Child and Family Services Act Review

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Submitted to: the Ministry of Children and Youth Services

Submitted by: the Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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The Ontario Bar Association (OBA) appreciates the opportunity to provide advice in connection with the Ministry of Children and Youth Services' ("MCYS") review of the *Children and Family Services Act* ("CFSA" or the "Act"). We look forward to working with the government as the review proceeds in order to ensure the Act serves the crucial purposes for which it is designed and to assist in finding ways to better meet the current and emerging needs of children, families and the justice sector.

The OBA

(a) Background

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 16,500 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 39 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

(b) The OBA's CFSA Working Group

This submission was formulated by members of our Family Law Section with contributions from members of our Child and Youth Law Section[1]. Together, these sections have more than 450 members, including leading practitioners in each of these fields. The lawyers in these sections would count among their clients virtually every stakeholder group who are parties to CFSA proceedings. The submission has also had the benefit of input from the OBA Equality Committee.

[1] In order to avoid conflict of interest or the appearance of such conflict, members of the Child and Youth Section who work for government agencies did not participate in the submission.

Introduction

In this submission we have suggested amendments to the legislation to improve its cohesion and ease of use. We have also identified, for further discussion, some broader concerns, the solutions for which may involve systemic change beyond legislative reform alone.

Legislative and Regulatory Amendment Issues

While in some cases technical, the below legislative and regulatory amendment suggestions are designed to improve the efficiency of the system and the confidence in the administration of justice on the part of those affected by the Act. These suggestions include:

(a) Rationalizing the provisions dealing with the granting of access orders and adoption;

(b) Creating two separate pieces of legislation or organizing the Act into parts that to create two comprehensive, distinct legislative codes – child protection versus voluntary adoptions preformed by licensees;

(c) Providing criteria for team assessments under section 54 to ensure appropriate preparation procedures and consistent treatment by courts;

(d) Requiring an official transcript of Child and Family Services Review Board (CFSRB) proceedings;

(e) Ensuring fair access to alternative dispute resolution at the option of families in child protection proceedings;

(f) Establishing explicit, clear, very limited legislative criteria for interfering with the finality of an adoption in the rare case where that may be necessary; and

(g) Inter-provincial legislative concordance for adult adoptions.

Legal and Justice Sector Issues Beyond Legislative Reform

The following issues have solutions that likely go beyond simple legislative amendment:

(h) Ensuring that the decision between crown wardship and returning a child to his or her home is made in the best interest of the child rather than crown wardship being a default in situations where parents lack necessary financial resources to address special needs; and

(i) Remedying regional service level variations that interfere with the established timelines in the CFSA. To the extent they cannot be remedied, the timelines in the Act need to take into account the variation in service levels;

We will review each of these in turn.

Equality Issues

In addition to the above, we are interested in assisting government in remedying the concerns that have been raised regarding the over-representation of equality-seeking groups among children in care. However, as a first step to a focused action-plan on this issue, it is important that government undertake the work necessary to fully understand the root causes. Such work would include:

(i) A focused assessment to determine the nature and effect of the interplay between child protection issues and:

a. systemic poverty faced by historically disadvantaged groups;
b. any lack of cultural understanding and sensitivity among those involved in the system;
c. Any inadequacy in the legislative guidance on cultural issues.

Many credible reports on poverty and other systemic disadvantages already exist and should form the foundation of a focused report on these issues in the child protection context; and

(ii) a transparent collection and analysis of statistics that will help understand the problem and measure the success of proposed solutions.

While it is tempting to propose a relatively simple legislative remedy that allows for effective government communication on the issue, we urge government to undertake the analysis necessary to determine the precise causes and most effective remedies. As lawyers on the front lines of the system, we offer any assistance we can provide in that endeavor.

I - Legislative and Regulatory Amendments

(a) Access orders and Adoption

Two previous tranches of amendments to the CFSA have resulted in an incohesive decision-making scheme for dealing with the issues of access, openness and adoption of Crown Wards. The 2006 amendments provided that no access order should be granted if it would interfere with a Crown Ward's prospects for adoption. Clause 59(2.1)(b) provides:

> (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...
>
> (b) the ordered access will not impair the child's future opportunities for adoption. 2006, c. 5, s. 17 (2).

Later, however, the CFSA was amended again to provide that access orders would be automatically terminated upon adoption. As a result of this automatic termination, access orders ceased to have an effect on a child's prospects for adoption. Some Ontario courts have already made this observation. It is no longer necessary for courts to consider adoption prospects as a factor when assessing the appropriateness of access orders. Clause 59(2.1)(b) should be repealed and the consideration of the intersection between adoption, access and openness should be dealt with as a comprehensive scheme in Part VII of the CFSA.

(b) Recognition of Two Distinct Schemes

The CFSA combines two very distinct legislative schemes: a child protection scheme and a voluntary adoption scheme (including licensee adoptions, step-parent adoptions etc.). While ultimately both are centred on the best interests of the child, the two schemes are accessed by parties in very different circumstances. Yet, both sets of parties have to move back and forth through much of the Act in order to determine applicable time lines and other procedures. In addition to the confusion and inefficiency visited on the parties, the presence of these schemes in the same Act requires legislative drafters to draft exceptions and extra protections that will apply in one circumstance that do not apply in the other. Policy makers are required to take extra precaution to ensure that protections and exceptions do not inadvertently or unnecessarily affect one scheme when they are only appropriate for the other. Circumstances rarely call for the review of both schemes yet both schemes are potentially opened up for review whenever circumstances call for one scheme to be amended. Both those who use the CFSA and those who create it would be better served by dividing the CFSA into two acts that could each provide a comprehensive code – a child protection act and voluntary licensee adoption legislation. At a minimum, the two distinct schemes should be separated into different parts of the Act and each scheme outlined as a comprehensive code in its respective part, without the requirement for cross-referencing.

(c) Team Assessments

Section 54 of the Act allows the court to order that the child, parent or someone putting forward a plan of care undergo an assessment. The assessment is to be conducted by a "person approved by the court." However, in some jurisdictions courts refer the party to multidisciplinary teams to carry out an assessment. These team assessments can be useful but, because neither the legislation nor the regulations provide guidance for the preparation, approval or criteria for admissibility, courts have given inconsistent treatment to team assessments – from weighty reliance on the team's report to a refusal to even admit the report into evidence. In order to ensure the appropriateness of the reports and more uniform treatment by the courts, the legislative and regulatory scheme should specifically outline the permissibility of such reports and provide guidelines for their preparation.

(d) Transcripts

The record of CFSRB hearings currently consists of notes of the adjudicator. As the remedies exercised by the CFSRB become increasingly more powerful and significant, there is an assumption that their decisions will be judicially reviewed more frequently. In order for the parties to produce appropriate material such as facta, and for courts to adjudicate these matters fairly and efficiently, an official transcript of CFSRB hearings will be required. The procedures of the Board should provide for the appropriate preparation of a transcript.

(e) Alternative Dispute Resolution

The CFSA directs children's aid societies to consider alternative dispute resolution (ADR) where it could assist in resolving any issue related to the child or a plan for the child's care. However, there are no guidelines given to the societies regarding

how that discretion should be exercised. Consequently, the refusal on the part of the society to mediate can appear arbitrary to the private parties who wish to participate in mediation or another ADR process. Allowing a government agency to, without consistent or transparent reasons, deny a willing party the ADR option provided for in the government's own legislation has a negative impact on a party's perception of whether or not he or she was treated fairly by the system. This, in turn, negatively impacts the reputation of the administration of justice. On issues as personal and crucial as the care of one's child, it is imperative that the justice system is trusted. Consideration should be given to amending the legislation and applicable regulation to provide a set of criteria to be considered by a society in determining whether to engage in ADR when the other parties wish to do so. Of course, children would not be required to participate as part of a society's mediation efforts.

(f) Explicit Guidelines regarding Review of Adoption Orders

There is absolutely no doubt as to the crucial importance of the finality of adoptions. However, as stories continue to emerge about parents coerced into relinquishing their children, it becomes increasingly possible that the common law will find a way to review adoptions, regardless of current limitations in the Act. In order for the legislature to control and limit the circumstances and truly protect the finality of adoptions, the government should consider laying out a specific legislative regime including very narrow circumstances of reviewability and remedies that protect the best interest of the child.

(g) Inter-Provincial Adult Adoptions

The current patchwork of regimes across the country for adoption of adults can prove unworkable. In one instance, for example, the respective provincial regimes have prevented a biological mother in Ontario and her adult child in Alberta (who had been previously adopted by another couple) from being reunified by the adoption they both want. The Ontario legislation requires both

the mother and child to reside here in order to apply. In Alberta, the mother is required to be a resident in order to apply. There does not appear to be any policy justification for not allowing either a prospective adult adoptee or a prospective parent to apply in the province in which either is resident. The government should consider amendments to the Act that would remedy this admittedly rare, but nonetheless unfortunate, circumstance. Following reform in Ontario, it may also be helpful to ultimately refer the matter to the Uniform Law Conference for its consideration, in order to bring other provinces in line.

II- Reforms beyond Legislative Amendments

(h) Financial Means and Best Interests

Particularly in cases involving children with special needs, the determination of whether a child should be made a crown ward or returned to his or her home, is sometimes determined based on the financial ability of the parents to provide for the child's special needs, rather than being based on the best interests of the child. In some cases where the child's best interest would dictate her remaining in the home, she is made a Crown Ward because her parents cannot afford to accommodate her special needs at home.

Courts are currently precluded by clause 57(8)(c) of the CFSA from ordering that the needs of the child be provided for in the home. The repeal of subsection 57(8)(c) is not the only potential solution to this issue or, in any event, is not the complete solution. It is understandable that the potential for *ad hoc* orders requiring government expenditure creates an unpredictable situation that makes budgeting and planning difficult. It is also understood that government expenditure choices cannot be made by courts in every circumstance. However, solutions should be investigated in order to remedy the potential for serious injustice to a child who is made a crown ward as a result of her family not being able to afford services or other accommodations in the home, despite the fact that her best interests would be served by remaining at home with her family.

While this injustice to the child is the more serious factor, it should also be understood that, in some cases, particularly where adoption is not a realistic option, crown wardship is also the costlier option when viewed from an overall public funding perspective. Where a child with special needs is made a crown ward and cannot be placed for adoption, government will become financially responsible for all aspects of her care (in a government-funded facility, for example). Providing some added support in the home to a family whose care is otherwise free is the cheaper option in such as case, as well as being the more just option.

Potential solutions for the current unjust and inefficient circumstances could include the establishment of a fund to be accessed by families at the discretion of a society or other agency. Even if the discretion was subject to judicial review, as would be appropriate, an established fund lends considerably more predictability to the budgeting process and the government's concern over courts making decisions about the general allocation of public funds would be mitigated.

(i) Timelines and Geographic Service Variations

While there is unquestionably an important public policy goal served by ensuring child protection cases move quickly to a final determination, the timelines provided for in the Act can yield non-optimal and unintended consequences where service levels do not allow for the timelines to be met. Often, in order to make a decision that will ultimately be in the child's best interest, the parents and/or the child may require services to deal with addiction or other mental health issues. The best interests of the child cannot be properly assessed until it is determined, through treatment and assessment, whether or not these difficulties can be mitigated or eliminated. In rural and remote areas, including Northern Ontario, the services necessary to provide treatment and assessment are scarce and waiting periods are long. These inadequate service levels, combined with the rigidity of the ultimate limitation period effected by

subsections 70(1) and 70(4), mean that decisions can be made by default – the parties simply run out of time waiting for the services necessary to determine if, for example, the child's best interests could be served by remaining with a parent whose addiction was successfully treated. A child is returned home or made a crown ward at the conclusion of the statutory timelines, before the best possible choice between those two options can be assessed.

The optimal solution to this issue is, of course, improved service levels. However, unless and until that is a reality, the Act needs to incorporate some recognition of the effect the scarcity of resources and the attendant waiting lists can have on the ability to meet the timelines in section 70.

Conclusion

Once again, the OBA appreciates the opportunity to provide input on the CFSA Review and we look forward to working with the Ministry as you progress. We look forward to hearing from you to discuss next steps. Please do not hesitate to contact us if we can be of any further assistance in the meantime.