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THE ADMISSIBILITY OF EXPERT OPINIONS
IN CANADA COURTS

Clifton Beech*

I. INTRODUCTION

EXPERT opinions are crucial in the search for truth during litigation, but they are also dangerous.1 Over the last two decades, Canadian trial judges have become “gatekeepers,” and the rules of admissibility and evidence have been “progressively tightened.”2 This progression seeks to guarantee expert opinions that do not meet basic standards will not be admitted as evidence.3 Experts who provide opinions have a duty to the courts to “provide fair, objective and non-partisan assistance.”4 If an expert is unable to fulfill that duty, then he is not qualified to give an opinion.5

The dangers of expert opinion evidence have been known for over a century: “Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.”6 Historically, potential bias was combated by a dual-mode system where jurors with experience relevant to the facts were selected and individual experts were invited as

* J.D. Candidate, SMU Dedman School of Law, 2016.
2. Id.
3. Id.
4. Id. at para. 2; GLENN R. ANDERSON, EXPERT EVIDENCE, 227 (Markham eds., 3rd ed. 2014) (“[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world”); National Justice Compania Naviera S.A. v. Prudential Assurance Co., [1993] 2 Lloyd’s Rep. 68 (Q.B.) at para. V.B.1 (Eng.) (“Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation”). Similar definitions for the duty of an expert witness could be found across Canada before White Burgess Langille Inman. See, e.g., ANDERSON, supra; Queen’s Bench Rules (Sask.), R. 5-37; Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 4.1.01(1); Rules of Court, Y.O.I.C. 2009/65, R. 34(23); Ontario Rules of Civil Procedure, R. 53.03(2.1); British Columbia Supreme Court Civil Rules, R. 11-2(2).
friends of the court to give neutral testimony. This unbiased system eventually faded away and “professional expert witnesses” became common. Over time, the dangers of expert opinions have become more recognized. The risk that a jury will “be unable to make an effective and critical assessment of the evidence” has since been acknowledged, as well as the danger that the trier of fact may defer to the expert opinion instead of using it to evaluate the facts. Furthermore, the risk of “attornment to the opinion of the expert” is increasingly present due to the challenge that attorneys who are not advanced in a particular field face when cross-examining experts of that field. The goal has always been for the jury to make an “informed judgment” and not make a decision as an “act of faith” based on the expert opinion.

II. THE TEST TO DETERMINE ADMISSIBILITY

Since the mid-1990’s, the Supreme Court of Canada has created and clarified the requirements for admissibility of opinion evidence, assuring “reliability . . . and emphasize[ing] the important role that judges should play as ‘gatekeepers’ to screen out proposed evidence whose value does not justify the risk of confusion, time, and expense that may result from its admission.” The Supreme Court of Canada’s decision in R. v. Mohan established a basic two-prong test for determining the admissibility of expert opinion evidence: (1) the proponent of the evidence must establish four threshold requirements of admissibility; and (2) if the threshold requirements are met, then the trial judge must undertake a cost-benefit analysis to determine “whether otherwise admissible expert evidence should be excluded because its probative value [is] overborne by its prejudicial effect.”

7. See Learned Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40 (1901).
9. See White Burgess Langille Inman, 2015 SCC 23, at para. 18; R. v. J.-L.J., 2000 SCC 51, at para. 25 (Can.) (addressing the risk of admitting “junk science”); id. at para. 55 (Can.) (addressing the risk of not subjecting unproven material that the expert relied on to cross-examination); R. v. Mohan, [1994] 2 S.C.R. 9, 10 (Can.) (recognizing the risk of a “contest of experts” distracting the jury); Masterpiece Inc. v. Alavida Lifestyles Inc., 2011 SCC 27, at para. 76 (recognizing the risk of the waste of time and money due to expert opinions).
11. Mohan, [1994] 2 S.C.R. 10 (“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.”).
ADMISSIBILITY OF EXPERT OPINIONS

A. The Proper Qualifications Component

Courts consider the following four factors to determine whether, as a matter of law, expert opinion evidence is admissible: relevance, necessity in assisting the trier of facts, absence of an exclusionary rule, and a qualified expert.\(^{17}\) In cases that involve contested or novel science, courts consider reliability as an additional factor.\(^{18}\) These requirements provide the threshold for admissibility—any evidence that does not satisfy them should be excluded.\(^{19}\) Evidence that does pass the threshold, by contrast, moves on to the “second discretionary gatekeeping step.”\(^{20}\)

1. Relevance

Expert opinion evidence, like all forms of evidence, must be relevant.\(^{21}\) The court in *White Burgess Langille Inman* adopted *R. v. Abbey*’s definition of relevance as “logical relevance.”\(^{22}\) To be logically relevant, evidence must “have a tendency as a matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely than it would be without the evidence.”\(^{23}\)

2. Necessity in Assisting the Trier of Facts

Courts previously considered whether evidence would be “helpful to the trier of fact.”\(^{24}\) This was no high-hurdle and, while courts did not seek to impose a strict standard for necessity, “helpful” was deemed too lenient.\(^{25}\) The standard has now evolved to require evidence “be necessary in the sense that it provide[s] information which is likely to be outside the experience and knowledge of a judge or jury.”\(^{26}\) The evidence provided by the expert “must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature.”\(^{27}\)

3. Absence of an Exclusionary Rule

Because expert witness opinions are similar to any other form of evidence, any expert opinion must follow all exclusionary rules, statutory or otherwise, to be admissible.\(^{28}\)

\(^{17}\) Id.
\(^{18}\) Id. at para. 23.
\(^{19}\) Id. (emphasizing necessity as a threshold requirement should be retained); but see *D.D.*, 2000 SCC 43, at para. 57 (posing that a higher standard might be necessary); D. M. PACIOCCO & L. STUESSER, THE LAW OF EVIDENCE, 209–10 (7th ed. 2015); *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; and *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.
\(^{23}\) *Abbey*, 2009 ONCA 624, at para. 82.
\(^{25}\) Id.
\(^{26}\) Id. (internal quotation marks and citation omitted).
\(^{27}\) Id.
\(^{28}\) Id. at 25.
4. Qualified Expert

An expert’s qualification requirements stem from his or her duties as a witness: impartiality, independence, and absence of bias. Impartial is defined as “reflect[ing] an objective assessment of the questions at hand.” An independent opinion is “the product of the expert’s independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation.” Unbiased means that the opinion “does not unfairly favour one party’s position over another.” “The acid test is whether the expert’s opinion would not change regardless of which party retained him or her.” That an expert is retained and paid by one of the parties to litigation is not independently sufficient to undermine any of these qualities. But a proposed expert witness who “is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert,” and any testimony from that witness is therefore inadmissible.

For an expert’s bias to be so severe as to render his or her opinion inadmissible, “the expert’s lack of independence [must] render him or her incapable of giving an impartial opinion in the specific circumstances of the case.” “[A]pparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court.” The relevant inquiry, then, is not “whether a reasonable observer would think that the expert is not independent” but “whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.”

An expert witness must “be aware of [his] primary duty to the court and be able and willing to carry it out.” An expert witness’s impartiality and independence should not be presumed absent a challenge, but “the expert’s attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.” If the expert testifies to this effect, the burden is on the opposing party to show “a realistic concern that the expert’s evidence should not be received because the expert is unable and/or unwilling to comply with that duty.” If the moving party does so, the burden then returns to the party calling

30. Id.
31. Id.
32. Id.
34. Id.
35. Id. at para. 53.
36. Id. at para. 36 (citing Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16, at para. 106).
37. Id. at para. 50.
38. Id.
39. Id. at para. 46.
40. Id. at para. 47.
41. Id. at para. 48.
the evidence to establish a “balance of probabilities” that this factor is met.\textsuperscript{42} If the party is unable to do so, the evidence will be excluded for lacking impartiality or independence.\textsuperscript{43}

Trial judges should rarely determine an expert is not impartial and independent.\textsuperscript{44} The mere existence of a relationship or connection between a party and expert witness is not alone sufficient.\textsuperscript{45} But a “direct financial interest” in the outcome of the trial or a “very close familial relationship with one of the parties” may be of some concern.\textsuperscript{46} That said, exclusion at the threshold stage “should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence” and “[a]nything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.”\textsuperscript{47}

5. Reliability

General acceptance of the science at issue is only one of the factors to be considered by courts.\textsuperscript{48} Novel science is subject to “special scrutiny.”\textsuperscript{49} Canadian courts have looked to United States law and \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.} as a guide for determining whether an expert’s opinion is reliable in the context of disputed or novel science.\textsuperscript{50} For that reason, courts consider factors such as: (1) “whether the theory or technique can be and has been tested;” (2) “whether the theory or technique has been subjected to peer review and publication;” (3) “the known or potential rate of error or the existence of standards;” and (4) “whether the theory or technique used has been generally accepted.”\textsuperscript{51} Therefore, a case-by-case analysis “is necessary in light of the changing nature of our scientific knowledge.”\textsuperscript{52}

B. Discretionary Cost-Benefit Analysis

Meeting “the basic threshold does not end the inquiry” into the admissibility of expert opinions.\textsuperscript{53} The second prong defers to the trial judge’s discretion “in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prej-

\begin{itemize}
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id. at para. 49.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} J.-L.J., 2000 SCC 51, at para. 34.
\item \textsuperscript{49} Mohan, [1994] 2 S.C.R. 9, at para. 32.
\item \textsuperscript{51} J.-L.J., 2000 SCC 51, at para. 33 (citing Daubert, 509 U.S. at 593–94).
\item \textsuperscript{52} Id. at para. 34.
\item \textsuperscript{53} White Burgess Langille Inman, 2015 SCC 23, at para. 54.
\end{itemize}
udicial effect.”

As gatekeeper, the judge should again take “the expert’s independence and impartiality into account when weighing the evidence” at this step. This discretion should be based on a cost-benefit analysis. Before White Burgess Langille Inman, cases would emphasize cost-benefit analysis but not explain how it fit into the overall test. But the court in White Burgess Langille Inman noted that the goal of the test was “to ensure that the dangers associated with expert evidence are not lightly tolerated” and that “[m]ere relevance or ‘helpfulness’ is not enough.”

It is this discretionary step where “the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks.” Judges should use a sliding scale consisting of the four Mohan factors in which an expert’s opinion must first meet a minimum threshold of admissibility and then continue to be weighed against “competing considerations in admitting the evidence.” The ultimate decision for the judge to make is whether “the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.”

C. CONCLUSION

White Burgess Langille Inman answered two questions about the admissibility of expert opinion: “Should the elements of this duty go to admissibility of the evidence rather than simply to its weight? And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?” The answer to both is yes: “a proposed expert’s independence and impartiality goes to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty.” If the threshold requirements are satisfied, the trial judge will consider any remaining concerns “as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping

54. Id. at para. 19.
55. Id. at para. 54.
56. Id. at 19.
59. Id. at para. 24. The discretionary process has been described differently in different opinions. See Mohan [1994] 2 S.C.R. at 21 (reliability versus effect); J.-L.J., 2000 SCC 51, at para. 47 (“relevance, reliability and necessity” are “measured against the counterweights of consumption of time, prejudice and confusion”); Abbey, 2009 ONCA 624, at para. 76 (“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”).
61. Id. at para. 33.
62. Id. at para. 34.
Courts thus apply a two-part test to determine whether expert opinion evidence is admissible. First, courts consider whether threshold admissibility requirements—relevance, necessity, absence of an exclusionary rule, properly qualified expert, and, sometimes, reliability—have been met. Concerns about an expert meeting his or her duty to the court, in particular his or her independence and impartiality, should be weighed as part of the qualified expert factor. Second, and only if the threshold requirements have been met, courts carry out their role as "gatekeeper" and weigh all other factors, including a second look at the impartiality and independence of the expert opinion, to decide whether to admit and how to weigh the evidence presented.

64. Id.
65. Id. at para. 19.
66. Id.
67. Id. at para. 53.
68. Id. at para. 54.