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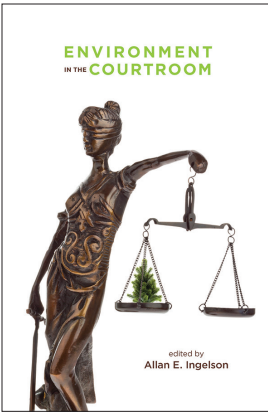
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## ENVIRONMENT IN THE COURTROOM

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## Admissibility of Expert Evidence and Costs

MARC McAREE, ROBERT WOON, AND ANAND SRIVASTAVA\*

### Introduction

The Supreme Court of Canada's judgment in *R. v. Mohan*<sup>1</sup> is the current leading authority on the admissibility of expert evidence. In *Mohan*, the court held that expert evidence should be admitted if the expert evidence is:

- relevant;
- necessary in assisting the trier of fact;
- absent of any exclusionary rule; and
- given by a properly qualified expert.<sup>2</sup>

The party tendering the expert bears the burden of meeting the four requirements in *Mohan*.<sup>3</sup> The *Mohan* test applies in both criminal and civil cases.<sup>4</sup>

### RELEVANCE

Relevance of an expert's evidence is a question of law to be decided by the presiding judge.<sup>5</sup> The evidence must not only be related to a fact in issue but also must be valuable to the trial. As described in *McCormick on Evidence*<sup>6</sup> and cited in *Mohan*, the value of the evidence must outweigh its impact on the trial process. In *Mohan*, the court held:

Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it

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involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.<sup>7</sup>

The ability for expert evidence to confuse or overwhelm a jury was questioned in *R. v. Melaragni*<sup>8</sup> and *R. v. Bourguignon*<sup>9</sup> and accepted in *Mohan* as being a factor in assessing the relevance of that evidence.<sup>10</sup>

#### **NECESSITY IN ASSISTING THE TRIER OF FACT**

An expert's evidence must be necessary in order to "provide information 'which is likely to be outside of the experience and knowledge of a judge or jury.'"<sup>11</sup> This includes instances where the trier of fact is enabled by expert evidence to appreciate technical matters.<sup>12</sup> Likewise, the standard may also be described with a reverse onus—such that an ordinary person is unlikely to correctly judge the facts of the case if unassisted by an expert.<sup>13</sup>

Evidence is expert evidence not solely because it is presented by a well-qualified expert or presented with heavy technical wording. If an issue before the jurors does not require an expert, an expert's evidence may incorrectly influence the trier of fact.<sup>14</sup>

#### **ABSENCE OF ANY EXCLUSIONARY RULE**

Expert evidence is not automatically admissible if it meets the other three criteria in *Mohan*. The expert evidence must also be admissible under the general law of evidence. If there is any applicable exclusionary rule, the expert evidence will be excluded despite being relevant, necessary, and provided by a properly qualified expert.<sup>15</sup>

#### **PROPERLY QUALIFIED EXPERT**

A properly qualified expert is one who "is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify."<sup>16</sup> Expertise is a relatively modest status that is achieved when the "expert witness possesses special knowledge and experience going beyond that of the trier of fact."<sup>17</sup>

In the 2015 case *White Burgess Langille Inman v. Abbott and Haliburton Co. (White Burgess)*, the Supreme Court of Canada added an evaluation of the proposed expert's independence and impartiality to the "properly qualified expert" requirement of the *Mohan* test.<sup>18</sup> A discussion of the Supreme Court of Canada's analysis is set out below under "Credibility of Evidence."

## The Gatekeeper Function

In *Mohan*, the Supreme Court of Canada underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should nonetheless be excluded based on a cost-benefit analysis.<sup>19</sup> *Mohan* did not explicitly address how the cost-benefit analysis fits into the overall analysis of expert evidence.

In 2009, the Ontario Court of Appeal's judgment in *R. v. Abbey* (*Abbey*) introduced clarity by dividing the assessment of expert evidence into two stages.<sup>20</sup> First, the party advancing expert evidence must meet the four requirements set out in *Mohan*. Second, if the requirements are met, the trial judge must decide if the evidence is "sufficiently beneficial" to the trial process.<sup>21</sup>

Justice Doherty described the function of the trial judge at the cost-benefit analysis stage as one of a "gatekeeper."<sup>22</sup> The Court of Appeal described the gatekeeper portion of the analysis as follows:

The "gatekeeper" inquiry does not involve the application of bright line rules, but instead requires an exercise of judicial discretion. The trial judge must identify and weigh competing considerations to decide whether on balance those considerations favour the admissibility of the evidence. This cost-benefit analysis is case-specific and, unlike the first phase of the admissibility inquiry, often does not admit of a straightforward "yes" or "no" answer. Different trial judges, properly applying the relevant principles in the exercise of their discretion, could in some situations come to different conclusions on admissibility.<sup>23</sup>

Within this framework, the Supreme Court of Canada's concerns in *Mohan* about the jury being confused or overwhelmed can be considered outside of the four requirements. The trial judge must undertake his or her own discretionary cost-benefit analysis.<sup>24</sup> The costs and inherent risks of the admissibility of expert evidence include prejudice, confusion, and the consumption of time.<sup>25</sup> The benefit of the expert evidence is that the trier of fact is properly informed about an issue on which he or she does not have expertise. In addition, the trial judge must also consider the effect on the proper administration of justice of excluding expert evidence.<sup>26</sup>

In *White Burgess*, the Supreme Court of Canada adopted, with minor adjustments, the two-step process of qualifying experts as outlined in *Abbey*.<sup>27</sup> Justice Cromwell, on behalf of the court, held that:

Consistent with the structure of the analysis developed following *Mohan* ... the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.<sup>28</sup>

In the Ontario Court of Appeal's decision *Bruff-Murphy v. Gunawardena* (*Bruff-Murphy*),<sup>29</sup> the court reemphasized and provided guidance on the trial judge's gatekeeper role respecting proposed expert witnesses. In *Bruff-Murphy*, the plaintiff was injured in a car accident. The plaintiff sought to exclude evidence from one of the defendant's experts on the basis that the proposed expert was biased and that the proposed expert's report in essence existed to destroy the plaintiff's credibility.

At trial, the judge concluded that the defendant's expert could testify but was not permitted to testify on certain sections of his report. The trial judge also concluded that the expert could in no way testify about the plaintiff's credibility. However, the expert crossed the line and called into question the plaintiff's credibility.<sup>30</sup> Additionally, the expert had "torqued" testing results in order to produce "results that supported his conclusion."<sup>31</sup>

The Ontario Court of Appeal held that the trial judge appeared to have assumed that once the expert was qualified to give testimony, the trial judge's gatekeeper role ended. The Court of Appeal rejected this approach as an error of law and held:

Where, as here, the expert's eventual testimony removes any doubt about her independence, the trial judge must not act as if she were functus. The trial judge must continue to exercise her gatekeeper function. After all, the concerns about the impact of a non-independent expert witness on the jury have not been eliminated. To the contrary, they have come to fruition. At that stage, when the trial judge recognizes the acute risk to trial fairness, she must take action.<sup>32</sup>

The Court of Appeal outlined several courses of action that the trial judge could have taken, including advising counsel that he was going to give either a mid-trial or final instruction that the expert's testimony would be excluded in whole or in part from the evidence, or could have asked for submissions from counsel on a mistrial.<sup>33</sup> The Court of Appeal concluded:

The point is that the trial judge was not powerless and should have taken action. The dangers of admitting expert evidence suggest a need for a trial judge to exercise prudence in excluding the testimony of an expert who lacks impartiality before those dangers manifest.<sup>34</sup>

The Court of Appeal ordered a new trial. While the court acknowledged that generally the failure to object to a civil jury charge is "fatal to a request for a re-trial on appeal based on misdirection or non-direction," the expert's testimony resulted in a miscarriage of justice and a new trial was warranted.<sup>35</sup> Further, the court held that "given the importance of a trial judge's on-going gatekeeper role, the absence of an objection or the lack of a request for a specific instruction does not impair a trial judge's ability to exercise her residual discretion to exclude evidence whose probative value is outweighed by its prejudicial effect."<sup>36</sup>

The Court of Appeal's decision in *Bruff-Murphy* reinforces the importance of the trial judge's gatekeeper role in assessing expert evidence. The gatekeeper role continues even after an expert has been qualified to testify and does not depend on opposing counsel's objection or request for specific instruction.

## **Junk Science**

In recent years, some commentators have suggested that courts give too much weight and rely too heavily on expert evidence. The Supreme Court of Canada in *Mohan* stated:

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.<sup>37</sup>

Justice Sopinka also stated:

In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is

subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert.<sup>38</sup>

This was a stark warning to litigation counsel and the courts to judiciously assess their reliance on expert evidence. Courts have a role as gatekeeper to ensure junk science or pseudoscience is not entered into evidence at trial.

The approach taken by courts on junk science has largely been shaped by jurisprudence in the United States, specifically the *Daubert* trilogy. The *Daubert* trilogy comprises three US Supreme Court decisions: *Daubert v. Merrel Dow Pharmaceuticals Inc.*,<sup>39</sup> *General Electric Company v. Joiner (Joiner)*,<sup>40</sup> and *Kumho Tire Company Ltd. v. Carmichael (Kumho)*.<sup>41</sup>

In *Daubert*, the US Supreme Court considered the applicability of the “general acceptance” test with *Federal Court Rules* when admitting expert scientific testimony. The court concluded that the “general acceptance test” was not a precondition for the admission of scientific evidence under the *Federal Rules of Evidence*. Rather the *Federal Rules of Evidence* required a preliminary assessment about “whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” The court identified a non-exhaustive list of factors for the assessment:

- whether the theory or technique can be (and has been) tested;
- whether the theory or technique has been subjected to peer review and publication;
- the known or potential rate of error and the existence and maintenance of standards controlling the technique’s operation; and
- whether the theory or technique has been generally accepted by a relevant scientific community.

At issue in *Joiner* was the applicable standard of review for evidentiary rulings for expert scientific evidence. The US Supreme Court held that the “abuse of discretion” was the proper standard of review.

In *Kumho*, the US Supreme Court upheld the *Daubert* approach. This included “technical” or “other specialized” knowledge, such as engineering. The court reaffirmed that the list of factors in *Daubert* was not meant to be exhaustive and may not be applicable in all cases. The court identified examples



where a subject has not been peer reviewed for lack of interest or where general acceptance may not be applicable because a discipline itself lacks reliability.

The Supreme Court of Canada in *R. v. J.-L.J.* adopted the *Daubert* list of factors.<sup>42</sup> The court cited *Mohan*, where the Supreme Court held that novel scientific theory or technique should be subject to “special scrutiny” and must meet a basic threshold of reliability.<sup>43</sup> Notably, in the criminal law context, the court in *R. v. J.-L.J.* was determining the admissibility of expert evidence relating to novel sexual assault testing. The court held that although the testing may be useful in therapy, it was not sufficiently reliable for use in a court of law.<sup>44</sup>

The Court of Appeal in *Abbey* offered a non-exhaustive broader list of questions that may be relevant and helpful in evaluating whether novel science expert evidence should be accepted:

- To what extent is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?
- To what extent is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?
- What are the particular expert’s qualifications within that discipline, profession or area of specialized training?
- To the extent that the opinion rests on data accumulated through various means such as interviews, is the data accurately recorded, stored and available?
- To what extent are the reasoning processes underlying the opinion and the methods used to gather the relevant information clearly explained by the witness and susceptible to critical examination by a jury?
- To what extent has the expert arrived at his or her opinion using methodologies accepted by those working in the particular field in which the opinion is advanced?
- To what extent do the accepted methodologies promote and enhance the reliability of the information gathered and relied on by the expert?
- To what extent has the witness, in advancing the opinion, honoured the boundaries and limits of the discipline from which his or her expertise arises?
- To what extent is the proffered opinion based on data and other information gathered independently of the specific case or, more broadly, the litigation process?<sup>45</sup>

Environmental litigators should be aware of *R. v. J.-L.J.* and *Abbey*, especially where evolving and novel science is involved. The cases highlight why litigators

must prudently examine the methodologies of opposing counsel's experts as well as their own experts. Litigators should determine if the expert is using widely accepted methods. Litigators should review the case law to assess if other courts have relied on the methods or techniques used by other experts in similar cases. Litigators need to be confident in their experts and the experts' methods and techniques.

## **Credibility of Evidence**

With respect, the Court would find it very difficult to accept an explanation with regard to the cause of the landfill off-site odour from a lay person with absolutely no background or experience in waste management, landfill or environmental studies, over that of a well-known, knowledgeable and experienced waste management and landfill expert.<sup>46</sup>

An expert's experience and qualifications must provide a solid foundation and support for his or her credibility at trial. However, an expert's credibility is not infallible. Experts can lose their credibility faster than they earn it. Losing credibility reflects badly on the expert, the litigator who retains the expert, and the litigant who retains the litigator.

### **INDEPENDENCE/BIAS**

Experts are paid by the party that retains them. Naturally, experts want to ensure that their client is satisfied in order to continue with the current work and to secure future work. Lawyers are often instrumental in selecting and retaining expert witnesses. Some have been known to "shop around" for opinions they prefer and to apply gentle influence on the expert. Undoubtedly, these practices can impact an expert's credibility, with the court leaving the litigant to bear the brunt of the expert's loss of or perceived loss of independence.

In the context of a prosecution, the case of *R v. Commander Business Furniture Inc*<sup>47</sup> presents an example of a complete loss of credibility by the defendant's consultant who was tainted by the influence of the defendant (not counsel). The defendant operated a facility that spray painted office furniture. Neighbouring residents made numerous complaints about odours to the then Ontario Ministry of the Environment. The defendant retained a consultant to assess the odour problem and provide potential solutions. The defendant tried to rely on the consultant at trial to establish a due diligence defence. The Ontario Court of Justice found that the defendant instructed the consultant

to change its recommendations.<sup>48</sup> The defendant wanted the consultant to recommend less expensive measures, though it was known by the defendant and consultant that the effectiveness of these less costly methods was limited. The court found that the expert's testimony, premised on the final report, was not a "credible professional opinion" given what the same consultant had said in earlier draft reports.<sup>49</sup>

In *WCI Waste Conversion Inc. v. ADI International Inc. (WCI Waste)*, both defendants' experts lost credibility because of the defendants' influence in the preparation of the experts' reports.<sup>50</sup> The plaintiff and the defendant started a joint venture to construct and operate a composting facility. The plaintiff filed an action when the defendant later terminated the agreement and took over the facility. The defendant retained experts to opine on the design and operation of the facility.

Regarding one of the defendant's experts, the court found that the evidence contradicted the expert's claim that only he had authored his report. The court concluded that the defendant was "intricately involved in outlining, drafting, revising, and editing" the expert report.<sup>51</sup> The court stated, "[a]n expert report is only of benefit to the Court if it is independent and unbiased and is not unduly influenced by someone having a pecuniary interest in the contents of that report."<sup>52</sup>

After reviewing the draft reports of the other defendant's expert, the court found that the final report was altered to eliminate any matters that would reflect negatively on the defendant or positively on the plaintiff.<sup>53</sup> Comparisons of the draft reports indicated that a significant number of paragraphs were deleted or altered after the defendant reviewed the reports. The court concluded:

... when the party engaging the expert seeks to control or direct or unduly influence the conclusions reached in the expert's report, that party has diminished the credibility and reliability of the report and of itself. When an expert succumbs to such influences, he or she compromises their own integrity and the report rendered is of little or no value.<sup>54</sup>

The challenge with the use of "hired guns" and "opinions for sale" was discussed in the *Osborne Report*.<sup>55</sup> Specifically, Justice Osborne wrote:

The issue of "hired guns" and "opinions for sale" was repeatedly identified as a problem during consultations. To help curb expert bias,

there does not appear to be any sound policy reason why the Rules of Civil Procedure should not expressly impose on experts an overriding duty to the court, rather than to the parties who pay or instruct them. The primary criticism of such an approach is that, without a clear enforcement mechanism, it may have no significant impact on experts unduly swayed by the parties who retain them.<sup>56</sup>

As a result, Ontario's *Rules of Civil Procedure* were amended based on Justice Osborne's recommendation to expressly impose a duty on experts.<sup>57</sup> The duty requires the expert to provide fair, objective, and non-partisan opinion evidence. The duty of the expert owed to the court is paramount to any obligation owing by the expert to his or her client/employer. In addition, the *Rules* now require that the expert acknowledge his or her duty to the court in his or her report.<sup>58</sup>

In *R. v. Inco*, the Ontario Superior Court of Justice held that the employment relationship or status of an expert vis-à-vis a party did not determine independence or impartiality.<sup>59</sup> In *Inco*, the defendant was charged with discharging untreated mine effluent into a watercourse. The trial judge declined to qualify an expert called by the then Ministry of the Environment for lack of independence with the Crown. On appeal, the court held that, before a witness can be rejected based on lack of independence, the court should conduct a *voir dire* hearing.<sup>60</sup> At the hearing, a judge can determine if the expert is in a co-venture with the party, or is acting as an advocate for the party.<sup>61</sup> A trial judge can also assess an expert's opinion based on how it is tested under cross-examination, the assumptions used, the disclosure of material facts, and the completeness and level of expertise.<sup>62</sup>

The court in *Abbey* did not address whether an expert's duty relates to admissibility of the evidence rather than simply to its weight. Further, if the expert's duty to the court goes to admissibility, there was no consensus about whether a threshold admissibility requirement existed respecting independence and impartiality.

In *White Burgess*, the Supreme Court of Canada added an evaluation of a proposed expert's independence and impartiality to the "properly qualified expert" element of the *Mohan* framework.<sup>63</sup> The court further held that there is a threshold admissibility respecting a proposed expert's duty of independence and impartiality to the court.

The independence and impartiality threshold is not onerous. The court in *White Burgess* held that "it will likely be quite rare" that a proposed expert's

evidence would be ruled inadmissible for failing to meet it.<sup>64</sup> The court in *White Burgess* was careful, however, to state that “the expert’s independence and impartiality should not be presumed absent challenge.”<sup>65</sup> Rather, if an expert’s independence and impartiality are not challenged, the expert’s evidence will be admissible once an expert attests or testifies on oath recognizing and accepting their duty to the court.<sup>66</sup>

A party who opposes the admission of expert evidence on the basis of bias must establish a “realistic concern” that the witness is unwilling or unable to comply with the duty of an expert.<sup>67</sup> The party proffering the expert evidence must rebut this concern on a balance of probabilities to satisfy the *Mohan* test.<sup>68</sup>

While an interest in or connection with the litigation does not automatically render the proposed expert evidence inadmissible, the court must consider whether the relationship or interest would result in the expert being unable or unwilling to carry out his or her primary duty to provide fair, non-partisan, and objective assistance.

In the criminal decision *R. v. Livingston*, the Crown sought to admit the evidence of Mr. Gagnon, a retired member of the Ontario Provincial Police (OPP) who was asked to participate in an OPP investigation as a technical analyst.<sup>69</sup> While Mr. Gagnon’s role initially was limited to providing technical analysis of seized hard drives, his role quickly expanded. Mr. Gagnon provided technical input for an important Crown witness, attended an interview to provide assistance if technical issues arose, provided advice about the investigation’s legal strategy, provided advice about a data preservation request, played a central role in processing an accused’s Blackberry, recommended an additional charge be laid against the defendants, and participated in the execution of a search warrant. During a *voir dire*, the Ontario Court of Justice concluded that “[i]nstead of maintaining his distance and independence from the day-to-day activities of the [OPP] team, Mr. Gagnon did just the opposite” and that Mr. Gagnon “conflated the roles of expert and investigator.”<sup>70</sup> After considering *White Burgess*, the court concluded that there was a realistic concern that Mr. Gagnon would be unable to provide independent, impartial, and unbiased evidence.<sup>71</sup> Further, the court held that the Crown did not rebut this concern on a balance of probabilities and failed to satisfy the “properly qualified expert” part of the *Mohan* test.<sup>72</sup> The court excluded Mr. Gagnon’s evidence.

## EXPERT WITNESS CREDIBILITY AND COSTS

The issue of expert witness credibility and costs resulting from a sophisticated appellant's pursuit of an ill-founded appeal, where its expert professional engineer's opinions were held to be "fundamentally and irredeemably flawed,"<sup>73</sup> was the subject matter of *Seaspan ULC (formerly Seaspan International Ltd.) v. Director, Environmental Management Act*. This case was heard before the British Columbia Environmental Appeal Board. Applications for costs were decided on September 15, 2014.

Seaspan ULC (Seaspan) appealed a British Columbia Director's Order against Seaspan ULC and Domtar Inc. relating to contaminated land located adjacent to Burrard Inlet in North Vancouver, the location of Seaspan's Vancouver shipyard. Before the hearing, Seaspan filed its expert's report, in which its expert concluded that the tests did not indicate that the creosote plume was continuous from Parcel A to the Western Front. As the tribunal cited Seaspan's expert's opinion, "[i]n his professional opinion, the creosote contamination found in the Western Front more probably than not originated from the storage of creosote treated boomed timbers on the tidal flats of the Western Front." This opinion was in support of Seaspan's position that Seaspan was not responsible to remediate the entirety of this particular plume (although Seaspan did have responsibility to remediate other contamination at the site).

The hearing commenced before the board. Seaspan called its engineering expert to testify. The expert was qualified to "give opinion evidence as a professional engineer with respect to the cause or causes and delineation of creosote contamination in soil, groundwater and sediments at the subject site."<sup>74</sup> Seaspan's expert testified that he was aware of the duty of an expert as required in the *British Columbia Supreme Court Rules*. The expert's evidence-in-chief and cross-examination concluded at the end of day two of the hearing. It was expected that the expert would be subject to reexamination on day three. However, on day three, the board was presented with a copy of a letter advising that Seaspan was abandoning its appeals (except those relating to security and registration of a covenant). Following the collapse of the hearing, opposing counsel advised that they would consider applications for an order for costs. Meanwhile, the opposing parties were granted an order compelling the expert to produce his expert file.

The British Columbia Environmental Appeal Board posed two key questions: (1) What is the legal test to award costs? and (2) Should applications for costs be granted in the circumstances of this case?

After hearing submissions, the board posed these questions: “When does a party’s behavior ‘cross the line’ to become a ‘special circumstance’? At what point does it deserve to be punished? And, how does the Board ensure that the threshold is not too low, such that it results in a ‘chill’ on legitimate appeals and litigation strategies?”<sup>75</sup> The board held that the power to award costs is discretionary and that an award of costs will turn on the particular facts of the case.<sup>76</sup> The board’s stated objective is to encourage responsible conduct throughout the appeal process and to discourage unreasonable and/or abusive conduct.<sup>77</sup> The board held that, “In other words, costs are punitive in nature: they are not compensatory, as in winner pays the losers’ costs. Rather, they are intended to punish and deter unwanted conduct.”<sup>78</sup> Finally, the board held that “[w]hen assessing whether or not to award costs, the Board will also weight the importance of ordering costs in the circumstances against the likelihood that an award of costs in those circumstances will have an unwanted ‘chilling effect.’”<sup>79</sup> The board proceeded to review Seaspan’s expert evidence presented during the hearing. The board held that:

- the expert’s report is deceptive;
- the expert adopted an artificially technical definition of “contamination” in reaching his conclusions in the report by only including analytical results with recorded exceedances;
- once there is discovery of free product, the “discontinuous plume” theory that Seaspan adopted collapses and the expert’s conclusion is completely discredited;
- the report was constructed such that a reader could not discern the unusual definition of contamination put forth by the expert;
- the expert’s report contradicts the conclusions in previous reports even though the expert was instructed to assume that the previous reports correctly identified the nature and extent of creosote contamination in soil.<sup>80</sup>

As stated by the board, “Seaspan claims that it did not know, or could not have known, of the flaws in [its expert’s] Report. The Panel disagrees. The Panel finds that Seaspan advanced a position that was fundamentally unsound from the outset, presumably, to avoid or lessen the costs of remediating the serious contamination at the Site.”<sup>81</sup>

In the end, the board held that “this was more than a ‘doubtful case.’ Rather it was hopeless, and the theory advanced at the hearing should never have been pursued.”<sup>82</sup> The board concluded that “[u]ltimately, the underlying

theory of its case—the theory that it chose to pursue to a hearing—was so ill conceived that it crumbled almost immediately under cross-examination. Evidence that free phase DNAPL [dense non-aqueous phase liquid] creosote found in bore holes did not signify ‘contamination’ because of a lack of confirmatory test results was preposterous.”<sup>83</sup>

As a deterrent, the board awarded costs in favour of the opposing parties. In addition, the board directed Seaspan to provide to the board, and to all other parties, submissions about the payment of the board’s expenses.<sup>84</sup> On April 1, 2015, the board concluded that an award of the board’s expenses was not justified.<sup>85</sup>

### FACTUAL ACCURACY AND CONFIRMING ASSUMPTIONS

Unlike some lay witnesses, experts are usually not present during the event that gives rise to the need for expert testimony. Accordingly, expert evidence usually comprises opinions formed on second-hand experiences. Experts base their opinions on factual information provided to the expert by others, and on assumptions that the expert draws. In an expert’s report, the expert must provide his or her reasons for his or her opinions, including an outline of the factual assumptions upon which he or she bases his or her opinion.<sup>86</sup>

One can appreciate that expert opinions can only be as supportable as the facts upon which the expert bases his or her opinion. Litigators should ensure that their experts have all relevant background facts and other necessary information. This assures that the expert can assess the problem posed to them and provide an informed opinion. In *WCI Waste*, the defendant’s expert was retained to provide recommendations about an aeration system at the waste facility. The expert relied strictly on information provided by the defendant. The expert failed to read or consider a 60-page manual that detailed the aeration control system.<sup>87</sup> As a result, the court held that the expert’s recommendations for improving the system were already implemented and this substantially devalued the expert’s testimony.<sup>88</sup>

In *Simpson v. Chapman (Simpson)*, the plaintiff’s expert was found by the court to have used the wrong methodology to assess if the site was contaminated.<sup>89</sup> The expert used a method that was not statutorily approved. The expert based the findings on this non-approved approach. The plaintiff’s claim was dismissed because it failed to show that the property was contaminated as defined by provincial regulation.

*Simpson* demonstrates the importance for litigators of verifying with their experts the factual assumptions the experts make in providing the expert’s opinion. This is especially relevant for environmental litigators where highly



technical regulatory requirements are the law. One example of this is Ontario's *Record of Site Condition Regulation*.<sup>90</sup> Knowing the nature of the soil type, the land use, and other very specific aspects of the property can make a significant difference in the assessment of whether a property meets the Ontario Ministry of the Environment and Climate Change's *Soil, Ground Water and Sediment Standards*. Ensuring in advance that the expert is adopting correct methodologies and relying on correct standards (whether prescribed in law or not) can avoid an expert's fatal loss of credibility.

## Weight to be Afforded to Evidence

The Ontario Superior Court of Justice (Divisional Court), in *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists* (Ostrander Point),<sup>91</sup> adopted the dictum of Justice Mohoney in *R. v. Capital Life Insurance Co.*:<sup>92</sup>

In context, the court has said no more than what is trite law: the weight to be given expert evidence is a matter for the trier of fact and an expert's conclusion which is not appropriately explained and supported may properly be given no weight at all.

The Ontario Division Court in *Ostrander Point* held that it was up to the Environmental Review Tribunal to determine if the tribunal should rely on the expert medical doctor's theory about linking the medical symptoms complained of to the operation of the wind turbines. Not surprisingly, the court held that the tribunal's decision should be entitled to deference from the court.

### NOTES

1 [1994] 2 SCR 9 (SCC) [*Mohan*].

2 *Ibid* at paras 17–21.

3 *R v Terceira* (1998), 38 OR (3d) 175 (CA) aff'd [1999] 3 SCR 866.

4 *Drumonde v Moniz* (1997), 105 OAC 295 (CA).

5 *Mohan*, *supra* note 1 at para 22.

6 Edward Cleary, *McCormick on Evidence*, 3d ed (St Paul, MN: West Publishing, 1984) at 544.

7 *Mohan*, *supra* note 1 at para 22.

8 (1992), 73 CCC (3d) 348 at para 16 (Ont Gen Div).

9 [1991] OJ No 2670 (Gen Div).

10 *Mohan*, *supra* note 1 at para 22.

11 *Ibid* at para 26, citing Dickson J in *R v Abbey*, [1982] SCR 24 at para 44.

12 *R v Abbey*, [1982] 2 SCR 24.

13 *Kelliher (Village of) v Smith*, [1931] SCR 672 at para 17.

14 *Mohan*, *supra* note 1 at paras 25–27.

15 *Ibid* at para 30.

16 *Ibid* at para 31.

17 *R v Beland*, [1987] 2 SCR 398 at para 74.

18 2015 SCC 23.

19 *Mohan*, *supra* note 1 at para 22.

20 *R v Abbey*, 2009 ONCA 624 at para 76 [*Abbey*].

- 21 *Ibid.*
- 22 *Ibid* at para 78.
- 23 *Ibid* at para 79.
- 24 *Ibid* at para 89.
- 25 *Ibid.*
- 26 *Ibid* at para 93.
- 27 *Ibid* at para 22.
- 28 *Ibid* at para 54.
- 29 2017 ONCA 502.
- 30 *Ibid* at para 53.
- 31 *Ibid* at para 52.
- 32 *Ibid* at para 63.
- 33 *Ibid* at para 67.
- 34 *Ibid* at para 68.
- 35 *Ibid* at para 69.
- 36 *Ibid* at para 70.
- 37 *Mohan*, *supra* note 1 at para 23.
- 38 *Ibid* at para 32.
- 39 509 US 579 (1993) [*Daubert*].
- 40 522 US 136 (1997) [*Joiner*].
- 41 526 US 137 (1999) [*Kumho*].
- 42 2000 SCC 51 at para 33.
- 43 *Ibid* at para 35.
- 44 *Ibid.*
- 45 *Abbey*, *supra* note 20 at para 119.
- 46 *Ontario (Ministry of the Environment) v Sault Ste Marie (City)*, 2008 ONCJ 583 at para 91.
- 47 *R v Commander Business Furniture Inc* (1992), 9 CELR (NS) 185, 1992 CarswellOnt 222 (Ont Ct J) [*Commander*].
- 48 *Ibid* at paras 174–175, 188.
- 49 *Ibid* at para 194.
- 50 *WCI Waste Conversion Inc v ADI International Inc*, 2008 PESCTD 40, var’d 2011 PECA 14, leave to appeal to SCC refused (2012), 328 Nfld & PEIR 360 (note) [*WCI Waste*].
- 51 *Ibid* at paras 224–227.
- 52 *Ibid* at para 228.
- 53 *Ibid* at para 234.
- 54 *Ibid* at para 244.
- 55 Hon Coulter A Osborne, “Civil Justice Reform Project – Summary of Findings & Recommendations” (2007) at 75 [*Osborne Report*], online: <<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>>.
- 56 *Ibid.*
- 57 *Rules of Civil Procedure*, RRO 1990, Reg 194 promulgated under Ontario’s *Courts of Justice Act* at Rule 4.1 [*Rules*].
- 58 *Ibid* at Rule 53.03(2.1).
- 59 *R v Inco* (2006), 80 OR (3d) 594 at paras 42–45 (Sup Ct J).
- 60 *Ibid* at para 45.
- 61 *Ibid* at para 49.
- 62 *Ibid* at para 45.
- 63 2015 SCC 23 [*White Burgess*].
- 64 *Ibid* at para 49.
- 65 *Ibid* at para 47.
- 66 *Ibid.*
- 67 *Ibid* at para 63.
- 68 *Ibid.*
- 69 2017 ONCJ 645.
- 70 *Ibid* at paras 51, 64.
- 71 *Ibid* at para 68.
- 72 *Ibid* at para 68.
- 73 British Columbia Environmental Review Board, Decision Nos 2010-EMA-005(c) & 2010-EMA-006(c), 15 September 2014 at para 186.
- 74 *Ibid* at para 52.
- 75 *Ibid* at para 153.
- 76 *Ibid* at paras 162–163.
- 77 *Ibid* at paras 164.
- 78 *Ibid.*
- 79 *Ibid* at para 168.
- 80 *Ibid* at para 181.
- 81 *Ibid* at para 187.
- 82 *Ibid* at para 194.
- 83 *Ibid* at para 193.
- 84 *Ibid* at paras 216, 217.
- 85 *Seaspan ULC v British Columbia (Director, Environmental Management Act)*, [2015] BCWLD 3202 (EAB).
- 86 *Rules*, *supra* note 57, Rule 53.03(2.1).
- 87 *WCI Waste*, *supra* note 50 at para 212.
- 88 *Ibid* at paras 201–213.
- 89 *Simpson v Chapman*, 2009 BCPC 28 [*Simpson*].
- 90 O Reg 153/04 promulgated under the *Environmental Protection Act*.
- 91 2014 ONSC 974 (Div Ct), rev’d on other grounds 2015 ONCA 269.
- 92 [1986] 2 FC 171 at para 127 (Fed CA).