TAB 2

Special Evidentiary Issues in Child Protection Matters

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Best Practices For The Conduct Of A Child Protection File - Part II

Strategies to Move your Case Forward to Settlement, ADR or Trial

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SPECIAL EVIDENTIARY ISSUES IN CHILD PROTECTION MATTERS

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For this program, I have attempted to summarise and assemble a collection of materials on evidence law in family and child protection matters. The result may look like a Frankenstein paper, but it'll be shorter and probably more useful. Besides, due to copyright issues, I was unable to include in the materials my two recent and comprehensive articles on evidence issues. Should you wish to find more detailed explanation of these issues, with a larger selection of citations, please see these two published articles in the September 2003 issue of the Canadian Family Law Quarterly:

"Are There *Any* Rules of Evidence in Family Law?" (2003), 21 Can.F.L.Q. 245-318

"The Cheshire Cat, or Just his Smile? Evidence Law in Child Protection" (2003), 21 Can.F.L.Q. 319-378.

What follows is a brief summary of the law of evidence, as it applies in family law in general and in child protection matters in particular. These summaries convey the guts of my two papers above. After that can be found three "outlines"that I prepared for previous programs in Ontario, addressing three common areas of difficulty in child protection cases: affidavits, business records and section 50 CFSA. Last in these materials is section 50 itself, as it once read and as it now reads.

The Purposes of Evidence Law in Family Law Matters

Canadian evidence law is mostly judge-made. Not for us the statutory codes like the American Federal Rules of Evidence or the massive statutory reforms of England. Starting in the early 1980's, the Supreme Court of Canada has been reforming the law of evidence, on a case-by-case basis. Judicial law reform began with a string of Charter-based challenges to common-law evidence rules in criminal law. Soon after came the reconstruction of the hearsay and opinion rules, as well as a flurry of privilege decisions. The "rules of evidence" have given way to "principled flexibility", which requires judges to balance multiple factors to determine the admissibility and use of evidence.

Some would say that trial judges have always exercised considerable discretion in the application of the old "rules of evidence". What is different now is that modern evidence law itself permits -- and even requires -- the open consideration of the purposes of evidence law, in reaching decisions on admissibility and use of evidence. In turn, this takes us back to the fundamental purposes of evidence law.

In my paper, "Are There *Any* Rules of Evidence in Family Law?", I have attempted to distil *the basic purposes of evidence law,* purposes which run right across all the subject areas of the law, whether criminal, civil, family or administrative. Five purposes can be identified:

(1) accuracy in factfinding: the need to admit all relevant evidence;
(2) the need for expedition, efficiency and finality in litigation;
(3) the protection of the process from confusing, misleading or unduly prejudicial evidence;
(4) the preservation of the fairness and legitimacy of the process;
(5) the protection of social values extrinsic to the factfinding process.

The cardinal principle of evidence law is "rectitude of decision" or "accuracy in factfinding": to find out "the truth", "what actually happened". To that end, we admit all relevant evidence. The first purpose thus predominates in evidence law, with the next four operating as limits on the first, to serve other, subordinate interests in the justice system.

The second purpose recognizes that law suits, unlike scientific inquiries and royal commissions, must come to an end, with one eye to the consumption of time and the cost of litigation. The third purpose derives from the jury trial origins of evidence law, but concerns about misleading evidence (opinion, for example) and undue prejudice (discreditable behaviour, myths, stereotypes, character) range beyond jury concerns. Our conventional notions of "natural justice" in an adversary system underpin the fourth purpose. The fifth purpose tends to focus upon the law of various privileges, intended to protect important social values other than "truth-finding".

To these generic purposes can be added two additional purposes which are specific to the *criminal law*: (a) the avoidance of wrongful convictions; and (b) the protection of suspects from illegal, unfair or improper treatment.

Are there distinctive purposes, specific to family law, that can be identified? In my article, I tentatively suggest three additional *"family law" purposes*:

(a) to assure the best interests of a child;
(b) to reduce familial conflict;
(c) to maintain, restructure and encourage family relationships.

"Best interests" is an obvious addition, for any case involving children. Most often, it seems to be assumed that the best interests purpose supports expanding the admissibility of evidence, even to the point of "letting it all in". I don't make any such assumption, but there is no question that "best interests" can justify different rules from those found in criminal or civil cases.

The second "conflict reduction" purpose is more important in family cases than other disputes, given the effects upon children and the modern move to reduce the adversarial content of family law. The third purpose is more tentative, an attempt to recognize another modern purpose, one that is more positive, therapeutic and systemic in nature. As I point out in the paper, "we can maintain existing relationships that do work, we can assist the parties to restructure those that don't, and we can encourage the creation of new relationships."

Family law cases can be subdivided into three broad categories: (i) financial matters (property and support); (ii) custody and access; and (iii) child protection. Each of of these categories raise different evidence issues.

Four Models of Evidence and Procedure in Child Protection Cases

The most difficult evidence issues in family law are always found in child protection cases. Protection statutes often make further changes to evidence rules, sometimes even applicable only in certain hearings within protection proceedings. The Charter has started to influence "due process" in protection cases, after broadly-phrased section 7 rulings in *New Brunswick (Minister of Health & Community Services) v. G.(J.)* (1999), 50 R.F.L. (4th) 63 (S.C.C.) and *Winnipeg Child & Family Services (Central Area) v. W.(K.L.)* (2000), 10 R.F.L. (5th) 122 (S.C.C.). In the end, however, there is not much specific guidance on evidence law for trial judges, in the protection statutes or the appellate decisions. Not surprisingly, protection judges have differed in their approaches to evidence law. I have identified four broad approaches, or "models of evidence and procedure", in my article, "The Cheshire Cat, or Just His Smile? Evidence Law in Child Protection". Here I summarise them, to the point of caricature.

(a) Full Cat: The Full-Scale Adversarial Model

The most formal "rules of evidence" in our justice system are found in the criminal trial. The full-dress criminal model remains a powerful image in protection cases, given some familiar ingredients -- the direct involvement of the state, moving against vulnerable parents, often seeking the termination of parent-child relationships. In this adversarial model, trials are more formal, oral testimony predominates, and trial judges regularly exclude evidence. This "criminal" model fits most comfortably at the apprehension, interim custody and finding stages of the protection process.

(b) Half Cat: The Ordinary Civil Litigation Model

Protection courts often emphasize that protection proceedings are "civil" in nature. Increasingly, especially with family court unification at the superior court level and with jammed dockets, protection hearings are assimilated to civil litigation practices. "Hearings" rely more upon affidavits, documents, records and other paper, as in motions or chambers hearings. Party control of pre-trial and trial procedures is the norm, with the judge adopting the role of civil dispute resolver. The ordinary "civil" rules of evidence are applied. In particular, this model influences interim hearings and disposition review hearings.

(c) Head Only: The Summary Administrative Model

Early family courts adopted summary procedures from their summary conviction criminal experience, adding the "therapeutic" bent of family court. Some of that informal past remains powerful in protection proceedings, emphasising a more "administrative" approach. Hearings are informal and oral in this model, more like case conferences than hearings (and sometimes the "real" hearings are the conferences). The judge plays the role of coercive counsellor, even activist, mixing legal and therapeutic methods, to encourage and warn the parties. Quick and efficient results are emphasized. Evidence "rules" are downplayed or ignored, to "get to the merits". The dispositional aspects of child protection are the focus of this older "child welfare" approach. With the modern use of case management and ADR techniques, this older "family court" approach may be making a comeback.

(d) Just a Smile: The Inquiry Model

Many judges talk of this "inquiry" model of child protection procedure, usually to admit evidence that would be otherwise inadmissible, starting with the child abuse hearsay cases of the 'eighties. No *lis*, no need for adversary protections, not much need for any "rules of evidence", in this ideal setting. Some sort of inquisitorial or Continental model of procedure probably lurks behind

this "smile" of the Cheshire Cat. Evidence rules would virtually disappear. Nowhere in Canada has this model ever been actually applied, as it would require the judge to investigate and direct the conduct of the case. The parties would be reduced to lesser roles, in some non-adversarial, rational "inquiry" into the child's best interests. Sort of like a royal commission, only short and efficient.

Each of these "models" or approaches has influenced specific evidence decisions in protection cases, whether consciously or unconsciously, as lawyers and judges grasp for models to provide practical guidance.

Relevance, Witness Examination and Privileges

There are some evidence rules that apply across the board and remain pretty much constant across contexts, even for arbitrators and administrative boards. Included amongst these would be the rules that govern the basics of adducing evidence and deciding cases: relevance, standards and burdens of proof, basic types and methods of proof, competence and compellability of witnesses, direct and cross-examination of witnesses, permissible methods for impeaching and supporting credibility, and the various privileges.

In family matters too, these generic rules apply. Any one of the three leading Canadian texts on evidence law can provide assistance here:

> Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999)
>
> Paciocco and Stuesser, *The Law of Evidence*, 3rd ed. (Toronto: Irwin Law, 2002)
>
> Delisle and Stuart, *Evidence: Principles and Problems*, 6th ed. (Toronto: Carswell, 2001)

Relevance can pose particular problems in child protection, at each one of the three levels that relevance is analyzed:

> (a) *Logical Relevance.* When does evidence of one "fact" have any tendency to make another "fact" more or less probable, based upon logic, common sense and experience? Many propositions and inferences about human behaviour are highly contestable. To make matters worse, much of family law is "prospective" in nature, requiring the prediction of future behaviour and events.
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> (b) *Materiality.* To be relevant, evidence must be offered to prove a "material fact", a fact in issue, that is of legal consequence to the determination of the dispute. In some areas of family law, notably child custody and spousal support, there is very little law to tell us what facts are "material".
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> (c) *Pragmatic Relevance.* Irrelevant evidence is excluded under steps (a) and (b). A trial judge also has a discretion to exclude evidence that has some logical relevance, some probative value, based upon a cost-benefit sort of analysis that balances the second and third purposes -- the need for expedition, efficiency and finality in litigation, and the protection of the process from confusing, misleading or unduly prejudicial evidence. The need for practical limits on logical relevance feeds this balancing act, which takes place as part of trial management. This is often shortened to "probative value vs. prejudicial effect" in the criminal setting, but it is a general power that inheres in any decision-making process. In family law matters, the cost of litigation is a major concern, as is delay, in both financial and custody matters.

In family matters generally, and in protection matters particularly, there are recurring problems of *witness examination* and *credibility* that can cause problems, notably:

- improper leading questions
- refreshing memory: present memory revived vs. past recollection recorded
- impeaching a party's own witness
- the effect of failure to cross-examine and the rule in *Browne v. Dunn*
- impermissible methods of cross-examination questioning
- improper imputations of misconduct and cross-examination for bad character
- use of prior inconsistent statements in cross
- rehabilitation by prior consistent statements
- the rule against rebuttal on collateral matters raised on cross

The range of *privilege* issues that arise in family law are narrower than those found in criminal cases, but similar to those that recur in civil litigation, most commonly:

- solicitor-client privilege
- litigation privilege
- privilege for settlement discussions
- privilege for professional and confidential relationships

Some of this privilege law may be applied differently in family matters, to recognize the interests of children or to reduce conflict by encouraging settlement even more strongly than in ordinary civil matters.

Opinion

The opinion rule is an exclusionary rule. Witnesses must testify to facts of which they have personal knowledge, not "mere opinions". There are two exceptions: lay opinion and expert opinion.

The *lay opinion* exception was relaxed in *R. v. Graat*, [1982] 2 S.C.R. 819, to permit witnesses to testify naturally about their personal observations, where "the facts perceived by the witness and the inferences from those facts are so closely associated that the opinion amounts to little more than a compendious statement of facts". There is much lay opinion offered in child protection matters, e.g. what an access supervisor observed in the interaction between parent and child, or what a relative thinks of a person's parenting skills. The purpose of this exception is to elicit "fact", not opinion, and thus a witness expressing a lay opinion must speak from personal knowledge. And, equally, a professional witness can always give such factual evidence, based on observations of which he or she has personal knowledge: *Mazara v. Clifton*, [22002] O.J. No. 4778, 33 R.F.L. (5th) 354 (Ont.S.C.J.).

By contrast, the *expert opinion* exception is clearly intended to obtain the expert's opinion, which in turn can be based upon information acquired second-hand -- from records, other expert reports, texts and articles, interviewing people (who may or may not testify as "witnesses"). The expert is required to refer to these sources, in order to state the basis for his or her opinion, but that does not make the underlying "basis facts" in the expert's report admissible evidence. To the extent that an expert relies upon inadmissible second-hand information, his or her opinion may receive less weight, according to the Supreme Court of Canada in *R. v. Abbey*, [1982] 2 S.C.R. 24 and *R. v. Lavallee*, [1990] 1 S.C.R. 852. These underlying hearsay issues often arise when assessors and other experts testify in protection cases.

Until 1994, there were two relatively simple requirements for expert opinion:

(a) a properly-qualified expert, qualifications which can be acquired through education, training or experience;

(b) the opinion had to be "helpful" to the factfinder.

In *R. v. Mohan*, [1994] 2 S.C.R. 9, Justice Sopinka held the latter test of "helpfulness" set "too low a standard" for admissibility, substituting a new, more demanding approach to expert evidence.

Mohan articulated a deceptively simple looking four-step test, to be applied on the voir dire:

(a) relevance;
(b) necessity in assisting the trier of fact;
(c) the absence of any exclusionary rule;
(d) a properly qualified expert.

These criteria were applied, to reject expert psychiatric evidence offered by the defence, evidence which attempted to define personality profiles for sexual offenders.

Most subsequent courts have interpreted steps (a) and (b) based upon their headlines: step (a) looks at "relevance", i.e. the reliability and probative value of the expert evidence, while step (b) considers the potential costs and distorting effects of the evidence.

Both of the first two branches have been elaborated in more recent Supreme Court decisions. "Relevance/reliability" was analyzed in *R. v. J.-L.J.*, [2000] 2 S.C.R. 600 (penile plethysmograph for diagnosis as sexual deviant). "Necessity" has been further narrowed in *R. v. D.D.*, [2002] 2 S.C.R. 275 (delayed disclosure of sexual abuse) and *R. v. Parrott*, [2001] 1 S.C.R. 178 (ability of mentally challenged complainant to testify). Note that all the leading cases are criminal and involve the social or behavioural sciences. For more on these issues, see also *R. v. K.(A.)* (1999), 176 D.L.R. (4th) 665 (Ont.C.A.) at 696-716 per Charron J.A. (expert evidence concerning behaviours of sexually abused children).

Mohan applies in civil cases: *Drumonde v. Moniz*, [1997] O.J. No. 4812 (Ont.C.A.). In civil matters, courts tend to exclude on grounds of "necessity", rather than "relevance/reliability". That was true for two leading custody cases applying *Mohan*: *Mazara v. Clifton*, above (no specific basis stated for expert's opinion); and *Mayfield v. Mayfield*, [2001] O.J. No. 2212 (S.C.J.)(assessment critique report). Each of these cases demonstrate how broad policy and systemic concerns can be incorporated into the "necessity" branch, to be weighed against relevance and probative value. Family courts have not always maintained *Mohan*'s standards of reliability, as when phallometric test results were once admitted in a protection case: *C.A.S. of Peel (Region) v. R.(J.)*, [2002] O.J. No. 3501 (Ont.C.J.).

In the end, however, *Mohan*'s scepticism about experts has made few inroads so far into the family courts. Most still seem to apply the pre-*Mohan* "helpfulness" approach. Can this different approach be justified by the distinctive demands of child protection cases?

Hearsay

Perhaps the archetypical evidence exclusionary "rule", the hearsay rule has been utterly transformed in the past decade. When lawyers and judges wanted to ridicule the technicality of

evidence law, their prime candidate was always the hearsay "rule", with its crazyquilt of exceptions. Today, what we have is a "principled" approach to hearsay. The basic premise remains that hearsay is inadmissible. But the principles of necessity and reliability have been used to reshape and rationalize admissibility under the exceptions. The traditional, categorical exceptions have sometimes been enlarged, sometimes narrowed. New exceptions have been added. Even if no categorical exception is available, an individual hearsay statement may be admitted if necessary and reliable.

Despite the long list of traditional exceptions, only a small number of categorical exceptions were engaged in most civil cases, in order of frequency: admissions, business records, declarations about physical, mental or emotional state, former testimony. The next section will deal exclusively with business records. Each of these exceptions has well-defined criteria for admissibility.

As we all know, the hearsay revolution began with child sexual abuse hearsay, first in child protection cases, then in the criminal context in the landmark case of *R. v. Khan*, [1990] 2 S.C.R. 531. Following *Khan*, mostly because of the frequency and difficulty of these cases, a considerable body of case law, both criminal and family, developed around child abuse hearsay. The "*Khan* exception", as it is sometimes called, resembles the older categorical exceptions. Proof of "necessity" for the most part has not been difficult. In the family law setting, there has been an ongoing debate whether any "necessity" is required or whether some lower standard, like "best interests", should be used. The assessment of "threshold reliability" may have become more systematic over time, but no easier. A complicating factor here has been the shifting ground of expert thinking on sexual abuse, which takes us back to some of those *Mohan* issues.

The principled approach allows us to admit individual out-of-court statements, to prove the truth of their contents, even if they do not fit within any established categorical exception. The decision in *R. v. Smith*, [1992] 2 S.C.R. 915 operates like a residual or catch-all exception, based on an individualized determination of necessity and reliability. Necessity is created most often by the unavailability of the out-of-court declarant, by reason of death, insanity, grave illness, absence from the jurisdiction, etc. Where a witness is "available", necessity will be scrutinized more closely: *R. v. Parrott*, [2001] 1 S.C.R. 178. "Reliability" means threshold reliability, as distinct from ultimate reliability, and requires the court to look at the circumstances surrounding the making of the statement.

The Supreme Court's most recent decision, in *R. v. Starr*, [2000] 2 S.C.R. 144, restated the principled approach, with a twist. Not only can the principled approach be used to expand the admissibility of hearsay, it may also be used -- again, on a statement-by-statement basis and only "in some rare cases" -- to exclude hearsay that might otherwise be admitted under a traditional categorical exception. For a textbook application of *Starr* in a family law setting, see the decision of Campbell J. in *Hartland v. Rahaman* (2000), 22 R.F.L. (5th) 310 (Ont.S.C.J.).

The principled approach now permits judges openly to admit hearsay, even when the statement does not fit within an "exception", provided necessity and reliability support the admission of a particular statement. Equally, it permits judges to exclude hearsay of dubious reliability, even if it would be admitted under an established exception. Between *Smith* and *Starr* family court judges can refashion the hearsay rule to suit the demands of child protection cases.

Business Records

Business records deserve special consideration, because of the frequency of their use in protection cases and because these records are replete with entries that raise opinion and hearsay

issues. In all provinces except Alberta and Newfoundland, there is a statutory "business records" exception found in the provincial *Evidence Act*, used most often. The common law exception for "declarations in the course of duty" continues to survive, although slightly narrower in scope than the statutory exception. It is used mostly in the two provinces without a statutory provision, and sometimes as a fallback in those provinces where the statute requires advance notice (as in Ontario and Manitoba).

For business records, the necessity flows from a mix of unavailability and business inconvenience, while the reliability is found in the regularity, contemporaneity and business reliance of the records. The leading and most comprehensive Canadian decision on both statutory and common law requirements is still *Setak Computer Services Corp. v. Burroughs Business Machines Ltd.* (1977), 15 O.R. (2d) 750, 76 D.L.R. (3d) 641 (Ont.H.C.).

In simplified form, the statutory requirements can be reduced to these five:

(1) "business": broadly defined, really "regularly-kept records";
(2) "any writing or record"
(3) "of any act, transaction, occurrence or event"
(4) "made in the usual and ordinary course of business" (the double "course-of-business" requirement;
(5) "at the time... or within a reasonable time thereafter".

There are slight differences for the common-law exception, as modified by *Ares v. Venner*, [1970] S.C.R. 608 and *R. v. Monkhouse* (1987), 61 C.R. (3d) 343 (Alta.C.A.):

(a) a written entry, or oral statement;
(b) made contemporaneously with the event recorded;
(c) in the routine;
(d) of a "business";
(e) by a person who was under a specific duty to do the very act and record it, expanded by *Monkhouse* to include the doing of the act by one employee and the recording of it by another;
(f) with no motive to misrepresent.

Business records cannot, however, be used to prove expert opinion found in records. Such an opinion is not an "act, transaction, occurrence or event". Further, the records exception ought not be used to circumvent expert report requirements. Some authors, like Delisle, argue that expert opinion should be admitted, but there is no case law to support this view and the post-*Mohan* law would seem to foreclose such laxity.

Can the business records exceptions be used to admit the double and triple hearsay found in such records? The majority view says no. The records exceptions only serve to admit the first level or stage of hearsay and each successive level or stage in the process must come within a hearsay exception to be admissible. To put it concretely, if a party in litigation makes a statement in a hospital record, which is recorded by a nurse, and then the hospital file is put in evidence without the nurse attending, the nurse's note would be admissible under the business records exception (the first level of hearsay) and the party's statement to the nurse would be admissible under the admissions exception when offered by the opposite party (the second level of hearsay).

A minority view suggests that anything written down in a business record is admissible, by reason of the exception, whether double or triple hearsay, with any reliability concerns going to weight, not admissibility. For two examples of this minority approach, see *R. v. Martin* (1997), 8 C.R. (5th) 246 (Sask.C.A.) and *R. v. Luckacko* (2002), 1 C.R. (6th) 309 (Ont.C.A.). It is interesting that this view is found in criminal cases, while the overwhelming majority of civil cases follows the majority *Setak* approach.

Two recent child protection decisions provide excellent demonstrations of the scope and limits of the majority approach to business records: *Re V.(S.)*, [2002] S.J. No. 714, 2002 CarswellSask 754, 33 R.F.L. (5th) 419 (Sask.Q.B.) (investigation record, assessments and case plans, and social histories excluded, application form admitted); and *Catholic Children's Aid Society of Toronto v. L.(J.)*, [2003] O.J. No. 172, 2003 CarswellOnt 1685, 39 R.F.L. (5th) 54 (Ont.C.J.)(father's criminal and arrest records admitted, only portions of police occurrence reports admitted, supplementary records of arrest excluded; society's individual service logs and some emergency after-hours reports and service requests admitted, but not all of society's historical records).

Evidence of Past Parenting

"Evidence of past parenting" can be defined as evidence of past child-rearing practices and conduct on the part of the same parent or parents in relation to a child in the care of one or both of them, *other than* a child who is the subject-matter of the current proceeding in which the evidence is offered. How a parent treated *this*, i.e. the same, child will always be relevant and likely admissible, at whatever stage of the proceeding. And it is important to distinguish *what* is proved by the evidence, i.e. past parenting, from *how* past parenting is proved, whether by live witnesses, or transcripts, or hearsay.

Evidence of past parenting raises a broader question: whether "character" is "in issue" legally in protection proceedings. If character evidence is freely admissible, then so to is past parenting evidence. If "character" is not "in issue", then past parenting evidence may still be admissible as similar fact evidence that meets the more relaxed civil standard. These questions were raised many years ago in the well-known case of *C.A.S. of Winnipeg v. Forth* (1978), 1 R.F.L. (2d) 46 (Man.Prov.Ct.), and more recently in *Re B.(J.)* (1998), 40 R.F.L. (4th) 165 (Nfld.C.A.). In each case, past parenting evidence was not treated as similar fact evidence, but was admitted on a broader approach. Two Canadian cases have ruled that a parent's "character" is placed "in issue" in protection proceedings: *Re B.(J.)*, above; and *Superintendent of Family & Child Services for B.C. v. F.(M.E.)*, [1992] B.C.J. No. 389, 11992 CarswellBC 58 (B.C.S.C.).

One of the leading cases on the admissibility and use of past parenting evidence is *C.A.S. of Waterloo (Regional Municipality) v. C.(R.)*, [1994] O.J. No. 2955, 1994 CarswellOnt 2132 (Ont.Prov.Div.). Katarynych Prov.J. admitted the evidence as "backdrop", while warning against the "front-end loading" of protection cases and offering suggestions for the assessment of such evidence. Even if evidence of past parenting is not treated as similar fact evidence, I would suggest those similar fact principles may assist in weighing the evidence: the similarity of the types of allegations, the lapse of time, any change of partners or parents, the prejudicial effectss, and the distinctive demands of "birthdate apprehensions" (where the past parenting evidence bears the full burden of the agency case). Above all, "undue emphasis" should not be given to evidence of past parenting.

Statutory Evidence Provisions

Every Canadian protection statute contains some evidentiary provision or provisions, typically intending to admit evidence that might otherwise be inadmissible. Although we will focus

upon s. 50 of the Ontario *Child and Family Services Act*, it helps to put the Ontario provision in perspective. In the "Cheshire Cat" article, I identify five different categories of such provisions and Appendix A to the article sets out all of them:

> (1) evidence from prior protection proceedings: N.B., s. 9; P.E.I., s. 30(4); N.S., s. 96(3); Nfld., s. 50(2)(d);
>
> (2) past parenting evidence: B.C., s. 68(1); Ont., s. 50(1)(a);
>
> (3) evidence from any civil or criminal proceeding: B.C., s. 68(2); Alta., s. 108(2); Sask., s. 30; Ont., s. 50(1)(b); Nfld., s. 50(2)(c).
>
> (4) broad, non-specific relief from the hearsay rule: B.C., s. 68(2)(a); Alta., s. 108(4)(b); Ont., s. 50(1)(b); Nfld., s. 50(2)(a);
>
> (5) an "informality" clause, that proceedings be informal: B.C., s. 66(1)(b); Man., s. 36; Nfld., s. 50(1)(b).

There is little case law on "informality" clauses. Note that all of these evidentiary provisions are discretionary in nature.

Apart from Manitoba, every provincial statute makes evidence from prior protection proceeedings admissible. Beyond that core, half the provinces extend potential admissibility to evidence from any civil or criminal proceeding. Four provinces attempt to provide even broader, non-specific relief from the hearsay rule.

Admitting transcripts and exhibits from prior protection proceedings can be seen as only a modest expansion of the common law hearsay exception for former testimony. It is highly reliable hearsay -- sworn, accurately recorded, and usually tested by some form of cross-examination. These provisions really just waive "necessity", as the common law exception requires that the previous witness be unavailable. Lurking within past parenting and prior testimony can also be difficult questions of *res judicata* and issue estoppel from previous proceedings, applicable against either agency or parents.

Ontario's section 50(1) admits past parenting evidence in various forms, but the debate continues whether this provision is a broad or a limited expansion of hearsay admissibility. Most judges have adopted a "limited" or "cautious" intepretation, e.g. *C.A.S. of Districts of Sudbury and Manitoulin v. M.(P.)*, [2002] O.J. No. 1217, 2002 CarswellOnt 965 (Ont.C.J.); *Catholic C.A.S. of Toronto v. L.(J.)*, above. A minority prefer a broader reading, now perhaps even without a past parenting threshol, e.g. *C.A.S. of Niagara Region v. P.(D.)*, [2002] O.J. No. 4015, 2002 CarswellOnt 3436 (Ont.S.C.J.); *C.A.S. of Waterloo (Regional Municipality) v. F.(S.J.M.)*, [1994] O.J. No. 955 (Ont.Gen.Div.).

A provision admitting evidence from civil or criminal proceedings can raise, not only hearsay issues, but again issues of *res judicata* and issue estoppel from the criminal prosecution, sometimes on an application for summary judgment in the protection proceeding.

Protection statutes from Alberta, British Columbia and Newfoundland and Labrador create broadly-worded hearsay exceptions. Alberta courts have read s. 108(4)(b) to incorporate the necessity and reliability tests of the Supreme Court's hearsay jurisprudence: *Re. M.(J.J.)* (1995), 11 R.F.L. (4th) 166 (Alta.C.A.). Above, I noted the two lines of authority that have developed around

Ontario's s. 50(1)(b), with the majority approach following the Supreme Court's "principled approach" to hearsay. Both B.C. and Newfoundland refer to "reliability" in their statutes, but the role of "necessity" under their provisions remains uncertain. In the end, it is not clear that these statutory provisions actually expand admissibility beyond that already provided by the Supreme Court's modern approach.

The Ontario case law under s. 50 is digested below. The wording of the current version of section 50 is set out at the very end of these materials, along with the wording of its predecessor provisions.

Section 24(2) of the Charter

The *Charter* applies in child protection proceedings. In *C.A.S. of Algoma v. C.L.*, [2003] O.J. No. 5559 (Ont.C.J.), Justice Kukurin found the society to have unreasonably "seized" information provided by the father and incorporated into a psycho-sexual assessment report conducted at a mental health clinic. The father had consented to disclosure of the report to the society, but the society then filed the report in the continuing record and provided it to the other parties to a protection proceeding. That was a breach of s. 8 of the *Charter*, as well as ss. 35 and 36 of the *Mental Health Act*. Kukurin J. then considered s. 24(2) of the *Charter*, but decided not to exclude the report as evidence, after considering the seriousness of the breach and the consequences for the children in excluding the evidence under s. 24(2). In the course of his reasons, Justice Kukurin considered another mental health case, that of *C.A.S. of London and Middlesex v. T.H.* (1992), 41 R.F.L. (3d) 122, [1992] O.J. No. 3050, 1992 CarswellOnt 272 (Ont.Prov.Div.), where Vogelsang Prov.J. had excluded a psychologist's assessment under s. 24(2).

In *C.L.*, Kukurin J. also held that s. 50(1) CFSA did not override the provisions of the *Mental Health Act* and the report had been disclosed in contravention of the latter Act. In the end, the psycho-sexual assessment was ordered removed from the continuing record and sealed, unless and until the society complied with s. 35(9) MHA.

AFFIDAVITS

1. Evidence Issues in Affidavits: Three Regimes

(1) Affidavits at Trial: OFLR 23(20), (21)
(2) Affidavits on Motions: OFLR 14(17)-(20), (22)
(3) CFSA Temporary Care: s. 51(7) CFSA, OFLR 33(6)

2. Affidavits at Trial

(1) Personal knowledge required: OFLR 23(21)(c)
"the evidence would have been admissible if given by the witness in court"

(2) Conventional rules of evidence apply
relevance and privilege, also family/civil versions of opinion and hearsay

(3) Opinion Evidence:
lay opinion:
admissible, only where first-hand knowledge and to better state facts
not to just state opinion, without factual underpinning

expert opinion: *Mohan* (SCC, 1994)
(a) a properly qualified expert
(b) relevance ("reliability", "probative value"), e.g. *J.J.* (SCC, 2000)
(c) necessity (costs and dangers of expert opinion), e.g. *D.D.* (SCC, 2000)
(d) no other exclusionary rule, e.g. lie detectors *Beland* (SCC, 1987)
compliance with OFLR 23(23), (24)

(4) Child Hearsay:
child's wishes: exception for contemporaneous "state of mind"
after *Starr* (SCC, 2000), reliability requirement

child abuse hearsay:
Khan (1990): necessity and reliability, crimes vs. child
is "necessity" necessary in family law matters?
reliability: threshold reliability

(5) Adult Hearsay:
admissions: statement by a party, offered by opposing party
OFLR 23(13)
business records: see separate program

declarations about physical, mental or emotional state:
Smith (SCC, 1992), *Starr* (SCC, 2000)
must be condition contemporaneous to statement
not assert past fact, although present intention to do future act okay
not used to prove act or intention of party other than declarant
not made in "circumstances of suspicion", i.e. reliable

past recollection recorded:
no present memory, recorded, contemporaneously, vouch for on stand now
Hartland v. Rahaman (2001), 22 R.F.L. (5th) 310 (Ont.S.C.J.)

residual/principled approach to admit under *Smith*:
if hearsay not admissible under any categorical exception
necessity: often unavailability of declarant, others
reliability: "circumstances surrounding the statement itself", threshold

principled approach to exclude admissible hearsay under *Starr*:
unreliable hearsay statements, otherwise admissible under categorical exception
mostly focussed upon reliability

3. Affidavits on Motions

(1) OFLR 14(18): "as much as possible" information within personal knowledge"
must clearly distinguish between personal knowledge vs. info and belief: *Csak v. Mokos* (1995), 18 R.F.L. (4th) 161 (Master)

(2) OFLR 14(19): hearsay, information and belief, if
(i) identify source, and
(ii) swears to belief that true
see: *Waverley (Village Commissioners) v. N.S. (Minister of Municipal Affairs)* (1993), 16 C.P.C. (3d) 64, 123 N.S.R. (2d) 46 (S.C.)

designed to facilitate motions, not to deny the normal procedural protections when the merits of a claim are being decided: *Wall v. Horn Abbot Ltd.* (1999), 29 C.P.C. (3d) 96, 176 N.S.R. (2d) 96 (C.A.)

(3) source:
must be identified
preferably the original source: *Waverley*
sufficient information to conclude "a sound source": *Waverley*
see also: *City Buick Pontiac Cadillac Ltd. v. Allan* (1977), 6 C.P.C. 182 (Ont.H.C.)

(4) belief:
affiant must swear that believes information received from source: *Waverley*
not to offer commentary on credibility of source: *Wall*

(5) confined to facts, not speculation: *Waverley*

not "supposition, conjecture, speculation, leaps of hyperbole, innuendo, gossip, unqualified opinion where qualified opinion is required": *C.A.S. of Toronto v. A.M.*, below.

not "mere assertions of a conclusion and opinion", "particularly those that make assertions about the motivation or thoughts or feelings of someone else": *P.A.E. v. C.V.E.*, [1998] O.J. No. 5098 (Ont.Gen.Div.) per Aston J.

not self-serving statements of "surprise, shock, disgust or other emotions claimed by a deponent": *Creber v. Franklin*, [1993] B.C.J. No. 890 (S.C.)

not legal opinions, or plea or argument: *Waverley*

not attached letters of support from third parties or brochures: *Desouza v. Desouza*, [2002] O.J. No. 943 (C.J.). And not attached notes and prose statements from transition house: *LiSanti v. LiSanti*, [1990] O.J. No. 3092, 24 R.F.L. (3d) 174 (Ont.Prov.Ct.)

not third party comments or letters about the other's parenting abilities: *Creber*, *Riss v. Greenough*, [2002] O.J. No. 4207 (S.C.J.)

(6) not "inflammatory" (OFLR 14(22) or "scandalous" or "irrelevant"
e.g. *Barefoot v. Paranet Services Inc.*, [2000] N.S.J. No. 175, 185 N.S.R. (2d) 88 (C.A.)
Dlouhy v. Dlouhy (1995), 130 Sask.R. 285 (QBFLD)
Re Paul and Paul (1980), 28 O.R. (2d) 78 (H.C.)
Weinberger v. Weinberger (1995), 11 R.F.L. (4th) 9 (QBFLD)

4. CFSA Temporary Care

"credible and trustworthy evidence": s. 51(7) CFSA

C.A.S. of Halton v. S.D., [2002] O.J. No. 4686 (Ont.C.J.)
statements by named professionals okay, supported by notes and reports
but "little weight to observations made by unnamed individuals that is not otherwise supported in the material"

C.A.S. of Peel Region v. S.R., [2002] O.J. No. 3895 (Ont.C.J.)
admitted 4-year-old psychological assessment of parents, 3-year-old phallometric test and report

C.A.S. of Toronto v. S.W., [2002] O.J. No. 3310 (Ont.C.J.)
no wholesale admission of entries from shelter log, no double hearsay from examining doctor via society's affidavit

C.A.S. of Toronto v. A.M., [2002] O.J. No. 1432, 26 R.F.L. (5th) 265 (Ont.C.J.)
no admission of notes from shelter, notes which were repetitive, not comprehensive and rife with opinion

C.A.S. of Bruce County v. J.V., [2001] O.J. No. 3392 (Ont.S.C.J.)
hearsay from children, teachers, CAS worker and police constable admitted in physical abuse cases

C.A.S. of London and Middlesex v. A.M., [1998] O.J. No. 2530 (Ont.Gen.Div.)
worker's affidavit attached internet material on shaken baby syndrome as exhibits not admissible: "The section was not intended, nor should it be used, to attempt to include as 'evidence' letters, newspaper clippings, magazine articles, opinion polls, generic and unsubstantiated data or statistics upon which judicial notice could not be taken."

C.A.S. of Metropolitan Toronto v. M.B., [1998] O.J. No. 728 (Ont.C.J.)
findings of fact by a court re past parental conduct would be admissible

Catholic C.A.S. of Metropolitan Toronto v. D.(A.) (1994), 1 R.F.L. (4th) 268, 111 D.L.R. (4th) 151 (Ont.Gen.Div.)
affidavits rejected where "filled with double hearsay and opinion" or "opinion based upon a review of the records without any personal involvement"
"Credible, trustworthy evidence for the purpose of a temporary protection application often will include conflicting evidence. Evidence ought to be admitted that has a sense of believability about it. Consistent complaints made to police, a doctor, a nurse and a social worker possess these qualities."
approves *Roman Catholic C.A.S. of Essex County v. H.(L.)*, [1987] O.J. No. 1845 (Ont.Prov.Ct.) where Abbey J. stated, in admitting police occurrence reports under the former s. 47(7): "the court... can admit evidence which is such that there is about it some apparent real sense of believability and reliability arising from the subject-matter of the evidence, the proximity of the witness or author of the document to that subject-matter, the nature of the relationship between the witness or author of the document and the person whose statements are recorded or repeated in evidence and the degree to which the evidence is material to the paramount issues in the case."

BUSINESS RECORDS

1. Four Steps to Admissibility and Use

(1) authentication, or proof of authorship
(2) use for non-hearsay purposes?
(3) proof that business records generally
(4) specific issues: multiple hearsay, opinion

2. Authentication of Documents

(1) proof of authorship, original or true copies, completeness
(2) by agreement
(3) or by statutory authentication of public documents:
OEA, ss. 29, 31, 32, various statutes
(4) or incorporated in proof as "business records"

3. Uses for Non-Hearsay Purposes

(1) to refresh memory: present memory revived
(2) to provide prior inconsistent statements of witnesses: OEA, s. 20, 23
(3) to provide basis for "reasonable grounds"

4. Proof of Business Records Generally

Section 35, Ontario Evidence Act

(1) "business": broadly defined in s. 35(1))(a), really "regularly kept records"
(2) "any writing or record": s. 35(1)(b)
(3) "of any act, transaction, occurrence or event": s. 35(2)
(4) "made in the usual and ordinary course of business"
double "course-of-business" requirement: s. 35(2)
(5) "at the time... or within a reasonable time thereafter": s. 35(2)
(6) at least seven days' notice: s. 35(3)
(7) lack of personal knowledge of *maker* goes to weight: s. 35(4)

Common law hearsay exception: declarations in course of duty

cumulative: availability maintained by OEA s. 35(5)
as altered by *Ares v. Venner* (SCC, 1970) and subsequent cases, esp. Alta.
no notice required, subject to OFLR 19

(1) a written entry, or oral statement
(2) made contemporaneously with the event recorded
(3) in the routine
(4) of a "business"
(5) by a person who was under a specific duty to do the very act and record it
includes observation as act, personal knowledge of maker/recorder required in *Setak*

expanded in Alta. to admit one person within business informing another who records it: *R. v. Monkhouse* (1987), 61 C.R. (3d) 343 (Alta.C.A.)

(6) with no motive to misrepresent (left uncertain by *Ares*)

5. Specific Issues

(1) Opinion

not to prove *expert opinion* in records
not "act, transaction, occurrence or event": *Adderly v. Bremner* (1968)
not to circumvent expert report requirements, e.g. OFLR 23(23), (24)
but what if qualifications proved?
business records to admit many of doctors' notes, observations, test data, etc.

what of "blue toes" in nurses' notes in *Ares*?
this *lay opinion*, i.e. personal knowledge, to better state facts
business records not restricted to numbers, accounts, "objective facts"

(2) Multiple Hearsay

one minority school:
s. 36(4) means that all multiple hearsay admissible, goes only to weight
e.g. *R. v. Martin* (1997), 8 C.R. (5th) 246 (Sask.C.A.)
mentioned by Ont.C.A. in *R. v. L.(M.)* (2002), 1 C.R. (6th) 309 at para. 13

majority school: *Setak, H.(L.T.), Johnson v. Lutz*
ordinarily, "maker/recorder" will have personal knowledge of act/event recorded
but what if not?
business records exception will admit record made, despite absence of maker/recorder
but what of statement by informant (who has personal knowledge) to maker/recorder?

multiple hearsay permitted, provided that each stage of hearsay admissible
"stacking exceptions"

business records:
if both informant and recorder operating under business duty to be careful
then both fall within business records exception, admissible
must informant and recorder both operate within same "business"?
or can each be in separate "business", e.g. CAS worker and police officer
not statements from mere "bystanders" or "volunteers outside of the business"

admissions:
what party says to "business" recorder, offered by opposing party

declarations re physical, mental or emotional state:
what individuals outside business say to doctor, nurse, therapist, etc.

Smith's residual, principled approach:
expanded admissibility where necessity and reliability
statement-by-statement analysis

Starr's residual, exclusionary approach:
unreliable individual statements excluded, even if within categorical exception

6. <u>Two Recent Helpful Child Protection Cases on Business Records</u>

C.C.A.S. of Toronto v. J.L., [2003] O.J. No. 1722, 39 R.F.L. (5th) 54 (C.J.)(Jones J.)

Re S.V., [2002] S.J. No. 714, 2002 SKQB 499, 33 R.F.L. (5th) 419 (Sask.Q.B.)

SECTION 50 CFSA

1. Section 50(1) CFSA

1999 amendment
predecessors: s. 46(1) CFSA (1984), s. 28(4) CWA (1978)

(1) past conduct toward any child (need not be in person's "care")
(2) of a person who has or may have care or access to this child
(3) consider at any stage in proceeding
(4) "may consider", i.e. discretionary
(5) any oral or written statement or report that is relevant including transcript, exhibit, finding, reasons for decision in earlier civil or criminal proceeding

separation into two clauses: (a) past conduct, (b) statements
but heading: "Consideration of past conduct toward children"

"Despite anything in the *Evidence Act*"?
s. 9(2): self-incrimination, liability to civil proceeding
s. 11: privilege for marital communications

2. Broad and Cautious Interpretations

two lines of authority:

(1) read broadly: general evidentiary exception
to admit hearsay and opinion freely, all reliability concerns go to weight
e.g. *C.A.S. of Niagara Region v. D.P.* (2002)
C.A.S. of Regional Municipality of Waterloo v. S.J.M.F. (1994)

(2) read cautiously: limited to past parenting
concerns about necessity, reliability and fairness remain
e.g. *C.C.A.S. of Toronto v. J.L.* (2003)
C.A.S. of Toronto v. J.R. (2003)
C.A.S. of Toronto v. N.C. (2003)
C.A.S. of Algoma v. R.N. (2003)
C.A.S. of Districts of Sudbury and Manitoulin v. P.M. (2002)
C.A.S. of Regional Municipality of Waterloo v. R.C. (1994)
T.T. v. C.C.A.S. of Metropolitan Toronto (1984)

3. Case Law under Section 50(1) and Predecessors

C.A.S. of Algoma v. C.L., [2003] O.J. No. 5559 (C.J.)(Kukurin J.)
psycho-sexual assessment report at mental health clinic, father consented to release to society
society then filed assessment in continuing record and provided to other parties
opening words of s. 50(1) CFSA override *Evidence Act*, but not *Mental Health Act*
society must obtain father's consent to use, or satisfy s. 35(9) *MHA*

C.C.A.S. of Toronto v. J.L., [2003] O.J. No. 1722. 39 R.F.L. (5th) 54 (C.J.)(Jones J.)
police records and historical society records
criminal and arrest records, some parts of occurrence reports admitted as business records
only a few service logs from society records admitted as business records
most of historical society records admitted under s. 50 as "backdrop"
or relevant to placement issue
much of the more recent material presented through viva voce evidence
no weight to risk assessment reports or third party hearsay

C.A.S. of St. Thomas and Elgin v. J.M., [2003] O.J. No. 1752 (C.J.)(O'Dea J.)
s. 50 not a "special circumstance" to permit society to relitigate a prior allegation of sexual molestation, where father previously consented to finding on grounds of physical abuse
but father also estopped from denying incident of physical abuse

C.A.S. of Toronto v. J.R., [2003] O.J. No. 2095 (C.J.)(Katarynych J.)
prior assesssment from protection proceeding that ended in mistrial
admissible as to disposition only in second proceeding under s. 50
"Charter values" considered

C.A.S. of Toronto v. N.C., [2003] O.J. No. 1525 (C.J.)(King J.)
narrow interpretation of s. 50, explained clearly
statements of 12-year-old to worker not admitted under s. 50, *Khan* motion required

C.A.S. of Algoma v. R.N., [2003] O.J. No. 552 (C.J.)(Kukurin J.)
s. 50 read narrowly, necessity and reliability required
admitted prior transcript from criminal trial by witness who then had stroke
but not testimony of teacher from trial, as society had not tried hard enough to locate

C.A.S. of Hamilton v. M.C., [2003] O.J. No. 1271 (S.C.J.)(Nelson J.)
society offered affidavit from former worker sworn at time of apprehension, s. 50
no evidence re steps to find worker, motion deferred

C.A.S. of Sudbury & Manitoulin v. C.B., [2002] O.J. No. 5121 (C.J.)(Humphrey J.)
request to admit from society re book of probation and parole records of grandfather
too general, society required to particularise request under OFLR 22
s. 50 CFSA can't be used to override Rules

Family, Youth and Children's Services of Muskoka v. D.F., [2002] O.J. No. 4466 (S.C.J.)(Perkins J.)
same judge need not preside over finding and disposition stages
old society notes and records dating back to 1994 admitted, little weight

C.A.S. of Region of Peel v. E.W., [2002] O.J. No. 4409 (C.J.)(Dunn J.)
summary judgment, previous eight children Crown wards
admitted four previous assessments from four different proceedings

C.A.S. of Niagara Region v. D.P., [2002] O.J. No. 4015 (S.C.J.)(J.W. Quinn J.)
no res judicata or issue estoppel from previous findings
admitted transcripts and affidavits (8 witnesses) from first protection proceeding
s. 50(1) trumps *Khan* and its requirements of necessity and reliability

C.C.A.S. of Hamilton v. C.L., [2002] O.J. No. 4679 (S.C.J.)(Steinberg J.)
oral statement to worker by Interval House worker admitted
not "simply the product of a casual conversation but the result of some formalized or required legal process", here statutory duty to report

Kawartha-Haliburton C.A.S. v. D.C., [2002] O.J. No. 3864 (S.C.J.)(Nelson J.)
not admit transcripts and exhibits of earlier proceeding, only reasons for judgment
to avoid relitigation and inconsistent findings

C.A.S. of Districts of Sudbury and Manitoulin v. P.M., [2002] O.J. No. 1217 (C.J.)(Renaud J.)
admitted previous parental capacity assessment re older child
cautious and careful interpretation of new s. 50(1)

C.A.S. of County of Simcoe v. C.S., [2001] O.J. No. 4915 (S.C.J.)(R. MacKinnon J.)
summary judgment, based on prior convictions for assaults on other children
criminal reasons for judgment considered
six other children made Crown wards

C.A.S. of Algoma v. L.H., [2001] O.J. No. 5877 (C.J.)(Kukurin J.)
contents of "trial record" under OFLR 223
not include transcript of preliminary inquiry re another child
trial record documents not automatically "evidence" at trial

C.A.S. of Algoma v. L.H., [2001] O.J. No. 5875 (C.J.)(Kukurin J.)
unrelated child (age 12) makes statement to worker, not admitted
but videotaped statement prepared for criminal trial better, if offered

Catholic C.A.S. of Toronto v. C.A.-Y., [2001] O.J. No. 2226 (C.J.)(King J.)
affidavits and transcripts of earlier proceeding rejected (also viva voce)
issue estoppel
only admit reasons for decision and findings accepted

C.A.S. of Brockville Leeds v. C., [2001] O.J. No. 1579 (S.C.J.)(Ratushny J.)
4 previous children Crown wards
reasons for judgment and expert reports from 2 previous trials admitted (consent?)

C.A.S. of London and Middlesex v. D.W., [1997] O.J. No. 6340 (Gen.Div.)(Aston J.)
reasons from 1992 trial treated as evidence, on consent
transcript also admitted
findings of past fact "unassailable", but not future events

N.H. v. C.A.S. of Regional Municipality of Waterloo, [1996] O.J. No. 4788 (Prov.Div.) (Katarynych Prov.J.)
mother's schizophrenia found as fact in earlier proceeding
father's criminal conviction for assault on another child and reasons for judgment admitted

C.A.S. of Algoma v. R.L., [1996] O.J. No. 2306 (Prov.Div.)(Kukurin Prov.J.)
criminal transcript and conviction of stepmother for assault on same child admitted
conviction as prima facie proof

C.A.S. of Haldimand-Norfolk v. D.C., [1995] O.J. No. 3747 (Prov.Div.)(Agro Prov.J.)
(reversed as to result, [1996] O.J. No. 3471 (Gen.Div.))
expert post-mortem report not permitted (no notice), but oral testimony allowed
also certificate of conviction of father for manslaughter of two previous children
res judicata applied
no transcripts or evidence of criminal trial filed

C.A.S. of Regional Municipality of Waterloo v. R.C., [1994] O.J. No. 2955 (Prov.Div.) (Katarynych Prov.J.)
concern for "front-end loading" via past parenting
documentary evidence from past proceeding, by agreement, including police incident reports, excerpts from hospital records
but not report of absent counsellor, offered by parent's counsel

C.A.S. of Regional Municipality of Waterloo v. S.J.M.F., [1994] O.J. No. 955 (Gen.Div.) (Salhany J.)
broad reading of s. 50(1)
admitted police reports, medical and hospital records (including opinion)

C.A.S. of Hamilton-Wentworth v. I.C., [1993] O.J. No. 2360 (Gen.Div.)(Fedak J.)
then s. 50(1) couldn't be used against society

C.A.S. of Region of Peel v. K.(D.), [1991] O.J. No. 159 (Prov.Div.)(Nasmith Prov.J.)
transcripts rejected, only 103-page reasons for decision from earlier proceeding
findings res judicata

C.A.S. for Districts of Sudbury and Manitoulin v. L.(D.), [1987] O.J. No. 1835 (Prov.Ct.) (Runciman Prov.Ct.J.)
s. 7 Charter challenge to s. 46 CFSA, where prior protection transcript offered
no findings of fact, no final order, prior case settled after 14 days
society counsel offers to produce any prior witness for further cross
no Charter infringement

Roman Catholic C.A.S. for Essex County v. G.(L.), [1986] O.J. No. 1724 (Prov.Ct.) (Abbey Prov.Ct.J.)
s. 28(4) can't be used to prove very conduct complained of
subject child's hearsay statements to expert re sexual abuse

T.T. v. Catholic C.A.S. of Metropolitan Toronto, [1984] O.J. No. 2262, 42 R.F.L. (2d) 47 (Prov.Ct.)(Nasmith Prov.Ct.J.)
s. 28(4): not to admit reasons for judgment from previous proceeding
hospital records admitted as business records, but not opinions
report from psychologist re brother not admitted
affidavit of CAS worker from another proceeding not admitted

Re C.A.S. of District of Kenora and Paishk (1984), 48 O.R. (2d) 591, 44 R.F.L. (2d) 70 (H.C.)(Sutherland J.)
s. 28(4) "a broad gauge statutory exception", following *E.C.*
admitted affidavits and oral reports as to previous proceedings

Re Catholic C.A.S. and Pamela M. (1982), 36 O.R. (2d) 451 (Prov.Ct.)(Nasmith Prov.J.) (reversed as to result (1983), 44 O.R. (2d) 375 (Co.Ct.))
transcripts and documents admitted under s. 28(4)
"with some reservations about the inefficiency of this method and the repetitive nature of much of the material", recommends better pre-trial procedures

Re T.A.M.D., [1982] O.J. No. 577 (Prov.Ct.)(Fisher Prov.Ct.J.)
criminal trial transcript and coroner's report re previous child admitted under s. 28(4)
police "dope sheet" and pre-sentence report not admitted
jury verdicts re mother and partner as prima facie evidence

E.C. v. Catholic C.A.S. of Metropolitan Toronto (1982), 37 O.R. (2d) 82 (Co.Ct.) (Sheard Co.Ct.J.), dismissing appeal from [1981] O.J. No. 514, 21 R.F.L. (2d) 426 (Prov.Ct.)(Main Prov.Ct.J.)
transcripts of previous proceeding (11 witnesses) admitted under s. 28(4)
earlier factual findings not binding, but could be considered

Re B. (No. 3), [1982] O.J. No. 876 (Prov.Ct.)(Karswick Prov.Ct.J.)
reasons for judgment in prior proceeding could well be admissible under s. 28(4)

Re B. (No. 2), [1982] O.J. No. 664 (Prov.Ct.)(Karswick Prov.Ct.J.)
letter of friend, neighbour, relative not admitted under s. 28(4)
witness out of jurisdiction
generally reports or statements of professional people admitted

C.A.S. of Metropolitan Toronto v. N.H.B., [1980] O.J. No. 1982 (Prov.Ct.) (Walmsley Prov.Ct.J.)
court orders, clinic reports, transcripts and judgments of previous proceedings admitted under s. 28(4)
"a very wide discretion" to admit hearsay, opinion, even "mere speculation"
court might exclude unfair or highly prejudicial evidence, which is only marginally relevant

Kawartha-Haliburton C.A.S. v. D.H., [1980] O.J. No. 923 (Prov.Ct.)(Karswick Prov.Ct.J.)
hospital report re mother's family background and social history not admitted
not re past conduct to other children, not under s. 28(4)

Child and Family Services Act, R.S.O. 1990, c. C.11

Consideration of past conduct toward children

50. (1) Despite anything in the *Evidence Act*, in any proceeding under this Part,
(a) the court may consider the past conduct of a person toward any child if that person is caring for or has access to or may care for or have access to a child who is the subject of the proceeding; and
(b) any oral or written statement or report the court considers relevant to the proceeding, including a transcript, exhibit or finding or the reasons for a decision in an earlier civil or criminal proceeding, is admissible into evidence.

Idem: order of presentation

(2) In a hearing under subsection 47(1), evidence relating only to the disposition of the matter shall not be admitted before the court has determined that the child is in need of protection.

Evidence on adjournments

51. (7) for the purpose of this section, the court may admit and act on evidence that the court considers credible and trustworthy in the circumstances.

Former section 50(1) (previously s. 46(1)) CFSA

50(1) Despite everything in the Evidence Act, before ordering that a child be placed in or returned to the care and custody of a person other than a society, the court may consider that person's past conduct toward any child that is or has been in his or her care, and any oral or written statement or report that the court considers relevant, including a transcript, exhibit or finding in an earlier civil or criminal proceeding, may be admitted into evidence and shall be proved as the court directs.

Former section 28(4) of the Child Welfare Act

28(4) Notwithstanding any privilege or protection afforded under the Evidence Act, before making a decision that has the effect of placing a child in or returning a child to the care or custody of any person other than a society, the court may consider the past conduct of that person towards any child who is or has at any time been in the person's care, and any statement or report whether oral or written including any transcript, exhibit or finding in a prior proceeding whether civil or criminal that the court considers relevant to such consideration and upon such proof as the court may require is admissible in evidence.