

# Canadian Journal of Family Law

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Volume 30 | Number 1

---

2017

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### Recommended Citation

Nicholas Bala, Rachel Birnbaum, and Carly Watt, "Addressing Controversies About Experts in Disputes Over Children" (2017) 30:1 Can J Fam L 71.

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# ADDRESSING CONTROVERSIES ABOUT EXPERTS IN DISPUTES OVER CHILDREN

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*There is significant controversy about the use of experts in child-related disputes in family and child protection proceedings in Canada. The 2015 Lang Review of the Motherisk Laboratory at Toronto's Hospital for Sick Children concluded that experts retained by child protection agencies were introducing unreliable expert testimony about parental drug and alcohol use. The recent decision of Ontario Court of Appeal in M. v. F. suggested that evidence from a party-retained expert critiquing the opinion of a court-appointed psychologist is "rarely" helpful or admissible. This paper addresses these and related controversies about the use of experts in child-related cases. It reviews recent developments in the law governing the admissibility of expert evidence, with a particular focus on the 2015 Supreme Court decision in White Burgess, and the role of the judge as a "gatekeeper," responsible for excluding biased or unreliable expert testimony. The paper explores the unique role played by court-appointed experts in child-related disputes. It is argued that there should be a continued role for experts retained by*

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*one parent to critique a report prepared by a court-appointed expert in a child-related case; nonetheless there is an obligation for party-retained experts to provide unbiased and reliable evidence, and avoid being “hired guns.” This critique role may be especially important when the state has been involved in the court process, either as a party in a child protection proceeding or by arranging for a particular court-appointed professional to undertake an assessment. It is also argued that there is a strong Charter based argument that indigent parents in child protection proceedings may be entitled to a court order for funding to retain their own experts to testify to counter evidence put forward by experts funded by the government.*

### **THE IMPORTANCE AND LIMITATIONS OF EXPERTS IN CHILD-RELATED CASES**

Since the 1970's there has been significant use in Canada of court-appointed experts, usually social workers or psychologists, to prepare reports for assistance in the resolution of family and child welfare disputes.<sup>1</sup> While these reports are frequently important for both settlement and judicial decision-making, there is continuing debate about when these reports should be ordered, what should be the qualifications,<sup>2</sup> training, and supervision of the experts who

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<sup>1</sup> See e.g., Nicholas Bala, “Assessments for Post-Separation Parenting Disputes in Canada” (2004), 42 Fam Ct Rev 485 [Bala, *Assessments*].

<sup>2</sup> In one disturbing Ontario situation, a man with some psychological education overstated his qualifications and was appointed by family courts in the Oshawa area to prepare reports that resulted in individuals losing custody of their children. Although he was eventually disciplined by the College of Psychologists of Ontario, it is unclear what happened to the cases where he testified: see Christie Blatchford, “Man accused of posing as psychologist in child-custody disputes,” *Globe and Mail* (27 January 2010), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>; Niamh Scallan “Whitby therapist Gregory Carter acquitted of fraud charges,” *Toronto Star* (10

prepare them,<sup>3</sup> who should pay for them, and how much weight the evidence of these court-appointed experts should receive. There has also been recent controversy over the role of the party-retained experts in child-related cases. The *Lang Review*<sup>4</sup> of the Motherisk Laboratory at Toronto's Hospital for Sick Children concluded that experts retained by child protection agencies were introducing unreliable expert testimony about parental drug and alcohol use in child welfare proceedings. In another development, the 2015 decision of the Ontario Court of Appeal in *M. v. F.*<sup>5</sup> suggested that evidence from a party-retained expert critiquing the opinion of a court-appointed psychologist is "rarely" helpful or admissible.<sup>6</sup>

This paper addresses these and related controversies about the use of experts in family and child welfare cases involving children

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February 2012), online: <[www.thestar.com](http://www.thestar.com)>; and College of Psychologists of Ontario, "Discipline Proceedings" (2012) 3:3 The E-bulletin 1, online: <[http://www.cpo.on.ca/Concerns\\_and\\_Complaints.aspx](http://www.cpo.on.ca/Concerns_and_Complaints.aspx)>.

<sup>3</sup> Concerns have, for example, been raised about whether all assessors appreciate issues related to spousal violence and abuse; see Shahnaz Rahman & Laura Track, *Troubling Assessments: Custody and Access Reports and Their Equality Implications for BC Women* (Vancouver: West Coast Leaf, 2012).

<sup>4</sup> Ontario, Ministry of the Attorney General, *Report of the Motherisk Hair Analysis Independent Review*, by The Honourable Susan Lang (Ontario: Ministry of the Attorney General, 2015), online: <[www.attorneygeneral.jus.gov.on.ca](http://www.attorneygeneral.jus.gov.on.ca)> [[Lang Review](#)]. In Quebec, a hospital-based pediatrician who did work for child protection agencies and was under investigation for making unfounded claims of child abuse against a number of families recently committed suicide: Aaron Derfel, "Montreal child-abuse expert commits suicide 'under intense social pressure' amid lengthy investigation," *Postmedia News* (6 December 2016), online: <[www.nationalpost.com](http://www.nationalpost.com)>.

<sup>5</sup> 2015 ONCA 277, 58 RFL (7th) 1.

<sup>6</sup> *Ibid* at paras 41, 34.

and parents. We begin by reviewing the law governing the admissibility of expert evidence, with a particular focus on the 2015 Supreme Court decision in *White Burgess*<sup>7</sup> and concerns relating to the admissibility, reliability, and impartiality of expert evidence. We then consider the unique role played by court-appointed experts in child-related disputes, and explore the controversy about when courts should order these reports. Next we discuss the application in child-related cases of the “cost-benefit” analysis established by the Supreme Court for the admissibility of expert evidence proffered by party-retained professionals, an approach that requires consideration of the reliability and lack of bias of the expert, as well taking account of concerns about fairness and the efficiency of the trial process; we argue that when dealing with child-related cases, the cost-benefit analysis may require a different balancing of factors than in the context of other civil or criminal cases. We then consider the implications of the *Lang Review*, arguing that the *Charter of Rights* s.7 requires that in a child protection proceeding the court may order that indigent parents receive state funding to retain their own experts to testify to counter evidence put forward by experts funded by the government. We conclude the paper by offering suggestions for addressing the challenges for the appropriate use of expert evidence in child-related disputes, and advocating for increased government resources to provide this vitally important type of evidence.

Expert evidence often has a central role in the appropriate and efficient resolution of child-related disputes, though courts need to play a “gate-keeper” role with respect to the ordering of assessments and admission of expert testimony. On the facts of *M. v. F.*, there were legitimate concerns in that case about the admissibility of testimony of the party-retained “critique expert.” However, in our

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<sup>7</sup> *White Burgess Langille Inman v Abbott and Haliburton*, 2015 SCC 23, [2015] 2 SCR 182 [*White Burgess*].

view the *obiter* comments in *M. v. F.* about restricting the admissibility of evidence from party-retained experts should not be broadly interpreted. We argue that there should continue to be a role for experts retained by one parent, to review or critique a report prepared by a court-appointed or state-retained expert in a child-related case, though counsel, judges, and potential expert witnesses need to be aware of the obligation for party-retained experts to provide unbiased and reliable evidence, and avoid being “hired guns.” This critique role may be especially important when the state has been involved in the court process, either as a party in a child protection proceeding or by arranging for a particular court-appointed professional to undertake an assessment. There is also a need for party-retained experts to be clear about their role and ethical obligations; at present, there are no widely accepted standards for mental health professionals undertaking a forensic review of the work of another professional in the context of child-related disputes, and appropriate guidelines should be developed by professional organizations.

Since much of the recent controversy about the role of experts in child-related cases has been in Ontario, we focus on the legislation and jurisprudence in that province, though much of the discussion is relevant to other parts of Canada, and we draw upon case law from other provinces and territories as well. Indeed, there are controversies about use of experts in family and child welfare cases throughout the world, and this paper contributes to the on-going international debate about whether, when, and how to make use of expert evidence in these most important cases.

### **THE SIGNIFICANCE OF BEING AN “EXPERT”: RELIABILITY AND BIAS CONCERNS**

In this part of the paper we review the principles of the law governing the admissibility of expert evidence, with particular focus

on the issues that most commonly arise in connection with experts in child-related cases: impartiality, qualifications, participant experts, and reliability.

Generally, witnesses can only testify about what they did, observed, or heard.<sup>8</sup> Witnesses who are qualified as “experts” may testify about their “opinions,” including the state of knowledge in their field, and quote from texts they consider “authoritative.” As the responsibility of drawing inferences or conclusions is generally the responsibility of the trier of fact, in order to be accepted as an expert witness and express an opinion, a person must “possess special knowledge and experience going beyond that of the trier of fact.”<sup>9</sup> Experts may relate their knowledge of the field to the specific case before the court and express opinions about the issues before the court, though an expert cannot testify that a particular witness is credible (or not), as this would violate the rule against “oath helping.”<sup>10</sup> The Supreme Court held in *R. v. Mohan*<sup>11</sup> that the closer an expert witness comes to expressing an opinion about the “ultimate issue” in a case, the more judicial scrutiny there should

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<sup>8</sup> There is scope for lay witnesses to express “lay opinion” about matters such as the age or sobriety of a person whom they observed: *Gratt v R*, [1980] 2 SCR 819, 144 DLR (3d) 267. “Lay opinion” is commonly admitted in child-related cases, both from professionals—such as child protection workers—and relatives of parents, about such issues as whether parents are being affectionate with their children or not. This issue of lay opinion evidence from child protection workers is discussed in later sections of this paper.

<sup>9</sup> *R v Marquard*, [1993] 4 SCR 223, 108 DLR (4th) 47 [*Marquard*].

<sup>10</sup> See *R v Béland*, [1987] 2 SCR 398, 43 DLR (4th) 641, and *Whitfield v Whitfield*, 2016 ONCA 581.

<sup>11</sup> *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 243 [*Mohan*].

be concerning the admissibility of this evidence.<sup>12</sup> However, in child-related proceedings, it is common for professionals, especially court-appointed experts, to express their opinion about the ultimate issue: the best interests of the child.<sup>13</sup>

### **JUDGES AS “GATEKEEPERS”: THE ADMISSIBILITY THRESHOLD AND THE COST-BENEFIT ANALYSIS**

In its 1994 decision in *R. v. Mohan*,<sup>14</sup> the Supreme Court of Canada held that judges must be “gatekeepers” for the admission of “expert testimony.” More recently, Cromwell J. in the 2015 Supreme Court decision *White Burgess Langille Inman v. Abbott and Haliburton* observed that since 1994, the “unmistakeable overall trend of the jurisprudence ... has been to tighten the admissibility requirements and to enhance the judge’s gatekeeping role.”<sup>15</sup> While *White Burgess* is broadly consistent with *Mohan*, it refined and clarified the test for the admissibility of expert evidence, specifically the need to establish the reliability and impartiality of an expert’s testimony.

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<sup>12</sup> *Ibid* at para 28 [emphasis added]: “expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. *The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.*”

<sup>13</sup> See e.g., *M v F*, *supra* note 5; *CLB v JAB*, 2016 SKCA 101, [2016] SJ 430. For statutory provisions establishing the centrality of the “best interests of the child,” see e.g Ontario, *Children’s Law Reform Act*, RSO 1990, c C-12, s 24 (parenting disputes); and *Child and Family Services Act*, RSO 1990, c C-11, s 38(3) (child protection).

<sup>14</sup> *Mohan*, *supra* note 11.

<sup>15</sup> *White Burgess*, *supra* note 7 at para 20.

Over the past two decades, the Supreme Court has repeatedly expressed concerns regarding the “dangers” of the admission of expert evidence, including that it may result in a trial becoming a “contest of experts,” with expert evidence potentially distracting the trier of fact rather than assisting.<sup>16</sup> The Court observed that the trial process must not become an “attornment to the opinion of the expert,” a possibility “exacerbated by the fact that expert evidence is often resistant to effective cross-examination by counsel who are not experts in that field.”<sup>17</sup> The Court has also expressed concerns regarding expert evidence prolonging the trial process and leading to an inordinate expenditure of court time and expense for the parties.<sup>18</sup> Issues of unfairness and of lack of resources to properly challenge an expert retained by a government agency may be especially critical when a litigant has very limited resources, as is often the case in child protection proceedings.

The Supreme Court has also recognized the need for courts to scrutinize the underlying science or body of knowledge that an expert relies upon. Experts may overstate the reliability of their tests and opinions, and there is risk of the admission of testimony based on “junk science.”<sup>19</sup> If the expert evidence is based upon a “novel” or “contested science,” or science used for a novel purpose, the

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<sup>16</sup> *Mohan*, *supra* note 11 at 24. Professor Rollie Thompson argues that the Supreme Court has displayed “deep skepticism, even suspicion” about the value of expert testimony based on social science research in the criminal trial process: DA Rollie Thompson, “Are There *Any* Rules of Evidence in Family Law?” (2003), 21 Can Fam L Q 245 at 276.

<sup>17</sup> *R v DD*, 2000 SCC 43, [2000] 2 SCR 275 at para 55.

<sup>18</sup> *Mohan*, *supra* note 11; *Supra* note 17 at para 56.

<sup>19</sup> *R v J-LJ*, 2000 SCC 51, [2000] 2 SCR 600 at para 25.

reliability of the underlying science for that purpose should be sufficiently proven before the evidence is admitted.<sup>20</sup>

It is worth emphasizing that the trial judge’s role as a “gatekeeper” arises even if opposing counsel does not object to the admission of the expert testimony, and arises in judge alone trials as well as jury trials.<sup>21</sup> In *Mohan*, Sopinka J. held that the party seeking to call an expert must establish that four “threshold” criteria of admissibility have been satisfied:<sup>22</sup>

- Relevance;<sup>23</sup>
- Necessity in assisting the trier of fact; that is providing information likely outside the knowledge and experience of the jury or judge; Sopinka J. stated that the word “helpful sets too low a standard,” but he also said he “would not judge necessity by too high a standard;”<sup>24</sup>
- A properly qualified expert; and

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<sup>20</sup> *Ibid* at paras 33, 35–36, and 47; see also *R v Trochym*, 2007 SCC 6, [2007] 1 SCR 239 at para 27.

<sup>21</sup> *R v Sekhon*, 2014 SCC 15, [2014] 1 SCR 272 at para 46, per Moldaver J. writing for the majority of the Supreme Court. Despite ruling the trial judge erred in admitting the expert testimony, the Court upheld the conviction as there was other “overwhelming” evidence of guilt.

<sup>22</sup> *R v Mohan*, *supra* note 11, at paras 17–21.

<sup>23</sup> *White Burgess*, *supra* note 7, at para 23. The concept of “relevance” was explained in *R v Shafia*, 2016 ONCA 812, at para 227, by Watt JA: “The expert opinion evidence must have a tendency, as a matter of human experience and logic, to make the existence or non-existence of a fact in issue more or less likely than it would be without the evidence.”

<sup>24</sup> *R v Mohan*, *supra* note 11, at para 26.

- The absence of any exclusionary rule that would preclude the admission of the expert evidence.<sup>25</sup>

The Court also stated that a "basic threshold of reliability" for expert evidence must be established before the admissibility of the evidence can be considered. The accused in *Mohan* was a pediatrician charged with sexually assaulting four adolescent female patients during medical examinations. The accused wanted to call a psychiatrist with expertise in treating sexual offenders as a witness to testify that the accused did not fit within the "limited and unusual group" of physicians who would commit such offences. The psychiatrist was prepared to testify that, in his opinion, the accused, as a medical doctor, did not have the "extra abnormal, extra component for the abnormality" that he would have had to possess to abuse these adolescents, since he would have been violating "the very strict professional norms against sexual involvement with patients."<sup>26</sup> The trial judge ruled that the psychiatrist could not testify before the jury. The Supreme Court upheld this decision, as the proposed evidence was regarded as mere "personal opinion" and not sufficiently "reliable" or grounded in research.<sup>27</sup>

In addition to the four criteria and reliability, *Mohan* established that judges have a residual responsibility to undertake a "cost-benefit" analysis of admissibility, and can exercise residual discretion to exclude otherwise admissible expert evidence if its prejudicial effect outweighs its probative value.<sup>28</sup> This includes consideration of

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<sup>25</sup> One of the most common exclusionary rules that may preclude the use of expert evidence is the rule against "oath helping," which precludes an expert from directly testifying about the credibility of another witness.

<sup>26</sup> *Mohan*, *supra* note 11, at para. 8.

<sup>27</sup> *Ibid* at para. 49.

<sup>28</sup> *Ibid* at para 21; *White Burgess*, *supra* note 7 at para 19.

prejudice to a fair trial, the costs imposed on the parties and court by admitting such evidence, and potential costs for the rebuttal of the expert evidence.

In *White Burgess*,<sup>29</sup> Cromwell J., writing for a unanimous Court, reviewed and synthesized the law governing admission of expert evidence, and largely adopted the two-step approach to *Mohan* put forward by the Ontario Court of Appeal in *R. v. Abbey*.<sup>30</sup> Justice Cromwell wrote:

At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose . . . Evidence that does not meet these threshold requirements should be excluded. . . . At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. . . . Doherty J.A. summed it up well in *Abbey*, stating that the “trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the

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<sup>29</sup> *White Burgess*, *supra* note 7.

<sup>30</sup> *R v Abbey*, 2009 ONCA 624, 97 OR (3d) 330 [*Abbey*], leave to appeal refused *Warren Nigel Abbey v Her Majesty the Queen*, 2010 CanLii 37826 (SCC), [2010] SCCA No 125.

expert evidence.”<sup>31</sup>

Trial judges must determine whether the four threshold conditions of admissibility are satisfied. If they are, the judge must also be satisfied that the evidence meets a threshold of “reliability” and then undertake a discretionary cost-benefit analysis. If the evidence is admitted, the trier of fact must ultimately determine what weight to give it. Thus, issues of reliability and bias may be considered at each stage.

Despite the cautious stance of the Supreme Court in *Mohan* and subsequent cases towards expert evidence, a theme of *White Burgess* is that trial courts also have a discretionary role and must undertake a “cost-benefit analysis” for the admissibility of expert evidence. In *White Burgess*, the Supreme Court ruled that the trial judge had been too strict in applying this analysis and had erred in excluding the testimony of an expert’s statement on the grounds of possible bias based on an economic relationship to a party to the litigation. When dealing with child-related cases, the cost-benefit analysis may require a different balancing of factors than in the context of other civil or criminal cases; child-related cases never involve a jury and always require judges to make decisions about the future of a child who is not a party to the proceedings; thus, the costs of admission of expert evidence may be lower and the benefits greater. However, even in child-related cases, there is reason for caution in the admission of expert evidence and judicial scrutiny of its reliability.

## **QUALIFICATION AS AN EXPERT WITNESS**

A party putting forward a person as an “expert” has the onus of establishing the area of that person’s expertise, and further, that it is

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<sup>31</sup> *White Burgess supra* note 7 at paras 23–24. Citations within quotation omitted.

an appropriate area for introduction of expert evidence.<sup>32</sup> Unless the opposing party consents to introduction of the expert evidence, there should be a *voir dire* to determine the qualifications and nature of expertise of the proposed witness.

Most commonly the *voir dire* will focus on the first issue, the qualifications and expertise of the particular expert.<sup>33</sup> The expertise of the witness is typically established by providing the curriculum vitae, and indicating whether the person has been accepted in other similar cases as an expert (which is not determinative, but helpful). The expertise may be acquired through education or experience, or a combination of the two. It is often helpful to establish qualifications within the field of expertise as well, for example by having a record of being a presenter at professional education programs or conducting peer-reviewed research. For some child-related issues, such as a child welfare agency staff person expressing an opinion about the adoptability of a child, significant professional experience working in the field may be sufficient to allow a witness to provide an opinion.<sup>34</sup> Other matters, particularly related to psychological testing or making a mental health diagnosis, clearly require formal qualifications and professional accreditation before a person can be qualified to express an opinion.<sup>35</sup>

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<sup>32</sup> *White Burgess, supra* note 7; *Mohan, supra* note 11.

<sup>33</sup> See Rollie Thompson, “The Ten Evidence ‘Rules’ that Every Family Law Lawyer Needs to Know” (2016), 35 *Can Fam LQ* 285 at 289.

<sup>34</sup> See e.g., *Children & Family Services for York Region v W(T)*, 2004 *CarswellOnt* 2430, [2004] *OJ* 2541.

<sup>35</sup> See e.g., *Children's Aid Society, Region of Halton v W(A)*, 2016 *ONCJ* 358, 2016 *CarswellOnt* 9713.

## NOVEL ISSUES: “RELIABILITY” IN HARD AND SOFT SCIENCES

A more complicated issue that may arise at the *voir dire* stage is whether there is a body of knowledge that is sufficiently reliable to allow it to be the subject of expert testimony. As observed by Charron J. (as she then was) in *R. v. Olscamp* (a case where she refused to permit an expert to testify in a child sexual abuse prosecution that the complainant’s condition was “consistent” with having been sexually abused) the issue was not the qualifications of a particular witness, but whether anyone could give the proposed expert testimony having regard to the present state of knowledge in the field.<sup>36</sup> As noted by Charron J.A. (as she then was) in *R. v. A.K.*:

The evidence must meet a certain threshold of reliability in order to have sufficient probative value to meet the criterion of relevance. The relevance of the evidence must also be considered with respect to the second criterion of necessity. After all, it could hardly be said that the admission of unreliable scientific evidence is necessary for a proper adjudication to be made by the trier of fact.<sup>37</sup>

Some cases, like the American precedent in *Daubert v. Merrill Dow Pharmaceuticals*,<sup>38</sup> state that expert evidence must have a “scientific basis” to be reliable and admissible. It is, for example, the basis of scientific research in the biological, medical, and physical sciences (“hard sciences”) to use control groups and randomized

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<sup>36</sup> *R v Olscamp*, 1994 CarswellOnt 114, 35 CR (4th) 37 (Ont SC), at para 7.

<sup>37</sup> *R v AK*, [1999] OJ 3280, 176 DLR (4th) 665 (CA) at para 84, per Charron JA.

<sup>38</sup> 509 US 579, 113 S Ct 2786 (1993).

studies, and expert evidence in these areas requires a foundation in this type of research. However, even for expert evidence in hard sciences to be considered “reliable,” the expert need not testify with certainty as to a particular opinion. Experts will often testify in terms of probabilities, and all tests have some type of “error rate.”<sup>39</sup>

At some point the error rate or uncertainty of a particular test or area of knowledge becomes sufficiently high that a court may decide it is insufficiently reliable to admit expert evidence based on this type of test or in this area. An example of testing that does not meet threshold reliability for admission in court is phallometric testing,<sup>40</sup> which is commonly used by clinicians working with sexual offenders to measure progress in treatment, and is sometimes

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<sup>39</sup> Some forensic tests are sometimes said to have a “zero error rate,” but this is the theoretical compared to actual error rate, as there are human proficiency issues that affect even “fool proof tests.” For example, some interesting work has been done on errors in finger print testing. While everyone has unique fingerprints (even identical twins who have the same DNA), a study of American fingerprint experts found a false positive rate of 0.5% and a false negative rate of 7.5%: Bradford T. Ulerya et al, “Accuracy and reliability of forensic latent fingerprint decisions” (2011) 108:19 PNAS 7733–7738. There is less research on forensic DNA testing, which (except for identical twins) has theoretical error rates of approximately 1 in a billion, but actual error rates due to sample contamination and human error might be as high as 1 in a thousand: Mueller, L.D., “Forensic DNA Laboratory Error Rates”, (22 April 2002), Online: <<http://darwin.bio.uci.edu/~mueller/>>. Retesting by an independent lab would almost always prevent human error for DNA evidence, and double checking forensic labs will reduce it.

<sup>40</sup> As discussed in *R v J-LJ*, 2000 SCC 51, [2000] SCJ No 52, Phallometric testing (or Penile Plethysmography) involves attachment of sensors to a man’s penis while he is shown various images, including ones showing adult consensual sexual images and images of naked children, and is intended to detect sexual arousal to children.

considered by police or child protection workers in their investigations to help establish whether a man is likely to have sexually abused a child. While useful for clinical and investigative purposes, due to concerns about reliability, judges in criminal and child protection cases have generally refused to admit testimony based on the results of phallometric testing to help determine whether a man sexually abused a child.<sup>41</sup>

Although there is utility in having expert evidence based on physical (hard) sciences, with its often-precise measurements and apparent certainty, there are also limitations and dangers to this type of evidence. The Supreme Court observed that the trial process must not, in effect, become an “attornment to the opinion of the expert,” a possibility “exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field.”<sup>42</sup> Few lawyers have the academic background or knowledge to effectively review and understand scientific literature or cross-examine an expert testifying based on hard sciences. The reality is that many judges lack the scientific background to effectively assess the evidence of a hard science expert in the absence of effective cross-examination or a testimony from an expert with a different opinion. Later in this paper we discuss the overreliance on evidence of drug and alcohol tests from the Motherisk Laboratory, and return to this issue and the importance of having an expert for the parents

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<sup>41</sup> *Ibid.* See also *Children's Aid Society of Algoma v ML*, [2012] OJ No 3292 (OCJ); *Children's Aid Society of the Region of Peel v SR-T*, [2003] OJ 6146 (OCJ). In the latter case, there was evidence that there was a “significant risk” of false negatives and a “false positive rate” of 4–21%. While generally not admissible at the trial stage, it is sometimes considered as a part of the testimony of an expert based in part on phallometric testing at sentencing or the dangerous offender stage of a criminal case because of the lower standard for the admission of evidence.

<sup>42</sup> *R v DD*, 2000 SCC 43, [2000] 2 SCR 275 at para 55.

or defence to assist in the challenging of an expert called by the Crown or child protection agency, especially one testifying based on “hard science.”

The courts have recognized that there must be different standards for the admission of evidence from experts regarding “soft” or social and behavioural sciences compared to testimony based on medical or other hard sciences. There are important areas, especially in child-related disputes, where the expert’s opinion is dependent on knowledge of social science literature and clinical experience rather than reliance on reporting results of a test based on rigorous scientific methodology. In *R. v. Abbey*, the Ontario Court of Appeal held that in deciding whether to admit expert testimony by a sociologist called by the Crown about the meaning of a “teardrop” tattoo within street gang culture, the Crown needed to establish “threshold reliability” of the proposed expert’s testimony. Doherty J.A. held that the voir dire into the admissibility of the expert’s testimony could address such issues as:

1. To what extent is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?
2. To what extent is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?
3. To the extent that the opinion rests on data accumulated through various means such as interviews, is the data accurately recorded, stored and available?
4. To what extent are the reasoning processes underlying the opinion and the methods used to gather the relevant information clearly explained by the witness and susceptible to critical examination by a jury?

5. To what extent has the expert arrived at his or her opinion using methodologies accepted by those working in the particular field in which the opinion is advanced?
6. To what extent has the witness, in advancing the opinion, honoured the boundaries and limits of the discipline from which his or her expertise arises?
7. To what extent is the proffered opinion based on data and other information gathered independently of the specific case or, more broadly, the litigation process?<sup>43</sup>

In *Abbey*, the Court of Appeal also commented:

Admissibility is not an all or nothing proposition. . . . The trial judge may admit part of the proffered testimony, modify the nature or scope of the proposed opinion, or edit the language used to frame that opinion.<sup>44</sup>

The Court of Appeal held the trial judge erred in not permitting the sociologist called by the Crown to testify about the range of possible meanings of the tattoo, including that it signified the wearer had killed a rival gang member, but ruled that the expert could not

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<sup>43</sup> *Abbey*, *supra* note 30 at para 119. See also *R v Shafia*, *supra* note 23 at para 240, where the Court of Appeal upheld the admissibility of expert evidence called by the Crown about culture and “honour killings,” with Watt J.A. observing: “Scientific validity is not a condition precedent to the admissibility of expert opinion evidence. Indeed, the great bulk of expert opinion evidence admitted in our courts is given by experts in disciplines that do not use the scientific method and whose opinions cannot be scientifically validated.”

<sup>44</sup> *Supra* note 30 at para 63.

testify that the tattoo had only one specific meaning that amounted to a “confession” of the “ultimate issue” of murder.

While social science expert evidence may be admissible, and sometimes is highly relevant and persuasive, there may be concerns about its reliability. This is especially true when party-retained professionals, such as police officers or child protection workers, address issues of “common experience” or credibility.<sup>45</sup> However, lawyers without access to a consultant or expert with relevant knowledge may find it less challenging to cross-examine an expert testifying based on social science knowledge or professional experience than one testifying based on research in the physical sciences. Further, most judges have greater professional experience with issues in the “soft sciences,” and can better assess the reliability of social science expert testimony. Judges may be better able to limit the weight of expert evidence regarding behavioural or social science than evidence from a “hard scientist” whose testimony may not be fully comprehended.

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<sup>45</sup> See for example *R v Sekhon*, *supra* note 21.

## **WHITE BURGESS AND IMPARTIALITY**

In *White Burgess*, the central issue was the allegation of bias of a party's expert, and its effect on the admissibility of the testimony as expert evidence. Justice Cromwell held that if an expert witness does not meet a "threshold requirement" for impartiality, his or her evidence should not be admitted. If the witness meets the threshold, but questions remain concerning impartiality, an apprehension of bias may be a factor in the discretionary "cost-benefit analysis" of admissibility, or in the weighing of the evidence.<sup>46</sup> To establish impartiality for threshold admissibility, Cromwell J. stated:

The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her. . . .<sup>47</sup>

Justice Cromwell and the case's outcome make clear that it will be the "quite rare" case where expert evidence is excluded on the basis of lack of "impartiality" due to a professional relationship with one of the parties.<sup>48</sup> Justice Cromwell provided some examples where expert testimony was excluded due to lack of impartiality,

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<sup>46</sup> *Supra* note 7 at para 10.

<sup>47</sup> *Ibid* at para 32. Emphasis added.

<sup>48</sup> *Ibid* at para 49.

including: the proposed expert was acting as counsel for one of the parties; the expert was a party to the litigation him or herself; and the expert's retainer agreement was inappropriate because it was contingent on a particular opinion or outcome.<sup>49</sup> On its facts, *White Burgess* indicates that a witness having a professional relationship with a party, such as an accountant or therapist, does not normally preclude that professional from giving expert evidence supporting the party's position in the litigation, as long as it is an honestly held opinion founded on professional knowledge and expertise. With regards to the procedure of proving impartiality, Cromwell J. wrote:

While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met. . . . This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court.<sup>50</sup>

Justice Cromwell notes that in determining exclusion of an expert's evidence, it is the nature and extent of the relationship between the expert and the party who has retained that expert that is relevant, rather than the fact that there is a relationship. He cautioned

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<sup>49</sup> *Ibid* at para 37.

<sup>50</sup> *Ibid* at paras 47–49. Emphasis added.

that “[a]nything less than clear unwillingness or inability to [provide the court with fair, objective, and non-partisan evidence] should not lead to exclusion” but instead would go to weight.<sup>51</sup> According to Cromwell J., possible bias should be addressed when considering whether an expert is properly qualified as part of the “threshold” inquiry,<sup>52</sup> as well as in the cost-benefit analysis discretionary decision made by the trial judge to exclude otherwise admissible expert evidence.<sup>53</sup> If the testimony is admitted, bias may still also be a factor in weighing it.

## **PARTICIPANT AND LITIGATION EXPERTS**

If a person is called as an expert witness, provisions like Ontario’s *Family Law Rules* normally require that notice and a copy of the expert’s report be served on the other parties so they can adequately prepare to cross-examine the expert.<sup>54</sup> When a party is seeking to have the court rely on expert evidence, the party proffering the evidence should be prepared to establish the witness’ qualifications and to have the expert cross-examined on the report, unless the other party agrees to waive the appearance and accept the admission of the report without the person testifying.

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<sup>51</sup> *Ibid* at para 49.

<sup>52</sup> *Ibid* at para 53.

<sup>53</sup> *Ibid* at para 54. See *ibid* at para 24 where Cromwell J. (adopting the approach of Doherty J.A. in *Abbey*, *supra* note 30) observed that despite passing the first step of *Mohan*, a trial judge must still evaluate whether the evidence is “sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow” from its admission.

<sup>54</sup> Ontario *Family Law Rules*, O Reg 439/07, r 20.1 [*Family Law Rules*].

Recently, Ontario courts have begun to differentiate between “participant experts” and “litigation experts,” a distinction with potential procedural significance in many family and child welfare cases.<sup>55</sup> A “litigation expert” is an expert specifically retained by a party to provide opinion testimony about a matter in dispute in litigation. A party calling such an expert has the obligation of providing an expert report to the court and other parties well in advance of the proceeding, pursuant to the *Ontario Rules of Civil Procedure*, Rule 53.01<sup>56</sup> and the *Family Law Rules*, Rule 20.1.

A “participant expert” is a professional who has provided services and had a relationship with a person apart from the litigation, and is later called as an expert witness to provide an opinion in ongoing litigation. In the context of child-related litigation, a participant expert may be a physician or therapist who has provided care or treatment to a child or parent, and then is called as an expert to testify about the person’s treatment and express an opinion about that person based on his or her professional knowledge. The rules for the prior filing of “an expert report” do not apply to a participant expert, as that professional had an on-going relationship with the person, and is likely to play a lesser role in expressing opinions about the “ultimate issues” in a case.<sup>57</sup> This typically reduces the cost and complexity of involving such a professional in the litigation. However, as with other witnesses in civil cases, there is an obligation in family cases on parties calling

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<sup>55</sup> *Westerhof v Gee Estate*, 2015 ONCA 206, 124 OR (3d) 721.

<sup>56</sup> RRO 1990, Reg 194, r 53.01.

<sup>57</sup> *Ibid.*

such a witness to disclose the substance of the testimony prior to a hearing.<sup>58</sup>

While the rules for prior filing of an expert report do not apply to participant experts, the court should be satisfied that the criteria for admission of expert testimony have been satisfied before considering that witness's opinion evidence. As with other expert witnesses, this would entail consideration of both expertise and impartiality for the admissibility and weighting of the testimony.<sup>59</sup>

### **COURT-ORDERED ASSESSMENTS IN CHILD-RELATED CASES**

In all Canadian jurisdictions, a judge in a family<sup>60</sup> or child protection proceeding<sup>61</sup> has the jurisdiction to appoint a mental health

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<sup>58</sup> See e.g., *Family Law Rules*, r 23. The disclosure requirements of Rule 23 are important, but considerably less onerous than the requirements for notice and provision of information under Rule 20.1 for expert witnesses.

<sup>59</sup> *White Burgess*, *supra* note 7.

<sup>60</sup> In Canada assessments can be ordered in Alberta, *Rules of Court*, Alta Reg 390/68, r 218; British Columbia, *Family Relations Act*, RSBC 1996, c 128, s 15; Manitoba, *The Family Maintenance Act*, CCSM c. F20, s 3 and *Court of Queen's Bench Act*, CCSM c C280, s 49; New Brunswick, *Judicature Act*, RSNB 1973, c J-2, s 11.4; Newfoundland, *Children's Law Act*, RSN 1990, c C-13, s 36; Northwest Territories, *Children's Law Act*, SNWT 1997, c 14, s 29; Nova Scotia, *Judicature Act*, RSNS 1990, c J-4, s 32F and *Maintenance and Custody Act*, RSNS 1989, c 160, s 19; Ontario, *Children's Law Reform Act*, RSO 1990, c C-12, s 30 and *Courts of Justice Act*, RSO 1990, c C-12, s 112; Prince Edward Island, *Custody Jurisdiction and Enforcement Act*, RSPEI, c C-33, s 4.1; Yukon, *Children's Act*, RSY 1986, c 22, s 43. It has also been held that a superior court has an inherent jurisdiction to order an assessment: *Cillis v Cillis*, 1980 CarswellOnt 315, 20 RFL (2d) 208 (Ont HC).

professional to undertake an assessment<sup>62</sup> of the child and parents in order to provide a report for the court and the parties. Such court-appointed experts have a unique role, testifying partially about the results of their factual investigations, and partially about their opinions.

There is a significant body of social science literature on conducting child custody and access assessments in family cases and parenting capacity assessments in child protection cases.<sup>63</sup> A number of professional organizations and regulatory bodies have developed

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<sup>61</sup> See e.g., Ontario *Child and Family Services Act*, RSO 1990, c C-11, s 54; and Court Ordered Assessments, Ontario Reg 25/07; and *Child Youth and Family Enhancement Act*, SA 2004, c 16, s 21.1(3)(b).

<sup>62</sup> Child custody and access “assessments” is the term used in Canada for these court-ordered expert reports in family cases, while the term child custody “evaluations” or “forensic evaluations” is more often used in the United States. In child protection cases, these are often called “parenting capacity assessments.”

<sup>63</sup> See e.g., Leslie Drozd, Nancy Olesen & Michael Saini, *Parenting Plan & Child Custody Evaluations: Using Decision Trees to Increase Evaluator Competence & Avoid Preventable Errors* (Sarasota, FL: Professional Resource Press, 2013); Rachel Birnbaum, Barbara Jo Fidler & Katherine Kavassalis, *Child Custody and Access Assessments: A Resource Guide for Legal and Mental Health Professionals* (Toronto: Thomson Carswell Publishing, 2008); Jonathan Gould & David Martindale, *The Art and Science of Child Custody Evaluations* (New York: Guilford Press, 2007); Philip Michael Stahl, *Conducting Child Custody Evaluations: A Comprehensive Guide* (Thousand Oaks, CA: Sage Publications, 1999); American Psychological Association (APA), “Guidelines for Child Custody Evaluations in Family Law Proceedings” (2010) 65:9 AM Psychol 863; and Association of Family and Conciliation Courts (AFCC), “Model Standards of Practice for Child Custody Evaluation” (2007), 45 Fam Ct Rev 70.

guidelines for conducting assessments in family<sup>64</sup> and child protection proceedings.<sup>65</sup> Although there is not a single standardized methodology, the assessment process is invariably “multimodal,” involving a range of ways of gaining an understanding of the needs of children, the capacities of the parents, and the relationship of each parent and child. Interviews with parents and children and observation of parent-child interactions are very important parts of the process.

An assessor will also usually review court documents and previous reports about family members, and contact “collateral sources”; various individuals who know the family, including professionals like teachers and coaches, as well as neighbours, relatives, and new partners. If a psychologist is involved, there may be psychological testing of the parents, and perhaps children, though there are no tests that can conclusively establish who is a good parent, or what child care arrangement will be “best” for a child. If psychological testing is used, the psychologist should be familiar with the current literature and latest versions of the tests, as well as

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<sup>64</sup> See e.g., Ontario College of Social Workers and Social Service Workers, “Practice Guidelines for Custody and Access Assessments”, (1 September 2009), online: <<http://ocswssw.org>>; Gregory Stevens “Custody and Access Assessments in Saskatchewan: Format, Process, and a Practitioner’s Opinion”, (September 2004), online: <<http://redengine.lawsociety.sk.ca/inmagicgenie/documentfolder/AC5609.pdf>>; Newfoundland & Labrador Association of Social Workers, “Standards for Child Custody and Access Assessments”, (8 January 2007), online: <<http://www.nlasw.ca>>.

<sup>65</sup> T Pezzot-Pearce & J Pearce, *Parenting Assessments in Child Welfare Cases: A Practical Guide* (Toronto, University of Toronto Press, 2004); Peter Choate & Karen Hudson, “Parenting Capacity Assessments: When They Serve and When They Detract in Child Protection Matters” (2014) 33 Can Fam LQ.

their limitations, especially for the particular parents and children being assessed.

The professional who conducts a court-ordered assessment should have relevant knowledge, expertise, and experience. Assessors also need to understand the cultural context of the parents and children, which may be especially important in child protection cases.<sup>66</sup> There is also growing awareness of the complexity of cases that involve children with special needs (e.g., learning disabilities, physical health issues, cognitive delay, Asperger Spectrum Disorder), refusal to visit a parent, or where parents have a high conflict separation, especially if it involves domestic violence, or one or both parents have substance abuse or mental health problems.<sup>67</sup> These cases require a specialized assessment and analysis, in addition to the mental health professional being competent and qualified in understanding child development, attachment, family dynamics, and knowledge of relevant case law and legal standards.

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<sup>66</sup> See e.g., Karen S. Budd, "Assessing Parenting Capacity in a Child Welfare Context" (2005), 27:4 *Children & Youth Services Rev* 429; and Sandra Azar & Linda Cote, "Sociocultural issues in the evaluation of the needs of children in custody decision making: What do our current frameworks for evaluating parenting practices have to offer?" (2002) 25:3 *Int'l JL & Psychiatry* 193–217.

<sup>67</sup> Birnbaum, Fidler & Kavassalis, *supra* note 63; Rachel Birnbaum et al., "Co-parenting Children with Neurodevelopmental Disorders" in Kathryn Kuehnle & Leslie Drozd, eds, *Parenting Plan Evaluations: Applied Research for the Family Court* (New York: Oxford UP, 2016) 270; Jo Fidler, Nicholas Bala & Michael Saini, *Children Who Resist Post-separation Parental Contact: A Differential Approach for Legal and Mental Health Professionals* (New York: Oxford UP, 2012). On the issue of concern about whether assessors have adequate training in dealing with cases involving domestic violence, see e.g., Rahman & Track, *supra* note 3.

While the assessment process should be informed by social science research, assessors will inevitably also engage in assessing the credibility of different sources of information and establishing a factual basis for their opinions, and using their own individual professional judgement, experience, and values in formulating recommendations. The broad concerns about reliability, impartiality, trial efficiency, and fairness that apply to the admission and weighing of expert evidence are also relevant to assessment reports. However, there are unique features of the court-ordered assessment process that result in some differences in the legal treatment of party-retained experts and court-appointed assessors.

In practice, many requests for an assessment are informal and made on consent. While assessments can be very useful for the parties and court, and can facilitate settlement and judicial decision-making, the process is intrusive for both parents and children, so there is understandable judicial scrutiny if the request for an assessment is opposed. Further, the assessment process is expensive (often starting in the range of \$5,000 to \$10,000, potentially much higher) and can take months to complete, possibly delaying a trial.

In all provinces, if the court orders an assessment in a child protection case, it is almost always paid for by the government. In family cases, in all provinces a judge can direct that one or both parents pay for an assessment, provided that they have the means. Courts in some provinces also have limited authority to direct or request that a government agency fund the preparation of an assessment in a family case, but the agency will usually select the assessor. In Ontario, for example, the court can order that parents pay for an assessment under the *Children's Law Reform Act* s. 30, in which case a specific professional, often a psychologist, will be identified in the order to prepare the report, but this is only realistic if the parents have significant resources as the parents must pay for this type of report.

An Ontario court may also direct that the Office of the Children’s Lawyer (OCL) consider involvement in a family case. The OCL will decide whether to appoint a lawyer for the child, undertake a “clinical investigation,” or do both or neither. While there is no charge to parents for the involvement of the OCL, for budgetary reasons it is only involved in about half of the family cases where there is a judicial request,<sup>68</sup> most often to provide a “clinical investigation report,” usually prepared by a social worker designated by the Office. As a result of government budgetary limits and parental lack of resources to pay for an assessment, there are many family cases where it would be desirable to have a court-appointed expert report, but none is available.

While most court-appointed assessments are undertaken on a consensual basis, often reflected in a consent order, there are cases where one party requests an assessment and the other party objects. There is some controversy in the jurisprudence over the test courts should apply when the judge must rule on whether or not to order an assessment. Some cases have taken a relatively narrow approach, concluding there needs to be a “clinical issue” to order an assessment in a family case.<sup>69</sup> In the 2012 Ontario case of *Baille v. Middleton*, Pazaratz J. reviewed the case law and adopted a “clinical issues” test for determining when to order an assessment, concluding:

Assessments should be limited to cases in which there are clinical issues to be determined, in order that such

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<sup>68</sup> For concerns about the inability of the OCL to fill all requests for service and delays in responding to requests, see Ontario Office of the Auditor General, *2013 Auditor General’s Annual Report* (2013), Chapter 4, Section 4.10.

<sup>69</sup> See e.g., *Linton v Clarke* (1993), 50 RFL (3d) 8 (Ont Ct (Gen Div)), affd 10 RFL (4th) 92, 21 OR (3d) 568 (Div Ct).

assessments can provide expert evidence on the appropriate manner to address the emotional and psychological stresses within the family unit in the final determination of custody. . . . Clinical issues have been loosely defined as being “those behavioral or psychological issues about which the average reasonable person would need assistance in understanding . . . not limited to psychiatric illness or serious psychological impairment.”<sup>70</sup>

Most cases, however, have rejected this narrow “clinical issues” test and take a broader approach. In its 2006 decision in *Ursic v. Ursic*,<sup>71</sup> the Ontario Court of Appeal upheld the decision to impose joint custody in a high-conflict separation. The Court of Appeal relied heavily on a post-trial assessment by a mental health professional that had been ordered by the court as part of the appeal process. The appeal court noted the assessor’s opinion “buttressed” the trial decision, and the appellate court varied the details of the parenting plan to accord with the specific proposal of the assessor rather than the Judge’s original order. The Court of Appeal also commented favourably on the importance of the assessment undertaken after trial and before the appeal, as ordered by a judge of the Court of Appeal.

The decision in *Ursic* recognized the value of the opinions of court-appointed mental health professionals in high-conflict child-related disputes. Significantly, the Court of Appeal did not

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<sup>70</sup> 2012 ONSC 3728 at paras 23-24. For a child welfare case where the court refused to order an assessment because the agency seeking the assessment failed to establish the possibility harm to the child from being placed in the care of her father, see *Children’s Aid Society for the Region of Halton v N(RR)*, 2008 ONCJ 95, 170 ACWS (3d) 319 per Zisman J.

<sup>71</sup> [2006] OJ 2178 (CA), 32 RFL (6<sup>th</sup>) 23.

suggest that there needed to be a “clinical issue” before an assessment is ordered. Instead, the Court indicated that in a high-conflict separation, it is sufficient for the assessment to be “useful.” In the 2013 Ontario decision *Glick v. Cale*, Kiteley J. extensively reviewed the jurisprudence and rejected the narrow “clinical issues” approach, citing the Court of Appeal decision in *Ursic*, observing that “judges are not trained to identify ‘clinical issues.’”<sup>72</sup> Justice Kiteley suggested a non-exhaustive list of criteria which might assist a judge in deciding whether to order an assessment, including consideration of whether it is “high conflict” separation, and whether the children appear to be stressed or having behavioural problems.<sup>73</sup> It is submitted that the broader approach of *Ursic*, *Glick v. Cale*, and other recent cases<sup>74</sup> is preferable to the narrower “clinical issues” approach in deciding whether to order an assessment, however, it is not appropriate to have an assessment in every contested child-related dispute. The assessment process can be expensive for the parties, as well as intrusive for parents and children. If a request for an assessment is opposed, the onus is on the party seeking the assessment to establish the “evidentiary foundation” to establish the need for an assessment and that the benefits outweigh the costs. In family cases, a “bald assertion” that it is a “high conflict separation” may not suffice to obtain an order for an assessment; a party seeking an assessment may need to provide independent affidavit evidence of the negative effects of such issues as separation on the children, high conflict, problems with access, or parental dysfunction.<sup>75</sup>

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<sup>72</sup> 2013 ONSC 893, [2013] OJ 573 at para 45.

<sup>73</sup> *Ibid* at para 48.

<sup>74</sup> See e.g., *Ryan v Scott*, 2013 ONSC 4759, 2013 CarswellOnt 9783 per Mesbur J and *KMP v JVER*, 2016 YKSC 10.

<sup>75</sup> *Morton v Morton*, 2015 ONSC 4633, 2015 CarswellOnt 11038.

Lawyers (or self-represented parents) involved in cases should be satisfied about the experience and views of a professional nominated as the assessor. In many cases, the parties agree on the professional who will conduct the assessment. If there is no agreement, the supporting materials for the motion for appointment should include the curriculum vitae of the proposed assessors. The court should consider the expected cost and time to complete the assessment, as well as each assessor's experience and issues of potential bias.

In *Karar v. Abo-El-Ella*,<sup>76</sup> the court ordered an assessment on consent, but the parties could not agree who would do the assessment. The mother's counsel proposed a psychologist in the city where the parties resided, while the father's counsel objected due to the mother's profession as a psychiatrist and the possibility she might have had colleagues who knew the psychologist proposed (though there was no evidence of this). The father proposed a psychologist from a more distant city; the mother objected because the father claimed the mother alienated the children from him, and his proposed psychologist had written extensively about "parental alienation syndrome" and his personal experiences with his estranged son. In ordering the mother's proposed psychologist to conduct the assessment, Beaudoin J. observed there was a "reasonable apprehension of bias" for the father's proposed psychologist because of his published work, and concluded that the father's concerns about the mother's proposed assessor were "based on speculation."

Once an assessment is ordered, legislation generally provides that a report prepared by the assessor named in the order is "admissible" in evidence, which suggests that there is no need for a voir dire on its admissibility,<sup>77</sup> though it is common for the court to conduct a process of qualifying the expert before that professional testifies.<sup>78</sup>

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<sup>76</sup> 2016 ONSC 1564, 2016 CarswellOnt 4171, per Beaudoin J.

<sup>77</sup> If the order directs that the assessment is to be undertaken by one

## **PARTY-RETAINED CRITIQUE EVIDENCE OF COURT-APPOINTED ASSESSORS**

It is clear that a party can retain and call its own qualified expert to challenge or limit the opinion of an expert called by the other party to testify. This is an inherent aspect of the adversarial process. Further, each party can cross-examine a court-appointed assessor and question the process adopted or opinions expressed.<sup>79</sup> A party may also challenge the basis of an assessor's opinions and recommendations, for example by calling other evidence to question the accuracy of the factual basis of the expert's opinion. However, different issues arise when a party wants to call their own expert to challenge or "critique" the methodology or opinions of a court-appointed assessor after the assessor's report is prepared and filed with the court. While there is controversy about whether a party-retained expert can challenge an opinion or recommendations expressed by an assessor appointed by the court, in our view, the preferable approach is to allow parties to introduce expert critique

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professional or member of the staff of a clinic and that person delegates significant portions of the assessment process to other professionals or staff members without the permission of the court, the report may not be admissible: see *CAS London v B(CD)*, 2013 ONSC 2858, 2013 CarswellOnt 8125, per Harper J.

<sup>78</sup> See e.g., *Children's Aid Society, Region of Halton v W(A)*, 2016 ONCJ 358, 2016 CarswellOnt 9713.

<sup>79</sup> The opportunity to test and cross-examine the recommendations of a court-appointed assessor is critical, and as a result it will only be in "rare or exceptional" cases that a court will rely on an assessor's recommendations at an interim hearing, as there is no opportunity to fully challenge those views; for one of those rare cases where a court did base an interim ruling to vary custody, see *Ly v Wade*, 2016 ONSC 1155, 2016 CarswellOnt 2418 per Pazaratz J.

testimony, provided that it meets the test for admission of expert evidence, and is appropriately focused.

In the 2015 Ontario Court of Appeal judgement in *M. v. F.*,<sup>80</sup> Benotto J.A., in *obiter*, expressed concern about the utility and admissibility of “critique evidence” admitted at trial to challenge the opinions of a court-appointed assessor about appropriate parenting arrangements. This case involved a high conflict parenting dispute about overnight visitation with the father for a six year old boy, and the trial judge largely based his decision to allow overnight visits on the recommendation of the court-appointed psychologist. Justice Benotto upheld the trial decision, and noted that the court-appointed assessor had been involved with the family “for nearly all of the child's life,” while the psychologist retained by the mother to comment on the recommendations of the assessor had never met the child or parties in a clinical setting, and never met the father. Justice Benotto found the party-retained expert’s “self-described task was to ‘raise concerns’ about the court-appointed assessment,” and concluded:

It would be difficult to find that such evidence meets the criteria of *Mohan* [for the admission of expert evidence]. . . . critique evidence is rarely appropriate. It generally—as here—has little probative value, adds expense and risks elevating the animosity between the parties.<sup>81</sup>

As Benotto J.A. explained, expert critique evidence about a court-appointed assessment must meet the *Mohan* (now *White Burgess*) test for admissibility. A restrictive approach to the second

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<sup>80</sup> *Supra* note 5.

<sup>81</sup> *Ibid* at paras 33–34.

stage “cost benefit” weighing for the admission is appropriate in a high conflict dispute between parents where the “critique expert” has not assessed the child.<sup>82</sup> In these parenting dispute cases, the “cost” of admission of evidence from a party-retained expert, in terms of lengthening the proceedings and adding to their complexity, can be relatively high. Notably, on the facts of *M. v. F.*, the parties both consented to the appointment of the assessor who was a psychologist well known to both as he had already been involved in mediation efforts with them.

Issues of lengthening the trial and expense were especially pronounced in *M. v. F.*, a long running high conflict parental dispute, which was focused not on whether the child would have a relationship with both parents, but rather on the details of the parenting plan. Significantly, and inappropriately, the psychologist whom the mother retained to provide a critique went so far as to make recommendations about the “ultimate issue” of the most suitable parenting plan and overnight visitation, without having assessed either the child or parents, or having established a basis for that opinion.

In some cases, especially high conflict family cases involving claims of alienation, a party may retain a mental health professional to interview the child and express an opinion about the significance of those views that is contrary to that of the court-appointed assessor. Even if that professional has undertaken assessments and has been accepted as an expert in other family cases, the courts have had understandable concern about the limited value of such evidence. Similar to the approach in *M. v. F.*, in such cases a court may decide that the expert opinion of such a professional is not admissible, though the statements made to the professional by the child are likely admissible hearsay under the “state of mind”

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<sup>82</sup> *Mohan*, *supra* note 11 at para 21; *White Burgess*, *supra* note 7 at para 19.

exception.<sup>83</sup>

It is appropriate for a court in a case like *M. v. F.*, dealing with a dispute between parents, to refuse to consider recommendations about the “best interests” of a child from a professional who has been retained by one party and not assessed both parents. Indeed, leading child custody evaluators<sup>84</sup> and professional standards for mental health professionals highlight that it is not professionally appropriate to express opinions that reflect on a person whom the professional has not properly interviewed and assessed. However, there is also a significant body of literature<sup>85</sup> and Canadian jurisprudence which recognizes a potentially valuable role for

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<sup>83</sup> See e.g., *F(V) v Halton CAS*, 2016 ONCJ 111, 2016 CarswellOnt 3035, where, in a very high conflict case, the court-appointed assessor had recommended a transfer of custody of a 13-year old girl to her father, from whom she had been alienated. The Family Court followed the assessor’s recommendation, and ordered custody to the father. In a child protection application brought by the child (with mother’s assistance), child’s counsel retained a social worker who had significant experience as an assessor to interview the girl and prepare a report. The court admitted the social worker’s statements of what the child told him (namely that she wanted to live with the mother). However, Kurz J. refused to admit his opinions about the girl’s competence to make decisions and perceptions of her parents, as the basis for these opinions had not been sufficiently established, since he had not interviewed both the parents and hence did not have sufficient basis for his opinions to be admitted as expert evidence.

<sup>84</sup> Birnbaum, Fidler & Kavassalis, *supra* note 63; William Austin et al, “Forensic Expert Roles and Services in Child Custody Litigation: Work Product Review and Case Consultation” (2011) 8:1-2 J Child Custody 47 [Austin et al]; and H.D. Kirkpatrick, William Austin & James Flens, “Psychological and Legal Considerations in Reviewing the Work Product of a Colleague in Child Custody Evaluations” (2011) 8:1-2 J Child Custody 103 [Kirkpatrick, Austin & Flens].

<sup>85</sup> *Ibid.*

professionals retained by one party to comment on or review a report prepared by a court-appointed assessor.

As recognized by the British Columbia Supreme Court in the 2010 case *Hejzlar v. Mitchell-Hejzlar*, testimony by a party-retained psychologist who is a “critic” of a court-appointed psychologist is only admissible if it complies with their professional standards, in this case the Code of Conduct of the BC College of Psychologists, which dictates what psychologists can do when they are reviewing the report of another psychologist: (a) they must limit comments to methods and procedures; (b) they must not state any conclusions unless they have done their own individual assessments; and (c) they must restrict themselves to comments as to their sufficiency and accuracy.<sup>86</sup>

Judges of the British Columbia Supreme Court have continued to exercise their “gatekeeping function” and rule evidence inadmissible or give no weight to testimony from party-retained mental health professionals who are critical of the recommendations of a court-appointed assessor and reached conclusions about the “best interests” of children or make diagnoses about parents whom they have not met.<sup>87</sup> Judges are especially concerned about opinions from party-retained professionals who lack experience in conducting assessments, and have become allied with the party who retained them.

However, consistent with *Hejzlar v. Mitchell-Hejzlar*, the British Columbia courts have accepted that parties may retain qualified, experienced professionals who may review the assessor’s report and testify about the methodological limitations and recommendations of

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<sup>86</sup> 2010 BCSC 1139, [2011] BCWLD 650 at para 11.

<sup>87</sup> See e.g., *M v M* [2015] BCJ 1584, 2015 BCSC 1297.

a court-appointed assessor, provided that they are not making their own recommendations about the most appropriate parenting plan or the child's best interests. In some cases, including the recent decision of the British Columbia Court of Appeal in *A.S.P. v. N.N.J.*, considerable weight has been given to some of the opinions of a party-retained professional who has undertaken a review of the work of a court-appointed assessor as the basis for discounting the recommendations of the court-appointed assessor.<sup>88</sup>

In the 2016 decision of the Ontario Superior in *Luo v. Le*,<sup>89</sup> a case involving allegations of alienation, the court admitted a "reply report" from a social worker retained by the mother, commenting on the report of two court-appointed mental health professionals that had recommended reversal of custody from the mother to the father and attendance by family members at a controversial "intensive reunification" program in British Columbia. The court noted that the purpose of this reply report was to "assess the process" undertaken and recommendations made by the court-appointed experts. Justice Chaney observed that the reply report was "primarily a generic discussion of the uncertainty and debate surrounding the causes and appropriate interventions in relation to parental alienation."<sup>90</sup> While the judge suggested that the reply report in this case was "not very helpful," it is notable that the court rejected the recommendation of the court-appointed experts, and used significant information from the party-retained expert in reaching his conclusion. Although the

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<sup>88</sup> 2015 BCCA 415, [2015] BCJ 2121. However, for a recent British Columbia decision suggesting that admission of expert critique evidence in family cases about the report of a court-appointed assessor should be "rare," see *Dimitrijevic v Pavlovich*, 2016 BCSC 1529, [2016] BCWLD 6022.

<sup>89</sup> 2016 ONSC 202, [2016] WDFL 1131.

<sup>90</sup> *Ibid* at para 26.

issue of the admissibility of the report of the mother's expert does not appear to have directly arisen, it is significant that this evidence did not purport to be an assessment of the parties and child, did not offer recommendations about the child's best interests, and would be admissible under the test set out in *Hejzlar v. Mitchell-Hejzlar*.

The admission of the type of expert commentary on the methodology of a court-appointed assessor and a summary of "generic [social science] knowledge" is also consistent with standards proposed by leading forensic mental health professionals,<sup>91</sup> who point out that given the wide variability in the education and experiences of those who undertake assessments, and the limited scope of professional regulation of this type of work, it is important to have external review of the work of assessors. Further, allowing for review testimony may encourage parties who are dissatisfied with the recommendations of an assessor to obtain their own objective, professional review, which, if it substantially confirms the original report, may facilitate settlement.

### **CRITIQUE EVIDENCE OF GOVERNMENT-RETAINED EXPERTS**

In *M. v. F.* and similar cases, the courts were considering the admission of evidence from a mental health professional retained by a parent to testify about a report prepared by a court-appointed

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<sup>91</sup> Austin, Dale, Kirkpatrick & Flens, *supra* note 84; Birnbaum, Fidler & Kavassalis, *supra* note 63; Austin et al, *supra* note 84. As noted above, in *Dimitrijevic v Pavlovich*, 2016 BCSC 1529 at para 37, Kent J. suggested that admission of expert critique evidence in family cases about the report of a court-appointed assessor should be "rare," but he also observed that there was a role for part-retained experts to provide testimony about "peer-reviewed, authoritative social science on parenting issues in dispute."

assessor who was nominated by the court, either with the consent of both parties or at least with opportunity for them to make submissions about the selection of an assessor. It is submitted that when the government has had a role in the selection of the assessor, or is a party to the litigation, in considering the admissibility of critique evidence a different judicial cost-benefit analysis at the second stage of the *Mohan* and *White Burgess* tests is appropriate; courts should give parents who disagree with the opinions of a government-retained expert greater scope for introducing their own expert evidence to challenge those opinions.

This situation may arise, for example, in family litigation in Ontario if a parent seeks the admission of evidence from a party-retained expert to critique the report of a clinical investigator from the Office of the Children's Lawyer (OCL). Although the parties may have consented or had an opportunity to make submissions prior to the order requesting the involvement of the OCL, they have no involvement in the selection of the specific clinical investigator. While many OCL clinical investigators are highly competent and experienced, some may have less academic qualifications than the professionals undertaking court-ordered (and party paid) assessments under the CLRA s. 30,<sup>92</sup> and they sometimes have only limited experience in the field.<sup>93</sup> In a number of recent Ontario cases

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<sup>92</sup> *Children's Law Reform Act*, RSO 1990, c 12, s 30.

<sup>93</sup> See, however, *Mayfield v Mayfield*, [2001] OJ 2212, 18 RFL (5th) 328 (SCJ), per Wein J., where the court refused to admit party-retained critique evidence about a report prepared by an OCL clinical investigator. This decision is problematic since the government selected OCL clinical investigator was undertaking one of her first assessments, and a parent was precluded from submitting testimony from a highly experienced assessor. In *Greenough v Greenough*, 46 RFL (5th) 414, [2003] OJ 4227 Quinn J. questioned *Mayfield* and held that a mother could call an expert whom she had retained to critique the methodology used by a psychologist whom both parents had agreed would undertake an assessment.

the courts have commented on the “bias”<sup>94</sup> of a government-selected clinical investigator, the unreliability of the investigator’s conclusions about the presence of parental alienation,<sup>95</sup> or the clinician’s under-appreciation of the effects of domestic violence.<sup>96</sup> In situations where the expertise of a government-selected assessor is questioned, there is a strong argument for the admission of critique evidence submitted by a party.

There is also a strong argument for the admission of critique evidence from an expert retained by a parent concerning an assessment under the Child and Family Services Act s. 54<sup>97</sup> for use in a child protection proceeding, where the state is a party and the order sought is severance of the parent-child relationship. An example of a flexible approach in child protection cases to the admission of expert critique evidence is provided by *Children's Aid Society, Region of Halton v. W. (A.)*.<sup>98</sup> The agency was seeking to have two children made permanent wards with the plan that they remain in kinship care with continuing parental contact, while the parents, who had separated by the time of the final trial, each wanted to resume care of the children. A court-appointed assessor undertook an initial parenting capacity assessment, and recommended that the children be made permanent wards and remain in their kinship placement. The mother, represented by counsel from a legal aid clinic, was able to retain an expert who had experience undertaking this type of assessment to testify about the methodology and psychological tests administered by the court-appointed assessor.

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<sup>94</sup> *D’Angelo v Barrett*, 2016 ONCA 605, [2016] WDFL 5155.

<sup>95</sup> *Deacon v Haggith*, 2016 ONSC 6360, [2016] WDFL 6493.

<sup>96</sup> *Whidden v Ellwood*, 2016 ONSC 6938, [2016] WDFL 6506.

<sup>97</sup> *Supra* note 13.

<sup>98</sup> 2016 ONCJ 358, 2016 CarswellOnt 9713.

After conducting a *voir dire*, the court admitted the critique testimony as expert evidence, with O’Connell J. observing:

In this case, the critique evidence . . . relates to a[n] . . . assessment under the CFSA for use in a child protection proceeding where the state is a party (and the applicant) to the proceeding and the order being sought is crown wardship—the permanent severance of the parent-child relationship. Further, the critique was solely concerned with the validity and reliability of the scientific testing conducted, as well as the methodology and process used. . . .

The use of critique evidence by vulnerable parents in child protection proceedings commenced by the state against them is fundamentally different than the critique evidence used in a high conflict parenting dispute about overnight visitation, which was the case of *M. v. F.* . . .<sup>99</sup>

The court noted the critique expert was a “reasonable and reliable witness,” who “although hired by the mother, was not a ‘hired gun.’” In many other cases he had been a court-appointed assessor and this was only the third time that he had been retained to provide a critique of a court-appointed expert, and on the two prior occasions he found nothing wrong with the assessment and reported that to counsel.<sup>100</sup> In this case, however, the expert raised significant

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<sup>99</sup> *Ibid* at paras 263–64. For another child protection case where the court admitted evidence from an experienced assessor who had retained by a parent to critique a report from a court-appointed expert, see *The Children’s Aid Society of Simcoe (County) v D(B)*, 2014 ONSC 2140 (Div Ct), aff’d 2013 ONSC 1610.

<sup>100</sup> *Supra* note 98 at para 266.

concerns about the tests and methodology used by the court-appointed assessor, including use of outdated tests and conducting all of the interviews and tests of the parents on a single day, contrary to normal practice, though fairly noting that it could not be known whether these concerns would have affected the ultimate opinion. The court concluded that in light of the critique of the party-retained expert, it should treat the conclusions of the court-appointed assessor “with considerable caution and placed very little, if any weight” on the opinions of the assessor.<sup>101</sup> In the end, however, the court made the order sought by the agency based on other evidence. The decision of O’Connell J. in *Children’s Aid Society, Region of Halton v. W. (A.)*, illustrates the importance of taking account of the role of the state in obtaining expert evidence in considering how to undertake the cost-benefit analysis of admitting critique expert evidence put forward by a parent.

Even in child protection cases, however, scrutiny should be given to the admission of evidence from “critique experts” who have no direct knowledge of the parents or children, and little or no experience with undertaking assessments, but rather are retained solely to comment on the process used in an assessment. In *C.A.S. of Toronto v. O.(K.)*,<sup>102</sup> the African-Canadian mother of twin girls who were Crown wards and the subject of a status review hearing proposed to call a professional with a doctorate in education to critique a psychologist’s court-ordered assessment, specifically to testify about the unreliability of some of the psychological tests performed for members of cultural minority groups. Justice Spence concluded that the “threshold reliability” test of *Mohan* was not satisfied, based on the “lack of research on the subject in the scientific community” within which the proposed expert worked.

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<sup>101</sup> *Ibid* at para 268.

<sup>102</sup> [2004] OJ No 630, 50 RFL (5th) 298 (Ont CJ), *per* Spence J [O(K)].

The mother also wanted the expert to testify about the lack of “cultural sensitivity” of the agency in dealing with visible minority children. Justice Spence ruled that the proposed expert could not establish he had current knowledge of the practices of the agency, and hence was not qualified to express an opinion on that subject. Further, the parts of the proposed testimony concerning the lack of “racial and cultural sensitivity” of the agency did not meet the *Mohan* criteria of “necessity”, since these matters were “within the experience of triers of fact who live in such a diverse place as the city of Toronto. . . .”<sup>103</sup> The judge also expressed a concern that the proposed expert, while a distinguished academic and community member, appeared to be coming to court “more as an advocate rather than as a scientist,” as he was prepared to proffer an opinion without even having seen the assessment report in question and had no direct experience in undertaking assessments.<sup>104</sup>

### **EXPERTS CALLED BY PARENTS AND “ONE-SIDED ASSESSMENTS”**

Given the limited resources of parents involved in family and child protection litigation, and the importance of perspectives of professionals involved with the family, it is submitted that there should not be too high of a threshold for the admission of opinion evidence from “participant professionals” with direct knowledge of a parent’s case (as a result of providing services to the parents or children). Of course, the ultimate weight of this evidence will be for the court to determine.<sup>105</sup>

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<sup>103</sup> *Ibid* at para 47.

<sup>104</sup> *Ibid* at para 39.

<sup>105</sup> *Ibid*. See also *Children’s Aid Society of the Regional Municipality of Waterloo v L*, 2004 ONCJ 116, [2004] OJ No 2996 and *Children’s Aid Society of Toronto v T(C)*, 2006 ONCJ 548, 36 RFL (6th) 443 (Ont Ct J).

Although a qualified professional who has treated a parent or child should generally be permitted to express an opinion about that person,<sup>106</sup> such a professional should not be permitted to express an opinion about the parenting arrangement that will promote the child's best interests, as they have not assessed the entire family.<sup>107</sup> While there may be concerns that a professional who is treating a parent, or who is retained by one parent in a high conflict separation to provide treatment to a child, may become "allied" with that parent and hence "los[e] some objectivity,"<sup>108</sup> this type of concern should normally only affect the weight of that expert's evidence rather than its admissibility. It is important to appreciate that in some cases a therapist or doctor who has had a long-term relationship with a parent or child may have opinions and information about their patient or client that are better founded than those of a court-appointed assessor.<sup>109</sup>

While there is an important role for participant experts in child related cases, there should be careful scrutiny of the admissibility of litigation experts retained by one parent solely to provide an opinion to the court. In family disputes, there are not infrequently concerns about unreliability and potential bias as a basis for refusing to admit testimony from a mental health professional who has been retained

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<sup>106</sup> See e.g., *Livisianos v Liadis*, 2016 ONCJ 292, [2016] WDFL 3947 [*Liadis*], per Zisman J. where the court placed significant weight on testimony from a counsellor who worked with the mother for more than a year on parenting issues.

<sup>107</sup> See e.g., *Williamson v Williamson*, 2016 BCCA 87, [2016] 7 WWR 263.

<sup>108</sup> Brownstone J., in *Catholic Children's Aid Society v CS*, [2010] OJ 5831, 2010 ONCJ 656 at para 36; see also e.g., *M v M*, *supra* note 95.

<sup>109</sup> See e.g., *Children's Aid Society for the Region of Halton v N (RR)*, 2008 ONCJ 95, [2008] OJ No 870 (CJ).

to undertake a “one-sided assessment” that purports to comment on a parenting plan without having met both parents.<sup>110</sup>

### **CHILD PROTECTION AGENCY STAFF AND RETAINED EXPERTS**

In a child welfare hearing, it is not uncommon for the child protection agency to seek to introduce expert opinion evidence from professionals whom the agency employs or regularly retains. These staff or retained professionals may have been providing services to a child or to the parents before the case goes to a hearing, or may be involved in making plans for the child’s future.

There is no doubt that properly qualified child protection agency staff and professionals retained by the agency can give expert evidence, and there is also some scope for child protection staff to provide “lay opinion” evidence about such matters as parental affection and demeanour. However, there are potentially contentious issues about the extent to which agency staff social workers should be permitted to express opinions about the central issues before the court. For example, in *Catholic Children’s Aid Society of Hamilton Wentworth v. S. (J.)*, Steinberg U.F.C.J. observed:

I note that some of the commentators . . . have written regarding a certain laxity . . . in certain [family] Courts toward admission of expert evidence. . . . That view ought not to apply in [child protection] cases

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<sup>110</sup> See e.g., *Liadis, supra* note 106 at para 34 where in dispute between two parents about parenting arrangements, Zisman J. refused to qualify as an expert and admit as evidence a report prepared by a social worker, Ms. Kendal, retained by the father solely for commenting on his proposed parenting plan and his capacities as a parent.

where the contested issue is whether or not a child should be made a Crown ward and adopted or returned home. . . . This issue is of such importance that laxity or latitude in the admission of expert evidence ought not to be accepted.<sup>111</sup>

A consideration of the issues at stake in a child protection proceeding and of the principles articulated in the Supreme Court expert evidence jurisprudence can help courts to decide whether to admit opinion evidence from agency staff. A major concern reflected in Supreme Court decisions is the apparent lack of independence of some expert witnesses. In *Children's Aid Society of Ottawa v. W.*, Mackinnon J. ruled that a child protection CAS worker who had a key role in the agency's decision-making process to seek permanent wardship was not qualified to give "expert evidence" about the appropriateness of that position. The judge observed that she "also wish[ed] to highlight the caution to be exercised before accepting a staff employee as an expert witness for that party on an issue central to the outcome of the case."<sup>112</sup> While *White Burgess* clearly establishes that being an employee of a party to litigation does not prevent a

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<sup>111</sup> [1986] OJ No 1866, 9 CPC (2d) 265 (Ont UFC).

<sup>112</sup> *Children's Aid Society of Ottawa v W(C)*, [2008] OJ 1151, [2008] WDFL 4013 (SCJ), *per* Mackinnon J. at para 93, [emphasis added] quoting from *Children's Aid Society of Ottawa v JD and DD*, (2 October 2003) Ottawa 94-FL-0615D (SCJ) Toscano-Roccamo J. See also *Children's Aid Society of the Niagara Region v M(D)*, [2002] OJ 1421 (SCJ (Fam Ct)) at paras 19–20. Similar concerns were raised about the use of Crown retained experts in criminal cases in the *Goudge Inquiry Report*. See also David Paciocco, "Taking a 'Goudge' out of Bluster and Blarney: An 'Evidence-Based Approach' to Expert Testimony" (2009) 13 Can Crim L Rev 135; and Gary Edmond & Kent Roach, "A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence" (2011) 61UTLJ 343.

properly qualified child protection agency staff member from providing expert evidence,<sup>113</sup> the comments of Mackinnon J. point to the need for courts to carefully consider the relationship of the proffered expert as one of the factors to weigh in deciding whether to admit the evidence.

If there is a concern about an agency staff member providing expert opinion evidence, there should be a *voir dire* to establish that person's expertise and whether those opinions should be admissible as expert evidence. The fact that a person is on agency staff should be considered by the trial judge in determining both the admissibility and weight of the evidence. Issues of institutional bias or impartiality may also arise with a psychologist in private practice if a significant portion of his or her professional practice is based on referrals from the local child protection agency. Chief Judge Stuart of the Yukon Territorial Court recognized the subtle but potentially "insidious nature" of a parenting capacity assessment prepared by an expert regularly retained by the child protection agency:

The party calling an expert has more than just a subtle influence over the nature of expert testimony. In selecting, directing, and paying for expert testimony, the department gains a significant advantage over the parents. . . . to ensure the integrity of the process and to give meaning to fundamental principles of justice, the use of expert evidence must be fair.

Several options exist to ensure expert evidence does not undermine a parent's ability to effectively participate, and thereby ensure a child's best interests are fairly and properly determined. To avoid

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<sup>113</sup> See e.g., *Chatham-Kent Children's Services v T(MCA)*, 2015 ONCJ 209, [2015] WDFL 2528.

unnecessary costs, one expert can often suffice . . .  
 Input on the selection and focus of the expert can be  
 made in court by all parties. . . .<sup>114</sup>

In the Northwest Territories case of *Re A*,<sup>115</sup> the judge admitted the testimony of a psychologist retained by the Director of Child and Family Services and accepted as an expert by the parents, but gave the testimony very little weight due to concerns about bias and cultural insensitivity. The psychological testing of the parents, which included a standardized IQ test, was normed using the general Canadian population. The judge took judicial notice that the Inuvialuit population—of which both parents were members—was markedly different than the general Canadian population and likely underrepresented in the population used to norm the tests. This caused the judge to have “considerable difficulty with the accuracy of the intelligence measures” as presented by the expert witness.<sup>116</sup> Further, in cross-examination the expert conceded that when faced with two conflicting test results, he chose to rely on the test that showed the greater potential for the children being at higher risk, as this offered the children the most protection. This approach caused the court considerable concern, and the judge observed:

Evidence must be interpreted in an impartial and neutral manner. At the end of the day when determining what orders are to be made, the best interests of the children must be the court's only consideration. However, that cannot require that each piece of evidence must be interpreted in a manner that

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<sup>114</sup> *Re RA*, 2002 YKTC 28, [2002] YJ No. 48 (Terr Ct) at paras 226–234 [*Re RA*].

<sup>115</sup> 2013 NWTTC 9, 2013 CarswellNWT 29 [*Re A*].

<sup>116</sup> *Ibid* at para 33.

favours the children being placed in the Director's care and custody. . . .

I do not necessarily believe that Dr. X was colouring his testimony to support the Director's position. . . . Nevertheless, his stated approach to interpreting the results of the tests he administered is dubious and calls into question his general objectivity.<sup>117</sup>

Concerns about bias and potential unreliability of professionals regularly retained by child protection agencies and often effectively “allied” with the agency were also highlighted in the recent *Lang Review* of expert testimony from the Motherisk Laboratory in Toronto.<sup>118</sup>

### **THE MOTHERISK CASES AND EXPERT EVIDENCE IN CHILD WELFARE CASES**

While expert evidence in child-related cases is most commonly from mental health professionals and based on social sciences, there have also been serious concerns about expert medical or “hard science” evidence in these cases, especially child welfare cases.

In 2008, the Goudge Commission Report documented the effects of misleading expert testimony of forensic paediatric pathologist Dr. Charles Smith of Toronto’s Hospital for Sick Children. Dr. Smith’s now discredited testimony resulted in a number of wrongful criminal convictions, and at least one case where a child was removed from

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<sup>117</sup> *Ibid* at paras 40–44.

<sup>118</sup> *Lang Review*, *supra* note 4. Although the Motherisk Laboratory was part of the Hospital for Sick Children and did some private hair analysis work, for example for family law cases, the vast majority of its hair analysis work was done for Ontario Children’s Aid Societies.

parental care, made a Crown ward, and adopted.<sup>119</sup> Concerns about the reliability of expert evidence in child abuse and neglect cases were again an issue as a result of the 2014 Ontario Court of Appeal decision in *R v. Broomfield*,<sup>120</sup> where a mother's criminal conviction for giving her infant cocaine was based largely on testimony by a toxicology expert from the Motherisk Laboratory at Toronto's Hospital for Sick Children, Dr. Gideon Koren. Dr. Koren and the Laboratory were frequented retained by child protection agencies, and occasionally by the police, to test hair for possible drug or alcohol use. The expert testified based on analysis of the child's hair that the infant had ingested cocaine over a lengthy period. At trial, the Crown's expert had been the only expert to testify. After being convicted and imprisoned, the mother obtained assistance for an appeal from the relatively well-resourced Association in Defence of the Wrongly Convicted.<sup>121</sup> In overturning the conviction, the Court of Appeal noted, "[a] live controversy at trial was whether the victim exhibited any behavioural signs consistent with chronic exposure to significant amounts of cocaine."<sup>122</sup> However, the mother, due to lack of resources, had no expert at the criminal trial, a trial by judge alone, to challenge the opinions expressed by the Crown's expert, and his evidence "remained unshaken" in cross-examination at trial. In reversing the conviction, the Court of Appeal found, as a result of fresh expert evidence adduced by the defence and admitted on appeal, that "the trial judge made her decision unaware of the

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<sup>119</sup> Canada, Commission of the Inquiry into Pediatric Forensic Pathology in Ontario: Report by The Honourable Stephen T Goudge (Ottawa: Ontario Ministry of the Attorney General, 2008).

<sup>120</sup> *R v Broomfield*, 2014 ONCA 725; [2014] OJ No 4903.

<sup>121</sup> See Pamela Stephenson Welch, "Motherisk: Total and Unquestioned Reliance on Science with Dire Consequences" (26 August 2015), online: <<https://www.aidwyc.org/motherisk-blog/>>.

<sup>122</sup> *Supra* note 120 at para 7.

genuine controversy among the experts about the use of the testing methods relied upon by the Crown expert at trial to found a conclusion of chronic cocaine ingestion.”<sup>123</sup>

A number of child protection agencies in Ontario and other provinces used the Motherisk hair analysis test results for investigative and case planning purposes. After the Court of Appeal decision in *Broomfield*, the Attorney General of Ontario appointed the Honourable Susan Lang to undertake a review to assess the adequacy and reliability of hair analysis evidence used in child protection and criminal proceedings.<sup>124</sup> Justice Lang reported in December 2015 that the hair-testing process used was “inadequate and unreliable” and the use of evidence from the lab “had serious implications for the fairness of child protection and criminal cases.”<sup>125</sup> The Hospital for Sick Children closed the Motherisk Laboratory in April 2015.<sup>126</sup>

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<sup>123</sup> *Ibid* at para 12.

<sup>124</sup> *Lang Review*, *supra* note 4. Since the *Review* process began, parents’ counsel have begun to call their own experts to challenge Motherisk experts and courts have given much less weight to Motherisk reports: see e.g., *Nova Scotia (Minister of Community Services) v BM*, 2015 NSSC 145, [2015] WDFL 3236.

<sup>125</sup> *Lang Review*, *supra* note 4. As recommended by the *Lang Review*, on December 22, 2015 the Ontario government established a second review to directly address individual cases. The *Beaman Review*, headed by a retired judge of the Ontario Court of Justice Judith Beaman, has an initial two-year mandate that focuses on providing support for individual parents and children who come forward with claims that they have been affected by flawed Motherisk hair test analysis. The *Beaman Review* has found at least 10 cases where the Motherisk tests likely played an important role throughout the process to remove a child from their family, including the temporary removal orders made by courts along the way. Sandra Contenta, Jim Rankin, & Rachel Mendleson, “Motherisk tests played role in 10

The Court of Appeal decision in *Broomfield* and the *Lang Review* did not directly address the issue of whether the testimony of staff from the Laboratory was insufficiently reliable as “novel science” to even be admitted, or merely insufficiently reliable to be given much weight. However, arguably, if the limitations of this evidence were known by the courts, it should not even have been admissible.

Issues related to use of Motherisk hair analysis serve as important reminders of the challenges inherent in the admission of and reliance on expert evidence. This paper does not directly consider the many complex issues that arise from the Motherisk cases and the *Lang Review*, except to argue that concerns related to expert evidence in child protection cases raise issues under the *Charter of Rights*.<sup>127</sup> The Canadian courts have accepted that there are cases where s.7 of the *Charter* and the “principles of fundamental justice” require a court to order that the state provide counsel for parents in child protection cases without resources, so there may be a fair trial process.<sup>128</sup> It is also clear that there are

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families where children taken, first phase of review finds,” *Toronto Star* (28 October 2016), online: <www.thestar.com>.

<sup>126</sup> Rachel Mendleson, “Sick Kids shuts down hair tests at Motherisk lab”, *The Star* (17 April 2015), online: <www.thestar.com>.

<sup>127</sup> For a fuller discussion of the basis for a *Charter* order for government funding of an expert, see Nicholas Bala & Jane Thomson, “*Motherisk* and *Charter* Orders for Experts for Parents in Child Welfare Cases” (2016) 35:2 *Can Fam LQ* 199.

<sup>128</sup> *New Brunswick v G (J)*, [1999] 3 SCR 46, [1999] SCJ No 47; and *R v Rowbotham*, 1988 CarswellOnt 58, [1988] O.J. No. 271. In a criminal case, it is common for the court to order a stay unless the accused has counsel, while in child protection cases this is not an appropriate remedy and courts will directly order representation for indigent parents.

cases, like *Broomfield*, where state-funded experts called by the Crown or a child protection agency are providing critical, and sometimes novel, scientific evidence. These are cases where, without appropriate challenging of a state-retained expert by an expert retained by the parents, the process may not accord with the principles of fundamental justice and may result in a miscarriage of justice. We argue that, in appropriate cases, the court may make an order for funding an expert for indigent parents under the *Charter of Rights* s. 7. This argument is especially strong in cases that involve medical or hard science evidence, which counsel and judges typically have greater difficulty in understanding and challenging compared to social science based testimony.

While there is no Canadian jurisprudence that directly deals with this issue, American case law establishes that, in appropriate cases involving termination of parental rights, the constitutional right to due process and a fair trial requires that the court order the state to pay to allow parents to retain an expert to consult with counsel and prepare a report to challenge an expert retained by a child protection agency.<sup>129</sup> These arguments should also be persuasive in Canada, where vital liberty and security of the person interests of parents and children are at stake in child protection proceedings, and the principles of fundamental justice may require that parents have access to their own experts to challenge expert evidence proffered by the government.

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<sup>129</sup> See *In Re Egbert Children*, 651 NE (2d) 38 (Ohio Ct App, 1994). In *Ake v Oklahoma*, 470 US 68 (1985) where the Supreme Court of the United States held that an indigent criminal defendant had the constitutional right to have the state provide a psychiatric evaluation to be used in this defense. See also Paul Giannelli, “*Ake v Oklahoma*: The Right to Expert Assistance in a Post-Daubert, Post-DNA World” (2004) 89 Cornell L Rev 1305.

## **CONCLUSION: ADDRESSING CHALLENGES IN USE OF EXPERT EVIDENCE**

It is essential for lawyers, judges, and other professionals involved in the justice system to understand the role of expert evidence in child-related cases. Experts, in particular mental health professionals, have a critical role in assisting courts, lawyers, and parents in making decisions about children and their parents. Experts in child-related cases, however, must have appropriate education and be familiar with evolving research. Their reports should always identify their role (court-appointed or party-retained), the procedures that they have adopted, and the limitations of their work. While mental health professionals may have important evidence for a child-related case, it is also vital for lawyers, judges, and mental health professionals to be aware of the limitations and challenges accompanying the use of such evidence.

Court-ordered assessments undertaken by qualified, independent professionals using accepted methodologies and standards can assist courts in making the most appropriate decisions about children, and these assessments can also play a significant role in facilitating settlements,<sup>130</sup> an especially important concern in child-related cases.

There are legislative provisions or rules of court in each province that permit assessments to be ordered by a court in child-

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<sup>130</sup> See e.g., Nicholas Bala & Alan Leschied, “Court-Ordered Assessments In Ontario Child Welfare Cases: Review And Recommendations For Reform” (2008), 24 Can J Fam L 1, which presents data on a study of Ontario lawyers and judges who reported that an independent court-ordered assessment in a child protection case often results in a settlement of a case. See also comments of Mackinnon J in *Hayes v Goodfellow*, 2011 ONSC 3362, [2011] WDFL 4395 at para 6: “Experience also shows that the prospect of settlement is significantly enhanced by the availability of an assessment report. With it, the entire trial may have proven unnecessary.”

related cases, and there is guidance in the standards of some professional organizations about how assessments are to be undertaken. However, there is an absence in Canada of government regulation and accreditation of those who undertake this most important work. Although many who undertake assessments are well trained, appropriately educated, and skilled, some are not. Some who prepare these reports are members of regulated professions and subject to some type of government-mandated regulation, while others who do these assessments are not members of regulated professions;<sup>131</sup> further, even for those who are members of regulated professions, the regulation is not focused on this type of forensic work.

Although the scope of their evidence and opinions should not be as broad as the testimony of court-appointed experts, professionals retained and called as a witness by one party can also have an important role in the resolution of child-related disputes. One of the contentious issues raised by the Ontario Court of Appeal decision *M. v. F.*<sup>132</sup> is the involvement a party-retained expert in a child-related case providing a review of the report of a court-appointed assessor. While there are professional standards for assessments by mental health professionals in child-related cases, there is a lack of clear professional standards about how to undertake and testify about a forensic review.<sup>133</sup> A growing body of literature provides helpful

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<sup>131</sup> British Columbia, 2010; Saskatchewan, 2001; Alberta, 2002; Newfoundland & Labrador, 2007; and Ontario, 2009, 2014, *supra* note 60.

<sup>132</sup> *Supra* note 5.

<sup>133</sup> In Ontario, the College of Psychologists (2014) Task Force released an informational set of guidelines for those members who perform child custody and parenting capacity assessments. The document specifically refers to a mental health professional who provides consultation for court purposes and critiquing an assessor's work, though it does not provide

guidance for mental health professionals retained by one party's lawyer in a child-related case,<sup>134</sup> but professional organizations should address in a more systematic way the ethical and other issues that arise when undertaking a review for forensic purposes. It is important for professionals to be reminded about and accountable for maintaining objectivity and independence, especially when retained for a forensic review of a colleague's work. There are also practical issues that need to be addressed about the admission of such critique evidence: for example, when and how the reviewer should be given access to notes and data used by the original assessor to allow for a complete review; and when the reviewer should be allowed (or required) to discuss the case with the original assessor.

A lawyer in a child-related case may also retain a mental health professional to provide assistance in preparing a client for an assessment or to assist the lawyer in understanding an assessment report and cross-examining the assessor. As with other roles concerning child-related assessments, in Canada at present there is a lack of professional guidance about this "litigation consultant" role for mental health professionals;<sup>135</sup> can, for example, a professional

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much detail on this topic. See the College of Psychologists of Ontario, "E-news Bulletin", (2015) 6:2, online: <<http://www.cpo.on.ca/Resources>>.

<sup>134</sup> Jonathan Gould et al, "Testifying Experts and Non-testifying Trial Consultants: Appreciating the Differences" (2011) 8:1-2 J. Child Custody 32; and Mark Juhas, "Commentary on Forensic Mental Health Consulting: Is More Better?" (2011) 8:1-2 J Child Custody 124; Kirkpatrick, Austin & Flens, *supra* note 84.

<sup>135</sup> See e.g., Association of Family and Conciliation Courts Child Custody Consultant Task Force, *Mental Health Consultants and Child Custody Evaluations: A Discussion Paper* (2011) 49 Fam Ct Rev 723; Austin et al, *supra* note 84; and Kirkpatrick, Austin & Flens, *supra* note 84.

who has been a litigation consultant maintain sufficient objectivity to also be an expert witness?

As with many other issues related to the family justice system, some of the most pressing challenges concerning experts relate to a lack of resources and inadequate access to the services of qualified mental health professionals for this type of work. Lack of training, education, and support has resulted in too few professionals who can do this type of work, and often significant delays in getting access to those who do it; the delay in obtaining an assessment may cause delay in the resolution of cases about children, who experience added stress as their cases are prolonged. While some parents, like those in *M. v. F.*, can afford to retain these professionals, many cannot. In some jurisdictions there is some access to government funded or subsidized services, but in many places in Canada there are lengthy delays in obtaining these services, and in too many places they are unavailable. As discussed in this paper, there may be situations in child welfare cases where claims can be made under the *Charter* to require the provision of expert assistance to parents, but in most situations, these critical resource questions are matters of political will and wisdom. It is hoped that those responsible for the justice system will recognize the importance of mental health professionals for making sound decisions about children, and devote sufficient resources to allow this to occur.