawa) v. M.M.*, 2018 ONSC 786, 8 R.F.L. (8th) 184; *A.B. v. J.B.*, 2017 ONCJ 866.

Conclusion: The proper approach to summary judgment in child protection proceedings

[80] To summarize and clarify the approach that the courts should take to summary judgment in child protection proceedings, I set out the following:

1. *Hryniak's* fairness principles for summary judgment must be applied recognizing the distinctive features of a child protection proceeding. In determining whether there is a genuine issue requiring a trial the court

must exercise caution and apply the objectives of the CYFSA including the best interests of the child.

2. The burden of proof is on the party moving for summary judgment. Although, r. 16(4.1) sets out the obligation of the respondent to the motion to provide "in an affidavit or other evidence, specific facts showing that there is a genuine issue for trial" this does not shift the ultimate burden of proof. Even if the respondent's evidence does not establish a genuine issue for trial, the court must still be satisfied on the evidence before it that the moving party has established that there is no genuine issue requiring a trial.
3. The court must conduct a careful screening of the evidence to eliminate inadmissible evidence. The court should not give weight to evidence on a summary judgment motion that would be inadmissible at trial.
4. Judicial assistance must be provided for self-represented litigants. In particular, judges must engage in managing the matter and must provide assistance in accordance with the principles set out in the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) (online) established by the Canadian Judicial Council.
5. The special considerations that apply to Indigenous children must be part of every decision involving Indigenous children.

CONCLUSION

[81] I would allow the appeal, set aside the motion judge's order and refer the matter back to the Superior Court on an expedited basis to determine the question of access pursuant to the CYFSA. Subject to the direction of the

Regional Senior Justice, and the discretion of the assigned judge, I would hope that a case-management conference is quickly convened to establish a timeline to prepare the case for a hearing either by way of summary judgment or mini-trial.

[82] I would not order costs.

Released: April 18, 2019
"MLB"

"M.L. Benotto J.A."
"I agree P. Lauwers J.A."
"I agree David Brown J.A."