

**FAMILY CROWN SERVICES OPERATIONAL MANUAL**

INITIATING COURT PROCEEDINGS AND DOCUMENT REVIEW	New	Office of the Attorney General / Family Crown Services	Policy 10
Policy Title	New or Amended	Division / Branch / Section	Policy #

SLT		June 1, 2022	June 1, 2025
Approved by	This policy was approved on:	This version takes effect on:	This policy will be reviewed by:

**INITIATING COURT PROCEEDINGS AND DOCUMENT REVIEW**

**1. Introduction**

The relationship between Family Crown Counsel and both the Minister of Social Development and the Director of Support Enforcement is that of solicitor and client. While the client will prepare the originating process as well as the supporting affidavits, it is the responsibility of Family Crown Counsel as the legal officer to review and approve the court documents before they are filed with the court and to ensure that there is sufficient admissible and reliable evidence to support a *prima facie* case.

The initiation of court proceedings and document review phase is perhaps the most important phase of the litigation process in that it promotes fairness, efficiency, and objectivity by ensuring that only meritorious cases proceed. Family Crown Counsel shall avoid and shall discourage the client from commencing or continuing proceedings that are without merit.

**2. Approval to initiate court proceedings**

Family Crown Counsel shall conduct a two-part approval process when initiating court proceedings consisting of an evidential test followed by a public interest test. Where the proposed court action passes the evidential test, Family Crown Counsel will apply the public interest test. Ordinarily the court proceedings approval standard is met when the proposed court action passes both tests.

Where the proposed court action does not pass the evidential test or the public interest test, Family Crown Counsel cannot proceed, regardless of the importance or seriousness of the proposed relief. Family Crown Counsel shall inform the client of the reasons for refusing approval and where appropriate, will identify alternate relief which may be supported by the available evidence.

**2.1 The evidential test**

Family Crown Counsel will consider all material available to him/her at the time of the review. Given that disclosure is not normally available at this stage of the process, Family Crown Counsel will be restricted

to the content of the documents submitted for review. Thereafter and throughout the ongoing disclosure phase, Family Crown Counsel will periodically reapply the evidential test.

Family Crown Counsel cannot be swayed by clinical or social concerns, but rather must assess the evidence based on legal evidentiary standards. He/She must be satisfied that there is sufficient admissible and reliable evidence to provide a reasonable prospect on the balance of probabilities that the court will grant the requested relief. Whether the evidence establishes this reasonable prospect is an objective determination Family Crown Counsel makes by considering whether an impartial trier of fact properly directed in accordance with the law, is more likely than not to grant the requested relief based on the available evidence.

## **2.2 The Public Interest Test**

Where the proposed court action passes the evidential test, Family Crown Counsel will then consider whether the court action is in the public interest.

In most adult protection, child protection and judicial support enforcement matters, the public interest will clearly support the court action once the evidential test has been met. Indeed, the mandate of Family Crown Services clearly states that the mandated areas of family law are of such serious and overriding concern that the Attorney General of New Brunswick has traditionally authorized the services of his agents to protect the broad public interest in such proceedings.

Public interest factors that may affect the decision to proceed generally depend on the specific facts and circumstances of the file. For example, if the respondents are willing to enter into an agreement with respect to the relief sought, it would not be appropriate to commence or continue court proceedings simply to “teach the respondents a lesson”.

By memo dated February 9, 2015, the Minister of Social Development has established the test for the addition of the Minister as a third party to private custody and access proceedings:

The Minister should not seek to be added as a party unless there are such grave child protection concerns regarding one of the parents/parties that the Minister would move to apprehend the child(ren) if the court were to grant custody or access to that parent/party.<sup>1</sup>

### **2.2.1 Factors that do not support court action**

The following factors do not support approval of court action:

- (a) the matter is frivolous or vexatious;
- (b) the matter can be settled by agreement and court action is sought “to teach the respondents a lesson” or “to emphasize the seriousness of the matter”; and/or
- (c) the client simply prefers to let the judge refuse the relief in a weak case.

### **2.2.2 Factors that cannot be considered**

The following factors cannot be considered:

- (a) the personal feelings of Family Crown Counsel concerning the ethnic or national origin, gender, religious beliefs, sexual orientation, or political views or associations of the parties;
- (b) the personal or professional relationship of Family Crown Counsel with counsel for the respondents;

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<sup>1</sup> Memo from Bill Innes, Director of Child Welfare, dated February 9, 2015

- (c) any partisan political advantage or disadvantage which might flow from the decision;
- (d) the possible adverse effect on the personal or professional circumstances of those responsible for the decision whether to proceed; and
- (e) any known or preconceived views held by the judge who is expected to hear the case.

### **3. Reassessment of approval for court proceedings**

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Although Family Crown Counsel employs careful consideration during the initial file approval stage to ensure that appropriate court action is sought based on the sufficiency of evidence and the public interest, Family Crown Counsel has an ongoing duty to reassess the appropriateness of the relief sought throughout the court process in accordance with the provisions in section 2 *supra*.

Discontinuance of the court action or modification of the relief sought may be considered where it becomes apparent on reassessment of all the circumstances that either the evidential test or the public interest test can no longer be met in the case before the court and that discontinuance or modification of the relief sought must be affected in a timely manner in the interest of the administration of justice.

The modification of relief sought may be considered where it becomes apparent on a reassessment of all the circumstances that either the evidential test or the public interest test cannot be met but would support a request for different relief.

### **4. Resolution of disagreements regarding approval or reassessment of court action**

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#### **4.1 Review of file approval or reassessment of file approval**

Where the client disagrees with the decision not to approve the requested court action, he should first discuss the matter with Family Crown Counsel.

Where the disagreement cannot be resolved regionally by Family Crown Counsel and the client, Family Crown Counsel will refer the matter to the Assistant Deputy Attorney General of Family Crown Services. Where appropriate, the Assistant Deputy Attorney General will review the court proceedings approval decision to determine whether it was reasonable and well founded, and was made in accordance with this Manual. The Assistant Deputy Attorney General will then advise the client accordingly.

### **5. Review of documents**

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#### **5.1 Introduction**

By inter-ministerial agreement, the client prepares the originating process as well as the supporting affidavits and submits them for review by Family Crown Counsel. This is permissible pursuant to subsection 33(2)(b) of the *Law Society Act, 1996* which provides as follows:

Nothing in this Act shall be construed to prohibit carrying out, for remuneration, functions that include the practice of law, if those functions are performed under the supervision of a practising member in good standing and the person carrying them out does not represent to be and is not held out as a barrister or solicitor.

Please note that while social workers, legal administrative assistants and enforcement officers can draft court documents, they must do so under the supervision of Family Crown Counsel who bears ultimate responsibility for the documents.

## 5.2 Procedure

The client will prepare and submit court documents in a timely manner to Family Crown Counsel for review.

Where the court documents lack necessary information, or fail to cover a significant period of time without explanation, Family Crown Counsel will contact the client or the deponent to request such additional information.

Within the time available, Family Crown Counsel will make, or will direct the client to make, all necessary changes to the documents and will ensure that he/she reviews and approves the final version of the documents. Family Crown Counsel will document (electronically or otherwise) his/her file regarding the revisions made to the documents. Any changes should be communicated in writing and such changes electronically tracked as per the following:

1. Initial Court pleadings, draft affidavits and other legal documents are to be forwarded to all Family Crown Counsel in the region on a timely basis;
2. When a Family Crown Counsel has carriage of a particular file, court pleadings, draft affidavits and other legal documents are to be forwarded only to such Family Crown Counsel or his/her designate on timely basis;
3. Family Crown Counsel will review court pleadings, draft affidavits and other legal documents and note any changes either by electronic change tracking or by highlighting such changes in yellow and requests for information / clarification in blue;
4. Family Crown Counsel shall then send reviewed documents to the client. Subsequently, no changes are to be made by the client without the express consent of Family Crown Counsel;
5. Social workers / deponents will review final draft affidavit / documents as reviewed by Family Crown Counsel;
6. Should social worker / deponent not agree with changes or have concerns they should contact Family Crown Counsel to discuss same;
7. Should social worker / deponent not be satisfied with decision of Family Crown Counsel with respect to the final draft affidavit / legal documents, they shall consult with their supervisor; and
8. Supervisor may consult with the Assistant Deputy Attorney General of Family Crown Services to resolve any outstanding issues.

It should be noted that significant discretion and deference will remain with Family Crown Counsel with respect to the content of pleadings, affidavits and other legal documents, and the Assistant Deputy Attorney General will only intervene if there is a significant departure from the acceptable norms.

## 6. Related documents

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MSD Memo dated February 9, 2015 from Bill Innes, Director of Child Welfare  
*Law Society Act*, S.N.B. 1996, c. 89