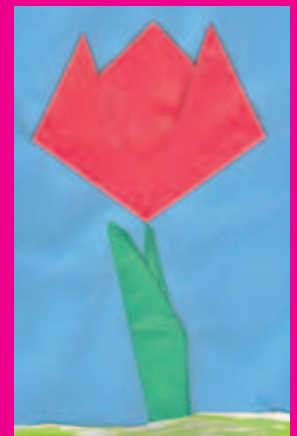


OCL Child Protection Consultation Committee

Final Report



**Office of the
Children's Lawyer**

Toronto ON
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TABLE OF CONTENTS

Foreword by Lucy McSweeney	4
Consultation Committee	6
Background	7
What We Heard	10
When the OCL Plays an Important Role in Child Protection Cases	11
When the OCL Does Not Add Significant Value in a Case	13
OCL Withdrawing from a Child Protection Case	15
The OCL's Role in Helping Reduce Unnecessary Delays	17
OCL Policies	19
a) Policy on Conflict of Interest Files	20
b) Policy on Disclosure of Police Records	21
c) Policy on Disclosure of CAS Records	24
d) Policy on Obtaining Information from Collateral Sources	25
e) Policy on Preparation of Requests to Admit	26
f) Policy on the Participation of Child's Counsel in ADR	26
g) Policy on the Requirement for Multiple Meetings with Child Clients	27
Subcommittee Recommendations on OCL Policies	28
More Effective Representation by OCL Counsel	29
Trial Management Conferences	30
How the OCL Can Help Panel Members	33
Working with Partners	34
Conclusion	35
Summary of Recommendations	38
Appendix A--Terms of Reference of Consultation Committee	42
Appendix B--Subcommittee Members	48
Appendix C--Section 38 of the <i>Child and Family Services Act</i>	52
Appendix D--Common OCL Activities in a Child Protection Case	56
Appendix E--Long Trial Committee's Proposed Trial Management Endorsement Form	62

FOREWORD

I am pleased to share this Report of the Office of the Children's Lawyer's Child Protection Consultation Committee. The purpose of this consultation was to seek advice from legal experts in child protection in order to assist us in making the best use of the funding available to us in fulfilling this very important part of our mandate.

The Office of the Children's Lawyer accepts and endorses the recommendations contained in this Report. We have already begun to implement many of the recommendations which apply specifically to our office. We look forward to sharing the recommendations more widely through the publication of this Report, and to working with the judiciary, courts, children's aid societies, Legal Aid Ontario and the family law bar as we all endeavour to improve services to the vulnerable children of Ontario.

As part of the Committee's process, we shared a draft report with the Offices of Ontario's Chief Justices for comments. Chief Justice Winkler, Chief Justice Smith and Chief Justice Bonkalo all kindly took time out of their busy schedules to meet with me to discuss the consultation recommendations. We also welcomed formal feedback from the Superior Court of Justice's Senior Family Justice Consultation Committee and the Ontario Court of Justice's Advisory Committee on Family Law. They, too, strongly supported our efforts to improve the value of our child protection representation services.

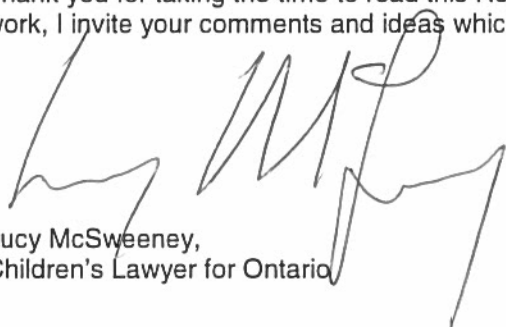
I am pleased that the recommendations in this report also align strongly with the *Prioritizing Children—Statement of Objectives* recently shared by Chief Justice Smith of the Superior Court of Justice, as well as with the ongoing activities of the Office of the Chief Justice of the Ontario Court of Justice.

I would like to express particular appreciation to the Honourable Joseph C. M. James for agreeing to chair our Consultation Committee. His commitment to improving Ontario's child protection system is longstanding and continues into his "retirement." The whole consultation process benefitted from his advice, patience and good humour.

I would also like to thank the members of the Consultation Committee and Subcommittee who gave generously of their time and experience. The collaboration among the Committee members, who brought perspectives from each of their unique roles in the child protection system, ultimately led to valuable recommendations not just for the OCL, but for the broader practice of child protection law in Ontario. We received feedback consistent with what we had heard anecdotally prior to the consultation and many other thoughtful and useful suggestions as well. We were encouraged by the genuine enthusiasm of everyone we consulted when discussing these issues.

The Child Protection Consultation Committee is the first of what I anticipate will be other consultations that the Office of the Children's Lawyer will convene. The purpose of this consultation was to seek advice from legal experts in child protection. It was not to obtain feedback from our clients. We look forward to initiating a youth consultation process in the near future in order to solicit important and vital feedback from our clients.

Thank you for taking the time to read this Report. As part of our ongoing commitment to improving our work, I invite your comments and ideas which the Report may inspire.



Lucy McSweeney,
Children's Lawyer for Ontario

REPORT OF THE OFFICE OF THE CHILDREN'S LAWYER CHILD PROTECTION CONSULTATION COMMITTEE

Consultation Committee

In the spring of 2012, the Office of the Children's Lawyer (OCL) convened a Child Protection Consultation Committee (the "Committee") to seek input from legal experts in child protection cases on ways to:

- Increase the value that OCL counsel bring to child protection proceedings;
- Improve efficiencies in the way OCL panel members perform their duties in child protection cases; and
- Enable the OCL to play a more strategic role in the child protection system.

The OCL invited senior members of its panel and the following organizations to nominate members to participate on the Committee:

- The Senior Counsel Network Group, Ontario Association of Children's Aid Societies (OACAS);
- Native Child and Family Services of Toronto;
- The Ontario Bar Association;
- The Family Lawyers' Association; and
- Legal Aid Ontario (LAO).

The Committee's Terms of Reference set out the scope of the consultation as follows:

1. How and when OCL involvement in a case adds value.
2. When it might be appropriate for child's counsel to withdraw from a case.
3. If a child's counsel did withdraw, how he/she could become re-involved if necessary.
4. How the OCL could work with the children's aid societies (CAS) to enable them to act as more effective gate-keepers when the court is considering making a section 38 direction (appointing counsel to represent a child in child protection proceedings).
5. What child's counsel and others can do to eliminate unnecessary delays in child protection cases.
6. Whether there are any OCL policies that contribute to unnecessary delays in child protection proceedings.
7. Whether there are any OCL policies that require counsel to spend unnecessary time on files, leading to increased expense.
8. Ways the OCL could offer more support or assistance to enable panel members to work more efficiently.

9. Ways the OCL could seek support from the judiciary to implement proposed changes.

The Terms of Reference, which include a list of the Committee members, is attached as **Appendix A**.

The OCL also created an OCL Panel Member Subcommittee (the “Subcommittee”) made up of fee-for-service panel members from across Ontario. The primary role of the Subcommittee was to consider OCL policies and practices and to identify circumstances in which adherence to these policies results in:

- Increased costs;
- Unnecessary delays; and
- Less effective representation of children and youth.

A list of the Subcommittee members is attached as **Appendix B**.

The Committee met in person twice, on June 22 and October 12, 2012. The Subcommittee had three teleconferences on July 16, July 31 and September 25, 2012. The OCL also conducted a survey of personal rights panel members (“OCL survey”) between November 15 and 23, 2012 and received 181 responses, a response rate of close to 50 percent.

A draft report was shared with the Office of the Chief Justice of each of the Court of Appeal, Superior Court of Justice (SCJ) and Ontario Court of Justice (OCJ) and with members of the Committee for feedback and suggestions. All three courts offered support for the consultation process and draft recommendations. Comments from the judiciary have been included in this final report.

Background

The OCL represents children in child protection and custody/access cases and acts as a litigation guardian to protect the legal interests of minors in some civil and estate cases. The OCL also has a clinical department whose members

conduct investigations and prepare reports for the court in custody/access cases as authorized in s. 112 of the *Courts of Justice Act*.

The OCL's head office employs approximately 80 staff members, including lawyers, clinicians, intake clerks, account and referral clerks and administrative staff. The OCL currently retains the services of between 350 and 400 panel lawyers to represent children in child protection and custody/access cases and between 225 and 250 clinical agents to prepare section 112 reports and assist counsel in family law cases across the province. The OCL also retains approximately 100 agents to represent minors' interests in property rights matters. The OCL legal and clinical panel members are supervised by in-house lawyers and clinicians, who act as regional supervisors.

OCL staff and panel members are committed professionals who constantly strive to provide excellent representation to the children of Ontario. The OCL panel members are well-respected members of the family law bar, who work for what is often far less than their usual rates of remuneration because they are dedicated to helping members of one of Ontario's most vulnerable populations--children involved in child protection and high-conflict custody and access cases.

The OCL annual budget for 2011/12 was approximately \$34 million, of which approximately \$25.6 million was spent on external professional services. Just over 37 percent of the total annual budget was spent on child protection legal costs and 34 percent of the budget was spent on custody/access legal and clinical costs.

In child protection cases, the OCL represents children and minor parents when the court makes a direction under s. 38 of the *Child and Family Services Act* (CFSA). The court can make the direction at the request of the CAS, one of the parties or of its own volition. The OCL is not given notice of a request for its appointment and when the court makes a s. 38 direction, the OCL has no

discretion to decline the court's request. In contrast, when a court makes an order pursuant to s. 89 of the *Courts of Justice Act* requesting the OCL to become involved in a custody/access case, the OCL has the discretion to accept the case and assign a lawyer, clinician or both, or it can decline the referral.

In 2011, the OCL underwent its first "value for money" audit by the Auditor General for Ontario. In his December 2011 report, the Auditor General noted that the OCL declines approximately 40 percent of the custody/access referrals it receives.¹ Although some cases are declined for legitimate case-specific reasons, others are declined because of a lack of available funding.²

In this time of fiscal constraint and in the wake of the release of the report from the Commission on the Reform of Ontario's Public Services (the *Drummond Report*), there is a general expectation that all government-funded services ensure that they are making the best use of public resources.

The OCL budget for external professional services is not divided into "silos." If more money is allocated to child protection cases, less is available for custody/access cases. In order to provide additional services in custody/access cases, the OCL must look for efficiencies in child protection cases.

In recent years, the OCL has heard informally from judges and lawyers that the value OCL counsel provide in child protection cases ranges from essential in some cases to negligible in others. This consultation process was initiated in order to gain a better understanding of how and when the OCL adds the most value in child protection cases so that the OCL can take steps to ensure a more optimal alignment of its resources with areas of greatest need for children.

One could argue, and many judges and OCL panel members do so with a great deal of passion, that there is value in ensuring that all, or at least most, children

¹ 2011 Annual Report of the Auditor General of Ontario, at p. 220.

² *Ibid*, at p. 223.

in child protection cases have independent legal representation in order to give them a voice or to protect their interests. Some of these same judges and lawyers simultaneously advocate for more OCL involvement in custody/access cases, an increasing number of which are high-conflict and involve allegations of serious emotional harm to children and youth.

Given that the OCL has finite resources, it must look at ways to make the most effective and efficient use of those resources. Although the focus of this report is child protection cases, the OCL anticipates that much of the feedback and many of the recommendations will also be applicable in custody/access cases.

WHAT WE HEARD

In addition to surveying all of its personal rights legal panel members, the OCL invited panel members from different regions of the province and with varying levels of experience to participate in the Subcommittee. Not surprisingly, there was not always consensus in the feedback we heard from Committee, Subcommittee and panel members. There were, however, some strong themes that emerged. There was universal support for the common goals of helping more children, where possible, and making sure that the children we do help are represented well. There was also recognition that while a fundamental role of an OCL counsel is to protect a child's interests, it is also to assist the court to make good and appropriate decisions in difficult cases when it must determine what is in a child's best interests.

The judiciary confirmed that they believe that "early and active" involvement by OCL counsel assists in resolving cases. They further commented that OCL lawyers "should more routinely file affidavits, bring motions and call witnesses."

Another theme that emerged was that while OCL policies and best practice guidelines are necessary and helpful, OCL counsel must have the ability to accommodate unique and/or complicating circumstances. Panel members want

the flexibility to be creative, when necessary, to ensure that they are able to effectively advocate on behalf of their child clients.

With some exceptions, there was broad acknowledgement that there are many cases where the OCL adds significant value, but there are others where the OCL contribution is minimal. Again, many panel members cautioned against hard and fast rules, noting that for every rule there is an exception. There was consistent feedback that there is a need for panel members and their regional supervisors to assess, on an ongoing basis throughout the life of a case, the role an OCL counsel is performing in order to determine if OCL participation is still necessary and if so, how the lawyer can maximize her/his effectiveness.

When the OCL Plays an Important Role in a Child Protection Case

Section 38 of the CFSA sets out the criteria for determining when it is desirable to direct that legal representation be provided for a child. A copy of s. 38 is attached as **Appendix C**. In many cases, the need for an OCL counsel is obvious. In other cases, the role for an OCL is not as clear. There was support from the judiciary for encouraging judges to outline the reasons why they are appointing the OCL in the space available on the standard-form order if it will help the OCL more effectively fulfill its roles. Some Committee members noted that it seemed that there were times when the s. 38 criteria were forgotten or ignored in the process of appointing counsel for a child.

Although the following list is not exhaustive, panel members and members of the Committee described the following ways in which OCL counsel regularly do add tangible value in a case:

- Ensuring that the court and parties are aware of the child's views and preferences;
- Helping to negotiate how a child's statements will be put before the court in compliance with the rules of evidence and in ways acceptable to the child, court and parties;

- Reassuring a child or youth that their opinion matters and will be given consideration by those making decisions about their lives;
- Helping to “mediate” issues between the CAS and parents or other family members, which can result in settlement or in the parents engaging in the activities necessary to have their children returned to their care;
- Advocating to avoid unnecessary delays, particularly where permanency planning is an issue;
- Obtaining information, including disclosure of necessary records, from parents who are reluctant to share this information with the CAS;
- Alerting the CAS to possible alternative placements for a child with family or community members;
- Advocating that the CAS explore alternative placements for a child;
- Helping to negotiate the terms of a s. 54 assessment to ensure all issues are canvassed, including sibling access, where appropriate;
- Advocating with both the CAS and parents to ensure that a child’s needs are met, including for treatment, counselling and placement;
- Encouraging the CAS to work with the family and to put appropriate services in place;
- Advocating for sibling access where children are not placed together;
- Ensuring that the court gets “the complete story” in a case by calling evidence or eliciting evidence from witnesses; and
- Advocating on behalf of First Nations children for arrangements that will respect and preserve their culture and heritage.

Although many panel members agreed that OCL involvement may not be necessary for young children, those who responded to the OCL survey indicated that they felt they were generally able to assist the court when representing children under the age of eight in the following circumstances³:

³ In many of the survey questions, respondents were asked to mark all of the circumstances that applied or were relevant.

Parents don't have counsel	71.5%
There is no parent or caregiver before the court	42.4%
The child has serious or unexplained injuries	23.8%
The child is part of a sibling group and they represent the older children	76.7%
The child is part of a sibling group and they do not represent the older children	39.5%
The child has special needs and the parents or caregivers are unable or unwilling to advocate on the child's behalf	59.3%
The child has special needs and the CAS is not making adequate arrangements to meet the child's needs	52.3%

There was general consensus that the OCL has a significant role to play when representing children ages eight and older. Subcommittee members also noted that since the introduction of renewed youth supports in the 2011 amendments to the CFSA⁴, OCL counsel play a critical role in negotiating services for youth who are considering leaving care and by explaining to youth their options if the CAS terminates the protection proceedings.

When the OCL Does Not Add Significant Value in a Case

Subject to the circumstances listed above, members of the panel, Subcommittee and Committee noted that OCL counsel are often not helpful to the court when representing young children who are unable to express views and wishes. Some members reported that judges in their area routinely appointed the OCL for infants and young children; by contrast, others noted that judges rarely appointed the OCL for children in this age group.

⁴ In September 2011, the CFSA was amended to include s. 71.1, which includes the following provisions:

(3) A society or agency may provide care and maintenance in accordance with the regulations to a person who is 18 years of age or more if, when the person was 16 or 17 years of age, he or she was eligible for support services prescribed by the regulations, whether or not he or she was receiving such support services; and

(4) Subject to the terms and conditions in this section, a person who chooses to stop receiving care and maintenance under this section may choose to resume receiving it.

Feedback from the Committee, Subcommittee and panel members suggested that the rationale for these different judicial responses varied. Based on members' anecdotal reports, it appears that some judges have a philosophical preference that all children be represented, while others appoint counsel because they lack confidence in the CAS or counsel in the case. Panel members from some regions in the province noted that judges rarely appoint the OCL to represent young children because the presence of an OCL would mean just one more lawyer's calendar to accommodate when scheduling a case, thus leading to more delays in the case for limited benefit.

The majority of Committee and Subcommittee members agreed that it would be preferable to appoint the OCL to act for children under the age of eight only in those cases where there is a specific role for the counsel to play. While it is true that the OCL can sometimes help the parties to move forward with the case, thus providing a purpose for being there, both the CAS and court also have that responsibility.

The Subcommittee members recommended strongly that OCL counsel should assess the value of their ongoing representation of children and adolescents in the following circumstances:

- There have been successive supervision orders and the parents or caregivers have been cooperating well with the CAS;
- The youth is "on the run" and his/her whereabouts are unknown;
- A child is in the care of the CAS and there is no other plan or option available;
- More than one OCL counsel is involved in a case and there is no conflict in the children's interests in the litigation; and
- A minor parent cannot be located or contacted.

The respondents to the OCL survey indicated that they have found that their participation does *not* assist the court when they have represented children between eight and fourteen years old in the following circumstances:

There is no plan for the child other than the one put forward by the CAS	80.2%
There have been a series of consecutive supervision orders	37.2%
The child is unable to communicate views and preferences	47.9%

Respondents indicated that they found their participation does *not* assist the court when they represent youth between the ages of 15 and 17 in the following circumstances:

There is no other plan for the youth other than the one put forward by the CAS	49%
There have been a series of consecutive supervision orders	21.4%
The youth is “on the run”/AWOL	84.1%
The youth is unable to communicate views and preferences	22.8%

In circumstances where the child or youth is unable to communicate views and preferences, the court and parties should consider whether the child has special needs that would warrant ensuring that s/he has independent representation.

OCL Withdrawing from a Child Protection Case

Despite the fact that the Committee, Subcommittee and panel members all agreed that there are circumstances where the OCL is involved in cases in which they do not add significant value, only 27.2 percent of the respondents to the survey indicated that they had previously brought a motion or asked the court to be removed as counsel for a child in a child protection case. Of those counsel who had asked to be excused from a case, 63.2 percent had only asked once in the last five years.

The OCL takes the position that because the Children's Lawyer is directed by court order to appoint counsel, only the court can vary or set aside that order. The current OCL policy for withdrawing from a child protection case requires a panel lawyer to seek permission from her/his regional supervisor and to bring a motion with an affidavit from the Legal Director in support of the motion.

A concern has been expressed by many panel members that making such a request would be poorly received by the judiciary. However, 60 percent of those respondents who had asked to withdraw from a case reported that the court had granted their request "every time."

There was general consensus amongst the Subcommittee and Committee members that court direction should be sought whenever an OCL counsel seeks to end and/or change her/his role in a case. As part of any such discussion, consideration should also be given to how or when an OCL might become re-involved in a case if circumstances change.

The Committee and Subcommittee members recommended that OCL counsel should continue to bring formal motions to be removed from the record in appropriate cases. In other cases, however, they noted that it may be appropriate for the ongoing role of the OCL counsel to be discussed at a settlement or trial management conference. For example, the court and parties might be able to agree that the only role for the OCL is a discussion of sibling access and agree to plan the trial so that the OCL would participate only when evidence is being led with respect to that issue. In others, the parties might agree that the OCL position could be put on the record at the beginning of the trial, either orally or in writing, and that the CAS or counsel would undertake to notify the OCL if they were planning to agree to an order that was contrary to this position.

Committee and Subcommittee members agreed that OCL regional supervisors and panel members should be encouraged to discuss the need for OCL involvement at appropriate points in a case.

The feedback from the judiciary on this issue was supportive. They recommended that the issue of the need for ongoing OCL involvement in a case be brought to the attention of the judge for consideration and noted that in some cases it may be possible to resolve the issue without the need to bring a formal motion.

The OCL's Role in Helping Reduce Unnecessary Delays

There was consensus among Committee, Subcommittee and panel members that one of the most important roles for OCL counsel is to advocate against unnecessary delays in child protection proceedings. The Committee and Subcommittee both reviewed the *Report of the Long Trials Advisory Committee Best Practices Working Group to the Family Courts Steering Committee* ("Long Trials Report") from May 2010. The Long Trials Committee was co-chaired by Justice Mary Jane Hatton, during her tenure as the Senior Judge of the Family Court, and Justice Ellen Murray of the Ontario Court of Justice and included representatives from CASs, the OCL, LAO, parents' counsel, the Child Welfare Secretariat and the Court Services Division of the Ministry of the Attorney General. The Committee and Subcommittee members noted that the concerns described in the Long Trials Report continue to be relevant and supported the recommendations in that report.⁵ The following is a summary of the recommendations in the Long Trials Report:

1. Child protection cases and trials should be given scheduling priority, where possible.

⁵ The Long Trials Report was approved by the Family Courts Steering Committee and Chief Justices Heather Smith and Annemarie Bonkalo in June 2010.

2. There should be enough time available during court appearances to allow the court and parties to address outstanding issues and establish clear expectations for all of the parties during any adjournment periods.
3. At every court appearance, parties and judges should consider the ages of the children, the length of time they have been in care and the issues that have to be addressed before a permanency plan can be implemented.⁶
4. Parties and the court should routinely consider whether an alternative dispute resolution option, such as mediation, family group conferencing or a talking circle, might help resolve outstanding issues.
5. Service issues should be addressed early on in the proceeding to avoid last-minute delays.
6. Temporary care and custody motions should be heard in a timely manner. If the parties do not wish to argue the temporary motion, the temporary order should be made “with prejudice” and the focus should move to settlement or trial management.
7. Conferences should move the case towards resolution. A checklist that prompts parties to identify and address issues in a timely fashion could be a useful tool.
8. Before a trial begins, parties should be expected to thoroughly canvass issues that may cause delay in the trial. Where possible, pre-trial motions should be scheduled to deal with evidentiary issues such as documentary and affidavit evidence.
9. A trial management endorsement form that prompts a comprehensive consideration of how the trial will proceed should be adopted in child protection courts.
10. Parties have a responsibility to ensure that allotted trial time is utilized in an effective and efficient manner. Before a trial starts, the court should establish “ground rules” such as start times, break times and finish times.

One of the themes that emerged from the discussion of reducing unnecessary delays was that when the OCL is involved in a case, the lawyer should be playing a proactive role in ensuring that the child’s interests remain the focus of the proceedings at all times. This theme was echoed by the judiciary. The

⁶ A permanency plan means a long term placement for the child and can include a return to parents, placement in a kinship home, Crown Wardship or adoption.

Committee echoed the comments in the Long Trials Report that not all delay is bad and that a strict adherence to statutory and *Family Law Rules* guidelines is not always appropriate. That being said, there continue to be many children left in litigation limbo and the OCL is well positioned to encourage the parties to move towards resolution on behalf of those children.

OCL Policies

As a publicly funded organization with a broad mandate, the OCL must strive for consistency and ensure adequate oversight of the services it provides throughout Ontario. In order to promote a high quality of services, the OCL prescribes policies for in-house and fee-for-service panel lawyers. Many of the policies relate to business-related, operational issues such as the tariff and billing periods; other policies and guidelines address the way in which OCL counsel are expected to represent a child's interests.

On occasion, the OCL has heard from judges, panel members and other lawyers in the child protection system that there are times when a strict adherence to mandatory OCL policies—or what are perceived to be mandatory OCL policies—can result in an OCL counsel not providing optimal representation for a child. With this in mind, the Subcommittee members were asked to consider whether any of the OCL's policies impeded panel members' ability to effectively represent children in child protection cases and/or contributed to unnecessary delay in cases.

The Subcommittee were asked to specifically review the following six OCL policies which are most frequently referred to in such discussions:

- a) Conflict files;
- b) Police disclosure;
- c) CAS disclosure;
- d) Obtaining collateral information;
- e) Requests to admit;
- f) Participating in alternative dispute resolution (ADR) processes; and

g) The requirement that OCL counsel interview child clients multiple times
Each of these policies is discussed below.

a. *Policy on Conflict of Interest Files*

The OCL has a policy of appointing different counsel to represent siblings in a case where there is a conflict of interest between the siblings. Sometimes a conflict is identified by the court or CAS at the outset of a case and in some cases the conflict becomes apparent at a later stage. Subcommittee members and in-house counsel at the OCL noted that there is a lack of consistency in the way conflicts are identified and that there are situations where a conflict is resolved or a potential conflict does not materialize, but children continue to have separate representation.

There are some cases where there is no question that the children in a family should be represented by separate counsel. Some examples include:

- One child is alleged to have harmed another;
- Permanency planning is appropriate for one child, but not another and there are conflicting interests in maintaining sibling contact; and
- The children's interests cannot be advocated without the OCL introducing or eliciting contradictory evidence.

Subcommittee members noted, however, that just because children express different views and preferences does not necessarily mean there is a conflict of interest requiring separate counsel. The judiciary concurred. Some Subcommittee members noted that there are times when one counsel is able to more effectively represent the children than two. The Subcommittee suggested that in assessing whether a conflict exists, OCL counsel and their regional supervisors should consider whether representing more than one child will raise evidentiary issues that would result in one child's position undermining the other.

In the OCL survey, 35.8 percent of the respondents indicated that they had represented children in cases where siblings were represented by other counsel and a previously identified conflict of interest had been resolved. Eighty-five percent (85%) of the respondents who indicated that a conflict had been resolved indicated that the children continued to be represented by separate counsel. Approximately two-thirds of the lawyers who had identified that a conflict had been resolved indicated that they had discussions with the other OCL counsel about the need for more than one lawyer to continue on the case. Of those who had agreed that the children only needed one counsel, over 80 percent sought advice from their regional supervisors with respect to how to proceed.

This issue is of particular interest to the OCL when multiple counsel are required in a long trial. In addition to the obvious cost implications and scheduling challenges with larger numbers of lawyers, multiple counsel can lead to unnecessarily long proceedings when several counsel take court time to advocate essentially the same position.

The Subcommittee recommended that the OCL provide training for both in-house counsel and panel members to promote consistency when identifying and dealing with conflict issues. The members also suggested that OCL counsel and their supervisors should routinely discuss the issues of conflict on cases where separate counsel are assigned to determine whether separate representation continues to be necessary.

b. *Policy on Disclosure of Police Records*

The current OCL policy requires OCL counsel to obtain police records for each person who has or is seeking custody or access or who may be placed in a caretaking role for a child, for example, the partner of a family member seeking to plan for a child. This policy applies regardless of the outstanding issues, unless the CAS has or is in the process of obtaining the records. OCL counsel are also directed to obtain and review police records before taking a position on behalf of

a child in child protection cases. It should be noted that there is a cost associated with obtaining police records and that in some jurisdictions, local police services can take several months to provide their records.

The Subcommittee members offered the following comments on the police records policy:

- There have been times when a strict adherence to this policy has led to the OCL role being diminished because the court has made a decision before the OCL has been ready to take a position;
- Where police records are needed, the OCL should not just rely on the CAS to obtain police records, as the CAS does not always do so; and
- It should not be mandatory for OCL counsel to seek police records in every case, however if OCL counsel exercise their discretion not to obtain police reports, they should explain their rationale to their regional supervisor.

In the OCL survey, respondents indicated that they either do not seek police records or think that it would not generally be necessary to do so in the following circumstances:

The CAS has already obtained the records	93.5%
The child is remaining with a parent who has always had custody	51.2%
The circumstances of the case do not suggest that disclosure of police records is necessary	59.5%
The parents and/or other caregivers refuse to sign consents	20.8%
It takes too long to get the records from their local police service	4.2%
The court has indicated that it is not prepared to wait for them to get police records	13.1%

Notwithstanding the above, in the OCL survey, a number of panel members commented that they felt that obtaining police disclosure was important in every case. Some noted that police records sometimes provide unanticipated, yet

significant, information. Others noted that the OCL does not provide sufficient direction in those cases where parents refuse to sign the consents needed to obtain the records.

Overall, the consultation and survey responses indicated the following:

- Obtaining police records is important, but should not be mandatory in all cases;
- Police records should not be necessary in cases where no one is seeking the return of the child or the reason for CAS involvement is a parent-teen conflict, with no history of abuse or violence;
- If parents do not consent to the disclosure of their records, OCL counsel should consider the reasons why disclosure is necessary or would be prudent to obtain;
- OCL counsel should consult with CAS counsel to determine if the CAS is going to bring a motion pursuant to s. 74 of the CFSA; and
- If the CAS is not going to seek the records and the OCL counsel feels that the records should be obtained, OCL counsel should bring a motion pursuant to rule 19 of the *Family Law Rules*.

In February 2012, the OCL introduced new standard-form court orders for the appointment of the OCL in both protection and custody/access cases. The terms in these orders were negotiated with the Ontario Association of Chiefs of Police and Crown counsel for over two years. The standard terms clarify the type of information the OCL can receive from police services and the procedure that is to be followed if additional information is required. The new orders are intended to provide greater consistency in the provision of police records across the province and to minimize delays that affect the OCL's ability to complete its work in a timely manner.

c. Policy on Disclosure of CAS Records

Current OCL policy requires counsel, in every case, to review the CAS file before taking a position and to update disclosure at appropriate intervals in the case.

The Subcommittee members were generally of the view that OCL counsel should obtain disclosure at appropriate intervals, including before trial, but noted that there are circumstances where the OCL has all of the necessary information to take an initial position based on the pleadings and interviews with the child. If an OCL counsel declines to take a position in this type of case, solely because she/he has not yet obtained disclosure of the CAS files, it is not helpful to the child and may cause unnecessary delay in the proceeding.

In the OCL survey, 41.9 percent of respondents indicated that they would not feel comfortable taking a position on behalf of a child client without obtaining disclosure of the CAS file, 21.2 percent said they would be comfortable taking a position without disclosure and 37.4 percent said they would be comfortable doing so in some cases.

When asked in which circumstances they believed that it might be appropriate for an OCL to take a position in a child protection case before obtaining disclosure of the CAS file, the respondents indicated the following:

The family does not have a history with the CAS and all of the relevant information is included in the CAS court documents	72.4%
The child has very clear views and is old enough to have his/her views and preferences carry weight with the court	77.9%
They have spoken to the CAS worker(s) and are satisfied they understand the issues	49%

Of note, members of the Committee, Subcommittee and respondents to the survey reported that in some parts of the province, there are considerable delays in obtaining CAS records. Although all participants acknowledged that providing disclosure is a time-consuming and resource intensive task for CASs, panel members reported the following issues with obtaining CAS records:

- Depending on the CAS, it can take up to three or four months for OCL and parents' counsel to obtain disclosure of CAS records;
- In some agencies, the files must be vetted by counsel before they are disclosed, which adds considerable time;
- Some agencies charge hourly rates for vetting the file and then additional fees for photocopying; and
- Some agencies provide documents on a disk, which can be difficult and time-consuming to review.

Delegates from the OACAS Senior Counsel Network Group advised that the Senior Counsel Network Group is working to develop a provincial protocol on disclosure of records. It is anticipated that the Deputy Legal Director of the Personal Rights Section of the OCL will work with the OACAS Senior Counsel Network Group to offer OCL input. The participants in this consultation process indicated that there would be widespread support for a protocol that ensured timely and efficient disclosure of records.

d. *Policy on Obtaining Information from Collateral Sources*

The OCL policy requires counsel to review information from collateral sources and to independently interview teachers, therapists, doctors etc. Members of the Subcommittee suggested that OCL counsel should have the discretion to focus on gathering information from the collateral sources with the most significant and relevant information to the child's case. Members noted that some of the most helpful sources of information can be: the child's First Nation, foster parent(s), group home staff, counsellors and teachers.

In the OCL survey, 88.4 percent of the respondents indicated that they felt they had sufficient flexibility in determining from which collateral sources they should be obtaining information. Only 5.5 percent said they did not feel they had enough flexibility and 6.1 percent responded "don't know".

Although this policy was identified by some members of the Subcommittee as one that may need review, it would appear from the survey results that panel members are comfortable with the level of discretion they have under the current policy.

e. *Policy on Preparation of Requests to Admit*

One tool that can be effective in narrowing issues in dispute is a request to admit. The procedure is set out in rule 22 of the *Family Law Rules*. The OCL policy requires a child's counsel to consult with their regional supervisors before they submit their response. In practice, this has often led to the regional supervisor and panel member drafting the response together.

Subcommittee members reported that this process can be cumbersome and time-consuming. They suggested that the OCL policy be amended to remove the requirement that OCL supervisors participate in the drafting of all replies to requests to admit given that the panel member is much more familiar with the case. This does not mean that the regional supervisors will not be available to assist where necessary.

Subcommittee members also noted that it might also be helpful for OCL counsel to consult with their supervisors about whether or not the OCL should be preparing a request to admit.

f. *Policy on Participation of Child's Counsel in ADR*

OCL policy requires panel members to submit a form to obtain permission from their regional supervisor before they can participate in any form of child protection alternative dispute resolution (mediation, family group conferencing, talking circles, etc.) Subcommittee members viewed this as time consuming and an unnecessary encumbrance to helping children in an efficient way. The OCL could consider alternative means of monitoring how many cases are using ADR.

g. Policy on the Requirement for Multiple Meetings with Child Clients

OCL best practices suggest that OCL counsel should meet with their child clients in person at least three times. The rationale for this best practice is that it enables an OCL to build a rapport with the child or youth and to assess the consistency, strength and independence of a child's views. Subcommittee members agreed that in many cases when they are first assigned to represent a child, it is necessary and appropriate to meet with child clients several times. They noted, however, that depending on how much things are changing in the file, it may not be necessary to meet with children or youth multiple times before a status review application.

It is an OCL expectation that OCL counsel meet with their child or youth clients during the course of a protection order that will be reviewed. 75 percent of the respondents to the survey indicated that they always or sometimes meet with their clients after a final order is made and before a status review application.

There are times when mandatory meetings with a client may not be appropriate. Subcommittee members noted that OCL counsel should be sensitive to situations where children or youth do not want to see their counsel. There are some children who find the process of meeting with their lawyer and expressing their views and preferences to be particularly stressful. The requirement to meet with children and youth in person should also be flexible given the way that young people communicate today. Many youth prefer to send text messages and some panel members advised that this is the only way they can contact some of their clients, especially those who are not consistently living in their foster or group home. The Subcommittee recommended that the OCL policy acknowledge that phone, email and text messages can be acceptable means of communicating with children and youth, although attempts should be made to meet with the child in person at least once.

Committee and Subcommittee members agreed that it might be helpful for the OCL to provide professional development to OCL panel members on solicitor-client issues between an OCL and child or youth client and best practices on communicating with the child client.

Subcommittee Recommendations on OCL Policies

The Subcommittee members indicated that OCL policies often provide helpful guidelines when representing children, but they emphasized that mandatory compliance with policies relating to the carriage of a file can encumber experienced OCL counsel in effectively and efficiently representing children and youth. They encouraged the OCL to give panel members discretion in some circumstances and welcomed the ability to discuss strategies that might fall outside the strict confines of policies and guidelines.

Other issues raised by Subcommittee members were:

- In the North, resources are scarce and it might be helpful to have clinical panel members available to act as mediators in child protection cases;
- In exceptional circumstances, it would be helpful to have clinical assists in child protection cases; and
- The OCL should provide professional development to its panel members on issues relating to working with First Nations (for example, a First Nation should be treated like a parent in a protection proceeding)

There was support from the judiciary for providing clinical assists in cases involving young children. The OCL has done this in a few cases and will continue to consider this option on a case-by-case basis. The OCL is mindful of the fact that there is always a CAS social worker involved in a child protection case and that there is an ever-growing need for OCL clinical involvement in custody/access cases.

More Effective Overall Representation by OCL Counsel

In order to assist in identifying specific recommendations on how OCL counsel might provide more effective representation for children and youth, the Committee looked at the various stages in a child protection proceeding and reviewed the activities often undertaken by OCL staff in preparation for those stages. A summary of those discussions is set out in the document *Common OCL Lawyer Activities in a Child Protection Case*, which is attached as **Appendix D**.

The Subcommittee made the following observations and suggestions with respect to steps OCL counsel can take to improve their efficiency and effectiveness:

- Work with other counsel in advance of a court appearance to ensure that all court appearances accomplish something meaningful in terms of helping the case move forward towards resolution;
- Parties should use Form 14B motion forms⁷ to request an adjournment rather than going to court where an adjournment is inevitable (e.g. service is outstanding, the parties are waiting for a s. 54 assessment, the child is AWOL etc.);
- There should be more consistent use of Form 14Bs to enable parties to confirm that the court does not require the parties to attend for cases when they believe their attendance is not necessary;
- It is helpful when judicial endorsements specify the expectations of the parties during the course of an adjournment;
- There should be communication between counsel in between court appearances, particularly with respect to Form 14C⁸ confirmation forms;

⁷ Under r. 14 (10) of the *Family Law Rules*, parties may fax or file a motion form asking the court to deal with “procedural, uncomplicated or unopposed matters” without having to appear in court.

⁸ Under r. 14 (11) (c), a party making a motion with notice must file a Form 14C confirmation form no later than 2 p.m. two days before the motion date. The confirmation form advises the court which issues will be discussed at the motion and the specific documents (affidavits etc.) in the court’s continuing record that will be relied upon in the motion.

- When CASs serve documents with very little notice, it almost always results in an adjournment;
- OCL counsel should put pressure on the CAS to comply with the timelines in the *Family Law Rules*, wherever possible;
- OCL counsel and CAS workers should maintain regular contact throughout a case, particularly with respect to a child’s placement;
- OCL counsel, CAS counsel, parents’ counsel and the court should work together to change the “culture of delay” and adjournments—there should be valid reasons for adjournments and delays that are consistent with the child’s needs and best interests;
- The OCL head office should work with CASs to come up with a reasonable disclosure protocol to enable timely access to relevant CAS records; and
- OCL counsel should work with other counsel and the court to make more effective use of trial management conferences.

There was strong judicial support for OCL counsel preparing settlement conference briefs and playing an active role in promoting resolution at all conferences.

Trial Management Conferences

The Committee and Subcommittee members agreed that the trial management endorsement form attached to the Long Trials Report would be a helpful tool in focusing parties on more effective and efficient trial management. The endorsement form, which was modeled on a form widely used by the Family Courts in the Central East Region, is attached as **Appendix E**.

Ideally, counsel would discuss the issues in the trial management endorsement form before attending the trial management conference in order to narrow the issues and reach agreements, where possible. A partially completed trial management form could then be given to the judge. In addition to reviewing any

agreements reached by the party, the judge could use the form as the basis for discussion at the trial management conference. At the end of the conference, the parties would receive a copy of the completed endorsement form that sets out any pre-trial orders.

Some of the key issues that the OCL can address at a trial management conference include:

- How the child's views and preferences will be put before the court;
- Whether there are any issues about child's statements;
- Whether there is a need for a *Khan* motion⁹;
- Who the witnesses will be and what they will say;
- How the evidence will be put in (affidavit, *viva voce*, reports etc.); and
- Drafting statements of agreed facts, chronology, etc.

Child protection cases can be complex and unpredictable. There are often multiple parties and plans and circumstances frequently change. It is not realistic to expect that all trials will go exactly as planned, but there was a general consensus that a lack of coordinated planning among counsel almost inevitably leads to trials taking longer than anticipated. When trials have to be adjourned because they were not completed in the time estimated or allotted, it can sometimes take months for the case to come back to court. In addition to the obvious delays, this increases the likelihood that family circumstances will change, witnesses will have to be re-called and new issues will arise. Most importantly, children are left in limbo.

From a cost efficiency perspective, the repeated adjournments of trials leads to additional preparation time for all counsel and many of the witnesses, most of whom are being paid with public funds. There have been reported decisions

⁹ If a party is seeking to have child's statements admitted into court without having the child testify, the court holds a *voir dire* and considers evidence about the necessity and reliability of the child's statements pursuant to the principles set out in *R. v. Khan* [1990] 2 S.C.R. 531

where the trial took so long to complete that the court neglected to make a finding because it assumed that the case was a status review application.

In order to make the most effective use of valuable trial time, the Committee members recommended that the OCL work with CASs, LAO and the courts to make trial management conferences a priority. In too many situations, trial management conferences are just one of many cases on a list on a given day and neither the counsel nor the court have or make the time to give sufficient consideration to how the trial will, or should, unfold.

The OCL survey asked panel members if the courts in their regions used a trial management checklist or standardized trial management endorsement form. 53.4 percent said yes, 33.7 percent said no and 12.9 percent did not know. Panel members were also asked how much time they typically spent preparing for a trial management conference. 59.5 percent responded that they spent between 1 and 3 hours preparing and 32.4 percent said they spent less than an hour.

The survey asked OCL panel members how often they prepare trial management briefs. 30.2 percent said never; 19.8 percent said rarely; 27.9 percent said sometimes and 22.1 percent said always.

The OCL asked its panel members: "If the OCL were to authorize a block of time to prepare for a trial management conference, including the preparation of a comprehensive trial management conference brief or checklist, how many hours do you think would be reasonable?" 49.7 percent responded "up to five hours" and 41.1 percent responded "up to two hours".

In order to encourage making trial management conferences a priority, the OCL is considering adjusting its tariff to give panel members a dedicated block of time to prepare for a trial management conference. If the OCL were to do this, it

would be helpful to work with LAO to harmonize the funding of time allocations. A commitment from CASs and a dialogue with the judiciary aimed at making trial management conferences meaningful, rather than a *pro forma* appearance to get on the trial list, would be part of this strategy.

The judiciary were very supportive of working together with all parties to ensure that all conferences, including trial management conferences, are comprehensive and effective.

How the OCL Can Help Panel Members

In addition to allowing for some flexibility with respect to policies, Subcommittee and panel members indicated that they would appreciate support from their regional supervisors in determining when they should consider asking the court to be removed from a case and whether or not multiple OCL counsel continue to be necessary in a case.

The OCL asked panel lawyers if the following topics for continuing education programs would be of interest and/or assistance in their role as child’s counsel. Their responses to the suggested topics were as follows:

Representing First Nations Children	44.2%
Working with First Nation (band) representatives in child protection cases	43.1%
Representing children from cultures that are unfamiliar to the lawyer	52.5%
A review of best practices when representing children	71.8%
Making settlement and trial management conferences more effective	43.6%
Trial management issues—making the best use of limited trial time to avoid unnecessary delays	42.5%
Representing children with special needs	67.4%
Understanding children’s mental health issues	78.5%
Representing adolescents exhibiting high-risk behaviour	90.1%

Respondents were also given the opportunity to provide other suggestions for professional development. A number of comments related to helping panel members communicate with their child clients. This topic is quite broad and encompasses everything from interviewing children to helping explain the OCL role and how to manage a child client's expectations about the lawyer's role. Interestingly, several panel members reported that they believe they should participate in a trial because the child will feel abandoned if they do not. Based on this feedback, it would appear that communicating with the child client would be an important topic for professional development.

In November 2012, the OCL's fall continuing education program was on developing cultural competency; two presentations in that program dealt specifically with First Nation issues. In both the Committee and Subcommittee consultations, the OCL heard that ongoing professional development on working with First Nations should be a priority for the OCL. The OCL remains committed to improving the cultural competence of its in-house staff and panel members and this will be the topic of the 2013 spring professional development.

Working with Partners

The Committee, which included CAS, LAO and parents' counsel representatives, recognized the importance of ongoing cooperation in not only helping the OCL to provide more efficient and effective representation for children, but also in working together to make the child protection system more efficient for the children and families everyone serves.

The Committee supported:

- Revisiting the Long Trials Committee report and building on the recommendations in that report;
- Liaising with the Offices of the Chief Justices, LAO and CASs to promote more effective use of trial management conferences; and

- Providing professional development that promotes the resolution of cases and the strengthening of a culture that avoids unnecessary delay.

There was judicial support for joint continuing legal education for OCL panel members, parents' counsel and CAS counsel. The judiciary also suggested that local bench and bar or Community Liaison and Resource Committees would be a good forum for courts and counsel to work together to strategize on ways to deal with child protection cases in a more effective manner.

Although the focus of the consultation was OCL involvement in cases up to and including trials, it is widely recognized that appeals of child protection cases can result in significant delays for children. The Court of Appeal, Superior Court of Justice and Ontario Court of Justice have been working cooperatively with each other and with counsel who appear on appeals for all parties and the children, to expedite appeals where the issue is Crown wardship without access. The OCL supports making child protection appeals a priority and will continue to represent children in those appeals as needed.

In cases where there has been no prior OCL involvement, the appellate court may find it helpful to weigh the value of the involvement of the OCL against any potential delays that may result from adding a new lawyer who is unfamiliar with the case. The court may wish to consider that OCL counsel would need time to meet with the child and potentially other parties and to obtain the necessary information to formulate an appropriate position on behalf of the child or youth.

Conclusion

As noted in the introduction to this report, the purpose of this consultation process was to seek input from legal experts in child protection cases on ways to:

- Increase the value that OCL counsel bring to child protection proceedings;

- Improve efficiencies in the way OCL panel members perform their duties in child protection cases; and
- Enable the OCL to play a more strategic role in the child protection system.

The consultation process confirmed that the OCL provides a valuable and meaningful service to children and youth involved in child protection cases before the court. Given that OCL resources are finite, however, it is important that OCL involvement in cases be limited to those in which child's counsel can provide a meaningful role in the litigation. This can be accomplished in several ways. Firstly, thoughtful consideration should be given when a section 38 direction is sought or made. When the OCL is involved, counsel and her/his regional supervisor should monitor the role the OCL is fulfilling in the case to ensure that the OCL continues to assist the child and the court. If the OCL is not making a meaningful contribution to a case, counsel should work with their clients, the court and other parties to determine if the section 38 order should be varied or terminated.

The OCL should review its policies with respect to: conflict files; disclosure of police records; disclosure of CAS records; preparing requests to admit; participation of child's counsel in ADR; and the requirement for multiple meetings with child clients. These policies are important and necessary, but requiring strict compliance with policies, without allowing for flexibility to address the complexities of an individual case, may lead to less than optimal representation of a child's interests.

Finally, the OCL should work with justice partners—including the judiciary, CASs, LAO and lawyers' associations—to strengthen a culture in which timely resolution of child protection cases in the best interests of the children becomes the focus of all child protection proceedings. The recommendations in the 2010 Long Trials Advisory Committee Report remain directly relevant today and should be

shared with judges and lawyers across the province in order to develop strategies for their implementation. In particular, there is a need to ensure that child protection trials proceed in an orderly and efficient manner. This requires a commitment from counsel and the bench to focus on making all conferences, including trial management conferences meaningful.

The goal of this consultation process was to provide recommendations to the OCL on how it might better utilize its resources to help children. There are a number of recommendations that specifically address OCL issues, and the OCL has started to implement those. The OCL is hopeful that the spirit of collaboration that was present in this consultation process will continue and that this report will spark conversations and lead to a renewed commitment from all justice partners to improve the child protection justice system for Ontario's children and families.

Report of the Office of the Children's Lawyer
Child Protection Consultation Committee
Summary of Recommendations

Role of the OCL

1. OCL counsel should be proactive throughout the proceedings to ensure that the child's interests remain the primary focus of child protection cases and to advocate against unnecessary delays when possible.

Appointment of the OCL in Child Protection Cases

2. The OCL should work with the judiciary to promote the consideration of the criteria set out in s. 38 of the *Child and Family Services Act* in conjunction with the role the court anticipates the OCL will fulfill when making a s. 38 direction.
3. The OCL should work with CAS counsel to promote the consideration of the criteria set out in s. 38 of the CFSA and the role they anticipate the OCL will fulfill in a case before seeking a s. 38 direction.
4. The OCL should only be appointed to represent children age 8 and under when there is a specific role for child's counsel.

Determining the Need for Ongoing OCL Involvement

5. On an ongoing basis, OCL panel members and their regional supervisors should assess the value the OCL is contributing to a case to determine whether the OCL's contribution can be improved.
6. On an ongoing basis, OCL panel members and their regional supervisors should assess the value the OCL is contributing to a case to determine whether OCL participation continues to be necessary.
7. In cases where panel lawyers and their regional supervisors have determined that ongoing OCL involvement is providing limited value in a case, OCL counsel should raise the issue of his/her ongoing participation at a court conference. The method by which OCL involvement may be limited or terminated should be discussed with the court (e.g. motion to terminate a s. 38 order, discreet or limited participation at trial etc.)

8. If a court determines that it is appropriate for OCL counsel to stop participating in a case, OCL counsel and the parties should ensure that the child's views and preferences are before the court and that there is a mechanism in place should the circumstances in the case change and in the event that it becomes necessary for the OCL to become re-involved in the case.

Conflict of Interest Issues

9. In order to address the issue of having multiple OCL counsel on one case unnecessarily, the OCL should provide continuing education for both in-house counsel and panel lawyers to promote consistency when dealing with conflict issues.
10. OCL panel lawyers and their regional supervisors should routinely discuss the issues of conflict of interest in cases where children are represented by different counsel to determine whether the conflict continues to exist. The focus of this discussion should be whether representing more than one child could lead to one child's position undermining that of another.

OCL Policies

11. OCL policies and guidelines are necessary and helpful, but they should be flexible enough to accommodate individual case needs.
12. Although the contents of police records can often provide crucial information in a child protection case, OCL counsel should have the discretion to not seek them if the information is not necessary in a particular case.
13. In cases where parents refuse to sign consents to allow the OCL to obtain police records and the CAS is not already seeking them, OCL counsel should consider bringing a motion for production of the police records under rule 19 of the *Family Law Rules*.
14. The OCL policy with respect to requests to admit should be more flexible to ensure that requests to admit can be prepared and responded to in an efficient manner.
15. The OCL should consider whether formal approval is necessary before OCL panel members can participate in ADR in cases already before the court.
16. OCL best practices suggest that OCL counsel meet with their clients a minimum of three times in order to build a rapport with the client and assess the strength and consistency of their views. The OCL policy should clarify that after at least one initial interview, counsel should consider how it may

be possible to accommodate the way in which a young person prefers to communicate, including by phone, email, text messaging, Facebook etc.

Disclosure of CAS Records

17. In some parts of the province, it can take several months for OCL counsel to obtain disclosure of CAS records. The OCL should work with the OACAS Senior Counsel Network Group to develop a protocol to ensure the timely and efficient disclosure of CAS records to OCL counsel.

Trial Management Conferences

18. Lengthy trials that are heard over extended periods of time lead to significant periods of delay for children. In order to make the most effective use of trial time, the OCL should work with Legal Aid Ontario, the Ontario Association of Children's Aid Societies and the Courts to make trial management conferences a priority. In order to do this, the OCL should:
 - a. Implement the use of a standardized trial management checklist or endorsement form that could be used in courts and for seeking authorization to attend at trial; and
 - b. Consider providing compensation to panel members, without the need for them to seek specific authorization for extra hours, for spending adequate time (up to five hours) to prepare for a fulsome trial management conference.
19. Some of the key issues that the OCL should ensure are addressed at a trial management conference include:
 - a. How the child's views and preferences will be put before the court
 - b. Whether there are any issues of child's statements
 - c. Whether there is a need for a *Khan* motion
 - d. Who the witnesses will be and what they will say
 - e. How the evidence will be entered (affidavit, *viva voce*, reports etc.)
 - f. Drafting statements of agreed facts, chronology, etc.

Professional Development

20. The OCL should continue to design and deliver professional development programs to panel members on topics identified as being relevant and of interest by panel members and should do so in consultation with local family justice committees. Included in those programs should be information about:
 - a. Ways the OCL can help resolve cases and work with the courts, CASs and other parties to reduce unnecessary delays in child protection proceedings;

- b. Communicating with child clients and managing child clients' expectations; and
- c. The importance of the OCL role in representing aboriginal children from First Nations and ways to facilitate better working relationships with First Nation and other aboriginal communities.

APPENDIX A

TERMS OF REFERENCE OF THE

OCL CHILD PROTECTION CONSULTATION COMMITTEE

**TERMS OF REFERENCE
OFFICE OF THE CHILDREN'S LAWYER CONSULTATION PROJECT
TO IMPROVE SERVICE IN CHILD PROTECTION CASES**

Mandate

- The Office of the Children's Lawyer (OCL) is committed to providing excellent representation to the children of Ontario who are involved in the child protection system.
- In this time of economic constraint, the OCL is seeking input from experts in child protection cases on ways to:
 - Increase the value that OCL counsel bring to child protection proceedings;
 - Improve efficiencies in the way OCL panel members perform their duties in child protection cases; and
 - Enable the OCL to play a more strategic role in the child protection system.
- The Committee members should start from the premise that there will not be additional funding available and any proposed changes should be cost neutral or result in the OCL allocating fewer resources to child protection cases.
- If the OCL can achieve cost efficiencies in child protection cases, it will be able to provide more services to families involved in high-conflict custody and access cases.

Committee Membership

Chair: The Honourable Joseph C. M. James

Counsel to the Chair: Jane Long, Special Projects Counsel, OCL

Children's Lawyer: Lucy McSweeney

Committee Members:

- Linda Feldman, OCL in-house counsel
- Linda Hofbauer, Senior Counsel, Children's Aid Society of Toronto
- Jean Hyndman, representative from the Family Lawyers' Association
- Katherine Kavassalis, Legal Director, Personal Rights (A) OCL
- Tom Kelsey, Legal Aid Ontario
- Peter Kirby, OCL panel lawyer, Kenora
- Stacy Neill, Senior Counsel, Children's Aid Society of Brant
- Bobbi Olsen, representative from the Ontario Bar Association
- Lise Parent, OCL panel lawyer, Ottawa (as she then was)
- Mary Reilly, OCL panel lawyer, Toronto
- Adit Sommer-Waisglass, Native Child and Family Services Toronto
- Cathy Tempesta, OCL in-house counsel
- Gerri-Lynn Wong, OCL panel lawyer, Windsor

Subcommittee Chair: Annemarie Carere, Senior Counsel, OCL

Subcommittee

- In order to maximize input from lawyers who represent children for the OCL, the Committee will form a subcommittee made up of:
 - In-house counsel from the Committee;
 - Panel lawyers from the Committee; and
 - Panel lawyers from each region.
- The subcommittee will be asked to specifically consider OCL policies and practices and to identify, if applicable, circumstances in which adherence to the policies results in:
 - Increased costs;
 - Unnecessary delays; or
 - Ineffective representation of children.
- The subcommittee will also be asked to identify regional differences in the ways that OCL services are requested and used.

Scope

The Committee will consider the following issues:

1. How and when OCL involvement in a case adds value.
2. Circumstances when it might be appropriate for child's counsel to withdraw from a case.
3. If a child's counsel should withdraw, the process for withdrawal and re-engagement, where appropriate.
4. How the OCL could work with the children's aid societies (CAS) to enable them to act as more effective gate-keepers when the court is considering making a s. 38 direction.
5. What child's counsel and others can do to eliminate unnecessary delays in child protection cases.
6. Whether there are any OCL policies that contribute to unnecessary delays in child protection proceedings.
7. Whether there are any OCL policies that require counsel to spend unnecessary time on files, leading to increased expense.
8. Steps OCL counsel could take to help cases move more efficiently.
9. Ways the OCL could offer more support or assistance to enable panel members to work more efficiently.
10. Ways the OCL could seek support from the judiciary to implement proposed changes.

Process

- The OCL will provide Committee members with background materials to be reviewed prior to the first meeting including:
 - A summary of applicable OCL policies;

- The Auditor General for Ontario's Report concerning the Office of the Children's Lawyer, December 5, 2011;
 - Report of the Long Trials Advisory Committee Best Practices Working Group to the Family Courts Steering Committee; and
 - A confidential OCL budget summary.
- The Committee will meet in June and early October 2012, with additional teleconferences if necessary. The meetings will focus on the issues for discussion and what additional information, if any, is required by the members to make recommendations. The first meeting is scheduled for June 22, 2012.
 - Between the June and October meetings, committee members will consult as necessary with their constituent groups and report back to Jane Long by mid-September 2012.
 - The Committee will receive the recommendations of the OCL subcommittee for consideration at the October meeting.
 - Jane Long will keep minutes and work with the Chair and Children's Lawyer. Jane will also provide a summary of feedback prior to the October meeting.
 - The OCL has advised Chief Justice Winkler, Chief Justice Smith and Chief Justice Bonkalo that it is undertaking this process. The OCL will consult separately with the Offices of the Chief Justices.
 - By November of 2012, Jane Long and the Chair will produce a draft report for review by the Committee.
 - By February 2013, a final report will be submitted to the Children's Lawyer for consideration.

Deliverables:

- A focused report containing recommendations on ways to:
 - Increase the value that OCL counsel bring to child protection proceedings;
 - Improve efficiencies in the way OCL panel members perform their duties in child protection cases; and
 - Enable the OCL to play a more strategic role in the child protection system.
- The Children's Lawyer will consider the recommendations and distribute the report to the participants, the Ministry of the Attorney General and elsewhere as she deems appropriate.

APPENDIX B
SUBCOMMITTEE MEMBERS

MEMBERS OF THE OCL SUBCOMMITTEE

Chair: Annemarie Carere, OCL Counsel

Linda Feldman, OCL counsel

Joanne Ferguson, Oshawa

Crystal George, Sarnia

Lorne Glass, Toronto

Frances Gregory, Toronto

Peter G. Kirby, Kenora

Claude Leduc, Niagara Region

Steven Leitman, Kingston

Yolanta Lewis, Hamilton

Jane Long, OCL counsel

Peter Marshall, Bracebridge

Lorelee Messenger, Toronto

Jay G. Meunier, Timmins

Lise S. Parent, Ottawa (now Justice Parent)

Stephen Paull, Kitchener

Mary P. Reilly, Toronto

Barbara Steinberg, Newmarket

Caterina Tempesta, OCL counsel

Christine A. Torry, Brampton

Gerri Lynn Wong, Windsor

APPENDIX C
SECTION 38 OF THE *CHILD AND FAMILY*
SERVICES ACT

CHILD AND FAMILY SERVICES ACT

LEGAL REPRESENTATION

Legal representation of child

38.(1) A child may have legal representation at any stage in a proceeding under this Part.

Court to consider issue

(2) Where a child does not have legal representation in a proceeding under this Part, the court,

- (a) shall, as soon as practicable after the commencement of the proceeding; and
- (b) may, at any later stage in the proceeding,

determine whether legal representation is desirable to protect the child's interests.

Direction for legal representation

(3) Where the court determines that legal representation is desirable to protect a child's interests, the court shall direct that legal representation be provided for the child. R.S.O. 1990, c. C.11, s. 38 (1-3).

Criteria

(4) Where,

- (a) the court is of the opinion that there is a difference of views between the child and a parent or a society, and the society proposes that the child be removed from a person's care or be made a society or Crown ward under paragraph 2 or 3 of subsection 57 (1);
- (b) the child is in the society's care and,
 - (i) no parent appears before the court, or
 - (ii) it is alleged that the child is in need of protection within the meaning of clause 37 (2) (a), (c), (f), (f.1) or (h); or
- (c) the child is not permitted to be present at the hearing,

legal representation shall be deemed to be desirable to protect the child's interests, unless the court is satisfied, taking into account the child's views and wishes if they can be reasonably ascertained, that the child's interests are otherwise adequately protected. R.S.O. 1990, c. C.11, s. 38 (4); 1999, c. 2, s. 10.

Where parent a minor

(5) Where a child's parent is less than eighteen years of age, the Children's Lawyer shall represent the parent in a proceeding under this Part unless the court orders otherwise. R.S.O. 1990, c. C.11, s. 38 (5); 1994, c. 27, s. 43 (2).

APPENDIX D
COMMON OCL LAWYER ACTIVITIES
IN A CHILD PROTECTION CASE

COMMON OCL LAWYER ACTIVITIES IN A CHILD PROTECTION CASE

The following is a description of activities that the Consultation Committee members felt OCL lawyers should undertake or at least consider as the case progresses. The goal was to identify how an OCL can:

- effectively represent a child;
 - assist in reducing unnecessary delay; and
 - assess if her/his ongoing participation is necessary.

- When a case is assigned, an OCL Lawyer will:
 - Review pleadings/court documents
 - Speak to CAS lawyer/workers
 - Arrange for disclosure of CAS file
 - Speak to other lawyers
 - Determine parents' position
 - Meet child
 - Seek collateral information
 - Explore possibility of alternate plans
 - Prepare for next court appearance

- Before a Case Conference/Court Appearance, an OCL will:
 - Meet with/call child
 - Formulate position
 - Prepare for court
 - Explore possibility of alternative plans

- If there is a Temporary Care and Custody Hearing, an OCL will:
 - Confirm child's position, if possible
 - Review court materials
 - Determine if additional materials needed for motion
 - Prepare to argue motion
 - Argue motion

- When a Settlement Conference is scheduled, an OCL will:
 - Review court documents and briefs
 - Determine if further disclosure is necessary
 - Confirm position with client
 - Determine if OCL settlement conference brief necessary
 - Participate in negotiations/propose terms of settlement
 - Help to narrow issues
 - Consider preparing a Request to Admit
 - Ensure the Court understands child's views
 - Start thinking about ways to get the child's views before the court

- When the Parties Reach a Consent, an OCL will:
 - Review Agreed Statement of Facts and Plan of Care
 - Confirm child's views
 - Negotiate changes as necessary
 - Attend court, if necessary

- Before a Status Review Application, an OCL should:
 - Have contact with the child and CAS workers to keep up to date on how the child is doing
 - Where appropriate, encourage parties to fulfill their obligations under the plan of care

- When a Status Review Application is served, an OCL will:
 - Review CAS documents
 - Review Answers/Plans of Care if available
 - Meet with client
 - Obtain information from CAS as needed
 - Determine other parties' positions
 - Negotiate terms of Agreed Statement of Facts/Plan of Care as necessary

- When a Trial Management Conference is Scheduled, an OCL will:
 - Review Trial Management Checklist
 - Determine issues, witnesses, length of trial
 - Identify experts and any issues (e.g. qualifications, availability)
 - Identify reports and whether there are any admissibility issues
 - Review documentary evidence
 - Determine if any motions for records are necessary
 - Identify any pre-trial motions necessary to deal with evidence
 - Determine if there are any *Wagg issues*
 - Help determine contents of trial record
 - Determine if there are any issues regarding a child's evidence
 - Help determine if there will be a need for *voir dieres*
 - Help to narrow issues, where possible
 - Proactively assist in determining necessary evidence
 - Consider whether OCL participation necessary
 - Consult with regional supervisor

- When Preparing for a Trial, OCL counsel may:
 - Update disclosure
 - Review trial record, affidavits and documentary evidence
 - Prepare or work with other counsel to prepare a case chronology if helpful
 - Prepare or work with other counsel to prepare a statement of agreed facts
 - Determine if any other evidence necessary

- Determine if OCL presence at trial necessary
 - Interview/prepare witnesses
 - Work with other counsel to schedule witnesses
 - Summons witnesses if required
 - Prepare examinations in chief and cross
 - Outline theory of case
 - Prepare opening statement
- When a Case goes to Trial, an OCL will:
 - Go to court
 - Prepare for each day as necessary
 - Be ready to argue evidentiary issues
 - Review evidence as necessary to ensure all relevant information is before the court
 - If adjourned, prepare again
 - Update evidence, if necessary
 - Prepare closing statement
- On a Motion for Summary Judgment, an OCL will:
 - Review motion materials prepared by CAS and other parties
 - Determine if any other evidence needed
 - Ensure child's views and preferences before the court in an agreed upon way
 - Prepare or work with other counsel to prepare a chronology and/or statement of agreed facts if necessary
 - Prepare oral argument

This is not meant to be an exhaustive list of all of the steps an OCL counsel might take in a case. Ideally, OCL counsel will assess what they can do to move a case forward so that it reaches a good conclusion for a child on an ongoing basis.

APPENDIX E
LONG TRIALS ADVISORY COMMITTEE'S
PROPOSED TRIAL MANAGEMENT
ENDORSEMENT FORM

Court Name and Address _____

Court File # _____

Date _____

Judge _____

RE: _____

Order sought: _____

Child 1

Name: _____

D.O.B. _____

Date in care: _____

Date of finding: _____

Child 2

Name: _____

D.O.B. _____

Date in care: _____

Date of finding: _____

Child 3

Name: _____

D.O.B. _____

Date in care: _____

Date of finding: _____

Child 4

Name: _____

D.O.B. _____

Date in care: _____

Date of finding: _____

APPLICANT: _____

COUNSEL: _____

Contact #'s if unrepresented

Work _____ Home _____

Cell _____ Fax _____

Email _____

RESPONDENT: _____

COUNSEL: _____

Contact #'s if unrepresented

Work _____ Home _____

Cell _____ Fax _____

Email _____

RESPONDENT: _____

COUNSEL: _____

Contact #'s if unrepresented

Work _____ Home _____

Cell _____ Fax _____

Email _____

CHILDREN'S LAWYER: _____

TRIAL MANAGEMENT ENDORSEMENT

Type of application: protection status review

Representation

1. Are all parties participating? yes no
If no, who is not participating? _____
2. Has any party been noted in default? yes no
3. Do all parties have counsel? yes no
4. Who does not have counsel? _____

- 5. Does anyone plan to retain or change counsel? yes no
- 6. Are all counsel intending to represent their clients at trial? yes no
- 7. If not, what is plan for getting off the record? _____
- 8. Is any judicial direction required? yes no

Preliminary Issues

- 9. Is service complete? yes no
- 10. Are disclosure issues outstanding? yes no
 - a. If yes, what are they and how will they be addressed?

- 11. Is anyone planning to bring a motion for records? yes no
 - a. If yes, who? _____
 - b. Name of record keeper(s) _____
 - c. Timing for bringing motion _____
 - d. Is a *Wagg* motion necessary? yes no

Assessments

- 12. Are all assessments completed? yes no
- 13. Have they been shared with all parties? yes no
- 14. If assessments are not completed, when will they be completed?

- 15. Timelines for completion and disclosure of reports: _____

Finding (if not already made)

- 16. Is there a dispute about finding? yes no
- 17. Can the issue of finding be settled? yes no
- 18. If no, is this an issue that could be dealt with by way of:
 - motion for summary judgment?
 - short hearing focused on finding?

Disposition

- 19. What are the issues in dispute?

Pleadings

20. Do the pleadings accurately reflect the parties' positions? yes no

21. Are all plans of care up to date? yes no

Admissions/ Statement of Agreed Facts

22. Has a request to admit been served? yes no

23. Has anyone filed a response to a request to admit? yes no

24. Have the parties prepared a statement of agreed facts? yes no

25. Will they? yes no

Directions for producing and filing statement of agreed facts?

Exhibits

26. All documentary evidence to be relied upon at trial will be served by the following dates:

Applicant _____ Respondent _____

27. Are any parties intending to rely on reports or business records? yes no

a. If yes, can they be introduced without calling the record keeper? yes no

28. Has notice of intention to rely on medical reports been served? yes no

29. Has notice of intention to rely on business records been served? yes no

Directions for filing notices: _____

Expert Witness

Expert witnesses to be called by CAS

Expert's name	Report and CV served?	Area of expertise?	Qualifications admitted?
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:

Expert's name	Report and CV served?	Area of expertise?	Qualifications admitted?
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:

Expert witnesses to be called by parent(s)

Expert's name	Report and CV served?	Area of expertise?	Qualifications admitted?
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:

Expert witnesses to be called by children's lawyer

Expert's name	Report and CV served?	Area of expertise?	Qualifications admitted?
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:
	<input type="checkbox"/> yes <input type="checkbox"/> no Date?		<input type="checkbox"/> yes <input type="checkbox"/> no Advise by:

Witnesses

30. Is there any evidence being sought from a child? yes no Age _____

31. How will the evidence be introduced?

- Statement of Agreed Facts
- Through Children's Lawyer
- Khan voir dire*
- Other (specify) _____

CAS Witnesses

Name of witness	How will evidence be presented?	Is witness's presence required?
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no

Parent(s)' Witnesses

Name of witness	How will evidence be presented?	Is witness's presence required?
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no

Name of witness	How will evidence be presented?	Is witness's presence required?
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	

Children's Lawyer's Witnesses

Name of witness	How will evidence be presented?	Is witness's presence required?
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no
	<input type="checkbox"/> viva voce <input type="checkbox"/> affidavit <input type="checkbox"/> report	<input type="checkbox"/> yes <input type="checkbox"/> no

32. Order for affidavit evidence? yes no

33. Affidavits to be served by applicant by _____
 Applicant's affidavits to be vetted by respondent(s) by _____

34. Affidavits to be served by respondent(s) by _____
 Respondent(s)' affidavits to be vetted by applicant by _____

35. Any dates when witnesses unavailable? _____

36. Have the parties produced a witness schedule? yes no

37. Are any special arrangements needed for witnesses?
 Amplification devices _____
 Interpreters—language _____
 Wheel chair access _____
 Judge's order to have an incarcerated witness/party brought to court

Trial Directions

38. In what order will the parties present their evidence?
 i. _____
 ii. _____
 iii. _____
 iv. _____

39. Opening statements written oral
 a. If written, to be served by: Applicant _____
 Respondent _____
40. Will written opening statements be put into the trial record? yes no
41. If not, when will they be provided to the judge? _____
42. Has the trial record been produced? yes no
43. Are the parties in agreement about what will be included in the trial record?
 yes no
44. Date for service of trial record _____
45. Directions re trial (start times, how long breaks will be, accommodations necessary, expectations regarding time court will end for the day etc.)
46. Will any special equipment (audio visual, screens, real time reporting etc.) be needed? _____
47. Would a further settlement conference be useful? yes no
 Date for further settlement conference _____
50. Should there be a further trial management conference? yes no
 Date for trial management conference _____
51. Are there any possible issues to be flagged for the trial judge?
 Evidentiary issues _____
 Legal issues _____
 Other _____
52. Total trial time necessary? _____

53. Are there any issues that must be heard urgently? yes no

54. Why is it urgent? _____

Trial dates: _____

Orders

55. It is ordered that:

The parties shall comply with the directions and dates set out above. Consent changes may be requested by Form 14B: Motion form.

There shall be no further motions without permission from the case management judge.

No exhibits may be relied on at the trial other than those described above **without a court order** obtained from the case management judge or trial judge.

No witnesses shall be called other than the witnesses on the witness list as outlined above unless a court order is obtained from either the case management judge or trial judge.

Any requests regarding the scheduling of the trial or an increased allocation of trial time shall be made as follows:

A copy of this endorsement shall be included in the trial record (rule 23 (1) par. 6).

The following endorsements shall also be included in the trial record:

The parties are aware that:

-
- They must inform the trial coordinator and each other of any changes in address, telephone number(s) or representation;
 - If a party does not attend the trial, an order may be made in his or her absence; and
 - Failure to comply with the terms of this endorsement could result in cost consequences.

Date

Judge's Signature

**Office of the
Children's Lawyer**

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