ONTARIO ASSOCIATION OF CHILD PROTECTION LAWYERS

February 26, 2019

Canadian Lawyer Magazine
Attn: Mr. Tim Wilbur – Managing Editor
One Corporate Plaza
2075 Kennedy Rd.
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SENT VIA FAX TO 416 649 7870

Dear Mr. Wilbur

RE: REQUEST FOR CORRECTION AND APOLOGY ASSOCIATED WITH ARTICLE "PROTECTING THE MOST VULNERABLE"

We are writing to express our extreme disappointment at the article titled "Protecting the most vulnerable", dated February 25, 2019. The article is unbalanced, misinformed, and includes material misrepresentations and inaccuracies, which we hope you will clarify. We are particularly concerned that it misrepresents the history of the Ontario Association of Child Protection Lawyers ("the OACPL"), its purpose, arguments it has advanced recently at the Ontario Court of Appeal, and the function the Association and its lawyers play in ensuring that children's and families' best interests include those rights and freedoms guaranteed by the highest law of the land.

Your article incorrectly states that the OACPL was formed to intervene in the appeal of Kawartha-Haliburton Children's Aid Society v. M.W. In fact, the OACPL was formed in May 2017 in response to the serious miscarriages of justice identified by Justice Susan Lang's Motherisk Hair Analysis Independent Review, and in particular, the finding that all players in the justice system (including children's aid societies, courts, and parents' counsel) had contributed to the problem by failing to challenge, explain, and reject unreliable evidence. The OACPL aims to foster a strong and independent child protection defence bar and to preserve and defend procedural protections for parents and families enshrined in the *Charter of Rights and Freedoms*. Contrary to what is stated in your article, the OACPL was formed well before M.W. came to the attention of the Court of Appeal.

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Your article further mischaracterizes the OACPL's intervention in Kawartha-Haliburton Children's Aid Society v. M.W. In that intervention, the OACPL is concerned with the fairness of using summary judgment in child protection cases that involve significant state intrusion into the lives of family and children. As we argue in our intervention, *Hryniak v. Mauldin* was a case arising out of corporate commercial matter and did not involve a state actor. Nowhere does *Hyrniak v. Mauldin* wrestle with whether the summary judgment test, as it is currently formulated, is appropriate where the state is intervening in the family unit and where *Charter* rights are engaged.

To put one aspect of the *Charter* argument very simply, is it fair that criminal accused are given full trials for minor misdemeanors such as theft or mischief, but parents risk removal of their children on a permanent basis without the chance of cross-examination? Is it fair that expediency and efficiency are now being used (and endorsed as is demonstrated in your article) at the expense of a parent's right to have a fair hearing? These are the questions that the OACPL are asking in its intervention, and which your article fails to mention or advert to.

We find it of great concern that your article assumes that the children's aid society is always correct in choosing summary judgment as the appropriate vehicle to resolve issues, and that it is in the "best interests of children" when they do so. In our respectful opinion, summary judgment motions are overused and abused with many agencies filing thousands of pages of materials on a summary judgment motion, replete with hearsay and expert evidence. These motions are often impossible to respond to in writing, given that many parents who are subject to child welfare involvement are poorly educated, are not fluent in English, and have low literacy levels.

As recognized by the Supreme Court of Canada in *R.B.* v. *Children's Aid Society of Metropolitan Toronto*, parents are presumed to appreciate the best interests of their children and the state can only intervene in this protected sphere *only when it conforms to the values underlying the Charter*. Procedural fairness is one of the fundamental principles underlying the Charter. It is incorrect and a misrepresentation to suggest that the best interests of children can be properly determined absent procedural fairness. Unfortunately, your article fails to appreciate that the debate around summary judgment is exactly this issue: is summary judgment a procedurally fair process given the rights at stake?

We invite Canadian Lawyer Magazine to read our intervention materials and our factum to understand the purpose of our organization and the arguments we raise in M.W. We attach our factum to this letter for your information. If your magazine is interested in providing a fulsome, balanced and accurate discussion of these issues, we would be happy to speak to you about them. The complexity of Protection Proceedings and the challenge of applying the Charter

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appropriately in this context is a matter of national interest and warrants greater accuracy in reporting than what was provided in this article.

In the meantime, we are asking that Canadian Lawyer Magazine retract and clarify the statements you made in your article which are inaccurate, and which imply that our organization is working against the best interests of children. It is our position that it is *never* in the best interests of children to endorse an unfair process for parents and families, and we are extremely disappointed that your magazine has missed this fundamental point in its coverage of this issue.

May we expect a prompt reply from you please?

Yours truly,

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