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Parenting Assessments and Their Use in Family Law Disputes in Alberta, British Columbia and Ontario

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**PARENTING ASSESSMENTS AND THEIR USE IN
FAMILY LAW DISPUTES IN
ALBERTA, BRITISH COLUMBIA AND ONTARIO**

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1.0 BACKGROUND

The use of mental health assessments for the purpose of decision-making in parenting disputes has become relatively commonplace in Canadian family law disputes. These assessments, also called “custody and access reports” and “bilateral assessments,” are usually requested when the views and opinions of an independent expert are needed to help separated parents or the court determine the parenting arrangements that are in the best interests of minor children. The experts who prepare these assessments are usually psychologists, psychiatrists, clinical counsellors or social workers, and their services may be paid by the state or paid privately by one or both parents.

The legal test that must be met to obtain a parenting assessment, and the processes generally followed to complete them, differ significantly between jurisdictions. This paper reviews practice and procedure in Alberta, British Columbia and Ontario, and examines: the extent to which these assessments are used and relied upon in courtroom decision-making; and, whether there is a relationship between the cost of private assessments and the frequency of their use in these jurisdictions.

2.0 LEGISLATIVE FRAMEWORK

The content of parenting assessments, the purposes for which they may be requested and the test to obtain them are subject to rules that vary by jurisdiction and are usually set out in the provincial or territorial legislation on domestic relations. Parenting assessments are not addressed in the federal *Divorce Act*,¹ and are available in cases proceeding under that act through the provincial or territorial legislation or the general rules of court relating to experts’ evidence and reports.

2.1 British Columbia

In British Columbia, section 211(1) of the *Family Law Act*² gives the court discretion to appoint an individual to assess one or more of the following:

¹ RSC 1985, c. 3 (2nd Supp.)

² SBC 2011, C 25

- (a) *the needs of a child in relation to a family law dispute;*
- (b) *the views of a child in relation to a family law dispute;*
- (c) *the ability and willingness of a party to a family law dispute to satisfy the needs of a child.*

Section 211(2)(a) stipulates that the assessor “must be a family justice counsellor, a social worker or another person approved by the court.”³

The British Columbia Ministry of Justice, Family Justice Services Division provides the Family Justice Report Service, through which Family Justice Counsellors prepare court-ordered section 211 reports at no cost to the parties.⁴ Alternatively, parents may agree or the court may order that a section 211 report be prepared by a privately-retained mental health professional.

2.2 Alberta

In Alberta, parenting assessments were formerly carried out under Practice Note 7, “Use of Independent Parenting Experts.” This Practice Note was repealed and replaced in 2012 by Practice Notes 7 and 8, which respectively provide procedural guidelines for “Interventions” and for “Parenting Time/Parenting Responsibilities Assessments.”

Practice Note 7 provides for interventions by parenting experts, whose role is to “describe what is happening in the family and/or with the children.” Parenting experts engaged under Practice Note 7 do not provide opinions or recommendations as to the best interests of the children or as to issues such as custody and access. They provide information of limited scope to assist the court with decision-making, including voice of the child reports and psychological evaluations of the parents, and may also provide mediation, parenting coordination and therapeutic services to individuals and families. Parenting experts may recommend that parenting assessments under Practice Note 8 be prepared, however an intervention under Practice Note 7 and an assessment under Practice Note 8 involving the same family may not be carried out by the same mental health professional.⁵

³ The *Family Law Act* came into force in 2013, repealing and replacing the *Family Relations Act*, RSBC 1996, c. 128. Parenting assessments were available under s. 15 of the former act, and cases decided under that act are referred to as “section 15 reports.”

⁴ <http://www.justice.gc.ca/eng/fl-df/fjs-sjf/view-affic.asp?uid=164>

⁵ Court of Queen’s Bench of Alberta Family Law Practice Note 7 Interventions (2012), available online at <https://albertacourts.ca/docs/default-source/Court-of-Queen's-Bench/practicenote7-interventions---final.pdf?sfvrsn=0>

Practice Note 8 provides comprehensive procedural guidelines for “Parenting Time/Parenting Responsibilities Assessments” and a model form of order when such assessments are to be prepared.⁶ Paragraph 15 of the practice note describes the nature and purpose of these assessments:

An Assessment is an objective, neutral evaluation carried out by a Parenting Expert as an aid to litigation. An Assessment may address only one home or parent or child. Assessments may include psychological testing. An Assessment may also explore individual issues such as the educational needs of a child, the mental health of an individual, and anything else that the litigants identify and the Court orders.

Practice Note 8 provides considerably more guidance than the British Columbia legislation, and addresses assessment parameters, confidentiality, a party’s failure to comply with the requirements of the assessment, the assessor’s authority to “investigate and collect evidence,” and professional complaints against an assessor.

2.3 Ontario

In Ontario, assessments are governed by section 30 of the *Children’s Law Reform Act*,⁷ which allows the court to:

(1) ... appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.

Pursuant to s-s. (5), the court may require “the parties, the child and any other person” to attend for assessment. In the event that a person fails to attend, the section provides that:

(6) ... the court may draw such inferences in respect of the ability and willingness of any person to satisfy the needs of the child as the court considers appropriate.

This provision provides more explicit judicial discretion than Alberta’s Practice Note 8, which directs a parenting expert to seek further direction from the court if a party fails to cooperate. British Columbia’s legislation does not address failure to comply.

⁶ Court of Queen’s Bench of Alberta Family Law Practice Note 8, “Parenting Time/Parenting Responsibilities Assessments,” available online at <https://albertacourts.ca/docs/default-source/Court-of-Queen's-Bench/pn8-bi-lateral-assessment---final.pdf?sfvrsn=0>

⁷ RSO 1990, c. C. 12

Ontario's *Courts of Justice Act*⁸ addresses clinical investigations undertaken by the Office of the Children's Lawyer. Although these investigations are initiated at the request of the court, the OCL has the discretion to decline to become involved. Its criteria for provision of services are available online.⁹ Section 112 of the act states that:

(1) In a proceeding under the Divorce Act (Canada) or the Children's Law Reform Act in which a question concerning custody of or access to a child is before the court, the Children's Lawyer may cause an investigation to be made and may report and make recommendations to the court on all matters concerning custody of or access to the child and the child's support and education.

Parties to a case are not required to pay for clinical investigations, which are publicly funded through the OCL. When OCL involvement is either not ordered by the court or declined, private assessments by social workers, psychologists or psychiatrists may still be conducted under s. 30 of the *Children's Law Reform Act*.

3.0 METHODOLOGY

This project involved a review of the case law in each of the subject jurisdictions to identify cases in which parenting assessments could have been and were introduced into evidence, as well as decisions relying on parenting assessments. The project also involved interviews with a number of assessors to obtain information about the preparation of parenting assessments.

3.1 Case Law Review

To determine the frequency with which parenting assessments are addressed by courts in Alberta, British Columbia and Ontario, judgments published between 1 January 2014 and 31 December 2015 were reviewed to identify decisions on issues for which a parenting assessment could potentially have been required, and decisions on these issues involving a parenting assessment.

Reviewing the case law in each jurisdiction involved the following steps:

⁸ RSO 1990, c. C. 43

⁹ Ontario Ministry of the Attorney General, Intake Criteria for Provision of Custody/Access Cases, available online at <https://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/intake.php>.

1. An initial search was conducted on CanLII, separately by province and year, for all family law cases that included the terms *parent* or *child*. The intention of this search was to capture as many cases as possible involving disputes over parenting in each of the three provinces. Cases were subsequently removed from the list if: they were not trial or post-trial variation decisions; and, did not involve issues related to custody, access, residence, mobility or parenting arrangements.¹⁰
2. A second search was conducted within these decisions for cases in which the terms *parent* or *child* appeared in the same sentence as *assessment, report, evaluation* or *expert*. This search was intended to identify cases which involved the use of expert evidence from mental health professionals. Cases were subsequently removed from the list if they did not involve such evidence.
3. When it became clear that these searches were failing to capture a significant number of Ontario cases which involved clinical investigations conducted by the Office of the Children’s Lawyer, an additional search was conducted for the terms *OCL* and *Office of the Children’s Lawyer* within these decisions.

Cases involving the use of expert evidence were then reviewed to identify judgments in which the court relied on the parenting assessment to some extent, determined if: the final order adopted the recommendations of the expert, as described in the case; and, the judgment made reference to the utility of the expert’s report or testimony, or explicitly accepted the expert’s opinion.

3.2 Interviews

Finally, several mental health professionals from each of Alberta, British Columbia and Ontario were interviewed. These interviews included a range of questions related to the standard practices involved in conducting parenting assessments, including methodology, timing, expense, best practices and professional regulations. The goal of these interviews was to gain an anecdotal understanding of notable differences in practice between provinces, which would ideally provide context for the numbers that emerged from the case law review.

¹⁰ Family law cases were eliminated where the issues were limited to: interim applications; uncontested trials; appeals; financial disputes about support or property division; child abduction; child protection; applications for costs, restraining orders or findings of contempt; and, jurisdiction disputes.

3.3 Limitations

This project is subject to several methodological limitations that restrict the extent to which generalizations can be meaningfully drawn from its conclusions.

First and perhaps most importantly, a review of case law will not reveal the number of cases that settle or otherwise do not proceed to trial as a result of parenting assessments prepared by mental health professionals. Given that expert reports are often ordered with the express purpose of helping parents resolve parenting disputes, this number could be significant. Further, when comparing the number of reported cases in each jurisdiction, a lower number of reported court cases involving parenting assessments could indicate only that parenting assessments in one jurisdiction result in more settlements than parenting assessments in other jurisdictions. Moreover, the cases reviewed for this project are those included in the CanLII database, which does not include every decision issued by the courts in the subject jurisdictions.

Second, judges do not always explicitly comment on the extent to which they have relied on expert evidence. For the purposes of this project, it was assumed that lack of discussion of the parenting assessment indicated a lack of reliance. However, this is not necessarily true, as not all judges provide a written comment on each piece of evidence introduced in the cases they decide.

Third, the terminology used to describe parenting assessments varies across jurisdictions; for example, these reports are often referred to as *bilateral assessments* or *PN8 assessments* in Alberta, while in British Columbia they are known as *needs of the child reports* and *section 211 reports*. While search terms were modified to accommodate references to investigations conducted by the Office of the Children's Lawyer in Ontario, it is possible that some search terms were more effective at "catching" cases involving expert reports in one province than another, which may have had an impact on the number of cases reviewed.

Fourth, the case law review resulted in substantially fewer decisions from Alberta than from British Columbia or Ontario. As a result of this small sample size, the data from Alberta in particular may not be representative of the actual frequency with which parenting assessments are addressed or are accepted by the courts.

Finally, the role played by the OCL in Ontario renders comparison with that province difficult. Review of the Ontario case law produced a considerably higher number of OCL clinical investigations by social workers under section 112 of the *Courts of Justice*

Act than assessments by psychologists under section 30 of the *Children’s Law Reform Act*. While the submissions of the OCL were often relied upon by the courts, these reports are qualitatively different from assessments provided under the *Children’s Law Reform Act*. As one Ontario judge put it, “at best a s. 112 report is in the nature of a fact-finding exercise, as contrasted with a more comprehensive assessment under s. 30 of the *CLRA*.”¹¹ One assessor in Ontario characterized the role of the OCL as “information gathering,” and noted that it was considerably different than the role of mental health professionals preparing assessments under section 30 of the *Children’s Law Reform Act*.

4.0 CASE LAW REVIEW

The case law review conducted for this report analyzed 273 cases from British Columbia, 57 from Alberta, and 290 from Ontario. In British Columbia, parenting assessments were considered in 98 cases; and, within those 98 cases, 61 cases exhibited reliance upon the assessments. In Alberta, parenting assessments were considered in 8 cases, 4 of which exhibited reliance on the assessments. In Ontario, parenting assessments prepared under either or both of the *Courts of Justice Act* and the *Children’s Law Reform Act* were considered in 73 cases, 37 of which exhibited reliance on the assessments. These results appear in Table 1.

Table 1
Frequency of Expert Involvement in Family Law Cases

	British Columbia	Alberta	Ontario
Total number of cases reviewed	273	57	290
Reviewed cases involving parenting assessment	98 (35.9%)	8 (14%)	73 (25%) 55: by OCL under <i>CJA</i> 16: under <i>CLRA</i> 2: under <i>CJA</i> and <i>CLRA</i>
Reviewed cases in which parenting assessment relied upon	61 (22.3%)	4 (7%)	37 (12.8%) 30: by OCL under <i>CJA</i> 7: under <i>CLRA</i> 0: under <i>CJA</i> and <i>CLRA</i>
Rate of adoption	62.2%	50%	50.7%

¹¹ *Cochrane v. Myers, Campeau, McSherry*, 2014 ONSC 2048 at para 345

The results of the case law review indicate that in British Columbia, parenting assessments are both used more frequently, and relied upon more consistently than in either Ontario or Alberta. The results in Ontario revealed notably more investigations by the Office of the Children’s Lawyer than assessments under section 30 of the *Children’s Law Reform Act*. Additionally, the results in Alberta revealed a significantly lower number of parenting assessments than found in the other two provinces.

5.0 INTERVIEWS

Interviews were conducted with three mental health professionals from each of the subject jurisdictions. Topics discussed included professional guidelines involved in conducting assessments, methodology, timeframe, expense, and issues with complaints to governing bodies.

The professionals interviewed all had at least ten years of experience with parenting assessments (most had considerably more), and assessments formed a regular part of their practice (on average between 10 and 20 each year). Assessors’ involvement in parenting cases resulted primarily from contested court orders or orders going by consent. Although assessors were routinely retained as the expert of a single party, such situations have become almost nonexistent in recent years.¹²

5.1 Professional Guidelines for Assessments

When asked what professional guidelines they adhered to in conducting assessments, responses varied slightly. Assessors frequently made reference to the Association of Family and Conciliation Courts, the guidelines of the American Psychological Association, or the codes of conduct of assessor’s governing bodies, such as the College of Psychologists of British Columbia.

The AFCC describes itself as “the premier interdisciplinary and international association of professionals dedicated to the resolution of family conflict.”¹³ Originally rooted in California, it has expanded to develop chapters in a number of American

¹² See the comments of James MacDonald and Ann Wilton to a similar effect in *The 2012 Annotated Divorce Act*, (Toronto: Thomson Reuters, 2011) at p. 489

¹³ Association of Family and Conciliation Courts, “About AFCC,” available online at <http://www.afccnet.org/About/About-AFCC>

states, as well as Australia. Currently the only Canadian jurisdictions with AFCC chapters are Ontario (founded 2008) and Alberta (founded 2014). The AFCC has developed model standards of practice for child custody evaluation,¹⁴ as well as a range of other guidelines related to custody disputes. One assessor suggested that there has been conflict within the British Columbia bar with respect to establishing an AFCC chapter, which would require a minimum of 75 AFCC members in the province. The APA, similarly, provides comprehensive general and procedural guidelines for conducting child custody evaluations.¹⁵

While guidelines for conducting parenting assessments had been provided by the College of Alberta Psychologists, these were rescinded several years ago. The 2013-2014 CAP Annual Report attributes this to the fact that they were “found to be dated in terms of current practice and legislation.”¹⁶ British Columbia assessors indicated that the Code of Conduct of the College of Psychologists of British Columbia provided sufficient guidance in lieu of rules specifically applicable to assessments. The Ontario College of Social Workers and Social Service Workers provides a set of Practice Guidelines for Custody and Access Assessments,¹⁷ though the College of Psychologists of Ontario does not.

While assessors referred to similar guidelines for professional practice in this area, the lack of explicit guidelines for assessment from the provincial governing bodies, combined with the differences in provincial legislation, suggests that practice across and within provinces is not necessarily harmonized. On the other hand, the APA and AFCC guidelines provide resources that may lead to increased harmonization despite jurisdictional differences. Given the apparent utility of these resources, it is unclear why Canadian jurisdictions have declined to create or adopt their own unified set of guidelines.

¹⁴ Association of Family and Conciliation Courts, “Model Standards of Practice for Child Custody Evaluation” (2006) online: <http://www.afccnet.org/Portals/0/ModelStdsChildCustodyEvalSept2006.pdf?ver=2013-08-21-071826-000>

¹⁵ American Psychological Association, “Guidelines for Child Custody Evaluations in Family Law Proceedings” online: <http://www.apa.org/practice/guidelines/child-custody.aspx>

¹⁶ College of Alberta Psychologists, Annual Report, April 1, 2013 – March 31, 2014, online: <http://www.cap.ab.ca/Portals/0/publications/CAPARPT-AnnualReport2013-2014.pdf>

¹⁷ Ontario College of Social Workers and Social Service Workers, “Practice Guidelines for Custody and Access Assessments, online: <http://ocswssw.org/wp-content/uploads/2015/01/PG-Custody-and-Access-Assessments.pdf>

5.2 Assessment Methodology

Methodology for the conduct of parenting assessments has been subject to considerably more thorough analysis elsewhere than is attempted here. This project does not endeavour to provide a detailed examination of the standard methodological approaches to conducting assessments. Assessment methodology is briefly outlined in order to provide contextual background for assessors' responses.

Typically, parenting assessments involve a combination of interviews (with parents, children and closely involved parties), observation of each parent interacting with the child, and interviews with collateral sources both supplied by the parents and not.¹⁸ Aspects of each element, such as length and order of interviews, location and structure of observation visits, and number and extent of collateral interviews varied by assessor.

Opinions varied with respect to the form of evidence gathering that is most important. Psychiatrists acting as assessors all conducted tests on the parties involved, though the set of tests conducted was not consistent, nor were the array of parties upon whom they were conducted. Several psychiatrists noted that psychological testing was essential with respect to distinguishing expert evidence from lay evidence; as a result, tests were always conducted despite a range of views on their relative usefulness as evidence. Social workers conducting assessments did not use psychological testing.

5.3 Time and Cost

The length of time taken to complete an assessment varied across jurisdictions. In British Columbia, private assessors reported the shortest timeframes, typically aiming to produce reports in two months or less, although unforeseen factors can easily lead to this time increasing. According to the Manual of Operations of British Columbia Family Justice Services,

... a section 211 Views of the Child report is completed within four weeks of assignment to a family justice counsellor. Other reports are completed within eight weeks of assignment.¹⁹

¹⁸ Retainer agreements often require parties to consent to collateral sources being contacted, regardless of which party suggested the source to the assessor.

¹⁹ Family Justice Services Division, "Family Justice Services Manual of Operations" (2014) at chapter 7.4.3, online: <http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-services-branch/fjsd/manual.pdf>

However, assignment to a family justice counsellor may take considerably longer due to the limited availability of counsellors. Private assessments under section 211 can be initiated without the sometimes months-long delay caused by waitlists for family justice counsellors.

In Ontario, assessors acting under the *Children's Law Reform Act* indicated that reports took an average of three to four months to produce. With respect to clinical investigations under the *Courts of Justice Act*, once a case is accepted and assigned (a process that can take additional time), OCL clinicians aim to complete their reports in three months.

Assessors in Alberta reported the longest timeframes: reports that went smoothly took a minimum of four to six months, while delays could push that timeframe back by several months, or in some cases take over a year.

Parenting assessments can be delayed for various reasons, such as the involvement of children's services, sources being out of town or otherwise unavailable, or lack of cooperation or payment from the parties. Delays can also result from difficulty acquiring relevant information, such as police records, to which privacy concerns may be attached. Alberta assessors in particular reported experiencing increasing difficulty accessing schools as collateral sources.

British Columbia assessors indicated that the cost of producing a report usually ranged between \$10,000 and \$15,000. In Alberta, the range was higher, with a minimum of \$15,000, and often extending well into the \$20,000 to \$30,000 range. *Children's Law Reform Act* assessors in Ontario reported high costs as well, ranging from \$15,000 to \$25,000. However, an OCL clinical investigator reported billing for private assessments as well, and doing so in the \$6,000 to \$10,000 range.

While reasons for costs were not discussed in detail, one assessor raised the fact that it is unusually time-consuming and costly to keep up with developments in this particular field, especially as some, though certainly not all, assessors also try to keep up with developments in the relevant case law.

5.4 Professional Complaints

Assessors interviewed for this project were widely in agreement that the prospect of complaints to their governing bodies operates as a powerful deterrent to individuals considering providing these assessments. Several suggested that concerns about

complaints might even dissuade other professionals, such as child therapists, from close involvement with high-conflict families. Since these professionals are often consulted by assessors as collateral resources during preparation of the report, concerns about complaints can operate to limit the overall utility of the reports themselves.

While the prospect of complaints to professional bodies is far from a new issue, several assessors suggested that the problem has recently been exacerbated by the arrival of social media and smartphones. One assessor revealed that interviews conducted for the assessor's assessments had been surreptitiously recorded (despite a term of the assessor's retainer agreement forbidding such recordings) and sent to the College of Psychologists in support of complaints. Another pointed to online forums and social media, where grievances about assessors, whether well-founded or not, are shared publicly and used as mutual encouragement for complaints to governing bodies.

Parenting assessments are often conducted during particularly acrimonious court proceedings, in which the parties have in some cases been dealing with the court system for years. One assessor pointed out that litigants with considerable experience manipulating the court system are uniquely well-equipped to take advantage of governing bodies' complaint mechanisms.

However, in Alberta, paragraph 14 of Practice Note 8 provides that:

Unless otherwise ordered, no complaint may be made to the professional body governing the practice of the Parenting Expert until the Assessment is complete or the Court has rendered its decision in the matter for which an Assessment has been ordered.

Retainer agreements for experts often contain similar stipulations. However, this provides little protection against complaints made after the assessment has concluded. It was revealed during the interview process that one parenting expert in Alberta planned to cease conducting assessments as a result of frequent complaints and lack of support from the assessor's governing body.

None of this is meant to suggest that all grievances related to parenting assessments are unfounded or otherwise meretricious. However, meritorious complaints face the risk of being drowned out by the high volume of vexatious complaints inevitable in high-conflict custody disputes. In all three jurisdictions examined, the barrage of complaints

has resulted in a limiting, if not actual diminution,²⁰ of the number of assessors who are willing to provide services in each province, potentially resulting in strategic decision-making by lawyers familiar with common assessors.

6.0 ANALYSIS

6.1 Public and Private Assessments

One of the distinctions between the three jurisdictions examined in this report is the approach taken to public and private assessments in terms of availability, frequency of use, and governing legislation. The case law review confirmed that the Office of the Children's Lawyer is regularly involved in high-conflict family disputes in Ontario. While OCL clinical assessments differ from psychological assessments conducted under the *Children's Law Reform Act*, it is quite rare that a single case will involve both types of assessment (in contrast with Alberta, where Practice Note 7 Interventions and Practice Note 8 Assessments remain explicitly linked). As a result, assessments under the *Children's Law Reform Act* are very likely less commonplace than they might be without the OCL's involvement. Of the 73 total cases referred to above, 55 involved OCL clinical investigations; two involved both the OCL and a *Children's Law Reform Act* assessor, and the remaining 16 involved privately conducted *Children's Law Reform Act* assessments.

Public assessments in British Columbia, conducted by Family Justice Counsellors, appear to be less ubiquitous than OCL assessments. Unfortunately, the case law from British Columbia does not consistently highlight whether an assessment is conducted publicly or privately, as FJCs are not always identified as such and do not operate under their own legislative authority.

While social workers provide both private and public assessments, psychologists and psychiatrists appear to only provide their services privately. Though there is certainly a difference between the way assessment services are provided by these two professions, it is not evident that one is more effective than the other, whether for procuring settlement or for persuasiveness in court.

²⁰ See the article by Tani Moscoe and Barbara Jo Fidler, "Where Have All the Assessors Gone? Addressing Frivolous and Vexatious Complaints and Moving Towards Potential Solutions," on the website of AFCC Ontario at <http://afccontario.ca/where-have-all-the-assessors-gone-addressing-frivolous-and-vexatious-complaints-and-moving-towards-potential-solutions/>

In Alberta, on the other hand, parenting assessments are paid for exclusively by the parties. This mix of approaches to public and private assessments by jurisdiction is further complicated by varying judicial approaches to ordering such assessments.

6.2 Ordering Assessments

The review of case law from Alberta, British Columbia and Ontario reveals differences in approaches to ordering assessments between provinces. As mentioned above, a significant proportion of assessments now arise as a result of court orders, making judicial approaches to ordering those assessments increasingly important.

In Ontario, various factors can play a role in which type of assessment is ordered. Case law evaluating requests for assessment orders indicate that assessments pursuant to the *Courts of Justice Act* are often favoured over *Children's Law Reform Act* assessments, a notion that is supported by the findings of the case law review. As one judge put it while deciding an application for assessment, cites omitted:²¹

Given the language of the legislation and relevant caselaw, it seems clear that a motion under s. 112(1) of the CJA for an investigation and report by the OCL is “much broader in its scope” and, on its face, more available than when the court considers making an assessment order under s. 30(1) of the CLRA.

This observation is consistent with a line of Ontario case law suggesting that the courts often exhibit considerable caution in ordering *Children's Law Reform Act* assessments. In *Morton v. Morton*, for example, Justice Raikes cited several applicable principles on an application for a *Children's Law Reform Act* assessment, cites omitted:²²

1. There is no requirement that there be evidence of a clinical issue or clinical pathology as a precondition to an assessment being ordered;
2. The presence of a clinical issue or clinical pathology may be a significant factor in favour of an assessment being ordered;
3. Assessments should not be ordered as a matter of routine given the expense and intrusive nature of such investigations; and,

²¹ *Tufford v. Pattinson*, 2015 ONSC 4615 at para 11

²² *Morton v. Morton*, 2015 ONSC 4633 at para 65

4. Each case must be determined on its own facts having regard to the evidence before the court as to the benefits and potential harms arising from the assessment process.

Justice Raikes subsequently described a non-exhaustive list of factors for consideration in determining whether to order a parenting assessment. The list included the age of the children, potential alternatives to ordering an assessment, the estimated cost and the financial resources of the parents, the potential for delay caused by the assessment and the impact of such a delay on the child, and whether the assessment would be in the best interests of the child.²³

This line of case law emphasizes the exceptional nature of *Children's Law Reform Act* assessments. The intrusive and expensive nature of assessments requires the justification of some evidentiary foundation, and consideration of the best interests of the child. This kind of evaluation is less evident in British Columbia, where the courts have explicitly set a low threshold for ordering a report. In *R.E.Q. v. G.J.K.*, the court stated that:²⁴

The thrust of the cases under the [*Family Relations Act*] required the court to take a broad and generous approach to applications for s. 15 assessments. A low threshold was imposed because such assessments were regarded as invariably providing a valuable source of information for a court faced with the onerous task of making fundamentally important decisions about the welfare of a child...since the enactment of the [*Family Law Act*], the courts have found the principles that governed s. 15 applications remain unchanged and continue to apply to the ordering s. 211 reports...

While orders for assessments are informed by considerations of the best interests of the child in both jurisdictions, it appears that the threshold for ordering one is lower in British Columbia than in Ontario, perhaps explaining why the bulk of Ontario assessments explored in the case law review were conducted by the OCL rather than by private *Children's Law Reform Act* assessors.

In Alberta, Practice Note 8 addresses several of the concerns expressed in Ontario's case law. It requires the Court to "determine the ability of the parties to pay" prior to ordering the assessment,²⁵ and to some degree minimizes the level of intrusion by

²³ *Ibid* at para 66

²⁴ *R.E.Q. v. G.J.K.*, 2015 BCSC 1786 at paras 32-34

²⁵ Practice Note 8, *supra* note 6 at paragraph 8

stipulating that “once the Court has ordered an Assessment, no additional assessments involving the children may be undertaken by the parties without an order of the Court.”²⁶ Aside from these considerations in the Practice Note, however, the degree of reluctance with which Alberta’s courts approach ordering assessments is unclear. In *A.M. v. F.M.*, the court declined to order a Practice Note 7 Intervention until the wife in the case had obtained adequate legal advice, noting that such an intervention “does represent an intrusion of sorts, and ... may not be either necessary or in everyone’s best interests.”²⁷ More recent case law is silent on the nature of the threshold for ordering a report in Alberta.

6.3 Time and Cost

Anecdotal evidence suggests that assessments typically take longer and cost more in Alberta than in British Columbia; interviews with Ontario assessors were less specific on this topic. Moreover, the framework provided by Practice Note 8 in Alberta is considerably more detailed than section 211 of the British Columbia *Family Law Act*. The case law review yielded a higher number of absolute cases in British Columbia than in Alberta, as well as a significantly higher number of cases involving assessments. These numbers could indicate that fewer assessments are undertaken in Alberta, perhaps as a result of the expense and lack of low-cost alternative options; while there may be a long waitlist for a Family Justice Counsellor in British Columbia, there is no equivalent option in Alberta. However, the results could also suggest that Alberta cases are more likely to settle prior to trial, resulting in fewer reported cases. If parenting assessments are intended to facilitate settlement, perhaps Alberta’s more time-consuming assessments are more effective at accomplishing this goal.

Conclusions about the British Columbia and Alberta numbers should also be informed by consideration of the range of practice approaches even within each province. Notably, while all assessors abide by their province’s professional code of conduct, they do not uniformly adhere to additional, optional guidelines such as those offered by the AFCC and the APA. Moreover, as mentioned above, specific assessment methodologies vary between assessors. Although distinctions can be drawn between provinces with respect to cost and duration, these aspects might also be influenced by the city in which the assessment is conducted or the court in which the proceeding is being heard. Willingness to pay a larger retainer presumably results in a greater number of hours dedicated to producing a thorough assessment. Because of this, Ontario may be a

²⁶ *Ibid* at paragraph 21

²⁷ *A.M. v. F.M.*, 2008 ABQB 498 at para 54

particularly difficult jurisdiction from which to draw conclusions; given its larger size and population, it may demonstrate considerable regional variation.

Furthermore, effectiveness at facilitating settlement does not necessarily correlate with persuasiveness in the courtroom. The numbers produced by the case law review indicate that, in court at least, assessment recommendations are no more likely to be accepted in Alberta than in other provinces. This may be related to the fact that the inevitable delay between the completion of an assessment and the start of trial often decreases the relevance of the report. For example, in the 2015 case *A.J.U. v. G.S.U.*, Justice Pentelchuk firmly rejected the submissions of the Practice Note 8 parenting assessor and took the opportunity to expound on “the evidentiary pitfalls that arise with parenting assessments.”²⁸ He observed that the College of Alberta Psychologists’ decision to rescind the Guidelines for Child Custody Assessments had created a “procedural vacuum” and argued that “there is a serious danger in the Court placing too much reliance on an expert’s opinion on what is in the child’s best interest.”²⁹ In particular, he raised concerns that exclusionary rules of evidence could be circumvented by overreliance on expert reporting, such as hearsay, illegally obtained evidence, and inadmissible lay evidence.

Justice Pentelchuk’s observations related not just to the specific report in the case at hand,³⁰ but to the use of and reliance upon such reports generally, suggesting disagreement among judges with respect to the utility of such expert reports. However, Justice Pentelchuk’s concerns are not shared by every judge; decisions in both Alberta and British Columbia make it clear that parenting assessments often have immense value for the court. However, his reasons further complicate a body of case law already subject to various degrees of uncertainty.

7.0 CONCLUSIONS

It is difficult to draw reliable, explicit conclusions from the results of the case law review. In particular, while it is tempting to extrapolate from the extremely low

²⁸ *A.J.U. v. G.S.U.*, 2015 ABQB 6 at para 175

²⁹ *Ibid* at para 176

³⁰ The parenting assessor in this case had been called to testify at trial more than two years after submitting her report. Justice Pentelchuk suggested that trials should be held within six to nine months of the assessment’s completion, noting that the family’s situation had evolved considerably by the time of trial.

numbers in Alberta, these could have been a result of many different factors. Differences in cost, timeframe and governing legislation could have each had a degree of impact on the quantity of reported cases. Moreover, differences in provincial approaches to public funding of assessments could have additionally impacted the results. While all of these factors support the conclusion that in Alberta, assessments are simply used less frequently, the persuasiveness of this conclusion is limited by the lack of corresponding information on settlement.

Additionally, cases potentially involving parenting assessments are subject to judicial discretion, and judicial opinions on the value of expert assessments may vary significantly both between and within provinces. In particular, case law from British Columbia and Ontario demonstrates different thresholds for even ordering a report in the first place. The numbers could also have been impacted by less visible factors; one assessor suggested that mediation, which is incorporated as a form of therapeutic intervention in Practice Note 7, is used more frequently in Alberta than in British Columbia, which could have factored into the relatively lower number of cases. Several respondents also indicated that critique reports commissioned by one party to dispute original assessments are given more weight in Alberta than in British Columbia.³¹

This project highlights a number of areas in which further inquiry might be productive. First, it would be useful to explore the distinctions between jurisdictions with respect to how frequently assessments are actually ordered, as well as how frequently those assessments result in settlement. Furthermore, it would be worthwhile to more carefully explore the influence of public assessments relative to private. While it was quite clear that there was a qualitative difference between assessments conducted by psychologists and psychiatrists compared to social workers, it was less clear whether those differences resulted in different rates of settlement, or different degrees of reliance by the court.

It may also be valuable to examine the utility and feasibility of establishing standard guidelines or best practices for parenting assessments. Such guidelines could address the extent and nature of assessors' duty to test the truth of statements made by parents and collateral witnesses and otherwise investigate the circumstances of families, establish a standard battery of psychological tests to administer, set target timelines for the completion of assessments, and perhaps address the circumstances in which the input of children will be overtly sought. Standard guidelines may help bound the

³¹ See, for example, the comments of the court *Hejzlar v. Mitchell-Hejzlar*, 2010 BCSC 1139 and *L.C.T. v. R.K.*, 2014 BCSC 2378.

expectations of the public, potentially reducing professional complaints, and those of the court, improving the consistency of work product between assessors.

Finally, it is clear that complaints are a common and perhaps growing issue for assessors in this field. It may be worthwhile exploring the ways in which the different governing bodies handle complaints from family law litigants, and how meritorious complaints are best distinguished from meretricious complaints. Moreover, it would be useful to discuss options for shielding assessors from the damaging impact of unmeritorious complaints. Given the value that many judges and lawyers place on parenting assessments, it would seem to benefit the public for as many mental health professionals to prepare these assessments as possible.