

**MOTHERISK HAIR ANALYSIS  
INDEPENDENT REVIEW**

The Honourable Susan Lang,  
Independent Reviewer



**EXAMEN INDEPENDANT DU  
PROGRAMME D'ANALYSE  
CAPILLAIRE DE MOTHERISK**

L'honorable Susan Lang,  
L'examinatrice indépendante

For the full report, please go to <http://www.m-hair.ca/>

## Summary of Recommendations

The Province of Ontario should, as expeditiously as possible, establish a Second Review of those individual cases that may have been affected by MDTL's flawed hair-testing methodology.

The Second Review should be carried out by a Commissioner, a sitting or retired judge, appointed under the *Public Inquiries Act* with the power to

- summons witnesses, as well as documents and other items relevant to the subject matter of the Second Review; and
- access all files appropriate to the criminal or child protection context, including court files, child protection files, exhibits, and transcripts, in order to fulfill the role of assessing and triaging cases.

The Commissioner should lead a Review and Resource Centre (RRC), which would provide support to potentially affected persons (including parents, children, young adults, siblings, and adoptive parents) involved in past child protection proceedings who may have been affected by MDTL test results. This support would provide efficient, comprehensive access to the resources necessary to permit them to make an informed decision about any steps that might be available and appropriate. These resources should include, at no charge,

- appropriate counselling assistance;
- appropriate legal advice from lawyers listed on the RRC roster;
- alternative dispute resolution services, including mediation; and
- fresh parenting assessments to assess if a parent currently has the capacity to have a relationship with a child.

The Province of Ontario should ensure that the RRC has sufficient resources to provide meaningful assistance and to fulfill its mandate. The Province should also ensure that

other child protection and justice-system institutions that must deal with the implications of this Report and the Second Review have sufficient resources to do so.

The Commissioner should provide widespread public notice of the Second Review in the manner that is most likely to come to the attention of those persons potentially affected by MDTL tests. Any parent who had an MDTL test and has a child who is no longer in her or his care, and where that child has not yet been placed for adoption or the adoption has broken down, should receive personal notice of the Second Review. In addition, any potentially affected person should be able to initiate a request for a review.

With the support of the Ministry of Children and Youth Services, child protection agencies should immediately identify any cases involving MDTL hair test results that remain open. In those cases, and in cases where a child has not yet been placed for adoption, child protection agencies should

- contact the parents or their lawyers to advise them of the potentially flawed hair test results and the creation of the Second Review;
- assess these cases without regard to MDTL test results unless and until those results are confirmed, if they can be; and
- provide a complete copy of the unredacted file to the RRC as soon as possible.

Child protection agencies should ensure that no person or organization relies on an MDTL test results for any purpose in any current or future proceeding. The Commissioner should consider all cases where there was an MDTL test result and where one of the terms of an operative court order requires the parent to comply with ongoing hair testing.

The Commissioner should work with children and youth, including youth who have experienced the child protection system, to ensure that their voices, both individually and collectively, are heard throughout the Second Review.

The RRC should have the capacity to assist residents across Ontario. It should make effective use of its online presence and telephone communication, including an immediately available toll-free number and e-mail address answered by well-trained and knowledgeable staff.

If an affected child has been placed for adoption (particularly without an openness order) in part because of flawed evidence from MDTL, the currently available range of remedies is legislatively limited. I recommend that the Commissioner consult broadly with affected persons, including youth, adoptive parents, and other caregivers, as well as with experts in the area, in an effort to develop approaches to resolution based on the best interests of the child. With this opportunity for broad consultation, and once the circumstances of

individual cases or classes of cases have been identified, the Commissioner will be in a position to identify the parameters of the problem and any public policy considerations at issue.

I recommend that the Commissioner also consider whether, in appropriate circumstances, birth parents or other affected individuals should be provided with the ability to file information on the adoption registry or in the child protection file concerning the MDTL controversy and the possible role of flawed hair tests in affecting the outcome of a child protection proceeding. This information would then be available for affected children who access the registry.

Public confidence in the justice system demands that any evidence relied on in criminal cases be adequate and reliable for forensic purposes. MDTL's hair tests did not meet this standard. Individuals who may have been affected by an MDTL test result in a criminal proceeding should also have access to the services of the RRC. With regard to individuals who may have been affected by an MDTL test result in a criminal proceeding:

- They should be permitted to access the counselling services, appropriate legal advice, and guidance from the RRC on the next steps they may wish to take.
- In cases in which an individual seeks to set aside convictions based on alleged errors in the Laboratory's work, the Crown Law Office – Criminal should assist in expediting the convicted person's access to the Court of Appeal and in facilitating a determination of the substantive issues in the cases, unencumbered by unnecessary procedural impediments. Such assistance should include
  - consenting to defence applications for an extension of time within which to appeal;
  - working toward agreement with the defence on evidentiary or procedural protocols for applications to extend the time within which to appeal or for introducing fresh evidence on appeal or respecting the appeal itself; or
  - narrowing the issues that need to be resolved by the Court.

The Province of Ontario, either directly or through Legal Aid Ontario, should adequately fund potentially affected persons to access legal and forensic opinions and advice for the purpose of pursuing either an appeal or a new trial or any other legal remedy, including a section 696.1 *Criminal Code* application, to set aside an existing criminal conviction.

In appropriate cases, this funding should extend to obtaining an expert opinion to determine whether or not there is merit to such an appeal or application.

The order in council establishing my Review did not provide me with a mandate to make recommendations about individual compensation. Accordingly, I do not make any

recommendations concerning compensation. Questions of any monetary compensation are left to the Second Review, the Province of Ontario, or civil litigation for consideration and determination.

The Hospital for Sick Children should carefully examine its programs to determine which, if any, are offering forensic services and should exercise meaningful oversight over any such services. The Hospital must ensure that appropriate standards and training are in place for any of its staff who testify in court as experts. Ultimately, the Hospital will be held accountable for the quality of any forensic services it provides.

There should be ongoing and expanded continuing legal education for counsel, including child protection counsel, and for the judiciary regarding expert evidence, particularly expert scientific evidence. Members of the bar should ensure that they understand the scope and limitations of an expert's opinion and expertise. In addition, they should exercise care to qualify an expert properly and set precise parameters on an expert's area of expertise. Counsel should be vigilant to ensure that justice is not undermined by the use of flawed forensic evidence. The recommendations of the Goudge Report continue to provide valuable insights on these issues.

## **Conclusion**

The citizens of Ontario are justifiably proud of the Hospital for Sick Children, which is one of the world's leading children's hospitals. I am confident that the Hospital will reflect deeply on what went wrong at MDTL and within its own institution, particularly because it appears that the Hospital has not adapted and implemented the lessons to be learned from the Goudge Report. There should never need to be another review or inquiry into how the Hospital, its professional staff, or its programs interact with the justice system.