SUPPLEMENTARY SUBMISSIONS OF THE

FAMILY LAWYERS ASSOCIATION

on the MOTHERISK HAIR ANALYSIS INDEPENDENT REVIEW

INTRODUCTION

On March 30, 2015, the Family Lawyers Association ("FLA") provided submissions to the Motherisk Hair Analysis Independent Review on hair strand testing for drugs from 2005 to 2010. The FLA had expressed concerns not only with respect to hair strand testing for drugs, but also with respect to testing for alcohol. (See page 14 of the FLA submissions.) The FLA also expressed concerns about limiting the scope of review to the years 2005 from 2010. In the context of child protection proceedings, particularly given the limited remedies available for cases where a child may have been removed several years ago, the more immediate concern was current testing. (See pages 18-19 of the FLA submissions.)

The FLA was pleased to see that the mandate was subsequently expanded to include hair strand testing for alcohol and for the period from 2005 to 2015. In these supplementary submissions, the FLA stands behind its original comments in its March 30, 2015 submissions as valid commentary for the expanded scope. In these submissions, the FLA focus is on what needs to be done to address any past errors and avoid any future errors.

It is the position of the FLA that the Motherisk testing concerns have a profound effect on public and professional confidence in the child protection process. This is case even if the science is found not to be flawed as it is clear that many questions remain about the transparency and methodologies used by Motherisk and other drug testing laboratories. New approaches are needed to restore the public and the profession's confidence in drug and alcohol testing in general.

METHODOLOGY

The FLA followed the same methodology as in its March 30, 2015 submissions. The FLA relied on three sources of information: (1) an on-line survey; (2) in person or telephone interviews with experienced child protection lawyers; (3) the professional experiences of the writers, Katharina Janczaruk and Tammy Law. Both lawyers have significant experience in the area of child welfare. In preparing the March 30, 2015 submissions, the FLA had gathered a significant amount of information upon which it relies on for these submissions as well.

SURVEY RESULTS

Over the 12 day period from August 27, 2015 to September 8, 2015, the FLA asked its membership to complete another survey. The survey is essentially in two parts. The first part identifies the frequency and significance of hair strand testing for alcohol in child protection cases. The second part speaks to solutions or remedies.

Thirty-three lawyers responded to the survey. Several lawyers verbally indicated that they did not feel they did enough work in this area to complete the full questionnaire, but were able to offer views on some of the questions. Those lawyers' comments, in addition to the information obtained on separate interviews, help form the FLA views and opinions which are the basis of these submissions.

In the survey, FLA lawyers were asked what percentage of their cases involved alcohol hair strand testing. About 21 per cent answered that they have seen testing in half or more of their cases. This number is slightly less than the amount of testing done for drug hair strand testing from the March 2015 survey.

FLA lawyers were asked what percentage of their cases involved alcohol hair strand testing from Motherisk. FLA lawyers responded that over half of the tests were done by Motherisk. Again the result is consistent with the answers to the March 2015 survey.

FLA lawyers were asked in what percentage of their cases was the Motherisk test results a significant factor. Again, as with the March survey, the results were significant with about 42 per cent of the lawyers stating that it was significant in half of their cases.

Overall, both hair and alcohol hair testing have been consistently used in child protection proceedings and is perceived as being influential to the outcome of a case.

The second part of the FLA survey was meant to capture opinions on what remedies could potentially flow should problems be identified with Motherisk's hair testing procedure or analysis.

Overwhelmingly, FLA lawyers were of the view that closing Motherisk's testing facilities was not an adequate response to the recent controversy about drug and alcohol testing.

The FLA membership was asked to consider further a range of options as remedies if testing by Motherisk was found to be flawed. About 36 per cent felt that a full judicial inquiry was warranted. The majority focused on case specific responses. Just under half of the respondents supported an immediate status review before the court. Roughly two thirds supported a case specific response after an analysis by an independent body. There was strong support for placing a notation in the child protection agency's file with about 63 per cent supporting that option. Further, about 60 per cent felt that LAO should issue certificates to an aggrieved parent for a lawyer to provide an opinion and recommendation as to further steps. A more detailed commentary of the options follows.

LAWYER INTERVIEWS

Based on the questions posed to the FLA by the Expanded Review, the FLA interviewed several of its members on possible remedies should the Review determine that the testing was not sound. The lawyers who were interviewed were selected by the writers for their experience and expertise in the area of child protection.

Remedies – Looking Back

These experienced lawyers struggled with the competing interest of the parent or caregiver to fairness and the best interests of a child. All were clear that they are not necessarily the same and that the child's best interests overrides all. (Section 1 of the *Child and Family Services Act*, the governing legislation in child protection, sets out that the paramount purpose of the Act is to promote the best interests protection and well-being of children.)

Most lawyers were of the view that any remedy would need to be on a case-by-case basis and that the particular remedy would flow from the very specific facts of the case including not only an examination of the merits and stages of the underlying protection proceeding but also a consideration of the child's best interests and needs.

Most lawyers commented on the complexity of unravelling the wrong that a false test result may have on the outcome of a case given the existence of collateral or other evidence which may have been present. Most lawyers agreed that it was rare to have a case where the only evidence would be the test result. Concern was expressed more for those marginal cases where there may have been evidence from the child protection agency and from the parent of more or less equal persuasiveness and that the test result may have been the piece that tipped the evidentiary scales in favour of the child protection agency. Concern also was expressed about the difficulty of determining to what extent a test result may have contributed to a confirmatory bias on the part of a child protection agency.

Most lawyers agreed that the type of remedy would depend on the stage of the proceedings with the passage of time being almost a complete barrier to any remedy. The child's relationship with his or her family would have to be balanced with other considerations concerning the child's welfare. Simply put, if a child has been made a Crown ward and is settled in his or her placement, or even adopted, it may not be in the child's best interests to be removed from that setting. The solutions then turn to what may be done to recompense the parent to deal with the loss of his or her child. Many felt that the parent should in that instance be able to obtain some sort of monetary compensation, recognizing that notwithstanding it is not likely to be in the child's best interests to be returned home, the injustice and loss to the parent is significant and real. Some or all of the monetary compensation may be needed, for instance, to pay for counselling or other support services.

Least complex are those cases that are still before the court in on-going child protection proceedings. There the court is still seized of the opportunity to address any concerns raised by the testing and its impact on the particular proceeding. If an order of supervision or society wardship has been made and the matter is not in court until its scheduled status review, a party may ask to have the matter brought back to court for an early review to have the court consider the remedy. These matters are still difficult in that there may be other evidence that support an order of supervision or society wardship; however, at a minimum there is access to the court to determine the issue. Such cases are less complex, however, as they do not lead to the same concerns as identified above with a child having been out of a parent's care for a long period of time with little or no contact with the parent.

More complex are those cases where a final determination has been made by making the child a Crown ward. The remedy to a parent would be to bring a status review before the court seeking to terminate the order of Crown wardship. In certain instances, for example if the child has been in the same placement for two years prior, the parent will need leave of the court to bring the status review. Most lawyers felt that the party should still be required to seek leave as opposed to it being granted as a matter of right; however, most were of the view that the unsoundness of the test would be a significant factor in the court's positive determination to grant leave. The lawyers interviewed stressed though that the parent would still face the challenge of adducing evidence of the parent's current ability to care for his or her children – the false test result is not enough to change the order, nor should it be taking into consideration the best interests of a child.

Different considerations govern depending on the age of the child and whether the order for Crown wardship provides for access. The example was given of the older child who has had on-going contact with a parent. There the child has an established relationship with the parent and, if the child has expressed a desire to be reunited with his or her parent, it may be perceived as an injustice to both the parent and the child to keep them apart on the basis of the test result.

Most lawyers were satisfied that the court was capable of addressing any potential wrongs through the court processes outlined above. Some suggested that any potential wrongs might be either identified or addressed through an administrative tribunal. All agree that the process of review must be independent and impartial and the review itself tailored to the individual case in question. In terms of identifying the case, most acknowledge that it would be difficult if not problematic for child protection agencies to identify those persons and felt any aggrieved individual would have to self-identify and seek assistance. Those individuals would require the expertise of a lawyer in child welfare law and most would likely need legal aid. Many were clear that Legal Aid Ontario had an obligation to issue a certificate for a lawyer to give an opinion as to the merits of proceeding further.

Finally, many felt that child protection files should be amended at least to show some question with respect to the test. Child protection files are significant in that there are instances in which the contents may be disclosed such as in subsequent child protection proceedings where there is a statutory recognition of the relevance of past parenting or in custody and access cases.

Remedies – Moving Forward

Despite the questions raised about alcohol and drug testing, there is a general consensus among the membership that some form of testing is helpful in child protection proceedings. It is therefore, extremely important that the scientific community gets the result "right" and that the legal community has the knowledge, opportunity, and skill to question those opinions.

The FLA believes that it would be helpful to establish protocols for the use of hair testing for child protection purposes. These protocols should be adopted by all agencies and courts in Ontario and should be consistent with the legal rules for the use of scientific evidence in court.

The following are some elements the FLA suggests should be included in the protocol:

a. The methodology used should be consistent with recognized international standards by accredited laboratories;
b. The laboratory involved in the testing should be willing and able to provide a comprehensive explanation of the testing results, including possibilities for error and factors that would lead to inaccuracies in the testing;
c. Less intrusive means of monitoring and testing should be used before a hair test is requested. Such testing could include urine testing. Courts should not be ordering hair testing as a default test.
d. The Society requesting the testing should clearly outline the evidentiary basis for the testing and the necessity for the testing. The Society should not be allowed to "fish" for information about caregivers or children.
e. There should be a defined process to dispute the testing results. This could include using another laboratory for secondary testing. Legal Aid Ontario should fund these tests when requested.
f. The expert conducting the testing should be made available for cross-examination. The test results should not be included as an exhibit to a worker's affidavit at trial or in a document brief.

CONCLUSION

There is a general recognition of the potential usefulness of hair strand testing; however, there is a deep concern about reliability. What is more than readily apparent is that the legal remedies are complex and, given the overriding best interest of a child, any potential wrong to a parent may not be righted from the perspective of the parent. If is critical, therefore, if any testing is done, it is done right and where there are questions about its accuracy there is the means and ability to challenge the result. There should be little, if any, room for error.