NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Community Services) v. J.M.*, 2018 NSCA 71

Date: 20180817
Docket: CA 474378
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

J.M. and R.R.

Respondents

Restriction on Publication: s. 94(1) Children and Family Services Act

Judges:	Farrar, Bryson and Derrick, JJ.A.
Appeal Heard:	June 15, 2018, in Halifax, Nova Scotia
Held:	Leave granted and appeal allowed, per reasons for judgment of Bryson, J.A.; Farrar and Derrick, JJ.A. concurring
Counsel:	Peter McVey, Q.C. and Adam Neal, for the appellant Coline Morrow, for the respondent J.M. Rejean Aucoin, Q.C. for the respondent R.R.

Prohibition on publication

94 (1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Reasons for judgment:

Introduction

[1] The Minister of Community Services appeals the February 16, 2018 decision of the Honourable Justice Theresa M. Forgeron by which she excluded toxicology evidence respecting drug use by the respondent R.R (2018 NSSC 31). The Minister tendered the evidence in the context of a child protection proceeding involving the nine-year-old daughter of J.M. and R.R. whose safety was put at risk by the drug use of her parents.

[2] As part of the child protection proceedings, an order was granted providing further drug testing of both parents. In his case, R.R. was alleged to have used cocaine. Testing for cocaine use involves analysing a urine sample for cocaine metabolite which is produced when a living organism metabolizes cocaine. Such samples cannot be "contaminated" by introducing cocaine into a urine sample because it has not been metabolized.

[3] In November of 2017, R. had been placed in the care of her mother, J.M., whose drug testing had been negative for some time. Because R.R. had tested positive for cocaine use on six separate occasions (misstated by the judge as three), the Minister would not agree to unsupervised access by R.R.

[4] For the first time, in November 2017, R.R. requested a hearing on the issue of drug testing. What followed was a six day ordeal respecting the qualifications of the Minister's expert, Dr. Bassam Nassar, which evolved into a hearing on forensic use of urine drug testing. The judge frequently referred to and relied upon the Ontario Lang Report which followed the discrediting of hair sample testing from the Motherisk Laboratory at the Hospital for Sick Children in Toronto. The Lang Report itself was not before the court. Dr. Nassar was the only source of evidence about that report and he clearly distinguished the errors identified by Justice Lang from the processes employed by his laboratory at the Queen Elizabeth II Hospital in Halifax.

[5] Deciding Dr. Nassar's evidence was inadmissible, the judge faulted the Minister's expert for lacking "forensic accreditation", dismissing his evidence regarding the QEII lab as "self-serving" and labelling it as unreliable because it lacked external accreditation, monitoring, and oversight.

[6] The Minister says that the judge's decision has "thrown off" the long-established provincial wide system of drug testing in cases such as this in favour of "unknown laboratories elsewhere".

[7] Mootness and the interlocutory nature of this appeal are preliminary questions that must be addressed. The Minister raises a number of grounds of appeal which are consolidated into four, described as follows:

> 1. Did the judge err in law by imposing an admissibility threshold she labelled "forensic", to be applied before an expert toxicologist may testify regarding cocaine metabolite in urine, or err in fact regarding what "forensic" means in forensic toxicology?
>
> 2. Did the judge err in law when finding Dr. Nasser's evidence to be self-serving, not objective or impartial, or in fact as the evidence reveals he was fair, objective and non-partisan?
>
> 3. Did the judge err in law by conflating expert qualification with threshold reliability, or by equating admission of the evidence with its weight, and further by ruling on reliability without considering any of the benefits of admission?
>
> 4. Did the judge err in law by requiring certification, accreditation, external testing, monitoring and/or oversight as a prerequisite to admission, or err in fact when appreciating the facts on these issues in the evidence before her?

[8] Questions 1, 2 and the first part of 3 concern whether Dr. Nassar should have been qualified as an expert in toxicological evidence respecting the drug use alleged in this case. The second part of question 3 and question 4 address admissibility of the evidence itself. Accordingly, these reasons will address:

(a) Preliminary issues respecting mootness and interlocutory appeals;

(b) The test for admissibility of expert evidence;

(c) Whether Dr. Nassar was qualified to give expert toxicological evidence;

(d) Whether that toxicological evidence should have been admitted.

[9] For reasons that follow I agree that the judge made errors of law and clear and material errors of fact warranting appellate intervention. Her decision should be set aside. Furthermore, the record establishes that Dr. Nassar was qualified to give expert toxicological evidence respecting the presence of cocaine metabolite in R.R.'s urine, indicative of cocaine drug use by R.R. His evidence should have been admitted.

Preliminary issues

Is the appeal moot?

[10] Although the parties do not agree on whether the appeal is moot, they all agree on the importance of the questions raised by the appeal.

[11] The Minister argues that the appeal is not moot because R.R.'s drug use remains relevant to the issue of access. A "live controversy" continues between the parties. Alternatively, the Minister says the Court retains the discretion to rule even if the immediate matter before the court is moot (*Nova Scotia (Community Services) v. Nova Scotia (Attorney General)*, 2017 NSCA 73, ¶ 56 and following).

[12] Generally, urine testing by the QEII toxicology laboratory is a longstanding practice in child protection proceedings in Nova Scotia. Whether to admit such evidence in similar cases is an enduring issue for litigants and courts in this province. Owing to the importance of future admissibility of evidence such as Dr. Nassar's in cases like this, exercise of that discretion favours consideration of the Minister's appeal.

There are arguable issues

[13] As the reasons that follow illustrate, this appeal raises arguable issues. But there is a further impediment to granting leave. As a rule, this Court does not grant leave in interlocutory appeals respecting evidentiary rulings for all the reasons elaborated upon in *T & T Inspections and Engineering Ltd. v. Green*, 2013 NSCA 107.

[14] Resolution of the issues raised in this appeal may affect the future conduct of this case and cases like it. Analogous to the mootness issue, leave will have a salutary effect on like future litigation. Leave should be granted.

The admissibility of expert evidence

[15] The Supreme Court and various courts of appeal—including this one—have recently commented on admission of expert evidence. In *R. v. Abbey (No 2)*, 2017 ONCA 640, Justice Laskin summarized those recent developments in this way:

> [48] The test may be summarized as follows:
>
> Expert evidence is admissible when:

(1) It meets the threshold requirements of admissibility, which are:

a. The evidence must be logically relevant;

b. The evidence must be necessary to assist the trier of fact;

c. The evidence must not be subject to any other exclusionary rule;

d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:

i. Impartial,

ii. Independent, and

iii. Unbiased.

e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,

and

(2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

a. Legal relevance,

b. Necessity,

c. Reliability, and

d. Absence of bias.

[16] As we shall see, although the judge cited the law, she did not correctly apply it in this case.

Was Dr. Nassar qualified to give expert toxicological evidence?

[17] All counsel—including R.R.'s counsel—agreed that Dr. Nassar's qualifications and admissibility of the lab's results were separate legal questions. The judge remained unconvinced because she collapsed the issue of Dr. Nassar's qualifications into whether the QEII lab results were "reliable":

> I cannot assess Dr. Nassar's credentials independently of the Capital Health Authority's toxicology lab. Dr. Nassar's opinion is based on the reliability of the lab's testing process and test results. The results from the toxicology lab are the foundation of Dr. Nassar's opinion. The lab's test results and Dr. Nassar's opinion are intertwined – indeed they are as one. ***Dr. Nassar's qualifications must***

> ***therefore be assessed in conjunction with the toxicology lab that he directs and from which the toxicology results were garnered.***
>
> [Emphasis added]

This confusion informed her interpretation of the case law:

> … Case law confirms that the reliability of proposed expert testimony is a pivotal question at the ***qualification*** stage … . [*Decision*, ¶ 16]
>
> [Emphasis added]

[18] Reliability of the lab's work is addressed later in this decision, but for purposes of determining Dr. Nassar's qualifications, the two are plainly distinct.

[19] The judge relied upon *Abbey (No 2)*, remarking that "the unreliability of the expert evidence ultimately led to the Ontario Court of Appeal to find the evidence inadmissible."

[20] In *Abbey (No 2)* (¶ 109), the Crown expert's evidence passed the threshold test of admissibility described in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (see Step 1 in ¶ 15 above). But admissibility foundered on the reliability criterion at the second stage – the gatekeeper role – of the test.

[21] The judge here erred in law by merging Dr. Nassar's qualifications with reliability of the evidence tendered on the merits.

[22] The judge distinguished *R. v. Mehl*, 2017 BCSC 1845 in which a psychiatrist was qualified to give an opinion about an accused's mental state at the time of the crime. The Crown had objected because the expert was not a "forensic psychiatrist." The judge in *Mehl* nevertheless ruled that he had the requisite qualifications to offer the opinion sought.

[23] In this case, the judge dismissed *Mehl* as inapplicable because the judge in *Mehl* "was not asked to exercise her discretion under the second stage of the analysis, that is the gatekeeper stage." Precisely; expert qualification and reliability of the expert's evidence are separate questions. Qualification of the expert preceded any reliability analysis. Here, the issue of Dr. Nassar's qualifications disappeared into the judge's consideration of reliability of the

laboratory results. For this reason, she never actually examined Dr. Nassar's impressive qualifications.

[24] Dr. Nassar's credentials were uncontradicted. To précis them: Dr. Nassar is a medical biochemist who holds a Ph.D. in physiology and a physician who has been a fellow of the Royal College of Physicians and Surgeons of Canada since 1989, with a specialty in medical biochemistry. In 2002, he became a fellow of the Canadian Academy of Clinical Biochemistry. He has been the Director of the Toxicology Services Division of Clinical Chemistry overseeing the QEII lab since 2006. He has ongoing training in forensic toxicology, most recently attending the tri-annual meeting of the International Association of Forensic Services in 2017. He has lectured to students and residents on pathology, including forensic toxicology. He is well published. His CV notes his most recent presentation as "*The Use of Tandem Mass Spectrometry in Screening and Confirmation of Drugs*" presented at the Triennial Meeting of the International Association of Forensic Sciences in Toronto in 2017. He testified that he had been qualified to give expert evidence on toxicology testing in Nova Scotia courts in the past.

[25] During cross-examination, it was put to Dr. Nassar that he had not been qualified as a "forensic" expert in an earlier child protection case: *Nova Scotia (Community Services) v. C.P.*, 2016 NSSC 46. Although the judge in *C.P.* ultimately disregarded Dr. Nassar's report (¶ 89), all counsel had conceded his qualifications to offer the evidence in his report (¶ 23). It would appear that *C.P.* was based on less detailed expert evidence. Unlike here, there was no evidence on the methodology used. There was no evidence regarding collection procedures, chain of custody, or testing procedures. Nor was there evidence on who completed the testing and what processes were followed. Lab results were not tendered.

[26] In this case, Dr. Nassar described in some detail the evolution of toxicological testing, culminating in the current QEII practice of using liquid chromatography and tandem mass spectrometry which he described as the "gold standard" for forensic testing (also approved in the Lang Report). He recounted his experience with other labs and institutions in Canada, the United States and the United Kingdom respecting use of this technology. He described recognized forensic techniques regarding the collection, transmission and storage of urine samples. He described the QEII's lab's internal and external quality controls. All of this will be elaborated on later in this decision regarding reliability of the evidence—but for present purposes, Doctor Nassar's evidence was more than

adequate to qualify him as an expert capable of opining on the presence of cocaine metabolites in R.R.'s urine samples, indicative of R.R.'s cocaine use.

Objectivity

[27] The judge also dismissed Dr. Nassar's evidence as "self-serving" and lacking in objectivity with respect to the test results of "his own lab." The question of expert objectivity was squarely addressed in *White Burgess*, in which the Supreme Court agreed with this Court's determination that "appearance of independence" is not the test (2013 NSCA 66). Justice Cromwell clarified:

> [47] […] ***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.***
>
> [48] ***Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty.*** […]
>
> [49] ***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. […] I emphasize that ***exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence.*** Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.
>
> [50] […], the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.
>
> [Emphasis added]

[28] Dr. Nassar's expert report complied with the requirements of the Rules of Court, including Rule 55. In his testimony, he confirmed his understanding of his obligations of fairness, objectivity and non-partisanship. He confirmed his belief in the accuracy of the QEII lab test results.

[29] There was no evidence that questioned Dr. Nassar's impartiality. The judge was wrong to disregard his evidence simply because of his association with the QEII lab. To impugn an expert's objectivity on this basis would render inadmissible many opinions that courts routinely receive from such witnesses, whose knowledge of the facts may often enhance the value of that evidence.

Should the toxicological evidence have been admitted?

[30] Initially, R.R. accepted the QEII lab results. But, on her own initiative, the judge asked if the QE II lab was "clinical" or "forensic". She described "the whole problem with the Motherisk … was it was clinical and not forensic." The Minister's counsel corrected the judge, pointing out the principal problem at the Motherisk lab was a failure to observe forensic practices. The judge suggested to R.R.'s counsel that he could have R.R. tested by "forensic" labs – none were mentioned. R.R. never did have anyone else conduct urine analysis testing.

[31] When R.R. decided to challenge the drug tests, the judge confronted the Minister's counsel:

> So you will have to show me that the concerns that are present in the Lang Report are not present here. … And I would assume that that's going to include a really good reason as to why the forensic lab designation has not been obtained. … Then you're going to have to show me why, and what good reason why that Doctor … Nassar has not obtained his designation as a forensic lab. …

Of course, the Minister had to do no such thing. The Minister had to establish the admissibility of the expert evidence, no more and no less. That does not mean the Crown had to establish that the information underlying Dr. Nassar's opinion was accurate; only that it was sufficiently reliable to be considered by the trier of fact who makes the ultimate decision on reliability: *R. v. Abbey*, 2009 ONCA 624 at ¶ 130.

[32] The judge's preoccupation with a "clinical" v. "forensic" distinction reappeared at numerous points in the transcript and coloured much of her analysis. This is really a false distinction obscuring the fundamental issue of reliability confronting the judge, which tainted her view of Dr. Nassar's expertise and capacity to provide expert testimony.

[33] Dr. Nassar made clear that the difference between clinical and forensic toxicology is not scientific but depends on the use made of that science. Standards

imposed by courts require such things as integrity of sample collection, chain of custody, security of the sample, and technique confirmation.

[34] The Lang Report strongly influenced the judge's approach. But as earlier described, it was not in evidence. It is not even clear that it would be admissible: *Barton v. Nova Scotia (Attorney General)*, 2014 NSSC 192; *Robb v. St. Joseph's Health Care Centre*, 87 O.T.C. 241. Dr. Nassar referred to the Lang Report in his written opinion to the Court. He clearly distinguished between the faulty processes the Lang Report describes and the different testing and practices followed at the QEII lab.

[35] The evidence was that the QEII lab followed forensic practices. The Minister's first witness was a licensed practical nurse, who described the collection, labelling, and transmission of the urine samples in this case. She explained how random visits were arranged to cover both weekdays and weekends. The written protocol for testing by child protection agencies was entered as an exhibit through this witness.

[36] The nurse testified about the use of rubber gloves, minimum sample quantity and temperatures, placement in a container with a tamper-proof seal, with R.R. present for each step. The sealed container is double-bagged before transmission to the lab. None of this process or testimony was challenged.

[37] The judge made no findings impairing the collection, transmission, storage or integrity of the samples.

[38] Dr. Nassar then testified. His report was entered, which the Minister summarizes in his factum:

> 101. **Exhibit 11, Dr. Nassar's Report, dated December 1, 2017**, states all of the following:
>
> a. It is an expert opinion "addressing the presence or absence of certain chemical substances in the urine" of R.R.;
>
> b. The expert's qualifications are briefly summarized, and his *curriculum vitae* is attached as Schedule A;
>
> c. The literature consulted is listed in Schedule B,
>
> d. The scientific methodologies used are briefly described, before his opinion on their "high degree of accuracy, sensitivity, and specificity" is stated; the methodologies are later described in considerable detail in Schedule C;

e. "Schedule C", in particular, offers a "further and more detailed description of our methodology, certifications and compliance with international guidelines";

f. The identity and qualifications of every person involved in testing are stated, as is the expert's belief they have the requisite skill, training and experience;

g. A summary of the results of testing on all 52 specimens is offered, whether the results were positive or negative; only 6 were positive for cocaine metabolite;

h. The witness said, "Our analyses indicate and **I confirm with a very high degree of certainty** that Mr. R. tested positively for Benzoylecgonine, a metabolite of Cocaine, indicating **use of Cocaine prior to providing a urine sample**".

i. The witness ended the main body of this Report with a very clear, "Rule 55-compliant", statement of objectivity, impartiality and completeness.

[Emphasis in original] [Footnotes omitted]

[39] Dr. Nassar's uncontradicted opinion was:

> On the basis of my qualification as a Medical Biochemist with skill, training and experience in clinical and analytic Toxicology it is my opinion that the above-described tests, methodologies and procedures are accurate, reliable, secure and sufficiently precise, in order to detect with a very high degree of certainty, the presence or absence of the drugs, chemicals or substances in urine as screened for, and to offer in a forensic setting, describing the results of such testing.

[40] Schedule C of the Report described accreditation and distinguished it from admissibility, citing the distinction made by Justice Lang in her Motherisk Report. Dr. Nassar confirmed in this Schedule that practices in the QEII lab are those followed by American Substance Abuse and Mental Health Services Administration (SAMHSA), the Virginia Department of Forensic Science, the Society of Forensic Toxicologists/American Academy of Forensic Sciences Guidelines, and the U.K. & Ireland Forensic Toxicology Guidelines. Dr. Nassar's Schedule C also recounts the QEII lab's methodology of sample testing with liquid-chromatography and tandem mass spectrometry, as earlier described, the "gold standard" approved in Justice Lang's Motherisk Report. Dr. Nassar also cited forensic science authority for use of this methodology.

[41] Dr. Nassar testified that each "run" of the tests (consisting of 48 tests) is subject to quality control testing with two low and two high tests of a known

concentration of metabolite. This ensures accuracy of equipment calibration. All of R.R.'s positive drug tests were subject to this quality control testing.

[42] Further quality control is provided quarterly by external testing by the College of American Pathologists' Forensic External Quality Assurance Program, which tests over a hundred labs, testing the same blind sample. The judge's skepticism about this external testing is addressed later in this decision.

[43] Although the judge noted the two-stage approach described in *R. v. Abbey*, 2017 ONCA 640 (No 2) the Minister says she did not correctly apply it. If she had, the Minister submits the following conclusions on admissibility would have been reached:

a. Evidence establishing the presence or absence of cocaine metabolite in a respondent's urine is logically relevant to: (1) is there a substantial risk of physical harm as alleged; and (2) should R.R.'s access be supervised?

b. The evidence could come from any of a clinical, analytical or forensic expert; clinical expertise is not "irrelevant" to the material issue, as the judge held;

c. Clinical toxicology is weak on continuity of evidence and sample security, and it allows the toxicologist to use screening without confirmatory testing;

d. That is all the evidence says here, and the distinction is not important in this case: forensic procedures were followed by the QE II Lab; if clinical methods had been used, that fact alone goes to weight not admissibility, the Minister would submit;

e. The evidence is necessary to assist the trier of fact, as only a Medical Biochemist can explain how to identify the presence or absence of a metabolite in urine;

f. The evidence is not subject to any other exclusionary rule; the Minister submits great care was taken in the preparation of Doctor Nassar's Report to avoid this;

g. Doctor Nassar is clearly personally qualified to give the evidence, and his laboratory tests between 4,500 to 5,000 samples each year for drugs of abuse;

h. The Respondent has not met his burden to displace, with evidence, Doctor Nassar's willingness to provide impartial, independent and unbiased evidence;

i. The science is clearly not novel, contested or used here for a novel purpose.

[44] I agree with these submissions.

[45] No other expert evidence was tendered in this case. No expert questioned Dr. Nassar's qualifications, his testing procedure, the evidentiary integrity of that procedure or the results obtained.

[46] The second stage of the *Abbey (No 2)* analysis obliged the judge, in her gatekeeper role, to determine whether the benefits of admitting the evidence were outweighed by the potential risks of doing so. This requires a consideration of legal relevance, necessity, reliability and absence of bias. The decision makes no mention of relevance or necessity and incorrectly applies the impartiality criteria. The decision says nothing about the benefits of admitting the evidence. These are clear errors in principle.

[47] The judge was obliged to weigh the costs and benefits, prejudice and value, risk and gain. No such weighing occurred.

[48] The judge raised three other concerns about the QEII lab. First, she questioned the value of external quality control testing by the College of American Pathologists, adding that such testing revealed "errors" made by the lab. Second, she faulted Dr. Nassar for not "recently" investigating the status of international standards, including whether they had been modified. Third, she said that Dr. Nassar "admitted that … [the] lab adapted certain standards to suit the needs of the lab based on volume and type of work that the lab performs". Having made such adaptions, Dr. Nassar was "not in a position to objectively and independently determine if such adaptations meet international standards".

[49] Before addressing these generalized concerns, it must be noted that neither cross-examination nor the judge's decision identified any "international" or other standards that the QEII lab was not meeting, nor was any question raised by cross-examination or the judge's interventions about the accuracy of the cocaine metabolite testing in this case that revealed six positive tests indicative of cocaine use by R.R.

[50] Returning to the judge's first concern about the survey testing of the College of American Pathologists, on no occasion did the QEII lab record a "false positive"; that is, reporting the presence of a substance not actually present in the College's sample. On no occasion did the QEII lab err with respect to the presence of cocaine metabolite, although in one instance, in 2016, the lab recorded a greater quantity than was present, owing to a calibration error that resulted from an

independent comparator sample used to calibrate the equipment. New comparator stock was used and equipment recalibration produced results in the appropriate range. More pertinently, testing in the second quarter of 2017—when R.R.'s tests were done—obtained a perfect score of 100% as compared to 127 labs surveyed.

[51] With respect to compliance with international standards, those standards were entered as exhibits. During cross-examination, Dr. Nassar said he had last checked for any changes "a couple of years ago". There was no evidence of material changes to these standards or non-compliance with them by the QEII lab.

[52] Regarding any modifications to the QEII lab made to international standards—Dr. Nassar testified that standards can be generic and have different purposes, not all of which are consonant with the work done by the QEII lab. For example, some labs have a much higher volume of testing; others—like the Dynacare lab in Ontario, applying SAMHSA standards, may test truck drivers crossing into the U.S. for drug use. Some test athletes for use of banned substances. Some guidelines apply to post-mortem toxicology. Crucially, no material change from standards applicable in this case was revealed by cross-examination, review of the standards in evidence, nor noted by the judge in her findings.

[53] Finally, the judge's comment that Dr. Nassar's Directorship of the lab precluded his offering the foregoing evidence, is an impartiality question, previously addressed (¶ 27 above). Dr. Nassar was able and entitled to give this evidence.

[54] With respect to the benefits of drug testing in this case, the Minister made the following apposite submissions:

> 209. Regarding the benefits of admitting the evidence, the Minister notes the following:
>
> a. Very early in the proceeding, the hearing judge stated why the use by parents of substances of abuse is a child protection concern; The Minister agrees;
>
> b. As well, a child may be present during sample collection, and the absence of concern in the child's observed environment is helpful evidence for the parent;
>
> c. The collection nurse said here she does a visual inspection for drug paraphernalia or liquor bottles, when randomly appearing at a home to collect urine samples;

d. Sample collection may occur early in the morning, into the evening, on a Saturday or Sunday, or on a holiday when the Agency office is closed;

e. In short, random drug testing offers impartial "eyes" outside of working hours; the Bayshore Notes document what is seen, then admissible as business records;

f. Allegations and counter-allegations of substance abuse by estranged parents may be "tested" by both parents being tested, the allegations being treated equally;

g. This is a benefit in testing for each parent in this case, if they are not "using";

h. The legislation places an emphasis on acceptance of supportive services;

i. Cooperation with drug testing is helpful evidence for parents if there is a trial;

j. Drug testing permitted the Minister to act promptly and move R. to a kinship placement, when J.M. was positive in testing prior to May 31, 2017;

k. R.R. surely applauded that decision, made because of urine test results;

l. It also allowed the Minister to recommend the return of the child to J.M. at the Disposition Hearing, after receiving eighteen consecutive clean drug tests;

m. R.R. may not have agreed with this decision, but the Minister stated she was prepared to remove supervision for R.'s access, with clean tests.

[55] J.M. agrees with these submissions. R.R. does not say the judge performed a gatekeeper analysis, but counters in his factum that the judge did not have to do that because she had already decided that Dr. Nassar was not impartial. This implicitly concedes that the judge erred in law by failing to do a gatekeeper analysis. It is plain from the factors described in the Minister's above-quoted submission that a benefit-risks analysis favoured admission of the test results in this case.

[56] I would grant leave, allow the appeal and order that R.R.'s positive drug test results be entered as evidence to be considered on the merits in the child protection proceeding.

[57] I would order no costs.

Bryson, J.A.

Concurred in:

Farrar, J.A.

Derrick, J.A.