Environment in the Courtroom

http://hdl.handle.net/1880/109483
book

https://creativecommons.org/licenses/by-nc-nd/4.0
Attribution Non-Commercial No Derivatives 4.0 International
Downloaded from PRISM: https://prism.ucalgary.ca
ENVIRONMENT IN THE COURTROOM
Edited by Allan E. Ingelson

THIS BOOK IS AN OPEN ACCESS E-BOOK. It is an electronic version of a book that can be purchased in physical form through any bookseller or on-line retailer, or from our distributors. Please support this open access publication by requesting that your university purchase a print copy of this book, or by purchasing a copy yourself. If you have any questions, please contact us at ucpress@ucalgary.ca

Cover Art: The artwork on the cover of this book is not open access and falls under traditional copyright provisions; it cannot be reproduced in any way without written permission of the artists and their agents. The cover can be displayed as a complete cover image for the purposes of publicizing this work, but the artwork cannot be extracted from the context of the cover of this specific work without breaching the artist’s copyright.

COPYRIGHT NOTICE: This open-access work is published under a Creative Commons licence. This means that you are free to copy, distribute, display or perform the work as long as you clearly attribute the work to its authors and publisher, that you do not use this work for any commercial gain in any form, and that you in no way alter, transform, or build on the work outside of its use in normal academic scholarship without our express permission. If you want to reuse or distribute the work, you must inform its new audience of the licence terms of this work. For more information, see details of the Creative Commons licence at: http://creativecommons.org/licenses/by-nc-nd/4.0/

UNDER THE CREATIVE COMMONS LICENCE YOU MAY:
• read and store this document free of charge;
• distribute it for personal use free of charge;
• print sections of the work for personal use;
• read or perform parts of the work in a context where no financial transactions take place.

UNDER THE CREATIVE COMMONS LICENCE YOU MAY NOT:
• gain financially from the work in any way;
• sell the work or seek monies in relation to the distribution of the work;
• use the work in any commercial activity of any kind;
• profit a third party indirectly via use or distribution of the work;
• distribute in or through a commercial body (with the exception of academic usage within educational institutions such as schools and universities);
• reproduce, distribute, or store the cover image outside of its function as a cover of this work;
• alter or build on the work outside of normal academic scholarship.

Acknowledgement: We acknowledge the wording around open access used by Australian publisher, re.press, and thank them for giving us permission to adapt their wording to our policy http://www.re-press.org
An Overview of Expert Evidence in Canada

GARY A. LETCHER AND ANDREA C. AKELAITIS

Opinion Evidence: Not Just the Facts

The justification for admitting opinion evidence is to explain complexity. As it has evolved, however, the purpose of explaining substantive complexity has introduced considerable procedural complexity into the trial process. As set out in the leading decision of *R. v. Mohan*:

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

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

Our Canadian courts are not entirely comfortable with expert opinion evidence. The Supreme Court of Canada has repeatedly cautioned that vigilance must be undertaken to ensure that the potential “mischief” of expert evidence does not overwhelm the benefits to the trier of fact. Indeed, the focus of the court’s analysis in *Mohan* was on the dangers that expert evidence can bring to the adjudicative process. In *R. v. D.D.*, Major J., said this:

In Mohan, Sopinka J. stated that the need for expert evidence must be assessed in light of its potential to distort the fact-finding process…. 
The potential for expert evidence to overwhelm the process is likely even greater in an administrative tribunal setting, where many environmental issues are heard.

As it has evolved, and as discussed below, there are now three categories of opinion evidence: expert scientific evidence, expert non-scientific evidence, and lay opinion evidence.

**The Big Four**

Adducing expert evidence in the environmental law context requires careful focus on four issues:

- Selecting the precise question with respect to which the opinion is sought;
- Ensuring that the expert is qualified with respect to that precise question;
- Determining the assumptions necessary to underpin the opinion and ensuring that those assumptions can be proven; and
- Ensuring that the expert opinion meets the requirements of admissibility (the Mohan factors as they have evolved).

We will address each of these in turn.

**SELECTING THE QUESTION**

For the most part, environmental law issues are statute driven. That is the case in environmental prosecutions, in environmental assessment litigation, and in statute-based contaminated sites litigation. As such, the first question for counsel is what statutory requirements must be established (or disproved) and what, if any, expert evidence, if available, may be helpful in order to meet that burden of proof. The earlier that this process occurs the better.

**QUALIFICATIONS**

One of the Mohan factors deserves particular early consideration. This is, it is not enough that the person selected to provide an opinion is an expert in his or her field. It is necessary to establish that the person providing the opinion is an expert in the precise discipline or area of knowledge with respect to which the opinion is directed. (An expert hydrogeologist experienced with groundwater flow dynamics may well not be an expert in toxicity issues related to that groundwater.)
ASSUMPTIONS

An opinion based on a set of assumptions may be completely rejected if the assumptions underlying the opinion are not proven. In the recent BC Environmental Appeal Board case, *Seaspan ULC v. Director, Environmental Management Act*, in which a number of assumptions on which the expert relied were upset on cross-examination, the board recounted that the expert “at the conclusion of his cross-examination … conceded that if any of the information he considered in reaching his conclusion was incomplete, or if any of the assumed facts were incorrect, then at the very least, he would have to reconsider his opinion.” In that case the expert was not re-examined.

ADMISSIBILITY

In 2014, in *R. v. Sekhon*, the Supreme Court of Canada again reviewed the admissibility factors contained in *R. v. Mohan*:

* A. Requirements for Expert Opinion Evidence


[44] With respect to the “relevance” criterion, *Mohan* states that the judge must conduct a cost-benefit analysis to determine “whether its value is worth what it costs” (p. 21, quoting *McCormick on Evidence* (3rd ed. 1984), at p. 544). The cost-benefit analysis requires the judge to balance the probative value of the evidence against its prejudicial effect (*Mohan*, at p. 21).

[45] As for the “necessity” criterion, *Mohan* holds that “[i]f on the proven facts a judge or jury can form their own conclusions without help, then the opinion of [an] expert is unnecessary” (p. 23, quoting Lawton L.J. in *R. v. Turner*, [1975] 1 QB 834, at p. 841). The Court went on to note that the concern “inherent in the application of this criterion [is] that experts not be permitted to usurp the functions of the trier of fact” (p. 24).

[46] Given the concerns about the impact expert evidence can have on a trial—including the possibility that experts may usurp the role of the trier of fact—trial judges must be vigilant in monitoring
and enforcing the proper scope of expert evidence. While these concerns are perhaps more pronounced in jury trials, all trial judges—including those in judge-alone trials—have an ongoing duty to ensure that expert evidence remains within its proper scope. It is not enough to simply consider the Mohan criteria at the outset of the expert’s testimony and make an initial ruling as to the admissibility of the evidence. The trial judge must do his or her best to ensure that, throughout the expert’s testimony, the testimony remains within the proper boundaries of expert evidence. As noted by Doherty J.A. in R. v. Abbey, 2009 ONCA 624, 97 OR (3d) 330, at para. 62:

The admissibility inquiry is not conducted in a vacuum. Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence. In doing so, the trial judge sets not only the boundaries of the proposed expert evidence but also, if necessary, the language in which the expert’s opinion may be proffered so as to minimize any potential harm to the trial process. A cautious delineation of the scope of the proposed expert evidence and strict adherence to those boundaries, if the evidence is admitted, are essential…. [Emphasis added; citations omitted.]

[47] The trial judge must both ensure that an expert stays within the proper bounds of his or her expertise and that the content of the evidence itself is properly the subject of expert evidence.

THE COURT AS GATEKEEPER

In R. v. Abbey, the court set out a two-step process for the assessment of expert evidence based on the criteria set out in the Mohan case. This two-step process has been described as a “rules-based” analysis under the first step (the four criteria for admission of expert evidence in Mohan) and under the second step focuses on the court’s role as a gatekeeper. It is at the gatekeeper phase of the inquiry where the court considers the cost-benefit analysis. The cost-benefit analysis also requires the consideration of the probative value of the evidence versus its prejudicial effect to the hearing.

It is important to note that the 2014 decision of the Supreme Court of Canada in R. v. Sekhon, referred to above, can be read to say that the “gatekeeper” function, or cost-benefit analysis, is not a separate step in the assess-
ment of the admissibility of expert evidence but is considered within the relevance and necessity steps in the *Mohan* criteria.

**Novel Scientific Theory or Technique**

**GENERAL PRINCIPLES OF ADMISSION: RELIABILITY**

In *R. v. Mohan*, the Supreme Court of Canada considered expert opinion evidence in the context of a novel scientific theory or technique. The Supreme Court of Canada held that a novel scientific theory or technique is subject to special scrutiny and must satisfy a basic threshold of reliability:

> 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. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.8 [Emphasis added.]

In *R. v. Mohan*, the Supreme Court of Canada did not create a specific test with respect to the admissibility of novel scientific evidence or techniques. Rather, the court set out the criteria to distinguish opinion evidence that is sufficiently reliable and necessary to assist the trier of fact from those opinions that are unnecessary, unreliable, or incompatible with the litigation process. In other words, novel scientific evidence or techniques are subject to the same criteria for admissibility as other expert evidence but with a particular focus on reliability. In *R. v. J.(J.-L.)*, the Supreme Court of Canada confirmed this approach and stated as follows:

> Mohan kept the door open to novel science, rejecting the “general acceptance” test formulated in the United States in *Frye v. United States*, 293 F. 1013 (D.C.) Cir. 1923, and moving in parallel with its replacement, the “reliable foundation” test more recently laid down by the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and 509 US 579 (1993).9

The Supreme Court of Canada in *R. v. J.(J.-L.)* then went on to determine that a trial judge could evaluate the reliability of novel science or techniques on the basis of the factors identified in the US *Daubert* case. These factors are:
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.10

NOVEL NON-SCIENTIFIC EVIDENCE
Both Abbey and a recent BC Court of Appeal decision (R. v. Aitken11) discuss the application of the reliability criteria in the context of novel non-scientific expert evidence. In Abbey, the court recognized that the Daubert factors are not essential to the reliability inquiry where the evidence is based on specialized knowledge acquired through training or experience in a particular discipline. Abbey was considering the admissibility of expert opinion evidence of a sociologist who was an expert in urban street gang culture in Canada. The court found that the expert’s opinion “could not pass scientific muster.” However, the court found that the expert’s opinion “flowed from his specialized knowledge gained through extensive research, years of clinical work and his familiarity with the relevant academic literature.”12

The court in Abbey then went on to determine that, with respect to non-scientific expert evidence:

Scientific validity is not a condition precedent to the admissibility of expert opinion evidence. Most expert evidence routinely heard and acted upon in the courts cannot be scientifically validated. For example, psychiatrists testify to the existence of various mental states, doctors testify as to the cause of an injury or death, accident reconstructionists testify to the location or cause of an accident, economists or rehabilitation specialists testify to future employment prospects and future care costs, fire marshals testify about the cause of a fire, professionals from a wide variety of fields testify as to the operative standard of care in their profession or the cause of a particular event. Like Dr. Totten, these experts do not support their opinions by reference to error rates, random samplings or the replication of test results. Rather, they refer to specialized knowledge gained through experience and specialized training in the relevant field. To test the reliability of the opinion of these experts and Dr. Totten using reliability
factors referable to scientific validity is to attempt to place the pro-
verbial square peg into the round hole.¹³

It is often said that much of what environmental engineers do is as much an art as a science. An example might be a hydrogeologist making an inference as to groundwater flow path. The “art” aspect of the environmental expert evidence may arise from the expert’s experience while the “science” part is the application of scientific principles in methodology. As discuss in Abbey, both types of expert evidence are admissible if otherwise falling within the Mohan criteria.

**Particular Issues Relating to Objectivity**

The Rules of Procedure in many of the provinces mandate objectivity on the part of the expert providing opinion evidence. For instance, Rule 11-2 of the British Columbia Supreme Court Rules provides that in giving an opinion to the court, an expert has a duty to assist the court and is not to be an advocate for any party. The Rule then goes on to require the expert to certify in their report that they are aware of the duty and have made the report in conformity with that duty and will give their oral or written testimony in conformity with that duty.

The independence issue is often just below the surface in many environmental contests given the different and sometimes overlapping roles played by environmental experts. The same person may have done the work (remediated the contaminated site) and assisted counsel in preparing to cross-examine, and may be proffered to provide expert evidence on the substantive issue.

Two appellate level decisions, one from Ontario and one from Nova Scotia, discuss the issues of objectivity, independence, and impartiality with respect to expert evidence. The appeal of the Nova Scotia Court of Appeal decision Abbott and Haliburton Company v. WBLI Chartered Accountants¹⁴ was dismissed by the Supreme Court of Canada.¹⁵ Both decisions take a less than strict view of issues relating to the “independence” of an expert.

The Nova Scotia decision found that issues related to “independence or even objectivity” go to weight rather than admissibility.¹⁶ The court found that “it is when a court is satisfied that the evidence is, in fact, so tainted by bias or partiality, so as to render it of no or minimal assistance, it can be excluded.”

The Ontario Court of Appeal decision, Moore v. Getahun,¹⁷ to the relief of the Ontario Bar, made this finding:
I reject the trial judge’s proclamation that the practice of consulta-
tion between counsel and expert witnesses to review draft reports
must end.

Lay Opinion Evidence

In *Giczi v. Kandola* (the “Bette Midler Case”), Sigurdson J., in the context of
somewhat colourful facts, discussed the principles surrounding the admission
of lay opinion evidence and held that witnesses from the entertainment field
could provide admissible lay opinion “comparing the plaintiff to other tribute
performers generally, Bette Midler tribute singers, or Bette Midler.” The court
referred to the leading authority on this point, *R. v. Graat*. In *Graat*, this is
what was said by the court:

The judge in the instant case was not in as good a position as the
police officers or Mr. Wilson to determine the degree of Mr. Graat’s
impairment or his ability to drive a motor vehicle. The witnesses had
an opportunity for personal observation. They were in a position
to give the Court real help. They were not settling the dispute. They were
not deciding the matter the Court had to decide, the ultimate issue.
The judge could accept all or part or none of their evidence.

I accept the following passage from Cross as a good statement
of the law as to the cases in which non-expert opinion is admissible.

When, in the words of an American judge, “the facts from
which a witness received an impression were too evanescent
in their nature to be recollected, or too complicated to be
separately and distinctly narrated”, a witness may state his
opinion or impression. He was better equipped than the jury
to form it, and it is impossible for him to convey an adequate
idea of the premises on which he acted to the jury:

“Unless opinions, estimates and inferences which men
in their daily lives reach without conscious ratiocination as a
result of what they have perceived with their physical senses
were treated in the law of evidence as if they were mere
statements of fact, witnesses would find themselves unable
to communicate to the judge an accurate impression of the events they were seeking to describe.” There is nothing in the nature of a closed list of cases in which non-expert opinion evidence is admissible. Typical instances are provided by questions concerning age, speed, weather, handwriting and identity in general [at p. 448].”

Something to Think About

One can easily form the view that the practice in Canadian trial courts and administrative tribunals with respect to the treatment of opinion evidence is not entirely in accord with the Supreme Court of Canada jurisprudence. The gatekeeper function for the most part is an open gate. Too often the cost-benefit of admitting expert evidence into the hearing process results in a net deficit. Also too often the question of whether the probative value is worth the cost is not fully addressed.

While expert evidence may be more likely to be useful in the litigation of environmental issues—given the technical overlay—careful thought should be given to whether the expert is actually explaining a complexity that the judge or the board could not on its own determine (especially in the case of expert tribunals).

Stepping back and reminding ourselves of basic principles, we see that the essential purpose of expert evidence is to explain complexity to the trier of fact while trampling as little as possible in the area of the determination of the ultimate issue and avoiding the role of an advocate. Necessity, within the principles set out in Mohan, can justify an expert providing a “ready made inference,” particularly where the added ingredient provided by the expert is sourced from experience and not just the application of scientific principles. Is a “ready made inference” provided by an expert “necessary” in many environmental cases? As discussed in Sekhon, the court (or tribunal) must control the expert evidence sought to be adduced so that the evidence does not overwhelm the adjudicative process. While it may be tempting to leave it to an expert to opine on what essentially is the ultimate issue, is it necessary in the sense of no other practicable way of determining the issue?21

NOTES

3 2010-EMA-005 and 006.
4 Ibid at para 88. See also Gregory v Insurance Corp of British Columbia, 2010 BCSC 651.
5. [2014] 1 SCR 272 at paras 43–47.
7. See R v Aitken, [2012] BCJ No 632, where the BC Court of Appeal summarized this two-step process for the assessment of expert evidence at paras 71 to 80 [Aitken].
10. Ibid.
11. Aitken, supra note 7.
13. Ibid at para 109
15. The appeal was heard on 7 October 2014 and judgment has been reserved.
16. See also Conseil Scolaire Francophone de la Colombie-Britannique v British Columbia (Education), 2014 BCSC 851.
18. 2014 BCSC 508.
21. See, for example, the class action lawsuit for decreased property values as a result of soil contamination, Smith v Inco Ltd, 2009 CanLII 63374, where the court found that while the expert evidence was helpful to the court, it was not necessary for the fair determination of the issues. In this case the court found the evidence was primarily a compendium of factual research and not opinion evidence.