Action No. 9801-01607

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

WILLIAM SCOTT DOERKSON

Applicant

- and -

SHARON THOMPSON

Respondent

AFFIDAVIT OF WILLIAM SCOTT DOERKSON

WILLIAM SCOTT DOERKSON
Pro Se Litigant

Admissibility of Polygraph Evidence in Canadian Courts January 2003

Child Related Civil Proceedings: Allegations in custody cases and no criminal charges laid

Written by Louise Malenfant
Family Advocate, Parents Helping Parents

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN

WILLIAM SCOTT DOERKSON

Plaintiff

- and -

SHARON THOMPSON

Defendant

AFFIDAVIT OF WILLIAM SCOTT DOERKSON

1. **THE PLAINTIFF SWEARS THIS AFFIDAVIT TO OPPOSE** Defendant's motion to exclude polygraph evidence involving allegations of child abuse during these custody proceedings. The Defendant has accused the Plaintiff of sexually abusing our daughter, CAROLINE ANNE THOMPSON, now five years old. The first allegation was made when the child was 11 months old, and was reported in the Defendant's first affidavit to the Court alleging sexual abuse dated August 21, 2000. Defendant's Motion was successful resulting in supervised access with no overnight access for the Plaintiff since that time to the present day. Supervised visitation with father began when Caroline was 2 years and 7 months old, and she turned five October 3.

2. While the Court may be prepared to provide oral reasons for a decision, the Plaintiff requests that the Court provide its written reasons on the issues of this Motion as well.

3. The Defendant moves to strike the evidence of Polygraph Examiner and RCMP veteran Gregg McMartin, who conducted a polygraph examination which found the Plaintiff to be truthful when he denies that he has ever sexually touched his daughter. Mr. McMartin's affidavit is filed with this Honourable Court, but is now marked as Exhibit #1 to this my affidavit, and dated October 24, 2001. The Plaintiff argues without explanation that this result and this evidence is somehow "oppressive" to her, and wishes that it be struck from the court record and not considered in the forensic assessment being conducted by Dr. Larry Fong of the city of Calgary.

4. Mr. Gregg McMartin is a certified forensic polygraph examiner, retired from the R.C.M.P. after 25 years of service. He has administered polygraph examinations for 15 years, and now conducts private polygraph exams across the country. He has lectured throughout North America to police departments and corporate companies on the subject of "The Detection of Deception In Written and Verbal Communication".

THE OPPRESSION ARGUMENT

5. The Plaintiff submits that if the Court is asked to measure the oppression experienced between the two parties, that I have experienced oppressive punishment for the allegations made by the Defendant, by virtue of the restrictive supervision I have experienced for 2 years and four months in any time I have spent with Caroline. Although this precaution has been taken in consideration of ensuring no sexual abuse occurs, the Defendant has been able to insist that even every word said between my child and I must be in the presence of a supervisor, while the Defendant has no such restrictions placed upon her communications with Caroline. This is humiliating and frustrating for both Caroline and the Plaintiff accused, and far exceeds any need arising to ensure that no sexual abuse occurs.

6. The Defendant has achieved this long standing result even though no credibility assessment has ever been applied to her inconsistent statements made to this Court and to other experts involved in this matter, nor have I ever benefited from a trial on the issue of sexual abuse, though I have already experienced the punishment for the crime. Attached hereto and marked as Exhibit #2 to this affidavit is an excerpt from Plaintiff's affidavit filed December 13, 2002, being paragraph 10, items (a) through (m), a summary of discrepancies in Defendant's evidence regarding abuse allegations.

7. It is an indisputable observation to note that Caroline has experienced a sustained atmosphere of sexual abuse allegations for nearly the entire time that the Defendant has had custody of her. The profound devastation these allegations have already had on her life has been harshly invasive no matter whether the claims are true or false. The Plaintiff has maintained throughout these proceedings that these long running and ever-changing claims made by the Defendant are false. The Defendant has instituted three police investigations and an unknown number of complaints to the Child and Family Service, beginning new claims whenever the previous investigations are closed during these past three years.

8. The Plaintiff has provided sworn testimony that I have never sexually harmed Caroline, while the Defendant has defamed my character in every way for several years without Court intervention or accountability imposed on the variability of her statements over time. The Plaintiff asks the Court to

consider Plaintiff's affidavits dated 24 June 2002, 26 June 2002, 3 December 2002 and 16 December 2002, which document many significant inconsistencies I claim in the evidence provided by the Defendant during these proceedings which directly relate to the sexual abuse allegations. The Plaintiff maintains that the credibility of the parties in the case at bar is therefore the most important evidence when it comes to determining the best interests of Caroline.

9. I respectfully submit that the need for supervised visitation that has been ongoing for nearly three years is a level of oppression that far exceeds that experienced by the Defendant as a result of the polygraph evidence tendered in this matter. I have been punished without benefit of trial, and without the Court's review of the inconsistent statements made in this matter by the Defendant.

THE SUPREME COURT OF CANADA POLYGRAPH CONTROVERSY

10. The Defendant offers in support of her position the Supreme Court decision of *R v. Belland and Phillips (1987) 36 C.C.C. (3d) 481 SCR*, as well as *Phillon v. The Queen [1978] 1 S.C.R. 18.* Both of these cases are criminal proceedings which therefore hold to different rules of evidence than the case at bar, which is a child-related civil matter.

11. *Phillon v. The Queen* was a case where the accused confessed to the murder of an apartment supervisor during a botched break-in. The accused elected not to give evidence at his trial. In the last days of the trial, the accused underwent a polygraph examination to try to show that he was lying to the police when he confessed to the crime, due to mental defect. The Court did allow into evidence the testimony of a mental health professional, who agreed that the accused tended to lie and describe himself in the worst light, and who reviewed the results of the polygraph as part of his evidence. The trial judge refused to admit the evidence of the polygraph examiner and the accused was convicted of non-capital murder. Court of Appeal of Ontario dismissed the Appeal.

12. The majority opinion in *Phillon* was written by Richie J. It was held that the appeal should be dismissed and the conviction upheld. Richie wrote:

> The admission of such evidence would mean that any accused person who had made a confession could elect not to deny its truth under oath and substitute for his own evidence the results produced by a mechanical device…

13. The dissent in *Phillon* was written by Spence J, who agreed that the appeal should be dismissed in the particular facts at bar, but also wrote as follows:

> I reserve my view as to whether under other circumstances, evidence given by an operator of a polygraph apparatus could ever be admissible. There may be circumstances where such evidence should be admitted…

14. The Plaintiff relies upon the significant difference in the facts of Phillon as they relate to the case at bar, particularly that evidentiary standard averring to a criminal case versus those rules applying in a child related civil matter. Unlike the *Phillon* accused, the Plaintiff in the case at bar is not accused by the State but by one of its citizens, who has a high level of self interest in prosecuting the matter. As well, the accused has always maintained his innocence in all sworn testimony to the Court, while the *Phillon* accused elected to stand mute. The Plaintiff therefore proffers the polygraph evidence in these proceedings as rebuttal evidence to the attack upon his credibility and character by the Defendant.

15. In *R v. Beland and Phillips [1987] 36 C.C.C. (3d),* at paragraph 29, Wilson J wrote for the minority:

> It is suggested [by majority opinion] that, oath-helping is the antecedent of a "well established rule" against the admissibility of evidence adduced solely for the purpose of bolstering the credibility of one's own witness. A number of authorities are cited in support of the proposition that evidence may not be given in chief to bolster the credit of one's own witnesses but, if evidence is given to impeach their credit, rebuttal evidence may be given on that issue. (emphasis added)

The Plaintiff submits that the Defendant has in fact impeached my credibility, and I am therefore entitled to adduce evidence in rebuttal to her allegations. Had the Defendant never falsely accused me of child abuse multiple times in sustained fashion, then I would not need to be punished for three years, and watch my daughter made to feel dirty and degraded in her person for those years, and also important, I would not need to be defending myself repeatedly by virtue of the Defendant's attacks. It does not serve the cause of justice to have the party who attacks the other party's credibility and character, protected by a rule that would deny the accused to provide rebuttal evidence showing the falsehood of the claims.

16. The Plaintiff is also entitled to take every step available to him to fully co-operate with all experts and authorities conducting investigations of those claims, which frequently will include a polygraph examination, particularly if the police are involved. I am advised and do believe that there is no controversy in the North American police community concerning the

investigative effectiveness and crime solving merit of the polygraph examination process. The Defendant does not speak to the effectiveness of the polygraph examination in her pleadings, or the converse, and she ought not to be able to exclude any rebuttal evidence to her own allegations.

17. Wilson J continued this theme at paragraph 31, noting the extra room an accused party has to make answer to aspersions upon his credibility. He wrote:

> Section 577(3) of the Criminal Code provides that an accused is entitled, after the close of the prosecution's case, to make full answer and defence. It might be said that this is precisely what the respondents were attempting to do through the introduction of the polygraph evidence. Indeed, it has been held that this section of the Code gives an accused the right to call such witnesses and evidence as he may consider necessary: see *R v. Cook (1960) 127 C.C.C. 207 (Alberta SCCA)*.

18. Since the 1987 *Beland* decision, the Supreme Court of Canada has considered polygraph evidence, even in criminal proceedings. In the case of *R. v. Oikle [2000]*, the accused was suspected of 8 arson crimes, and was asked to take a polygraph by the police. After being told he failed the test, the accused confessed to one of the crimes. The police advised him of his rights and continued to use interrogative techniques with the accused, who then subsequently confessed to 7 of the crimes and participated in video tape re-enactments. The trial judge ruled that all evidence arising from the polygraph examination process, including the video taped re-enactment, was admissible. Ontario's Court of Appeal excluded the confessions because of the polygraph and entered an acquittal. Attached hereto and marked as Exhibit #3 to this affidavit is the case of R. v. Oikle [2000] 2 S.C.R.

19. The Plaintiff argues that the Supreme Court cannot arbitrarily select those parts of the polygraph process to admit into evidence that assist the Crown, while ignoring those parts of the process which is requested by Defence. It is also unlikely that the Supreme Court would now impose more stringent rules of evidence for the Defence than it would for the Crown, and as this a criminal matter, impose stricter rules of evidence in a civil matter than they would a criminal case. Both propositions would invert the history of jurisprudence on these two aspects of the law.

20. The majority in *Oikle* upheld the principal that the Courts must balance the goals of protecting the rights of the accused "without unduly limiting society's need to investigate and solve crimes". Since the polygraph process was used to solve the crime, the Plaintiff argues that it should be no less acceptable as evidence in a child-related civil matter where no criminal charges have been laid. The need to "investigate and solve" allegations in this type of

proceeding is no less important than solving crimes, and the Plaintiff argues, even more so given the fact that he must prove he did not commit an act.

21. Perhaps the best known case where polygraph evidence was accepted in a case before the Supreme Court, is the Ontario civil matter of *Whiten v. Pilot*. The Whitens were insured by Pilot when their home burned to the ground. Two of Pilot's experts provided Pilot with the opinion that the fire was not intentional but of accidental origins. Pilot ignored its own experts and refused to pay the claim. The Whitens offered to undergo a polygraph examination on the question of whether they had committed arson on their own property, by an examiner chosen by Pilot, but the Insurer ignored this offer and proceeded to trial. It was admitted at the Court of Appeal by Pilot that they had tried to compel an adverse settlement by forcing the matter to the expense of a trial. Attached hereto and marked as Exhibit #4 to this affidavit is the case of *Whiten v. Pilot Insurance Co. [2002] S.C.C. 18.*

22. At trial before Matlow J, the Court instructed the jury as follows:

> You have also heard evidence that polygraph testing is commonly used by insurers to resolve suspicions in certain cases, even though the results of such testing are not generally admissible in evidence in trials.
>
> In the circumstances of this case, the Whitens' offer may be viewed by you as evidence of good faith on their part in helping to resolve the issue of arson that had been raised by Pilot, even though the results of any testing would almost certainly not be admitted as evidence in any trial. (emphasis added)

23. It is ironic that polygraph procedures were here admitted because it was the Defandant Pilot, the accusers, who refused the offer of resolving the question of arson, even though this was often used as an investigative tool in the insurance industry. The Whitens successfully proved "bad faith" on the part of their accusers, and were awarded the amount of their claim as well as 1 million dollars in punitive damages. Pilot appealed, partially on the grounds that the trial judge's charge to the jury about the inference to be drawn from the offer to submit to polygraph. The Ontario Court of Appeal ruled in Pilot's favour in part, in that the amount of punitive damages was reduced to $100,000 dollars.

24. Pilot was given leave to appeal to the Supreme Court, who released their decision December 14, 2002, being the same time when the case at bar was before this Court. At paragraph 24 of the majority reasons delivered by Binnie J. states as follows:

> In the spring of 1995 the Whitens, in an attempt to satisfy Pilot that they did not set the fire, offered to take a polygraph test

> administered by an expert selected by Pilot. This was apparently accepted by the jury as a good faith offer made to allay Pilot's suspicions. Pilot refused, without giving any reasons.

There was no negative or exclusionary commentary offered by the Court on the issue of polygraph in this most recent of decisions.

25. Much of the bad faith actions taken by Pilot were initiated by their legal counsel, who vigorously pursued the object of proving arson and attempted to manipulate the evidence of the third expert consulted by Pilot for that purpose. Binnie J. noted at paragraph 22:

> The trial judge commented unfavourably about [counsel for Pilot] Crabbe's role in this litigation. He felt that his "enthusiasm for his client's case appears to have caused him to exceed the permissible limits which ought to confine a lawyer in the preparation of witnesses". At the Court of Appeal and in this Court, Pilot conceded that these comments were justified, but added:
>
> …Pilot, not its counsel, made the decision to deny the claim and Pilot was fully aware, because it was the recipient of the letters, of counsel's enthusiasm.

26. In short, the question before the Supreme Court sought to answer how much were Pilot's actions "reprehensible and high-handed" insofar as establishing a fair amount of punitive damages to deter the conduct. With only one dissenting vote, the Supreme Court of Canada overturned the Ontario Court of Appeal and re-instated punitive damages at 1 million dollars. The dissenting opinion of LeBel did not criticize inference drawn from polygraph evidence, but he disagreed only in so far as he would have affirmed the OCA and reject Pilot's request to reduce damages, leaving them at the $100,000 dollar figure set by the OCA.

27. The Plaintiff therefore argues that the authorities provided by the Defendant are now outdated, in that, the Supreme Court of Canada has now accepted polygraph as evidence in both criminal and civil proceedings. Though they do so cautiously, it has now been done.

28. Also as Plaintiff, I am advised and do believe that in the 50 volumes of decisions of the Supreme Court of Canada which date to 1983 on the internet website of the SCC, it is revealed that the Supreme Court of Canada has never given leave to appeal to a child-related civil case where allegations of child abuse have been made and no criminal charges laid. I am advised by the advocate of Parents Helping Parents that such a careful review of the case decisions released by the Supreme Court has been undertaken by her, and no case such as the one at bar has been found.

29. I am further advised and do believe that cases of this type did rise in Canada from 1983 to 1990 at a rate of two to three times the number of cases which existed prior to that time, with some variation between jurisdictions. I am advised that only in recent years has the incidence of allegations in custody cases begun to drop from those historical heights, so it is notable that the Supreme Court has never heard such a case.

30. The Plaintiff therefore submits that the allegation in divorce without criminal charges case has a unique evidentiary need, dependant as it is upon a careful analysis of the credibility of the parties, the imposition of restrictions upon the accused without trial or conviction, the mixing of features usually seen in criminal or civil cases, and the great harm that arises for the child when an error of finding is made regardless of the outcome. The Plaintiff concludes this examination of polygraph decisions at the Supreme Court level by arguing that the high court's total lack of experience in a similar fact case such as the one at bar does not make them the best authority on the probative value and the admissibility of polygraph evidence.

EVIDENTIARY DIFFERENCES IN CIVIL V. CRIMINAL PROCEEDINGS

31. The Defendant relies upon criminal court split decisions of the Supreme Court of Canada to support her request to strike the polygraph evidence from these proceedings. As will be shown, it is well established that the rules of evidence for a criminal proceeding differ greatly from the needs of a civil matter where the best interests of the child are to be determined.

32. The Plaintiff wishes to state for the record that he is convinced of polygraph reliability, and finds it unfortunate that both parties cannot be ordered by the Court to submit to the process in the early stages of a matter like this. If the case at bar is any example, such a rule might have ensured that my daughter could have had a normal life instead of the sexual abuse hysteria she has been forced to endure for most of her life.

33. It has been noted by other courts that in matters relating to the best interests of the child, hard and fast rules regarding the admissibility of evidence do not apply, as the court has a paternal and administrative responsibility to act in the best interests of the child. In *Official Solicitor v. K., [1965] A.C. 201, [1963] 3 W.L.R. 408, [1963] 3 All E.R,* and cited by Spencer J in *Foote v. Foote*, attached hereto and marked as Exhibit #5, Spencer J wrote:

> *Official Solicitor v. K* was not a case of hearsay evidence but one in which in wardship proceedings the official solicitor submitted a confidential report from a medical expert which the Chancery Judge decided ought not to be shown to either parent. His decision was

> overturned by the Court of Appeal, who thought that the rule of natural justice requiring that evidence upon which the court relied should be communicated to the parties to the proceedings should prevail. The House of Lords unanimously upheld the trial Judge. The principle upon which they did so was that wardship proceedings are special in that they partake of a paternal and administrative flavour. (emphasis mine)

34. This citation is provided to show that, where the Court must decide the best interests of the child, the normal rules of evidence are not inflexible.

35. In the B.C. Court of Appeal case of *Bartesko v. Bartesko*, the Court heard an appeal of the Plaintiff mother, who lost custody of her children at trial to the Defendant father after allegations of sexual abuse were made, and the mother was found to be "untruthful and manipulative". Regarding differences between civil and criminal proceedings, McEachern CJBC wrote for the unanimous court in paragraph 12 as follows:

> (Counsel for Plaintiff) Ms. Brown also argued that the trial Judge erred in stating that it was significant that the father, after intensive investigation, was not charged with a sexual offense. I entirely agree with Ms. Brown that the different standards of proof and the different focus upon the accused in criminal matters and the children in civil matters makes the fact that no charge was laid less than conclusive. But to describe such fact in the entire concept of the case as significant cannot be elevated to an error that would justify interference with this judgement. It was at least a matter the trial Judge was entitled to comment upon.

Attached hereto and marked as Exhibit #6 to this affidavit is the case of *Bartesko v. Bartesko [1990] B.C.C.A McEachern C.J.B.C., Taylor and Wood JJ.A.*

36. The Plaintiff submits that evidence available to the court includes the result of the Plaintiff's polygraph examination due to the reason that the civil hearing to determine the best interests of the child differs significantly from a criminal proceeding. The Plaintiff submits that this should be especially so when allegations of serious crimes are made where no criminal charges are laid.

COURT CAPABLE OF WEIGHING RELATIVE VALUE OF EVIDENCE

37. The Plaintiff submits that the Court must use every means necessary to ascertain what is in the child's best interests, and that it is certainly capable of weighing all evidence, including polygraph evidence, by giving proportionate weight to polygraph within the consideration of all other evidence available.

38. The Plaintiff submits that the Court and the multiple psychology reviews conducted in this matter have done nothing to resolve the issue of sexual abuse. The Courts have shown that the abilities, methods and practices of psychology professionals are of variable quality, and have demonstrated the means by which the Court gives a different weight to different psychologists in a given case by assessing those variables. The Plaintiff argues that the polygraph process is a unique and effective means of investigating serious issues, which is no less variable according to the abilities, methods and practices of the polygraph examiner than those of psychologists. The Plaintiff submits that the Court can be trusted to weigh and assess the value of polygraph evidence according to an assessment of those variables.

39. It is almost unheard of for a child custody case to go to trial in Canada without assessment reports prepared by psychology professionals, who routinely provide credibility evidence for the courts to consider. The Plaintiff will show that polygraph evidence has been submitted to both criminal and civil proceedings, including the Supreme Court of Canada, in decisions which are later dated than those relied upon by the Defendant.

40. In the *Beland* dissenting opinion, Wilson J spoke to the probative value of polygraph evidence at paragraph 42:

> In my respectful view, the polygraph operator does not give an opinion on the credibility of the witness. Rather, she interprets the physiological data and gives an opinion as to whether the data pattern conforms to that of a person who is telling the truth. The operator will also testify as to the nature and accuracy of the device itself. The jury will consider this evidence along with the other evidence going to the issue of credibility in order to reach their final conclusion. Thus, the polygraph operator provides an expert opinion on the interpretation of the polygraph results. <u>This evidence is relevant to, but not determinative of, the credibility issue.</u> (emphasis added)

41. The Civil Courts have shown themselves to be capable of apportioning weight to evidence being heard in a matter with conflicting expert opinion. In the case of *W.(K.M.) v. W.(D.D.)* heard in the Ontario Court of Justice, Webster Prov J reviewed the methods and practices used by a psychologist and a social worker, in this case where the mother had accused the father of sexually abusing their four year old daughter. Webster J found that, although the social worker was not qualified as an expert, she had used standard investigative protocols to examine the evidence in the case, while the psychologist, though qualified as an expert, had conducted a 6 hour "blitzkrieg" assessment which confirmed the mother's suspicions of abuse. The Court preferred the evidence of the social worker. Webster J wrote:

> I have always understood that the weight given to the testimony of witnesses is something which is entirely within the purview of the trial judge. In giving weight to testimony, the court is not bound by the fact that a witness is an expert. Being qualified as an expert merely permits opinions to be offered to the court in the field of the expertise. It is still open to the court to reject conclusions drawn, provided that there is a proper basis for doing so.

42. The father was provided unsupervised access to the child. Attached hereto and marked Exhibit #7 to this affidavit is the case of *W.(K.M.) v. W.(D.D.) Ontario Court of Justice 47 R.F.L. (3d) 378-387.*

43. In *Bartesko v. Bartesko* {1990) (Exhibit #6, above), the mother appealed the trial decision which awarded the custody of children to the father, following allegations of sexual abuse made by mother. On Appeal, the mother sought a new trial on the grounds that the trial judge had not properly considered all of the expert evidence before it. McEachern CJBC wrote for the unanimous court as follows:

> More and more frequently we are hearing submissions based upon the failure of trial judges to mention, or "deal with" as it is often termed, parts of the evidence. While detailed analyses of evidence are helpful I wish to say that, in my view, a trial judge is not required, particularly in a case lasting so many days as this one, to discuss the expert evidence intensively. It is not always possible to formulate a comprehensive rule in these matters and in this connection. But it seems to me, with respect, that counsel are often making too much out of the absence of detailed analyses or even mention of evidence which is subsumed in a comprehensive assessment of the facts.

44. The Plaintiff argues that *Bartesko* shows how the courts have relied upon the Court's ability to analyze and give weight to the evidence before it, even if the Judge does not provide details of that analysis.

45. The Plaintiff objects to the Defendants effort to exclude any evidence, and argues that she forfeited that right by being the source of the chronic and serious allegations that have been made against the Plaintiff. The Plaintiff is entitled to an effective and thorough investigation, and argues that the polygraph is one piece of evidence to be considered in the context of all evidence. In the B.C. matter of *D.J.F v. Z.M.F (1996)*, the mother sought to exclude evidence in a custody proceeding with sexual abuse allegations. Similar fact to the case at bar, the Defendant mother sought to exclude a continuing investigation by a forensic practitioner who had previously provided opinion. Attached hereto and marked as Exhibit #8 to this affidavit is the case of *D.J.F. v. Z.M.F. (1996) BCSC BCJ No.: 2056 Vancouver Registery No: DO94313.*

46. Dr. Michael Elterman of British Columbia was the practitioner involved, an expert well known in that province and throughout Canada for his forensic analysis of sexual allegations in custody cases. Dr. Elterman had previously advised that he did not substantiate the abuse allegations, and mother argued that "…someone who has delivered an opinion is inclined afterwards to find reasons why that opinion was sound." Fraser J dealt with her objection as follows:

> The answer to this contention is to be found in previous decisions of this Court in which it has been held that the suspicion of a party as to an expert, when it is based on speculation only, is not a ground for rejection of the expert by the Court. These decisions say that the trial is the place where the fairness, partiality, credibility and objectivity of the expert will be assessed. (See note below)[1].

47. The Plaintiff argues that when an accusing parent attacks in sustained fashion the character and credibility of the accused parent, she ought not to be able to tamper with or prevent my ability to defend myself. With all due respect to this Honourable Court, it is established in the history of this case that the Defendant has managed to punish and convict me of crimes that I have never been charged with butfor her claims and those of a few consultants in this case. It is therefore submitted that Mr. Gregg McMartin is an expert in his field, and furthermore, has used various techniques for the detection of deception in his examination of the Plaintiff. It is my respectful submission that the opinion of a former RCMP Officer with 25 years of experience, 15 of those years as a polygraph examiner, is relevant to this case.

48. It has been suggested by the Supreme Court of Canada that triars of fact do not have the ability to weigh evidence in the context of the entire case, and credibility needs no expert evidence to be determined. This is particularly false in civil matters where children are involved, and the Plaintiff submits that the Courts have routinely weighed evidence, even the less controversial psychology evidence.

49. In Carnahan v. Coates, the accusing mother claimed that the 2 children of the marriage, both under five years, were rejecting visitation visits with the father. An expert psychologist, Mr. Coates, was hired by the mother who interviewed the children once and wrote a report advising the children were "suffering considerable anxiety" over visits and that their "negative attitudes" were not caused by the mother. Mothers application to eliminate weekend access to the father was successful, and this was affirmed on appeal. Attached hereto and marked as Exhibit #9 to this affidavit is the case of *Carnahan v. Coates, R in*

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[1] *Sorenson v. Loza (1994) 1990 BCLR (2d) 355 (BCSC); Brousseau v. Bettencourt (1994) 92 B.C.L.R. (2d) 255 BCSC.*

Right of British Columbia and Minister of Health [1990] 27 R.F.L. (3d) BCSC Huddart J.

50. The father persisted until four years later, when he won a variation application for more extensive access, after psychologist Mr. Coates was found to have "engaged in unethical conduct that could have – or did – lead to substantial harm". The psychologist was also found to engage in "unprofessional conduct" in that he had failed to act with due care toward the father and his written report was inadequate. Though the father had been vindicated, his relationship with his children was already destroyed. The father sued the psychologist, but the Court upheld the immunity of the psychologist from accountability.

51. The Plaintiff argues that it is a breech of the Court's duty in a civil matter involving children if it does not weigh and assess the relative probative value of all evidence proferred for consideration. The Defendant makes no allegations of incompetence or poor practices by Mr. McMartin as to how he conducted the polygraph examination. Contrary to the two experts who support the Defendant's claims, Mr. McMartin was provided with all important expert reports and affidavits which contained the allegations against the Plaintiff. In addition, interrogation techniques as well as a polygraph reading of the sexual abuse issues was conducted in strict accordance of police methodologies established for polygraph examinations.

52. *Regina v. Olscamp* is a similar fact case except that the accused father was criminally charged with sexually abusing his 7 year old daughter. Mother hired a playtherapist who would testify that the girl "displayed symptoms of a child who had been sexually abused." Charron J found that the expert's practices as used to obtain her opinion were substandard, and the motion to suppress the evidence by the accused Defendant was successful. Also quoted in this decision was a passage relevant to the issue at bar:

> In essence, then where expertise cannot be taken for granted, careful attention has to be given to the soundness and reliability of the theory or technique being presented. Moreover, and this point is critical, careful regard must be given to whether the expert evidence can be assessed or evaluated in a meaningful fashion by the trier of fact in light of the extent to which its soundness and reliability can be demonstrated by resort to the relevant expert community, and/or by an explanation of the theory or technique that can be understood.[2]

53. The Plaintiff argues that Mr. Gregg McMartin's polygraph technique has not been brought into contention by the Plaintiff, and it is argued that the quality

[2] Paciocco, David (1994) Evaluating Expert Opinion Evidence for the Purpose of Determining Admissibility: Lessons from the Law of Evidence (National Judicial Institute) at p. 14 [reported 27 C.R. (4^{th}) 302 at pp. 318-9.

of the report, the methods contained therein, and the experience of the practitioner are all factors which may be weighed by the Court as it considers all other evidence. Mr. McMartin has also provided sworn testimony which is subject to cross-examination by the Defendant. It is therefore submitted that polygraph evidence does lend itself to analysis and weighing by the triar of fact, and is suitable in a case such as this, where credibility of the parties is paramount to determining the best interests of the child. Attached hereto and marked as Exhibit #10 is the case of Regina v. Olscamp (1994) 95 C.C.C. (3d) 466-480 Ontario Court, General Division, Charron J.

54. Contary to the Supreme Court's opinion, the Plaintiff contends that the lower Courts in these civil matters routinely, and usually, effectively attribute relative weight to all evidence on the issue of credibility. *Carnahan v. Coates* may perhaps be read as a cautionary tale for the Courts, in that both the lower and the Appeal courts accepted the evidence of the psychologist without weighing the relative value of this evidence.

CREDIBILITY OF THE PARTIES PARAMOUNT

55. As the party accused by the Defendant, I ought to be able to use every means necessary to show my good faith cooperation with the multiple investigations that have taken place during this long ordeal. I have advised this Court on numerous occasions that I have offered several times to both the Defendant and the Calgary Police Service, and that I am ready and willing at anytime to take a police-administered polygraph where the results are made known to both parties.

56. I have been very active in every investigation conducted without reservation, in the hope of providing our five year old daughter with a normal life before she enters the school system. It is my opinion and belief that I am entitled to explore all possible means of demonstrating my cooperation with the investigations that are undertaken, and the polygraph process is a legitimate and effective means of adding to the evidence to be considered.

57. This is particularly true of cases like the one at bar, where allegations of child abuse are made in custody proceedings but where no charges are laid. Such cases can only be resolved by assessing the credibility of both the accused and accusing party. The Defendant has put my credibility at issue by portraying me as a depraved monster capable of any indecency. In rebuttal, I therefore place the evidence of the polygraph examination process into the record of these proceedings so that it is considered in the determination of credibility. I would argue that the Defendant is free to do the same.

58. The Plaintiff submits that if the Defendant were genuinely concerned for the welfare of our daughter, than she ought to be very happy that I have taken all

available steps to co-operate with the investigation of her claims, and further, that I have passed a polygraph showing a low likelihood that I have ever sexually abused Caroline.

59. There have also been three formal investigations conducted by the Calgary Police Service (CPS), and this Honourable Court is asked to attribute some weight to the fact that I have never been charged with a crime arising from this lengthy process. The Defendant has attempted to suggest that the police investigations are not finalized, and offers as proof a letter written by the Calgary Police Service acknowledging that Ms. Thompson has initiated formal complaint proceedings against ten (10) Calgary Police officers. Attached hereto and marked as Exhibit #11 is Defendant's letter dated 2002 December 10, which is provided for the Court's ease of reference.

60. The Defendant wishes the court to infer from this that the police investigations of the child abuse allegations are therefore still "open". The Plaintiff infers from this evidence that the Defendant will maintain an irrational belief in the child abuse allegations she has made, regardless of what the authorities have determined after full investigation.

61. I have offered to take a further polygraph examination with the CPS, and they have indicated that they do not require me to do this in order to reach the conclusion that no charges will be laid. I am further advised by the CPS that the child, Caroline, has never disclosed any incident of abuse as perpetrated by me, her father. I attach and mark as Exhibit #12, the five pages from police records obtained under FOIP, which indicates that three investigations have been conducted in this matter and that no charges will be laid. These records will show the number of child abuse investigations conducted by the police, my provision of polygraph evidence, my level of cooperation, and Police recommendation to the Crown that no charges be laid.

62. The Calgary Rockyview Child and Family Services has also provided correspondence indicating that they have "…no protection concerns…" regarding my parental care of Caroline. I am advised by CFS Team Leader Troy Marsh and do verily believe that no disclosure has ever been made by Caroline that I have abused her in any way, and they have closed their investigations. I attach and mark as Exhibit #13 a letter signed by Troy Marsh dated June 18, 2002, and previously filed with this Honourable Court.

63. The Plaintiff has also noted that the Defendant has given different facts to different experts at different times regarding the abuse allegations she is making, and further, those facts as reported in the expert reports differ significantly than those as reported by the Defendant to this Honourable Court. These variations have been previously filed, and are summarized in Plaintiff's affidavit sworn December 13, 2002. I ask the Court to review the summary of discrepancies of the Defendant in her evidence, as provided in

paragraph 10 of Plaintiff's Affidavit. I am advised and do verily believe that such discrepancies over time are indicative of deceptiveness. (See summary of allegation discrepancies of the Defendant of Exhibit #2)

64. *Foote v. Foote* is similar to the case at bar, in that, the father was accused by the mother of sexually abusing their 4 year old daughter. Spencer J notes that harm is caused to a child in such cases, regardless of whether the claims are true or false. In his British Columbia Supreme Court decision dated 22 September 1986, Spencer J wrote:

> In July 1986 serious allegations were made against the respondent (father) involving suggested sexual abuse of the child. Such allegations are grave indeed, both from the point of view of the child who, if they are correct, is at risk, and of the respondent, who, if they are wrong, is gravely defamed. The court must, both in its duty to the child and its duty to the respondent, take every step available to it to determine the truth of the matter.

65. In *Foote v. Foote*, the accused father sought the resumption of access to his child which was opposed by the accusing mother, who sought elimination of all access. Spencer J ordered interim access for the father and child, but to be supervised by a "responsible adult". (previously marked Exhibit #5).

REGARDING THE NATURE OF A POLYGRAPH EXAMINATION

66. As the person who must defend himself throughout these proceedings, the Plaintiff asks only for at least the same rights as any defendant accused of a crime, and maintains that it is a great personal leap of faith to trust your fate to a polygraph examination, even when you know you are innocent. The lengthy interview and file review process that is undertaken by a seasoned and experienced polygraph examiner is far more than a simple mechanical process. I reject the Defendant's right to decide what evidence I may pursue to address the gross invasion upon my child and myself caused by these allegations.

67. The polygraph process involves a full interrogation lasting several hours as conducted by the examiner, which is known as the pre-test interview. Once the allegations are reviewed, a series of questions relating specifically to the contested claims is developed, and the accused is asked to answer while connected to the polygraph equipment. Three bodily responses to the questions are recorded by the polygraph, and the results are then analyzed by computer and by the examiner. I am advised and do verily believe that most human beings have a standard physical reaction which can be measured during response to non-threatening questions, such as "Are you 34 years old". This rate sets the baseline to compare physical responses to the answering of

serious accusations, and in particular, whether those measures reflect that the accused is being truthful or deceptive. Following the test, the material is reviewed and an opinion formed by the examiner, which leads to the third part of the polygraph exam, being the Post Test Interview. Attached hereto and marked as Exhibit #14 to this affidavit is a brief summary of the process prepared by the Canadian Association of Police Polygraphers (CAPP), and found on their website at www.muskokaweb.ca/CAPP .

68. In *Belland* the writer Wilson J noted the following features of polygraph evidence (para 26):

> The polygraph operator…has subjected the accused to a number of tests and gives his expert opinion as to whether the physiological reactions of the accused are similar to those of someone telling the truth. He is open to cross-examination on his technique, his assumptions, his interpretation of the data, and the accuracy of the device. His evidence is only one of many factors the jury will consider when assessing the credibility of the accused.

69. The Plaintiff has never asked for more than that the polygraph evidence be admitted so that it may be considered in the context of all other evidence revealed in the case. Wilson J points out that this type of evidence lends itself to a complex analysis of the relative weight of such evidence. The Plaintiff further argues that the polygraph process, with complex interrogation techniques and credibility analysis methods, is more than the mechanical and one-dimensional polygraph "test". At paragraph 27, Wilson J comments further:

> Any suggestion of similarity [with oath-helping], it seems to me, have to be based on the assumption that, despite the cross-examination of the polygraph operator, the calling of other operators to challenge erroneous statements by the original operator, and the delivery of a proper charge to the jury, the jury would automatically base its decision on the polygraph operator's testimony. I think this is an unwarranted assumption. I do not think we can make it even if my colleague's concern about the heightened weight that might be given to polygraph evidence because of the "mystique of science" has some validity. For reasons which will be given later I doubt that this concern is a valid one.

70. The Plaintiff notes that many detractors of the polygraph often site the fact that some persons can pass a polygraph when they are in fact guilty of the accused crime. I am advised and do verily believe that some parties will take sensation-reducing drugs prior to an exam, to attempt to interfere with the accuracy of the polygraph equipment. I am also advised and do believe that it

is known that, where an accused has a sociopathic personality and therefore a reduced sense of morality, they are also able to "fool" the machine into finding them truthful. I am told that this is precisely why the polygraph process cannot be viewed as strictly equipment based.

71. Reputable Polygraph Examiners usually are former police investigators who have made a specialty of interrogation and credibility assessment. The Pre-test and Post-test portion of the process is of equal or more value to the task of identifying deception and truthfulness, for in this stage, the examiner can identify drug intoxication, a sociopathic world view or personality disorder, as well as any other benign reasons why the polygraph can not be helpful with the particular accused. I am advised and do verily believe that the polygraph examiner will simply stop the examination if he notes any of these features in the evidence of the accused.

72. Another ground for exclusion of polygraph evidence is that it infringes the rule against the admission of past consistent statements. Wilson J in Beland answers this criticism as follows at paragraph 34:

> The cases and authorities make it clear that these [past consistent] statements are excluded because they are at best irrelevant and at worst fabricated and self-serving. The irrelevance rationale has, it seems to me, little applicability to polygraph evidence. The argument that the mere repetition of a story has no bearing on the truth of the story is, of course, a convincing one. Polygraph evidence, however, is not merely evidence that the accused has said the same think twice. <u>It is expert evidence on how closely his physiological responses during the test correspond to those of someone telling the truth. It is, in my opinion, clearly relevant.</u> (emphasis added).

73. Most polygraph examiners will also review a good selection of previous reports and other evidence available on the file to obtain a good knowledge base with which to interview the accused. Mr. McMartin examined many reports and evidence that was both positive and negative to the interests of the accused.

74. I am advised and do verily believe that police polygraph examiners use other scientific means of credibility assessment in both the pretest and post test interview stage. These include interrogative questioning methods which test the consistency, clarity and credible or non-credible details of the evidence provided by the accused. The process also involves methods of analysis that include assessing body language and voice-change features which assist in the detection of deception and truth telling in the evidence of the accused. Mr. McMartin lectures on this subject, and the Plaintiff has located a shorter version of this subject matter. Attached hereto and marked as Exhibit #15 to

this affidavit is an article from the FBI Law Enforcement Bulletin entitled "Detecting Deception", which explains credibility assessment in brief.

75. I maintain this evidence is valuable primarily because I am advised and do verily believe that the police forces across North America value the polygraph as part of their investigations, and it is my further opinion and belief that the police of any society are the best investigators in almost every instance.

76. Dr. Nicholas Bala is a University of Queens Professor of Law, and presented a well-received paper to the Family Law Seminar of the National Judicial Institute, February 14, 2002, Toronto. Entitled, "Sexual Abuse Allegations When Parents Have Separated[3], Bala conducted a caselaw review of some 190 cases of allegations in divorce where no criminal charges are laid. The article has been cited in several Canadian judgements as well since its publication, and Bala had this to say on the polygraph exam for this type of case:

> In some cases it will be helpful for an accused parent to offer to take a polygraph test.(104) Although polygraph results are clearly not admissible in a criminal case, in family cases there is a less stringent approach to evidentiary issues. Judges may admit polygraph results as corroborative of other evidence. Even if not admissible in court, polygraph results (or even the offer to take a polygraph test) may also affect how investigators and assessors view a case.[4]

77. Perhaps no other case in Canada demonstrates the investigative effectiveness of the polygraph process, than does the case of *R. v. Baldwin*. Demonstrating process rather than machinery, the Court in *Baldwin* allowed into evidence the entire transcript of the pre-test polygraph interview of the accused. *Baldwin* makes obvious the wealth and quality of evidence that can be obtained from the process associated with the polygraph. Attached hereto and marked as Exhibit #16 to this affidavit is the case of *R. v. Baldwin [2002] N.S.S.C.* Source:http//wwwcanlii.org/ns/nssc/2002/2002nssc73.html.

78. The accused was suspected of causing bodily harm to his three month old infant daughter. Five medical doctors gave evidence of 3 or 4 broken ribs, as well as brain and eye injury. The suspect agreed to take a polygraph which was to be video recorded. In the pretest interview, the accused was skillfully interrogated until he confessed to the crimes.

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[3] Bala N and Schuman (2000) "Allegations of Sexual Abuse When Parents Have Separated". **17** *Can. Fam. L.Q.* 191- 241.

[4] Ibid, page 211, *C.(R.M.) v. C.(J.R.) [1995] 12 R.F.L. (4th) BCSC Edwards J;* and *L.(C.M.) v. T.(R.) [2000] 8 R.F.L. (4th) 288 Sask Q.B. per McLellan J.*

79. The Plaintiff is advised and believes that not all subjects are good subjects for a polygraph, or may not be in the right condition to obtain accurate readings from the polygraph equipment. When a test must be ruled "inconclusive" it may be for a variety of reasons that do not weigh in favour of a truthful or deceptive finding, but it does mean that the polygraph will not be utilized in the investigation of the accused. Research conducted for the preparation of this affidavit has also revealed where the polygraph is misused to improperly compel a false confession from the accused.

80. There are cases demonstrating the misuse of polygraph, such as the Edmonton, Alberta child abuse investigation of R v. C.L.B.. Police investigators lied to the accused about the results of a polygraph to compel a confession. A mother accused of providing a morphine pill to her infant son leading to his death did offer to take a polygraph to convince the police of her innocence. Though the test result was inconclusive, the Edmonton Police detectives told the accused she had "failed" and proceeded to misuse the post-test process to interrogate her for hours. Justice Brian Burrows excluded all evidence arising from the polygraph interviews.[5]

81. In another Edmonton child abuse investigation, *R. v. M.J.S.,* the detectives asked the accused to attend at their offices to submit to a polygraph, when they had made no arrangements for it. Their purpose was to use the polygraph as a false pretense for interrogating the accused without counsel present. The accused was asked to handwrite an apology to the child, which the accused did. In it, he wrote that the police told him he had hurt the child so he was apologizing for it. The police had used the guise of the polygraph pretest interview to interrogate the accused, and also misused a well known interrogation technique known as the John Reid method. Part of this method involves falsely advising the accused that the police "know" he is guilty, to see how the accused responds. In this case, however, the police were able to convince the young and rather gullible accused that he had committed the crime. Judge P.G.C Ketcham excluded all evidence arising from the interview, including the handwritten "confession".[6]

82. The Plaintiff submits that the decisions of both Judge Ketcham and B Burrows ably demonstrate the analysis that must be conducted regarding polygraph evidence and the methods used to obtain it, consistent with other types of admissible evidence, which enhances the probative value of polygraph evidence in general.

83. The lower courts have sometimes made polygraph evidence an integral part of their analysis. Such is the case of *E.T.(C) v. E.T.(D)* where a father accused

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[5] Cited but not included as an Exhibit, the case is reported as *R. v. M.J.S. [2000] ABPC docket no.: 81497133P10101 Judge P.G.C. Ketcham.*

[6] Cited but not included as an Exhibit, the case is reported as *R. v. C.L.B. [2000] ABQB 1008 Action no.:9903-3078-C5 B. R. Burrows J.*

by mother of sexually abusing his children argued undue hardship to lower his child support payments, and sited that the costs of a polygraph and other experts to address the mother's claims entitled him to some monetary compensation from the accusing parent. The mother sought an increase in child support from $150 to $380 per month, and this was the amount prescribed by the father's income and the Child Support Guidelines. The father claimed defending himself from the mother's allegations cost $14,000.00. Saunderson J. commented as follows (para 8):

> On the facts of this case, the debt was incurred solely for the purpose of the respondent exercising access to J [the child]. Moreover, given the number of professionals engaged by the respondent to prove the allegation against him was groundless, the size of the debt was reasonable. Finally, it was reasonable for the respondent to structure his defence to the allegation as he did, including retaining different psychologists for different purposes. <u>This provides a textbook example of the harm that can be done and expense generated by irresponsible accusations of the most damning kind – accusations which, by their very nature, are almost incapable of disproof.</u> (emphasis added)

84. The Plaintiff respectfully asks this Honourable Court to reflect upon the degree of trauma associated with the fact that the Plaintiff father at bar has spent upwards of $100,000 dollars maintaining a relationship with Caroline. The Plaintiff advises that the Court cannot ignore its own responsibility for the course of this action, especially as it relates to its own ability as an institution to assess credibility of evidence. Attached hereto and marked as Exhibit #17 to this Affidavit is the case of *E.T.(C) v. E.T.(D) [2000] BCPC 187 Saunderson J*
(source: http://canlii.org/bc/cas/bcpc/bcpc/2000/2000bcpc187.html).

85. The Plaintiff submits that if the Court does not allow the repeated offers to submit to polygraph as evidence showing Plaintiff's good faith cooperation, than it disallows him to make a full defence as rebuttal to the attacks sustained by the Defendant over the past three years. The Plaintiff submits that as he has never been allowed time alone with the child in that time, there has been no opportunity to commit any crime against the child. It is also the case that all of the multiple and ongoing claims being made by the Defendant mother are her elaborations on events which are alleged to have occurred when the child was 2 ½ to 3 years of age.

86. In an unusual ruling, Saunderson J exercised his discretion to make an order outside of the Child Support Guidelines, a significant rarity since they became law in 1997. He maintained the father's duty of child support at the rate of $150 per month, less than half as recommended by the Guidelines, for a period of two years to retire the debt arising from investigation costs.

87. In yet another polygraph decision in a criminal case, the accusing party was asked to make a sworn statement and also undergo a polygraph exam on the veracity of her claims. The results caused the police to recommend to the Crown that no charges be laid. After a period of time, the transcripts of interview notes and audiotapes with the accusing party, as well as the polygraph evidence, were shredded by the police department. For some reason unexplained, the Crown eventually did lay charges against the accused, which were dismissed by the trial judge at preliminary hearing. Attached hereto and marked as Exhibit #18 to this affidavit is the case of *Her Majesty the Queen v. Gary Frank Daye [1999] Ontario Court of Appeal Docket No. C30268. Brooke, Austin and Moldaver JJ.A*

88. After reviewing the Crown's evidence, the trial Judge noted many discrepancies in the evidence given by the complainant, and considered that the records destroyed by the police from the first investigation would have yielded many more, thereby depriving the accused of necessary disclosure and the right to a fair defence. The Court of Appeal dismissed the charges against the accused, sustaining the trial judge's decision. The case is quite extraordinairy as well because the female accuser of sexual assault was asked to undergo polygraph on allegations she made.

89. I am advised and do verily believe that Parents Helping Parents has maintained a sustained research of polygraph in the courts for approximately 10 years, and this case is the only one known to feature a request for a polygraph of the accuser before pursuing charges against the accused. The Plaintiff submits that if an efficient use of polygraph in the early years of this nightmarish sexual abuse hysteria caused by the Defendant's concerns had been implemented, it may have been only $14,000 required to clear my name, and see that Caroline is allowed to be a little girl.

90. In furthering the argument that polygraph is not mere mechanics but does lend itself to a careful weighting in the context of all other evidence, the Plaintiff closes this section with more words from the dissenting opinion of Wilson J in *Belland* (para 61):

> Having regard to the fact that it is completely open to the opposing party to cross-examine the [polygraph] operator as to the weaknesses inherent in the process and to call an opposing expert to dispute the validity of the interpretation of the results, I see no reason to exclude the evidence of the polygraph. It is, moreover, well within the purview of the judge to issue a caution to the jury not to give undue weight to polygraph evidence if he or she considers such a caution warranted. The polygraph evidence is clearly relevant. I am not persuaded that it falls within any of the exclusionary rules advanced by the Crown.

91. The Plaintiff submits that the relative scientific, methodologies and effectiveness rate of a polygraph examination is at least as valuable as evidence from the psychology profession. The Plaintiff notes that in some cases, as in this one, the analysis of the methods used by consulting experts from other professions can frequently be inferior to the polygraph examination in terms of probative value.

CIVIL CHILD-RELATED PROCEEDINGS WHERE POLYGRAPH EVIDENCE ADMITTED

92. The Defendant seeks to exclude the polygraph evidence from the Court and also, from being considered by forensic psychologist Dr. Larry Fong who is conducting a bilateral assessment of this case. The Plaintiff argues that a forensic psychologist is very familiar with the polygraph techniques for detecting deception, and that he is able to weigh its probative value in its relation to all other evidence before him. In the case of *JPADZ v. KLADZ*, forensic psychologist and well-known expert in the field of assessing the credibility of allegations, noted the polygraph in the context of all other evidence provided for his analysis. Similar fact to the case at bar, Smith J wrote at paragraph 13:

> With respect to criminal charges, the plaintiff offered to take a polygraph examination through the police. It appears this offer was not accepted and he then went to an independent polygraph examiner, R.C. Cowen. A trained polygraph operator and former sergeant in charge of the Vancouver polygraph section. In his report dated December 21, 1998, Mr. Cowen expresses the opinion that the plaintiff was being truthful when answering "no" to the questions: "Did you ever touch K.'s genital area in a sexual manner?" "Did you ever insert anything into K.'s anus or vagina?" Did you ever masturbate in K.'s presence?" The results of the polygraph test were provided to the RCMP and to the Ministry of Children and Families.

93. The case of *JPADZ v. KLADZ* (1999) BCSC Docket D10236, Smith J, has already been submitted to this Honourable Court and can be located as Exhibit "C" of Plaintiff's affidavit dated June 23, 2002.

94. It is notable to observe how close to the similar facts of the case at bar was heard by the Honourable Justice Smith. Dr. John Yuille's report is then quoted at length, and this well regarded forensic psychologist placed the fact that the father passed a polygraph within the context of all the evidence that was reviewed. The Plaintiff submits that forensic practitioners are well versed in polygraph methods, and frequently examine this type of evidence in the context of all other evidence. The Plaintiff argues that a forensic psychologist

is capable of assigning proper weight to this type of evidence, as is this Honourable Court.

95. In the trial decision of *Bartesko v. Bartesko*, Drake L.J.S.C of BC heard a similar fact case of allegations made against the father by the mother in a custody proceeding. Drake awarded custody of the children to the father and wrote as follows:

> My conclusion is based largely upon my finding that these children have been badgered into their disclosures firstly, by their mother and secondly, by well meaning persons with a less than objective view of the matter. It is not going too far to say that they have been corrupted by over much questioning. The best evidence on this point was that of two police officers concerned…. By the time the police became involved – and it is significant that they laid no charges – it was too late to obtain reliable statements from these girls…The allegations of abuse have been consistently and hotly denied by Mr. B. To me, his evidence has the ring of truth, and I accept it.

The case of *Bartesko v. Bartesko* [1990] 31 R.F.L. (3d) 213 BCJ Drake J. is attached hereto and marked as Exhibit #19 to this affidavit.

96. Drake J also wrote about the impact of child abuse allegations on the children when he noted:

> [The child] showed an interest in sexual matters from a very young age, and indulged in inappropriate behaviour in school and elsewhere: all this going very far beyond the ordinairy and normal curiosity of little children in such matters. I would classify this interest as morbid. Apart from that, many witnesses testified to her being an aggressive and difficult little girl. Others saw no signs of such difficulties when she was with her father. (emphasis added).

Drake further wrote as follows:

> There is no doubt that these two children have suffered from the dreadful animosity which exists between their parents. They may well have become seriously disturbed.

97. The Plaintiff submits that the child in the case at bar has experienced the same impact upon her state of wellbeing as that described by Drake J. Both cases have in common the fact that the accusing mother and her witnesses have described the child as sexually morbid, exposing herself, night terrors, insertion of objects in the vagina, and constantly disclosing abuse. As in Bartesko, the child in the case at bar demonstrates absolutely happy behaviour with no sexual features in the visitation reports arising from visits with the

Plaintiff. The Plaintiff asks this Honourable Court to note the harmful impact of false allegations upon the general best interests of the child.

98. In the Saskatchewan case of *K.(R.L.) v. W.(M.D.)*, polygraph evidence was admitted by the court in a case of allegations of child abuse during custody proceedings. Wilkinson J wrote on October 25, 2001 as follows:

> [The accused father] M.W voluntarily took a polygraph test. Although the results are not admissible evidence for the purpose of establishing the truth, or otherwise, of a denial of sexual abuse, and individual's willingness to submit to a test is relevant and admissible. Nothing further transpired in respect of the sexual abuse allegations after M.W. completed his polygraph.

The case of *K.(R.L.) v. W.(M.D. [2001] SKQB 481 F.L.D No. 351* is attached hereto and marked Exhibit #20 to this affidavit

101. Wilkinson J. awarded custody of the children to the father with liberal access to the mother, and wrote as follows:

> [The Children] have been in their mother's care for a little over four months. For half of that time they have been unable to see their father due to unsubstantiated allegations of sexual abuse. They have been subjected to the influence of a man [mother's boyfriend] who will go to some lengths to gratify his own selfish needs, who has called them "morons" and threatened to return at least one of them to Social Services. As for the children , there was scant evidence of neighbourhood friends, of child centred activities, of ties to the community other than in the institutional form of school enrollment. When interviewed by the R.C.M.P., [the child] did not extol the virtues of his mother's home but recounted, rather poignantly, his fond memories of life in the foster home. <u>In recent years, that is the closest he has come to experiencing what other children take for granted.</u> (emphasis added)

102. In another similar fact case where polygraph was admitted, the accused father was submitted to supervised visitation with his 2 daughters for 7 years. The two girls were 2 and 5 years old when sexual abuse allegations were made by mother following a visit with their father. *Spurgeon v. Spurgeon* was heard by the Alberta Queen's Bench Justice E. Nash, who noted as follows:

> The allegations were investigated by the Department and by the R.C.M.P., but no charges were laid. Mr. Spurgeon voluntarily submitted to two polygraph tests. The first was inconclusive because he fell asleep and he passed the second one.

Attached hereto and marked Exhibit #21 to this affidavit is the case of *Spurgeon v. Spurgeon (1997) ABQB Action No.: 4809A-003160 Nash J.*

103. Justice Nash carefully reviewed all evidence arising from expert reports, the police, and the Child and Family Service and wrote:

> Another concern that I have is the apprehension of bias on the part of the [CFS] Department who investigated the allegations of sexual assault. Mr. Spurgeon was cleared by the polygraph which, I appreciate, is not admissible in a Court of law. There was no medical evidence supporting these allegations. In effect, Mr. Spurgeon has been denied unsupervised access to his children on the basis of disclosures made by a three and five year old to their mother which have never been substantiated nor has there been sufficient evidence to charge Mr. Spurgeon.

Justice Nash concluded with the observation that supervised access was never meant to be a permanent Order and wrote: "to hold otherwise would be to recognize that any unsubstantiated accusation of sexual abuse against a father would effectively terminate any access other than supervised between himself and his children". Justice Nash ordered unsupervised visits for Mr. Spurgeon.

104. The Plaintiff asks the Court to note that the child, Caroline, in the case at bar, has experienced little but a hysterical obsession with sexual abuse as found in the mother's home. Like the child in the above noted case, Caroline has also poignantly described her happiness in the care of the father in visit supervisor reports. Unlike the above case, the mother in the case at bar did not aver from making additional allegations of sexual abuse following the Plaintiff's polygraph. The Plaintiff submits that the welfare of Caroline has been severely compromised and she has never known a normal life such as other children that is devoid of abuse allegations and investigations being conducted in her life. Indeed, she has been submitted to "treatment" at the hands of a playtherapist for alleged abuse that has never been substantiated in criminal or civil proceedings, since the age of 2 years and 7 months.

EXACT SIMILAR FACT (1999)
A.A. V. L.T. V. WINNIPEG CHILD AND FAMILY SERVICES

105. The Plaintiff has been advised that of the hundreds of cases read on behalf of his case, Parents Helping Parents could find none which was more similar fact with the case at bar than *A.A.* .

106. The child K. was 4 years old when her parents separated for the last time in 1995, and soon thereafter, allegations of sexual abuse against the father were

made. From that day forward, the father paid a supervisor approximately $400.00 per 6 hour visit, once mileage, report writing, and incidental costs were factored in. Though the father was entitled to an additional weekly visit of 4 hours duration, he could rarely afford both in the same week. Attached hereto and marked as Exhibit #22 to this Affidavit is the case report of *A.A. v. L.T v. Winnipeg Child and Family Services [1999] Manitoba Q.B. Docket No.: 98-01-07769 Allen J.*

107. As in the case at bar, Mr. A. located the family advocate of Parents Helping Parents, Ms. Louise Malenfant, which occurred when the father had been supervised for three years July 1997. By that time, he was lucky to see his daughter once a month due to financial constraints, and had been driven to a point of despair by his circumstances. PHP first took action to remedy the visitation problem by having the accuser pay for the supervision they were demanding. In the last year of his case, Mr. A exercised all court ordered visitation at a cost of $2,400.00 a month to the accusing party, and found seeing his daughter for 10 hours a week to be "almost normal" compared to the past three years.

108. The Plaintiff has not been successful in asking the Court to be concerned by the fact that Caroline and father spend only half the time ordered by the Court, due to financial constraints. In addition, for the sake of visitation and related costs, Mr. Doerkson must forgo the expense of legal representation. The Plaintiff maintains a two bedroom home so that Caroline always has her own space in their home.

109. It is certainly true that the Defendant has absolutely no restrictions regarding her communications with our pre-school child, even though there is obvious and indisputable evidence that the mother is the primary source of sexual abuse hysteria in Caroline's life. These conditions have been invasive and humiliating for both of us, especially in light of the fact that no criminal charges or child welfare proceedings have ever been the result of all the sexual allegations made by the Defendant.

110. As in the case at bar, the supervisor in A.A. felt it was part of her job to not only ensure no sex abuse could occur, but to listen to every word spoken between father and child. In some fashion and without court order stipulating this stressful intervention, the Defendant has accomplished the ability to dictate what our daughter and I can and cannot say to each other, and the Court has done nothing but her will in these matters, without careful scrutiny of testimony given by both parties.

111. Though we have learned to make the very best of it, we cannot escape the fact that Caroline has been treated like a sexual deviant, presented as emotionally disturbed, hurtful towards small animals, and forced to link her first sexual experience and awareness to the grotesque idea that her father is associated

with sexuality. It is my opinion and belief that when you teach a child with sexual obsessions before they can talk, the result must be similar to the pain of pedophilia. It is a form of sexual assault to the child's self image, especially if it begins before conscious thought. It holds the danger of making a child believe that terrible abuse has occurred with her father that has never happened. Many similar fact cases that have been reviewed here include claims that the children are disclosing incidents of abuse.

112. Allen J did as most judges have done regarding the acknowledgement of polygraph evidence in *A.A.* . In a careful review of all expert evidence, they note and include the results of polygraph examinations in evidence for the Defence. Because of the legal controversy surrounding polygraph due to the Supreme Court, no Canadian judge has carefully reviewed all aspects of this type of evidence, with the exception of Wilson J in *Beland*. Even Wilson J did not explore the pre-test and post-test interview or the scientific methods of credibility assessment. Allen J noted as follows (para 28):

> As the police often use a polygraph in sex abuse cases, they suggested a polygraph test to Mr. A. 's lawyer. Although they knew Mr.A. had had one done privately, their policy is to only consider the results of the police polygraph. Mr. A. did undergo a police polygraph in January 1998. This was unusual.

Later at paragraph 55 Allen J notes:

> Mr. A. took a polygraph test administered by the Winnipeg Police Service in January 1998. He underwent a four hour interview and the police concluded that no deception was found in his denial of fondling Karen.

113. I am advised and do believe that Mr. A.'s first polygraph examiner was also a 25 year veteran of the police, retired and in private practice at the time of his exam of Mr. A.. I spoke with Mr. A. regarding this issue, and he advised that the police told him they did not need to do a polygraph in order to arrive at the decision that no charges would be laid, just as the case at bar. He persisted for more than a year requesting this from the Winnipeg police until it did take place 2 years after their investigation was closed. The Plaintiff advises that he intends to vigorously pursue a police-administered polygraph examination to be added to the evidence speaking to the relative credibility of the Defendant and I in the case at bar.

114. In A., Allen J gives a partial description of what a child so young experiences from an allegation of sexual abuse as follows (para 86):

> It is clear that Karen has suffered a great deal since September 1995 [date of allegations]. Regardless of the outcome of this case

> she will suffer further loss – either the loss of her mother, the loss of both her mother and father or the loss of her half sister. Many people have discussed this trial with her for different reasons and motives.

And later writes at para 108:

> In any event, the fact that these allegations have been "out there" alive for three and one half years without adjudication has not served the interests of the parties or of Karen.

115. The *A.A* case made a significant difference in the many future cases of allegations in divorce that are to be investigated in its city of origin. Attached hereto and marked as Exhibit #23 to this Affidavit is a letter from the Manitoba Office of the Ombudsman to Mr. A. regarding those changes.

116. In particular, the Plaintiff asks the Court to note that the Reviewers examining the case wrote as follows:

> Reviewers: That the Agency explores the veracity of the polygraph test for use in these situations. Consultation with the Winnipeg Police Services or an organization such as the Association for the Treatment of sexual abuse would provide useful information.
>
> CFS Response: While the Branch is aware that polygraph tests are not admissible in court, we are of the opinion that consideration should be given to the results in abuse investigations.

117. The outcome of Mr. A.'s case is inspiring to the Plaintiff, for he became the custodial parent of K. after 3 years of visit supervision. As documented by media stories regarding the case, Mr. A.saw justice done, and saw changes made to the system that had caused the significant legal harm against him, and had separated him from his child in all but supervised visits for more than 3 years. Six months after the trial decision was released, the accusers of Mr. A. also wrote a cheque in the amount of $20,000 which was provided to the accused without the need to file a statement of claim.

118. The Plaintiff argues that polygraph evidence was an important factor in resolving Mr. A.'s case, and hereby asks that the Court recognize the investigative value of this type of evidence in the case at bar. In paying the accused a large sum of money, there was perhaps no better way to confirm without any doubts that Mr. A. was considered innocent of the allegations made against him. Attached hereto and marked as Exhibit #24 to this affidavit are two media reports published regarding the facts and results of the A. case in Manitoba.

119. The Plaintiff hereby concludes this affidavit with the submission that no evidence of any probative value ought to be ignored in this long standing abuse allegation. The Plaintiff further submits that these allegations of child abuse have caused significant harm to the child, Caroline, and that the child should be released from her prison of false sexual abuse reality so that she may lead a normal life as other children do, now or in the immediate future.

120. I make this affidavit bona fide and in Opposition to the Defendant's Motion to exclude polygraph evidence from these proceedings.

SWORN BEFORE ME at the City Of Calgary, in the Province of Alberta, this __th day of January,

_____
A Commissioner for Oaths in and for The Province of Alberta

_____
WILLIAM SCOTT DOERKSON

ACTION NO. 9801-01607

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

WILLIAM SCOTT DOERKSON
(Plaintiff)

- and -

SHARON THOMPSON
(Defendant)

A F F I D A V I T

William Scott Doerkson
Pro Se Litigant