PROOF OF PATERNITY IN AFFILIATION PROCEEDINGS IN RECENT CANADIAN CASE LAW

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August, 1975

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I. Prefatory Remarks

Although a number of studies have been undertaken in relation to proof of paternity and reform of the law of evidence in paternity cases, particularly in respect to blood tests, this paper will deal with such studies only tangentially. Its primary purpose is to examine the Canadian case law of proof of paternity in affiliation proceedings.

II. Ancillary Matters

The question of proof is to some degree tied to the question of who is entitled to prosecute in an affiliation suit and what limitation periods affect the proceedings. In some provincial statutes the provincial officers responsible for prosecuting affiliation proceedings are affected by a different limitation period than the mother of the child. In Prince Edward Island for instance the provincial guardian can make an application to the county courts within five years of the birth of the child whereas the mother is affected by a one year limitation period. This has consequences for the type of evidence that is available to the court, particularly where slowly maturing biological, anthropological or genetic factors are involved.

III. Persons who may bring the proceedings

In Alberta, by virtue of section 13 of the Maintenance and Recovery Act R.S.A. 1970 c. 223, as amended by S.A. 1971, c. 67, proceedings are brought by way of a complaint which may be lodged by the mother or by the next friend or guardian of a child born out of wedlock or by the director who is responsible for implementing this legislation.

In past years the entitlement of certain persons

to institute proceedings under the various provincial statutes providing for affiliation proceedings has usually been contested on the basis that the complainant was not a "mother" within the meaning of the relevant Act.

Our present statute attempts to give a fairly exhaustive definition of mother to permit applications not only by unmarried mothers or mothers to be, but also widows giving birth twelve months after the death of their husbands, separated married women who give birth twelve months or more after ceasing to co-habit with their husbands, and married women who have born a child admitted by a putative father to have been father by him or found not to have been father by the women's husband.

Where the "mother" is a single women who has never been married, there are no difficulties in finding her entitlement to prosecute under the Act. The question has arisen whether a subsequent marriage by the single mother will affect her right to prosecute an affiliation suit.

In Wolski v. Osinchuk (1966) 55 W.W.R. 507 (Alta. AD.) The suit was commenced by the mother before her marriage, but was not heard until after her marriage. The complaint was dismissed in district court because the Child Welfare Act R.S.A. 1955, as amended 1963, c. 7, provided that :

> s.104(2) An order under this part for the payment of money for the maintenance and education of a child terminates
> . . .
> (b) On the mariage of the mother where she retains the child in her custody.

In the result, the Appellate Division held that she was entitled to an order of affiliation limited so far as payment for maintenance was concerned to the period up to the date of her marriage.

The problem raised in Wolski v. Osinchuk would

probably not arise under the present Act since s.14(3), as amended S.A. 1972, c. 63 provides for the very point in issue in that case:

> 14(3) If the child is retained in her custody and under her care and control,
>
> (a) the marriage of the mother, or
> (b) the resumption by the mother of co-habitation with her husband,
>
> Does not bar the making of a complaint, the continuation of any proceedings commenced under this Part before the marriage or resumption of co-habitation, or the making of an order.

The present Act also has provision for continued maintenance payments for the child even after the mothers marriage or resumption of co-habitation with her husband, if an application for re-enstatement of maintenance or re-enstatement and variance of maintenance is made pursuant to s.23(2).

A problem arises under s.7(c)(v)(B).

> s.7(c) "mother" means . . .
> (v) a married women who has been delivered of the child,
> (B) where a court has found that the women's husband is not the father of the child; . . .

Does this section mean that adjudication must first be made to rebut the presumption of legitimacy? If so, how are these proceedings initiated? Can this be done under this Act, or can it come from another source?

Under s.8(b) a court has jurisdiction in the judicial district "where the mother resides . . ." "in all matters respecting the child, the mother and putative or declared

father, or any of them." Is this grant of jurisdiction broad enough to include an adjudication as to whether or not a women is a mother within the meaning of s.7(c)(v)(B)? Note that the definition requires such a finding of law and paternity to have been made by "a court"; this appears to include findings made by other courts and doesnot of itself exclude the jurisdiction of the judge presiding over the affiliation application to make such a finding.

The intention of this extension of the definition of "mother" appears to be to avoid the restriction in s.7(c)(iii), which limits the meaning of "mother" to cases where the complainant is at the time of the complaint a married women living apart from her husband. A similar definition section in the B.C. legislation proved fatal to the complainant in Re Summary Convictions Act: Ondzik v. Metcalfe (1965) 54 W.W.R. 571 (B.C.S.C.). The complainant was sworn at a time when the complainant was residing with her husband again. Gould J. held that she was therefore not at that time not a mother within the meaning of the Act.

On possibility in affiliation proceedings does not appear to have been completely covered by the definition of "mother" in the Alberta statute. S. 7(c)(ii) provides:

> A widow who
> (a) has been delivered of a child,
> or
> (b) is pregnant and likely to be delivered of a child,
> (c) 12 months or more after the death of her husband

Is a "mother" within the meaning of the Act. However, this definition depends on the presumption of legitimacy working in favour of a child born before the twelve months limitation in any event. The definition does not take into account the possibility that a child born within that period may have its

paternity disputed successfully by the estate of the husband. In such circumstances, who will bear the burden of providing for the child? It is clear that the real father escapes without any liability.

With the exception of the last mentioned possibility, the definition of "mother" in the Alberta Act, combined with the concurrent right to prosecute by the guardian, next friend or Director, appears to cover all situations in which paternity suits can be brought. Note, however, that in Alberta the right to bring the action apart from these persons does not extend to the parents of the mother as its does in other jurisdictions such as Manitoba, New Brunswick and Newfoundland.

The question may also be asked: On whose behalf may affiliation proceedings be brought? Lord Ellenborrough C.J. held in The King v. DeBrouquens (1811) 104 E.R. 607 that a child must have been born alive for an affilation order to issue. While this remains the law under some provincial statutes, such as Newfoundland's, where no final order can be made until birth, it does not appear to be a limitation under the Alberta Maintenance and Recovery Act. S. 21(1) specifically provides for an order or agreement to cover the reasonable expenses for the maintenance and care, medical and otherwise, of the mother for 3 months preceding birth "or the termination of the mother's pregnancy and for such period thereafter as is considered necessary as a consequence thereof."

Nor is the fact of the causal act of intercourse outside of the province or the birth of the child outside of the province bar to proceedings in Alberta if in fact the mother or the putative father reside here: s.8. In Re Child Welfare Act: Leblanc v. Huffman et al. (1966) 57 W.W.R. 312 (Sask. Q.B. Chambers) both parties resided outside of Saskatchewan at the time of the intercourse and of the birth of the child. The complainant, a native of Saskatchewan, then returned to the

province and launched the affiliation proceedings. The putative father remained outside of the province and appealed the resulting affiliation order served on him ex juris. MacDonald J. held that although at common law a court has no jurisdiction to entertain an action in personam--such as an affiliation suit--when the defendant is outside of the jurisdiction, the legislature had expressly extended its jurisdiction over the father outside of the province by statute--the Child Welfare Act--and that it was competent to do so because it was a matter within the competence of the provincial legislature. However, where the putative father stays outside of the jurisdiction of the court and has not submitted to it, such an order would be a nullity under private international law except in the forum where it was pronounced and authorized by special legislation. For this reason the court in Bodnar v. Popovich [1974] 3 W.W.R. 658 (Alta. BC.) refused to issue a provisional maintenance order under the Reciprocal Enforcements of Maintenance Orders Act because the complainant could not show that the enforcing jurisdiction, in this case Nova Scotia, would enforce such an order.

IV. The Limitation Period

As mentioned above, the various provincial statutes providing for affiliation proceedings have different limitation periods dependant on different sets of circumstances. Although there is no uniformity among the statutes, Alberta's position is substantially the same as s. 53 of the Ontario statute, although Alberta's wording is broader to include the termination of pregnancy as well as birth. Both jurisdictions provide for a basic two year limitation period after birth as well as 12 month limitations on the revival of the cause of action upon a condition precedent occuring. Other provinces provide for only a basic one year limitation period. New Brunswick restricts the laying of an information to no later than 1 year after birth of the child. Manitoba, which permits the director to lay an

information before the child is 16 if no pre-natal information was laid and there was no approved agreement, has the longest limitation period. For the sake of convenience, a tabulation of the various provincial statutes in force in Canada in relation to affiliation proceedings and the limitation periods therein contained accompanies this paper as Appendix 1. There is no relevant recent case law on the limitation periods in force in the Alberta statute. What may constitute an act of acknowledgement by a putative father under section 14 will be discussed in a later section of this paper dealing with evidence. However, as noted above, the length of the limitation periods is of importance for the maturing of material biological evidence. At this point it would be useful to turn to the evidence of Dr. Colin Henry Manock before the Law Reform Committee of South Australia. Dr. Manock was replying to the question whether he could see any fields other than blood grouping as a useful determinate of paternity:

> ***Dr. M.***: There are numerous other characteristics which are inherited from the parents which should be considered, and I feel that little weight is given to, say, the colour of the child's eyes. If a child has brown eyes, the mother has blue eyes and the putative father has blue eyes, then obviously the putative father has been falsely accused. One of the difficulties is that the colour of a child's eyes does not develop immediately at birth and therefore one has to state a time after which the colour is properly formed. In the case of the colouration of the eyes, three years would be a reasonable time. You probably know that all white babies are born with blue eyes: the colour eventually changes within three years.
>
> ***Dr. M.***: Finger prints can be used at the time of birth. There are patterns on the fingers which derive from the patterns of father and mother and this could be tested from birth. The finger prints remain constant throughout life.
>
> ***Mr. C.***: Could we discuss those two?
>
> ***Dr. M.***: Blood grouping is a genetic characteristic in this kind of exercise. It is of the same sort of standing and recognition. No one challenges it.
>
> ***Mr. C.***: Can one say the same of these characteristics such as eye colour and finger prints?
>
> ***Dr. M.***: I think the genetics of finger prints and colouration of eyes are well accepted throughout the world and have been investigated. It is just that it has rarely been applied in this particular field.
>
> ***Mr. C.***: Is this likely to enter the field of certainty or reasonably possible or strong possibility?

Dr. M.: Again, results from genetic characteristics which are inherited are mainly on an exclusionary basis. With finger prints there is a possibility of positive identification of the father but this is most uncommon. It would have to be very infrequent collection of characteristics, but it is an instrument which can be used to widen the search I feel should be applied.

Mr. C.: You say it has been used in Denmark?

Dr. M.: Yes.

Mr. C.: What about bone structure?

Dr. M.: Bone structure. The genetic characteristics determine the underlying bone structure but unfortunately these are not fully formed until after the age of puberty. Age of 15 or 16 years.

Finally, it should be noted that certain of the provincial statutes provide specifically for bringing the proceedings during the term of the mothers pregnancy as well as times thereafter. S. 14 of the Alberta Act limits the making of a complaint to three times, all of which are post-natal. However, these times do not exclude all other times for making the complaint, since s. 13 provides that the complaint may be made by the mother, and mother is also defined as a woman who is pregnant and likely to be delivered of a child. Furthermore, s. 14(1) doesnot limit the time for application to the period of 24 months after birth or termination or pregnancy, but merely provides that the complaint may not be brought "later than this time period".

V. Standard of Proof

Meher K. Master writes:

> Affiliation proceedings, like many other orders made under provisions of the family law, are enforceable through the provisions of the criminal law, but in nature affiliation proceedings are civil and are not criminal or quasi criminal in character . . . Procedurally problems arise from this dichotomy. Because the proceedings are of a civil nature, the standard of proof or

> corroborative evidence of the fact of paternity is a balance of probabilities; but procedure under the Summary Convictions Act and other statutes for enforcement of an order involves the provisions of criminal law.

Master's statement is an accurate statement of the law as it now stands where the issue is simply paternity and the question of the legitimacy of the child doesnot arise. It should be noted, however, that as late as 1944 the Ontario Court of Appeal declined to settle the issue of whether the standard of proof should be civil or criminal in paternity suits in Re Gwyllt [1944] O.W.N. 212. In the following year Lucyk v. Clark [1945] 1 W.W.R. 481 was decided by the Saskatchewan Court of Appeal which held that since affiliation proceedings arise under provincial statute and the relief sought was in the nature of compensation or damages, the rule that the decision on the evidence in a civil case should be on a balance of probabilities is applicable to such proceedings. This has since become settled law and has been further amplified in Morrison v. Heide (1967) 59 W.W.R. 222. The latter case has been quoted with approval in Lloyd v. Ribalkin (1968) 63 W.W.R. 193, an Alberta district court decision. Morrison v. Heide was applied by the court to make an affiliation order against a juvenile in Berg v. Walker (1969) 70 W.W.R. 394 (B.C.S.C.). In Morrison v. Heide the court stated at p. 228:

> Affiliation proceedings being civil rather than criminal in nature, evidence may in law be treated as corroborative if it tends to show that the mother's evidence is probably true. Proof beyond a reasonable doubt is not required by the law in such cases.

Still the issue is not yet completely certain. Ontario Provincial Judge Fisher noted that the standard of proof presents a problem in paternity cases and that there are few cases on this subject in Robinson v. Mangoni [1975] 17 R.F.L. 117 at

p. 119. He then proceeded to go into the history of the standard of proof in affiliation cases. First he pointed out that there are 3 factors which suggested that the civil standard is the more appropriate one. Firstly, the proceedings are no longer penal in nature and sexual relation outside of marriage per se no longer have there former stigma. Secondly, the relief sought is of a civil nature--mainly, financial assistance from the alleged father for the mother and child. And then he continues:

> The third factor is that the distinction between a civil and criminal standard seems to have been somewhat blurred and that accepting that affiliation proceedings are civil in nature there are further guidelines to be considered beyond just 'balance of probabilities'.
>
> The rule is that within the civil standard there can be allegations which require something higher than a 'balance of probabilities' sometimes even to the degree of requiring proof beyond a reasonable doubt. A civil standard to be applied depends, so say some cases, on the 'gravity of the consequences'. This view, which we might refer to as the rule of gravity, was put forth by Cartwright J. in the Supreme Court of Canada in the case of Smith and Smith, [1952] 2 S.C.R. 312, [1952] 2 D.L.R. 449. In determining a standard of proof in divorce proceedings he stated that the court acts on a 'preponderance of probability' and added at p. 331:
>
> > ". . . in every civil action before the tribunal can safely find the affirmitive of an issue of act required to be proved it must be reasonablly satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences". (The italics are mine.)

Judge Fisher came to the conclusion that not only are proceedings of the Ontario Child Welfare Act civil in nature to which generally the balance of probability standard applies but that within that standard there are degrees which depend on the gravity of the consequences and that the balance of probabilities test must be subject to the rule of gravity. In this case there was evidence of a long and intimate relationship between the mother and defendant on the one hand, and evidence of the mother's possible relationship with other men which might have involved the question of the paternity of the child. In weighing the gravity of the consequences to the parties, the court held that since there was a long relationship between the parties--and not simply an isolated act of intercourse--with few group control precautions taken, there was a very real risk of pregnancy, and Mangoni was the father of the balance of probabilities.

It should be noted, however, that the Ontario Child Welfare Act R.S.O. 1970, c. 64, s.57, requires the judge to be satisfied that there is good and probable cause for believing that the putative father of the child is in fact the father and s.59 speaks of "sufficient evidence being adduced". These two sections are in substance different from s.18 of the Maintenance and Recovery Act of Alberta, which merely requires a judge to be satisfied that the putative father caused the pregnancy or was one of a number who might have caused the pregnancy.

While Judge Fisher did not expressly say so in his judgment, it would appear that the addition of the gravity rule to the balance of probabilities test is a result of the standard of proof requirements set out specifically in the Ontario statute, and not in the Alberta statute. Although the point has not been litigated in Alberta, the

application of the gravity rule might well form part of the defense in affiliation proceedings under the Alberta statute as well: Cartwright J., in the passage quoted by Fisher Prov. Judge above, expressly states the rule is applicable to "every civil action".

The standard of proof is more stringent where the child is born of a married women and the presumption of legitimacy applies in its favour. While parties to a dispute and the courts are no longer bound by the stringency of the rule in Russell v. Russell [1924] A.C. (687) (H.L.), s. 6 of the Alberta Evidence Act permitting the courts to receive evidence as to non-access during the marriage which thereby tends to bastardize a child of the marriage, the presumption of legitimacy is still potent. In Minaker v. Minaker and Raugust [1972] 4 R.F.L. 48 (Manitoba Q.B.) the husband in a divorce proceeding disputed the paternity of a child born to his wife. The child was conceived at a time when the wife still had sexual relations with her husband but was also carrying on an adulterous affair. Initially, the wife refused to have a blood test and lied to her husband. Counsel for the husband asked the court to draw a reasonable inference that the petitioner was not the father of the child. Matas J. refused to do so although he expressed that he found the evidence of the wife to be less than satisfactory. He quoted from the case of Wikstrom v. Childrens' Aid Society of Winnipeg et al (1955) 16 W.W.R. 577 where Schultz J.A. at p. 582:

> The presumption of legitimacy in t he case of a child born to a married woman is, of course, one of the strongest presumptions known to the law; it can only be rebutted by evidence that is unquestionablly decisive to the contrary. This being so it is necessary to scrutinize closely and weigh carefully evidence tending to bastardize issue of a married women, particularly when, as in the Instant case, access

> on the part of the husband and sexual relations were admitted for the period in which, in the course of nature, the child was conceived.

If the husband disputes that he had access to the wife at the time when the child must have been conceived then the standard of proof required of him in order to find adultery is that of the criminal law requiring proof beyond a reasonable doubt. So Kirke Smith J. stated in Loewen v. Loewen [1969] 2 R.F.L. 230 (B.C.S.C.):

> It is established beyond question that the standard of proof required of a plaintiff, in an action in which a decree, if granted, will bastardize a child born during the continuance of the marriage is that adultery must be proved beyond a reasonable doubt: See Preston-Jones v. Preston-Jones [1951] A.C. 391 . . .; Irish v. Irish (1958) 24 W.W.R. 671 (B.C.).

In this case Kirke Smith J. found that the wifes repeated refusal to submit herself and the child to blood tests, for which she gave no explanation at trial, warranted the drawing of a strong inference of an adulterous relationship by the court, and the decree was granted.

Although strong, "the presumption may be rebutted by evidence which establishes to the satisfaction of the court, that sexual intercourse did not take place at any time when, by such intercourse, the husband could, according to the laws of nature, be the father of the child,: Welstead v. Brown [1952] S.C.R. 3 CK., J. at p. 25 quoted by Thompson J. in Henderson et al v. Northern Trust Compnay et al (1952) 6 W.W.R. (N.S.) 337 (Sask. Q.B.). In this case the separated minor wife of an intestate and her child were denied the benefits of the Intestate Succession Act because the wife had contracted out of the Act at the time of her separation from her husband in which agreement it was recited that the child in question was not the child of the deceased. It was independently

proved to the satisfaction of the court that the child was conceived before marriage but not by the husband and the presumption of legitimacy was therefore rebutted.

The presumption of legitimacy is reversed and becomes a presumption of illegitimacy where the parties are judicially separated and living apart and the child is born more than 9 months after such separation. This was held by Schultz J.A. in Fillion v. Payment (1957) 21 W.W.R. 591 (Manitoba C.A.). The Alberta Appellate Division considered the same issue in Workun v. Nelson (1958) 26 W.W.R. 600 at p. 607, but was not as decisive as the Manitoba court. In the latter case the respondent mother had been separated and living apart from her husband for 5 years, although this was not a judicial separation. The appellant argued that there was still a prima facie presumption of legitimacy of the respondents child and that her evidence fell short of rebutting it. The court implied that the presumption still existed but that it had no weight:

> Suffice it to say that the learned trial judge having the responsdent before him, having observed her demeanor and assessed her credibility, had evidence before him rebutting the presumption, which, as he indicated in his judgment, he accepted, more especially as appellant was in court with his counsel but did not give evidence. As pointed out in Rex v. Clark [1921] 2 W.W.R. 446, at 453 61 S.C.R. 608, by Duff J., later C.J.C., at 618, the fact that in given circumstances there is a rebuttable presumption of law in favour of a certain conclusion doesnot necessarily afford any guide as to the weight or strength of the evidence required to rebut that presumption. Here, this was a matter largely for the learned trail judge. I am of the opinion that he was quite correct, in all the facts and circumstances, in accepting the evidence before him as sufficient to rebut the presumption.

While generally the standard of proof is that applied in civil cases, where admissions are involved the standard may be more stringent. In Matheson (Inspector of Child Welfare) v. Frederick [1945] 2 W.W.R. 591 (Alta. A.D.) the court reaffirmed that affiliation proceedings are of a civil rather than a criminal nature, yet for the admissibility of admissions by persons charged or likely to be charged the court felt that they should partake of the practice usually followed in the criminal proceedings. The putative father had made certain statements to the superintendent of Child Welfare and to a member of the R.C.M.P. Without implying any discredit upon these two persons the court stated:

> What a court is concerned with, when admissions or confession are offered in evidence, is as to the truth of the statements made therein. A caution or warning, or evidence that such admissions and confessions were made freely and voluntarily, are only a means to an end, namely, to ensure that the evidence sought be given as truthful and may be relied upon. This is not taken to mean that all the safe guards be adopted or the practice laid down in criminal matters should be followed--although that might be advisable.
>
> . . .both the superintendent and the constable are persons in authority. It would appear to me quite probable that, having regard to the nature of the interviews and of the questions asked of the appellant, and of the appeal made to him to admit the parentage if he were guilty, that is was probable that the admissions obtained could not, of necessity, be relied upon as being truthful.

The court was influenced by the fact that the two officers were convinced, before the interview, that the appellant was the

father and that the purpose of the interview was to obtain the admission of this from him.

However, in Re Child Welfare Act: Brysh v. Davidson (1963) 44 W.W.R. 654 (Alta. D.C.), Tavender D.C.J. admitted the evidence of answers given by the respondent in an interview with the welfare worker. Matheson v. Fredericks does not appear to have been argued before the court, and there is no suggestion in the case that the welfare worker exerted any sort of coercive influence. The evidence of the welfare worker was the only corroborative evidence in the case, and counsel for the respondent argued that is was privileged. The court considered the law relating to privilege as laid down in McTaggart v. McTaggart [1949] p. 94, Mole v. Mole [1951] p. 21 and Henley v. Henley [1955] p. 202, and came to the conclusion that privilege exists only in cases of a matrimonial dispute between husband and wife where it is in the interests of the state that the marriage be sustained rather than broken and that the interviews be undertaken with the object of conciliation and without prejudice to the parties. Tavender D.C.J. then asked two questions: (1) Is the welfare worker a conciliator? and (2) Is there a matter of public or state interest in such a case?

> In my opinion, the welfare worker in case such as the present one is not a conciliator. She is not attempting to preserve a marriage union because there is no marriage. I think she is attempting to obtain some financial provision for the maintenance of the illegitimate child and is only acting in most cases in the interests of such child. It is true that marriage was discussed but I am not prepared to hold that marriage under such circumstances between a 16 year old women and a 20 year old man was the true object of the discussion between the parties in the presence of the welfare worker nor that it is in the public interest that the

> parties should be persuaded to enter into such a union simply to legitimize the off-spring.
>
> If there is any public interest involved I think it is that a male who fathers a child should not be allowed to avoid the responsibility which normally attaches to such action.
>
> I think I have no right to extend the doctrine of privilege in a case such as this one and I accordingly find that the evidence of the welfare worker is admissible.

Paternity agreements are also admissions but in their enforcement the question of paternity is not material and no question of the standard of proving paternity arises. In Hrycewich v. Hegi (1964) 50 W.W.R. 237 (Alta. D.C.) the respondent failed to continue the agreed payments and sought to introduce evidence that he was not in fact the father. Complainant objected that the court had no jurisdiction to deal with the question of paternity, only with the variance or enforcement of a maintenance order. The court held that it had power to deal with the question as one of contract, and that the respondent could argue grounds that would allow him to avoid the contract in equity. Cormack D.C.J. said at p. 240:

> The paternity agreement which the respondent admits signing is a contract between the respondent, the mother of the child, and the superintendent of Child Welfare in which the respondent admits paternity and covenants to pay $25 per month for the maintenance and education of the child over a stated period of time. The only way in which the respondent may avoid paying under that agreement is, in my opinion, by showing that the agreement is one that can be set aside on the grounds used to set aside any agreement such as mistake, fraud and the like. The question of

> whether or not he is the father does not enter into the issue.
>
> . . .the question of paternity is not material to that issue all, but it is a factor which gave rise to the making of the contract. To put it another way--the paternity agreement, having by the Act been deemed an order, is of the same force and effect as a judgment. In fact, it is analogous to a consent judgment and, bearing in mind that a consent judgment is a contract, equity will not ordinarily release a party thereto from his obligations thereunder: . . .

It is to be noted that while s. 10 of the Maintenance and Recovery Act expressly provides that an agreement made between the putative father and the director or between putative father, director and mother must contain an admission that the putative caused or possibly caused the pregnancy. This is not the case under the Ontario Child Welfare Act. In Re Ferrier and Smith [1974] 4 O.R. (2d) 766 (Divisional Court) the majority refused to vary a lump sum agreement. Cromarty J. said at p. 772:

> With regard to the question of public policy the court must balance the needs of the child, whose interests were represented by the Childrens' Aid Society when the agreement was struck, against the reluctance of the court to interfere with the terms of the completed contract. In this instance, it does not seem just that the agreement should be set aside. The appellant entered into this agreement on the understanding that any legal obligation which he might have with regard to the respondent and her child would be fully satisfied by payment of the lump sum. This understanding should not be disregarded

> especially in view of the fact that many such agreements calling for the payment of lump sums do not acknowledge paternity and may even deny it.
>
> In my experience, extending back over 35 years, agreements such as this were always considered by the bar to be final settlements of putative fathers obligations, whether the paternity was admitted or disputed.

On a narrow point the court decided that the power to vary agreements could only extend to those agreements providing for periodic payments under which monies still remained payable. Such restrictions do not appear to be hinderance in the Alberta legislation as s. 43 of the Maintenance and Recovery Act reads very broadly.

VI. Onus of Proof

Generally the onus of proof is on the complainant, and under the Alberta Maintenance and Recovery Act, as under most provincial affiliation statutes, she has not met the onus unless there is corroborative evidence. "The onus of proof is clearly on the mother alleging paternity": as per Fisher Prov. J. in Robinson v. Mangoni [1974] 17 R.F.L. 117 at 119.

Where the presumption of legitimacy applies, the onus of rebutting it is on the person against whom it applies, usually the mother bringing the suit, but often also the husband of the mother. The standard of proof required in rebutting these presumptions was discussed above.

In the case of a paternity agreement in Alberta, it is clear from Hrycewich v. Hegi, supra, that the admission is a term of the contract, and the onus is on the party attempting to avoid the agreement to show that this term is avoidable on equitable grounds.

Where service ex juris is required, and there has been no submission to jurisdiction, it is clear that the complainant has the added onus of showing that if a maintenance order is made by an Alberta court, it will be enforced by the jurisdiction in which service was made: Bodnar v. Popovich, supra.

Where the case is sought to be re-opened under an application under s. 30 of the Maintenance and Recovery Act, which may be done on the discovery of new evidence or fraud, the applicant faces a different onus. In Re Mestnik and Maric [1973] 11 R.F.L. 277 (Ont. Prov. Ct.) both counsel agreed that in order for the applicant to succeed he must make out a "prima facie" case. In determining the meaning of prima facie, Wang Prov. J. referred to the definitions in Blacks Law Dictionary 4th ed., 1951, and Cross on Evidence, 2nd ed., 1963.

In Black prima facie is defined as:

> "Such as will suffice until contradicted and over come by other evidence; a case which has proceeded upon sufficient proof to that stage where it will support a finding of evidence to the contrary is disregarded."

In Cross the first sense given for prima facie evidence is:

> "The next degree of cogency is where the parties evidence in support of an issue is sufficiently weighty to entitle a reasonable man to decide the issue in his favour, although as a matter of common sense, he is not obliged to do so."

The Alberta Appellate Division determined the burden of proof that an application to re-open the proceedings had to meet in Smolak v. Necula [1974] 1 W.W.R. 1. The court held that on

an application to reopen the proceedings with fresh evidence the complainant does not need to show "due diligence", if it was evidence not in fact known and tactically disregarded at the first hearing, but need only show that the new evidence is of "a substantial nature, not necessarily decisive."

VII. Problems of Admissibility of Evidence

For many years the rule in Russell v. Russell [1924] (A.C. 687) was the major obstacle in affiliation proceedings. The effect of the rule was overcome by s. 19 of the Maintenance and Recovery Act and its predecessors and s. 6 of the Alberta Evidence Act and its predecessors. The rules intended to protect the legitimacy of children born in wedlock by preventing the spouses from adducing evidence of non-access or non-intercourse. As a result the Ontario Appellate Division held in Re Brown and Argue [1925] 3 D.L.R. 873 that an admission of paternity can not by itself be more than an admission of adulterous intercourse. The provision in our present Act, providing for any agreement to which the Director is a party to contain an admission of paternity or possible paternity, seems to override the holding in Re Brown and Argue. However, we are left with the question of the effect of such an admission where the mother is a married woman who was co-habiting with her husband at the time of conception, and where the husband--for reasons of his own--wants the child to be considered as his own. In such a case, would the husband be able to rely on the presumption of legitimacy to have the affiliation agreement set aside? The point does not appear to have been litigated.

Admissions of paternity made other than in written agreements may or may not be admissible as admissions depending on the circumstances. Where there is a suspicion of coercion as in Matheson v. Fredericks, supra, the admission is not admissible. However, Re Child Welfare Act: Brysh, supra, where no such suspicion existed the court received the evidence

of the welfare worker. In both of these cases, admissions by the father were involved. However, where the mother has made statements to another person implicating the alleged putative father these statements are not admissible in court--being merely heresay evidence. In Luther v. Ryan (1956) 3 D.L.R. (2d) 693 (Nfld. S.C.) the complainant relied for corroboration on the evidence of a friend which was summarized as follows:

> The witness for the complainant said that she knew that the complainant had been keeping company with the defendant, and that the complainant had told her that she had spent nights in his room. She said that the complainant later told her that she believed that she was pregnant and that the defendant was the father of her child.

The court held per Walsh, C.J., at p. 696:

> It is unnecessary for the purposes of this case to express any opinion as to whether complaints, freshly made, of improper attempts or acts of a person, who later becomes the defendant in an affiliation case, are admissible in evidence in such a case. The statement by the complainant to the other girl was not a complaint as to anything of that kind and is of no value even as a test of consistency of conduct. It is clear that the statement is hearsay and it is inadmissible as evidence, as are the the complainants later statements to the witness about her pregnancy and the paternity of her expected child.
>
> It may be well to point out that, in cases in which a complaint is admissible, it does not furnish the corroboration that are required by any statute applying or by the rule of practice at common law. Such corroboration can be found only in evidence possessing the essential quality of independence and the coming from an

> independent quarter. The witness whose testamony requires corroboration can not corroborate herself by her own statements or conduct.

However, while the mothers evidence is not admissible as corroboration of her own complaint, the putative father is a compellable witness and his evidence can provide the corroboration. There are no limitations on this testimony in court, although the point was raised whether he could be compelled to testify as to his own adultery if either he or the mother were married, since s. 8 of the Alberta Evidence Act provides that no witness in a action is liable to be asked or shall be bound to answer a question tending to show that he or she has been guilty of adultery. The point arose in Dmytrash v. Chalifoux, [1974] 16 R.F.L. 88. The Alberta Appellate Division held, per Clement J.A., that s. 8 of the Alberta Evidence Act is inapplicable to affiliation proceedings since s. 19(3) of the Maintenance and Recovery Act provides that a putative father is a competent and compellable witness "notwithstanding any other Act". Furthermore the privilege contained in s. 8 of the Evidence Act was held to be applicable only to cases where proof of adultery is the central issue. Therefore questions and answers tending to prove the adultery of the witness are admissible in affiliation proceedings.

In Goodwin v. MacMillan, (1967) 60 W.W.R. 47 (B.C.S.C.) a second question in a stated case was whether failure to introduce the written complaint of the complainant at the hearing as an exhibit and having it identified by the complainant, although she testified to having sworn out the complaint, made it inadmissible as evidence? Dryer J. relied on Rex v. Wheeler, [1945] 1 W.W.R. 61 to hold that the written complaint of the complainant need not be filed as an exhibit of the proceedings provided that something is done to make it a part of the record. Robertson J.A. said in the latter case at p. 69:

> If counsel had been told of the complaint and of the magistrate's intention to use it in evidence at the hearing and did nothing, the complaint might have been admissible as a record of the court (although I do not so decide) even though there is no provision in the Act (or in the Summary Convictions Act R.S.B.C. 1936 c. 371, which is applicable to proceedings under the Act [s. 13]) for keeping a record or minute of complaints: Rex v. Lewis (1941) 30 W.W.R. 575 . . ."

Dryer J. then held:

> The case before me also differs in that in it the complaint was read by counsel for the putative father and he questioned the complainant about it. These are stronger grounds for holding the complaint to be a record of the court than those which Robertson, J.A. said (without so deciding) might make a complaint part of the record and I hold that in the case before me the complaint was made part of the record. In my opinion this is sufficient and it is not necessary that the complaint be filed as an exhibit.

The complaint was thus validly admitted in evidence.

VIII. Corroboration

It appears that all provincial statutes except those of New Brunswick and Nova Scotia require that the mother's evidence be corroborated. Section 19(1) of the Maintenance and Recovery Act provides:

> An order shall not be made upon the evidence of the mother unless her evidence as to the paternity of the child is corroborated by some other material evidence implicating the putative father.

The requirements for corroboration have tended to be minimal in practice. There are however some requirements that must be met. Most recently, Hughes J. of the Saskatchewan Queen's Bench held in Re Hodge and Semeniuk (1974) 52 D.L.R. (3d) 252, that the statute required corroboration of some material particular of a complainant's evidence. The evidence of the complainant and of the respondent agreed in all respects except as to whether actual intercourse took place at the time. There were, however, some minor discrepancies. Hughes J. writes at p. 262:

> It is within the foregoing discrepancies in the evidence that the complainant suggested the denials of innocent facts are to be found which amount to corroboration within the meaning of the Act. I no not agree. The reference in the cases to which I have referred, is to a denial of a material fact which is found to exist other than with respect to the question of intercourse or no intercourse. . . . even if the evidence of the sisters was believed in total over that of the appellant in all of the foregoing instances where differences were found to exist, at one point in his judgment the acting judge stated that the sisters were very good witnesses and that he saw no reason to disbelieve them, the necessary element of materiality would remain lacking. Shortly stated, evidence does not exist to give a different complex to the proved opportunity of sexual intercourse on the occasion in question.

In Bartley v. Gall, [1925] 2 W.W.R. 669, Trueman J.A. of the Manitoba Court of Appeal held that mere evidence of opportunity of intercourse is of itself not corroboration. This was then and has remained settled law. In that case the cause of the fact of intercourse was alleged to have taken place during a visit to Killarney Park in September 1972. The defendant claimed that the visit took place in the previous July thereby putting himself outside of the time of possible paternity. However, as per Trueman J.A. at

p. 675:

> The complainant and her witnesses fixed the date of the visit to the park as September 23. The accused and Blackwood stated it to be July 15. The magistrate was free to believe that the accused was lying and that Blackwood was lying in collusion with him. A falsehood of this materiality is corroborative evidence for the complainant.

Fulton J.A. had stated at 670:

> If the defendant in this case had frankly admitted the visit to Killarney Park on September, 1923, but denied that anything of an improper nature between himself and the complainant had occurred, I would have had no hesitation whatever in holding that there was no corroboration. He, however, maintained in his evidence that the visit took place in the previous July. But it is remembered that the child was born in June, 1924, the significance of this evidence becomes at once apparent.

It is not necessary for the corroborative evidence to show that intercourse in fact took place, but more than mere opportunity must be established. As per Barkley v. Gall, denial of innocent material facts that are proven to be true may cast a guilty complexion on the defendant's evidence, and as such tends to show that the mother's evidence is probably true. The circumstances by themselves may show more than mere opportunity of intercourse. In Morrison v. Heide (1967) 59 W.W.R. 222, a steady dating relationship extending over 10 months was established and the complainant claimed that a sexual relationship existed from August until January of the next year. In December she informed him that she was pregnant, marriage plans were made, a marriage rehearsal was held and

a date for the wedding was set. The complainant's mother testified that her daughter occupied a downstairs suite in her house in which the defendant made her feel unwelcome. The defendant claimed that this did not amount to anything more than proof of opportunity for intercourse:

> It was strongly argued by the appellant's counsel that the evidence of the respondent's mother amount to no more than proof of opportunity for intercourse and that such evidence could not be regarded as corroborative. Further counsel submitted that Reverend Adam's evidence as to the couple's intention to marry could not be considered as corroborative of paternity.
>
> The trial judge was, however, entitled to consider all the evidence together as circumstantial evidence going to the question of corroboration of paternity.

MacLean J.A. then concluded at p. 222 quoting from Lord Goddard in Moore v. Hewitt [1947] K.B. 831:

> . . .we have a young man and a young woman who were sweethearts . . . that these young people were associating at different hours of the day and night, being in each others company for various periods of time, . . . It would, I think, be going far beyond any case which is every yet been decided to say that justices were not entitled to take the circumstances of the present case into consideration, more especially when there is no suggestion that the girl was associating with any one else.

It had been held in Lucyk v. Clark [1945] 1 W.W.R.

481, per Mackenzie J.A. of the Saskatchewan Court of Appeal, at p. 486 that: "That authority is not lacking to show that corroboration can properly be founded upon a probability, though not upon a suspicion". In this case a witness to the circumstances affording opportunity for intercourse made certain statements to the police officer serving the summons on him. The defendant then met with this witness and accompanied him to the office of his solicitor where the witness made a statement different from the statements previously made by him to the police. The witness was closely associated with the defendant and was only 15 years of age at the time. The court infessed from these facts the probability that the witness had been tampered with by the defendant, disclosing a guilty mind corroborative of his paternity of the child.

Lloyd v. Ribalkin (1968) 63 W.W.R. 193 (Alta. D.C.) was another case in which denial of an innocent fact was invoked by the court as firming the rule enunciated in Lucyk v. Clark and Morrison v. Heide that "evidence may in law be treated as corroborative if it attends to show that the mother's evidence is probably true. Proof beyond a reasonable doubt is not needed in such cases." In this case the complainant had given evidence of association in detail notwithstanding that much of it must have been painful and embarrassing to her. Her evidence of a meeting at the Calgary Inn with another couple, which was denied by the respondent, was affirmed by one of the complainant's witnesses. The respondent had denied any sort of friendly relationship with the complainant and this was found to be false by the evidence of the meeting at the Inn. This amounted to a false denial of innocent intimacy between the parties. Cullen J. quoted Lord MacLaren on this subject in Dawson v. McKenzie [1908] S.C. 648, 45 Sc. L.R. 473, at 650:

> There must be corroboration of the pursuer's evidence, yet when the effect of the defendant's false evidence, ie., his denial of circumstances which are other wise proved, is to show that there is something of which he

> ashamed, or something in the admission of which he conceived would throw suspicion upon himself, this would put a different complexion on what the court might otherwise be disposed to regard as innocent intimacy between the parties.

Where parties have lived together, the courts now appear to be inclined quite readily against any assumption that subsequent relations between the parties have the colour of innocent intimacy. In Kuchera v. Menduk (1970) 73 W.W.R. 508 (Alta. A.D.), the parties had lived together in 1962 and a child had been born of the union. The respondent also admitted that on numerous occasions since the parties had ceased living together there had been sexual relations, but denied any intercourse in the fore-part of 1967 when the conception of the twins now being sued for must have taken place, and furthermore denied that any intercourse had taken place since January 1965. In crossexamination, however, he was more vague as to the last time of intercourse stating only that it must have been 3 or 4 years before the trial date of February 17, 1969. He also admitted seeing the appellant several times thereafter, especially on one midnight visit at her apartment in early 1967. The appellant for her part claimed that sexual relations with the respondent took place in February, March and April of 1967. The complainant's counsel argued that the affiliation order should issue in view of the fact that the respondent had admitted having intercourse with the complainant approximately until the early part of 1966, and that he had called upon her on a number of occasions thereafter including in the early part of 1967. Smith C.J.A. expressly did not decide whether the previous illicit relationship was corroborative in the circumstances mentioned because he considered that the inconsistencies in the respondents evidence was sufficient independent corroboration:

> Of course the trial judge did not weigh the evidence which, in my opinion, is of a character which is capable of being corroborative because of his view that the evidence did not amount to corroborative evidence in law. It appears to me to be quite obvious and clear that had he considered that such evidence amounts in law to corroborative evidence he would have found that such evidence, in fact did not corroborate the appellant. Under these circumstances I do not consider that in reversing the decision of the trial judge we would be 'user being at the exclusive function of the tribunal of fact" (Hubin v. Reg., supra) If we allowed the appeal and made the order declaring the respondent to be the father of the child for the purposes of Pt. IV of the Child Welfare Act 1966.

There was, however, a strong dissent in this case by Johnson J. A. who considered that there was no corroboration of the fact of intercourse at the material time. He reviewed some of the evidence and concluded:

> This evidence was ample justification for the learned trial judge's finding that his evidence was 'confusing' and 'inconsistent' and even 'evasive'. He may have considered, although he did not say so, that the apparent lack of memory was feigned. A reading of all the evidence, however, does not justify such a finding that he lied as to the last time he saw the complainant after 1965 as would justify its use as corroboration of the complainants story.
>
> . . .if it cannot be said that there is any admission of a lie as to opportunity that could be construed as corroboration, there remains only the

> question whether a finding by the learned trial judge that this witness was a 'thoroughly untruthful dishonest witness' can be considered corroboration in this case. I am unaware of any case that has gone so far and, in my opinion, such an extension of the law of corroboration would be highly dangerous. Frequently the most honest persons are poor witnesses. If a judge makes a mistake as to the truthfulness of a witness before him then (and I am not suggesting that this was so in the present case), his error in compounded when such a finding is used to corroborate anothers evidence.

Johnson J. was of the opinion that inconsistencies and contradictions in the putative father's evidence should not amount to corroboration but that only a clear admission that his evidence was false or if the court is satisfied by clear evidence other than the putative father's or the complainant's that the evidence of the putative father at the relevant time was false:

> Such evidence should not merely be the judge's assessment of the witness' truthfulness based upon the observation of his conduct in the witness box. Such corroboration is not present in this case and I agree with a learned trial judge that there was not the corroboration the Act requires.

It is clear that evidence of a long association between the parties together with evidence of opportunity for intercourse meets the standard of probability of intercourse. In Re Chaskavichk and Runzer (1968) 2 D.L.R. (3d) 617 an affiliation order was made for this reason. The mother gave evidence that she dated the respondent over a period of 18 months and had sexual relations with him throughout that time and that she was already pregnant at the time they parted. There were no relations with other men. Her evidence as to this long association was corroborated

by the testimony of three independent witnesses. The appellant did not testify about his relationship with the complainant. There was evidence about opportunity for intercourse which was also corroborated. The appellant and respondent went to frequent dances but only once did the appellant actually escort the complainant to the dance. Johnson J. commented at p. 618:

> Perhaps this is the modern way of courting or perhaps chivarly is dead but I am convinced that if the appellant had honourable intentions towards the respondent he would have been most anxious to call for her and escort her to these social functions.

He then concluded at 619:

> I am fully aware of the fact that it has long been settled that mere evidence of opportunity for sexual intercourse alone does not provide the corroboration required in these cases. Here, however, there is evidence of a relationship, which, in my opinion, showed that for over a period of 18 months the appellant was in all probability merely using the respondent for his own purposes. These cases are to be decided on the balance of probabilities and not on evidence sufficient to convince the court beyond a reasonable doubt, the standard required by the criminal law.
>
> Considering the entire evidence I am satisfied that there was evidence corroborating the respondents story and accordingly the appeal is dismissed with costs.

An application for leave to appeal to the Court of Appeal was dismissed by that court. Culliton C.J.S. said at 620:

> Whether or not there is corroboration of the complainants evidence in a paternity application, is always a difficult problem. Such corroboration

> must, in most instances, be found from a careful review of all the circumstances surrounding the conduct and relationship of the parties. While evidence of mere opportunity for sexual intercourse if not enough, yet where there is evidence of opportunity together with a continued affectionate association between the parties and no evidence of the complainants association with other men, such evidence is in law capable of amounting into corroboration of the complainants testimony as required by the statute: Morrison v. Heide (1967) 59 W.W.R. 222; Moore v. Hewitt [1947] K.B. 831.

Re Chaskavickh and Runzer was applied in two Ontario cases. In Maric v. Mestnik [1974] 14 D.L.R. 267 the putative father completely denied that any sexual intercourse took place with the respondent after the first meeting in 1965. The respondent claimed to have had continual sexual intercourse with the appellant to September 1968, and disclosed her suspicions of pregnancy to the appellant at that time. Grosberg Co. Ct. J. found the respondent to be evasive in his testimony and preferred the evidence of the appellant. Among the corroborative evidence was the evidence of continual association and of opportunity and the judge applied Re Chaskavickh and Runzer to this effect. Three witnesses testified to the length of association. He comments at p. 270:

> I was particularly impressed with the evidence of a Mrs. Zedicka Janus. Her evidence alone is strong corroboration. She described the appellant's visits to the home and also saw the respondent leave frequently in the motor vehicle of the appellant. On one occasion the respondent was absent all night and did not return until the afternoon the next day. Mrs. Janus telephoned the appellant at the house he occupied to inquire about the respondent. The

> appellant said to her words to the effect, 'don't worry, we are going to get married'. She also corroborates that the respondent did not keep company with any other male.

In Re J. and D. [1974] 14 R.F.L. 317 the parties had lived together as man and wife for 5 years and a child was born of that union. Wang Prov. J. summarized the mother's evidence at p. 319:

> She testified that within a period of one year prior to that date [of birth], she had not had sexual relations with any one other than with the respondent. She continued to live with the respondent until November 1972. During this period of time, the respondent acted, 'as any normal father would' toward his son. 'He took him places. Took him to baseball games and took him out skating, did everything that a father would do. He was affectionate towards him. He loved him. He bought him toys. He bought him birthday gifts. He was like an ordinary father. We did talk about what he would be when he got older and that, and his father used to say that he would like him to be a lawyer like himself and would give him financial support if he every needed to go through school.'

This evidence was corroborated by the next door neighbour. The judge compared these facts to the facts of Re Chaskavickh and Runzer and held the corroboration to be sufficient. However, the father also disputed the timeliness of the application claiming that there was no evidence of an acknowledgement of paternity within the time limits specified by the statute. The judge found otherwise at p. 321:

> I believe there is such evidence, such as the evidence of M.G. who testified that in August 1972

> and in February 1973 (all within one year prior to 18th June 1973, the date of service on the respondent of the application) the respondent referred to the boy as 'my son'. Although there are times when an adult male refers to any boy in this manner without any intention of indicating that he was the actual father of the boy, the circumstances in which the words were used in the instances referred to in this case, do not suggest a casual relationship. In the evidence of Miss. J. she stated that the respondent took the boy home for Christmas 1972 and to the exhibition in the summer of 1973, all of which would be within the year ended 18th June 1973.

Corroborative evidence may also be had from the father's own hand. In Workun v. Nelson (1958) 26 W.W. R. 600 corroborative evidence was provided by unsigned letters from the putative father to the mother. The letter did not expressly acknowledge paternity, but did impliedly acknowledged some responsibility which the writer claimed to be unable to meet. The question of proving such a letter arose, and counsel for the father argued that it was not independent testimony implicating his client, being produced and identified by the mother herself. This was the view that had been affirmed by the Ontario Court of Appeal in Walker v. Foster (1923) 54 O.L.R. 214, although in that case the complainant was allowed to call further evidence to prove the letters through independent testimony. The Alberta Appellate Division, per McBride J.A., disagreed with the Ontario Court of Appeal and preferred the reasoning of the English Court of Appeal in Jeffrey v. Johnson [1952] 2 Q.B. 8:

> With respect, I approve and adopt the reasoning in Jeffrey v. Johnson, supra having no difficulty persuading myself that that decision enunciates the true principle. There, Denning, L.J. distinctly points out the evidence of the

> mother can be divided into two parts, first, the part in which she proved orally that the man was the father; secondly, that part in which she proves the hand writing of the letter. It is the first part of her evidence which needs corroboration. That corroboration is afforded by the contents. She does not prove the contents of the letter, she only proves the hand writing to be that of the man.

As to the validity of the contents, that was a question for the trial judge who accepted it as 'enough to satisfy me'. It is to be noted however, that the principle in Jeffrey v. Johnson sounds a note of warning which McBride J.A. drew attention to:

> While as a matter of prudence, it is desirable that the hand writing should be proved by other testimony than that of the woman, we are of opinion that her evidence alone, if credible, is sufficient for the purpose, and that letters, when thus proved may furnish the corroboration required by the statute.

McBride J.A. also noted that in any event the father is a competent and compelable witness to identify his own hand writing although this point was not decided in this case.

Circumstances relating to the willingness of the father to testify, to cross examine the mother--particularly with respect to relations with other men, and to submit himself to blood testing will bear on the courts judgment of the relative credibility of the complainant and the putative father and may amount to corroboration. In Re J. and D. [1974] 14 R.F.L. 317 (Ont. Prov. Ct.) the respondent did not take the stand and no evidence was given on his behalf by any witnesses. Wang Prov. J. referred to the judgment in Re Carleton and MacLean [1953] O.W.N. 271 at p. 722:

> Further, while the law protects MacLean in not allowing him to be crossed examined on his alleged adultery with Miss Carleton, it appears from the record that he was present in court when the evidence of the mother and her witnesses was taken and he refrained from taking the witness box and giving any evidence on his own behalf. That of itself can not be regarded as evidence of corroboration, but I might refer to a passage taken from Latey on Divorce, 14 ed.1952 at p. 406, as to what inference may be drawn from such conduct. The passage is as follows
>
> > 'If a party goes into the box and does not deny a charge or suggestion of adultery in chief, or without sufficient reason fails to go into the box and give evidence when he or she ought to do so, the circumstances will be taken strongly against such a party, and may be considered so far corroborative of guilt as to make what was previously a weak case against him or her into a strong one.'

Wang Prov. J. then continued:

> From these cases, I conclude that when the respondent stays out of the witness box of his own accord and refuses to give an explanation of circumstances which call for an explanation, the case of the applicant is made stronger.
>
> I should refer to the matter of a blood test. This was suggested by the court and agreed to by both parties. However during the adjournment of the case, I understand that

> the respondent refused to attend for such a test. It would seem to me that reluctance to do so further weakens his case.

It should be noted, of course, that in Alberta the father is a compellable witness and may be forced to testify. There is however the possibility that if the complainant's counsel does not call the putative father and the putative father does not voluntarily take the stand such conduct may lead to an inference against him.

Finally it should be noted that it is advisable for the trial judge to indicate what evidence he relies upon as being corroborative of the testimony of the mother of the child and express and expression as to its truth. This was the conclusion of Parlee J.A. in Matheson v. Frederick [1945] 2 W.W.R. 591 at 595.

IX. Compellability of Witnesses

S. 19 of the Maintenance and Recovery Act provides that both the complainant and the putative father are competent and compellable witnesses notwithstanding any other law or any other fact in all proceedings under this part, and that the putative father may be cross examined without notice and the complainant would nontheless not be bound by his testimony. Subsection 4, as amended S.A. 1973 c. 70 attempts to provide statutory protection against the use of such evidence in matrimonial proceedings, but it must be noted that this can only extend to provincial legislation and that proceedings under the Divorce Act, which is federal, will not be covered.

It was pointed out in Workun v. Nelson, supra, without deciding, that the father is a competent and compellable witness to identify his own hand writing to prove the letter

in question.

Section 8 of the Alberta Evidence Act provides that no witness in an action is liable to be asked questions tending to show that he or she has been guilty of adultery. The appellant in Dmytrash v. Chalifoux [1974] 16 R.F.L. 88 (Alta. AD.) had claimed the protection of this section of the Evidence Act to avoid being compelled to testify under s. 19(3) of the Maintenance and Recovery Act. The complainant in the case was a married woman. At the trial Belzil D.C.J. ordered him to answer and this is the point in appeal. Clement J.A. went into the legislative history of the privilege accorded by s. 8 of the Evidence Act and found that when proof of adultery was not the central issue upon which was dependent the relief sought in the proceedings, the privilege was not available. The privilege was accorded to witnesses in proceedings which could fairly be said to be "instituted in the consequence of adultery". His Lordship held that "the privilege reserved by section 8(1) of the Alberta Evidence Act in its original form would not have been available to Dmytrash, since affiliation proceedings under the Maintenance and Recovery Act have paternity of an illegitimate child as the first central issue: "not adultery alone which, whether or not it leads to conception, of itself is a matrimonial offense for which the innocent spouse if given a rememdy" (p. 91). Furthermore his Lordship was of the opinion that s. 9(3) and (4) of the Maintenance Act-providing that the act is to have effect "notwithstanding any other Act" and providing that such evidence is not admissible against the-party giving it in any matrimonial cause to which he is a party are conclusive in excluding the operation of s.8 of the Alberta Evidence Act from affiliation proceedings. He then adopted the rationale of the Manitoba Court of Appeal in Schmidt v. Hamilton [1946] 3 W.W.R. 610, quoting Bergman J.A. at p. 629:

> That being so, there is nothing shocking in the thought that the defendant should be compelled to give evidence against himself. In so doing he is not incriminating himself he is simply admitting a civil liability, something which can be compelled in every civil action.

X. Use of Blood and Other Genetic (Anthropological) Tests In Evidence

The value of blood tests is generally acknowledged to be only of negative or exclusionary value. As such they can only be favourable to an alleged putative father. However, if a defendant in an affiliation suit wishes to bring the results of blood tests into evidence he should be prepared to do so before the trial begins. In Re Carleton and MacLean [1953] O.W.N. 721 (H. Ct.) the evidence of the complainant was sufficiently corroborated to support an affiliation order against the putative father. An application was then made asking for an adjournment for the purpose of blood testing. The trial judge refused to allow the adjournment on the basis that the putative father had indicated that he was ready for trial and the request was not made until the mother had submitted all her evidence:

> It seems evident that if he was relying on such a defense he should have made some preparation to put that defense forward and he should have a medical witness present to give evidence and to submit to cross examination to show that such a test might be of some assistance to the court.

The response of the court to the value of blood tests has been somewhat varied in Canada. In Maric v. Mestnik [1974] 14 R.F.L. 267 (Ont. Co. Ct.) blood tests were submitted in evidence. Grossberg Co. Ct. said at 271:

> Counsel for the respondent [mother] invited me to attach significance to the blood tests. I wish to make it plain I have not considered the blood tests as having probative value. I submit it is common knowledge that the evidence provided by blood grouping is only of negative or exclusion value. Blood tests may be submitted as evidence that an alleged father is not or cannot be the father of the a child, but blood group finding cannot have probative value to identify a father, except perhaps in a rare case where it is conceded the father must be one of only two persons, and one of such persons is excluded on the basis of blood group evidence.

In fact, the exclusionary value of blood tests often results in non-conclusive findings. In Minaker v. Minaker and Raugust [1972] 4 R.F.L. 48 (Man. Q.B.) such a blood test was in fact non-conclusive. The evidence of Dr. Chown was reported in the case. Dr. Chown said:

> For certain exclusion a child must have an antigen which both the putative mother and the putative father lack. You read each column down, and you will see that in no case does Bret have an antigen (indicated by plus sign) which both Linda and Gilbert lack (indicated by minus sign).
>
> I would point out that this evidence in no way proves that Gilbert is the father of Bret. About one man in four (27.25%) in our population carries the blood group genes that the father of Bret must have.

In this case the petitioner contended that the court could draw an inference adverse to the respondent from her initial refusal to agree to blood tests. The court did not speak

to this point but found in favour of the respondent since the presumption of legitimacy was very strong and not rebutted by the evidence of the petitioner. However, although the blood test would normally work only in favour of the putative father, where such a blood test is refused it seems that the court will draw an unfavourable inference. In Re J. and D. [1974] 14 R.F.L. 317 the putative father did not take such a blood test. Wang Prov. J. commented:

> I should refer to the matter of the blood test. This was suggested by the court and agreed to by both parties. However, during the adjournment of the case, I understand that the repondent refused to attend for such a test. I would seem to me that reluctance to do so further weakens his case.

With respect to the putative father such a finding seems to me questionable in view of the effect that a blood test normally has. However, where the test is refused by the mother when requested to do so by her husband the effect of the test may be quite different. This was the case in Loewen v. Loewen [1969] 2 R.F.L. 230 (B.C.S.C.), an action for divorce on the basis of adultery in which the child was liable to be bastardized. Kirke Smith J. preferred the evidence of the husband. He said at p. 231:

> The wife's actions throughout indicate to me an effort on her part to conceal the fact of the childs birth, and the date of that birth from her husband. I am particularly impressed here by the fact that she was requested by her husband, and after the commencement of the litigation by his counsel to submit herself and the child for blood tests, and consistently refused to do so. For this refusal she gave no explanation at trial.
>
> The value of blood test in circumstances such as these are well

> established: See H. v. H., [1966] 1 All.E.R. 356, [1966] 1 W.L.R. 187 (sub. nom. Holmes v. Holmes, and F. v. F. [1968] 1 All. E.R. 242, [1968] 2 W.L.R. 190. The failure to accede to repeated requests for this scientific assistance and a lack of explanation for such refusal are to meet equivalent to a refusal to testify on this vital issue and warrant by drawing a strong inference of an adulterous relationship on the wifes part.

While these were divorce proceedings and no finding as to paternity was made, it would seem that a similar refusal by a complainant mother to submit to blood tests should be a favourable inference in favour of the allegedly putative father if he is willing to submit to such a test. It has not yet been decided whether such tests can be compelled of witnesses in paternity proceedings in Alberta. The English House of Lords wrestled with the issue in S. v. S., etc. [1973] 11 R.F.L. 142 in which two appeals were joined on the same question--whether in proceedings regarding the paternity or legitimacy of a child a blood test of the child should be ordered. It is to be noted that the central issue was whether the court should order the test on the child, not the parents, but the compellability of the latter to take a blood test was also discussed. Lord Reid said at page 147:

> I must now examine the present legal position with regard to blood tests. There is no doubt that a person of full age and capacity can not be ordered to under-go a blood test against his will. In my view, the reason is not that he ought not to be required to furnish evidence which may tell against him. By discovery of documents and in other ways the law often does this. The real reason is that English law goes to great length to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups

> d'etat but by gradual erosion; and often it is the first step that counts. So it would be unwise to make even minor concessions. It is true that the matter is regarded differently in the United States. We will refer to a number state enactments authorizing the courts to order adults to submit to blood tests. They may feel that this is safe because of their geographical position, size, power or resources or because they have a written constitution. But here parliament has clearly endorsed our view by the provision of s. 21(1) of the 1969 Act.

Lord McDermott approached the problem somewhat more broadly. Asking the question: "Has the High Court jurisdiction to order that a blood test be taken of a person who is sui juris and a party to the proceedings before it?" He replied at p. 150:

> . . .I think it must be accepted that, save where parliament has otherwise ordained, the High Court has no power to direct that a person who is sui juris is to have a blood test taken against his will. . . .but this lack of power on the part of the court to enforce its order physically without consent does not mean that the question under discussion must be answered in the negative; for much of the jurisdiction of the High Court can only be made effective by indirect means--such as a stay of proceedings, attachment or the treatment of a refusal is evidence against the disobedient party. This is very much the case in one branch of the jurisdiction of the High Court, namely, its inherent jurisdiction to make interlocutory orders for the purpose of promoting a fair and satisfactory trial. I do not think there is now any question about the existence of this jurisdiction, which I shall refer to as the 'ancillary jurisdiction'. It may be procedural in character, but it is much more than that. It is a jurisdiction which

> confers power, and the exercise of judicial discretion, to prepare the way by suitable orders or directions for a just and proper trial of the issues joined between the parties.
>
> . . .if such be the character of this ancillary jurisdiction, I know of no reason why the High Court should not in a proper case order a party who is sui juris to submit to a blood test. The probative value of such a test may vary according to the circumstances and the nature of the material issue; and the relief sought is only to be granted in the exercise of a judicial discretion. But today there can be no valid distinction in principle between a blood test and a clinical examination, and no doubt that one as well as the other may be a powerful factor in determining the truth. In my opinion, this jurisdiction exists and applies to blood tests. I would therefore answer this question in the affirmative.

Lord Morris of Borth-y-gest did not speak specifically to the narrow point. He stated more generally at p. 159:

> When the legitimacy issue is tried, the court will have to come to a conclusion on the basis of all the available evidence. If evidence as to blood grouping of the various persons involved could be valuable evidence and could assist the court to arrive at a correct conclusion, then on principle it would seem appropriate and desirable that the court should have that assistance.

Lord Hodson recited at p. 165: "No one doubts that so far as adults are concerned the law does not permit such an operation to be performed against the wishes of the patient". But in concluding he stated at page 168:

> I agree with the observations in the speech of my noble and learned friend Lord Reid, directed to the question of directions to be given by the court under s. 20(1) of the Family Law Reform Act, 1969 c. 46, and I think it follows for what I have already said that I am in general agreement with his opinion and that of my noble and learned friend, Lord McDermott on the whole topic under discussion.

In the result there does not seem to be any certainty as to whether or not the court has power to order blood testing of adults since Lord Reid and Lord McDermott were in direct conflict on this point and Lord Hodson agreed with both of them.

The Nova Scotia Children of Unmarried Parents Act, s. 41 provides for making a judicial order to submit to blood grouping tests, refusal of which by the mother permits the court to infer that the test would have established that the putative father could not be the father of the child.

An application for such an order was made by the defendant-appellant in Thompson v. Lampille (1975) 10 N.S.R. (2d) (N.S. Co. Ct.).

The County Court allowed the appeal from the order of the Family Court Judge after ordering blood-grouping tests which established that the appellant would not be the father.

The Act gave the court discretion to make the order, and McLellan C.C.J. did so on the grounds that the baby was born prematurely, and thus raised a doubt about the month of conception, coupled with allegation of the appellant that he was out of the province during other relevant periods.

While blood tests are generally only of exclusionary character and only in rare instances would provide affirmative

evidence of paternity, other anthropological evidence might provide generally positive evidence of paternity. Attempts have been made to bring forward the resemblance of the child to the alleged father as such evidence. The Ontario Divisional Court was faced with this question in Re Eisenmenger and Doherty (1924) 26 O.W.N. 323. In this case there was no material evidence to corroborate the evidence of the mother other than the likeness of the child to the appellant. The court rejected this evidence and allowed the appeal, stating:

> The only suggested evidence was some likeness in the child to the appellant, which, it was said, the County Court Judge perceived; but he could not have formed any reliable opinion, and no importance should be attached to his guess.

On the other hand, in a more recent case the English Family Division admitted such evidence. In C. v. C. [1973] 10 R.F.L. 36, photographs were advanced as evidence of resemblance. The official solicitor contended that such evidence should be excluded for its unreliability and lack of safety in admitting it. Latey J. admitted the evidence but with care as to its perils and the weight to attach to it. He relied on the decision in Russell v. Russell and Mayer (1923) 129 L.T. 151 in which Hill J. allowed evidence of resemblance to go to the jury while giving it a strong warning about acting on it, describing it as "very unsafe and conjectural". Although this decision is guarded in respect to such evidence, it should be noted from the evidence of Doctor Manock before the South Australia Law Reform Commission quoted earlier that such evidence may be scientifically well founded, and that there seems to be no reason not to place greater reliance on it when it can be independently varified.

XI. Effect of Affiliation Proceedings for Other Purposes

The question arises whether an affiliation order

or an admission of paternity can ever be conclusive of paternity for purposes other than those of the Maintenance and Recovery Act. The Ontario Appellate Division held in Re Brown and Argue [1925] 3 D.L.R. 873 held that in that case the admission of paternity amounted to no more than an admission of adulterous intercourse with this woman; and that, standing alone, was insufficient to establish that he was the father of the child in question.

The law reform division of the Department of Justice of New Brunswick found its Working Report, Status of Children Born Outside Marriage; Their Rights and Obligations and The Rights and Obligations of Their Parents, that affiliation proceedings do nothing for the status of the child and does not establish paternity for such purposes as inheritance. It continues, at p. 34:

> In addition, the affiliation proceedings employs the questionable practise of penalizing one of several 'possible progenitors'. The statute reflects the notion that it is wise to obtain an affiliation order an any cost, presumably in support of the historical aim of the statute to keep the child from becoming a public charge. This explains the low standard of proof required and demonstrates why an affiliation order is extremely poor evidence of paternity where property distribution comes into question.

There are, however, no Canadian cases in the period since 1965 which have dealt with this question.

XII. Effect of Other Statutes on Affiliation Proceedings

The effect of s. 8 of the Alberta Evidence Act has been discussed above under Compellability in the case of Dmytrash v. Chalifoux, supra.

The effect of the Alimonies Order Enforcement Act R.S.A. 1955 c. 12, s. 12, was discussed in Hrycewich v. Hegi (1964) 50 W.W.R. 237 in which Cormack D.C.J. held that this section was sufficient authority for him to hear the matter of setting aside a paternity agreement on such grounds as would have given a court power to avoid a contract.

The effect of the Juvenile Delinquents Act on affiliation proceedings was discussed in Berg v. Walker (1969) 70 W.W.R. 394 (B.C.S.C. Chambers). In this case the conception of the child born out of wedlock occurred while the putative father was 17 years of age and thus a juvenile within the definition of the Juvenile Delinquents Act, R.S.C. 1952 c. 160. The magistrate held that the Children of Unmarried Parents Act is a quasi civil statute intended primarily for the benefit of the child, and the Juvenile Delinquents Act was no bar to the making of an order against him under the Children of Unmarried Parents Act. The appellant sought to invoke the Juvenile Delinquents Act since at the date of conception he was subject to the jurisdiciton of the juvenile court. McIntyre J. dismissed the appeal. He said at page 395:

> Proceedings under the Children of Unmarried Parents Act are not criminal or punative proceedings. They are, in essence, civil proceedings designed to protect mothers and illegitimate children and to provide for their care and maintenance. The Juvenile Delinquents Act can not therefore be involved in this matter. There is no suggestion in the proceedings below of any breach of the law or any criminal act. All that has occurred is that the appellant has become the father of a child and as a consequence the law provides that he must make a contribution towards its maintenance. The Juvenile Delinquents Act is criminal legislation in the broad sense of the term designed to replace other penal statutes when juveniles are in breach of the criminal law but it was never intended to give a juvenile immunity to civil liability.

APPENDIX I

The information in the following compilation is correct to the end of 1973 except for Alberta and Prince Edward Island, both of which are up-to-date to the end of 1974.

ALBERTA	Maintenance & Recovery Act	complaint: s. 11 s. 13	District Court	s.8: Jud. dist. where child born out of wedlock, or where mother resides, or where putative father resides.	s. 14: within lifetime of putative father and 24 months after termination of pregnancy or birth OR 12 mths. of an act of acknowledgement by putative father OR 12 months after his return to Alta. if absent at end of 24 mths above.
COLUMBIA	Children of Unmarried Parents Act, RSBC 1960, c.52 as amended.	s. 7: complaint	Family and Children's Court	s. 2: residence or stay of the mother within the jurisdiction	s. 8 Within the lifetime of the put. father AND a) within 1 yr. of birth, or b) 1 yr. of act evidencing acknowledgement of paternity, or c) 1 yr. of return to province if absent at end of 1 yr. limit above.
MANITOBA	Child Welfare Act, RSM 1970, c. 80. Part III	s. 25: information by mother s. 30: information by mother, her parent, exec. off. of a society	Juvenile or Family Court: s. 24	s. 26; residence of father in Man. at commencement of proceedings.	s. 25: during pregnancy s. 30: within two years after birth or 2 yrs. after last maintenance payment OR 2 yrs after put. father's return to Man. where he left before or up to 6 mths. after the birth OR Where no pre-natal information laid and no director-approved agreement, Director may lay information at any time before child is 16.
BRUNSWICK	Children of Unmarried Parents Act, sub. nom. Illegitimate Children Act, RSNB. 1952, c.108 as amended	s. 3: information	Magistrate's Court County Court	s. 3: residence of mother within the jurisdiction	Information laid within one year of birth.
NEWFOUNDLAND	Children of Unmarried Parents Act, SN 1966, c. 63	s. 6: information s. 13: information	Magistrate or Family Court Judge	s. 6: no basis stated	s. 6: during pregnancy s. 13: "as soon as is convenient after the birth" including miscarriage, still-birth and legal abortion, the magistrate shall issue a summons for service on the alleged father

NOVA SCOTIA	Children of Unmarried Parents Act, RSNS 1967, c.32	s.2: information	Supreme or Family Ct.	s.2: residence of mother in jurisdiction. Marriage during pregnancy is a bar to affiliation: s.25	s. 13: with 2 yrs. of birth OR 2 yrs. of father's last maintenance payment OR 2 yrs of father's return to the province OR where mother and father cohabited and were not married and a child was born, two years after ceasing to cohabit.
ONTARIO	The Child Welfare Act, RSO 1970, c. 64	s. 53: application	Juvenile or Family Court	s. 51: no basis stated	s. 53: within 2 yrs of birth OR 1 yr from last act evidencing an acknowledgement of paternity OR 1 yr after his return to Ontario AND within the lifetime of the father
PRINCE EDWARD ISLAND	The Children's Act, RSPEI 1951, c. 23	s. 14:application	County Court Judge	s. 13(2): residence within the jurisdiction is NOT necessary	s. 14: Within the lifetime of the father AND 1 yr of the birth, Or lyr of any act acknowledging paternity, or 1 yr of his return to province Application by PROVINCIAL GUARDIAN can be made within 5 yrs of the birth.
SASKATCHEWAN	Children of Unmarried Parents Act, S.S. 1973, c. 12.	s. 3: filing affidavit	District Court or Magistrate	s. 2: residence of "complainant" s.9: subsequent marriage is a bar to the proceedings	s. 101: within 1 yr of birth or of last maintenance payment or of written admission of paternity or of return to province by father Where man and woman were cohabiting, woman may bring proceedings within 2 yrs of cessation of cohabitation.