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Case Law Update

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CASE LAW UPDATE

I. Introduction

The purpose of this caselaw update is to provide a brief summary of important decisions concerning the admissibility and use of expert opinion evidence, since the last CLE on expert evidence in June 2011. These materials supplement the information contained in the CLE publication, *Expert Evidence*.

II. Admissibility—Substantive Requirements

A. Mohan Requirements

R. v. Mohan, [1994] 2 S.C.R. 9

The Supreme Court of Canada decision in *R. v. Mohan*, [1994] 2 S.C.R. 9 provides the foundation for assessing the substantive requirements for admissibility of opinion evidence. For the Court, Sopinka J. described the four requirements for admissibility:

(1) **Relevance**: the opinion must relate to a matter that is properly in issue. Moreover, the probative value of the opinion must outweigh any prejudicial effect (*Mohan*, parags. 18-20);

(2) **Necessity**: the opinion must be with respect to a matter that is outside the knowledge of lay persons, such that it will assist the trier of fact in drawing inferences from evidence. The opinion must be necessary to enable the trier of fact to appreciate the matters in issue, due to their technical nature. As is the case when assessing relevance, when considering necessity the trial judge must consider the potential that the proffered opinion will distort the fact-finding process (*Mohan*, paras. 21-25);

(3) **No exclusionary rule**: Opinion evidence will not be admitted if its admission violates an exclusionary principle. So, for example, an opinion that is offered as to the disposition of the accused person to commit the offence charged in the first instance would be inadmissible (the subject matter of the *Mohan* decision itself) unless the accused has put his or her character in issue (*Mohan*, para. 26); and

(4) **Properly qualified expert**: Because opinion evidence is premised upon the principle that the topic of the opinion is outside the knowledge of lay persons, the expert who offers the opinion must be properly qualified to provide it. A properly qualified expert is one who obtains expertise in the area of the opinion through a course of study, or through experience sufficient to secure the expert's habitual familiarity with the subject matter (*Mohan*, paras. 27 and 28).

B. Abbey #2—The "Gatekeeper" Function

R. v. Abbey, 2009 ONCA 624

In the Abbey decision noted above (usually referred to as "*Abbey #2"* to distinguish it from an earlier decision of the Supreme Court of Canada by the same name), the Ontario Court of Appeal provided an analytical framework for the application of the Mohan principles. For the court, Justice Doherty carefully noted that he was not attempting to diminish the importance of the Mohan decision, but rather, that he was outlining "an approach that I suggest may be helpful when assessing admissibility" pursuant to the Mohan criteria.

The accused, Abbey, was charged with the murder of Mr. Peter. At trial, the evidence established that Abbey was a member of a gang, and that he thought Peter was a member of a rival organization. The only issue at trial was identity – was Abbey indeed the person who had shot Peter to death. Abbey had a teardrop tattooed onto his face four or five months after the murder. The Crown sought to adduce the opinion of Dr. Totten as to the meaning of the teardrop tattoo. Totten's opinion was that the teardrop tattoo could have one of three meanings, one of which was that the wearer had killed a rival gang member. The Crown wished to introduce Dr. Totten's evidence to support the inference that, because Abbey acquired the tattoo after the murder of Peter, it was evidence that he, Abbey, was the murderer. In the alternative, the Crown sought to introduce Dr. Totten's opinion to explain the potential meanings of the teardrop tattoo within the urban street gang culture. The trial judge refused to admit the opinion for either purpose.

Doherty J.A. began his analysis by noting that it was necessary for the trial judge to determine, with precision, the nature and scope of the proposed expert evidence. The court noted that this exercise is not conducted in a vacuum, and that a "cautious delineation of the scope of the proposed expert evidence and strict adherence

to those boundaries" are essential (para 62). Therefore, at the conclusion of the voir dire, the trial judge must "identify with exactitude the scope of the proposed opinion". However, admissibility is not an "all or nothing proposition" (para 63).

Justice Doherty noted that, the closer the opinion sought to be admitted is to the ultimate issue in the case, the closer the scrutiny should be, given the greater potential for the opinion evidence to distort the fact-finding process. He described the role of the experts (to "take information accumulated from their own work and experience, combine it with evidence offered by other witnesses, and present an opinion as to a factual inference that should be drawn from that material" (para 71). He noted the presumptive inadmissibility of expert evidence, however, given that it has "the real potential to swallow the whole fact-finding function of the court, especially in jury cases".

The court described the need, after Mohan, for trial judges to assess the potential value of the proposed expert evidence to the trial process against the potential that the evidence would harm the fact-finding process (para 74), and then set out the four Mohan criteria.

Doherty J.A. then described a two-step process for determining admissibility. At the first stage, the party offering the evidence is required to demonstrate certain pre-conditions to admissibility. Then, at the second stage, the trial judge must decide "whether the expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission", notwithstanding the potential harm that the evidence may inflict upon the trial process. Justice Doherty noted, "This 'gatekeeper' component of the admissibility inquiry lies at the heart of the present evidentiary regime government the admissibility of expert opinion evidence." (para 76).

The two stages of the admissibility inquiry propounded in *Abbey #2* are different. At the first stage (consideration of the pre-conditions to admissibility) the court embarks upon a yes/no analysis. If the proposed evidence fails any one of the pre-condition tests, then no further consideration is necessary. If, on the other hand, all of the pre-conditions to admissibility are satisfied, then the trial judge must go on to the second stage of the analysis, and weigh the benefits of the evidence against the cost of admitting it. At this second stage, the 'gatekeeper' function, requires an exercise of discretion, rather than the application of the rules-based analysis that is undertaken at the first stage (paras 78 & 79).

The four pre-conditions to admissibility that must be established at the first stage of the inquiry are described as follows (para 80):

- The proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;
- The witness must be qualified to give the opinion;
- The proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule; and
- The proposed opinion must be logically relevant to a material issue.

Doherty J.A. then elaborated on the fourth pre-condition – relevance – and noted that he used the term differently than Sopinka J. used it in Mohan (para 81). He described the two meanings of relevance in the evidentiary context – logical relevance being the "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"; and legal relevance, which he described as the quality of being "sufficiently probative to justify its admission despite the prejudice that may flow from its admission" (para 82). He clarified that, at the first (pre-condition) stage, the relevance inquiry is directed at logical relevance, and that the evaluation of legal relevance occurs at the second stage of the admissibility analysis.

At the second stage of the admissibility analysis, the benefit side of the evaluation requires "a consideration of the probative potential" of the evidence. This, in turn, involves several factors, including: the significance of the issue to which the opinion is directed; the reliability of the evidence (both the subject matter of the evidence, and the methodology employed by the expert in reaching the opinion); the expert's expertise; and

the extent to which the expert is shown to be impartial and objective (para 87). The court noted that it was the trial judge's role at this stage to determine whether the proposed evidence is sufficiently reliable so as to be worthy of being considered by the trier of fact. If this threshold of reliability is established, then the ultimate question of weight (that is, the extent to which the opinion should be accepted and relied upon) is left to the trier of fact (assuming the evidence is ultimately admitted).

The "cost" analysis at the second stage involves a consideration of the "various risks inherent in the admissibility of the ... evidence". Factors to be considered are the potential that the evidence will consume more time than it is worth; the potential for prejudicing the fairness of the trial process; and the potential that the evidence will cause confusion. Doherty described the risk that the jury will not be able to effectively evaluate the evidence due to "the complexity of the material underlying the opinion, the expert's impressive credentials, the impenetrable jargon in which the opinion is wrapped and the cross-examiner's inability to expose the opinion's shortcomings" (para 90). The court also noted that the Mohan requirement of necessity is to be considered at the second stage of the analysis (para 93). In conclusion, Doherty J.A. wrote that "the ultimate admissibility of the opinion, even where it is essential, will depend not only on its potential benefit, but on the potential prejudice to the trial process associated with its admission" (para 94).

Lush v. Connell, 2012 BCCA 203, Prowse, Garson, Hinkson JJA

The Court of Appeal affirmed that admissibility of expert evidence is governed by *R. v. Mohan*. Furthermore, the matter of whether or not the pre-conditions for admissibility are met is a question of mixed fact and law. The standard of review is therefore palpable and overriding error on the part of the trial judge. The decision of a trial judge on these matters cannot be overturned unless it is clearly wrong (para. 37).

C. Relevance

R. v. Wiens, 2013 BCSC 1579, Barrow J.

The Court considered the application of the *Mohan* criteria. Given that the opinion in this case approached the "ultimate issue," the Court noted that it was appropriate to apply the *Mohan* criteria strictly. In this instance, the Court found that the impugned opinions were inadmissible for a number of reasons. In his discussion of the 'relevance' criterion from *Mohan*, Barrow J. noted that "subsumed within the notion of relevance as a criterion for the admission of expert opinion evidence is the notion of the cost of the admission of such evidence to the trial process" (at para. 24). He pointed out that this aspect of the consideration of relevance involves "an assessment of the probative value of the evidence and its potentially prejudicial effect." Justice Barrow considered a number of factors affecting the probative value of the impugned opinions, including those which appeared to address the expertise of the expert and the lack of evidence in the trial that would make the opinions relevant to the events that actually occurred.

D. Necessity

Walsh v. BDO Dunwoody LLP, 2013 BCSC 1463, Fitzpatrick J.

A taxpayer, Walsh, obtained advice from the defendant BDO Dunwoody with respect to a tax planning scheme. The scheme involved setting up an interest deduction against earned income for a departing resident of Canada. Walsh sought to rely on an opinion from C. Michael Ryer, a prominent Canadian tax lawyer and former justice of the Federal Court of Appeal. Ryer's opinion dealt with the interpretation of provisions of the *Income Tax Act*. On a preliminary pre-trial application, the court was asked to rule on the admissibility of the report. BDO contested admissibility on the basis that the report was not necessary, dealing as it did with the interpretation of Canadian domestic law. BDO argued that the interpretation of Canadian domestic law was the exclusive purview of judges, and that the opinion was unnecessary and that it violated an exclusionary rule—that opinion evidence was not admissible on the interpretation of domestic laws. The Court agreed, and excluded the report.

In rejecting the report, the Court relied on the *Mohan* criteria, as well as the analysis in *Abbey #2*—the gatekeeping role of the trial judge.

The case is especially interesting because it provides an expansive discussion of the function of trial judges in light of their limited expertise in given areas.

E. Properly Qualified Expert

Fabretti v. Singh, 2012 BCSC 593, Savage J.

The plaintiff in a personal injury suit sought to tender an expert report on her future earning capacity and prospects for employment. The "expert" (Andruschak) from whom the report was obtained was the national sales director for the company that employed her at the time of her accident. The "expert" provided an opinion as to the plaintiff's employment capacity and projected earnings with the employer.

The defendant objected to the admissibility of the report in part on the basis that Andruschak was not properly qualified. The defendants argued that the witness had no educational background as an economist or a business loss evaluator, and that there was no evidence of any previous experience performing this type of work.

Justice Savage recited the two-step process for assessing admissibility that was set out by the Ontario Court of Appeal in *Abbey #2*. Evidence must first meet all of the pre-conditions for admissibility set out in *R. v. Mohan*, [1994] 2 S.C.R. 9. At the second step of the process, the court must weigh the probative value of the opinion against its potentially prejudicial effect—the "gatekeeper" phase of the process. The Court set out the following passage from *Abbey #2*, paragraph 78:

> Evidence that does not meet all of the preconditions to admissibility must be excluded and the trial judge need not address the more difficult and subtle considerations that arise in the "gatekeeper" phase of the admissibility inquiry.

Justice Savage rejected the report on the basis that Andruschak did not have either training or experience in the field in which he was proffering an opinion.

> [19] In this case, the subject matter of Mr. Andruschak's Report is the plaintiff's future earning capacity. However, Mr. Andruschak's experience is properly viewed as concerning the earning possibilities for RVPs at Primerica generally; his experience is not in preparing objective reports on how such earning possibilities might manifest themselves in specific individual into the future.
>
> [20] Thus, while having firsthand knowledge and experience in RVPs' earning potential at Primerica, based on their actual earnings, which is information that may be useful to the Court, Mr. Andruschak does not offer particular expertise in the subject matter of the Report, purporting to prepare an objective estimate of future income and thus income loss for a specific person. As such, on the basis that Mr. Andruschak does not qualify as an expert, the Report cannot be admitted on that basis.

Chen v. Ross, 2012 BCSC 1605, Ballance J.

The Court considered the admissibility of the opinion of Dr. Zhu, a doctor who practised in China, in a professional negligence case in BC. The expert had no training or experience with respect to the standards of practising physicians in BC. The Court first noted the former rule that excluded opinion evidence from an expert whose geographic location of practice was different from that of the defendant:

> [46] At one time, the admissibility in our Court of the evidence of medical experts who practised in other parts of the province or in another province altogether was routinely determined by reference to what became known as the "locality rule". That rule supported the rejection of the opinion of a physician whose geographic location of practice was in a different community than that of the defendant physician.

Justice Ballance rejected the applicability of that rule today, and noted that the matter is now one of weight. She then noted the evidence in a *voir dire* that Dr. Zhu had no knowledge of the standard of care of physicians in BC, other than that which he gleaned from reading guidelines endorsed by the College of Physicians and Surgeons of BC and the Canadian Ophthalmology Society, and concluded:

> [52] My reading of the authorities overall indicates that serious deficiencies in the depth of the proffered expert's experience and familiarity with the defendant physician's medical field and practice is likely to affect the admissibility of the opinion evidence, while lesser flaws are more apt to negatively affect the weight given to that evidence once it has been admitted.

The Court then rejected the opinion of Dr. Zhu.

F. The Residual "Gatekeeper" Function of the Trial Judge

R. v. Aitken, 2012 BCCA 134, Finch CJBC, Hall, Hinkson JJA

Aitken was convicted of first degree murder, based on circumstantial evidence about the crime, wiretap intercepts, and the expert evidence of a podiatrist, Kelly. Kelly viewed videotape of the shooter from security cameras, as well as a number of known videos of the accused, and opined that the gait of the person on the tape bore a very strong likeness to the gait of the accused. On appeal, Aitken argued that the trial judge had erred in admitting the opinion of the podiatrist, on the basis that the evidence lacked the requisite level of reliability for novel science.

The Court of Appeal found that the podiatrist who provided the opinion on the murder's gait was properly qualified to do so. It is noteworthy that the Court noted that the trial judge had rejected the appellant's argument that opinion evidence of gait was novel on the basis that podiatry had been in existence for a thousand years, "and the expertise of a podiatrist to analyze an individual's gait has long been accepted and practiced (sic) in a clinical setting." The Court of Appeal agreed with this observation.

Justice Hall (for the Court) then discussed the 'gatekeeper' function of the trial judge, which is engaged at the second stage of the Mohan analysis. "In this phase, the trial judge must exercise judicial discretion to determine whether the benefits associated with the evidence outweigh the costs" (at para. 76). Factors to be considered include the necessity of the evidence, and its legal relevance (its probative value must outweigh its prejudicial effect). The Court noted that an assessment of the probative value of opinion evidence involves considering its reliability.

At paras. 79 to 80, the Court remarked that when the evidence is scientific in nature, the factors enumerated in *Daubert* may apply, but that this was not necessarily the case. Justice Hall, relying on a passage from *R. v. Abbey #2* to the effect that scientific validity is not a condition precedent to the admissibility of expert opinion evidence, found that the podiatrist Kelly was qualified to provide an opinion, and that therefore his opinion was admissible.

Justice Hall wrote, at para. 80:

> [80] In my view, the forensic gait analysis provided by Mr. Kelly in the present case falls into the category of expert opinion evidence based on "specialized knowledge gained through experience and specialized training". In determining the admissibility of Mr. Kelly's evidence, the trial judge did not err in failing to consider indicia of scientific validity such as peer review, rate of error and adherence to a scientific method. These factors have limited relevance in a case like the one at hand where a witness's expertise is gained over a period of years through observation and experience in the professional realm.

This passage is noteworthy because the court seems to endorse the principle that even novel scientific opinion evidence may be admissible because the expert providing it has "expertise" that is "gained over a period of years through observation and experience in the professional realm." One might question how a practitioner's long period of observation and experience in a field renders the field itself one that is suitably the subject of expert opinion evidence, or how that experience provides sufficient assurances of reliability with respect to the opinion itself.

R. v. Thomas, 2012 BCPC 215, Birnie PCJ

The accused was charged with having care and control of a motor vehicle while his ability to drive was impaired by a drug. In the course of the investigation that led to the charge, the accused was required to submit to an evaluation pursuant to the "Evaluation of Impaired Operation (Drugs and Alcohol) Regulation." At trial, the admissibility of the opinion of the evaluator who performed the screening under the Drug Recognition Evaluation and Classification Program ("DRECP") was challenged on the basis that the evaluation itself was not reliable.

The Crown called an expert witness, Jeffery, to provide an opinion as to the "efficacy and validity of the DRECP as a tool in detecting drug impairment." That opinion was ruled admissible. The Court then considered the admissibility of the opinion of the DRECP evaluator, in light of the expert evidence on the validity of the DRECP screening protocol.

The Court accepted that the impugned opinion met the four *Mohan* criteria for admissibility, and then considered the role of the trial judge as gatekeeper—the *Abbey #2* analysis. The Court noted that the DRECP purported to be scientifically-based, and that it was therefore appropriate to consider the scientific basis for the opinion. After referring to three scientific articles on the protocol, the judge concluded that, while the protocol was capable of detecting impairment by a drug, there was no basis for concluding that this was equivalent to an impairment of the accused's ability to drive. The Court wrote, "I find that the DRECP has not been shown to have the threshold reliability necessary to support an expert opinion as to whether a person's ability to drive is impaired. At most it has been shown to be useful in determining if a person is under the influence of a particular drug category."

The Court concluded that the DRECP analysis had not been shown to be a reliable predictor of whether a person's ability to drive is impaired by a drug. The Court then noted that the prejudicial effect of the evidence far outweighed its far outweighs any probative value. Accordingly, the trial judge rejected the opinion of the DRECP examiner.

G. Novel Scientific Evidence

Bialkowski v. Banfield, 2011 BCSC 1045, Bracken J.

The trial judge in this personal injury action ruled opinion evidence derived from quantitative electroencephalograph analysis ("QEEG") in admissible on the bases that Dr. Malcolm was not qualified to conduct testing and analysis using QEEG and that QEEG did not meet the requisite reliability threshold as it was still novel science.

The plaintiff sought to introduce the QEEG evidence to support a diagnosis of traumatic brain injury. Several experts testified on the *voir dire*. QEEG was described as a relatively new neuroimaging technique, using computer assisted analysis of raw EEG data (the electrical activity in the brain).

As to the reliability of QEEG to assist in diagnosing a traumatic brain injury, Dr. Malcolm "retreated significantly" on cross-examination from his stated opinion of 75% probability in his report. In addition, Bracken J. applied *Meghji v. Lee*, 2009 BCSC in finding that as a neuropsychologist, Dr. Malcolm was not qualified to give his opinion on whether the plaintiff had an injury to the tissues of her brain or as to the cause of that injury. In addition, by purporting to conduct EEG analysis, even through the use of a computer program such as QEEG, Dr. Malcolm was engaging in the unauthorized practice of medicine rather than psychology or neuropsychology.

The defendant called Dr. Peter Wong as a witness qualified to give expert evidence in the area of neurology and electroencephalography. Dr. Wong challenged the reliability of QEEG analysis. After a review of peer reviewed journal articles and publications, Bracken J. concluded that the evidence revealed a significant conflict in the scientific community concerning its use and reliability. As it was "potentially very powerful evidence" on the ultimate issue of whether the plaintiff had a traumatic brain injury, a strict application of the *Mohan* criteria was appropriate. The evidence was excluded.

III. Procedural Requirements—Rule 11

A. Certification

Jampolsky v. Shattler, 2013 BCSC 373, Harvey J.

The Court considered the improper conduct of a doctor retained by the defence as a factor, in deciding not to award costs to the defendant at the end of trial. The plaintiff was awarded $15,000 at trial, and the Court found that the plaintiff should have accepted an offer to settle in a higher amount. However, the Court considered the conduct of defence counsel (he provided an affidavit that was somewhat misleading on his instructions regarding an admission of liability that the defendant subsequently withdrew), and the conduct of a doctor (Dr. Rees) retained by the defendant to provide an expert report.

> [64] Counsel for the plaintiff suggests another factor to be considered is the evidence of Dr. Peter Rees. In my reasons for judgment, I noted that Dr. Rees had, in my view, failed in several instances to appreciate the neutrality required of an expert witness. Dr. Rees, at times, gave evidence in fields far outside the scope of his expertise and only when pressed in cross-examination did he admit that he was "guessing" about matters requiring scientific certainty.

The Court noted that it was the responsibility of the defendant (and hence, defence counsel) to ensure that the expert witness conducted himself properly.

> [73] The degree to which the evidence of Dr. Rees crossed the boundary from expert opinion into advocacy is a matter which rests at the feet of the defendants. He was their witness and the defendants assume responsibility for his conduct. The *Rules* require experts to certify that they will prepare their reports and provide testimony in accordance with their duty to assist the court and not assume the role of advocate: *Jayetileke*, *supra*.

This decision raises the interesting question of why the expert report was admitted into evidence in the first place. The Court then declined to award costs to the defendant, notwithstanding the plaintiff's refusal to accept an offer that exceeded the amount awarded at trial.

B. Statement of Facts and Assumptions

1. Expert May Use Relevant Literature Without a Party Having to Prove the Literature

Hartmann v. McKerness, 2011 BCSC 927, at para. 30, Johnston J.

Johnston J. confirmed that an expert may rely on information the expert considers reliable. That permits an expert to have recourse to relevant literature in their field of expertise, without a party having to prove in evidence the literature on which the expert relies: *Mazur v. Lucas*, 200 BCCA 473 at para. 40. This is to be distinguished from assertions of fact from a third party which must be proved in evidence for the opinion to have any weight.

2. Use of Discovery Transcripts

Friebel v. Omelchenko, 2013 BCSC 948, Ker J.

In *Friebel v. Omelchenko*, the Court ruled that asking an expert to review discovery transcripts was not, in and of itself, problematic. The problem (from the admissibility perspective) arises from the expert not setting out a concise statement of the facts and assumptions upon which the opinion is based:

> [18] Chief Justice Brenner [in *Blackwater v. Plint*] identified the crux of the problem which has led some judges to criticize the practice of providing experts with material such as transcripts of examinations for discovery. The problem does not arise as a result of the

> expert's review of the transcript, but where the transcripts are relied upon in the report in such a way that the trier of fact is unable to determine what facts form the basis for the expert's opinion. This is the underlying concern in the decisions which are critical of the fact of providing examination for discovery transcript to experts which I referred to earlier. One of those decisions was *Ralston v. Morris*, *supra.* To remedy the problem presented by the report in *Ralston*, it was amended to include a statement of factual assumptions. The report was then admitted into evidence.
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> [19] The review by an expert of examination for discovery evidence does not alleviate counsel's duty of setting out the factual assumptions on which an opinion is based. So long as the expert complies with the requirement that the facts on which the opinion is based are clearly set out, the trier of fact will be in a position to assess the basis for the opinion and determine whether counsel has succeeded in proving the underlying facts.

The Court noted that in some circumstances, it is beneficial to have the expert review transcripts of examinations for discovery. However, it must never be left to counsel and the court to guess as to which facts and assumptions the expert relied upon in reaching his or her opinion.

C. Access to Expert's File

1. Rule 11-6(8) Limits to Scope of Expert Witness File Disclosure

First Majestic Silver Corp v. Davila, 2012 BCSC 1250, Myers J.

Mid-way in a trial and before the defence experts testified, the plaintiff made an application, pursuant to Rule 11-6(8) and common law principles, to obtain the defendant's experts' notes made by them during trial while the plaintiff's witnesses were testifying. The plaintiff had been provided with the defence expert's files up to the time they prepared their reports.

Myers J. ruled that Rule 11-6(8) limits production to what was clearly stated in the rule, namely the "contents of the experts files *relating to the preparation of the opinion*" [emphasis added]. Since the experts had served their opinions in a written report, the notes they were making at trial were unrelated.

The Court rejected the notion that the new formulation of the disclosure rule merely modified the timing of disclosure of the expert's file and that the common law requirement of production of the whole expert file still prevailed. On the plain reading of the rule, Myers J. found that the words "relating to the preparation of the opinion" must be given meaning and that disclosure was thereby limited.

D. Service of Expert Reports—Notice

1. Late Expert Reports are to be Used Sparingly

Perry v. Vargas, 2012 BCSC 1537, Savage J.

A supplementary expert report was sent to the defendant without notice on the eve of trial by email and fax. The expert of this report was set to testify on the afternoon of the first day of trial. The plaintiff relied on Rules 11-6(6) and 11-7(6) to support its arguments for admissibility. The Court rejected the arguments and ruled the report was not admissible for the following reasons:

- Rule 11-6(6) was not intended to allow experts to add fresh opinions or bolster their opinions after reviewing further material under the guise of there being a material change in their opinion.
- Rule 11-7(6) focuses on whether there is prejudice to the party against whom the evidence is sought to be tendered. This was not a case where the report was delivered a few days late and there was no prejudice. The extremely tardy delivery of the report placed the defendants in obvious difficulties and resulted in some prejudice.

The Court also remarked that the purpose of serving reports in compliance with the Rules is to ensure reasonable notice and considered review of the expert opinions. Rule 11-7(6)(c) is a residual provision giving courts discretion to admit expert evidence in the interests of justice when the provisions of (a) and (b) are not met and override the requirements of Rule 11. However, "the discretion provided in 11-7(6)(c) must be exercised sparingly, with appropriate caution and in a disciplined way given the express requirements contained in Rules 11-6 and 11-7". The "interests of justice" are not a reason to simply exclude or ignore the requirements of other Rules. There must be some compelling analysis why the interests of justice require in a particular case the extraordinary step of abrogating the other requirements of the Supreme Court Civil Rules."

Neyman v. Wouterse, 2013 BCSC 95, Walker J.

Walker J. refused to allow defendant to tender rebuttal report that had been delivered 27 days prior to trial. The court found that Rule 11-7(6) governed the circumstances in which an order can be made when the requirements of Part 11 have not been met. A failure to comply with Rule 11-6(4) (notice) is one of those requirements. The Court then considered the three tests set out in Rule 11-7(6). Walker J. relied heavily on *Perry v. Vargas*, and concluded that either the trial should be adjourned, or the report excluded.

2. Limits of Court to Order Litigants to Reveal Experts They Intend to Rely on at Trial

Amezuca v. Norlander, 2012 BCSC 719, Master D. Baker

At a case planning conference, defence counsel sought confirmation of which experts and reports the plaintiff planned to rely on at trial pursuant to Rule 5-3(1).

The master held that while Rule 5-3(1) sets out the rules for a court to deal with experts at a case planning conference, it does not specifically require a party to disclose the identity or area of expertise of the expert before serving the report. This was consistent with the reasoning in *Galvon v. Hopkins*, 2011 BCSC 1835 where the concern was that early disclosure would infringe on litigation privilege.

However, an order for early production of the plaintiff's reports was granted in this case given the unusual circumstances of the 13-year passage of time since the first accident and the dearth of useful information identifying the extent of the injuries claimed.

Nowe v. Bowerman, 2012 BCSC 1723, Dickson J.

At a case planning conference, defence counsel sought an order that plaintiff's counsel disclose the area of expertise of his proposed experts approximately 10 months before the trial date. Dickson J. refused the order, applying the principles articulated in *Galvon v. Hopkins*:

- litigation privilege or the solicitor's brief rule, was alive and well as the BC Court of Appeal in *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 made it clear that it would be rare, if ever, that the need for disclosure would displace privilege;
- a defendant has no right to know what a plaintiff, as litigant, does in the preparation of his/her claim because it is not relevant to the matters contained in the pleadings and is an aspect of confidentiality that is worthy of protection;
- there is nothing in Rule 5-3 governing case planning conferences that clearly, expressly, and specifically allows the presider to compel a party to provide another party with the details of any potential expert witnesses before that party has even consulted with the or made an election whether to call the witnesses' evidence at trial;
- Rule 5-3 cannot be read as to allow the case planning conference judge or master to disregard the common-law principle of privilege; and
- requiring the plaintiff to disclose the very fact of her attendance before a medical expert, and run the risk of an adverse inference if she did not call the expert at trial, interferes with the

> plaintiff's right to elect which witnesses to call. Such interference is not sanctioned, nor warranted, by our Supreme Court Rules.

Madam Justice Dickson also remarked that the type of expert a plaintiff intends to retain is a matter of trial strategy and which is a key component of a solicitor's brief. In view of the fact that intentions change as the process unfolds, there must be a compelling reason for such disclosure delving into a solicitors brief such as a complex brain injury case.

E. Requirement for Notice of Objections—Rule 11-6(10)

Farand v. Seidel, 2013 BCSC 323, Savage J.

The Court found that the requirement in Rule 11-6(10) that a party give notice of the intended objections to expert reports at least 21 days notice of objections to admissibility, is mandatory. The Court also held that mere inadvertence was not sufficient to relieve a party from a breach of this rule.

> [110] The first matter to note is that Rule 11-6(10) is mandatory. It uses the term "must" in relation to the timeframe allowed for an objection to the admissibility of expert reports.
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> [111] Rule 11-6(11) also use the term "must" in relation to the whether the court should permit an objection; however that section also says "[u]nless the court otherwise orders". In short, the court has an overriding discretion to permit such objection.
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> [112] In this case the defendant gave no particular reason for failing to abide by the timeline for raising such an objection, except to say "we let our guard down". I think it proper to characterize this as simple inadvertence.
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> [113] I do not think simple inadvertence is a good reason for the court to relieve from the operation of Rule 11-6(10). The timelines for the exchange of expert reports and the taking of objections to them are part of a general scheme in the Supreme Court Civil Rules to provide for the timely disclosure of the parties' positions on matters. That can have a number of benefits, including promoting the resolution of disputes and promoting the efficient use of court time.

IV. Use of Opinion Evidence at Trial

A. Need for Expert Evidence

Collins v. Rees, 2012 BCSC 1460, Williams J.

The plaintiff claimed she lost control of her vehicle on ice while driving through the Massey Tunnel. She crashed, and was injured. She sued, and alleged that her loss of control was caused by ice, and that the Province and its highway maintenance contractor (Mainroad) were negligent in allowing ice to be present on the surface of the highway. She also alleged defects in the drainage of the Massey Tunnel, saying that these defects had permitted ice to form. She also alleged negligence with respect to a failure to provide signage. At the close of the plaintiff's case, the Province and Mainroad brought a no-evidence motion, arguing that the plaintiff had failed to provide any evidence of the applicable standard of care. The defendants argued that the trial judge needed expert evidence as to the applicable standard of care and of a breach of the standard of care. The plaintiff urged the judge to use his knowledge of everyday matters to find that ice on a highway was a dangerous condition and was therefore evidence of a failure to abide by the standard of care. Justice Williams noted:

> [38] Insofar as applying my own knowledge of every day matters, that would not be an appropriate way to deal with this issue. Decisions as to the proper steps, measures and procedures to sign and maintain a highway system in a large metropolitan community are undoubtedly complex things. I am sure that engineers have spent their entire lives working on those very issues. The same applies with respect to issues such as drainage and vapour

> barriers. It is not reasonable to expect that a trial judge, as a layperson, will draw the inferences to establish this element. It is clearly a matter that requires expert evidence.

The Court found that the plaintiff had adduced no evidence of the standard of care, and no evidence that the defendants had failed to meet the standard of care, and dismissed the case.

McKerr v. CML Healthcare Inc., 2012 BCSC 1712, Power J.

Plaintiff sued as a result of suffering a hematoma during a screening mammogram. The issue arose as to whether or not the court required expert evidence on the standard of care of the technician employed by the defendant to conduct the mammogram. The defendant argued that, in order to establish the standard of care (that of a reasonable health care professional in the area of practice of the defendant) the plaintiff needed to provide expert evidence. The plaintiff countered, arguing that expert evidence was not necessary since the facts lacked anything technical, complex or scientific and that the subject matter falls within the common experience of a judge or jury. The Court found that, considering the authorities and the totality of the evidence, that expert evidence was not necessary on the standard of care.

Edmondson v. Payer, 2011 BCSC 118, Smith J.

The introduction of clinical records is not a substitute for expert evidence. A diagnosis recorded in a clinical record is evidence that a diagnosis was made, but it is not evidence of the opinion itself. The Court cannot accept the diagnosis as being correct in the absence of proper opinion evidence to that effect.

B. Lay Opinion Evidence

American Creek Resources Ltd. v. Teuton Resources Corp., 2013 BCSC 1042, Grauer J.

The Court considered the scope of the exception to the rule that opinion evidence must properly be provided by an expert. One of the issues in the case was the proper characterization of expenditures in a mining venture. The defendant sought to tender opinion evidence from a lay witness who had specialized knowledge of the mining industry.

The Court described the witness (Cremonese) in these terms:

> [5] Over the years, Mr. Cremonese has acquired a good deal of experience in dealing with mining exploration projects in the Stewart area of British Columbia. This experience includes, among other things, the geological aspects of drilling from the perspective less of a geologist than of a program operator. Drilling, of course, forms the backbone of any exploration project. He has not, however, been qualified as an expert.

The defendant sought to elicit evidence on practices and procedures in the mining exploration industry and his observations of industry norms and practices, as well as the witness' impression and conclusions regarding the mining exploration programmes undertaken by the plaintiff. The defendant sought to tender this opinion evidence on the basis that lay opinion evidence coming from a party can be admitted, and referred to Rule 11-1(1)(b).

The Court concluded that the evidence in question was not of the sort that was permissible from a lay witness. The Court noted that it would be permissible for a lay witness to state an opinion that "consists of inferences drawn from observed facts" when the opinion is a compendious mode of speaking that allows the witness "to sum up more accurately and adequately the facts he or she is testifying about." An example of this sort of opinion would be the opinion that a person observed by the witness, was intoxicated. The Court rejected the proposed evidence in this instance because it concerned specialized, technical expertise based upon the witness' review of documentation and reports.

The Court also rejected the applicability of the saving provision in Rule 11-1(1)(b), and noted that its purpose was not "to allow an end run around the provisions of Part 11."

C. Response Expert Reports vs. Opinion "in chief"

1. Expert Evidence and Rebuttal

Lennox v. Karim, 2012 BCSC 930, Armstrong J.

The plaintiff obtained a report from a doctor that contained the opinion that the plaintiff's knee injury had been caused by the motor vehicle accident at issue. The accident was nine years prior to trial. The report was served 87 days before trial and was the first notice to the defendant that the plaintiff was claiming for a knee injury. The defence obtained a responsive rebuttal opinion from a doctor, who critiqued the plaintiff's expert report. The plaintiff objected to the admissibility of the defence report on the grounds it was fresh opinion and did not meet the requirements of admissibility under 11-6(3) or (4).

The Court allowed the admission of the defence report, finding that it was limited and truly responsive to the opinion of the plaintiff's doctor. In view of the lack of reference to the specific type of knee injury alleged until 86 days before trial, and the plaintiff's failure to disclose his upcoming expert report at the CPC, the judge remarked:

> [42] If I am wrong in this decision, it would have also been my further opinion that in the circumstances of this case the defendant would have otherwise been entitled to an adjournment of the trial to secure the medical report of Dr. Leith if it was not otherwise admissible under 11-6(4). It seems to me that 11-1(2) is purposely directed at requiring the plaintiff and defendant to avoid the last minute introduction of medical evidence in cases which may have proceeded for many years on a different track or a different theory. I note that neither of the experts described in the CPC report have been or are going to be called as witnesses in this case, but I am not required to deal with that issue.

Commercial Electronics v. Savics, 2011 BCSC 162, Adair J.

In this case, the plaintiff sued for the unpaid balance owing for the supply and installation of sophisticated home integration systems, including a home theatre and whole-house music system. The defendant counter-claimed for monies already paid. In her ruling on the *voir dire*, Adair J. confirmed that Part 11 of the Supreme Court Civil Rules strongly reinforces the purposes of the expert rules to prevent ambush and avoid surprise at trial; to ensure fairness to the parties; and to promote the orderly progression of the trial. The opinion evidence sought to be tendered by the plaintiff in defence of the counterclaim appeared to be the antithesis of these purposes.

The case also illustrates the transition requirements between the former *Rule 40A* and Rule 11, confirming that Rule 11-7 applies to expert opinion evidence at trial even if the report was served under *Rule 40A*.

Despite the plaintiff's non-compliance with Rule 11 in serving opinion evidence regarding the counterclaim, (and the trial judge's finding that the report was partisan commentary and inadmissible argument and conclusions), Adair J. permitted opinion evidence on a limited scope in the "interests of justice" under Rule 11-7(6). In an unusual set of circumstances peculiar to the case and the expert's limited availability for trial, counsel was permitted to conduct a full direct examination of the expert on the *voir dire*.

D. Bias

Moll v. Parmar, 2012 BCSC 1835, Meiklem J.

This was an appeal from a master's decision granting a defence application to compel the plaintiff to attend, *inter alia*, an independent medical examination with a neuro-psychologist, Dr. Williams. Dr. Williams had previously provided defence counsel with a strong written critique of the some of the plaintiff's expert reports.

The case is noteworthy because the appeal was allowed on the basis of anticipated bias on the part of the proposed medical examiner. It is also a warning for counsel to take care in considering whether to engage an expert in any preliminary review of the opposing side's expert opinions.

Mr. Justice Meiklem provided the following reasons:

> [13] Turning first to the Master's errors alleged by the appellant, I initially gave rather short shrift to Mr. Harris' submissions that Drs. Craig and Williams had been recruited as advocates for the defence by virtue of the nature of the defence request to them and the nature and content of their reports, that they would be viewed as lacking the necessary objectively to warrant being appointed by the court to conduct IMEs of the plaintiff. After considering the retainer letters and the reports of Drs. Williams and Craig, I see considerable merit in the appellant's argument with respect to Dr. Williams' compromised objectively. The circumstances in respect of Dr. Craig's report are somewhat different.
>
> [14] The appellant's concern was not only the advocacy bias apprehended by the plaintiff, but also the bias concerning the plaintiff's condition that was already demonstrated by the roles these experts were retained for and the reports that they had already delivered. He considered it highly improbable and purely theoretical that either of these specialists would be able to change any previously expressed views after their examination of the plaintiff.
>
> [15] Dr. Williams' report emanated from a retainer letter wherein the pertinent paragraph stated simply that Mr. Moll was advancing a claim for a head injury in a highway collision and then stated: "I ask that you please kindly review the enclosed report of Dr. Jeffrey Martzke dated May 1, 2012, together with the enclosed documentation set out in the attached schedule "A", with a view to discussing Mr. Moll's claim with me." The letter promised to forward Dr. Martzke's raw test data, which was forwarded in due course and reviewed by Dr. Williams.
>
> [16] Dr. Williams described the purpose of his report as responding to the reports of Dr. Martzke and Dr. Wallace (the plaintiff's vocational consultant) and he said he limited his comments to aspects pertaining to the methods, procedures and process of the reports, as well as the sufficiency of the conclusions, recommendations or diagnosis of Drs. Martzke and Wallace.
>
> [17] Dr. Williams' report is, however, a very rigorous critique of Dr. Martzke's methods and testing, as well as his conclusions, and in my view does at least border on advocacy, as argued by Mr. Harris. Dr. Williams' criticisms of Dr. Martzke's report and findings may well be found to be completely correct, and my comments will not fetter the trial judge's rulings if the report is tendered, but I do not think it is appropriate for the court to order a medical examination of a plaintiff by an expert who has previously taken such a strong stance in accepting the role as a reviewer of a previous examiner's report, particularly in view of the specific provisions of Rule 11-2(1) of the *Civil Rules*.

E. Weight Given to Opinion Based on Records Review

Rizzotti v. Doe, 2012 BCSC 1330, Tinsdale J.

The plaintiff suffered psychological injuries as consequence of a serious motor vehicle accident. The defendant relied upon the report of a psychiatrist, who disagreed with the plaintiff's experts with respect to the extent of the plaintiff's psychological injury. The defence psychiatrist had not met with the plaintiff, but based his opinion on a review of material, including some documents that were not introduced into evidence.

The Court admitted the report but, ultimately found that a psychiatric opinion could be given very little weight if the expert does not interview the subject of the report. In this instance, the psychiatrist had also testified that he could not do a proper assessment without interviewing the plaintiff.

F. Limits on Use of Opinion Evidence

R. v. Sanghera, 2012 BCSC 995, Holmes J.

The Court considered both the qualifications of a Vancouver Police detective to give expert evidence, and the limits to be placed on that evidence. The Court found that the witness, Det. Sgt. Sangha, was properly

qualified as an expert (through his having gained specialized knowledge about urban street jargon from his observations and experiences over the course of his own personal and professional life) to give opinion evidence as to the meaning of "urban street jargon." However, the Court restricted the scope of that opinion evidence to explaining the meaning of certain terms or words, but did not permit Sangha to interpret specific passages of intercepted conversations.

In the same ruling, the Court concluded that Cst. Sangha was not properly qualified to translate Punjabi to English. Although he was fluent in both languages, the Court found that:

> [22] The interpretation and translation of verbal exchanges, however, involves more than proficiency in the languages concerned. Reliable interpretation and translation of, for example, a full sentence depends on the interpreter or translator selecting the appropriate grammatical structure for the sentence, so as to convey as accurately as possible the tone, tenor, and nuance of the original.
>
> [23] There is no evidence that Det. Cst. Sangha has any training or experience in interpretation or translation of this type. It is a field for which certification standards have been developed and implemented, for good reason. In the interpretation of court proceedings, for example, the importance and value of the interpretation process as such is well-recognized, as contrasted with word-for-word translation from one language to another.

Jarmson v. Jacobsen, 2013 BCCA 285, Frankel, Neilson, Hinkson JJA

The Court of Appeal accepted trial judge's rejection of the cost of future care opinion of Janice Landy which was characterised by the trial judge as "not only a Cadillac, but a gold-plated one". Hinkson J.A. held that the trial judge properly assessed the need for reasonableness of items claimed, and that his reference to the life care plan as "gold-plated" (which was argued as a ground of appeal) was meant to address its unsuitability, based upon her reliance on facts, opinions and assumptions not in evidence; her costing in some instances displaying a "discomforting lack of care"; and the fact that the plan lacked the support of medical opinions other than her own.

V. Use of Opinion Evidence before Tribunals

A. British Columbia Lottery Corporation v. Skelton, 2013 BCSC 12, Goepel J.

The Court determined that the Information and Privacy Commissioner erred in admitting opinion evidence from an expert not as "expert evidence," but as simply evidence. In discussing the admissibility of expert evidence before tribunals, the Court noted that the only proper way to place opinion evidence before a tribunal is through an expert. Opinion evidence that meets the four *Mohan* criteria for admissibility is admissible in an administrative proceeding. Opinion evidence that does not meet the *Mohan* criteria for admissibility may still be admitted, given the more relaxed evidentiary rules employed by tribunals. However, it was improper for the tribunal to admit opinion evidence:

> [62] In this case the Commissioner stated that Mr. Lauzon's evidence would be admissible, but not as expert evidence, because he was providing an opinion on the precise matter she was legally obliged to decide and further that the evidence was general and speculative with regard to the issue of reasonable expectation of harm.
>
> [63] The Lauzon Report contains opinions. Opinions are only admissible as expert evidence. If the opinion meets the *Mohan* criteria, it is not open to the Commissioner to determine that she will admit the evidence "but not as expert evidence". Opinion evidence is only admissible as expert evidence. It cannot be admitted in any other way.
>
> [64] What the Commissioner had to decide was whether or not the Lauzon Report met the *Mohan* criteria. If it did, it was then admissible as expert evidence. If it did not, given the relaxed rules of evidence in administrative proceedings, she could at her discretion admit it in any event.

[65] The Commissioner said she rejected the Lauzon Report as expert evidence because it opined on the precise matters that she was legally obligated to decide. What the Commissioner had to decide was whether the disclosure of the Sales Figures could be expected to harm the financial or economic interest of BCLC or the Government. In deciding that question the Commissioner had to determine if the Sales Figures had monetary value and whether the disclosure of the Sales Figures could provide BCLC's grey market competitors with a competitive advantage. Those are questions of fact.

[66] Whether the information had monetary value or its disclosure would put BCLC at a competitive disadvantage are not matters that can be determined in a contextual vacuum. In the inquiry the onus was on BCLC to establish the exceptions upon which it relied. It could only meet this burden by calling evidence. The opinions set out in the Lauzon Report were intended to provide the evidentiary foundation for its submissions that the Sales Figures had monetary value and their disclosure could be expected to harm the financial or economic interest of BCLC.

[67] The Lauzon Report met the *Mohan* criteria for admissibility. It was prepared by a qualified expert, it was relevant, it was necessary and was not subject to any exclusionary rule. I find the Commissioner erred in failing to consider the Lauzon Report as expert evidence.