

Gatekeepers to Playing in the Sandbox

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At the 2015 6-Minute Municipal Lawyer Seminar, Mary Flynn-Guglietti and Paul Stagl presented “The Rules for Playing in the Sandbox”, chronicling the recent decisions of the Ontario Superior Court and Ontario Court of Appeal in *Moore v Getahun*¹, as well as providing examples of what can happen when the rules governing expert witnesses are not followed. While the Supreme Court of Canada (the “SCC”) dismissed the application for leave to appeal in *Moore v Getahun*², the jurisprudence surrounding expert witnesses continues to evolve, including with the Supreme Court of Canada decision in *White Burgess Langille Inman v Abbott and Haliburton Co.* (“*White Burgess*”)³. The following is a summary of recent case law relating to the rules governing expert witnesses and, in particular, the gatekeeper role of the trial judge respecting the admissibility of expert evidence.

White Burgess Langille Inman v Abbott and Haliburton Co. (“*White Burgess*”)

White Burgess focuses on the test for admissibility of expert evidence, and in particular, the need for independence and impartiality as a threshold question for such admissibility.

In its 1993 decision in *R v Mohan*⁴ the SCC set out the criteria governing the admission of expert evidence:

“Admission of expert evidence depends on the application of the following criteria:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule;
- (d) a properly qualified expert.”⁵

¹ *Moore v Getahun*, 2015 ONCA 55, 124 OR (3d) 321 [*Moore*].

² *Getahun v Moore*, 2015 CarswellOnt 14067 [*Getahun*].

³ *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, 2 SCR 182 [*White Burgess*].

⁴ *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 419 [*Mohan*].

The SCC in *White Burgess* confirms that these four elements form the threshold to admissibility of expert evidence, characterizes the trial judge as the gatekeeper to the admissibility of expert evidence, and elaborates on how the special duty of expert witnesses to provide fair, objective and non-partisan assistance to a court or tribunal fits within this framework.

In *White Burgess* the shareholders of a corporation initiated an action against the former auditors of their company claiming professional negligence. The action was started after the shareholders retained a different accounting firm, the Kentville office of Grant Thornton, which indentified problems with the previous auditors' work. The former auditors brought a motion for summary judgment seeking to dismiss the shareholders' action. In response, the shareholders submitted the affidavit of a forensic accounting partner from the Halifax office of Grant Thornton. The former auditors applied to strike out the accountant's affidavit on the basis that she had a personal financial interest in the matter, disqualifying her from testifying. More specifically, the action related to a difference of opinion between two accounting firms, including Grant Thornton. Thus, Grant Thornton could be exposed to liability if its approach was not accepted by the court. Consequently, the accountant, as a partner of Grant Thornton, could be personally liable giving her a personal financial interest in the outcome of the action.

The Nova Scotia Supreme Court held that the affidavit must be struck in its entirety, finding that the accountant had a conflict of interest rendering her evidence inadmissible.⁶ The Nova Scotia Court of Appeal overturned the decision of the Nova Scotia Supreme Court, finding that the motions judge improperly adopted and applied the test that an expert "must be, and be seen to be, independent and impartial"⁷.

As discussed in "The Rules for Playing in the Sandbox", expert opinion evidence constitutes an exception to the rule that witnesses may only testify to facts, not opinions: "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is

⁵ *Ibid* at paras 17-21.

⁶ *Abbott and Haliburton Co. v. White Burgess Langille Inman*, 2012 NSSC 210, 219 ACWS (3d) 508.

⁷ *Abbott and Haliburton Co. v. White Burgess Langille Inman*. 2013 NSCA 66, 226 ACWS. (3d) 750.

therefore allowed to state his opinion about such matters, provided he is expert in them.”⁸ In *White Burgess*, the SCC elaborates upon the risks of admitting expert evidence set out in *R v Mohan*. The risks identified include:

- expert evidence will be misused and will distort the fact-finding process;
- the decision-maker will be unable to make an effective and critical assessment of the evidence;
- the decision-maker will attorn to the opinion of the expert;
- admitting “junk science”; and
- distraction of the decision-maker by a contest of experts.

The SCC characterizes trial judges as the “gatekeepers” who must screen out proposed expert evidence “whose value does not justify the risk of confusion, time and expense that may result from its admission”.⁹ The gatekeeping role is articulated by the SCC as being a two-step process:

1. The gatekeeper must consider the four criteria for admissibility set out in *R v Mohan*; and
2. The gatekeeper must balance the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks.

The special duty of expert witnesses to the court or tribunal is closely related to this framework to be applied by the gatekeeper. This duty is clearly articulated in Rule 4.1.01(1)(a) of the Rules of Civil Procedure¹⁰ as follows:

It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these Rules,

- (a) to provide opinion evidence that is fair, objective and non-partisan;

⁸ *White Burgess*, *supra* note 3 at para 15.

⁹ *White Burgess*, *supra* note 3 at para 16.

¹⁰ *Rules of Civil Procedure*, RRO 1990, Reg 194, s 4.

- (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
- (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Impartiality, independence and absence of bias are recognized by the SCC in *White Burgess* as three related concepts underlying the formulation of the duty of expert witnesses:¹¹

- The expert's opinion must be impartial – it must reflect an objective assessment of the questions at hand;
- The expert's opinion must be independent – it must be the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation; and
- The expert's opinion must be unbiased – it must not unfairly favour one party's position over another.

These factors will have an impact on the probative value of the expert's opinion but do not represent insurmountable barriers to the admissibility of the expert's evidence.¹² The SCC recommends that the gatekeeper consider the expert's impartiality, independence and bias/objectivity with the "qualified expert" element of the *R v Mohan* criteria. A witness who is unable or unwilling to fulfil an expert's duty to the court or tribunal is not properly qualified and, when balancing the potential risks and benefits of admitting the evidence, those risks associated with biased experts may be considered.¹³ What must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case.¹⁴ Where an expert cannot give fair, objective and non-partisan opinion evidence, such evidence should not be admitted.¹⁵

¹¹ *White Burgess supra* note 3 at para 32.

¹² *Ibid* at para 36.

¹³ *Ibid* at para 53.

¹⁴ *Ibid* at para 36.

¹⁵ *Ibid* at paras 2, 10, 46.

Thus, the SCC concludes that an expert's lack of independence or impartiality can form the basis for exclusion of their evidence, but can also be considered in relation to the weight to be given to the evidence. The threshold for exclusion is where it cannot be established, on a balance of probabilities, that the expert can and will carry out their primary duty to the court or tribunal.

Once an expert attests or testifies under oath to their recognition and acceptance of their duty to the court or tribunal, the burden is on the party opposing the admission of the expert's evidence to show there is a realistic concern that the witness is unable or unwilling to comply with his or her duty. If this is established, the burden moves to the party proposing to call the evidence to establish, on a balance of probabilities, that the duty can and will be met. If this is not achieved, the evidence or those parts of the evidence that are tainted by a lack of independence or impartiality should be excluded. The SCC also indicates that the party seeking to oppose the admission of the expert's evidence should establish the basis for exclusion by way of independent evidence as "imposing this threshold requirement is not intended to and should not result in trials becoming longer or more complex"¹⁶. In other words, cross-examination of the expert witness should not be used as a fishing expedition in an effort to establish bias or lack of independence or impartiality. Rather, the necessary evidence should be produced independently.

The SCC emphasizes that exclusion of evidence altogether will likely be rare and "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"¹⁷. Where the evidence does not meet the threshold for exclusion and is admitted, the gatekeeper must still take concerns about the expert's independence and impartiality into account in weighing the evidence.¹⁸ Examples of circumstances where an expert's interest in the litigation or relationship to the parties can lead to exclusion of their evidence include:

- Where the expert has a familial relationship to counsel or one of the parties;
- Where the expert is also a party to the litigation;

¹⁶ *Ibid* at para 47.

¹⁷ *Ibid* at para 49.

¹⁸ *Ibid* at para 54.

- Where a substantial part of the expert’s remuneration is contingent upon success at trial;
- Where an expert may incur liability depending on the result of the trial;
- Where an expert assumes the role of an advocate for a party.¹⁹

Conversely, the fact that an expert has been retained, instructed and paid by a party to an adversarial proceeding does not necessarily undermine the expert’s independence, impartiality and freedom from bias.²⁰ Additionally, the appearance of impartiality plays no part in the test for admissibility²¹ and an expert may rely on the work of other professionals in reaching his or her own opinion.²²

The SCC’s decision in *White Burgess* has not yet been cited in any decision of the Ontario Municipal Board (the “**Board**”), however, the Board’s approach to the exclusion of expert evidence generally appears to be consistent with the principles established in *White Burgess*. In the cases considered in “The Rules for Playing in the Sandbox”, the Board effectively held that the threshold had not been met as, under the circumstances, the experts could not fulfil their duty to the Board to provide impartial, independent and unbiased evidence:

- In *Jeff and Patricia Avery v The City of Sault St. Marie*²³ the Board refused to qualify Mr. Breen as an expert in part because he lacked impartiality – he had engaged in a course of conduct indicative of a person who was an advocate for a certain position.²⁴
- In *Eugene Knapik v Kiran Cheema & Damandeep Aujila*²⁵ and *Gino Fiorucci v City of Toronto*²⁶ the Board refused to qualify Mr. Godley as an expert as he lacked

¹⁹ *Ibid* at paras 37, 49.

²⁰ *Ibid* at paras 32, 49.

²¹ *Ibid* at para 57.

²² *Ibid* at para 61.

²³ *Re Avery* (2015), 87 OMBR 1.

²⁴ *Ibid* at para 52.

²⁵ *Knapik v Cheema* (2013), 79 OMBR 328.

²⁶ *Re Fiorucci* (2015), 86 OMBR 136.

independence, impartiality and objectivity – he lived in the neighbourhood and was entrenched in his position that severances should not be permitted in the area.^{27 28}

Anderson v Canada (Attorney General) (“Anderson”)

In one of the first cases to consider *White Burgess*, the Newfoundland and Labrador Supreme Court in *Anderson*²⁹ held that the expert witness could provide testimony and evidence for only two of the expert’s three proposed issues. As detailed below, however, the basis for this decision by the court was not the witness’s ability to meet the expert’s duty of impartiality, independence and objectivity, but that on one issue the witness did not have the necessary qualifications to satisfy the *R v Mohan* test.

Anderson concerns class action law suits wherein the class members are aboriginal people who attended schools, dormitories or orphanages in Newfoundland and Labrador. The plaintiffs’ sought to have the expert witness, Dr. Enns, qualified in three distinct areas of expertise:

1. the treatment, needs, care, protection and education of residents in residential schools across Canada before and after 1949, including the standard of care of the day;
2. the history and development of federal knowledge, policies and oversight of this system throughout Canada, including Newfoundland and Labrador after 1949; and
3. the concept of "total institutions", the knowledge of Canada of such institutions and, in particular, the adverse impact on residents of residential schools.

In determining that Dr. Enns was only qualified to provide expert testimony in respect of some of these issues, the judge considered the basis for Dr. Enns expertise, including the sources of his knowledge. In particular, the judge did not appear satisfied that Dr. Enns had sufficient

²⁷ *Knapik v Cheema supra* note 25 at para 60.

²⁸ *Re Fiorucci supra* note 26 at paras 16-20.

²⁹ *Anderson v Canada (Attorney General)*, 2015 NLTD(G)138, 259 ACWS (3d) 298 [*Anderson*].

knowledge specific to Newfoundland and Labrador. While it was recognized that “a person with knowledge of the Indian Residential School System could use that knowledge as a springboard to become an expert on the [facilities in Newfoundland and Labrador]”³⁰, the judge concluded that the requisite level of expertise had not been achieved and that the evidence in this respect was to be excluded. Interestingly, the following factors were considered by the court in coming to this determination:

- **Timing of report:** The first draft was prepared “in just two months” and the report itself was completed over two years later in May 2015.³¹
- **Number of documents reviewed:** Dr. Enns reviewed some 133 documents whereas 7500 relevant documents had been produced after May 2015 when the report was completed.³²
- **Types of sources cited:** The judge held that “a properly qualified expert should be able to comment on other social science disciplines that are necessarily incidental to the expert’s field of expertise”. Dr. Enns did not refer to the work of the expert historians retained by the parties to the action and referred to institutions that were not the subject of the action.³³

The judge held that, with respect to those issues where Dr. Enns was qualified, he would be able to discharge his special duty to the court to provide fair, objective and non-partisan assistance to the court and that merely because he was hired by different plaintiffs in respect of Indian Residential Schools in 2004 does not mean that he is unable to discharge this special duty. (para 39) Thus, it was held that Dr. Enns could provide expert testimony on two narrowed issues as follows:³⁴

³⁰ *Ibid* at para 15.

³¹ *Ibid* para 15.

³² *Ibid* para 16.

³³ *Ibid* para 17.

³⁴ *Ibid* para 41.

1. the treatment, needs, care, protection and education of residents in Indian Residential Schools before and after 1949, including the standard of care of the day; and
2. the history and development of federal knowledge, policies and oversight of the Indian Residential School System.

The weight to be given to Dr. Enns evidence, however, “remained to be seen”³⁵.

Anderson is one of many cases that have considered *White Burgess* and its process for assessing the admissibility of expert evidence. *Anderson* and other cases demonstrate that courts and tribunals alike will assess each element of the *R v Mohan* test and for each claimed area of expertise prior to allowing an expert’s testimony.

Although the SCC did not allow the appeal in *Moore v Getahun*, it is clear that the role of expert witnesses and the admissibility of their testimony will continue to be a significant and evolving issue, both in the courts and at the Ontario Municipal Board.

³⁵ *Ibid* para 45.