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The Advocates' Society

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September 11, 2015

Ms. Linda Rothstein
Motherisk Hair Analysis Independent Review
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Dear Ms. Rothstein:

RE: Motherisk Hair Analysis Independent Review

Thank you for providing the Society with the opportunity to make submissions on the Motherisk Hair Analysis Independent Review (the "Independent Review") chaired by The Honourable Justice Susan Lang.

As you are well aware, The Advocates' Society (the "Society") is a not-for-profit association of over 5,000 lawyers throughout Ontario and the rest of Canada. The mandate of the Society includes, among other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. The Society's members practise in a wide variety of areas of law, including family law and criminal law.

The matters under review are of concern to members of the Society. Hair strand testing and analysis have been routinely used in family law proceedings involving child protection issues and custody and access issues, and also in criminal proceedings. The judicial determinations in these proceedings result in significant consequences for the adult parties and their children. The reliability of expert evidence used in these cases is therefore of crucial importance.

Prior to the commissioning of the Independent Review, the Motherisk Laboratory at The Hospital for Sick Children was considered reliable to the point of near incontrovertibility and infallibility. Test results provided by the Motherisk Laboratory were rarely questioned in judicial proceedings where they were provided as evidence. With the reliability of Motherisk Laboratory results now being called into question, the Society's members have raised concerns that relate not only to those who are parties to cases where such testing is used, but also to the public perception of the testing process.

The Society has reached out to its members who practise in the areas of family and criminal law to canvass their views on the issues being examined as part of the Independent Review. The Society was unable to secure a statistically significant response rate from its membership on some of the more specific questions posed in your letter of June 10, 2015. Those members who shared their concerns, however, expressed the following views:¹

¹ It is important to note that while the membership of the Society does include Crown counsel, these submissions were not contributed to nor approved by any Crown counsel.

- Reliable hair strand testing that is in accordance with international forensic standards is essential not only to the parties to the cases in which the testing is used, but also to the confidence of the public in the science and its use in the justice system. It is critical that any testing be done, and be seen to be done, in a wholly unbiased manner. This is particularly true given the perceived resource and power imbalance that is often present between the party relying on the test results and the party defending against them.
- Interpretive aids are an important component to improving the understanding and potential implications of hair strand test results, including clear specification around the limits of reliability of such testing. Even hair strand analysis that is segmented to provide a more accurate picture of the timing of drug use does not, without a consideration of additional factors, provide the full picture of the impacts of drug use. For example, any such analysis must be culturally sensitive to account for cultural differences in hair growth rates.
- The use of hair strand testing is an issue not only in child protection and criminal proceedings, but also proceedings where custody and/or access are at issue.
- Should the Independent Review conclude that there were issues with regard to the reliability of the testing and analysis performed by Motherisk Laboratory, all cases which relied on this science should be re-examined by a team of professionals to determine whether any cases should be re-opened. This was the process used following the public inquiry involving Charles Smith, the former head pediatric forensic pathologist at The Hospital for Sick Children, where a team made up of Crown counsel, criminal defence counsel and the Chief Forensic Pathologist for Ontario re-examined the cases at issue.

We have noted the comprehensive submission on this matter by the Family Lawyers Association (“FLA”). The FLA noted that many of its members felt they did not have sufficient knowledge of the science underlying hair testing, and also noted that there is very little continuing education in that area. This has raised for the Society the question of whether advocacy skills related to challenging scientific evidence should receive more attention in the Society’s educational programming. The Society will be considering that question and also whether a specialized Society training program dedicated to the general topic of scientific evidence would enhance the role of advocates in the truth-seeking process.

I would be pleased to discuss this letter with you further at your convenience.

Yours very truly,



Martha McCarthy
President