A Road Map to the Admissibility of Expert Evidence: *White Burgess Langille Inman v. Abbott and Haliburton Co.*

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In the trilogy of recent cases dealing with expert evidence, namely *Moore v. Getahun,*[1] *Westerhof v. Gee* Estate[2] and *White Burgess Langille Inman v. Abbott and Haliburton Co. ("White Burgess)*[3] the Ontario Court of Appeal and the Supreme Court of Canada laid out important guidance as to how expert evidence should be approached. In this paper, we address the critical principles articulated by the Supreme Court of Canada in the *White Burgess* case.

I. Background

Our courts have been grappling with how to handle expert evidence for almost 800 years. Before the emergence of the modern expert witness, the courts dealt with the need for specialized knowledge by calling "special juries" in certain cases. In a 1351 case where the defendant was charged with selling bad food, the jury was composed of cooks and fishmongers. In matters regarding trade, merchants or members of a particular guild or trade would be called.[4]

The modern expert witness emerged in the second quarter of the nineteenth century and the battle of the expert witnesses was born.[5] Complaints about expert witnesses are not new. There has been an ongoing debate about the role of expert witnesses for over 150 years and, ironically, many of the same concerns being voiced today were being raised then.[6]

With the proliferation of expert witnesses in civil and criminal cases, expert evidence being advanced in new areas of science, sometimes dubious in quality and tendered under the mystique

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[1] 2015 ONCA 443
[2] 2015 ONCA 206
[3] 2015 SCC 23
[4] *The New Wigmore, A Treatise on Evidence,* R.D. Friedman, General Editor, Wolters Kluwer, Expert Evidence, Chapter 1, §.1.3
[5] *Ibid.*
[6] See for example W.L. Foster, *"Expert Testimony—Prevalent Complaints and Proposed Remedies"* (1897) 11 Harv. L. Rev. 169 at 170. In *Winanas v. New York & Erie R.R.,* 62 U.S. 88, 101 (1858) the Court noted, "Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount…wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved…" cited in *New Wigmore, supra.*

of science,[7] coupled with the increasing length of trials, judges began to express their concerns about the use of expert testimony at trials. This concern was perhaps best captured by Sopinka J. in *R. v. Mohan*:[8]

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

As a result of these concerns, both in Canada[9] and in the United States[10] new criteria were developed to control the admissibility of expert evidence. In *Mohan,* the Supreme Court of Canada, in the context of novel scientific evidence, developed four criteria for admissibility of this type of evidence, namely relevance, necessity, the absence of any exclusionary rule and that the witness was a properly qualified witness and introduced the cost-benefit principle.

It has been more than 20 years since the articulation of the *Mohan* rule and there have been a number of key developments since then, including the Osborne Report[11] and the Goudge Report.[12] The Supreme Court of Canada's decision in *White Burgess* is helpful in providing an updated framework for the admissibility of expert evidence. The decision is also important because it assimilates into the rules of admissibility, the expert's duty of impartiality, independence and absence of bias and explains how these concerns should be handled. It also resolves the debate as to whether these concerns should be addressed at the admissibility stage or during the witness's cross-examination.

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[7] *R. v. Beland* (1987), 36 C.C.C. (3d) 481 at p. 507, 43 D.L.R. (4th) 641 at 667, [1987] 2 SCR 398 (S.C.C.) at para 20 per LaForest J.

[8] [1994] 2 S.C.R. 9, 89 CCC (3d) 402 (SCC) at 411. For an excellent review of the issues, see Todd Archibald and Jeremy Fox "Examining the Reliability of Expert Soft Science Evidence in the Courtroom", 2014 Annual Review "of Civil Litigation (Thomson: Toronto, 2014) at 1-30. See as well *R. v. Orr*, 2015 BCCA 88 at paras 63-64

[9] *R. v. Mohan, supra.*

[10] Interestingly, the United States Supreme Court recalibrated its rules as to the admissibility of expert evidence in about the same time and moved away from the *Frye* standard to the more nuanced "Daubert standard" which required an inquiry into the scientific validity of scientific methods, and then again addressed the issue in *Kumho Tire Company, Ltd. v. Carmichael,* see *New Wigmore, opt. cit.* at s.1.1.

[11] *Civil Justice Reform Project: Summary of Findings & Recommendations*, 2007.

[12] Hon. Stephen T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Ottawa: Queen's Printer for Ontario, 2008).

II. The *White Burgess* Case

The appeal in *White Burgess* arose out of a professional negligence action brought by the shareholders of the company against the company's former auditors. After starting the lawsuit, the shareholders retained the Kentville office of the accounting firm of Grant Thornton LLP to carry out certain accounting tasks which revealed certain problems with the work performed by the previous auditors which led to financial losses to the shareholders. The auditors brought a motion for summary judgment to dismiss the claim. The shareholders retained a forensic accounting partner at Grant Thornton's Halifax office to review the relevant documents and to prepare a report of her findings. The auditors applied to strike out the affidavit filed by the expert on the grounds that she was not an impartial expert witness because the expert's firm could be exposed to liability if the firm's approach was not accepted by the court.

The motions judge agreed with the auditors and struck out the expert's affidavit because in his view the expert's evidence had to been seen to be independent and impartial to be admissible. The Nova Scotia Court of Appeal reversed the motions judge and held that the motions court judge erred as the test was actual bias or partiality and not the test adopted by the motions judge.

III. The Expert's Duty

In *White Burgess*, Cromwell J, speaking on behalf of the Court, noted that experts have a duty to the court to give fair, objective, and non-partisan opinion evidence. More importantly, experts must be aware of this duty and be able and willing to carry out this duty. If an expert does not meet this threshold requirement, then his or her testimony should be excluded. Once this threshold is met, any concerns about the expert's independence or impartiality should be considered in the overall weighing of the costs - benefits analysis. This analytical framework is subject to statutory or other provisions which may alter the rules of admissibility.[13]

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[13] *White Burgess* at para 10.

The Court stressed the need for independence and impartiality by expert witnesses and pointed out that expert testimony played an important role in miscarriages of justice.[14] The Court also referred to recent reports which examined the civil litigation process and which called for impartial and independent expert evidence.[15] As well, Justice Cromwell noted that it was clear that an expert's duty to the court is to provide an objective and unbiased opinion. He referred with approval to the elements of this duty outlined by Cresswell J. in the well-known English case of *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*[16] where the trial judge outlined the duties and responsibilities of expert witnesses, and stressed the need for expert testimony to be independent, objective and unbiased. Justice Cromwell also pointed out the description of the expert's role in civil proceedings as set out in the rules of a number of Canadian jurisdictions was simply a reflection of the common law duty that an expert witness owes at common law. The Court stressed that at the heart of the expert's duty lay three key concepts: impartiality, independence and absence of bias.[17]

IV. The *Mohan* Test

In the mid-1990's Canadian courts became concerned about some of the expert evidence that was coming before the courts which had dubious value. Moldaver J.A. (as he then was) framed the concerns as follows in *R. v. Clark,* a case involving the admissibility of the expert evidence of a criminal profiler:[18]

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

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[14] *The Commission on Proceedings Involving Guy Paul Morin Report,* by Honourable F. Kaufman and the report by the Honourable Stephen Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario*
[15] *Access to Justice Final Report*, by The Right Honourable the Lord Woolf, Master of the Rolls, July 1996, *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*; *Civil Justice Reform Project: Summary of Findings & Recommendations*
[16] [1993] 2 Lloyd's Rep. 68 (Q.B.), *White Burgess, supra*. at para 27.
[17] *R. v. Mohan supra.* at 20; *White Burgess, supra*. at para 32.
[18] (2004), 69 OR (3d) 321 (C.A.) at para 107.

In reaction to a deluge of experts entering, in particular, the criminal courts, the somewhat *laissez faire* attitude towards the admissibility of expert evidence[19] and the concern over the reliability of this evidence, in *R. v. Mohan*[20] the Supreme Court of Canada tightened the threshold requirement for admissibility and introduced a principled approach which required a closer scrutiny of the proposed evidence. The Court added new requirements to ensure reliability, in particular in cases involving novel scientific evidence. The Court emphasized the important function that trial judges played as "gatekeepers" to screen out proposed expert testimony, the value of which did not justify its admission due to risk of prejudice, confusion, time and expense from its admission.[21]

The Court also pointed out the risks involved with expert evidence, namely that the trier of fact will not decide the case on its merits but rather decide it as an "act of faith" in the expert's opinion. Further, expert evidence was resistant to effective cross-examination as counsel are not experts in the area and the expert relying on unproven material which is not subject to cross-examination. In addition, there was the risk of admitting "junk science", the risk that the "battle of the experts" distracted from the fact finding process, and the concern about the inordinate time and expense involved in expert evidence. The *Mohan* case was designed to address these dangers, but the case law was not explicit as to where the cost-benefit analysis fit and where other concerns such as the reliability of the expert evidence fit into the overall test.[22]

In *White Burgess,* the Court adopted the two step analysis proposed by Doherty J.A. in *R. v. Abbey*[23] with minor modifications. At the first stage, the threshold stage, the proponent must establish the requirements of admissibility. The considerations at this point are the four *Mohan* elements: relevance, necessity, absence of an exclusionary rule and a qualified expert. In addition, in the case of expert evidence based on novel or contested science, or science used for a novel purpose, the party calling the expert must show the reliability of the underlying science.

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[19] *R. v. Abbey,* [2010] 2 SCR v. at paras 72 and 74

[20] [1994] 2 SCR 9, 114 DLR (4th) 419; 29 CR (4th) 243; 89 CCC (3d) 402; 166 NR 245; [1994] CarswellOnt 66; AZ-94111042;EYB 1994-67655; JE 94-778; [1994] SCJ No 36 (QL); [1994] ACS no 36; 23 WCB (2d) 385; 71 OAC 241

[21] *R. v. Mohan supra* at 21; *White Burgess, supra*. at para 16.

[22] *R. v. Mohan supra* at 21, *White Burgess, supra*. at para 21.

[23] 2009 ONCA 624 at paras 76-77, leave to appeal refused, [2010] 2 SCR v.

Relevance at this phase means logical relevance. Evidence that does not meet the threshold requirements should be excluded.[24]

The second stage of the analysis is the discretionary gatekeeping or cost-benefit function. At this point in the *voir dire*, the judge balances the potential risks and benefits of admitting the evidence to determine whether the potential benefits of the testimony justify the risks involved in admitting the expert testimony. This balancing process has been described in a variety of ways, for example, Sopinka J. in *Mohan* described it as "reliability versus effect factor" and Binnie J. in *R. v. J.-L.J.,* called it "measured against the counterweights of consumption of time, prejudice and confusion".

This two stage process, now modified, was perhaps best described by Doherty J.A. in *Abbey* in as follows:[25]

> [76] Using these criteria [the *Mohan* criteria], I suggest a two-step process for determining admissibility. First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. For example, that party must show that the proposed witness is qualified to give the relevant opinion. Second, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence. This "gatekeeper" component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence… [citations omitted]

Doherty J.A. explained there was a distinction between the precondition to admissibility, the *Mohan* elements and the gatekeeper function. His separation of logical relevance from the cost-benefit analysis was done to first focus on the essential prerequisites to admissibility. At the second stage, the focus is on the factors relevant to the exercise of the trial judge's discretion. Justice Doherty described the second stage of the analysis as follows:[26]

> [89] In assessing the potential benefit to the trial process flowing from the admission of the evidence, the trial judge must intrude into territory customarily the exclusive domain of the jury in a criminal jury trial. The trial judge's evaluation is not, however, the same as the jury's ultimate assessment. The trial judge is deciding only whether the

[24] *White Burgess* at para 23, see also *R. v. J.-L.J.,* [2000] 2 SCR 600 at paras 33-35.
[25] *opt. cit.* at para76.
[26] *Ibid* at paras 89-90.

> evidence is worthy of being heard by the jury and not the ultimate question of whether the evidence should be accepted and acted upon.
>
> [90] The "cost" side of the ledger addresses the various risks inherent in the admissibility of expert opinion evidence, described succinctly by Binnie J. in *J.-L.J.* at para. 47 as "consumption of time, prejudice and confusion". Clearly, the most important risk is the danger that a jury will be unable to make an effective and critical assessment of the evidence. The complexity of the material underlying the opinion, the expert's impressive credentials, the impenetrable jargon in which the opinion is wrapped and the cross-examiner's inability to expose the opinion's shortcomings may prevent an effective evaluation of the evidence by the jury. There is a risk that a jury faced with a well presented firm opinion may abdicate its fact-finding role on the understandable assumption that a person labelled as an expert by the trial judge knows more about his or her area of expertise than do the individual members of the jury: *J.-L.J.* at para. 25.

V. The Expert's Duty and Admissibility

The Court then turned to the critical issue of how this duty translates into admissibility. In other words, should the duty go to admissibility or to the weight to be accorded to the expert's testimony? Justice Cromwell reviewed Canadian law, as well as the law from other jurisdictions, and concluded that the dominant view in Canadian cases was that lack of independence and the absence of impartiality went to admissibility in addition to the weight to be given to the testimony. He cited Binnie J.'s admonition in *R. v. J.-L.J.*[27] that expert evidence should be scrutinized at the time it is adduced and "not allowed too easy an entry" on the basis that at the end of the day, the frailties of the evidence would go to weight.

Cromwell J. concluded that the threshold requirement was whether the witness was unable or unwilling to fulfill his or her duty to assist the court. If the witness was not aware of the primary duty to the court or was not able to or was not willing to do so, then the testimony should be excluded. Justice Cromwell cautioned that imposing this additional threshold test was not intended to have trials become longer and more complex. In other words, the *Mohan voir dire* was not intended to be recanvassed during the witness's testimony.[28]

Generally, in the absence of a challenge to the expert's testimony that the expert recognizes and accepts the duty to the court overrides his or her obligation to the party calling the testimony will generally be sufficient to meet the threshold. If the expert testifies under oath to this effect, the

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[27] 2000 SCC 51, [2000] 2 SCR 600 at para 28.
[28] *White Burgess, supra*. at paras 46-47.

burden then shifts to the party opposing the admission of the expert testimony to show that there is a realistic concern that the expert's testimony should not be admitted because the expert was unable to and/or was unwilling to comply with this duty. If the party opposing the admission of the expert's evidence is successful in discharging this burden, then the burden shifts to the party calling to witness to show that the threshold requirements have been met on a balance of probabilities.[29]

The Court stressed the threshold requirement was not particularly onerous and that it was likely quite rare that the expert's testimony would be excluded on a *voir dire.* The key to this process was that the trial judge had to determine whether the expert was able and willing to carry out his or her primary duty to the court.[30]

Justice Crowell cautioned that the trial judge had to examine the nature and extent of the interest or connection that the expert had with the litigation. The mere presence of an interest or a connection will not automatically exclude the evidence. Considerations such as a direct financial interest, a very close family relationship with one of the parties, or a case in which the expert would likely incur professional liability if the expert's testimony was not accepted were situations that should cause concern. As well, an expert who becomes an advocate for the party calling him or her, is clearly unwilling and/or unable to carry out the duty the expert owes to the court. The Court stressed that is only in "very clear cases" where the expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence that the testimony will be excluded.[31]

When looking at the expert's relationship with a party, the question is not whether a reasonable observer would conclude that the expert witness is not independent. Rather, the issue is whether the witness is unable or unwilling to discharge his or her overriding duty to the court to provide fair-minded, unbiased and objective evidence. If there is a finding of such inability or unwillingness, then it should lead to the exclusion of the expert's testimony.[32]

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[29] *Ibid* at para 48.
[30] *Ibid* at para 49.
[31] *ibid.*
[32] *Ibid* at para 50.

Cromwell J. rejected the appearance of bias test and emphasized that the question is whether the facts lead to the conclusion that the expert is unable or unwilling to carry out his or her primary duty to the court. This assessment will be a factual one and will be a matter of degree.

VI. The Revised *Mohan* Test

In the past, the concerns about an expert's independence and impartiality have been addressed under different elements of the *Mohan* test. In the first stage of the *Mohan* analysis, Justice Cromwell concluded that an expert's duty to the court and his or her willingness and ability to comply should be addressed initially under the "qualified expert" component of the *Mohan* analysis. By addressing the issue at this stage of the inquiry, it ensures that the courts will focus on the important risks that are associated with biased experts.[33]

If the proposed expert testimony is found to meet the initial threshold, in the second stage of the *Mohan* framework, exercising the gatekeeper function, the trial judge may still take into account concerns about the expert's independence and impartiality. At this stage, relevance, necessity, reliability and absence of bias play a role in the cost-benefit analysis. The judge must be satisfied that potential benefits of the case are not outweighed by the risks associated with the expert evidence.[34]

Since under the Nova Scotia rules, the judge hearing a summary judgment motion cannot weigh evidence, the judge had to be satisfied that the proposed expert testimony met the threshold test in the first stage of the *Mohan* test but generally a judge should not engage in the cost-benefit analysis.[35] However, in Ontario, under rule 20.04(2.1) the court has the power to weigh evidence. Therefore a judge on a summary judgment motion addressing the issue of the admissibility of expert testimony is obliged to address the cost-benefit analysis under *Mohan.*

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[33] *Ibid* at para 53.
[34] *Ibid* at para 54.
[35] *Ibid* at para 55.

In the end result, because the expert witness had testified that she owed an ultimate duty to the court in testifying, there was no basis for concluding that the expert was not able to and not willing to provide the court with fair, objective and non-partisan testimony. Therefore, the motions judge made a palpable and overriding error in excluding her evidence at the summary judgment motion.[36]

VII. The Post White Burgess Decisions

Several courts have recently considered the *White Burgess* case. In *Smysniuk v Stecyk*[37] the issue involved a business evaluator's testimony and whether the proper foundation had been laid for the evidence. Given that the witness had identified the inquiries he had made, as well as the background materials he had reviewed, and that his actions were in accordance with standards used by business valuators, the Saskatchewan Court of Appeal found that this was not a case in which the expert's testimony should have been excluded under the *White Burgess* principles. Similarly, in *Eli Lilly Canada Inc. v. Apotex Inc.*[38] the court found no indication of partiality or bias. In *R. v. Tang*[39] the Ontario Court of Appeal reiterated that in most cases, the suggestion that the expert witness lacks independence or impartiality will go to the weight of the evidence and not its admissibility. The determination of whether an expert's prior connection with an investigation should disqualify the witness must be made with the full context of the specific facts of the case. In *Tang* the expert's evidence related to tracing funds, and the few areas of opinion evidence given by the expert did not have consequence to the central issues.

VII. Conclusion

In the aftermath of the Supreme Court of Canada's decision in *White Burgess* we now have a clear blueprint as to how the admissibility of expert evidence should be approached. We also have clear guidance as to how alleged partiality by an expert witness should be handled. Challenges to the testimony of the proposed expert on the basis of alleged partiality, lack of independence and bias can now be brought at the admissibility stage and such issues are no

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[36] *Ibid* at para 62.
[37] 2015 SKCA 54 (CanLII) at para 151.
[38] 2009 FC 320 (CanLII) at para 165.
[39] 2015 ONCA 470 (CanLII) at para 7.

longer reserved to cross-examination. The modified *Mohan* test is also helpful in understanding the test and the evidentiary burden on the *voir dire* into the admissibility of the expert's testimony.

The intriguing question that emerges is with the increasing scope of challenge to expert testimony, whether in civil cases, we are moving toward *in limine* type of hearings to deal with the admissibility of expert evidence. These types of hearings at the outset of the trial are not uncommon in criminal trials[40] and are also used in the United States. The benefits to resolving questions as to the admissibility of expert testimony at the outset of jury trials are many. It minimizes the time that juries are excluded from court during the admissibility hearings. An early resolution of these issues will make jury trials more efficient. As well, counsel will know, early in the proceedings, the case they have to meet. It will be interesting to watch future developments in this area of trial practice.

[40] Section 645(5) specifically grants this power to the trial judge in a case tried with a jury.