COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308

Date: 20170831
Docket: CA43000; CA43392

Docket: CA43000

Between:

J.P. and as Litigation Guardian for BT.G., K.G., BN.G., and P.G.

Respondents
(Plaintiffs)

And

The Director of Child, Family and Community Services and Her Majesty the Queen in Right of the Province of British Columbia

Appellants
(Defendants)

And

B.G.

Respondent
(Third Party)

And

William Strickland

Respondent

- and -

Docket: CA43392

Between:

J.P.

Respondent
(Plaintiff)

And

B.G.

Appellant
(Defendant)

SEALED FILE

Restriction on publication: Order sealing court records (with the exception of the factums) in effect and ban on publication of the names of the respondents (with the exception of Mr. Strickland) pursuant to the order of Chief Justice Bauman made 14 November 2016.

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Fitch

On appeal from: Orders of the Supreme Court of British Columbia, dated July 14, 2015 and June 25, 2012
(*J.P. v. British Columbia (Children and Family Development)*, 2015 BCSC 1216, Vancouver Docket No. S118923)
(*J.P. v. B.G.*, 2012 BCSC 938, Vancouver Docket No. E093361)

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Place and Date of Hearing:	Vancouver, British Columbia November 14–18, 2016
Place and Date of Judgment:	Vancouver, British Columbia August 31, 2017

Written Reasons by:
The Honourable Madam Justice D. Smith

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Fitch

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Summary:

Two separate but interconnected appeals involve three proceedings: (i) a family proceeding commenced by the respondent mother against the appellant father for a divorce, corollary relief and division of property under the Family Relations Act; (ii) a child protection proceeding under the Child, Family and Community Service Act by the Director of Child, Family and Community Services relating to the removal of the parties' four children from the mother's presumptive custody following the parties' separation; and (iii) a civil proceeding by the mother against the Director and her employer, the Province, for misfeasance in public office, breach of fiduciary duty and negligence relating to decisions by the Director and her delegates with respect to the parties' children. Common to all three proceedings was the mother's allegation that the father had sexually abused all four children, which he denied. The proceedings are interconnected because the same judge heard all three, joined the child protection proceeding from the Provincial Court with the family proceeding (the former was abandoned mid-trial) and seized himself of the civil proceeding. The civil proceeding was subject to an order that rolled most of the evidence and rulings from the joint trial, including findings of credibility in favour of the mother and adverse to the father into the civil proceeding. The advance determination of these issues prejudiced the Director and father in their defence of the tort claims. During the joint trial, the mother had advanced allegations of bad faith by Ministry social workers. The Director did not respond to those allegations as they were irrelevant to the CFCSA proceeding. In the family proceeding, the judge found: (i) the father had sexually abused the three older children; (ii) the father had physically abused the mother and three older children; and (iii) the mother was not mentally unstable as alleged by the father. In the civil proceeding, the judge found a non-party social worker had committed misfeasance in public office for which the Director was vicariously liable, the Director had breached her fiduciary duty to the children after their removal, and the Director was negligent in her decisions regarding the children. On appeal, the father applied to adduce fresh evidence that one of the mother's "expert" witnesses called on the joint trial misrepresented her qualifications and credentials and ought not to have been permitted to give opinion evidence going to the central issue of whether the father sexually abused the children. Held: Application to adduce fresh evidence on appeal granted. The fresh evidence demonstrated that the witness misled the Court by misrepresenting her credentials and qualifications to give expert evidence. The Palmer criteria were met. In addition, the fraud perpetrated on the court went to the integrity of the judicial process and caused a miscarriage of justice. Appeal of order from the family proceeding allowed, order set aside and new trial ordered; appeal of order from the civil proceeding allowed, order set aside and proceeding dismissed. In the family trial, the judge erred in law in admitting opinion evidence that did not meet the requirements of threshold admissibility, and erred in his treatment of that evidence. The opinion evidence improperly admitted was heavily relied on by the judge and its admission and use led to an unfair trial and a miscarriage of justice. The impact of these errors coupled with the admission of inadmissible expert evidence, carried over to the civil proceeding because of the decision to roll most of the evidence from the joint trial into the civil trial. The decision to do so created significant procedural and

substantive unfairness. The judge's finding on the civil trial that the father had sexually abused the youngest child was tainted as the expert opinion he relied on to make that finding relied, in turn, on the judge's finding in the family proceeding that the father had sexually abused the three older children. The finding of misfeasance in public office against the non-party social worker was also the product of procedural unfairness and, in any event, along with the other tort claims must be dismissed because there was no evidence to support the judge's findings upon which they rested.

Reasons for Judgment of the Honourable Madam Justice D. Smith

I. General Overview

[1] The two appeals before us are from final orders made in separate but interconnected actions. They arise in the context of a family proceeding, a child protection proceeding that was joined with the family proceeding but abandoned mid-trial, and a civil proceeding.

[2] The three proceedings are connected by a common factual background and a common evidentiary foundation in that the evidence and rulings from the family proceeding were largely rolled into the civil proceeding. The judge assigned to case manage the family law matter eventually seized himself of all three proceedings.

[3] The appeals were heard over five days at a single hearing. They raise important common issues relating to procedural fairness, the judge's gatekeeper role with respect to expert evidence, the tort of misfeasance in public office and, ultimately, trial fairness.

[4] In these circumstances, a single set of reasons is necessary for both appeals.

A. The Family Proceeding

[5] The first appeal is from a final order in a family proceeding between J.P. (the mother) and B.G. (the father). The parties are the parents of four children: BT.G., K.G., BN.G. and P.G. The mother commenced the proceeding after an incident in which the father allegedly assaulted the mother. The incident led to the father's arrest, removal from the family home and release on his own recognizance, subject to several conditions. One of those conditions prohibited him from having any

contact with the mother and the children. After his release, the mother commenced the underlying action for a divorce and corollary relief under the *Divorce Act,* R.S.C. 1985, c. 3 and the former *Family Relations Act,* R.S.B.C. 1996, c. 128 (the "*FRA*"). In the family proceeding, she also obtained an interim without-notice order restraining the father from having any contact with her and the children.

[6] The central issues in the family proceeding were custody and guardianship of the children. The mother alleged that the father had physically assaulted her and the older children and had sexually abused all the children. The father denied the sexual abuse allegations and maintained throughout the proceedings that they were driven by the mother's mental instability and mental health issues. He admitted that he had inappropriately disciplined the children, but also alleged that both he and the mother were physically abusive toward one another during heated arguments. Prior to the assault allegation that triggered the litigation, each party had complained to the police or the Ministry of Children and Family Development (the "Ministry") about the conduct of the other.

[7] After the incident leading to the father's arrest, the parties' conflicting allegations escalated in intensity. The Vancouver Police Department (the "VPD"), the Director of Child, Family and Community Services (the "Director"), social workers with the Ministry, and in particular, Mr. William Strickland, Mr. Jeff Tymkow, Ms. Xeni Pop and Ms. Rosalie Caffrey, all became involved in the family's crisis.

[8] Mr. Strickland allowed Detective Rowley of the VPD to lead the investigation into the mother's allegations of assault and sexual abuse of the children. The VPD concluded that there was insufficient evidence to pursue criminal charges against the father and closed the file. After consulting with Det. Rowley, Ms. Caffrey and Ms. Sheila Robinson, the Deputy Director, Mr. Strickland decided to remove the children from the mother's care pursuant to s. 17 of the *Child, Family and Community Service Act,* R.S.B.C. 1996, c. 46 (the "*CFCSA*").

[9] After their removal, during a case management conference, the mother advised the judge in the family proceeding that she had made audio and video

recordings of the two older children disclosing the father's sexual abuse. She also complained that Mr. Strickland and the Ministry social workers were not taking her allegations of physical and sexual abuse seriously. Thereafter, the judge became interested in the Provincial Court *CFCSA* proceeding. On his own initiative, he proposed to join the *CFCSA* proceeding with the family proceeding. Counsel for the Director expressed her concern about the proposed order; however, the proceedings were eventually joined by consent and the judge seized himself of the matters. In the joint trial, the judge sat as a Provincial Court judge in the *CFCSA* proceeding and as a Supreme Court judge in the family proceeding.

[10] The joint trial commenced on October 17, 2011. Mid-trial, on February 20, 2012, the judge granted the parties a divorce. On March 29, 2012, the Director abandoned the *CFCSA* proceeding. The remaining family trial concluded on June 25, 2012, after 91 days, with reasons for judgment of 137 pages.

[11] On December 29, 2011, before the Director had abandoned the *CFCSA* proceeding, the mother filed the Notice of Civil Claim in the civil proceeding against the Province of British Columbia (the "Province") and the Director. On April 17, 2012, two days before the close of evidence in the family trial, but after the *CFCSA* proceeding was abandoned, the judge heard the mother's application to have the civil and family proceedings joined. In her application, the mother also asked the judge to seize himself of that proposed joined proceeding. Counsel for the Director/Province vigorously opposed both aspects of the application. The judge dismissed the application to join the proceedings but agreed to seize himself of the civil proceeding.

[12] During the joint family and *CFCSA* trial, the judge admitted expert opinion evidence from Ms. Claire Reeves. The mother discovered Ms. Reeves on the Internet and retained her directly to provide an opinion on the *indicia* of child sexual abuse and, in particular, an opinion as to whether the father had sexually abused the children. In seeking to tender Ms. Reeves' report, counsel for the mother said, "[m]y

client feels strongly that -- that it should go in" and "we think it would -- it would assist the court".

[13] The Director and the father objected to the admissibility of Ms. Reeves' report on the following grounds: non-compliance with the *Supreme Court Family Rules*, B.C. Reg. 169/2009 ("the SCFR"), including inadequate notice as the report was produced after the trial had started; concerns about her qualifications, given informational gaps in her *curriculum vitae* relating to her education and employment history; concerns about the reliability and necessity of her evidence, particularly given that she had not interviewed the mother, father, or any of the children; concerns about Ms. Reeves' objectivity and impartiality, given her long-standing advocacy work for a non-profit organization called Mothers Against Sexual Abuse ("MASA"); concerns about whether Ms. Reeves was qualified to give some of the opinions expressed in her report; and concerns about whether the proposed evidence was necessary and sufficiently reliable to be admitted. Counsel for the Director also attempted to articulate what I consider to be a concern that evidence of the sort proposed to be given by Ms. Reeves needed to be carefully scrutinized at the gatekeeping stage given that it approached the ultimate issue in the family proceeding—whether the father had sexually abused his children.

[14] Nevertheless, the judge admitted Ms. Reeves' late report on the following conditions: the certification required by Rule 13-2 of the *SCFR* would be supplied by the witness; the instructions she was given and the questions she was asked to consider would be provided to counsel for the Director and B.G. forthwith; and, that a final ruling regarding her qualifications to give opinion evidence in the areas addressed in her report would be made following the qualifications *voir dire*. In his interim ruling the judge said this:

> In submissions, the Director said that a considerable amount, if not all of her report, contains argument. While it may be said that some of the opinions in the report could possibly be seen as argument, the report also contains opinions discussing incidences of recanting, behaviour surrounding it, and statistics concerning it. I am going to leave it open to the parties to make submissions during closing argument concerning the weight, if any, that should be given to any or all of the opinions contained in the report, including

> submissions concerning purported advocacy or argument in the guise of evidence.
>
> ...
>
> I am therefore allowing [counsel for the Director] to cross-examine Dr. Reeves on her qualifications. If [counsel] wants to then make submissions that an opinion Dr. Reeves has expressed on a certain page is something she is not qualified to state, then that is her right to do so. She is a clinical psychologist. She has a PhD in counselling and says she has been qualified to give evidence in other courts, but nevertheless, [counsel for the Director] may argue that some of the opinions Dr. Reeves expressed are things about which she is not qualified to give.
>
> [Emphasis added.]

[15] Following the qualifications *voir dire*, which I will discuss in greater detail below, counsel for the Director noted that "certain rulings" had already been made and that while she was taking no position on whether Ms. Reeves should or should not be qualified because of her experience or training, she reiterated the position that Ms. Reeves' report should not be admitted as it went to the ultimate issue the court was being asked to decide. The father, who was unrepresented at the time, advised the court that, "I certainly would take issue with what she has identified as her qualifications and her coursework and her expertise and how that pertains to the case at hand, but that...I can address in cross-examination". Ms. Reeves was then qualified to give expert evidence regarding child sexual abuse, including incest.

[16] The mother's counsel never inquired into or confirmed Ms. Reeves' qualifications. Fresh evidence applications in both appeals allege that Ms. Reeves was not qualified to give opinion evidence and, in fact, fraudulently mispresented her credentials and expertise.

[17] Ms. Reeves opined that the children's behaviour, as reported by the mother and demonstrated in the audio and videotaped disclosures, was "sexualized". She opined that their sexualized behaviour was indicative of child sexual abuse and that the father was the one who had sexually abused them. The judge relied heavily on her evidence in both the family proceeding and, as a result of an agreement between the mother and the Director/Province which I shall explain below, in the civil proceeding.

[18] At the conclusion of the family trial, the judge made a number of findings, including that: (1) the mother was a credible witness whose evidence should be preferred where it conflicted with the father's; (2) the mother was not mentally unstable and did not have any mental health issues; (3) the father had physically abused the mother and the three older children; and (4) the father had sexually abused the three older children.

[19] In the result, he awarded the mother: (1) sole custody and guardianship of the children; (2) a permanent order prohibiting the father from having any access, direct or indirect, to the children; and (3) a permanent order restraining the father from having any contact with the mother and the children, with a police protection clause. Reasons for judgment are indexed as *J.P. v. B.G.,* 2012 BCSC 938.

[20] The mother applied for special costs in the family proceeding. The judge did not address her costs application until he issued his reasons for judgment in the civil proceeding some three years later. In those reasons, indexed as *J.P. v. British Columbia (Children and Family Development),* 2015 BCSC 1216, he awarded the mother special costs for the part of the joint trial that related to the abandoned *CFCSA* proceeding, with the percentage allocation of those costs to be determined at a subsequent hearing. His reasons did not address the jurisdictional basis for this award. Neither the *CFCSA* nor the *Provincial Court (Child, Family and Community Service Act) Rules,* B.C. Reg. 533/95, include provisions for a costs award.

B. The Civil Proceeding

[21] The second appeal is from the final order in the civil proceeding between the mother, on her own behalf and on behalf of the children as their litigation guardian, and the Director/Province. The civil trial began on April 8, 2013. It was heard over 146 days and concluded on July 14, 2015, with reasons for judgment of 341 pages.

[22] In the civil proceeding, the mother initially applied for damages against the Province for negligence, breach of fiduciary duty and a declaration that the Director had acted in bad faith toward her. Misfeasance in public office was not pleaded until after the close of final submissions when the insufficiency of the pleadings on that

claim was brought to the mother's attention by the judge. Although the mother had alleged bad faith throughout the proceedings, the specific claim of misfeasance in public office was only properly pleaded for the first time in the Further Amended Notice of Civil Claim, which was filed four days before the reasons for judgment in the civil trial were issued.

[23] In the Further Amended Notice of Civil Claim, she alleged that the Director and the Province: (1) intentionally and in bad faith failed to meet their statutory, common law and fiduciary duties to the children; (2) were motivated by an *animus* toward her in making child protection decisions; (3) improperly interfered with the police investigation; (4) failed to properly investigate her sexual abuse allegations and the father's counter allegations about her mental instability; (5) improperly assisted the father in the custody and access dispute; (6) intentionally, with their legal counsel, breached court orders to secure improper aims; (7) intentionally gave false and misleading information to the Provincial Court following the removal of the children; (8) intentionally misled the judge during the family trial about the Provincial Court process and orders; (9) failed to monitor the father's access to the children before they were interviewed by Mr. Colby (the court-appointed expert); and (10) gave extensive false and misleading information to Dr. Eirikson (a psychologist retained by the Director to prepare a parental capacity assessment of the parents).

[24] Although Mr. Strickland was not a named party in the civil proceeding, it became evident during the trial that he was the principal target of the mother's bad faith allegations against the Ministry, which formed the basis of what she eventually pleaded as misfeasance in public office. The judge found that Mr. Strickland had: (1) "ill will" toward the mother; (2) intentionally reported misinformation to the VPD while it was investigating the sexual abuse allegations; and (3) predisposed other Ministry staff against the mother. The judge also found that the father had sexually abused P.G., the youngest daughter, while she was in the Director's care and while the father was exercising unsupervised access at the discretion of the Director. As a result, the judge held the Province liable for the father's tortious actions in relation to her.

[25] In the final order, the judge dismissed the mother's personal claim of negligence against the Director and the Province, but found the Province liable to the mother, on behalf of the children, for the Director's actions, and the actions of her delegates, in negligence, for breach of fiduciary duty, and for misfeasance in public office.

[26] Liability was based on the judge's finding that Mr. Strickland intentionally chose not to discharge his statutory duties under the *CFCSA,* to ensure the safety and well-being of the children and to act in their best interests, because of his *animus* toward the mother. In particular, he found that Mr. Strickland had a closed mind about the sexual abuse allegations and that he removed the children based on his antipathy toward the mother. The judge also ordered damages for the tortious conduct, beyond nominal damages, to be assessed at a later date.

[27] Mr. Strickland testified in the trial for the Director/Province. Given that misfeasance in public office was not pleaded until after final submissions were made in the civil trial, and given that he was not a named party in the proceeding, Mr. Strickland was unaware that his actions formed the basis for the mother's claim against the Director/Province. Even after misfeasance in public office was pleaded, Mr. Strickland was not named in the pleadings, and no particulars were provided as to his specific conduct that allegedly gave rise to the claim.

[28] The final order made no reference to the father's liability as a third party.

[29] The judge awarded the mother special costs of the civil proceeding for ten aspects of the Director's conduct. Those special costs were to be determined at a subsequent hearing, or third trial on causation issues relating to some outstanding "minor" negligence claims.

II. Procedural Overview

A. The Family and *CFCSA* Proceedings

[30] The initial Supreme Court family proceeding was focused on determining custody and guardianship of the four children as between the parties. The Provincial Court *CFCSA* proceeding was initiated after the children were removed from the mother and placed in the Director's care. The mother's allegations of bad faith first arose during a case management conference in the family proceeding. She alleged that the Director and the Ministry social workers had acted in bad faith based on an *animus* toward her in their investigation of the sexual abuse allegations, and that they conspired with the VPD and others in the Ministry to discredit her allegations. The judge, on his own initiative, asked counsel for their positions on whether he could sit as a Provincial Court judge and take control of both the *CFCSA* and the family proceedings.

[31] Counsel for the Director initially opposed the joinder of the proceedings. She advised the judge that the Ministry was still investigating the parties' conflicting allegations and that the Director had not yet decided whether to return the children to one or the other of the parents. The Director also required time to prepare for the temporary custody application in Provincial Court and submitted that if the proceedings were joined, she would require an adjournment of the family trial.

[32] On October 8, 2010, however, an order was made joining the Provincial Court *CFCSA* proceeding with the Supreme Court family proceeding. Thereafter, on the mother's application, the judge seized himself of the joint trial, sitting as a Provincial Court judge in the former and as a Supreme Court judge in the latter.

[33] The judge also ordered that a s. 15 *FRA* report be prepared by a court-appointed expert. At the mother's request, Robert Colby, registered psychologist, was appointed. The order provided that: (1) "Dr. Colby is not to take instructions from any of the parties or the Ministry"; (2) "[i]f evidence comes into the hands of the Ministry that raises issues of concern for any interviews of the Children that Dr. Colby may wish to conduct, the Ministry may apply to the Court for directions

upon proper notice to the parties and Dr. Colby"; and (3) "Dr. Colby is not to be provided with a copy of Dr. Eirikson's report itself but only the documents referred to therein."

[34] Ms. Pop, the Ministry social worker assigned to the family at the time, became concerned about the mother's conduct during access visits with the children and, in particular, with the safety and well-being of the children. The mother had exhibited highly unusual behaviour with a number of individuals and during some supervised access visits. As a result, Ms. Pop, and counsel for the Director in the *CFCSA* proceeding, communicated those concerns to Mr. Colby, as well as their concern about the potential harm of repeatedly interviewing the children. Nothing came of their concerns, as Mr. Colby advised them that the children's interviews were essential for his assessment.

[35] The judge viewed these communications as a violation of the s. 15 *FRA* order. He rejected Ms. Pop's and counsel's explanations and found that the purpose of the communication was to dissuade Mr. Colby from interviewing the children and to communicate adverse views about the mother. He advised counsel for the Director that she should consider the implications of her actions overnight. The next day, after consulting with senior counsel, counsel for the Director advised the judge she felt compelled to withdraw as counsel. The judge stated that she had "misunderstood what [he] said" and that he did not "impugn [her] conduct", but she felt ethically bound to withdraw.

[36] On March 29, 2012, new counsel for the Director advised the judge that the Director was abandoning the *CFCSA* proceeding, withdrawing from the joint trial, and would be returning the children to the mother as the parent entitled to presumptive custody of them. This left the issue of the children's custody and guardianship, interim and final, as well as access by the non-custodial parent, to the sole determination of the judge.

B. The Civil Proceeding

[37] The mother's claim against the Director/Province was commenced on December 29, 2011. On April 17, 2012, after the Director abandoned the *CFCSA* proceeding, the mother applied to have the family and civil proceedings joined. She asked to have the civil proceeding stand as a "counterclaim" in the family proceeding and, in the alternative, asked that the judge seize himself of the civil proceeding. She also asked that the evidence and findings of fact in the family trial stand as evidence and findings of fact in the "counterclaim" civil trial. Counsel for the mother characterized the family trial as "Phase 1" and the civil trial as the "counterclaim" or "Phase 2". During his exchanges with counsel on the application, the judge adopted this terminology and appears to have maintained this view of the proceedings throughout the civil proceeding.

[38] The Director and Province strongly opposed the application and, in particular, transferring the evidentiary record of the family trial into the evidentiary record of the civil trial. Counsel for the Director/Province took the position that the issues in each proceeding were substantially different. Counsel underscored that the Director had initiated the *CFCSA* proceeding in the exercise of her statutory duties to ensure the safety and well-being of the children and that her interest in the *CFCSA* proceeding was solely for the protection of the children. As such, counsel for the Director informed the judge that she had not responded to any allegations of bad faith advanced by the mother in the joint family trial as they were not material to the issues in the *CFCSA* proceeding or the Director's statutory mandate under that legislation.

[39] In contrast, counsel for the Director/Province in the civil proceeding submitted that the Director was involved to defend against the mother's common law claims of negligence, breach of fiduciary duty and what would later be framed as a claim of misfeasance in public office. In opposing the mother's application, the Director/Province focused on the potential conflict created by the proposed joinder in the context of the Director's markedly different interests in each of the proceedings.

[40] Counsel for the mother submitted that judicial economy, procedural fairness, and the necessity of avoiding prejudicial delay for the children required joinder of the proceedings as "the logical and equitable resolution" to the application.

[41] When the judge inquired if it was open to him to make findings about Mr. Strickland's conduct in the family trial but not find malice or bad faith because he had not yet heard from Mr. Strickland, counsel for the mother cautioned him against doing so at "Phase 1" because malice and bad faith would be best decided in the "counterclaim" or "Phase 2". He stated that an appellate court might find that he had pre-judged the claim against the Director/Province if he made such findings in the family trial. Counsel for the mother suggested instead that the judge order the evidence and findings of fact from "Phase 1" to be deemed evidence and findings of fact in "Phase 2" because he was presiding over both trials.

[42] Counsel for the Director/Province objected to the terminology "Phase 1" for the family trial and "counterclaim" or "Phase 2" for the civil trial. She submitted that the terminology was misleading because neither the Director nor the Province was a plaintiff in the civil proceeding. She maintained that the family and civil proceedings involved two separate actions, each with discrete and different issues, and that joining them would not serve the interests of justice. She underscored that the potential for prejudice to the defendants was significant and expressed concern that the bad faith claim against the Director, as stated in the Notice of Civil Claim, had "morphed" into the family trial, which she submitted, had occurred because the family trial had been joined with the *CFCSA* proceeding. She posited that the evidence in the *CFCSA* proceeding should not be considered in the civil proceeding because the Director, a defendant in the civil proceeding only, would be responding only to the mother's evidence tendered in the civil trial. She further underscored that it would be inappropriate for the judge to make findings of bad faith in the family trial given the irrelevance of the issue to the custody dispute.

[43] The judge then asked counsel if it would be appropriate for him to find in the family trial that Mr. Strickland had acted with "inappropriate motivation". Again,

counsel for the Director/Province insisted that such a finding in the family trial would not be binding in the civil trial as it would be procedurally unfair to foreclose the Director/Province from making a full defence to the claims. In response, the judge likened the Director/Province's position to leading one defence in one proceeding, and a different, inconsistent defence in another. He asked counsel for the Director/Province for submissions on whether he might have to recuse himself from the civil trial based on a perception of bias. Counsel responded that, in her opinion, if the trial judge made a finding of bad faith against the Director in the family trial, it would be "difficult" for the judge to remain seized of the civil trial because there would be a perception of bias, if not a reasonable apprehension of bias.

[44] Throughout her submissions, counsel for the Director/Province insisted that the defendants reserved their right to respond to anything relating to the bad faith claim and repeatedly flagged her concern about the difference between cross-examination as part of the Director's mandate to ensure the best interests of the children, and cross-examination for the purpose of defending against the mother's common law claims.

[45] At the conclusion of these lengthy submissions, however, counsel for the Director/Province reluctantly agreed to the following order: (1) the judge would be seized with the civil proceeding; (2) his findings of fact in the family trial with respect to the veracity of the mother's sexual abuse allegations, the risk the father posed to the children, and the mother's mental health, would stand as findings of fact in the civil trial; and (3) the evidence in the family trial that the mother intended to rely on to prove the civil claims would stand as evidence in the civil trial, provided the mother's counsel gave notice of that evidence to the Province by a certain date (the "Agreement").

[46] On May 14, 2012, counsel for the mother gave notice that she would be relying on all of the evidence in the family trial for the civil trial except for those issues relating to the parties' financial matters. This included the mother's evidence of bad faith by Mr. Strickland in the *CFCSA* proceeding, which had not been

challenged by the Director because it was irrelevant in the context of that proceeding.

[47] During the hearing of the appeals, the division was advised that the mother was represented by counsel provided by the Province. The father was self-represented. During the joint trial, he was assisted by counsel for the Director until the Director withdrew and the *CFCSA* proceeding was abandoned. The father did not participate in the aforementioned submissions and was not a party to the Agreement.

[48] During the remainder of the family trial, after the *CFCSA* proceeding was abandoned, the judge periodically referred to the bad faith issue, as if there was a free-standing "bad faith" claim against the Director/Province – a non-party in the family trial.

[49] In advance of the civil trial, the father applied to have the judge recuse himself in view of the very serious adverse findings against him in the family trial but the judge dismissed his application.

[50] At a case management hearing for the civil trial on November 14, 2012, in the father's absence, the judge stated that the father could participate in the civil trial to the extent that he could "try and convince [the judge]" that he had not sexually abused P.G." The judge also granted the father access to expert reports tendered on that issue, stating that it was a matter of "procedural fairness so he can show up if he wants to try and defend that allegation." Also during that conference, there was an exchange between the judge and the mother's counsel over whether the father should have access to a video of P.G. masturbating that was included in the expert's report. The judge stated: "Why should it be given to [the father] if he can then show it all over the community?"

[51] The civil trial commenced on April 8, 2013. The father testified as a witness for the Director/Province. He acted on his own behalf without the benefit of counsel because, he said, he had no income and he could not obtain legal aid or a *pro bono*

counsel due to the nature and complexity of the proceedings. Therefore, he participated in the civil trial only intermittently and made no closing submissions in the face of: (1) adverse findings of fact in the family trial that he had sexually abused his three older children; (2) an Agreement, to which he was not a party, that precluded him from challenging those findings and the positive finding of the mother's credibility in the civil trial; and (3) the dismissal of his application to have the judge recuse himself from the civil trial. Nor did the father challenge the evidence of the mother's expert, Dr. Hervé, who relied in large part on the judge's finding that he had sexually abused the three older children, to conclude that the father had also sexually abused P.G.

[52] During the civil trial, the Director/Province expressed concerns about deficiencies in the Amended Notice of Civil Claim, including the mother's failure to name the individuals who were the subject of her allegations and, in particular, her failure to name Mr. Strickland as a defendant given that he appeared to be the principal focus of what would become her claim of misfeasance in public office.

[53] On November 12, 2014, long after the close of evidence on January 15, 2014, long after the close of the mother's submissions on May 7, 2014, and long after the close of the Director/Province's submissions on October 20, 2014, the judge issued a memorandum to counsel asking them to address the state of the pleadings in light of the Director/Province's submission in closing argument that the misfeasance in public office claim, which required that the alleged unlawful conduct be intentional, was not specifically pleaded in the Amended Notice of Civil Claim.

[54] The original December 29, 2011 Notice of Civil Claim had simply requested a declaration that the Director had acted in bad faith toward the mother and in breach of her statutory duties. The November 14, 2012 Amended Notice of Civil Claim pleaded the negligence and breach of fiduciary duty claims more specifically but did not address the underlying bad faith claim. Therefore, on December 9, 2014, the mother applied for leave to add the word "intentional" to the pleadings and to allege

that "the Director acted with a level of intent which amounts to misfeasance in public office". The judge granted the application.

[55] The order granting the amendment was not filed until July 3, 2015. As noted earlier, the Further Amended Notice of Civil Claim was not filed until July 10, 2015, four days before the judge issued his reasons for judgment. However, the new amended pleading still did not name Mr. Strickland as a party. The addition of the word "intentional" was tied to a list of 31 alleged wrongful acts and omissions, but the further amended pleading provided no additional clarity as to which allegations were leveled against which Ministry personnel. Any responses would, in any event, have been too late as the parties had closed their cases.

[56] The final order in the civil proceeding, entered on April 1, 2016, did not determine all the claims in negligence. The judge had determined most of the claims in favour of the mother on behalf of the children; however, four "minor" ones remained outstanding on issues of causation. In his reasons for judgment, the judge stated that, with respect to the four outstanding negligence claims, "the Province has agreed that they may seek to prove causation at the next [damages] trial" (at para. 1048). The judge declined to sign the draft final order reflecting this agreement. Instead, he endorsed the following provision:

> The claims of the [children] against the Province in respect of their claim of negligence of the Director of [Child] Protection and her delegates will be determined when damages are assessed.
>
> ("Term 2")

[57] The difficulty created by Term 2 is that s. 6(1) of the *Court of Appeal Act,* R.S.B.C. 1996, c. 77, gives this Court jurisdiction to hear an appeal only from "an order of the Supreme Court or an order of a judge of that court". This point was confirmed in *Janis v. Janis,* 2016 BCCA 364, where the Court explained:

> [78] An appeal may only be brought from an order, and not from reasons for judgment: *Knapp v. Faro (Town),* 2010 YKCA 7 (Y.T.C.A.) at para. 6. As noted in *D. (B.) v. British Columbia* (1997), 30 B.C.L.R. (3d) 201 (B.C.C.A.) at paras. 60–63, this Court is a creature of statute and authority must be found in the *Court of Appeal Act* or another enactment conferring jurisdiction...

> [79] As in *D.(B.),* there is no other enactment within the meaning of s. 6(2) involved in this case, and the jurisdiction to entertain the appeal must therefore be found in the order. This ground of appeal is taken from the reasons for judgment, and not from the order…

[58] Initially, the Director/Province did not appeal the judge's decision settling the terms of the order. Instead, the parties drafted a consent order in which the Province/Director waived proof of causation for the four outstanding negligence claims and "unconditionally acknowledge[d] that this waiver of proof of causation results in a finding of negligence against the Province in relation to the Outstanding Liability issues." The judge again declined to sign the draft consent order.

[59] On appeal, counsel for the Director/Province requested that this Court substitute Term 2 of the entered order with one similar to that expressed in the rejected consent order signed by all the parties. This is analogous to the remedy unsuccessfully sought by the appellant in *Law v. Cheng,* 2016 BCCA 120, where the Court held that it had no jurisdiction to entertain an appeal from a recital "just as we have no jurisdiction to entertain an appeal from a finding in reasons for judgment" (at para. 20) noting that it was "not a case in which one party appeals from an order made after a hearing to settle the form of order" (at para. 25).

[60] Appeals are taken from the formal order, as entered, and not from reasons for judgment. Errors found in the reasons for judgment may inform the validity of the order appealed, but in the result, it is the correctness of the order that is the subject of appellate review, not the correctness of the reasons: Sopinka, John & Mark Gelowitz, *The Conduct of an Appeal* (Toronto: Butterworths, 1993) at 4 and 5.

[61] To resolve this conundrum, the division invited counsel to apply for an extension of time to appeal Term 2 of the order settling the terms of the order following trial (the "Settled Order"), to file a Notice of Appeal, and proposed that the appeal be granted by consent on the terms of the previously agreed upon proposed order. Counsel for the Director/Province filed the application as suggested, however, the mother now opposed the proposed disposition, taking the position that it would not be appropriate to have any appeal from the order because: (1) subsequent to the

decision, all parties signed a further proposed consent order; (2) the trial judge had issued a further memorandum on the matter; and (3) no further efforts were made to amend the proposed consent order after that memorandum. Counsel for the mother submitted that the parties should further amend the second version of the proposed consent order and re-submit it to the trial judge for approval.

[62] Pursuant to s. 26 of the *Court of Appeal Act*, the division directed that argument of the extension of time application and appeal of the Settled Order be submitted in writing. In reply to the mother's position, counsel for the Director/Province contended that the mother should not be permitted to argue that the proposed consent order be sent back to the trial judge on the basis that, at all times throughout the appeal proceedings, she had concurred with the Director/Province's position that the proposed consent order should be entered and the appeal proceed as it has at this time. The mother did not file a response to that submission.

[63] I would grant the application for an extension of time to appeal Term 2 of the Settled Order and allow the appeal on the terms set out in the initial draft consent order. Those terms are as follows:

> 1. The infant Plaintiffs BT.G., K.G., BN.G. and P.G shall be deemed to have proven causation in the Liability Action for the [the outstanding negligence claims identified in paras. 1043(c) and 1044-1047 of the civil reasons for judgement] subject to retention by the Province of all its rights to defend against claims for damages beyond the amount that may be assessed as nominal damages.
>
> 2. The scheduling of any trial to assess damages and costs in this action as against the Province, and the Province's third party claim against B.G., shall be adjourned sine die until after such time as any appeals from the Liability Reasons have been heard and determined by the British Columbia Court of Appeal.

Together, the Settled Order and the parties' draft consent order make up the final order in the civil proceeding ("the Final Civil Order").

C. The Appeals

[64] The father appeals the final order in the family proceeding; the Director and the Province appeal the final order in the civil proceeding. In this Court, Madam Justice Bennett was assigned to be the case management judge for both appeals. She made the following three orders.

[65] First, with respect to the appeal of the order in the civil proceeding, Bennett J.A. ordered that the father, who had been added as a third party to the civil proceeding by the Province, be added as a respondent in the civil appeal so that he could challenge the findings of fact and potential liability made against him in the trial, given that he had not been a party to the Agreement. See *J.P. v. British Columbia (Children and Family Development),* 2015 BCCA 480.

[66] Second, she ordered that Mr. Strickland be added as a respondent to the Province's appeal of the order in the civil proceeding, with leave to challenge the findings against him with respect to the claims of misfeasance in public office and breach of fiduciary duty. She found that the judge's finding of serious wrongdoing by Mr. Strickland clearly engaged his interests and held that he should have had the opportunity to fully respond to those allegations given their significant impact on him and his family. Notably, he had received implied threats targeting his family and faced potential negative consequences in his career. See *J.P. v. British Columbia (Children and Family Development),* 2015 BCCA 481.

[67] Third, she granted the father an extension of time and leave to appeal the order in the family proceeding based on his fresh evidence application that challenged the admissibility of the opinion evidence of Ms. Reeves. See *J.P. v. B.G.,* 2016 BCCA 91.

[68] The Province/Director makes a similar fresh evidence application in the civil appeal as the judge's finding that the father sexually abused the children, based largely on Ms. Reeves' evidence at the family trial, became part of the evidentiary record of the civil trial after the Agreement.

[69] The father also applies to adduce fresh evidence about his mental state during the civil trial and the mother applies to adduce fresh evidence of her own. Before addressing these applications, I propose to give an overview of the chronology of the significant events.

III. Chronological Overview

[70] Between June and October 2009, the Ministry received calls from a variety of sources expressing concerns about the safety of the children and about matters between the parents. Mr. Strickland was the head of the intake team of social workers during that period. The intake team addresses immediate and short-term issues with families. It refers longer-term issues and planning decisions to the family services team.

A. Events Leading to the Children's Removal

[71] On October 5, 2009, the mother called 911 alleging that the father had assaulted her and was hurting the children. The father was arrested, removed from the home and released on his own recognizance, subject to several conditions, including a condition that prohibited him from having any contact with the children.

[72] On the same date as the father's arrest, the VPD contacted the Ministry about its investigation. The Ministry had initiated its own investigation after receiving a number of calls from various individuals in the community, some anonymously, including from the Vice-Principal of the children's school and the Mental Health Emergency Services. All were expressing concerns about the mother's mental health and the children's safety. Some concern was also expressed about the father being depressed and taking medication.

[73] On October 20, 2009, Mr. Strickland assigned the intake file to Mr. Tymkow for investigation. Mr. Tymkow was tasked with conducting a home visit and making collateral checks.

[74] On November 10, 2009, Mr. Tymkow attended at the mother's home. He spoke with the mother, the children's nanny and the two older children. No one

raised any concerns about the father sexually abusing the children. Mr. Tymkow also interviewed the father, who reported that the alleged assault began with an argument about finances, when the mother became violent toward him. He said there was no physical violence toward the children.

[75] On November 23, 2009, Mr. Tymkow concluded the first intake investigation, finding that the children were not in need of protection. At the father's request, Mr. Tymkow and Mr. Strickland co-signed a letter addressed "to whom it may concern". The letter stated:

> The Ministry feels that both parents are capable and able to provide a safe environment for their children. Only if the parents decide to reunite or reconcile would the Ministry have concerns regarding the parent's ability to protect from domestic violence.

[76] The mother did not receive a copy of this letter. At trial, Mr. Strickland acknowledged that it was a mistake not to copy the letter to the mother.

[77] On November 28, 2009, the mother called the VPD twice. The first call was to report that she was being harassed by the father's family who had attended one of the children's soccer games. The second call was to report that she suspected the father had sexually abused P.G., the youngest child, in September 2009. She stated that around that time she had noticed that P.G.'s vagina was unusually large, but thought it might be a yeast infection and was too busy with the children to report it to the Ministry. Later, she told Dr. Eirikson and Mr. Colby that she had been suspicious about what she saw, but thought that P.G. might have had a yeast infection and therefore decided to simply monitor it to see if it went back to normal. She said she had planned to ask the nanny about it but forgot to do so.

[78] Two officers attended the mother's home to investigate the sexual abuse complaint. It seemed unusual to them that this allegation had not been raised when they attended the mother's home to arrest the father. The officers reported that, during their meeting, the mother appeared to be more preoccupied with her criminal harassment complaint than her sexual abuse allegation. They said she also presented as disorganized and scattered in her thoughts. The VPD concluded the

mother's allegation of the father's sexual abuse of P.G. was unfounded, but on the same day passed the allegation on to the Ministry to investigate.

[79] On November 30, 2009, the Ministry opened a second intake file. Mr. Tymkow was reassigned to investigate the sexual abuse allegation concerning P.G.

[80] On December 3, 2009, a social worker from the Children's Hospital Child Protection Service Unit ("Children's") contacted Mr. Tymkow to report that the mother had called there several times and was scattered in her speech and difficult to understand. Mr. Tymkow asked Children's to investigate the mother's allegation that P.G. had been sexually abused.

[81] On December 4, 2009, the mother met with Mr. Strickland to discuss her concern about the November 23, 2009 letter, which had come to her attention. It was at this meeting that she first alleged the father had sexually abused all of the children.

[82] On December 6, 2009, the mother advised the VPD that she had made a recording of K.G. in which K.G. had made a statement about the father engaging in sexual activity with her. The police officer who discussed the complaint with the mother described the mother's comments as scattered, but a new investigation was started.

[83] On December 7, 2009, Children's contacted the Ministry to advise that the mother was there presenting as "manic and disorganized" and that they had called security. The Ministry asked Children's to arrange for the children to be examined. Dr. Jain, a pediatrician at Children's, examined the children. She found no evidence of physical or sexual abuse but stated that abuse could not be ruled out. She also discussed her findings with the mother. A social worker at Children's recommended counselling for all four children through the "Children Who Witness Violence Program" as well as counselling for the mother.

[84] On December 7, 2009, Mr. Strickland directed Mr. Tymkow to change the second intake opened on November 30, 2009 to an investigation. On the same day, Mr. Tymkow reported the new allegations of sexual abuse to the VPD and advised that the Ministry was comfortable with the VPD leading the investigation. Thereafter, Mr. Strickland was in regular communication with the VPD. He expressed to them concerns about "possible malicious efforts by the complainant … to make complaints of sex abuse against the children's father", her possible mental health issues and her inconsistent statements.

[85] On the same day, the Ministry issued a second letter addressed "To whom it may concern" stating that it had been involved with the family since October 5, 2009, and that the outcome of the first intake was that "the children were safe in the care of either parent". The letter further stated that after additional reports on November 30, 2009 (the allegations about P.G.), the Ministry felt that the "no go no contact order" in place at the time would ensure the children's safety, while it collected further information about the allegations. Mr. Tymkow informed the father that the Ministry no longer supported visits between him and the children.

[86] On December 14, 2009, Mr. Tymkow described the mother as "hellish" to work with in an email to Mr. Strickland. Mr. Strickland considered this comment unprofessional, unfair and disrespectful. He asked Mr. Tymkow to delete the email.

[87] On December 16, 2009, the mother interviewed the three older children and partially recorded their statements using a hand-held recorder and iPhone. The following day, the mother advised her then lawyer that K.G had told her the father had engaged in sexual activity with her and P.G.

[88] Also on December 16, 2009, the Ministry wrote a third letter addressed "To whom it may concern" stating:

> Currently the Ministry of Child and Family Development has an open investigation on the [family]. At this stage of the investigation the Ministry is in support of [the father] having supervised access to the children.

[89] On December 17, 2009, the father applied before the judge in the family proceeding to vary the restraining order by granting him access to the children. The Director was not a party to that application as there were no protection concerns at that point because the father was prohibited from having any contact with the children. The judge adjourned the application to December 21, 2009, but granted the father supervised access to the children on December 19, 2009. That same evening, the mother left a message on the "After Hours" Helpline, requesting a social worker to contact her in the morning as the children had now made disclosures to her of sexual abuse by the father.

[90] On December 18, 2009, the mother took the two older children to see Dr. Edamura, the family doctor. In the presence of the mother and a friend, Dr. Edamura interviewed the children for 5–10 minutes about the disclosures. Following his interview of the children, Dr. Edamura faxed a letter to Children's asking them to investigate the disclosures as he found them "credible and sincere". At trial, Dr. Edamura testified that he referred the matter to Children's because he had no expertise in the area of child sexual abuse.

[91] On the same day, Mr. Tymkow issued an "Information Alert", which set out the terms of the December 19, 2009 access order and noted that the Ministry had concerns about the mother's mental health.

[92] On December 21, 2009, the mother again interviewed the two older children, this time using the videotape feature on a small camera that could record only up to 15-second intervals. The interviews took place at a "Go Bananas" facility. In response to questions the mother put to them, the children disclosed sexual activity they had had with the father. The mother later advised that she had videotaped the children's disclosures on the advice of her lawyer. Det. Rowley testified that she spoke with the lawyer about that issue as part of her investigation. The mother did not call her former lawyer as a witness or waive solicitor-client privilege to confirm the advice she said she had received from him.

[93] The father's application to vary the earlier restraining order was also heard on December 21, 2009. The mother asked the judge to maintain the no access order based on the children's disclosures in the "Go Bananas" videotaped recordings. In his oral ruling, the judge granted the father access during specified hours with supervision by G.P., the mother's brother. The transcript indicates the supervised access was meant to be on a short term basis and that it would be revisited at the next hearing date on January 11, 2010. This aspect of the judge's oral ruling was not reflected in the entered order. Further, it was unclear if the order meant that the duration of supervised access continued to January 11, 2010, when it would be reviewed, or whether supervision of the access by G.P. was limited to January 11, 2010, when the supervising individual would be reviewed. Either way, the father's access to the children was not revisited on January 11, 2010, as the children were removed on December 30, 2009.

[94] On December 22, 2009, the judge emailed counsel asking them to appear before him on January 5, 2010, to advise him of the status of the VPD investigation.

[95] On December 23, 2009, Det. Rowley interviewed the mother. The mother had brought with her a box of materials that included the videotapes of the two older children's disclosures, a blotter calendar with graphic hand-drawn images of women, photographs of the father kissing the children, Dr. Edamura's letter to Children's and other materials that she viewed as evidence of the father's bad character. The blotter drawings were made by the father about 20 years earlier. The mother left the materials with Det. Rowley, who called Sergeant Ramos, an RCMP Certified Criminal Analyst with the RCMP Behavioural Science Group. Sgt. Ramos examined the materials, reviewed the steps taken in the VPD investigation to date, and provided an opinion on the mother's allegations.

[96] The mother also contacted Mr. Strickland and asked him to stop the father from having any access to the children. She refused to give the father the court-ordered supervised access. The father complained to Mr. Strickland that the mother had denied him access.

[97] On December 24, 2009, the mother attended at the Ministry's office to give Mr. Strickland more material. On the same date, the Ministry received a call from the BC Nurses' Line expressing concerns about the mother's mental stability as a result of a call they had received from her.

[98] On Christmas Day, the mother sent emails to at least 20 individuals, including family, friends and service providers, in which she attached the video and audio recordings of the children's disclosures.

[99] On December 27, 2009, the father again advised the Ministry that the mother had denied him supervised access to the children. He expressed concern about their psychological well-being, the mother's mental health and her isolation of the children, whom he had not seen around the family home over Christmas. One of the recipients of the emailed videotapes called the Ministry to express concern about K.G.'s appearance in the videotapes, seeing the family home "draped and boarded up" and her fear that the mother would flee with the children or take their lives to prevent the father from having access to them. Another recipient expressed concern about the children's safety and well-being, the mother's mental health and the fact that the children had not been seen for about a week. A third recipient expressed concern about the children, in particular K.G.'s appearance in the videotape, and the fact that they had not been seen for a while.

[100] On December 28, 2009, both the VPD and the Ministry continued to receive messages expressing concern about the children's safety and well-being and about the fact that they had not been seen over Christmas. A VPD officer met with the mother at a Kinko's copy shop. Based on his contact with the mother (he did not see the children), the officer was satisfied the mother was "rational", but also found her to be "obsessed" with the custody dispute. Other officers, however, expressed serious concerns about what they viewed as the mother's deteriorating mental state.

[101] That same day, "Car 86", a joint VPD and Ministry vehicle used to check on the health and welfare of children, attended at the home. Although the home was not boarded up as had been reported, no one was home or answering the door, mail

was seen gathered on the doorstep, and there was unopened visible mail inside the home. The social worker who attended the home then contacted the mother by phone and spoke with her. She reported the mother remained secretive about the location of the children, but informed her that they were healthy and happy.

[102] On December 30, 2009, Det. Rowley advised Mr. Strickland that she was very concerned that the mother's mental health was deteriorating and that the mother might flee or kill herself and the children. Both agreed that "apprehension of the children, if necessary" was appropriate. After further discussion with Det. Rowley, Ms. Caffrey and Ms. Robinson, the Deputy Director, Mr. Strickland decided to remove the children using Car 86. The children were placed in the care of the mother's brother and his wife, on the condition that neither parent was to attend at their home or be in direct contact with them.

B. Post-Removal Events

[103] The children were removed from the mother's presumptive custody. On December 31, 2009, Mr. Strickland met with the mother to explain his reasons for removing the children from her care and to advise her that arrangements would be made for her to have supervised visits with the children. The mother surreptitiously recorded their conversation. Mr. Strickland questioned the mother about whether she had fabricated the allegations against the father or coached the children about their disclosures. The recorded conversation reveals that Mr. Strickland was concerned about the mother's mental health.

[104] On January 2, 2010, Sgt. Ramos advised Det. Rowley that, in her opinion, the father's blotter drawings and the photographs did not indicate the father had a deviant sexual interest in children. She further opined that it was "difficult, if not impossible" to determine the veracity of K.G.'s disclosures in the video clips. She also recommended that the mother undergo a complete forensic examination as a pre-condition to having the children returned to her.

[105] On January 4, 2010, the father had his first supervised visit with the children since his arrest in October 2009.

[106] On January 5, 2010, the mother had her first supervised visit with the children since they were removed from her care.

[107] The children's social workers, in consultation with Mr. Strickland and the Director's lawyer, prepared the Form A report for the Provincial Court presentation hearing on January 6, 2010. The report stated: "On December 17, 2009, [the mother] went into hiding with the children and no one was able to locate them until December 30, 2009" and that "[the mother] was unwilling to divulge the whereabouts of herself or the children". The Form A report had been reviewed by the Director's counsel.

[108] Det. Rowley interviewed the father on January 5 and 14, 2010.

[109] Also on January 5, 2010, the parties appeared before the judge in the family proceeding. The judge ordered: (1) Mr. Strickland to appear before him on January 11, 2010, with all the relevant documentation concerning the children; (2) the VPD to provide to him its position with respect to the father's access to the disc of evidence provided by the mother to the judge; and (3) a transcript of the January 6, 2010 hearing in Provincial Court. Neither Mr. Strickland nor the VPD were parties to the family proceeding and neither were notified of any application that involved their attendance at court.

[110] On January 6, 2010, the VPD interviewed the two older children, and did so again on January 21, 2010. The interviews were conducted by Detective Foster, a six-year veteran of the Sex Crimes Unit and a child interview specialist who had conducted over 80 such interviews. During the first interview, BT.G. disclosed that his father had asked him to touch his penis when they were in the shower. He repeated this disclosure during the second interview. Det. Rowley and Det. Foster each formed the opinion that the contents of BT.G.'s disclosures were inconsistent and lacked sufficient context to ensure their veracity. K.G. was also interviewed on two occasions. In both of her interviews, she denied that she had been sexually touched by any adult and denied the veracity of her comments in the videotapes.

[111] On January 11, 2010, counsel for the Director appeared before the judge and advised him that the children had been removed from the mother's custody and new access arrangements had been put in place. Counsel for the VPD also attended on that date and advised the judge of the status of the VPD investigation.

[112] At that hearing, the judge first raised the prospect of joining the *CFCSA* proceeding with the family proceeding. There was no discussion about the access provisions of the December 21, 2009 order, although the father advised the judge that the mother had denied him supervised access over the Christmas holidays and that he intended to bring a contempt application. That application was never brought because the father did not have the financial means to secure the assistance of counsel.

[113] The Director had interpreted the December 21, 2009 order as granting the father supervised access to the children for a fixed term only. However, the mother had interpreted it as requiring the father to have access supervised indefinitely. The Director gave the father supervised access from January 4, 2010, until May 13, 2010, when she granted him unsupervised access based on Provincial Court orders pronounced February 3, 2010 and April 14, 2010, giving the parents reasonable access to the children "supervised at the discretion of the Director". The mother continued to have supervised access.

[114] The December 21, 2009 order was not revisited again until June 2, 2010, when the mother expressed concern about the father's unsupervised access. The judge advised her to return to Provincial Court to make an application to vary the April 14, 2010 order. The father continued to have unsupervised access to the children until August 16, 2011, when the judge said the mother's interpretation of the December 21, 2009 order was the correct one and that the father was not to have unsupervised access to the children.

[115] On January 12, 2010, the two older children were examined by Dr. Kot, a psychologist at Children's, at the Ministry's request. Dr. Kot saw the children five more times. In her April 27 and 28, 2010 reports to the Ministry, Dr. Kot found no

evidence of sexualized behaviour with respect to BT.G., inconsistent answers about his previously reported sexual touching by his father, and rated him generally at a low risk for sexual abuse. With respect to K.G., she found a heightened awareness of sexual knowledge but could not identify the source of that knowledge. K.G. had denied experiencing any sexual touching. Both children were found to have experienced stress over their parents' excessive conflict. At its highest, Dr. Kot found the allegation that the father had sexually abused the children ambiguous. Dr. Kot's report (and Dr. Jain's) was tendered in evidence in the family trial as business records, but not for the truth of its contents. The Director planned on calling Dr. Kot (and Sgt. Ramos) to give evidence, but did not do so when the *CFCSA* matter was abandoned.

[116] On February 1, 2010, the VPD concluded its investigation and advised Mr. Strickland of its finding that there was "no evidence to support [the mother's] allegations that [the father] molested their children". No charges were laid against the father for the alleged assault or the alleged sexual abuse of the children.

[117] On February 3, 2010, by consent, the Provincial Court ordered interim custody to the Director with reasonable access to both parents, to be "supervised at the discretion of the Director". Two subsequent dates fixed for the Director's application for temporary custody of the children were adjourned with the consent of the parties. On April 14, 2010, again by consent, the Provincial Court ordered temporary custody of the children to the Director for three months, with access to both parents to be supervised at the discretion of the Director (the "*CFCSA* Consent Orders").

[118] In mid-February, the Ministry's file was transferred from its intake team to the family services team. The file was assigned to Ms. Pop. Mr. Bruce Blandford was the leader of the family services team.

[119] Mr. Blandford asked Dr. Eirikson, a 30-year registered psychologist specializing in the assessment and treatment of children, their parents and parenting capacity, to conduct a parental capacity assessment for the purpose of determining

whether the children could safely return to either the mother or the father, and to determine whether either or both parents should have access to the children while the issue of custody was outstanding.

[120] On May 11, 2010, Dr. Eirikson provided the Ministry with his 70-page "Parental Capacity Assessment". In answer to seven referral questions, he opined under the heading "Conclusions, opinions and recommendations" that: (1) the father had the necessary emotional and psychological capacity to parent the four children with some assistance; (2) there was no psychological diagnosis of the father relating to pedophilia or psychopathy or substance abuse that would affect his care of the children; (3) the mother had many but not all the necessary emotional and psychological capacities to appropriately parent the children; (4) the father did not have a mental health diagnosis or a substance abuse condition that interfered with his ability to appropriately parent the children; (5) the mother had a mixed personality condition related to highly suspicious thinking, manipulation and dramatic presentation; (6) the father should follow through on counselling for the children and himself to some degree, as well as a parenting course on disciplining children; (7) the mother should be referred to a mental health practitioner for psychiatric assessment and counselling for herself; (8) both the mother and the father would likely commit to following through with the recommended treatment; (9) the father was not at risk to sexually abuse children; (10) it was unlikely the children were sexually abused by the father; (11) the court should consider what is safe contact between the mother and the children related to placement or access; (12) the parents were not capable of dealing appropriately with each other to ensure the children's needs are met; (13) the father was appropriately bonded with the children, particularly the two older children, and he was more consistent with the children and their behaviour than the mother; and (14) the mother was appropriately bonded to the children.

[121] On May 13, 2010, the Director granted the father unsupervised access to the children, in part, because there had been no problems with his supervised visits.

[122] On June 2, 2010, the judge ordered an expert report from Mr. Colby, pursuant to s. 15 of the *FRA*. The order provided that neither party, nor the Ministry was to give instructions to Mr. Colby about his report. The judge asked him to assess the emotional and psychological status of the parents as it related to their parenting abilities and involvement; the parent-child bonding and parental history with respect to the best interests of the children; the emotional, psychological and developmental status of the children; any new partners of either parent where they had a significant involvement in the children's parenting; and the needs and safety of the children as a paramount concern. The father had unsupervised access visits with the children in advance of the children's interviews with Mr. Colby.

[123] The mother did not have access to the children between May 20, 2010 and August 31, 2010, after which she had supervised access visits, because around the time the expert reports were being prepared, there were problems with her exercise of access to the children. On one supervised visit, the mother brought a friend who became aggressive with the access supervisor. The mother was advised that she could not bring unapproved persons to the supervised visits or they would be cancelled. On May 20, 2010, during another supervised visit, the mother forcibly held K.G. on her lap while telling her that she was "keeping secrets for daddy" and that her actions were "ruining our lives". The mother's access to the children was suspended after that visit for a period of time.

[124] On June 3, 2010, the mother and a friend attended at the Ministry office without notice. Her friend entered the restricted area, placed his hands on Mr. Blandford, and told him that he was under "citizen's arrest". Staff called 911 and the police intervened.

[125] That evening, the mother and her friend went to her brother's home where the children were staying and attempted to force their way in by reaching through the door. The mother had pepper spray in her purse. In the ensuing altercation, the pepper spray discharged. The brother, his wife, and the father, who was there returning the children after an unsupervised visit, were all exposed to the spray. The

children had only minor exposure, but were emotionally distraught and crying over the incident. Police, paramedics and firefighters were called to the home. The mother was arrested and taken into custody. The family had to leave their home for 10 days while it aired out. Thereafter, they advised the Ministry that they could no longer care for the children. The children had to be moved as a result of the incident and a new foster home was found for them.

[126] During the trial, the mother testified that she had taken the pepper spray out of her purse because her brother was "coming towards [her]" and somehow it was inadvertently sprayed onto the occupants of his residence. Evidently, the judge accepted her explanation for the incident, characterizing it as "unfortunate contact between [the mother] and her brother". He made no adverse finding about the mother's conduct at her brother's house.

[127] On June 9, 2010, the mother was released on terms that prohibited her from contacting the children's foster caregiver or entering the premises in which they resided for a period of six months, or until further order of the Court, with an arrest clause and liberty to apply to vary or cancel the order. She was also prohibited from entering the Ministry's Vancouver family services office on the same terms.

[128] The mother had retained Dr. Elterman to respond first to Dr. Eirikson's report and later to Mr. Colby's reports, and to assess her mental status. In his report dated June 12, 2010, Dr. Elterman critiqued "the procedures and methodology as well as the logical consistency of conclusions drawn" by Dr. Eirikson. He stated, however, that he was unable to provide an alternative conclusion in relation to the sexual abuse concern. In his second report dated July 10, 2011, Dr. Elterman confirmed that the mother's mental profile was "entirely within normal limits" and opined:

> ...the one common flaw that I think runs through both [Dr. Eirikson's and Mr. Colby's] reports is the lack of thorough interviewing of the children. The reports seem to focus on the psychological status of the parents and particularly [the mother] rather than trying to evaluate the likelihood that the children were or were not abused.

[129] Dr. Abdallah Sidky, a psychiatrist, also assessed the mother and found that she "is of a sound mind and has no mental illness".

[130] On June 21, 2010, counsel for the Director telephoned Mr. Colby to express concerns about repeated interviews with the children. Ms. Pop also communicated with Mr. Colby about her concerns for the safety of the children and her concerns about repeated interviews of the children. On August 19, 2010, Ms. Pop advised him about the mother's May 20 and June 3, 2010 access visits. Both denied instructing Mr. Colby to refrain from interviewing the children. In any event, Mr. Colby advised them that he had to interview the children in order to complete his assessment and did so without incident.

[131] On July 14, 2010, the mother retained new counsel and indicated her opposition to the Ministry's application to extend the temporary custody order. An eight-day trial was set for the application but it did not proceed because, on October 8, 2010, the family and *CFCSA* proceedings were joined and the judge seized himself of the joined proceedings.

[132] Mr. Colby delivered his 90-page report on September 13, 2010. He also prepared an updated report on October 11, 2011. In his first report, Mr. Colby found insufficient evidence to conclude that the children had been sexually abused by the father. He recommended that the father receive parenting counselling, which if successfully completed, would, in his opinion, make the father the better parent to care for the children. With respect to the mother, he recommended that she receive professional counselling and that her visits with the children be supervised. Mr. Colby confirmed his opinion in the updated report he was asked to provide after he reviewed the contents of the father's hard drive, which appeared to him to indicate access to adult pornography sites. He left the ultimate question of whether the father had sexually abused the children for the judge to decide.

[133] Mr. Colby and Dr. Eirikson had no communication with each other and did not see each other's report. In both assessments, the mother presented negatively while

the father presented well. Both psychologists independently reached similar conclusions and made similar recommendations.

[134] The Ministry engaged John Day to provide parenting counselling for the father, as recommended by Dr. Eirikson and Mr. Colby, and to act as a parenting coach. Between October 2010 and May 2011, the father met with Mr. Day and, on four occasions, with the children and Mr. Day. In his final report, Mr. Day stated that he found no protection concerns and found the father "to be a caring, able parent". He opined that "the children will be well looked after" by the father.

[135] In further response to Mr. Colby's report, the mother retained a registered clinical counsellor, Dr. Deborah Dunne. The mother attended sessions with Dr. Dunne from October 15, 2010 onward. Dr. Dunne wrote two letters to the Ministry, neither of which was tendered as expert opinion evidence. In her January 31, 2011 letter, Dr. Dunne confirmed that the mother had met all of the conditions outlined by the Ministry in their "Risk Reduction Service Plan" to obtain increased/unsupervised access to or a return of her children. She also wrote an undated letter "To Whom it Concerns" in which she opined:

> I am extremely concerned about the welfare of these children. I don't believe that the Ministry is acting in the best interests of the children and, at the very least, I think they should examine the evidence that [the mother] can provide to the effect that her husband may be a dangerous offender. I believe the father must not have unsupervised access to the children. I also believe that, with the support and therapy for herself and for the children, the best outcome would be that [the mother] be given full custody of the children.

[136] On August 10, 2011, the mother applied for a declaration that the father had violated the December 21, 2009 supervised access order by having unsupervised visits with the children. Relying in part on *H. (S.) v. H. (L.-A.)* (1997), 35 B.C.L.R. (3d) 100, counsel for the Director contended that the December 21, 2009 order provided a fixed-term for supervised access over Christmas only, but that in any event, the *CFCSA* Consent Orders (granting temporary custody of the children to the Director for three months with access to the parents to be supervised at the discretion of the Director) superseded the December 21, 2009 order because *CFCSA* proceedings are within the exclusive jurisdiction of the Provincial Court, and

therefore, the Provincial Court had exclusive jurisdiction to decide the access issue while the children were in the Director's care.

[137] In *H. (S).*, the Master held that because of the Provincial Court's exclusive jurisdiction over child protection matters, a *CFCSA* proceeding could only be transferred to the Supreme Court if the judge in that court sat as a Provincial Court judge. Acting on her understanding that, because of the Provincial Court's exclusive jurisdiction, the *CFCSA* Consent Orders superseded earlier Supreme Court orders made under the *Divorce Act*, the Director maintained that she had appropriately exercised her discretion to grant the father unsupervised access to the children. The father had unsupervised access from May 2010 to August 2011. During this period, his mother lived with him from September 2010 onward and assisted with the children.

[138] On August 15, 2011, more than a year after the December 21, 2009 order was made, the judge clarified that the order did not in fact limit the father's supervised access to a fixed period and that he should not have had unsupervised access to the children. He also stated that the interim access orders in the family proceeding superseded the *CFCSA* Consent Orders. In the intervening period, however, when the mother raised the issue in the family proceeding, he directed her to apply to the Provincial Court to have the *CFCSA* Consent Orders varied to prevent the father from having further unsupervised access.

[139] In his July 14, 2015 reasons for judgment in the civil proceeding, the judge held that the *CFCSA* is not a complete code that ousts the jurisdiction of the Supreme Court on child protection matters. He found that "in the particular circumstances of this case" the *CFCSA* Consent Orders did not supersede the terms of the December 21, 2009 order. He held that because the protection concerns in relation to the father were squarely before the Court when the December 21, 2009 order was made, and because the Director was concerned about the children's safety and well-being in relation to the mother when they were removed from her

care, there was no conflict between the December 21, 2009 order and the subsequent *CFCSA* Consent Orders. He stated:

> [638] The children were apprehended on the basis of purported protection concerns in relation to [the mother]. The subsequent Provincial Court orders made in the Apprehension Proceeding in respect of the Director's discretion concerning [the father's] access to the children were not, however, made as a result of a judicial determination of new facts and circumstances regarding [the father]. The judges who issued them were not made aware of the context in which the [December 21, 2009 order] was made or the protection concerns it addressed. As a result, they did not consider their jurisdiction or the appropriateness of making those orders in light of the prior [December 21, 2009 order]. On their face, the Provincial Court orders permitted the Director to exercise her discretion regarding [the father's] access to the children in a way that would facilitate his breach of the [December 21, 2009 order].
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> [639] In these very specific circumstances, I find the subsequent Provincial Court orders did not supersede the Supervised Access Order.

[140] The judge considered *British Columbia (Superintendent of Family & Child Service) v. D.S.* (1985), 63 B.C.L.R. 104 (C.A.), where this Court concluded that the *CFCSA's* predecessor was not a complete and closed "code unto itself" and found it did not oust the jurisdiction of the Supreme Court on child protection matters (at para. 21). He also considered *W.N. v. C.G.*, 2012 BCCA 149, where this Court also addressed parallel proceedings between the Provincial Court under the *CFCSA* and the Supreme Court under the *Divorce Act/FRA*. In that case, Madam Justice Garson explained:

> [72] ...in British Columbia, child protection proceedings may run concurrently with *FRA* proceedings. In *Re Superintendent of Family & Child Service et al. v. Stuart* (1985), 18 D.L.R. (4th) 617 at 624, 63 B.C.L.R. 104 (C.A.), Craig J.A. held that:
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> > ...There is no doubt that the tenor of all the legislation in British Columbia relating to children is that a court's paramount concern is the best interests of the child. When considering the best interests of a child, a court may deal with the applications under the *Family Relations Act* at the same time as dealing with applications under the *Family & Child Service Act*: *J.M. v. Superintendent of Family & Child Service*, *supra* and *Mirasty v. Superintendent of Family & Child Service*...
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> ...
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> [74] Thus I conclude from the jurisprudence that the jurisdiction of the court under the *FRA* is not necessarily ousted where *CFCSA* proceedings are underway.

> [75] The next question is which scheme prevails in the case of a conflict and whether there is a conflict in this case. As addressed above, the law in Ontario is clear that child protection legislation prevails in the case of conflict. This also appears to be the law in British Columbia. In *Stuart*, Esson J.A. said the following in his concurring reasons at 626:
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> > It is sometimes said that the *Family and Child Service Act* is to be treated as "a code unto itself". That phrase may be useful to emphasize the point that the Act embodies a comprehensive legislative scheme and that, to the end that the scheme will be carried out, effect should be given to the plain meaning of the language of the Act. But it is a statute like any other. In a proceeding under it, due regard must be had to other applicable laws of the province and, should there appear to be overlapping or conflict, that must be resolved by ordinary rules of interpretation such as those which provide for priority as between general and particular provisions....
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> [76] In the case of conflict, the *CFCSA* is paramount.
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> [Emphasis added.]

[141] The judge then referred to *Christie and the Superintendent of Family & Child Service*, (23 February 1993), Vancouver 4063 and 3723 (B.C. Prov. Ct.), and *E.I.H. v. British Columbia (Superintendent of Child Welfare)* (1971), 5 R.F.L. 219 (B.C.S.C.), where the Court stated that "[t]he learned Provincial judge had jurisdiction to make the order for the narrow and special purpose mentioned in The Protection of Children Act and that jurisdiction was not ousted by the prior order of Verchere J. [who made the order providing custody to the mother]."

[142] The judge interpreted this jurisprudence to mean that the December 21, 2009 order, which he found was made under the *Divorce Act,* was not ousted or superseded by the subsequent *CFCSA* Consent Orders for two reasons: (1) orders made under the federal *Divorce Act* are paramount over conflicting orders made under provincial legislation, such as the *FRA* or the *CFCSA*; and (2) even if the subsequent *CFCSA* Consent Orders superseded the previous *Divorce Act* order, the latter would only be suspended in the case of a direct conflict, which he found did not exist as the Director could have complied with both orders if she had exercised her discretion in accordance with the December 21, 2009 order, or applied to vary the December 21, 2009 order to allow the father unsupervised access.

[143] The problem with this reasoning is two-fold: (1) the *CFCSA* Consent Orders did create a conflict with the December 21, 2009 order when the Director, acting under her statutory authority and the *CFCSA* Consent Orders, exercised her discretion to grant the father unsupervised access believing it to be in the best interests of the children; and (2) the judge's solution to the conflict was for the Director to abandon her statutory obligation to exercise her discretion in a manner that, in her opinion, was in the best interests of the children.

[144] The Director's mandate under the *CFCSA* is broader than the parties' custody and access issues under the *Divorce Act*. It includes decisions about whether the children should continue to be in the care of the Director or whether they should be returned to the care of one or the other, or both of the parents. In fulfilling her mandate to decide what plan would be in the children's best interests, the Director developed an expert-based re-integration plan that included the father eventually having primary care of the children. In these circumstances, the rights of the parents flowing from the December 21, 2009 order were viewed as secondary to the safety and well-being of the children. The Director, informed by expert opinions, properly exercised her discretion to gradually return the children to the father, first with supervised access and then with unsupervised access, with the goal of finally releasing the children from her care. The judge's interpretation of the law in these circumstances would effectively strip the Director of the discretion she requires, and is granted under the *CFCSA,* to ensure the safety and well-being of the children regardless of the nature of the dispute between the parents in the family proceedings.

[145] The judge found, in the alternative, that the Director had failed to exercise her discretion appropriately in granting the father unsupervised access. He relied on this finding in his assessment of the Director's conduct in the civil proceeding. I shall return to this issue when addressing the mother's claim that the Director was reckless and grossly negligent in exercising her discretion under the *CFCSA* in this manner.

IV. The Family Proceeding

[146] The family trial began on October 17, 2011. Based in large part on the evidence of Ms. Reeves, the judge found that the father had sexually abused the three older children and had exposed all the children to inappropriate sexualized knowledge. He also found that the father had physically assaulted the three older children and the mother.

[147] The father submits the judge erred:

a) in law, by admitting and/or relying on the opinion evidence of Ms. Reeves, Mr. Woods with respect to his risk assessment, and Dr. Edamura on the cause of K.G.'s anal fissures;

b) in law and fact, by giving little or no weight to the opinion evidence of Dr. Eirikson and Mr. Colby;

c) in law, by failing to give [him] a fair trial and by adopting an approach that gave rise to a reasonable apprehension of bias; and

d) in fact, by making findings of fact that are unsupported by the evidence.

A. The Expert Evidence

[148] The principal issue on appeal is the manner in which expert opinion evidence was admitted and considered by the judge. The rules of evidence in proceedings such as these play a critical role in protecting procedural fairness for the various parties involved; they must not be ignored or relaxed in favour of judicial economy or expediency. As Henry J. stated in *Windsor & Annapolis Railway Co. v. The Queen and the Western Counties Railway Co.* (1885), 10 S.C.R. 335 at 410 (SCC): "[r]ules of evidence, long and well established, as necessary for the due and proper administration of justice, are not to be set lightly aside, or frittered away; and we are bound to observe them".

[149] The rules of evidence were not followed in this case. The judge did not fulfill his gatekeeper role to ensure that the expert evidence sought to be adduced would enhance, rather than distort, the fact-finding process. That role required him to admit opinion evidence that was necessary, reliable and furthered the goal of accurate fact-finding while at the same time refuse to admit evidence that was unnecessary, insufficiently reliable or not based on an adequate scientific foundation. The judge admitted and then accepted much of the mother's opinion evidence without properly determining its threshold admissibility or fully considering the prejudicial effect of admitting it given that some of the evidence sought to be adduced did not comply with the *SCFR.*

[150] The test for determining the threshold admissibility of an expert's opinion is set out in *R. v. Mohan,* [1994] 2 S.C.R. 9. To be admissible, opinion evidence must be relevant and necessary; it must not be rendered inadmissible by any other exclusionary rule; and it must be offered by a properly qualified expert. Expert opinion evidence must also be fair, objective and non-partisan to be admissible: *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 at para. 2. If an expert is not properly qualified and is not neutral, his or her opinion has the potential to "swallow whole the fact-finding function of the court": *R. v. Abbey,* 2009 ONCA 624 *per* Doherty J.A. Opinion evidence that fails to meet these requirements is prejudicial to each party's right to a fair determination of the issues, lacks probative value and is therefore irrelevant, unnecessary and unhelpful.

[151] While the *CFCSA* relaxes the rules of evidence for removal hearings (see ss. 66, 67 and 68), the process must still be fair and conducted according to law: *G.(J.P.) v. British Columbia (Superintendent of Family & Child Services),* [1993] 77 B.C.L.R. (2d) 204 (C.A.) at paras. 5 and 23; and *M.(K.) v. British Columbia (Director of Child, Family & Community Service),* 2004 BCSC 560 at paras. 23–29 (where the *Mohan* test was applied to expert opinion evidence in a *CFCSA* proceeding to ensure fairness). In blended proceedings like these, the more relaxed evidentiary regime under the *CFCSA* must, as a general rule, be replaced by the rules of

evidence that are generally applied in all civil proceedings: *W.(W.M.) v. W. (J.),* 2011 BCPC 360 at paras. 5 and 48–50.

[152] The procedural requirements for tendering expert evidence in family proceedings are also important. Rule 13-6 of the *SCFR* requires: (1) certification by the expert; (2) the name, address, and area of expertise of the expert; (3) the expert's qualifications, employment and education in his or her area of expertise; (4) the instructions provided to the expert in relation to the case; (5) the nature of the opinion sought and the issues to which it relates; (6) the expert's opinion; and (7) the expert's reasons for his or her opinion, including any factual assumptions on which the opinion is based, any research he or she conducted to form the opinion and a list of every document he or she relied on to form the opinion. Rule 13-7 sets out the time limits for serving a report to be produced at trial and provides that the report must comply with the requirements in R. 13-6. Rule 13-7(6) permits the court to dispense with the requirements if "non-compliance is unlikely to cause prejudice" by depriving a party of the ability to prepare for cross-examination or the opportunity to introduce evidence in response, or if "the interests of justice require it."

[153] A significant portion of the mother's expert opinion evidence did not meet the threshold admissibility requirements; nor did some of it comply with the procedural requirements for tendering expert opinion evidence in support of her claims.

[154] The importance of the trial judge's gatekeeper role for determining the admissibility of expert opinion evidence, and for weighing the potential risks and benefits of admitting the evidence, cannot be overstated. Mr. Justice Cromwell explained the importance of this function in *White Burgess*:

> [12] ... we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D.D.* at para. 16: *R.D.D.,* 2000 SCC 43, 2 S.C.R. 275, at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, flawed, forensic scientific opinion has played a prominent role in miscarriages of justice": para. 105. Other reports outline the critical need for impartial and independent expert

> evidence in civil litigation: *ibid.*, at para. 106; see the Right Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).
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> ...
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> [16] Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

[155] Similarly, in *R. v. Bingley*, 2017 SCC 12, the Chief Justice reinforced the importance of the trial judge's gatekeeper role, stating:

> [13] The modern legal framework for the admissibility of expert opinion evidence was set out in *Mohan* and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182. This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into "trial by expert" and that the trier of fact maintains the ability to critically assess the evidence: see *White Burgess*, at paras. 17–18. The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.
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> ...
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> [17] The expert opinion admissibility analysis cannot be "conducted in a vacuum": *Abbey*, at para. 62. Before applying the two-stage framework, the trial judge must determine the nature and scope of the proposed expert opinion. The boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized: see *Abbey*, at para. 62; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 46.
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> [Emphasis added.]

See also *Williamson v. Williamson*, 2016 BCCA 87.

[156] In this case, the most striking example of the judge's failure to adhere to the admissibility and procedural requirements for tendering expert opinion evidence involved the admission of Ms. Reeves' evidence. Other examples include the admission of: (1) opinion evidence from Mr. Woods; (2) extemporaneous opinion evidence elicited from Dr. Edamura during his testimony as a factual witness on the cause of K.G.'s anal fissures when she was three months old, whom he had never

examined, and after he admitted to having no expertise in the area of child sexual abuse; and (3) the evidence of Dr. Dunne, also called only as a factual witness but permitted to give opinion evidence on a variety of matters in support of the mother.

Claire Reeves

[157] The mother discovered Claire Reeves on the Internet and retained her directly to establish that the father had sexually abused the children. At the outset of the trial, counsel for the mother advised the judge that "Dr." Reeves was an expert in the area of child sexual abuse from the United States and that her report, which was not yet completed, would be tendered as "rebuttal evidence" to Mr. Colby's s. 15 *FRA* report. Even if admissible, it is unclear to me how her report could have constituted "rebuttal" evidence when the mother's sexual abuse allegations were the foundation for her custody and guardianship claims.

[158] Ms. Reeves' November 13, 2011 report was served on the father on November 17, 2011, one month after the commencement of the trial. In it, she did not certify herself as an expert witness in accordance with R. 13-6(1) of the *SCFR* but, at the direction of the trial judge, subsequently signed a document to that effect on January 17, 2012. The mother also failed to comply with other procedural and time requirements for tendering her opinion evidence at trial, as set out in R. 13-6(1) of the *SCFR*.

[159] In her report, Ms. Reeves claimed to be a licenced psychologist, an expert on child sexual abuse, and experienced in testifying as an expert witness in cases "across the United States and Canada" involving child sexual abuse.

[160] In addition to some obvious spelling errors in her report, Ms. Reeves' *curriculum vitae* provided no dates for when she obtained her Bachelor's, Master's and Doctorate degrees, and no qualifications for obtaining her credentials as a licenced psychologist. Her experience in the area of child sexual abuse was principally that of an advocate: (1) she founded MASA; (2) she attended fundraising events with Hollywood movie stars; and (3) she expressed public opposition to Michael Jackson.

[161] On the qualifications *voir dire*, she testified that it took her nine years to do all of the course work necessary to obtain her doctorate from Ashwood University in Houston, Texas and that "[i]t was a long time going to school". She said that she had been qualified as an expert witness 52 times in the U.S. She testified that she was previously qualified to give opinion evidence in court proceedings in Newfoundland and Manitoba. She said that while she always testifies on behalf of the children, she was called by the father in the Newfoundland case and noted that "we were very successful with that case". She said that MASA is the only organization in the United States "that has tunnel vision" in the sense that it only deals with incest and child sexual abuse cases. She said that MASA lobbied in the United States to make child pornography a felony and was instrumental in the passage of chemical castration legislation for repeat sexual offenders in California and Oklahoma. She testified that her work in this area was worth it if it kept even one pedophile from hurting a child. She became emotional in her testimony at one point, noting that she has a child of her own. She testified that she was extremely busy and was trying to "clone myself" in every state. She said that she has done a lot of media, including with CNN on high profile sexual abuse cases, but was not interested in appearing on the Jerry Springer show, even though her publicist was contacted about it. She testified that she was "more than qualified", that some of her credits from the Los Angeles Institute and Society for Psychoanalytic Studies were transferred over to Ashwood University, and that her education and working experience was at an "even higher level than most doctorates in clinical psychology". She described herself as Michael Jackson's "nemesis".

[162] The father, who was unrepresented, attempted to explore Ms. Reeves' impartiality on the qualifications *voir dire*. His line of questioning was objected to by counsel for the mother, and the father indicated that he would return to the question of "bias" later. In submissions on the admissibility of Ms. Reeves' opinion evidence, the father took issue with her "qualifications and her coursework and her expertise" but said that he would address it in cross-examination.

[163] As noted earlier, Ms. Reeves was qualified to give opinion evidence regarding child sexual abuse, including incest, over the objections of counsel for the Director and the father.

[164] Ms. Reeves' website, entitled "Signs and Symptoms of Sexual Abuse", was tendered as an exhibit in the trial proper. The website listed multiple symptoms of child sexual abuse including: night terrors, temper tantrums, fecal smearing, abuse of little animals, acting out sexually with other children, age inappropriate knowledge of sexual acts, and child masturbation. In her testimony, Ms. Reeves also added the following *indicia* of sexual abuse: cruelty to animals; "sexualized behaviour" (rejected by Dr. Eirikson and Mr. Colby who distinguished between sexualized behaviour and sexual behaviour); disclosures followed by recantations (taken from the now debunked theory of "child sexual abuse accommodation syndrome" ("CSAAS")—see *R. v. K (A.)*, (1999), 45 O.R. (3d) 641 (C.A.) at paras. 86, 124−130 and *R. v. R.O.*, 2015 ONCA 814 at para. 41); viewing of adult pornography (also rejected by Dr. Eirikson and Mr. Colby); and physical abuse of a spouse.

[165] With respect to children who demonstrate age inappropriate knowledge of sexual acts, Ms. Reeves testified that, "there's no way in this world these things happen unless something happened to that child". She was invited by counsel for the mother, and permitted, to express her "personal view" about the incidence of false allegations because, according to counsel, "[the father] needs to hear this". She testified that she thinks false allegations are extremely rare and expressed this view on the Monte Williams show. She agreed that studies show that children recant about 70 per cent of the time but that her professional opinion is that children recant 95 per cent of the time.

[166] Ms. Reeves also stated that where there is sexual abuse, physical abuse, including spouse battering, is common as the perpetrator has a need to exert power and control over the other spouse and children. She seemed to suggest that this feature was present in about 95 per cent of her cases.

[167] Ms. Reeves also testified that viewing both child and adult pornography is indicative of a propensity to sexually abuse children.

[168] Ms. Reeves said she was given no instructions by either the mother or the mother's counsel, but understood that she was being asked to express an opinion, "as an international expert in incest and child sexual abuse" about whether the children had been sexually molested. In her report, she said that there is "no question…the events disclosed by [BT.G. and K.G.] happened to them". In her testimony, she said that she was absolutely, "like 180 percent" sure that the children were sexually molested. She also said that the four children in this case "certainly had the bad fortune of having, I think, a father who is less than honourable". After giving this evidence, she said to the father, "I don't mean to insult you. It's a professional opinion".

[169] Ms. Reeves testified that that she relied on CSAAS in her assessment, explaining that it is "used as a template now in… discerning child sexual abuse" [emphasis added]. She testified that the syndrome consists of these behaviours: secrecy; helplessness; entrapment; accommodation; delayed, conflicted and unconvincing disclosures; and recantation. She did not mention, or perhaps know, that Dr. Roland Summit, who developed this theory in an article published in 1983, later lamented that it was improperly being used as a diagnostic tool both in the field of behavioural sciences and in the courtroom: see *K. (A.)* at para. 125.

[170] Ms. Reeves opined about the difficulties in coaching young children and the disincentives for doing so, an opinion that was not included in her report. She spoke of her support of chemical castration laws, her belief in the prevalence of ritual abuse, and her Hollywood talk show appearances. Despite being outside her area of expertise, she was permitted to give evidence respecting her own clinical observations of the aggressive behaviour of a patient she had counselled who was attempting to come off an addiction to steroid use. The father testified that he had experimented with steroid use.

[171] Despite Ms. Reeves' evidence that she testified as an expert witness in 52 cases in the United States alone, the fresh evidence reveals that she is not listed in any expert witness database back to 1980 and in only three reported cases was she found to have testified as an expert witness. In one of those cases, her evidence was rejected as being unbelievable and not credible because she had never interviewed the child or the father as the alleged perpetrator: *Wolford v. Willis,* Case No. 20084261, (Ohio, Gallia County Common Pleas Court, Juvenile Division) 29 February 2016 at 7.

[172] Ms. Reeves did not interview either of the parents in this case, except for a telephone conversation with the mother, or any of the children. It is noteworthy that the judge rejected Dr. Eirikson's evidence, in part, because he interviewed the children only once. The materials Ms. Reeves reviewed were also limited to those provided to her by the mother.

[173] In her response to the father's fresh evidence application, the mother does not say that the evidence sought to be tendered is not reasonably capable of belief. In fact, the reliability of the fresh evidence has not been challenged by the mother on appeal. In my view, the fresh evidence establishes that Ms. Reeves' representations as to her qualifications were false. Ms. Reeves is not a licenced psychologist, her educational degrees came from "diploma mills", and her experience is that of an advocate rather than an expert in the area of child sexual abuse.

[174] None of her degrees—a Bachelor's Degree from Lacrosse University, a Master's of Science Degree in Clinical Psychology from Hill University, and a Doctorate in Clinical Counselling from Ashwood University—were obtained from legitimate academic institutions. The fresh evidence identifies the institutions as unaccredited diploma mills that provide credentials for a fee without any requirements for exams or study. Lacrosse is a fake school that began on the Internet and was accredited by a fake entity. Hill was also an online entity, accredited by two fake accrediting agencies. Its website, which is now inactive, advertised "No Need to Take Admission Exams, No Need to Study, Receive a

College Degree for What You Already Know." Ashwood University offered doctorate degrees for $349, plus free shipping with delivery in approximately 15 days. The fresh evidence includes a screenshot taken from the website of Ashwood University that advertises its doctorate degree program in these terms:

> This program offers you an opportunity to earn a **doctorate's degree** based on your work or life experience, without requiring you to take admission exams, attend classes, or study course books.
>
> [Emphasis in original.]

Ashwood University was itself accredited by fake accreditation agencies.

[175] In my view, the fresh evidence establishes that Ms. Reeves is not a qualified expert. She ought not to have been permitted to give opinion evidence in the family proceeding. There were a number of obvious "red flags" that ought to have alerted counsel for the mother and the judge to the need for caution at the gatekeeping stage. Ms. Reeves is a self-described advocate. Her interest in this area is intensely personal. Her aspirations include bringing the work of MASA into Canada. Her testimony on the qualifications *voir dire* (and the trial proper) is not what one would expect from an expert witness and ought to have been subjected to particularly close scrutiny at the admissibility stage. The judge should not have deferred to closing argument the question of whether Ms. Reeves' evidence amounted to advocacy or constituted argument in the guise of evidence: *R. v. J.-L.J.*, 2000 SCC 51 at paras. 25, 28. At the same time, the trial judge could not have known the extent to which the witness was, through material non-disclosure and misrepresentation, prepared to deceive the court.

[176] The mother does not dispute that the relevancy, credibility or due diligence requirements of the test from *Palmer v. The Queen,* [1980] 1 S.C.R. 759 have been met, but submits the judge did not give Ms. Reeves' evidence much weight, and therefore, the fresh evidence could not have reasonably changed the outcome of the trial.

[177] In particular, the mother submits that if the judge erred in admitting Ms. Reeves' evidence, the error was not significant as there was a substantial body

of other evidence the judge accepted, which supported his finding that the father had sexually abused the three older children. She says the other evidence included: (1) her own evidence, which he found to be credible; (2) the children's disclosures to her; (3) the children's disclosures to Dr. Edamura; (4) the video and audio recordings she made; (5) the judge's adverse findings about the father's credibility; (6) the violent and sadistic nature of the father's blotter drawings; (7) the father's visits to adult pornography sites; (8) the father's "inappropriate conduct with the children"; and (9) the opinions on this issue of Mr. Woods, Dr. Edamura and Dr. Dunne, which he accepted.

[178] With respect, I cannot agree. The judge's reliance on Ms. Reeves' opinions permeated his analysis of the issues in both the family and civil proceedings because, pursuant to the Agreement, the evidence in the family trial became part of the evidentiary record of the civil trial.

[179] As I have indicated, on her website, Ms. Reeves listed the *indicia* of child sexual abuse, which the judge reproduced in the following unreferenced comments:

> [193] One method used to assess whether sexual abuse has occurred to children is to examine their conduct and behaviour. For younger children under 12, indicators include age inappropriate sexual knowledge, sexualized or highly aggressive behaviour with other children or adults (including requests for sexual touching), night terrors, using sexualized language, making efforts to insert foreign objects into the vagina or anus, touching genitalia in public settings, excessive masturbation, unusual toileting behaviour, exploring sexuality with younger siblings, engaging in drawings that are sexually explicit, bed wetting, withholding bowel movements, spreading feces, and throwing temper tantrums, ...

[180] He then linked the children's sexualized behaviour with their sexual abuse:

> [204] A significant amount of sexualized and aggressive behaviour, that I find connotes sexual abuse, is described in numerous supervised access reports. ...

[181] He also relied on Ms. Reeves' evidence with respect to the recantations and its link to CSAAS as a diagnostic tool:

> [279] According to Dr. Reeves, it is not uncommon for children who have been sexually abused to recant their previous disclosure at some point.

> Dr. Reeves said that recanting occurs in at least 70% of cases. In Mr. Colby's opinion, recanting is "not determinative", "not indicative that an abuse did not occur", and does not "negate" the original disclosure of sexual abuse. He explained: "recanting, in and of itself, is –not of great value" in determining whether sexual abuse occurred.

[182] Echoes of Ms. Reeves' opinion evidence may also be found in the following comments by the judge:

> [280] Children recant because they are ashamed, embarrassed, "feel dirty", are threatened, or assume the guilt of the perpetrator. There are times that children are unable to cope with their feelings and seek to compartmentalize them.
>
> [281] Apart from an overt statement denying the prior disclosure, a child who is unable to cope with the distress caused by sexual abuse may withdraw, stating they can no longer recall. Another coping mechanism is for a child to do what K.G. did in her interviews with the VPD, i.e., stop speaking of any matter that is connected with the sexual abuse and the prior disclosures.

[183] Additionally, the judge relied on Ms. Reeves' evidence: (1) at para. 246, where he accepts her opinion (along with Mr. Woods') that the blotter drawings, while not directly pointing to pedophilia, indicate the mind-set of the person who drew them—the inference being that the blotter drawings point to pedophilia indirectly; (2) at para. 269, where he adopts her opinion that physical abuse of a spouse is "quite often" connected to sexual abuse of a spouse and/or child; (3) at para. 458, where he relies on the "objective criteria" identified by Ms. Reeves to find that BN.G. was sexually abused by the father; and (4) at para. 461, where he accepts her opinion that temper tantrums can be *indicia* of sexual abuse, but declines to find that P.G.'s temper tantrums during access visits were a result of sexual contact by the father.

[184] In sum, the judge made express findings based on Ms. Reeves' opinion evidence that linked his reliance on that evidence to his ultimate finding that the father had sexually abused the children. He further stated that his finding that the father had sexually and physically abused the three older children and had physically abused the mother was based on the totality of the evidence:

> [101] My findings of fact, set out in the factual narrative that follows, as well as my ultimate determination, are based upon the totality of the evidence, which includes objective and expert opinion evidence in addition to admissions made by [the father]. I found there to be a significant body of evidence from which I am more than satisfied, on a balance of probabilities, that B.G. sexually abused his three older children and physically abused them and his wife.
>
> [Emphasis added.]

[185] The extent to which the trial judge relied on expert evidence, including the evidence of Ms. Reeves, to conclude in the family proceeding that the father sexually abused the three older children is also made clear from background comments made in the civil judgment about the reasons given in the family proceeding:

> [33] The Reasons [in the family proceeding] provide important background facts about J.P. and B.G. (and their dysfunctional relationship), B.G.'s sexual and physical abuse of the three older children, and expert opinion evidence that bears directly on whether sexual abuse occurred. …
>
> [Emphasis added.]

[186] In my assessment, the fresh evidence establishes that Ms. Reeves knowingly misrepresented her qualifications to the court, was untruthful about her expertise, employment and court experience, and offered opinion evidence that was based on discredited science, namely the CSAAS theory, and its reliability in identifying or diagnosing instances of child sexual abuse. Ms. Reeves did not follow any conventional methodology in arriving at her opinion, she did not interview the children, and she admitted to being an advocate for the children. She also failed to demonstrate the requisite neutrality or objectivity of an expert witness. Significantly, however, the judge gave considerable weight to her opinion on the *indicia* of child sexual abuse, the import of children's disclosures followed by their recantation, and the ability of children to be coached to make false allegations.

[187] Her fraudulent credentials as a purported expert on child sexual abuse can only result in the rejection of her evidence, regardless of when the fraud was, or could have been, discovered in relation to the trial.

[188] In addressing the fourth prong of the *Palmer* test, I recognize that the judge justified the order he made on the alternative grounds that the father's physically abusive behaviour toward the children and his overall character are such that he should not have any direct or indirect contact with the mother and his children. He said this:

> [464] Even [if] I had not found B.G. to have sexually abused BT.G., K.G., and BN.G., I would have denied him access to his children at this time because of his character and the physical abuse he has subjected his children to. My view of B.G.'s overall character is that the children would be at continued risk of physical and emotional harm from access. In addition, I have no doubt that B.G. would use every opportunity to malign J.P. to his children.
>
> [Emphasis added.]

[189] Despite the alternative basis upon which the family proceeding was determined, I am nonetheless satisfied that the *Palmer* test is met. I say this for two reasons.

[190] First, even if the judge was unprepared to find that the father sexually abused the children, Ms. Reeves' evidence was still available to him for use on other issues, including whether the father physically abused the children. Ms. Reeves testified that where there is sexual abuse, physical abuse, including spousal abuse, is common. The judge accepted Ms. Reeves' evidence on this point (at para. 269). Against this background, it is unreasonable to suppose that admission of the evidence of Ms. Reeves had no influence on the judge's finding that the father was physically abusive. She was the only witness who drew such a clear connection between the existence of sexual abuse and physical abuse.

[191] Second, the judge's alternative finding rested, in part, on his assessment of the father's character. I am satisfied that Ms. Reeves' evidence went directly to the issue of the father's character and that it was relied on for this purpose by the judge. For example, she testified that the father is "less than honourable". She emphasized the father's tendency to assert dominance and control, and said that control issues are common to those who physically and sexually abuse others. She relied on a number of other factors to suggest that the father had a propensity to abuse. She

testified that the father's admittedly disturbing drawings were the product of "a very sick mind". She said an inference could be drawn that the maker of the drawings "really hates women". Relying on the evidence of Ms. Reeves, the judge accepted that the father's drawings "indicate the mindset of the person who drew them". He found that the drawings are evidence of "deviancy" and a "perverse interest in sexualized torture of women". All of these findings went to the father's character and may be sourced, in large measure, to the evidence of Ms. Reeves.

[192] In the result, I would grant the father's fresh evidence application as having met the *Palmer* test, and in particular, the fourth requirement that "if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."

[193] In coming to this result, I recognize the substantial body of jurisprudence emphasizing the need for flexibility in considering the admission of fresh evidence that bears on the issue of the best interests of the children and in applying child welfare legislation: *Catholic Children's Aid Society of Metropolitan Toronto v. C.M.*, [1994] 2 S.C.R. 165 at 188−189; *C.P. v. D.S.*, 2008 NSCA 10 at para. 18; *T.G. v. Nova Scotia (Minister of Community Services),* 2012 NSCA 43 at para. 82, leave to appeal to S.C.C. refused [2012] S.C.C.A. No. 237; *J.M. v. Alberta (Director of Child Welfare)*, 2004 ABQB 512 at para. 15; and *Stav v. Stav*, 2012 BCCA 154 at para. 31. I have found it unnecessary, in this case, to rely on this jurisprudence to resolve the fresh evidence application. I would simply note that doing so could only serve to fortify the conclusion I have reached.

[194] Before leaving this point, I would note that the fresh evidence in this case has a significance that goes beyond impugning findings of fact that were material to the order made below—the evidence goes to the integrity of the trial process itself. Where the fresh evidence is said to impugn the integrity of the trial process, both the procedure to be employed and the *Palmer* criteria require modification: *R. v. Duguay*; *R. c. Taillefer*, [2003] 3 S.C.R. 307; *R. v. Hamzehali*, 2017 BCCA 290 at

paras. 34−39. Fresh evidence of this kind is admitted to permit evaluation of whether a miscarriage of justice occurred.

[195] Where, as here, the fresh evidence establishes that a fraud was perpetrated on the court in relation to a material issue at trial, close attention must be paid on appellate review to the broader interests of justice, including not only preserving the fairness of the trial, in substance and appearance, but also maintaining the integrity of the proceedings and public confidence in the administration of justice: *R. v. Davey*, 2012 SCC 75 at paras. 50−51. Fraud is an act that is capable of vitiating the most solemn proceedings of our courts of justice: *R. v. Stoltz*, [1993] B.C.J. No. 891 at para. 26 (C.A.). In my view, the admission of Ms. Reeves' evidence compromised the integrity of the proceedings below and has been shown to have occasioned a miscarriage of justice.

[196] In the result, applying a modified *Palmer* test in this case leads to the same result. On both footings, admission of the fresh evidence requires an order for a new trial.

Glen Woods

[197] Mr. Woods' risk assessment was also tendered by the mother as a "rebuttal report". It too did not comply with the notice requirements of the *SCFR*.

[198] Mr. Woods is a retired RCMP Superintendent. During his 35 years of service he was responsible for investigative support services including criminal profiling, geographic profiling, truth verification, National Sex Offender Registry and threat/risk assessment programs. He is currently a Certified Investigative Analyst (i.e., a profiler). He was retained by the mother to provide a behavioural profile regarding the risk the father posed to the children, specifically in relation to sexual abuse, and a critique of the VPD's investigation of the mother's allegations.

[199] Mr. Woods' October 21, 2011 risk assessment and his November 23, 2011 critique of the VPD investigation were delivered after the trial had commenced. The procedural requirements in R. 13-6(1) were not met nor were the factors in R. 13-

7(6) considered for disposing of those requirements. Counsel for the mother submitted that, like Ms. Reeves' report, Mr. Woods' reports were commissioned as "rebuttal evidence", not as expert reports at first instance. Again, his opinion, while inconclusive, that the father presented a risk to the children as he likely sexually abused them, went to the foundation of the mother's claim for custody. It was not a rebuttal report.

[200] Mr. Woods' risk assessment was based on materials provided to him by the mother's counsel. He did not communicate with, or interview, the father. The materials included affidavits of the mother and others on her behalf, the reports by Mr. Colby, Dr. Eirikson, Dr. Kot, Dr. Edamura, Dr. Sidky, Dr. Dunne, the mother's video and audio recordings of the two older children's disclosures, the pornographic images found on the father's computer, and the father's blotter drawings.

[201] Mr. Woods prefaced his assessment by stating "...the nature and extent of any sexual abuse that may have occurred remains unclear to me." He continued: "[t]he challenge at this point is trying to assess the credibility of the allegations made by the [children] given the circumstances under which the disclosures were made and the fact that the children have since recanted those claims." He concluded: "the substance of the [children's] disclosures are believable when you consider the information in its totality". He then turned to specific events involving the father, from which he inferred the father may have sexually abused the children and therefore presented a risk to the children. His methodology for opining that the disclosures were believable and that the father may have sexually abused the children when he was not qualified to give such an opinion was never addressed by the judge.

[202] Mr. Woods stated the father's blotter drawings were disturbing because of the level of violence displayed in them. He opined that because the father had kept them, they provided insight into the sexual fantasies of the author/artist. He also found that the father's visits to adult pornographic websites were consistent with the mother's reports that the father had demonstrated "inappropriate behaviour with the children" (physical and sexual). He concluded:

> Although the evidence in support of the allegations against [the father] is not conclusive, there is sufficient information to suggest that some level of physical and sexual abuse may have occurred. Additionally there are strong indications that [the father] has other deviant interests including violent sexual fantasies and inappropriate age preference. Considering all of these factors I believe he will continue to present a risk to his children if given the opportunity.

[203] In his critique of the VPD investigation, Mr. Woods was critical of the way the police questioned the mother concerning the sexual abuse allegations, which appeared to him to focus on the reliability of the mother's complaints, her health and her personal details. In his opinion, Det. Rowley went into the interview with a pre-conceived notion that the children had been coached by their mother and that the allegations were unfounded. He was of the view that the mother became the suspect, the children's disclosures were never properly investigated, and the VPD did not follow normal investigative procedures with respect to the allegations of sexual abuse. He concluded:

> I don't believe that there was a conscious effort on the part of police and others to abdicate their investigative responsibilities. The challenge from the beginning was that authorities, based on their perceptions of [the mother], did not believe the allegations against [the father]. Rather than assessing the disclosures separately and objectively and then following the normal & basic investigative strategies, they dismissed them entirely and concluded the investigation as unfounded.

[204] On the admissibility *voir dire*, counsel for the mother argued that the threshold for the admissibility of evidence in a child protection hearing is much lower. His submission on this point did not address the blended nature of the hearing.

[205] Neither the Director nor the father objected to Mr. Woods' qualifications. The father objected to the admissibility of both reports, but primarily to the risk assessment. The Director objected only to the admissibility of the risk assessment. The principal objection from both parties was the scope of the risk assessment. The Director acknowledged that some of the risk assessment might be admissible as rebuttal evidence to Sgt. Ramos's evidence, whom she intended to call in the *CFCSA* proceeding but did not because it was abandoned, but other parts of the

report she objected to because they went to ultimate issues, which were solely for the judge to decide.

[206] Aspects of the report, including Mr. Woods' opinion on the father's past incidents of violence, his "inappropriate/disturbing sexual behaviour", the credibility of the children's disclosures, and his opinion, reproduced in paragraphs 201 and 202 above, all encroached on the ultimate issues, namely whether the children's allegations were credible and whether the father posed a real risk to the children. The admission of this evidence ought to have attracted particularly close scrutiny at the gatekeeping stage. Even if some aspect of Mr. Woods' evidence might conceivably have been admitted as opinion evidence, his qualifications had to be clearly defined and efforts made to ensure that his testimony did not exceed those bounds. Unfortunately, the proposed evidence of Mr. Woods was not rigorously scrutinized at the admissibility stage and he was permitted to give evidence on issues that exceeded the outermost boundaries of his potential qualifications.

[207] Instead of adopting this approach, the judge asked the Director why the report should not be admitted when she had advised the court that she intended to call Sgt. Ramos to support her position in the civil proceeding that the Director had acted *bona fides* throughout. The Director reminded the judge that she had not yet put in her case in the *CFCSA* proceeding and that the *bona fides* of the Director's actions was not an issue in the family proceeding. Despite these submissions, the judge admitted Mr. Woods' reports, ruling that that any issues about the scope of his evidence would go to the weight of the opinion.

[208] The judge accepted Mr. Woods' risk assessment, and his opinion that the blotter drawings, while not a direct indication of pedophilia, were indicative of the mind-set of the person who drew them. He also accepted Mr. Woods' opinion that the father's use of the adult pornographic websites was an indication that some level of physical and/or sexual abuse had occurred.

Dr. Edamura

[209] The mother called Dr. Edamura, the family doctor, as a factual witness. He testified about the children's disclosures and that he responded to those disclosures by contacting Children's. Counsel for the mother questioned Dr. Edamura on his qualifications as a general practitioner and topics related to sexual abuse that had come up at conferences he had attended. Dr. Edamura maintained that he was "no expert" on child sexual abuse. Dr. Edamura was qualified as a general practitioner with expertise "to make general comments about the physiology of young children". He was not qualified to give evidence about child sexual abuse and did not purport to be an expert in that area.

[210] During his testimony, counsel for the mother asked Dr. Edamura about a medical record concerning K.G. when she was three months old. The record indicated that she had anal fissures. It was not Dr. Edamura's medical record and he had not examined K.G. at that time. Dr. Edamura was asked if anal fissures were consistent with some form of anal penetration or if they could have been caused when an infant was only breast feeding. The Director objected to this line of questioning as Dr. Edamura had not been tendered or qualified as an expert in child sexual abuse and he was only testifying as a factual witness with respect to the children's disclosures. The Director took the position that the probative value of his evidence was outweighed by its prejudicial effect. Nevertheless, the judge allowed Dr. Edamura to opine on the cause of K.G.'s anal fissures, stating that the Director's objection would go to the weight he gave the evidence.

[211] Dr. Edamura testified that, in his opinion, the anal fissures would not have been caused by stool movement. However, he repeatedly qualified his evidence by stating that he was not an expert in that area and that only a specialist could determine if the fissures were caused by anal penetration. He also agreed that nothing in the hospital records suggested that the medical staff were suspicious of sexual abuse. In re-examination, counsel for the mother was permitted to ask if the fissures could have been caused by anal sex or "some sort of manipulation of the anus". Dr. Edamura replied: "it's possible" and that certain *indicia* amounted to

sexual abuse, which is why he referred the matter to Children's. Counsel for the mother was also permitted to elicit Dr. Edamura's opinion on whether the mother had coached the children, the credibility of the children's disclosures, and their veracity. In cross-examination, he acknowledged that anal fissures were not uncommon in infants.

[212] The judge ultimately found "from Dr. Edamura's evidence concerning the Children's Hospital records, that K.G.'s anal fissures were the result of sexual contact from [the father]". He made this finding, in part, because neither the father nor the Director called evidence to challenge Dr. Edamura's evidence that K.G.'s anal fissures were not caused by stool movement.

Dr. Dunne

[213] The Director objected to the admissibility of Dr. Dunne's two letters as opinion evidence. At trial, she was called to testify as a factual witness only. She was not called or qualified as an expert witness. However, during her testimony, the judge qualified her as an expert witness and permitted her to give opinion evidence on: (1) the mental and emotional state of the mother; (2) the mother's compliance with the Ministry's risk reduction plan; (3) the contents of her two letters to the Ministry; (4) battered woman syndrome; (5) the use of dissociation as a coping strategy for battered women; (6) why the mother's pre-disclosure knowledge of the father's alleged inappropriate interactions with the children did not cause her to take action sooner, or to use it in support of her allegations of physical abuse; and (7) the mother's lack of psychopathology. Again, the judge held that the mother's lack of compliance with the admissibility and procedural requirements for tendering this expert opinion evidence would go to its weight.

[214] In cross-examination, Dr. Dunne acknowledged that she was an advocate for the mother and conceded that she had never met the father. She also acknowledged that the two letters were not written for the purposes of providing expert opinion evidence in court, that she had no expertise as a psychologist, and that she did not

diagnose patients in accordance with the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-V).

[215] The judge nevertheless relied on Dr. Dunne's opinion evidence to find that the mother's testimony was credible and that she was not responsible for failing to protect the children. He noted that other than an attack on her qualifications to provide opinion evidence in the areas she did, Dr. Dunne's evidence was not challenged by any other expert.

B. The Additional Fresh Evidence Applications

[216] On appeal, the father makes two fresh evidence applications: the first concerns Ms. Reeves' qualifications, which I have granted; the second relates to his mental state during the family trial. The mother also applies to adduce fresh evidence in the event the father's application pertaining to Ms. Reeves' qualifications is successful.

[217] The father applies to adduce fresh evidence from his treating psychiatrist, Dr. Schertzer, in relation to his mental health, which he contends was deteriorating during the family trial to the degree that it had a negative impact on the judge's view of his credibility.

[218] The father did not indicate at any point during the trial that he was suffering from mental health issues. Neither Dr. Eirikson's nor Mr. Colby's assessments suggested that the father had any mental health issues. Both experts were of the view that the father was able to participate in the family trial even though he was self-represented. The judge also found that the father presented as "a suave, engaging, highly intelligent, sophisticated, and articulate person who is quite capable of grasping, very quickly, court procedures and legal issues" (at para. 50).

[219] In my view, the father has failed to meet the *Palmer* criteria for admitting the fresh evidence related to his mental health. In particular, he has not met the due diligence requirement and the requirement that the evidence could reasonably have affected the outcome.

[220] Given that I am allowing the father's fresh evidence application with respect to Ms. Reeves' qualifications, the mother applies to adduce fresh evidence of post-trial communications with the Supreme Court Registry and submissions to the judge, as well as a document that demonstrates Ms. Reeves was a member of the American Counselling Association from January 1, 2000 to April 30, 2007. I would dismiss the mother's application because the proposed evidence does not meet the *Palmer* test.

C. The Judge's Treatment of the Expert Evidence

[221] In my view, the judge erred in law in his treatment of the "expert" evidence I have highlighted. I am satisfied that his treatment of this evidence led to a fundamentally unfair trial.

[222] The judge's approach to admitting expert opinion evidence was seriously flawed by his failure to fulfill the gatekeeper role in determining the admissibility of such evidence. Instead, he admitted much of the mother's opinion evidence without properly considering its threshold admissibility as required by the *Mohan/White Burgess* test. He also failed to properly consider the effect of its non-compliance with the procedural requirements of the *SCFR,* leaving any deficiencies or prejudice caused by the non-compliance to be considered in terms of the weight of the opinion. While his flawed approach may have been caused, in part, by the mother's incorrect characterization of the evidence as "rebuttal evidence", this did not alter his obligation to address the threshold admissibility of the evidence.

[223] The opinion evidence was clearly initial evidence tendered to support the mother's allegations that the father had sexually abused the children and was therefore unfit to have custody of them. As such, it was incumbent upon the mother, and ultimately the judge, to ensure that the threshold and procedural requirements had been met before admitting and considering the evidence.

[224] The difficulty with admitting opinion evidence that has not properly been vetted for threshold admissibility is that it may have insufficient probative value and, accordingly, cause significant prejudice by distorting the fact-finding process. As Mr. Justice Sopinka in *Mohan* observed at para. 19:

> There is danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

[225] Similarly, in *R. v. Clark* (2004), 69 O.R, (3d) 321 (C.A.), Mr. Justice Moldaver (as he then was) stated the following with respect to the admissibility of expert evidence by a proposed criminal profiler:

> Combined, these two concerns [giving expert evidence more weight than it deserves and accepting expert evidence without subjecting it to the scrutiny it requires] raise the spectre of trial by expert as opposed to trial by jury. That is something that must be avoided at all costs. The problem is not a new one but in today's day and age, with proliferation of expert evidence, it poses a constant threat. Vigilance is required to ensure that expert witnesses… are not allowed to hijack the trial and usurp the function of the jury.

[226] I have addressed the legal error, in my opinion, with respect to the admission of Ms. Reeves' evidence. She was not qualified to give the evidence she did. The dangers of admitting opinion evidence from an unqualified witness or, more commonly, of admitting evidence from an otherwise qualified witness that strays beyond the legitimate scope of the witness's expertise is well documented: see Ontario, Ministry of the Attorney General, *Inquiry into Pediatric Forensic Pathology in Ontario*: *Report* (Toronto: Ministry of the Attorney General, 2008) (The Goudge Report).

[227] The judge also, in my respectful view, erred in admitting the opinion evidence of Dr. Edamura and Dr. Dunne, who were tendered as factual witnesses only, but were permitted to give opinion evidence, and of Mr. Woods who was permitted to give opinion evidence well outside the bounds of his expertise and in relation to the ultimate issue of whether the father posed a risk to the children.

[228] Dr. Edamura was called to testify about the disclosures the children made to him. He was not tendered as an expert witness on child sexual abuse and he maintained that he had no expertise in the area. He resisted counsel's attempts to elicit opinion evidence from him on whether the children had been sexually abused. Only when pushed to give an answer as to what might have caused K.G.'s anal

fissures, did he respond that "it was possible" they were the result of inappropriate digital or other forms of anal penetration. Again, he qualified his opinion by maintaining that he did not have the expertise to opine on that subject, and in any event, he had not examined K.G. at the time.

[229] Despite his lack of expertise, the judge relied on Dr. Edamura's evidence to find that the father had sexually abused K.G. in this manner when she was three months old. This finding was extremely prejudicial to the father, and it was made without any properly laid evidentiary foundation. It was also an error to justify the admission of this very problematic opinion evidence on the basis that it was open to the father to tender "rebuttal evidence" to refute what was inadmissible opinion evidence.

[230] Similarly, Dr. Dunne was another factual witness who, during her testimony, was asked and permitted to give opinion evidence on a matter for which she had not been qualified and for which notice had not been given to the father. Dr. Dunne gave opinion evidence on battered woman syndrome to explain the delay in the mother's reports of sexual and physical abuse. The judge referred to this evidence, rejecting what he viewed as attacks on her expertise. Again, he noted that her opinion evidence was not challenged by any other expert, a perplexing observation given that Dr. Dunne was never called to provide expert opinion evidence.

[231] Lastly, Mr. Woods was permitted to give opinion evidence on the believability of the disclosures made by the children, whether the father may have physically and sexually abused the children, and the risk that the father might sexually and/or physically abuse the children if they were in his care, all based on the father's profile and behavioural characteristics. This evidence was not, in my view, admissible. First, it was not necessary. The central issue Mr. Woods addressed did not require specialized knowledge beyond the understanding of the average person. As was noted in *R. v. D.D.,* [2000] 2 S.C.R. 275 at para. 57, "[o]nly when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to

important information will be lost unless we borrow from the learning of experts" will the necessity criteria be met.

[232] In addition, Mr. Woods' evidence was not shown to be reliable by reference to the factors identified in *J.-L.J.* at para. 33. Indeed, Mr. Woods testified on the qualifications *voir dire* that criminal profiling was created as an investigative aid, not for the purposes of tendering criminal profiling as opinion evidence. The evidence went to the ultimate issue of whether, in view of the allegations of sexual and physical abuse, the father posed a real risk to the children if granted custody or unsupervised access to them. Historically, opinion evidence was inadmissible when it touched on one of the ultimate issues before the court. The rule is no longer one of general application. Even so, opinion evidence that approaches the ultimate issue has the potential to distort the fact-finding process by cloaking the witness with an aura of specialized knowledge on critical issues. As a consequence, the admissibility criteria must be applied more strictly as the proposed evidence approaches the ultimate issue the court has to decide: *Mohan* at 24−25. Consistent with this approach, the evidence of Mr. Woods (and Ms. Reeves) should have attracted close scrutiny at the gatekeeping stage. That did not occur in this case. Further, admission of the evidence was highly prejudicial to the father. See *E.J.L. v. B.J.L.* (1983), 54 B.C.L.R. 164 (C.A.); and *G.E.C. v. M.B.A.C.,* [1993] B.C.J. No. 1393 (S.C.).

[233] The father relies on *Mohan* and *R. v. Ranger* (2003), 67 O.R. (3d) 1 (C.A.) in support of the proposition that expert evidence with respect to an offender's profile is inadmissible unless there is something distinctive about the behavioural characteristics of a perpetrator that makes comparison helpful in determining guilt.

[234] In *Mohan,* Sopinka J. (at 26) referred to the following passage he wrote in *R. v. Morin*, [1988] 2 S.C.R. 345 at 371, with respect to expert evidence on disposition:

> In my opinion, in order to be relevant on the issue of identity the evidence must tend to show that the accused shared a distinctive unusual behavioural trait with the perpetrator of the crime. The trait must be sufficiently distinctive that it operates virtually as a badge or mark identifying the perpetrator. ...

and then explained in *Mohan* at 37:

> Before an expert's opinion is admitted as evidence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt. Although this decision is made on the basis of common sense and experience, as Professor Mewett suggests, it is not made in a vacuum. The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group. Put another way: Has the scientific community developed a standard profile for the offender who commits this type of crime? An affirmative finding on this basis will satisfy the criteria of relevance and necessity. Not only will the expert evidence tend to prove a fact in issue but it will also provide the trier of fact with assistance that is needed. Such evidence will have passed the threshold test of reliability which will generally ensure that the trier of fact does not give it more weight than it deserves. The evidence will qualify as an exception to the exclusionary rule relating to character evidence provided, of course, that the trial judge is satisfied that the proposed opinion is within the field of expertise of the expert witness.

[235] Similarly, in *Ranger,* Madam Justice Charron (as she then was), writing for the Court, stated that for evidence about a person's disposition to be admissible, there must first be something distinctive about the behavioural characteristics of either the accused or the perpetrator that makes a comparison of the two sets of characteristics helpful in determining innocence or guilt. In making this determination, the trial judge must evaluate the scientific reliability of the expert's opinion as to the behavioural characteristics of the perpetrator. She found that criminal profiling is a novel field of scientific endeavour for which its reliability must be established at trial to be admissible:

> ... from her limited testimony about the available verification of opinions in her field of work that her opinions amounted to no more than educated guesses. As such, her criminal profiling evidence was inadmissible. The criminal profiling evidence also approached the ultimate issue in this case and, hence, was highly prejudicial. The prejudice was further heightened by the limits placed on defence counsel's cross-examination and by the prominence that the trial judge gave to Detective Inspector Lines' evidence in his charge.
>
> [Emphasis added.]

[236] On any view of the law, Mr. Woods ought not to have been permitted to give any evidence on the believability of the disclosures. This evidence went well beyond the limited areas in which he might conceivably have been shown to be qualified to give opinion evidence.

[237] In sum, the judge erred in law in admitting much of the opinion evidence tendered by the mother because it failed to meet the threshold admissibility requirements. It was highly prejudicial to the father, and led to a distorted fact-finding process. The admission of this body of evidence fundamentally undermined the fairness of the trial. A new trial is also justified on this ground.

[238] While this is sufficient to dispose of the appeal, I would note that expert evidence tendered by the Director, including the evidence of Dr. Eirikson, Mr. Day and the court-appointed expert, Mr. Colby, all of whom provided positive assessments of the father, was systematically rejected as "unreliable" where it conflicted with the (largely inadmissible) opinion evidence of the mother's experts. The judge justified this approach by finding that Dr. Eirikson had a pre-disposition against the mother, Mr. Colby's report had been compromised by the father having unsupervised access to the children before they were interviewed, and Mr. Day's opinion had been secured by the father manipulating him. There was no evidence to support any of these findings.

[239] This Court will not interfere with a judge's factual findings where those findings are supported by an evidentiary foundation. This is reflected in the deferential standard of review applicable to findings of fact: namely, palpable and overriding error. In my view, it is unnecessary to deal with the judge's allegedly differential treatment of the expert evidence tendered by the Director to dispose of this appeal, and I decline to do so. Still, I feel compelled to make some observations on this point because, in my view, some of the findings made below unfairly cast aspersions on the professionalism and integrity of those witnesses.

Dr. Eirikson's and Mr. Colby's assessments

[240] Independent of one another, Dr. Eirikson and Mr. Colby arrived at similar findings, psychological assessments of the parties and the two older children, and recommendations as to the parties' parenting abilities.

[241] Dr. Eirikson found the father had no sexual interest in children and that it was unlikely he had sexually abused his own children. Mr. Colby found there was insufficient evidence to conclude that the children had been sexually abused by the father. Both interviewed the parents and the two older children (Mr. Colby interviewed each child twice; Dr. Eirikson interviewed each child once). Both observed parent-child interaction with all four children, interviewed Ministry social workers and collateral contacts, reviewed a multitude of documents, reports and the audio and video recordings of the children by the mother, and the VPD video recordings of interviews with the parents and children to arrive at their respective assessments on the parenting capabilities of each parent. Both concluded that the father was the parent better able to care for the children. The judge rejected each of their assessments as unreliable, albeit for different reasons.

[242] In his report, Dr. Eirikson opined that the mother demonstrated "pervasive distrust and suspicions of others' motives as malevolent", was reluctant "to give information, vagueness or to maintain secrecy", was manipulative with "a driven intensity in her personality and high anxiety and manic like sleeplessness", had "some difficulty controlling her anger" (as he found also with the father), exhibited a "dramatic presentation" and "some acute mental health [issues] related to pressured speech, hypomanic features and suspiciousness", culminating "in an intense belief that the children were sexually abused by [the father] despite independent information that suggests otherwise." That independent information included the VPD investigation and Dr. Jain's and Dr. Kot's reports from Children's.

[243] With respect to the father, Dr. Eirikson found "no indication of a psychological diagnosis related to pedophilia or psychopathy or substance abuse that would affect [the father's] care of the children", even accepting the mother's reported

"inappropriate behaviour" by the father with the children, and despite her "insisten[ce] that [the father] is a psychopathic pedophile". He concluded that the father had "the necessary emotional and psychological capacity to parent the four children with some assistance" but cautioned him about appropriate boundaries with the children in light of the allegations. He opined that "safe contact" between the father and the children would be "at minimum unsupervised access" and that the court should consider placing the children with the father.

[244] The judge was critical of Dr. Eirikson's methodology because: (1) he had conducted only a single interview of the children (in contrast, the judge did not appear concerned that Ms. Reeves had never interviewed any of the children); and (2) he accepted the result of the VPD investigation, which the judge found was biased.

[245] The judge concluded that Dr. Eirikson's opinion was unreliable because: (1) it reflected a pre-disposition against the mother; (2) his view of the case was "significantly coloured" by his review of the biased VPD investigation; (3) of his response to the mother's presentation during his interview with her; and (4) he was "persistent and dogged" in his determination to stand by his assessment when presented with evidence that the judge believed should have caused him to change his opinion.

[246] With respect, there was no evidentiary basis for the judge's first three reasons and an expert defending his or her opinion does not render that opinion unreliable.

[247] There was no evidence that Dr. Eirikson was pre-disposed against the mother or was biased against her because of the VPD investigation. However, the judge appears to have reasoned that, because—in his opinion—the VPD investigation was biased, Dr. Eirikson became biased in reviewing the VPD's findings. No similar finding was reached with respect to any of the other experts who reviewed the VPD investigation, including Ms. Reeves or Mr. Colby.

[248] Dr. Eirikson's "response" to the mother's presentation was his psychological assessment of her. It is unclear to me how that assessment was biased because of its negative findings. It was the mother's unusual presentation during her interviews (also reported by many others) that gave rise to Dr. Eirikson's concerns.

[249] Lastly, the fact that on cross-examination Dr. Eirikson declined to deviate from the findings, conclusions and recommendations in his report based on evidence the judge found "objectively" supported the mother's allegations, does not make him biased or mean that he "remained pre-disposed against [the mother]". An expert witness is entitled to defend his or her opinion without that defence affecting its reliability, as long as the witness does not become an advocate for a party: *Keefer Laundry Ltd. v. Pellerin Milnor Corporation,* 2007 BCSC 899. In that case, the Court stated:

> [16] In short, the Court should be able to approach the opinion with some confidence that the expert would have rendered the same opinion if he or she had been consulted by the opposite party. However, once an expert has formed an opinion through that process, he or she may be firm, emphatic or even strident in the way he or she expresses the opinion or defends it against contrary opinion.

[250] During Dr. Eirikson's testimony, the mother raised a lengthy and convoluted side-issue concerning the timing of one of Dr. Eirikson's handwritten notes in one of his interviews with her. Again, I feel compelled to address this issue because of a very serious allegation in the mother's factum in which she claims that Dr. Eirikson perjured himself in the trial. She alleges:

> The evidence was clear that Dr. Eirikson had lied and tried to perpetrate a fraud on the court, and yet the Trial Judge showed a great deal of restraint and was careful to note that he was not rejecting his evidence based on this. Neither Dr. Eirikson nor [the father] asked to provide further evidence in rebuttal to Mr. Purdy's report and conclusions.

[251] The mother alleges Dr. Eirikson inserted the impugned note sometime after her interview in an attempt to discredit her allegation that the father had told her he had raped a woman when he was younger. After Dr. Eirikson was finished testifying, the judge permitted the mother to call Daniel Purdy, a forensic handwriting expert, to

provide "rebuttal evidence" that the impugned note had not been written contemporaneously with the other handwritten notes of the interview.

[252] The impugned note is what I would characterize as a "note-to-self". It was written in different tenses but was consistent with the manner in which Dr. Eirikson appears to have made his other handwritten notes during the various interviews. The arrow pointing to the note-to-self was drawn from the word "rape", which was listed in the bullet point list of what the mother had said to him. The note-to-self reads: "I call [name of person] myself, I looked her up, she confirm to me –raped [named person] –call her suggested".

[253] Dr. Eirikson testified that the note reflected what the mother had told him, including her suggestion that he call the woman to confirm the allegation. Dr. Eirikson did just that. He contacted the woman and she denied having been raped by the father. He testified that the woman told him she had explained this to the mother when the mother had called her earlier about the allegation, and that the incident, a casual sexual encounter, had occurred many years ago when she was in her 20's. Dr. Eirikson interpreted the mother's information to him about an alleged rape by the father as a deliberate false allegation that was intended to manipulate the assessment process.

[254] In cross-examination, Dr. Eirikson strongly denied that he wrote the impugned note after the mother's interview. Mr. Purdy's report was produced after Dr. Eirikson testified, so he was unable to respond to Mr. Purdy's opinion. The mother, however, asked the judge to infer from Dr. Eirikson's denial, that he was being intentionally untruthful in his evidence and therefore all of his evidence should be rejected. The judge did not decide this issue because he rejected Dr. Eirikson's opinion on other grounds; however, he seemed to hint about his potential finding:

> [413] What I will say about those notes, however, is that they are capable of being read to confirm J.P.'s evidence that she raised the possibility of the rape with Dr. Eirikson, was not able to identify the victim's full name, and asked him to investigate to confirm it. It is telling that in order to support his interpretation of his notes, Dr. Eirikson read in a different tense to some of the words in his notes that do not appear on their face.

[255] I refer to this issue only because of the mother's position that the judge correctly rejected Dr. Eirikson's report because he "had lied and tried to perpetrate a fraud on the court". The judge made no such findings and I confess to being troubled by counsel making such a statement about a witness in the absence of any express finding to that effect.

[256] Mr. Colby's experience with the mother was similar to that of Dr. Eirikson's. He reported that the mother refused to comply with his instructions not to phone his office to provide him with information but to wait until her follow-up appointment. She ignored his instructions and repeatedly called his office leaving long messages beyond the telephone's capacity. If she succeeded in reaching him directly, Mr. Colby said she would not "modify her input" as requested. She also complained to him about the rules imposed on her by the Ministry for access to the children and she attempted to direct the interview process by making demands about the process and insisting that he interview the children with her so that he could find out the "truth". He also had difficulty with her lack of impulse control and "her fixation with the matters raised", writing:

> Despite direction and Court Order to the contrary, [the mother] was quite intrusive within the psychological assessment process, repeatedly contacting the Psychologist and asking for outcome results of interviews with the children and accounts of the amount of time spent with each of the children, the types of matters that were discussed, specifically in relation to the allegations of sexual impropriety. …
>
> [The mother] was reminded that this assessment constitutes a Family Relations Act, Sec 15, Custody and Access Assessment, as well as an exploration into the matters raised in regards to the sexual impropriety. However, [the mother] focused solely upon matters related to the disclosures that were presented in video of the children being interviewed by her in December 2009.

[257] In Mr. Colby's opinion, the mother was a "highly distressed individual", with an intense distrust of the father that concerned him, and who, in his opinion, required professional intervention. On the other hand, he found that the father had the ability to effectively parent the children if he successfully completed a parenting program that addressed issues concerning the appropriate sharing of information with the

children, establishing appropriate boundaries, learning about disciplinary options, and how to address unwanted behaviour and the stress of managing four children.

[258] He recommended that the father have custody of the children and that the mother continue to have supervised access until she was able to control her verbal input to the children regarding the parental breakup and family distresses. He also posed the following hypothetical scenario:

> One of the options that this Psychologist considered was that the children did provide disclosure of a sexual abuse. They recanted on this disclosure due to pressure presented or awards presented by the abuser, and that [the mother's] concerns are real. Her behaviours in relationship to those concerns were appropriately protective when she did not receive a response in that matter from police or Ministry personnel, as they escalated their attempts to assure for the safety and wellbeing of her children. Based on the videotapes and the precocious sexual knowledge of [K.G.] there are no other explanations presented for the knowledge-based disclosure and recanting. A further denial of engaging in such acts is not criteria for them not having happened. This Psychologist cannot reach that conclusion, and that is a matter for the trier-of-fact. Neither prior maternal personality nor emotional status considerations mitigate against the possibility of the children being sexually abused.
>
> Further, maternal protective behaviour of the children, believing that they have been abused, although it is not the criteria for the existence of that abuse, may be an indicator of appropriate protective parenting. If the trier-of-fact determines that such abuse occurred, that places [the mother's] behaviour in a different light.
>
> [Emphasis added.]

[259] Despite this hypothetical scenario, the judge concluded that "the independence and integrity of the s. 15 investigation was impeded" and he rejected Mr. Colby's assessment and recommendations on the basis that: (1) the investigation was compromised by the father having had unsupervised access to the children; (2) the children recanted their earlier disclosures to the mother because the father had intimidated the children during his unsupervised visits; and (3) he had looked at the facts "through a distorted lens" as a result of the "negative reporting about [the mother] and the report of the VPD conclusion", as well as "his perception of [the mother's] dramatic and often frantic presentation".

[260] Again, there was no evidence to support any of the judge's reasons for rejecting Mr. Colby's assessment. Each reason given was speculative. In June 2010, the judge was made aware that the father was having unsupervised access to the children. He did not intervene to stop the father's unsupervised access until the mother made an application to that effect in August 2011. During that interval, there were no reported adverse effects on the children. This was confirmed by Mr. Colby, who testified that he saw no evidence the father had attempted to influence the children before his interviews. There was no evidence that Mr. Colby's psychological assessment of the mother was conducted through a "distorted lens". It was simply based on how the mother presented during the interview process. Even with the difficulties Mr. Colby experienced with her conduct during the process, the fairness of his approach was made evident in the hypothetical scenario he set out for the judge, as the trier-of-fact, which expressly left it open for the judge to reach a different conclusion based on different findings of fact.

[261] I would add one further example of the judge's treatment of the parties' expert evidence: the report of Dr. Kot, which was admitted as a business record only and not for the truth of its contents. Although it was not tendered for its opinion, the judge offered the comment that he had "significant reservations" about the report, concluding that it was unreliable both as a summary of the two older children's statements and for Dr. Kot's opinion with respect to the children's apparent recantation of their prior disclosures to the mother. He relied on Mr. Colby's evidence as to how questions should be framed for children, finding that at least one of BT.G.'s answers to Dr. Kot was unreliable because, in his opinion, the question contained an implied judgment. He also found deficiencies in Dr. Kot's report based on: (1) its failure to describe the basis of her retainer, and to list all of the information and documents she had reviewed; (2) the fact that she was asked to provide a therapeutic assessment and not a forensic investigation; and (3) the fact that she made one minor factual error.

[262] Of course, neither the father nor the Director responded to Dr. Kot's report as it was never tendered as expert opinion evidence admissible for the truth of its

content. Dr. Kot's report was simply a response to Dr. Jain's referral from the Children's Emergency Department for an assessment of the children. It was an internal document produced for the purpose of demonstrating that the Director and her delegates followed-up on the mother's allegations by asking Children's to interview the two older children.

D. Trial Fairness

Reasonable Apprehension of Bias

[263] The father submits that the cumulative effect of the judge's errors, which he says include the judge's flawed approach to admitting expert opinion evidence, his inconsistent approaches to and treatment of the mother's and the father's expert evidence, and his blanket acceptance of the mother's evidence in contrast to his systematic rejection of the father's evidence, demonstrate a reasonable apprehension of bias.

[264] The test for a reasonable apprehension of bias is a difficult one to meet. It was set out by Madam Justice Abella in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General),* 2015 SCC 25:

> [20] The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:
>
> > ... what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, *per* de Grandpré J. (dissenting)].

[265] In my view, it is unnecessary for this Court to address this ground of appeal. The introduction of inadmissible opinion evidence including, but not limited to the evidence of Ms. Reeves, fundamentally compromised the fairness of this trial and caused a miscarriage of justice. A new trial is required on this basis alone.

Procedural unfairness

[266] In his role as case management judge, the judge was responsible for managing the family proceeding so that it would be ready for trial. The objective of the *SCFR,* which govern the procedure for family proceedings, is to: (1) help parties resolve the legal issues in a family case fairly and in a way that will (a) take into account the impact that conduct of the family case may have on a child, and (b) minimize conflict and promote cooperation between the parties; and (2) secure the just, speedy and inexpensive determination of every family case on its merits. It is not clear to me that either of these objectives were achieved by the manner in which this proceeding was ultimately determined.

[267] During a case management conference early in the proceeding, the mother alleged bad faith against the Ministry social workers and, in particular, against Mr. Strickland with respect to the *CFCSA* proceeding. She also raised her theory that all were conspiring against her to dismiss her allegations against the father. This seems to have triggered the judge's interest in the Provincial Court *CFCSA* proceedings, causing him to initiate the process of joining the family and the *CFCSA* proceedings, with its attendant expansive consequences.

[268] The Director was initially opposed to the joinder for valid reasons. The joinder, in my respectful view, unduly complicated the high-conflict family proceeding by expanding its scope to include a consideration of the mother's allegations of bad faith, which were ultimately irrelevant in both proceedings. Had the Ministry been allowed to pursue the course of its investigation, which appears to have been focused on returning the children to one or the other of the parents, the resulting 91-day trial may have been reduced considerably.

[269] After the *CFCSA* proceedings were abandoned, the judge seized himself of the civil proceeding and persuaded the Director and Province to enter into the Agreement, while ignoring the father's input and lack of consent. With respect, I am of the view that insufficient consideration was given to the impact his adverse

findings against the father and the Agreement would inevitably have on the overall fairness of the civil proceeding.

[270] Our justice system prides itself in providing litigants with a forum for adjudicating their disputes in a manner that is and appears to be objectively fair and impartial. The appearance of trial fairness is as important as actual trial fairness if the public is to maintain confidence in the administration of justice. Even if judicial economy supports certain shortcuts, any appearance of unfairness, particularly where a judge has made adverse findings of credibility against a party, should dictate serious consideration if not mandatory recusal from a subsequent proceeding involving that party.

Evidentiary rulings

[271] *White Burgess* recognizes that if the admissibility requirements for expert opinion evidence are ignored, a trial may fall prey to the dangers of inordinate "time, prejudice and confusion" (at para. 24). The fairness of the trial may be compromised by admitting unreliable, irrelevant, flawed or misleading evidence that lacks probative value while being highly prejudicial (at para. 18). It is therefore imperative for a trial judge to streamline the trial process by excluding evidence that does not meet the admissibility criteria. The rigour that ought to have been applied at the gatekeeping stage to questions going to the admissibility of expert evidence is not evident in this proceeding. As a consequence, inadmissible opinion evidence was introduced and relied on by the judge in significant ways. In addition, Ms. Reeves, a central witness, misled the court and was permitted to give what was, from the father's perspective, highly prejudicial testimony she was not qualified to give. Unfortunately, that evidence was relied on by the trial judge and had a material impact in the resolution of the family proceeding.

Were the factual findings supported by the evidence?

[272] As I have said, I do not propose resolving the fourth ground of appeal as, in my view, and for the reasons stated, the appeal must be allowed on other grounds, the order set aside and a new trial ordered.

V. Disposition of the Family Appeal

[273] In summary, the flawed procedural and evidentiary rulings resulted in the introduction of a considerable body of inadmissible opinion evidence that was relied on by the trial judge in determining the central issues that arose in this case. The admission of this evidence resulted in an unfair trial and taints the judge's finding that the father had sexually abused the three older children.

[274] Accordingly, the appeal is allowed, the orders for sole custody and guardianship of the children to the mother, and no access to the father are set aside, and the family proceeding remitted for a new trial. As the mother was the parent with presumptive custody of the children before the final order was made, I would leave in place an interim order for custody and guardianship of the children pending the outcome of the new trial, without prejudice to the father. Given the order I propose making, I offer no comment on the very serious allegations of misconduct toward the children which will have to be addressed in the new trial.

VI. The Civil Proceeding

[275] The second appeal is from the Final Civil Order, which holds the Director/Province liable for: (1) misfeasance in public office by Mr. Strickland; (2) breach of fiduciary duty; and (3) negligence. The Director/Province, the father, and Mr. Strickland each submit that the judge's adjudicative process in the civil proceeding resulted in prejudice, procedural unfairness, and liability findings that are substantively unsound. They contend that the judge erred in his treatment of the evidence and, in particular, ignored and/or misapprehended relevant evidence and drew inferences that were not available to him on the evidence. I agree on both points. For reasons I will develop, I am also of the view that there was no evidence to support any of the claims advanced by the mother. In the circumstances, the proper disposition is not a new trial but dismissal of the Notice of Civil Claim.

[276] Section 2 of the *CFCSA* sets out guiding principles that inform the Director's discretionary actions under the Act. The *CFCSA* "must be interpreted and administered so that the safety and well-being of children are the paramount

considerations…" and orders made at a protection hearing must be "in the child's best interests" (s. 41). The *CFCSA* mandates that a child's immediate safety and well-being govern any decision to remove the child from the parent's care: *B.S. v. British Columbia (Director of Child, Family and Community Service*) (1998), 48 B.C.L.R. (3d) 106 (C.A.). Any doubts in that regard must favour the protection of the child: *B.B. v. British Columbia (Director of Child, Family and Community Services)*, 2005 BCCA 46 at para. 13.

[277] It is well established that when discharging their responsibilities under the *CFCSA,* the Director and her delegates do not owe a private law duty of care to anyone other than the children whose interests they are obliged to protect: *C.D. v. Cunningham,* 2014 BCCA 180 at paras. 11–12.

A. Pre-Removal Events

[278] At the time of their removal, the children were ages 7, 5, 3, and 14 months', respectively and were in the mother's presumptive custody. Mr. Strickland was faced with conflicting and escalating allegations. The mother alleged that the father had physically and sexually abused the children while the father alleged that the mother was mentally unstable. At the same time, the mother's unusual behaviour had alarmed a variety of individuals in the community who had reported concerns about the children to the Ministry. The reports came from, among others, members of the mother's family, the Vice-Principal of the school where the children attended, Mental Health Emergency Services, VPD officers who had met with the mother while investigating her complaints, a social worker at Children's, Dr. Jain, a pediatrician at Children's, and other Ministry social workers who had interacted with the mother. All were consistent in their reports about the mother's unusual presentation, her apparent deteriorating mental state, and the negative effect her behaviour was having on the children. In particular, some expressed concern over K.G.'s appearance in the mother's recorded videotapes of the children's disclosures.

[279] Mr. Strickland was extremely concerned with those videotaped recordings and the fact that the mother had distributed them on Christmas Day to over 20

individuals in the community. He stated that the videos were a "red flag" to him. In his 20-year career, he had never before seen a parent make such recordings and distribute them to the community. In his view, the mother was causing emotional harm to the children by her conduct, which alarmed him and led to his decision to remove the children from her presumptive care. Det. Rowley's opinion that the mother might harm herself and the children, tipped the scale for him in favour of their removal.

[280] The Director had no immediate concerns about the safety and well-being of the children in relation to the father, pending the completion of the VPD investigation of the mother's allegations. As a condition of his bail and an interim order in the family proceeding, he was prohibited from contacting the children after his arrest and removal from the family home on October 5, 2009. He did not see the children after his arrest until his first supervised access on January 4, 2010.

[281] Before the children were removed from the mother's care, Det. Rowley had interviewed the mother about her allegations against the father. As a result of the mother's unusual presentation and behaviour at that time, Det. Rowley became concerned about the mother's mental stability and her unexplained disappearance with the children over Christmas, which she believed might end in the mother fleeing with the children, or even killing herself and the children. Mr. Strickland was similarly concerned. They discussed these concerns in a subsequent conversation. Other VPD officers involved with the family also expressed growing concerns about the mother's behaviour and the fact that the children had not been seen for 10 days. The judge misapprehended this evidence in finding (at para. 350) that Mr. Strickland misled Deputy Director Robinson and Ms. Caffrey in advising them the children had to be removed immediately because the mother might harm herself and/or the children based on his conversation with Det. Rowley. The judge found that Det. Rowley had not advised Mr. Strickland of her concerns. Unfortunately, he misapprehended the evidence on this important point. Det. Rowley testified that she did communicate her concerns to Mr. Strickland:

> Q. Detective Rowley, I'm going to ask the question a different way. I'd like you to answer the question, how did you develop the view or the worry that Ms. [P.] might kill her children?
>
> A. I developed the view because she had stopped exhausting voicemail, she had isolated herself, she had just started to change her -- her previous practices. I relied on my experience as my knowledge of people when they're suicidal, how they isolate themselves, from my time in the military and from working on the road and having attended suicide calls. And so my concern was that she feared that she would believe that the only way to save or protect the children from further harm was to actually take their -- kill the children and herself. And that -- to isolate herself from what she perceived was a conspiracy against her.
>
> Q. Okay. And did you in turn -- once you developed that view, did you in turn share it with anyone?
>
> A. Yes, I did.
>
> Q. And who did you share that view with?
>
> A. I shared that with one of my coworkers and my supervisor at the time, Leah Terpsma, and there was the opinions that had been provided to me from other patrol officers, which we discussed prior to the break for lunch. And also with William Strickland from the Ministry, who had concurrently formed the same opinion.
>
> Q Okay. Did you share that specific view, the view that Ms. [P.] may kill her children with anyone from the Ministry?
>
> A Yes, I did, Mr. Strickland.
>
> [Emphasis added.]

This misapprehension of the evidence caused the judge to find that "Mr. Strickland did not provide a truthful account of his conversation with Detective Rowley to Ms. Robinson and Ms. Caffrey" (at para. 350).

[282] This was the factual matrix Mr. Strickland faced at the material time. Only after consulting with the Deputy Director and Ms. Caffrey did he decide to remove the children from the mother's care, resolving any doubts he had about the mother in favour of the children's safety and well-being, pending the completion of the ongoing investigations by the police and the Ministry.

B. Post-Removal Events

[283] On December 31, 2009, Mr. Strickland met with the mother to explain to her why the children were removed. The meeting lasted approximately one and a half hours. The mother surreptitiously recorded their conversation at that meeting. I have

reviewed the audio recording of that meeting. Throughout the meeting, Mr. Strickland was courteous, the information he gave her was helpful, and the concerns he expressed about her conduct and its harmful emotional effect on the children were honest and forthright.

[284] He confirmed with the mother that he had reviewed all the material she had left with the Ministry. He expressed concern about the stress she was under with the breakdown of her marriage and the removal of her children. He explained the *CFCSA* process to her and encouraged her to retain counsel for that proceeding. He advised her that he had consulted with the Deputy Director before removing the children. He explained that they were removed because of the Ministry's concern that her actions were emotionally harmful to the children. Those actions included her questioning and videotaping the children's disclosures, her distribution of the videotapes on Christmas Day to over 20 individuals, and the negative impact her various interventions were having on the criminal investigation by the police.

[285] As part of his ongoing statutory duty to protect the safety and well-being of the children, he asked difficult questions, including whether the mother had coached the children to make the disclosures or fabricated the allegations. The mother was clearly offended by those questions, but Mr. Strickland's statutory duty required him to canvass all potential scenarios given the context of the allegations.

[286] The judge made a number of critical findings in relation to Mr. Strickland's conduct during this meeting. Although these findings do not provide a basis for appellate intervention, I again feel compelled to make some observations on this point.

[287] The judge characterized Mr. Strickland's comments as "taunting" the mother, "accusing" her of forcing K.G. to make her disclosures and of failing to give the father supervised access, "falsely" telling her that he shared her concerns about the allegations, that the children had to be in care so that the VPD could conduct a clean interview of them given that her interviews may have affected the VPD's ability to validate their disclosures, and of "pursuing" the mother for information only to

"buttress the basis for the Apprehension". I find none of these descriptors to be fair or accurate assessment of what occurred during that meeting. In my respectful view, the audio recording of that meeting could not reasonably support the use of these descriptors.

[288] The focus of the judge's analysis was demonstrated by his statement that during this meeting the mother "suggested that the children's nanny be interviewed by the police, to which Mr. Strickland took issue, and said that he was 'certainly within [his] rights to speak with the caregiver of [her] children'" (at para. 375). However, the context of this statement was not fully articulated and speaks to a different scenario. The mother had brought the nanny with her to the interview. When Mr. Strickland asked the nanny questions about concerns she may have had with the care of the children, the mother repeatedly interjected with her own answers. Eventually, Mr. Strickland insisted that she stop interjecting. The mother continued to interject, then tried to control the wording of Mr. Strickland's questions to the nanny, stating: "she is here as a witness for me". The mother then suggested that the nanny be interviewed by the police, rather than by Mr. Strickland. At that point, Mr. Strickland stated that it was within his rights to interview the nanny. Eventually, Mr. Strickland arranged for the nanny to be interviewed in a separate room by another social worker in an attempt to get uninfluenced answers about the well-being of the children.

[289] This scenario of the mother attempting to control the interview process was similar to that reported by Dr. Eirikson and Mr. Colby. Mr. Strickland did not "take issue" with the mother's suggestion that the nanny be interviewed by the police, but rather, he wanted to speak with the nanny because she was independent of the family and had extensive knowledge of and exposure to both the children and the parents. He recognized that the nanny might have had important information for the ongoing child protection investigation. When the mother prevented him from interviewing her, he arranged for another social worker to do so in a different interview room.

[290] While the children were not removed from the mother's care because of her allegations of physical and sexual abuse, those allegations factored into the Ministry's investigation under the *CFCSA*. The Ministry was required to determine if the children could be returned to one or other of the parents: *Hepton v. Maat*, [1957] S.C.R. 606. To that end, Mr. Strickland retained Dr. Eirikson to conduct a parental capacity assessment for the purpose of recommending which parent could provide the best care for the children. As part of his assessment, Dr. Eirikson was asked to address the mother's sexual abuse allegations.

[291] More than two years after Dr. Eirikson completed his report, and in advance of the civil trial, the mother retained Dr. Hugues Hervé, a registered psychologist who specializes in the area of forensic psychology. Dr. Hervé was asked to conduct an investigative interview of then four-year old P.G. to determine if she had been sexually abused by the father. Dr. Hervé interviewed P.G twice; both were audio and video recorded.

[292] In his October 31, 2012 report, Dr. Hervé stated that his interviews of P.G. provided only limited details, which precluded a reliable and valid analysis of the issue. It was his opinion, however, that the consistency of the child's statements with those of her sister's added to their credibility. He also opined about memory processes and P.G.'s ability to remember events. He noted that P.G. would have been 16 months old when she was removed from the mother's care and that "memory about previously experienced events (episodic memory) emerges between 18 and 30 months of age, with episodic memories between 18 and 24 months of age being the exception, not the rule." He found that "[a]lthough there is not enough evidence…to determine with certainty that [P.G.] was in fact sexually abused by her father, her allegations, spontaneous gestures, age inappropriate and ritualized masturbation are of concern." He concluded that it was more likely than not that P.G. had been sexually abused by the father because: (1) her ritualized masturbatory behaviour after being returned to the mother suggested learned behaviour (i.e., consistent from episode to episode) rather than experimentation, which would occur in different ways; (2) the judge found in his reasons in the family proceeding that

K.G. had told her mother that the father had engaged in sexual activity with P.G.; and (3) the judge, in his reasons, had found that the father had sexually abused the three older children.

[293] Based upon episodic memory development, Dr. Hervé opined that P.G.'s behaviour could only have been learned after she had been removed and during the period in which the father had unsupervised access. He understood that period to have been between mid-2010 and mid-2012. In fact, the father only had unsupervised access to all four children from May 13, 2010 until August 2011, and, during that period, his mother lived with him from September 2010 to August 2011.

C. Prejudice

[294] The Province, the Director and the father went into the civil trial concerned about trial fairness, in part, because of the judge's rulings in the family proceeding. Some of these findings negatively impacted their respective positions in the civil proceeding. They were also concerned that the judge was pre-disposed to a certain outcome because of those rulings.

The Director/Province

[295] In the family trial, the judge repeatedly referred to the mother's "bad faith" claim against the Director. Although much was said about that claim, it was not a fully pleaded claim of misfeasance in public office until four days before the reasons for judgment in the civil proceeding were released.

[296] The mother raised the issue of bad faith early in the family trial in the context of the joined *CFCSA* proceeding. She was permitted to testify about the alleged bad faith during the joint trial even though it was not relevant to the *CFCSA* matter. As I have noted, at the conclusion of the evidence in the family trial, the judge asked counsel if he could make a finding of bad faith against the Director in his reasons for judgment. Counsel for the mother cautioned against making such a determination as it would likely require him to recuse himself from the civil trial. In his family reasons, the judge stated that he would address the mother's evidence on the bad faith

allegation, on which she had not been cross-examined, in his civil trial reasons (at para. 27). This approach appears to reflect the "Phase 1" and "counterclaim/Phase 2" view of the two proceedings.

[297] The Director/Province submits it was prejudiced by the Agreement when the mother gave notice she wanted all the evidence from the family trial rolled into the civil trial, except for the evidence concerning the parties' financial matters. This evidence included her testimony about her bad faith allegation against the Director. When the Director entered into the Agreement, she understood that it prevented her from re-litigating the main findings of fact in the family trial only, namely that the mother was mentally stable and that the father had sexually abused the three older children and physically assaulted the mother and the three older children. However, on August 2, 2013, the judge made an "issue estoppel" ruling (reasons indexed as 2013 BCSC 1403) that appears to have expanded the Agreement because he ruled that the Director/Province could not re-litigate "the impugned findings falling within the scope of the Agreement and any of the other impugned findings except for a few specific instances where the overriding fairness exception identified in *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd. et al.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.) is engaged." The judge's ruling also prevented the Director/Province from adducing evidence to show that Dr. Eirikson's and Mr. Colby's assessments were not flawed.

[298] The judge listed three reasons for his "issue estoppel" ruling: (1) the Province was bound by the Agreement which included most of the impugned findings; (2) the Province was attempting to establish defences in the civil trial that were advanced by the Director in the *CFCSA* proceeding in "most of the First Trial"; and (3) to permit the Province to pursue those defences would "cause irreparable prejudice to the plaintiffs" after they had served notice that most of the evidence "in the First Trial" would be imported into the civil trial. He added that his "ruling permits the Province's counsel to cross-examine [the mother] on all of her evidence in chief in order to challenge her credibility and the reliability of her evidence." That, unfortunately, did not occur.

[299] In the civil trial, the judge permitted the mother to refuse to answer certain questions put to her by counsel for the Director/Province in cross-examination on the basis that the solicited evidence had been canvassed in "the first trial". During the mother's cross-examination, the judge repeatedly reminded counsel for the Director of the Agreement and its effect on the matters at issue in the civil trial. After those cues from the judge, the mother refused to answer certain questions, including those related to her bad faith allegation, on the basis that her answers were given in the "first trial" and she did not intend to go into the allegations again. She was not directed by the judge to answer the questions asked of her.

[300] In the joint family trial, however, the mother was not cross-examined on the bad faith allegation because it was not material to the *CFCSA* proceeding. The Director's role and the issues in each proceeding were substantially different. Counsel for the Director/Province objected to this constraint on her cross-examination in the civil trial, advising the judge that it would prejudice her ability to challenge the credibility and reliability of the mother's evidence with respect to the very serious allegations being advanced against the Director/Province. Nevertheless, she was unsuccessful in broadening the scope of her permitted cross-examination.

[301] In the family proceeding, the judge found the mother to be a credible witness. That finding included her evidence on the allegation of bad faith against the Director. Even though the *CFCSA* proceeding was abandoned, her unchallenged evidence was rolled into the civil trial. The effect of the judge allowing the mother to testify about this allegation, coupled with his finding that the mother's evidence was credible, was to undermine the Director's position that the mother's conduct gave rise to valid protection concerns requiring them to remove the children from her care.

[302] The Director thus went into the civil trial with the same judge who had already determined that the mother was a credible witness on the very matters at issue in the trial. The Director/Province and the father—the adverse parties—who were subject to the Agreement that permitted the mother to rely on the judge's finding that

she was a credible witness could only have been prejudiced in their defence of the tort claims by that prior determination. The potential for serious prejudice was most evident when the judge asked counsel at the end of the family trial whether he could find the Director had acted with "inappropriate motivation", and by his comments to counsel (in the absence of the father) that procedural fairness permitted the father to convince him that he had not sexually abused P.G., which reversed the burden of proof onto the father.

[303] The credibility of a witness must never be pre-determined in a proceeding; it must always be decided at the trial based on the parties to the proceeding, the nature of claims, the live issues, and most importantly the evidence tendered in that proceeding: *Faryna v. Chorny*, [1952] 2 D.L.R. 152 at para. 356 (C.A.) and *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–188. As I have said, a judge who has pre-determined an issue as important as the credibility of a party, must seriously consider whether that pre-determination could raise at least a subjective perception of bias that might best be addressed by his or her recusal from presiding over a subsequent related proceeding.

Mr. Strickland

[304] Mr. Strickland was a witness for the Director/Province in the civil trial. As I have noted, the claim of misfeasance in public office was not properly pleaded until four days before the reasons for judgment were released, and no specific claim was ever made against Mr. Strickland directly. The judge, however, found that Mr. Strickland had committed misfeasance in public office. Such a finding will inevitably have a profound reputational impact on a public office holder, and carries with it the "stench of dishonesty". It has the potential to be career-ending. The Director/Province, as Mr. Strickland's employer, was found vicariously liable.

[305] As the trial unfolded, it became apparent that Mr. Strickland, although not a named defendant in the proceeding, was the target of the mother's evolving "bad faith" claim. The theory of the claim against Mr. Strickland was first articulated in closing submissions. Even then, more than one theory was advanced. Mr. Strickland

had no notice of the theories, none were articulated in particularized pleadings, and none were put to him on cross-examination. He had no opportunity to respond. In view of the manner in which this finding unfolded and its very serious consequences for Mr. Strickland, Bennett J.A. added Mr. Strickland as a respondent to the appeal.

[306] In the appeal, Mr. Strickland raises issues about trial fairness, and in particular, the lack of procedural protections, including the lack of: (1) formal notice of the claim against him by being named as a defendant; (2) a clear pleading with particulars of the category of misfeasance being advanced against him; (3) the right to pre-trial procedures for discovery; and (4) the right to retain independent counsel from that of the Director/Province to protect his professional interests from the grave consequences of a potential liability finding. The prejudice to Mr. Strickland from the manner in which this claim was determined only became apparent in the judge's final reasons for judgment.

[307] The mother submits that Mr. Strickland suffered no prejudice or trial unfairness as a result of any deficiency in the pleadings because the claim was advanced against only the Director and the Director conceded the pleadings were sufficient. This submission has no merit. The misfeasance finding was against Mr. Strickland personally. He was the public officer who was found to have deliberately committed an unlawful act with the knowledge that it would likely harm the mother. His career was on the line. The Director, as Mr. Strickland's employer, was only held vicariously liable for his misfeasance.

[308] Particularized pleadings are essential for responding to a claim of this nature, as will be explained below, especially as there are two branches of the tort, each with slightly different elements and requirements of proof.

The father

[309] The father was also prejudiced in defending the new allegation relating to P.G. given: (1) the judge's adverse findings against him in the family trial, specifically that he had sexually abused the three older children; (2) the judge's findings in the family trial that the mother's evidence was credible but his evidence, including his

denial that he had sexually abused the children, was not; (3) the judge's statement, in his absence, that he would have to persuade or convince him that he had not sexually abused P.G. thereby reversing the burden of proof on that allegation; (4) the fact that Dr. Hervé's opinion was based in large part on the judge's finding that he had sexually abused the three older children; (5) the judge's ruling that he was foreclosed from challenging that finding in the civil trial because of the Agreement to which he was not a party; and (6) the judge's dismissal of his application to have the judge recuse himself from the civil trial. Faced with a subjectively held perception of bias, and given his lack of financial means to retain counsel, the father participated in the civil trial, at best, intermittently.

[310] Significantly, the judge recognized that procedural fairness was owed to non-parties given the serious nature of the claims at issue. He said:

> [403] The plaintiffs have alleged that [counsel for the Director] acted maliciously in a number of respects and as an agent of the Director, acting on instructions, the plaintiffs say they have established another basis for the Director's liability in misfeasance. Absent this submission, which was put squarely and forcefully in submissions and set out in the pleadings, I would not engage in an analysis of the conduct of a non-party professional. …
>
> [Emphasis added.]

[311] However, the judge did not apply these comments to Mr. Strickland, a professional social worker, and failed to ensure that Mr. Strickland and the father, both of whom were non-parties, were afforded procedural fairness in the face of extremely serious and egregious allegations against them.

[312] In my opinion, the procedure followed by the judge in the civil trial was unfair to the Director/Province, Mr. Strickland and the father. As a result, they did not receive a fair trial. In that regard, I am reminded of the words in *Toronto (City of) v. C.U.P.E.* (2001), 55 O.R. (3d) 541 at para. 74, aff'd 2003 SCC 63:

> The adjudicative process in its various manifestations strives to do justice. ...the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases

> and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.
>
> [Emphasis added.]

[313] Procedural fairness "is a foundational principle of our legal system that justice can only be achieved if the procedure leading to a decision is fair": *Moradkhan v. Mofidi*, 2013 BCCA 132 at para. 81. In my assessment, justice was not achieved or seen to be achieved for all of the parties and the non-parties against whom serious findings were made in this litigation.

D. The Director's Fresh Evidence Application

[314] The Director/Province applies to adduce fresh evidence in the civil appeal relating to whether Ms. Reeves was properly qualified to give the opinion evidence that all the children were sexually abused by the father. For the reasons stated in the family appeal, I would grant the Director/Province's fresh evidence application in the civil appeal.

E. The Tort Claims

[315] The mother claimed that the Director/Province: (1) was vicariously liable for Mr. Strickland's misfeasance in public office; (2) breached her fiduciary duty to the children in the manner in which she addressed the mother's allegations; and (3) was negligent in the manner in which she addressed the mother's complaints.

Standard of review

[316] The Director/Province requests an order dismissing the civil action, submitting that there was no evidentiary basis upon which the foundational factual findings and factual inferences for each of the torts were established. Mr. Strickland seeks an order setting aside the finding that he committed misfeasance in public office for the same reason. As well, the father applies to have the finding that he sexually abused the youngest child, P.G., set aside in the event that the order in the family appeal is allowed, as the finding in the civil proceeding was based on Dr. Hervé's opinion, which relied in large part on the findings of the trial judge in the family trial.

[317] An appellate court may only set aside findings and/or inferences of fact if palpable and overriding error is demonstrated or they are "clearly wrong": *Housen v. Nikolaisen,* 2002 SCC 33 at paras. 5 and 22. An appellate court may not interfere with factual findings or inferences unless it can plainly identify the impugned error and that error is shown to have affected the result: *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at para. 55. In *H.L.* the Supreme Court articulated the test for palpable and overriding error as follows:

> [56] ...where the trial judge's findings of fact can properly be characterized as "unreasonable" or "unsupported by the evidence". In *R. v. W. (R.)*, [1992] 2 S.C.R. 122, McLachlin J. (as she then was) explained why courts of appeal must show particular deference to trial courts on issues of credibility. At the same time, however, she noted (at pp. 131–32) that
>
> > it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.
>
> The statutory framework in criminal matters is, of course, different in certain respects. But as a matter of principle, it seems to me that unreasonable findings of fact — relating to credibility, to primary or inferred "evidential" facts, or to facts in issue — are reviewable on appeal because they are "palpably" or "clearly" wrong. The same is true of findings that are unsupported by the evidence. I need hardly repeat, however, that appellate intervention will only be warranted where the court can explain <u>why</u> or <u>in what respect</u> the impugned finding is unreasonable or unsupported by the evidence. And the reviewing court must of course be persuaded that the impugned factual finding is likely to have affected the result.
>
> [Emphasis in original.]

[318] I shall first address the most serious of the judge's findings with respect to the mother's three tort claims: Mr. Strickland's misfeasance in public office.

Misfeasance in public office

[319] The mother advanced her claim of misfeasance in public office against the Director and her delegates generally. This is an intentional tort and, therefore, the claim must be pleaded against the individual holder of the public office: *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 at para. 44. In this case, the pleadings alleged the Director and her delegates committed the tort but at trial Mr. Strickland became the specific target of the claim. The only clear finding of misfeasance in

public office was made against Mr. Strickland, with the Director/Province held to be vicariously liable for his actions.

[320] Misfeasance in public office is among the most egregious of tortious misconduct. Until this decision, such a finding against a social worker was unprecedented in Canadian jurisprudence. It is reasonable to suppose that such a finding would have a chilling effect on social workers, particularly in the field of child protection where very difficult decisions sometimes need to be made on an emergent basis and in the face of conflicting and unclear information.

[321] The tort is based on the premise that those who hold public office may not exercise their power in a deliberate and unlawful manner for the ulterior or improper purpose of harming a member of the public. The rationale for the tort was articulated by Lord Steyn in *Three Rivers D.C. v. Bank of England,* [2000] W.L.R. 1220 at 1230 (U.K.H.L.): "… in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes."

[322] In *Odhavji Estate v. Woodhouse,* 2003 SCC 69 at para. 30, the Court explained the rationale of the tort as "to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions."

[323] For good reason, the ambit of the tort has always been narrow. As was observed by Madam Justice Newbury in *Powder Mountain Resorts Ltd. v. British Columbia,* 2001 BCCA 619:

> [2] But for reasons that are perhaps obvious, the tort must be used cautiously. Otherwise, the courts risk straying into the arena of political decision-making, bypassing the normal restraints associated with judicial review, and becoming the arbiters of the personal thought processes of public officials. One recent commentator (Phillip Allott, "EC Directives and Misfeasance in Public Office", [2000] 59 *Camb. L.J.* 4) has written that the court should not, by means of the tort, take on the role of "ombudsman, a parliamentary committee, or an organ of public opinion in reviewing even egregious acts of maladministration, official incompetence, or bad judgement." (at 6.) To avoid dangers of this kind, a balance must be sought

> between curbing unlawful behaviour on the part of governmental officials on the one hand, and on the other, protecting officials who are charged with making decisions for the public good, from unmeritorious claims by persons adversely affected by such decisions. ...

[324] There are two branches of the tort; both share two common elements: (1) deliberate unlawful conduct by a public officer in the exercise of his or her powers (the *actus reus*); and (2) the awareness (knowledge) that the unlawful conduct is likely to injure the particular plaintiff (the *mens rea*): *Odhavji* at para. 23. With respect to the nature of the conduct, "the essential question to be determined is not whether the officer has unlawfully exercised a power actually possessed, but whether the alleged misconduct is deliberate and unlawful": *Odhavji* at para. 24.

[325] The two ways this tort can arise were first described by the House of Lords in *Three Rivers* and subsequently adopted by the Supreme Court in *Odhavji*:

> [22] ...In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff.

[326] Category A misfeasance is established when a public officer exercises his or her power for the specific purpose of harming the plaintiff. *Three Rivers* described it as "targeted malice" that includes conduct done for the ulterior or improper purpose of harming the plaintiff. Proof of the specific intent to harm the plaintiff will be sufficient to establish that the public officer had knowledge his or her conduct was likely to harm the plaintiff: *Odhavji* at para. 23.

[327] Category B misfeasance is more complex. It does not require a finding of specific intent to harm the plaintiff, but rather an objective determination that the public officer knowingly engaged in a deliberate unlawful act with an awareness that his or her conduct would likely harm the plaintiff or a class of plaintiffs. Knowledge of harm alone is insufficient to establish that the public officer acted in bad faith or dishonestly. Rather, the officer must know that the deliberate conduct is inconsistent

with the obligations of the office, including that it exceeds the powers of the office, or omits a legally required act: *Odhavji* at para. 28 and *Powder Mountain* at para. 67.

[328] Thus, to establish Category B misfeasance, the mother was required to prove that Mr. Strickland deliberately engaged in an unlawful act, knowing of the possible harmful consequences to her and the children, and she was required to prove each element of the tort independently of the other: *Odhavji* at para. 23.

[329] The mental element of Category A or Category B misfeasance establishes the "bad faith" or "dishonesty" of the public officer. Accordingly, it requires "clear proof commensurate with the seriousness of the wrong": *Powder Mountain* at para. 8 and *Odhavji* at para. 28. Awareness or knowledge that the unlawful act is likely to harm the plaintiff requires at least a subjective recklessness or wilful blindness, if not actual knowledge, of the likely consequences of the unlawful act: *Powder Mountain* at paras. 7 and *Odhavji* at paras. 25 and 38. Subjective recklessness or wilful blindness requires a higher standard of proof than objective foreseeability of harm for negligence. The mental element of the tort thus constrains its ambit from including inadvertent or negligent conduct by a public officer in the discharge of his or her official obligations: *Odhavji* at para. 26.

[330] In *Powder Mountain,* Newbury J.A. addressed this important distinction as follows:

> [7] ...Thus there remains what in theory at least is a clear line between this tort on the one hand, and what on the other hand may be called negligent excess of power - i.e., an act committed without knowledge of (or subjective recklessness as to) its unlawfulness and the probable consequences for the plaintiff. ...
>
> [8] ...In *First National Properties Ltd. v. McMinn* (2001) 198 D.L.R. (4th) 443, we also stated that courts should be cautious in dealing with the tort because it is an exception to the normal disinterest of the civil law in the motive underlying conduct, as opposed to the conduct itself; see *Bradford Corp. v. Pickles* (1895) A.C. 587 (H.L.). (The criminal law distinguishes between "motive" and "intention" but that distinction seems inoperative in the present context.) Motive is of course notoriously difficult to discern, and one may act for more than one motive. [Emphasis in original.]

[331] The policy rationale behind this narrow application of the tort was also explained in *Odhavji*:

> [28] ...In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to the interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.
>
> [Emphasis added.]

Application to the case

[332] The judge found that Category A misfeasance had not been established because there was no evidence that Mr. Strickland intended to harm the mother or the children by his actions, nor was there evidence that he had acted for an improper motive because he was never cross-examined on that issue (at para. 585). Thus, the judge found no evidence to support a finding of targeted malice or improper motive.

[333] He then turned to Category B misfeasance. He found that Mr. Strickland's conduct between early December 2009 and early January 2010, including his failure to correct the inaccuracies in "Form A" at the *CFCSA* presentation hearing, amounted to a deliberate unlawful act because it fell below the standard of care of a reasonable social worker and careful parent, and because Mr. Strickland had a "closed mind" toward the mother as a result of his "ill will", "antipathy" and "*animus*" toward her (at paras. 587 and 593).

[334] The judge found that Mr. Strickland's deliberate unlawful conduct included: (1) expressing to Sgt. Pollard that the mother may have fabricated the allegations or coached the children's disclosures and reporting some information "which he knew to be untrue and others to which he was reckless as to its truth... act[ing] purposefully in making his remarks..." (at para. 589); (2) his intent "to portray [the father] in a positive light and to malign [the mother] to the VPD and [acting] with ill will towards [the mother]" (at para. 590); (3) the December 16, 2009 letter supporting

the father's application to vary the interim no contact order (at para. 591); and (4) intentionally misleading the Deputy Director and Ms. Caffrey when he inaccurately advised them that Det. Rowley believed that the mother was at risk of killing herself and the children.

[335] The judge also found that Mr. Strickland's "closed mind", a frequent refrain throughout his reasons (at paras. 10, 37, 104, 187, 206, 210, 280, 306(a) and (g), 362, 369, 434, 464, 557, 583(a), (b) and (d), 587, 589, 593, 1057 and 1073), caused him to fail to "impartially assess relevant information about the reports of sexual abuse, such as the videos and audios of the children making their disclosures of sexual abuse, the report from Dr. Edamura, and the advice from [the mother's sister]" (at para. 588). This finding flowed from his other findings that Mr. Strickland bore "ill will", "antipathy", and an "*animus*" toward the mother, in spite of finding—at the same time—that the mother had not adduced evidence to establish targeted malice or an improper motive.

[336] Based on these findings of misconduct, the judge concluded that Mr. Strickland acted unlawfully in the exercise of his statutory powers by approaching the file "other than in [the children's] best interests as required" (at para. 587), and "wilfully [choosing] not to discharge his statutory obligations and in doing so, chose not to act and make decisions at all times in the best interests of the children" (at para. 593).

[337] The difficulty with this analysis is twofold: (1) negligent conduct i.e., conduct that falls below the standard of care, does not amount to deliberate unlawful conduct (*Odhavji* at para. 26); and (2) critical factual findings that informed the judge's assessment of Mr. Strickland's conduct were based on a misapprehension of the evidence.

[338] Further, finding that Mr. Strickland had a "closed mind" based on his "ill will", "antipathy" and "*animus*" toward the mother is effectively a finding of targeted malice or improper motive under Category A misfeasance, for which the judge found no direct evidence. Therefore, targeted malice or improper motive could only have been

inferred. Relying on *Miguna v. Toronto (City) Police Services Board,* 2008 ONCA 799 at paras. 28–30, Mr. Strickland submits that, in the absence of direct evidence, malice or improper motive cannot be inferred unless they are the only reasonable inferences to be drawn from the proven facts. On this point, *Miguna* is arguably inconsistent with *Alberta (Minister of Public Works, Supply & Services) v. Nilsson*, 2002 ABCA 283 at para. 112, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 35 ("*Nilsson*") and with Lord Hutton's reasons in *Three Rivers District Council v. Bank of England,* [2001] UKHL 16 at para. 148. In my view, it is unnecessary to resolve the point to dispose of this appeal and I would leave for another day resolution of the seemingly divergent lines of authority on this issue. For the purposes of this appeal, I am content to proceed on the footing that an inference of malice or improper motive need not be the only reasonable inference. As noted in *Powder Mountain*, however, such an inference must be grounded in evidence that provides proof commensurate with the seriousness of the wrong.

[339] On well-settled authority, inferences can only be drawn from proven facts. As this Court noted in *Fuller v. Harper*, 2010 BCCA 421 at para. 38:

> If there are no positive proven facts from which an inference can be drawn, then a conclusion based on an inference that lacks an evidentiary basis is speculative. Speaking for the Court in *Hall v. Cooper Industries Inc.,* 2005 BCCA 290, 40 B.C.L.R. (4th) 257, leave to appeal to SCC refused, [2005] S.C.C.A. No. 351, Mr. Justice Thackray observed:
>
> > [47] ... inferences must be drawn from "accepted facts" and "must be reasonably supported by the findings of fact of the trial judge." If a trial judge errs in the finding of facts upon which the inference is drawn, then the "inference-drawing process" is in error. (See *Housen v. Nikolaisen*) [2002 SCC 33, [2002] 2 S.C.R. 235].

[340] The difference between inference and speculation was explained by Lord Wright in *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152 at 169-170 (H.L.):

> ...Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable

> probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

[341] A similar point was made in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 209 (Ont. C.A.): "An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation". If the factual foundation upon which an inference is drawn rests on a misapprehension of the evidence, the inference itself reflects palpable error.

[342] For present purposes, it is sufficient to note that Mr. Strickland was never cross-examined on the bad faith allegation and none of the Ministry social workers testified that he had acted in bad faith. More importantly, the findings of fact on which the judge appears to have relied to infer that Mr. Strickland had a "closed mind", were based in large part on misapprehensions of the evidence, were not supported by the evidentiary record, or were clearly wrong. In addition to the procedural unfairness that characterized this proceeding, I am satisfied that the judge's misapprehension of the evidence on important points was material and that it played an essential role in his reasoning process.

[343] Cumulatively, in my view, the judge's findings about Mr. Strickland's conduct amount to a palpable and overriding error: *H.L.* at para. 56, *Housen* at paras. 20–21. I highlight just a few:

1. The judge found that Mr. Strickland led the mother to believe that the November 23, 2009 letter to the father was prepared and sent out in error, and would be retracted, and that he gave no explanation for why it was written (at para. 583(c)). However, Mr. Strickland was never asked why he sent the letter, nor did he testify that the letter was incorrect or would be retracted. He did admit that it should have been copied to the mother. In his subsequent December 7, 2009 letter to both the mother and the father, he advised them that the "no go no contact order" in place at the time would ensure the children's safety while the new allegation (about P.G.) was being investigated (at para. 154).

2. The judge found that during the December 31, 2009 meeting, which the mother surreptitiously recorded, Mr. Strickland did not advise her of what would happen next or where she might look for legal representation and support services (at para. 394). However, in the recording, Mr. Strickland expressly advises the mother to apply for legal aid and strongly recommends that she have representation at the *CFCSA* proceeding. He also advises her of the next steps in the process, expresses concern about her well-being over the long weekend, informs her that he would be sending a mental health care worker to her house to check up on her, and asks her if she has support in the community, which she confirms that she does.

3. The judge found that Mr. Strickland did not ask Dr. Kot to investigate the veracity of the mother's sexual abuse allegations (at para. 292). However, Dr. Kot's report certainly addressed the allegations relating to the two older children. She opined that whether BT.G. had been sexually abused remained ambiguous, and that K.G. may have been sexually abused, noting however, that she did not disclose abuse during the police interview. She opined that K.G.'s sexual knowledge may indicate a higher risk that abuse had occurred, but that "it could also be an indicator of a caregiver's heightened anxiety about sexual abuse and repeated questions or conversations of sexual abuse" noting that it was "usually hard to determine the source of sexual information".

4. The judge found that Mr. Strickland's call to Sgt. Pollard suggesting that the mother may be fabricating the allegations had "tainted" the VPD investigation (at para. 197). However, there was no evidence to support this finding, nor was there evidence that Mr. Strickland was not honestly concerned that the allegations had been fabricated. He was not cross-examined on his concerns and the judge made no finding that he acted for an improper motive. Significantly, the judge also misconstrued Det. Rowley's evidence (at para. 195) on this issue. She did not say that

Mr. Strickland's call would have had a significant impact on her investigation, but that what Sgt. Pollard wrote and told her would have had a significant impact on her because she trusted what he said (i.e., she trusted his investigative insights). Contrary to the judge's finding, Det. Rowley did not say that Mr. Strickland's views had significantly impacted the investigation.

5. The judge found that Mr. Strickland falsely advised Deputy Director Robinson and Ms. Caffrey of his conversation with Det. Rowley by leading them to believe that Det. Rowley was concerned the mother might harm herself and/or the children (at para. 350). Again, the judge misapprehended the evidence on this issue as Det. Rowley did express this concern with Mr. Strickland (see para. 281, herein). This error led the judge to incorrectly find that Mr. Strickland intentionally misled the Deputy Director and Ms. Caffrey to believe that Det. Rowley was of the opinion that the mother may kill herself and/or the children (at paras. 359 and 583).

6. The judge found that Mr. Strickland directed Mr. Tymkow to delete his email so there would be no trace of it or the views that he and Mr. Tymkow shared about the mother (at para. 200). However, Mr. Strickland testified that he asked Mr. Tymkow to delete the comment because it was unprofessional and "incredibly disrespectful" to the mother. He said he did not share that opinion. Again, this finding presumes an improper motive by Mr. Strickland, which the judge found was not available to him on the evidence.

7. The judge found that Mr. Strickland knew of the Form A inaccuracies by imputing that knowledge to him as the intake team leader (at paras. 434 and 583(g)). However, Mr. Strickland flatly denied the allegation that he knowingly permitted the lawyer for the Director to submit an incorrect Form A to the Provincial Court, stating that he was only made aware of its

omissions long after the presentation hearing, even as late as his preparation for the civil trial. The evidence was clear that others had prepared the document. Further, the Form A is not evidence but rather a summary to the court explaining the reasons for a child's removal. It provides the court with notice of an interim plan for the child's care, including any recommendations about the terms and conditions for a supervision order. Any dispute over the protection concerns set out in the Form A are addressed at the protection hearing: *B.B.* at paras. 13 and 14. Omitting the mother's sexual abuse allegations against the father from the Form A did not render the facts manifestly wrong, untrue, or unlikely to have occurred, nor did it diminish the reason for the children's removal. The children were removed primarily because of the risk of emotional harm to them by the mother. The mother also was represented by legal counsel at the presentation hearing and at subsequent Provincial Court hearings in which temporary custody orders were made by consent. Lastly, the judge's imputation of knowledge of what he found to be deliberate unlawful conduct is a finding of constructive knowledge rather than actual knowledge of an alleged unlawful act. There is no jurisprudence that has been brought to our attention that supports the view that a finding of constructive knowledge meets the requirement for knowledge that an impugned act was unlawful.

8. The judge found that Mr. Strickland's December 23, 2009 information alert to staff, which set out the details of the December 21, 2009 access order and the mother's allegations against the father, was prepared for the purpose of predisposing staff against the mother (at para. 263). However, there was no evidence to support that finding. Mr. Strickland testified that he knew of the disclosures because Mr. Tymkow, who had attended the VPD interview of the mother, had advised him of them. He testified that the purpose of his alert was to update the staff about the court's access order. The finding that he intended to predispose the staff against the mother runs contrary to the judge's finding that there was no evidence to

support an improper motive. Moreover, Mr. Strickland was never cross-examined on his alleged improper motives.

9. The judge found that Mr. Strickland gave vague and unsatisfactory evidence for sending the December 16, 2009 letter in support of the father's December 17, 2009 application for access to his children. He found that Mr. Strickland admitted that the letter should not have been sent and that he deflected blame onto Mr. Tymkow (at para. 210). However, Mr. Strickland gave no evidence about this letter.

10. The judge stated that Terry Lejko, the area manager, testified that Mr. Strickland was an "imposing man" who had trouble working with others in the past (at para. 581). However, while Ms. Lejko did describe Mr. Strickland as "imposing", she said so in the context of her description of him as being "six-four, well-spoken [and] physically large." She was otherwise positive about his work history and described him as "formal in his presentation" and very professional. Mr. Strickland also testified that he had never had a negative performance review or been disciplined.

11. The judge found that Mr. Strickland had a closed mind toward the mother before he had met her in person (at para. 583(a)), toward the sexual abuse allegations (at para. 434), and toward anything she had to say at their December 31, 2009 meeting (at para. 369). However, Mr. Strickland testified that he had not drawn any conclusions after his first meeting with the mother on December 4, 2009, and that as of December 31, 2009, he had not reached any conclusions on whether the mother had fabricated the allegations because the VPD's and the Director's investigations were ongoing. He advised the mother that his investigative mandate under the *CFCSA* required him to consider all possibilities, that it was the Ministry's protocol to have the VPD take the lead on sexual abuse investigations, and that it was the Director's job to share information with the VPD in that regard (at para. 169*).* Further, this finding appears to ignore the

comprehensive risk assessment Mr. Strickland co-drafted in February of 2010, which included a reference to awaiting Dr. Kot's report to address the unresolved allegations of sexual abuse.

12. The judge found that Mr. Strickland did not view the children's disclosures as significant (at para. 243). However, Mr. Strickland advised the mother at the December 31, 2009 meeting that he took her allegations seriously, but stressed that there was an appropriate way to investigate and address those concerns. He stressed the importance of waiting for the outcome of the VPD investigation, referring the matter of the children's disclosures to Dr. Kot at Children's for follow up, and asking Dr. Eirikson to address the allegations in his parental capacity assessment. Once again, this finding appears to ignore the comprehensive risk assessment Mr. Strickland co-drafted in February of 2010, which made reference to Dr. Kot's pending report in the context of the children's disclosures.

[344] There were also a number of "red flags" that provided an objective basis for Mr. Strickland's concerns about the veracity of the mother's allegations: (1) during their December 4, 2009 meeting, the mother offered to pay Mr. Strickland double what "[the father's] troops were paying"—he did not include her comment in the Ministry record to avoid discrediting her, but he did discuss his concerns about it at the December 31, 2009 meeting; (2) he had never had a case where a parent questioned and videotaped their children's disclosures, and as in this case, where a parent gave a child a prop to act out the sexual activity; and (3) the mother had not taken P.G. in to be examined by a doctor, nor had she contacted the Ministry in September 2009, when she first suspected that abuse had occurred—she told the VPD on November 28, 2009 that she had not reported her concerns because she was too busy with the children.

[345] There was a substantial body of evidence confirming the objective reasonableness of Mr. Strickland's decision to remove the children from their mother's care, including the evidence of Mr. Strickland, the Ministry social workers,

the VPD and RCMP, Children's, and the individuals who reported escalating concerns about the mother's mental health, and in particular, her unusual presentation and conduct (variously described as manic, obsessed, disorganized and as having scattered thoughts and speech) during the relevant period. There was a substantial body of evidence that Mr. Strickland placed the children's interests above all other interests, as he was required by statute to do, while he continued to have the mother's sexual abuse allegations investigated by the VPD, Children's, the experts from Children's and Dr. Eirikson. I am satisfied that the judge's contrary inference is speculative and/or rests on fundamental misapprehensions of significant portions of the evidence. At the very least, I am satisfied that there was no "clear proof commensurate with the seriousness of the wrong" to establish that Mr. Strickland acted in "bad faith" or "dishonestly" toward the mother.

[346] Lastly, I must comment on the judge's adverse finding of credibility with respect to Mr. Strickland. It is common ground that findings of credibility are entitled to deference by an appellate court. This is for good reason: appellate judges do not see or hear witnesses testify. However, there still must be an evidentiary basis to support a finding of credibility. An appellate court may intervene where the finding of credibility rests on a misapprehension of the evidence, or is made in the absence of any objectively discernable evidence to support it, and the finding goes to the heart of the judge's analysis: *Mariano v. Campbell*, 2010 BCCA 410 at para. 50.

[347] Here, the judge went into the civil trial having pre-determined a number of factual issues including, and most significantly, that the mother was a credible witness, while the father was not. This advance determination prejudiced the Director and her delegates, including Mr. Strickland, in their defence of the civil claim.

[348] Furthermore, he evaluated Mr. Strickland's actions through the lens of hindsight without considering that any doubts about the parents' ability to care for the children had to be resolved in favour of the children's safety and well-being. In *D. (B.) v. British Columbia* (1997), 30 B.C.L.R. (3d) 201 (C.A.), a similar case that

involved a trial judge's finding of liability against a social worker who placed a child in a foster home where she was physically and sexually abused, this Court stated:

> [40] …Decisions have to be made about care when the outcome is unpredictable. It is too easy to say when things turn out badly that it was the fault of the person who made the judgment. Social workers should not be so afraid of making a mistake that they cannot do their job properly.

[349] In my view, the judge's adverse finding of credibility with respect to Mr. Strickland (at para. 580) was coloured not only by misapprehensions of the evidence on critical points, but by his acceptance of the mother's speculative conspiracy narrative. That narrative distorted his view about Mr. Strickland and others who were involved with the mother, especially where their actions did not accord with the narrative. It led him to conclude that Mr. Strickland and others intentionally acted in a nefarious manner to discredit the mother and dismiss her allegations. This is made evident by his findings of nefarious conduct from: (1) the testimony of Ms. Lejko that Mr. Strickland was an "imposing man" who had trouble working with others; (2) Mr. Strickland's failure to disclose his phone call with Sgt. Pollard when he attended a meeting following the pepper spray incident (at para. 738); and (3) Mr. Strickland's failure to take notes and make records in the Ministry's Management Information System as indicative of "manifestations" of his "misfeasance" (at para. 1047).

[350] The tort of misfeasance in public office is an extremely serious claim. Finding someone liable for such egregious conduct requires, at the very least, that the individual be a named party in the Notice of Civil Claim so that they may defend the claim against them. Procedural fairness in our justice system mandates that an alleged tortfeasor have notice of, and the opportunity to defend, such a claim, with all of the attendant procedural safeguards to which a party to a proceeding is entitled. Mr. Strickland was not provided those rights. There was also no evidence to support a finding that he had engaged in an unlawful act, or omitted to do a legally required act, in the exercise of his statutory obligations, let alone that he did so knowingly. In the absence of an unlawful act, the finding that Mr. Strickland committed misfeasance in public office must be set aside, the finding that held the

Director vicariously liable for Mr. Strickland's tortious conduct must also be set aside, and the claim dismissed.

Breach of fiduciary duty

[351] It is common ground that the Director has a fiduciary duty to children who are in the care of the Province, based on a relationship that is "fiduciary in nature": *K.L.B. v. British Columbia,* 2003 SCC 51 at para. 38. In *K.L.B.,* the Court held that the duty imposed at law "is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust" (at para. 49). In *E.D.G. v. Hammer,* 2003 SCC 52 at para. 24, the Court explained that "[f]iduciary obligations are not obligations to guarantee a certain outcome for the vulnerable party, regardless of fault" but "…[r]ather they hold the fiduciary to a certain type of conduct." Breach of fiduciary duty requires fault; it is not a result-based liability and is "not breached simply because the best interests of a child have not in fact been promoted": *K.L.B.* at para. 45. Furthermore, it must be ascertainable at the time of the breach if it is to found legal liability; "[i]t does not recommend particular courses of conduct that [parents] must engage in or not engage in to avoid legal liability" as "[i]t is often unclear at the time which, among all of the possible actions that a parent could perform, will best advance a child's best interests" (emphasis added). Therefore, acting in the best interests of the child is not a legal or justiciable standard for the fiduciary duty, which must be narrowly construed: *K.L.B.* at paras. 45–46.

[352] If the plaintiff establishes a *prima facie* case of breach of the duty, the onus then shifts to the defendant to negate the allegation: Leonard I. Rotman, *Fiduciary Law* (Toronto: Carswell, 2005), at p. 614.

[353] The mother contended, and the judge found, that the Director had breached her fiduciary duty to the children by "her improper and unreasonable support of [the father], a person she conceded may have sexually abused the children," (at para. 554) in a manner that "put her own or another person's interests ahead of the children's in a manner that abused their trust" (at para. 556). In particular, the judge

found that: (1) the Director's stated position on December 14, 2011—which I note she was directed by the judge to provide at that time—was an act of disloyalty to the children in that it acknowledged the "possibility" that the father had sexually abused them, and yet she continued to support his application for their custody (at para. 556); and (2) the "pervasive antipathy" and "hostility" toward the mother by the Director and amongst many of the social workers caused them to overlook the interests of the children and prefer "the custodial interests of the parent they conceded could be the abuser" (at para. 557).

[354] The first finding ignores the evidence of the challenges the Director faced in assessing the risk to the children from each parent, especially in view of the number of possible risks each parent presented, but none of which had been established. It must be recalled that whether a fiduciary duty has been breached is not determined through the lens of hindsight, that is, after it becomes clear that the best interests of the children may not have been achieved by the specific course of action that was chosen in the circumstances. The violation of the trust must be ascertainable at the material time, which in this case, was on December 14, 2011.

[355] The Director's position did not change on December 14, 2011. From the outset, her plan was to return the children to the parent best able to care for them. At the material time, the Director and her delegates were faced with a complicated situation where, on the one hand, the mother had alleged sexual abuse against the father, and on the other hand, the father had alleged that the mother was mentally unstable. While the VPD investigation into the sexual abuse allegations had been closed because there was insufficient evidence to support criminal charges, the mother's presentation continued to cause those who interacted with her concern about what appeared to be her deteriorating mental health. The Director and her delegates, despite their best efforts to ascertain the truth in the circumstances, were faced with imperfect information about how best to meet the needs of the children.

[356] At the same time, the Director was required under the *CFCSA* to make every effort to return the children to their natural parents as soon as was reasonably

possible if the circumstances permitted her to do so. Given the complexity of the issues, in my opinion she acted appropriately by obtaining reports from Dr. Kot and Dr. Eirikson, both of whom found the evidence about the sexual abuse allegations inconclusive. Both recommended that the father was better able to meet the needs of the children at that time, and both were of the view that the mother required psychiatric support before being able to properly parent the children. Although Dr. Kot's report was not admitted for the truth of its contents at trial, its contents are relevant to the reasonableness of the Director's position and her decisions about the safety and well-being of the children because, in part, it informed those decisions.

[357] Even Mr. Colby, the court-appointed expert, reached the same opinion, independent of Dr. Eirikson's assessment. Contrary to the judge's finding that Mr. Colby's approach and conclusions shifted during his testimony, and that he appeared to be "grappling to rationalize the new evidence he was being shown with information previously provided to him," including the audio and videotape of the VPD interviews of the two older children, the father's blotter drawings, and the evidence of the children's sexualized behaviour, Mr. Colby maintained his position that the children's best interests would be best met in the father's care. At most, Mr. Colby conceded that the video interviews would lead him to seek more information about the shower interaction in particular.

[358] On the advice of the experts, the Director referred the father to Mr. Day for counselling and support around appropriate discipline of the children. Mr. Day met with the father weekly from October 26, 2010 to May 17, 2011. In February 2011, Mr. Day opined that the father was "gentle and caring with the children" and that he strived to understand and to attend to their needs. He recommended that the father "continue to see the children regularly and to have them home as often as possible for extended visits." In May 2011, Mr. Day recommended that the father become more involved with the children's teachers and counsellors in order to "normalize his parenting and gradually take back the reigns of decision making for his children." In his final May 30, 2011 report, Mr. Day stated that he had "never felt that there were

any protection concerns", that he had "observed [the father] to be a caring, able parent and [felt] that the children [would] be well looked after."

[359] By December 14, 2011, the two older children had been interviewed at least seven times about the sexual abuse allegations and all the experts agreed that further interviews on this matter would only harm them. The Director, acting only on the information available to her at the time, that is, without all of the expert reports adduced by the mother at trial, decided to gradually return the children to their father's care.

[360] There was simply no evidence at trial upon which the *K.L.B.* test for a breach of fiduciary duty could be established. The judge's finding of liability rests on acceptance of the proposition that the Director could not return the children to the father after the police investigation concluded that there was insufficient evidence to support the mother's allegations that the father had sexually abused the children, and after all of the independent evidence in the Director's possession at the material time was that the sexual abuse allegations were unsubstantiated.

[361] The second finding of a breach of fiduciary duty is simply a grossly overstated generalization for which, again, there was no evidence. None of the social workers captured by this finding, although identified in the reasons for judgment as having antipathy or hostility towards the mother, were identified in the pleadings as having overlooked or preferred the interests of the father over the children. There was no evidence that the social workers deliberately disregarded the interests of the children in favour of the father. Rather, the evidence is clear that the Director prioritized the safety and well-being of the children by obtaining and following expert reports about the parenting abilities of the parties.

[362] In sum, at the relevant time, the Director's considered decision to return the children to the father's care was consistent with the VPD's decision not to pursue criminal charges and the experts' recommendations as to what was in the best interests of the children. It reflected the common concern of those who had interacted with the mother at the material time that she was mentally unstable. The

methodical approach with which the Director evaluated the circumstances does not support a finding of a breach of fiduciary duty. There was no evidence that the Director had deliberately put her interests ahead of the interests of the children by disregarding what was in their best interests. The judge based this finding on speculative inferences that were not supported by the evidence, which amounts to palpable and overriding error. In these circumstances, the claim must be dismissed.

Negligence

[363] The Director owed a duty of care to the children upon their removal from the mother's custody. That duty of care continued from the time the children were removed until they were returned to the mother's presumptive custody. The central issue was whether the Director and her delegates, during this period, breached the standard of care of a professional social worker in similar circumstances by the manner in which they exercised their duties to ensure the safety and well-being of the children.

[364] The standard of care in negligence is that of a reasonable person in similar circumstances: *Hill v. Hamilton-Wentworth Regional Police Services Board,* 2007 SCC 41 at para. 69. The standard of care for a social worker is generally that of a reasonable social worker in similar circumstances: *M. (B.) (Litigation Guardian of) v. British Columbia,* 2009 BCCA 413 at paras. 32–33. However, when a child is removed from the custody of his or her parent(s), the standard of care is elevated to that of a "careful parent", which imposes "a heightened degree of attentiveness" on social workers. More specifically, "the careful parent test imposes the standard of a prudent parent solicitous for the welfare of his or her child": *K.L.B.* at para. 14.

[365] In *M. (B.),* this Court reiterated that the concept of good faith is not a component of the reasonableness standard of care expected of social workers. However, it clarified that the presence or absence of good faith may be relevant to whether the standard of care has been breached "where the basis for the judgement is laid squarely before the court" (at para. 54). The Court also reiterated that social workers often face fluid and evolving circumstances, which affect the safety and

well-being of children, and therefore their decisions should not be so critically examined in hindsight "as to ignore the dilemma" (at para. 57).

[366] That caution echoed the comments of the Supreme Court in *Hill* with respect to the application of the reasonableness standard of care to the discretionary decisions of professionals in general and, in particular in that case, by police officers conducting an investigation:

> 73 ...This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made–circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired results. Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere "error in judgment" which any reasonable professional might have made and therefore, which do not breach the standard of care. [Citations omitted.]

[367] The extent of the discretion exercised by professionals in carrying out their duties is also an important consideration in assessing whether a breach of the standard of care has been established. As the Court in *Hill* observed:

> 54 Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals. An appropriate standard of care allows sufficient room to exercise discretion without incurring liability in negligence. Professionals are permitted to exercise discretion. What they are not permitted to do is to exercise their discretion unreasonably. This is in the public interest.

[368] Where the conduct being reviewed includes a defendant's special skill and experience, the general standard of reasonableness is qualified by an additional principle that the defendant must "live up to the standards possessed by persons of

reasonable skill and experience in that calling": *Hill* at para. 69. Generally, this will require expert evidence on the content of the standard of care where the reasonableness of the manner in which the professional exercised his or her specialized skills and experience will be beyond the common knowledge and experience of the average individual: *Bergen v. Guliker,* 2015 BCCA 283 at paras. 106–131.

[369] External indicators of reasonable conduct, including professional standards and internal policies, do not, on their own, establish a standard of care. While they may be relevant considerations on whether a standard of care has been met (see *Bergen* at paras. 110–113), non-compliance with those standards and policies is not determinative of whether there has been a breach of the standard of care sufficient to establish liability in negligence.

[370] In the circumstances of this case, I am of the view that expert evidence was necessary to establish the standard of care expected of a reasonable social worker after the children were removed from the mother's care until they were returned to the mother's presumptive custody. Determining whether the Director and her delegates' exercise of discretion in the decisions they made with respect to these children was objectively reasonable, was not a matter within the knowledge and experience of the ordinary person. The mother had the burden of establishing the standard of care for the Director in these circumstances and how that standard of care was breached. However, she tendered no expert evidence on this critical element of her claim.

[371] The pleadings assert 31 acts or omissions said to constitute misfeasance, breach of fiduciary duty and negligence. It is difficult to discern the specific allegations in negligence from the pleadings as they are lumped in together with the other tort claims. However, to the extent that they can be identified, evidence of the standard of care was required on the discrete issues that were central to this claim. This was the mother's action and, therefore, it was her obligation to establish the standard of care and the acts or omissions of the Director and her delegates that

allegedly breached that standard of care. The judge recognized this gap in the mother's case and purported to draw from the evidence of the Director/Province's witness, Francis Grunberg, to fill the gap. In my opinion, he erred in that respect.

Francis Grunberg

[372] In order to reach his findings on negligence, the judge relied in part on the evidence of Ms. Grunberg, a retired Ministry social worker, who had extensive experience in her field, including, after her departure from the Ministry, working as a consultant with the VPD, the Vancouver School Board, advising the Provincial government on child protection issues, and 10 years in private practice assisting adult victims of sexual abuse.

[373] Ms. Grunberg was called as a witness by the Director/Province and was qualified to give opinion evidence as a clinical and supervising social worker with expertise in: child protection practice in British Columbia; child abuse; and the use of risk assessments in child protection work.

[374] Ms. Grunberg was asked to answer the following two questions, which included her opinion on the standard of care in relation to four critical decisions made by the Director:

> 1. Did the Director and its delegates act in accordance with the policies and procedures (also referred to as the Ministry's Child and Family Development Standards) with respect to the impugned steps and decisions they made with respect to the plaintiffs?
> 2. Did the decision of the Director and its delegates to apprehend [the children], place them in foster care, support the father as the custodial parent, and permit the father to have unsupervised access visits meet the requisite standard of care? Specifically, was/is it acceptable standard practice for social workers in British Columbia with delegated authority pursuant to the CFCSA to make the impugned decision in this case (i.e. to allow [B.G.] to have unsupervised access).

[375] At the conclusion of her comprehensive review of the steps taken by the Ministry social workers from late 2009 to 2012, Ms. Grunberg answered each of these questions in the affirmative with reference to the standards and governing

legislation, as well as provided her opinion on best practices. She opined that the Director had met the standard of care in each of those discrete areas, stating:

> Based on my review of the materials it is my opinion that the Director and its delegates did act in accordance with the policies and procedures with respect to the impugned steps and decisions they made with respect to the plaintiffs. It is my opinion that the Director and its delegates did properly investigate complaints and based their decisions on the accumulation of evidence, facts and observations made over a period of time.

[376] Specifically, Ms. Grunberg gave evidence on the Ministry's policies and the "Best Practices" standards as contained in its Manual and Standards documents, respectively. She opined that the joint investigation between the VPD and the Ministry was appropriate given the allegations of sexual abuse and domestic violence. Proceeding in this fashion, she said, reduced the emotional trauma to the children and the frequency with which they had to be interviewed. In her opinion, the Ministry social workers acted in accordance with the "Guiding Principles" of the *CFCSA* by ensuring that the safety and well-being of the children were of paramount consideration at all times and found that they had substantially complied with the Manual and Standards.

[377] In her report, she addressed the following matters in particular.

1) <u>The removal of the children</u>

[378] Ms. Grunberg was of the opinion that the Director and her delegates: (1) properly responded to the reports to the Ministry; (2) arrived at conclusions based on the accumulation of evidence, facts and observations over a period of time as required by policy; (3) were honestly concerned about the mother's conduct, including whether her allegations were fabricated or malicious, and did not abrogate their responsibility in questioning the mother about their concerns; (4) appropriately asked the mother whether she had coached the children given the numerous reports to the Ministry and the VPD's concerns; (5) appropriately followed policy in collaborating with the VPD; and (6) appropriately removed the children from the mother's custody given the very serious reports about her conduct with the children, including concerns about (a) her mental health and behaviours, which the Ministry

believed had compromised the safety and well-being of the children; (b) missing guns from the residence; (c) information reported in the After Hours memo of December 29, 2009; and (d) Det. Rowley's opinion that she might harm herself and the children. Ms. Grunberg opined that the children were removed to ensure their safety and well-being while the VPD and the Ministry completed their respective investigations.

[379] Ms. Grunberg concluded that while the mother may have felt unheard and frustrated, Mr. Strickland acted properly in carrying out his duties by informing her of the grounds for the children's removal and that the children had been placed with family in accordance with her request. She further noted that Mr. Strickland had clearly articulated his concerns to the mother: that her mental health and behaviours were believed to have "compromised the safety and emotional/physical well-being of the children".

2) The Form A document

[380] Ms. Grunberg stated the mother's complaint about the missing information in the Form A was partially justified, but opined that the Director's concern that the children had not been seen for some time was equally justified as grounds for removal given the information available to the Ministry staff at the time. The Form A did not include the mother's allegations of physical and sexual abuse, but focused instead on the reasons for the children's removal from the mother's care: her mental health was the primary concern in determining whether to remove the children.

[381] During the civil trial, Mr. Strickland conceded that the information on the Form A was incorrect and that it should have been corrected to reflect that the children had not been seen by Ministry staff during the time period from December 17, 2009 to December 30, 2009 but that people had spoken with the mother during that time, including a police officer who met the mother on December 28, 2009. Mr. Strickland also acknowledged that omitting the mother's sexual abuse allegations in the Form A report was an error in judgment but explained that the Ministry was focused on concerns about the children's safety and

well-being while in the mother's care. The mother's allegations of sexual and physical abuse were not the principal focus of the Ministry's concerns at that time because under the December 21, 2009 order the father's access to the children had to be supervised. Ms. Grunberg opined that it was appropriate for the Director to be concerned that no one had seen the children during this time.

3. The father's access to the children before Mr. Colby's interview

[382] Pursuant to the *CFCSA* order, the Director, in the exercise of her discretion under the *CFCSA* Consent Orders, permitted the father to have unsupervised access to the children in May 2010. Mr. Colby's report suggests that the father had unsupervised access to the two older children on the day they were interviewed by him. Ms. Grunberg opined that:

> Once the decision was made by the Director to allow [the father] unsupervised access, it would not be common practice for the Director to directly monitor visits. That would defeat the purpose of allowing unsupervised access. The Director did however respond appropriately when there were reports made to the Director about incidents that might have occurred during the unsupervised visits. ...

Nevertheless, Ms. Grunberg was of the view that the father should not have been the one to take the children to their interview with Mr. Colby given the concerns about tainted evidence. She also was of the view that the visitation schedule for supervised access with the mother and the father—11 hours each week—to be excessive and not in the children's best interests.

4. Lack of follow-up with Dr. Edamura

[383] Ms. Grunberg found that the social workers should have followed up with Dr. Edamura but also that Dr. Edamura should have contacted the Ministry or the police about the children's disclosures, as required by the *CFCSA.*

5. The Director's reliance on Dr. Eirikson's report

[384] Ms. Grunberg found no evidence that the Director had asked Dr. Eirikson to assume for his parental capacity assessment that the mother had an irrational belief that the children had been sexually abused by the father. In her opinion, it was

proper for the Director to rely on the report of Dr. Eirikson, a well-qualified and experienced professional, for her decision about which of the parents was better able to care for the children in the circumstances.

6. The father's unsupervised access and the return of the children to his care

[385] The Director relied on six factors to support granting the father unsupervised access: (1) Dr. Kot's assessment that the alleged sexual abuse of the two older children remained ambiguous and K.G.'s failure to disclose any incidents of abuse; (2) Dr. Eirikson's parental capacity assessment that recommended custody be granted to the father, or at least unsupervised access; (3) Mr. Colby's similar recommendation; (4) the father's commitment to working with Mr. Day for seven months and Mr. Day's lack of concern about the father having custody of the children; (5) the father's response to the concerns raised during the Ministry's investigation and those noted in Mr. Colby's report; and (6) counsel for the Director's advice that the *CFCSA* proceeding took precedence over the *Divorce/FRA* proceeding.

[386] Ms. Grunberg found that once the children were removed from the mother's care, the Ministry would logically have worked towards returning them to her, given that she had presumptive custody. However, the mother's erratic and uncooperative behaviour, along with the experts' reports about her presentation, made that plan increasingly less meritorious. By February 10, 2010, the Ministry's investigation was complete. It had received the expert reports of Dr. Jain, the VPD and RCMP sex crimes specialists, Dr. Kot and Dr. Eirikson. The father had also expressed a willingness to engage in therapeutic and education services to address the deficits in his parenting abilities as identified by the experts. Ms. Grunberg concluded that in these circumstances it was appropriate for the Ministry to increase supervised access to the father, with the next step being unsupervised access, and eventually, returning the children to him. She stated:

> It is my opinion that the Ministry followed the standards and engaged in Best Practice. In fact, in view of all of the evidence, failing to consider [the father] as custodial parent would have in my opinion been a breach of the Standard.

[387] At trial, she reiterated that she had found no substantive breaches of the legislation, policy or the standards and "believ[ed] strongly that their [the Ministry social workers] practice was very careful, thoughtful and complied with the standards and legislation." She added:

> I have thought about this case very carefully… I do not believe the Ministry could have done things differently. I think they did a very excellent job and it was a very complex situation. A high conflict divorce, children, a number of vulnerable children in the middle of a highly emotional family situation. The Ministry conducted itself, I believe, the social workers conducted themselves with respect for the children, with respect for the parents, with respect for the experts. They worked collaboratively with all of the professionals… I firmly believe they did their very best.

[388] On cross-examination, she maintained that in her view the experts did everything they were required to do to properly complete their assessments, she agreed with the Director's decision to return the children to the father as their sole custodian, which she said "was consistent with best practice in child welfare", and she confirmed that while the social workers may have made some mistakes, those were "technical errors" and not substantive.

[389] In summary, Ms. Grunberg found the actions and decisions of the Director and her delegates to have been appropriate, for the most part in compliance with the Ministry's Manual and Standards, and in any event to have been made in the best interests of the children based on the information available to them at the time. To the extent that Ms. Grunberg was asked for and provided her opinion on the standard of care on four discrete areas, her evidence could be said to have addressed, in part, the standard of care issue.

[390] The judge, however, rejected most of her evidence. He found that: (1) Ms. Grunberg was "neither independent nor unbiased," that she "lacked objectivity, was argumentative… inconsistent, at times evasive… and defensive"; (2) she did not have a "full and accurate picture" of the facts, and overall had failed to provide a useful opinion; (3) her failure to comment on Mr. Strickland's conduct in particular, was a significant gap in her analysis, which undermined the strength of her opinion; (4) she was not candid and became "visibly alarmed" when she could

not remember details; and (5) the "many problems and concerns arising from [her] testimony … affect[ed] the integrity, impartiality, and credibility of her opinion". He volunteered that:

> It is not necessary for me to determine… whether Ms. Grunberg was actually instructed by counsel to change her opinion over a matter of substance (i.e. the Director's conduct during the First Trial) and to withhold disclosure about her assistant (who did more than act in a clerical function). I will, however, express my hope that such improper conduct did not occur.

[391] I have reviewed the transcript of Ms. Grunberg's evidence. While it is not central to the disposition of this appeal, there was, in my opinion, no evidence to support such a characterization of her evidence or the egregious conduct implied by these comments. While it was apparent the judge did not accept the substance of Ms. Grunberg's opinion on the matters she was asked to review, his complete disparagement of her professional reputation, his scathing findings with respect to her integrity, impartiality, and credibility as a highly qualified, experienced and seasoned social worker in both the public and private sectors, is disturbing to say the least. The judge clearly ignored the scope of her retainer as a witness, misapprehended and mischaracterized aspects of her evidence, and made unreasonable findings with respect to her impartiality and professionalism that were not supported by the evidence.

[392] As an example of this approach to her evidence, the judge concluded that Ms. Grunberg had "conceded that there was no policy in place that allowed the Director to support custody to a parent who was accused of sexually abusing his children, let alone in circumstances where the Director admitted sexual abuse was a possibility" (at para. 895). His finding on this issue misstates Ms. Grunberg's evidence and fails to appreciate that she had considered the Ministry's decision-making process on the basis of the information the social workers had at the time, which included the expert reports and the results of the police investigation. Her evidence on that point was as follows:

> Q And surely the Director would not support custody for a parent who poses a risk of sexual abuse towards children, correct?

A I -- I hesitate to be definitive about that because we're talking about, supposedly. And there are many, many factors that go into play in deciding what is the best for children within the Ministry's realm. So would the Ministry knowingly place a child with a sexual offender? No, I don't believe they would.

Q All right. Let's answer this question. Is it the policy of the Ministry of Children and Family Development to support a claim for custody of a parent who may have sexually abused his children?

A Well, again, it's hard to generalize. If you're talking about the specifics of this case, I can speak to what I believe from reading the files was the Ministry's rationale regarding their allowing the children to have unsupervised visits with [the father] and ultimately -- well, to have unsupervised visits, yes.

Q All right.

A And there was a lot of rationale for making that decision. It was not made lightly. I believe that the Ministry social workers right up to the highest level were involved in making that decision based on their information that they had gathered and the information gathered from experts, physicians, psychologists who had seen and assessed the children, who had seen and assessed [the father] who had seen and assessed [the mother]. So the decision was made with all of that information at hand and that's how social workers come to make their decisions.

Q But Ms. Grunberg, you're not answering my question. My question is not about the decision to support unsupervised access. My question is a general one. Is it the policy of the Ministry of Children to support a claim for custody of a parent who may -- may have sexually abused his children? The answer to that would be no, of course?

A Well, you say is it the policy of the Ministry. There's no such policy.

...

Q In fact, would it be astounding if the Ministry actually supported a claim for custody to a father who they knew may have sexually abused his children?

A Well, I think the crux of your question is may have. If it was without a -- beyond a reasonable doubt established by criminal terms that a person was a pedophile or a sexual offender, and the Ministry have that information, they would not support custody for that person.

...

Q Would the Ministry support custody to a father who may have sexually abused his children?

A Well, I --

Q The answer would be no, correct?

A There is a yes -- there isn't a yes or no answer, sir. I'm giving you my answer, which is if the Ministry had reasonable cause to believe that children would be in danger by putting them with a certain person, then they would not put them with that person.

...

> Q It's about protecting the most vulnerable.
>
> A Absolutely.
>
> Q That's the primary mandate.
>
> A Yes.
>
> Q Right. And would it not be almost absurd if the Director's position was that, "Well, we don't know what happened. It's possible that [the father] sexually abused his children but it's also possible that maybe they got information from somewhere else. But nevertheless it's still possible that he sexually abused his children. But given all that, we're still supporting custody for [the father]." Now, that would be a pretty absurd situation, right?
>
> A Well, I can't comment on that because that is really not what happened in this case. So if you're asking me for a general opinion on this supposition, of course, the Ministry would not place children, knowingly place children in harm's way. That is not what the Ministry does.

[393] The judge also found (at para. 64) that, even assuming expert evidence was required in this case to establish the standard of care, "admissions" made by Ms. Grunberg in her testimony constituted evidence of that standard of care. At para. 902, the judge listed a number of those "admissions", which he claimed Ms. Grunberg made on cross-examination. However, none of the listed items were "admissions" as that term is commonly understood; for the most part, they were general and uncontentious statements of fact. Some were tainted by a misapprehension of the evidence. In short, the "admissions" did not fill the gap that was required of the mother to establish the requisite standard of care and that it had been breached, and in any event the totality of her evidence simply was not capable of supporting a reasonable finding that the conduct of the social workers fell below the applicable standard of care.

[394] The judge's conclusions about Ms. Grunberg's view that the Ministry did not believe the father had sexually abused the children despite what he calls the "December 14 Statement" also failed to appreciate that the Ministry was statutorily mandated to return the children to the parent best able to care for them. Faced with allegations against the father that had not been substantiated, while having serious concerns about the mother's mental health, the social workers sought expert opinions about which of the two parents could best care for the children. Based on the recommendations of the independent experts, which they appropriately relied on,

the Director concluded that the father was better able to parent the children and that the children should be returned into his custody.

[395] Lastly, the judge's critique of Ms. Grunberg's failure to address Mr. Strickland's actions in her report was also not justified. Ms. Grunberg was asked to address the claims set out in the Amended Notice of Civil Claim, which at no point identified Mr. Strickland as the central target of the mother's claims. This deficiency in the pleadings, which continued through to the conclusion of the proceeding, can only be laid with the author of the Notice of Civil Claim.

[396] In my respectful view, Ms. Grunberg's opinion accurately reflected the difficult and complex circumstances the Director and her delegates are often asked to navigate. In such circumstances, the public interest requires the Director and her delegates to make the best decisions they can, with the information available to them, to protect the safety and well-being of children. Those decisions are often made with imperfect information, especially in circumstances such as these, where there are conflicting allegations between parents. It is critical that courts evaluate claims of professional negligence based on the information available to the decision-maker at the time the impugned decision was made. Although the trial judge cautioned himself about adopting a hindsight analysis (at para. 65), his reasons, when read as a whole, demonstrate that this is precisely what he did.

[397] As the Supreme Court said in *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38:

> [64] Child protection work is difficult, painful and complex. Catering to a child's best interests in this context means catering to a vulnerable group at its most vulnerable. Those who do it, do so knowing that protecting the child's interests often means doing so at the expense of the rest of the family. Yet their statutory mandate is to treat the child's interests as paramount. They must be free to execute this mandate to the fullest extent possible. The result they seek is to restore the child, not the family. Where the duties to the child have been performed in accordance with the statute, there is no ancillary duty to accommodate the family's wish for a different result, a different result perhaps even the child protection worker had hoped for.

[398] In my opinion, the judge's assessment of Ms. Grunberg's evidence was rooted in hindsight based on his acceptance of the mother's narrative in the family proceeding, and on conjecture and inferences of bad faith for which there was no evidence. His chastisement of Ms. Grunberg's "improper conduct" was similarly founded on little more than speculation about the process by which she formed her conclusions. His treatment of her evidence was also consistent with his rejection of every expert's opinion that did not accord with the mother's narrative. In these circumstances, his justification for rejecting Ms. Grunberg's evidence constituted an error in principle and was clearly wrong.

[399] Even if the judge's rejection of Ms. Grunberg's opinion is accepted, that does not assist the mother in establishing her negligence claim. She still is left with having failed to discharge the burden of proving the standard of care expected of the Director and her delegates in these circumstances. There was simply insufficient evidence to support the judge's findings that the Director and her delegates' conduct breached the standard of care in relation to: (1) the November 23, 2009 letter to the father (which predated the children's removal); (2) the mother's allegations of sexual abuse; (3) the decision to remove the children from the mother's care; (4) the Form A and the presentation hearing; (5) the protection hearing and applications for the temporary custody order; (6) the father's unsupervised access to the children; (7) Mr. Colby's report; (8) access to counselling for the children, both while they were in the Director's care, and after they were returned to the mother; (9) the children's extra-curricular activities; (10) the reports of the children's aggressive and sexualized behaviour and of the use of corporal punishment by a foster parent; and (11) new disclosures of sexual abuse in 2011. In my opinion, it was not open to the judge on the record before him to reasonably conclude to the contrary. In these circumstances, the mother's claim in negligence must fail.

The father's unsupervised access

[400] The judge found that the Director was reckless and grossly negligent when she permitted the father to have unsupervised access to the children, contrary to his

December 21, 2009 order, thereby demonstrating reckless indifference to the potential harmful consequences for the children (at para. 701).

[401] For the reasons stated above, the Director acted on her understanding that the Provincial Court had exclusive jurisdiction to address matters under the *CFCSA* involving the safety and well-being of the children. The Provincial Court granted her the authority to determine if supervised access by either parent was necessary and in the best interests of the children. The judge himself appeared to share this understanding when he directed the mother back to the Provincial Court to vary the *CFCSA* Consent Orders after the mother expressed concern that the father was being granted unsupervised access to the children. In my opinion, the Director acted within her statutory mandate and as authorized by the Provincial Court. Her decision was informed and objectively reasonable—it was based on the VPD's decision not to charge the father because of a lack of reliable evidence to support the mother's allegations and on the reports of Dr. Eirikson, Mr. Colby and Mr. Day, all of which consistently opined that the father was the better parent to care for the children at that time.

[402] The mother again provided no evidence that these decisions breached the standard of care of a reasonable social worker.

[403] The Director has a broad mandate under the *CFCSA* to determine whether the safety and well-being of the children required that they remain in the care of the Director or be returned to one or the other parent, or both. To that end, the Director developed an independent, expert-based reintegration plan that provided for the father eventually obtaining primary care of the children. The Director's plan allowed the children to be gradually returned to him, beginning with supervised access, followed by unsupervised access and finally full-time care and custody. The judge's interpretation of the scope of the Director's statutory authority where there is an earlier Supreme Court order under the *Divorce Act* would have effectively stripped the Director of the discretion she required, and is granted under the *CFCSA,* to

implement a reintegration plan that ensured the safety and well-being of the children, regardless of the nature of the dispute between the parents in the family proceeding.

Compensation application from the Crimes Victims Assistance Program

[404] The judge made a further finding against the Director and her delegates that I feel obliged to address, although it was not addressed in the parties' factums or submissions.

[405] The November 14, 2012 Amended Notice of Civil Claim and the final July 10, 2015 Further Amended Notice of Civil Claim had pleaded that the Director and her agents, and various social workers (none of whom were identified), breached their statutory, common law, and fiduciary duties by "[r]efusing to provide funding for counselling services for the Children notwithstanding the findings of fact contained in the June 25, 2012 Reasons for Judgment" in the family proceeding. The children were returned to the mother's care in June 2012.

[406] At trial, during re-examination on June 3, 2013, the mother testified for the first time, albeit with the consent of the Director, that she had applied on October 12, 2012, to the Crime Victims Assistance Program ("CVAP"), a program operated by the Province, for compensation based on the judge's findings that the father had sexually abused the children, and physically abused her and the three older children. She said someone told her that she had not received any compensation because the Ministry had failed to respond to requests from the CVAP for documents that were in the possession of other government departments, which CVAP required to approve the claim, and that someone else had told her the application form had been sitting on the Director's desk "for a long, long time." None of the Director/Province's witnesses were asked about this issue. It arose for the first time during the mother's testimony in June 2013, long after the children had been returned to the mother's care. The mother's counsel referred to this evidence as "fresh evidence". The judge was critical of the Director/Province's failure to lead evidence on this issue.

[407] The judge found:

> [861] I find the delay was unreasonable. While there was no direct evidence of malice, I can find no reasonable explanation for the Director's failure to act other than either a deliberate tactic or neglect. In either case, it was callous. It is a breach of the standard of care of a reasonable social worker to fail to respond to a request for records necessary to allow funds for counselling to be provided to the children. The Director's conduct falls outside of her statutory mandate to protect children and ignored Mr. Colby's opinion evidence and the Director's previous commitment to assist the children.

[408] The basis on which this "fresh evidence" claim was advanced is unclear from the pleadings. The judge's reasons for finding that the delay was unreasonable mix the language of misfeasance in public office with the language of the standard of care in negligence. He finds that the Director's failure to act was "deliberate", "neglect[ful]", and "callous", language consistent with his broader findings of bad faith. However, he also finds the conduct to have been a breach of the standard of care of a reasonable social worker.

[409] There are three fundamental flaws with this finding: (1) the specific claim was never pleaded and therefore was not addressed by Ms. Grunberg who was asked about matters in the Notice of Civil Claim; (2) it is unclear whether the finding is for misfeasance in public office or negligence, neither of which was specifically pleaded on this issue; and, in any event, (3) there was simply no admissible evidence to support the allegation, which was based solely on hearsay evidence about which none of the Director's witnesses were asked. There was also no evidence about how such a request should have been dealt with, what steps should have been, but were not taken, or who failed to meet the unspecified standard of care. The burden of proof was on the mother to establish this claim, not on the Director to explain the alleged misconduct, which was not pleaded, not raised in evidence until re-examination, and not put to any of the Director's witnesses on cross-examination. In the absence of any admissible evidence to support the allegation, I would set aside the judge's finding on this issue.

VII. Disposition of the Civil Appeal

[410] In the result, I would allow the appeal, set aside the orders in the civil proceeding against the Director/Province, and dismiss the Notice of Civil Claim. In

particular, I would set aside the finding that Mr. Strickland committed misfeasance in public office, that the Director and her delegates breached their fiduciary duty to the children, and that the Director and her delegates breached the standard of care in the decisions they made with respect to the children while they were in her care.

[411] Attendant upon this proposed disposition, I would also set aside the award of special costs for the family proceeding.

"D. Smith J.A." per M.E.

The Honourable Madam Justice D. Smith

I AGREE:

CJBC.

The Honourable Chief Justice Bauman

I AGREE:

J. Fitch J.A.

The Honourable Mr. Justice Fitch