THOMPSON DORFMAN SWEATMAN

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October 24, 2024

VIA EMAIL

THE PUBLIC UTILITIES BOARD OF MANITOBA
400-330 Portage Avenue
Winnipeg, Manitoba R3C 0C4

Attention: Dr. D. Christle, Board Secretary and Executive Director

Dear Dr. Christle:

Re: IGU Submission on Admissibility of Expert Evidence
Our Matter No. 0210261 AFH

We write in our capacity as counsel for Manitoba Industrial Gas Users Group ("IGU"). IGU wishes to respond to a particular aspect of Centra's Comments on Applications for Intervenor Status dated October 23, 2024. This submission will address Centra's specific objection to approving Mr. Dale Friesen as an independent expert on behalf of IGU for this GRA. This letter will address the following:

- PUB Order 130/22;
- The Expert's Acknowledgement of Duty;
- The law regarding the admissibility of expert evidence;
- IGU's submissions with respect to approving Mr. Friesen as an expert witness; and
- IGU's reply to certain Centra submissions regarding Mr. Friesen's independence, impartiality and expertise.

PUB Order 130/22

In PUB Order 130/22, it was Manitoba Hydro's position that Mr. Friesen should not be approved as an independent expert since he serves as a representative of, and advocate for, the Manitoba Industrial Power Users Group ("MIPUG"). MIPUG strenuously opposed Manitoba Hydro's position and argued that Mr. Friesen ought to be declared an expert. However, the timing of the argument was not such to give MIPUG or its counsel sufficient lead time to prepare a thorough submission on the issue.

In determining the issue, the Board quoted from its previous Order 109/22 wherein it referred to the duty of an expert witness according to the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton,* 2015 SCC 23 ("*White Burgess*"):

> The duty of an expert witness to a court or tribunal, and the implication of any impartiality or bias, was summarized by the Supreme Court of Canada in White Burgess Langille Inman v. Abbott and Haliburton, 2015 SCC 23: [2] Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.
>
> […]
>
> [50] […] The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or

> unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance

The Board went on to recognize that Mr. Friesen "**has ample experience on the matters for which MIPUG intends to retain him**" (**page 19 of 27**) but that Mr. Friesen's involvement as a representative of MIPUG means that he should not file independent expert evidence on the record of the proceeding.

IGU agrees that *White Burgess* is a leading authority on the law of admissibility of expert evidence; however, IGU respectfully submits that the Board did not apply the legal tests confirmed in *White Burgess* correctly, and specifically did not apply the two-pronged test confirmed therein for determining the admissibility of expert evidence where concerns are raised with respect to independence and impartiality.

Accordingly, for the reasons that follow, IGU respectfully submits that the Board's decision to exclude Mr. Friesen from participating as an expert witness prior to him testifying would be premature and the Board's previous decision ought not be followed or applied.

Expert's Acknowledgement of Duty

The Ontario Energy Board Rules of Practice and Procedure (revised March 6, 2024) (**TAB 1**) require that an expert agrees to accept the responsibilities that are or may be imposed on the expert as set out in Rule 13A, Form A (see: **Rule 13A.06**).

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Rule 13A, Form A (**TAB 2**) requires the expert to acknowledge that it is the expert's duty to: (a) provide opinion evidence that is fair, objective and non-partisan; (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and (c) to provide such additional assistance as the Board may reasonably require, to determine a matter in issue.

Form A also requires that the expert acknowledge that such duty prevails over any obligation which the expert may owe to any party by whom or on whose behalf the expert is engaged.

As part of the Intervener Application by IGU, the signed Acknowledgement of Duty of Expert of both Mr. Friesen and Mr. Ferris was filed. There is no evidence to the contrary suggesting that they will not adhere to their signed acknowledgements.

Admissibility of Expert Evidence: The Law

In *White Burgess* (**TAB 3**), the S.C.C. confirmed that the duty owed by an expert witness is that the expert must be fair, objective, and non-partisan. Absent a challenge to an expert's independence and impartiality, an expert's attestation or testimony recognizing and accepting the duty **will generally be sufficient to establish that the threshold is met**.

Once the expert attests or testifies an oath to this effect, the burden is then on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. (See: **paras. 46 & 48**)

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The S.C.C. confirmed that **the threshold requirement is not particularly onerous** and it will likely be **quite rare that a proposed expert's evidence would be ruled inadmissible** for failing to meet it.

The trier of fact must determine, having regard to **both the particular circumstances of the proposed expert and the substance of the proposed evidence**, whether the expert is able and willing to carry out their primary duty to the court (in this case, the PUB).

It is the nature and extent of the interest of connection with the litigation or a party thereto which matters, **not the mere fact of the interest or connection**. The existence of some interest or a relationship does **not automatically render the evidence of the proposed expert** inadmissible.

An expert who, ***in his or her proposed evidence*** assumes the role of advocate may be unable to carry out this duty. (See: **para. 49**). We ask the PUB to pay particular attention to those italicized words, which we will address later in this submission.

The exclusion of expert evidence at this "threshold stage" of the analysis should occur **only in very clear cases where the proposed expert is unable or unwilling to provide fair, objective and non-partisan evidence**. Anything less should not lead to exclusion, but rather be taken into account in the overall weighing of costs and benefits of receiving the evidence. (See: **para. 49**)

The S.C.C. described the test as a "sliding scale" – there is first a basic threshold for the witness to meet. If it is met, the witness is not excluded from giving evidence but concerns regarding independence and impartiality may go to weight.

At **para. 50** of its decision, the S.C.C. confirmed that the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with

the litigation is a matter of **fact and degree**. **The concept of apparent bias is not relevant** to the question of whether or not an expert witness will be unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

Moreover, the S.C.C. went further to confirm that **the question is not** whether a "reasonable observer" would think that the expert is not independent. Rather, the question is whether the relationship or interest in the results renders the expert being unable or unwilling to carry out his or her primary duties to the trier of fact to provide fair, non-partisan and objective assistance. (Also at **para. 50**).

At issue in the *White Burgess* case was whether an accountant was prevented from providing expert evidence on account of having previously worked with the client attempting to adduce her expert evidence. The S.C.C. found that this did not disqualify the accountant as an expert witness, and that proof would have been required that the accountant "was hired to take a position dictated to it by the [client]." (See: **para. 60**)

In *R. v. Bingley*, 2017 SC 12 (**TAB 4**), the S.C.C. restated its decision in *White Burgess* and confirmed the two-pronged test (at **para. 14**):

> The expert evidence analysis is divided into two stages. First, the evidence must meet the four *Mohan* factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. Second, the trial judge must weigh the potential risks against the benefits of admitting the evidence: *White Burgess,* at para. 24.

The second stage was described as whether the benefits in admitting the evidence outweigh any potential harm to the trial process (in other words, the probative value outweighs any prejudicial effect). (See: **para 16**)

Submissions

Mr. Friesen has signed an Acknowledgement of Expert's Duty (**TAB 5**), which is filed with the PUB as part of IGU's Intervenor Application. His Acknowledgement of Expert's Duty complies with Form A required by the Ontario Energy Board.

Accordingly, IGU respectfully submits that this in and of itself is sufficient to pass the first "threshold" stage of the test. Absent any actual evidence (as opposed to mere allegations) from Centra that Mr. Friesen if unable or unwilling to provide the PUB with fair, objective and non-partisan evidence, Mr. Friesen must not be ousted from participating as an expert witness at this early stage in the proceedings.

According to the test set out in *White Burgess*, any concern related to any alleged bias of Mr. Friesen is not relevant to the question as to whether Mr. Friesen meets the threshold test. Such concerns may only be raised as part of the second step of the test, which goes to the weight that Mr. Friesen's evidence ought to be afforded. This makes sense, as it is as this second stage that the evidence can be tested through cross-examination.

Respectfully, IGU submits that the Board ought not to follow its Order 130/22, as it did not correctly apply the first threshold step of the test, in that the allegations of bias raised by Manitoba Hydro can only be considered in the second step of the test. Manitoba Hydro did not otherwise present any evidence in that proceeding that Mr. Friesen was unable or unwilling to act as an independent and impartial witness, which is the only relevant consideration at the first threshold stage of the test.

IGU also respectfully submits that even if the Board had considered Manitoba Hydro's allegations as part of the second step of the test, it did so incorrectly as the Board did not engage in any exercise of weighing the costs and benefits of receiving his evidence.

By analogy, if PUB Order 130/22 is upheld, it would also arguably disqualify any of Centra's employees from testifying on their areas of expertise, as they can all be expected to testify in their employer's favour. This would obviously create an absurd result. Rather, the Board determines how much weight to assign to their evidence after having the benefit of their fulsome presentations which are then subject to cross-examination.

Mr. Friesen's potential evidence could be useful and beneficial to the Board given that he is the only proposed witness who holds a Professional Engineer designation. The Board obviously values the expertise of Professional Engineers as it engages its own Professional Engineer consultants to advise it. In that regard, Mr. Friesen's expertise is also different from Mr. Bowman or any other of the proposed expert witnesses.

Mr. Freisen's potential participation as expert witness will not result in a duplication of efforts. Mr. Friesen's potential evidence will not address cost of service matters (which will be addressed by Mr. Bowman). Rather, Mr. Friesen's expertise lies in other matters such as rate matters, rate design, bill impacts, consumption behaviour and rate classification. These are all areas that are relevant to this GRA, and in particular how they related to industrial rates for high volume users. This again distinguishes his expertise from other potential experts.

Finally, any past involvement of Mr. Friesen as an advocate for industrials on different matters does not create any automatic exclusion. It is clear from ***Burgess White*** that the expert cannot be an advocate with respect to matters addressed *by his or her proposed evidence*. However, it is strongly submitted that any potential finding that Mr. Friesen is advocate for IGU in possible matters addressed by his evidence can only be determined *after* the Board has had the benefit of hearing Mr. Friesen's evidence and engaging in a balancing exercise of the probative value of Mr. Friesen's evidence versus its prejudicial effect.

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Reply to Centra's Comments on Applications for Intervenor Status

Finally, notwithstanding IGU's position that Centra's alleged concerns with respect to Mr. Friesen's independence and impartiality can only be considered during the second step of the *White Burgess* test (the "weight" test), IGU responds to Centra's allegations as follows:

- Centra submits that Mr. Friesen is akin to an "Executive Director" of IGU. This is not accurate. IGU has no corporate structure, Executive Director or other organizer. IGU is an informal association and does not utilize a governing body or pass resolutions.

- Mr. Friesen is not a representative of IGU and is not authorized to speak on IGU's behalf outside of this GRA. Rather, Mr. Friesen's role involves coordinating the member companies forming IGU. That membership is not limited to the companies identified in IGU's Intervenor Application (Roquette, Amsted, Hylife, Maple Leaf, Cenovus (Husky), Simplot, Gerdau and Koch Fertlizer) and may involve others as IGU continues discussions with other industrials.

- Centra has submitted no evidence that Mr. Friesen is being hired to take a position dictated by IGU (as the court noted would have been required to exclude the witness in *White Burgess*).

- Mr. Friesen is a consultant to IGU and uses his expertise to assist IGU members in understanding the Centra GRA and identifying areas of concern specific to industrials. According to the test set out in *White Burgess*, the mere existence of a relationship or connection with a client does not automatically exclude an expert. IGU submits that the relationship or connection with a client does not mean that an expert has a closed mind or that they cannot appreciate the difference between their role when acting on behalf

of a client and their duty as an expert witness to provide fair, non-partisan and objective assistance.

- Mr. Friesen does not lack expertise with respect to the matters in issue in this Centra GRA. Mr. Friesen's expertise relates to rate matters, rate design, bill impacts, consumption behaviour and rate classification; all areas that are relevant to this GRA. Contrary to Centra's concern, Mr. Friesen's potential participation as an expert is not intended to speak to issues such as cost of service, natural gas supply or transportation matters.

- Finally, it appears that another potential intervenor (Environmental Defence and Manitoba Eco-Network) intends to raise issues related to energy transition, energy efficiency and fuel switching. These are areas which fall under Mr. Friesen's area of expertise.

All of which is respectfully submitted this 24th day of October, 2024.

Yours truly,

THOMPSON DORFMAN SWEATMAN LLP

Per: 

Melissa Beaumont

MDLB/ll
Encls.

*Electronically executed

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TAB 1

12. Affidavits

12.01 An affidavit shall be confined to the statement of facts within the personal knowledge of the person making the affidavit unless the facts are clearly stated to be based on the information and belief of the person making the affidavit.

12.02 Where a statement is made on information and belief, the source of the information and the grounds on which the belief is based shall be set out in the affidavit.

12.03 An exhibit that is referred to in an affidavit shall be marked as such by the person taking the affidavit, and the exhibit shall be attached to and filed with the affidavit.

12.04 The OEB may require the whole or any part of a document filed to be verified by affidavit.

13. Evidence

13.01 Other than oral evidence given at the hearing, where a party intends to submit evidence, or is required to do so by the OEB, the evidence shall be in writing and in a form approved by the OEB.

13.02 A party shall not file written evidence without leave of the OEB. This requirement does not apply to: (i) evidence filed in an application; (ii) answers to interrogatories or undertakings; (iii) amendments or corrections to evidence already on the record; or (iv) evidence that the party is required to file by the OEB.

13.03 In determining whether to grant leave under **Rule 13.02**, the OEB will consider:

(a) the relevance and materiality of the proposed evidence;

(b) where the intervenor has requested its costs in connection with the proposed evidence, the quantum of those costs; and

(c) any other relevant considerations affecting the fairness, efficiency or timeliness of the proceeding or the fulfillment of the OEB's statutory mandate.

13.04 When requesting leave from the OEB to file evidence, a party shall provide a description of the proposed evidence and an explanation of why leave should be granted based on the considerations set out in **Rule 13.03**. In addition, where the party is an intervenor who intends to seek recovery of costs associated with preparing the evidence as part of a cost award under **Rule 39**, the intervenor shall also:

(a) provide the estimated cost to prepare the proposed evidence and to participate in expected procedural activities related to that evidence (e.g.,

responding to interrogatories or attendance at oral hearing); and

(b) promptly advise the OEB upon becoming aware that the cost of preparing that evidence or participating in expected procedural activities related to that evidence will be materially higher than previously estimated.

13.05 For greater certainty, the granting of leave to file evidence and of eligibility for an award of costs in relation to that evidence does not guarantee cost recovery.

13.06 In response to a request pursuant to **Rule 13.04**, the OEB may grant or deny leave to file evidence. Where there are multiple requests to file evidence on the same issue from parties with similar interests, the OEB may require these parties to work together. The OEB may also grant leave to file the evidence but deny costs of preparing that evidence and/or participating in expected procedural activities related to that evidence if the OEB determines that the costs should be funded by the party filing the evidence.

13.07 Where the OEB grants leave to a party to file evidence under **Rule 13.05**, the OEB may impose any conditions it considers appropriate, including the timeline for filing the evidence.

13.08 When it is filed, written evidence shall include a statement of the qualifications of the person who prepared the evidence or under whose direction or control the evidence was prepared.

13.09 Where a party is unable to submit written evidence as directed in accordance with the timelines set by the OEB, the party shall:

(a) file such written evidence as is available at that time;

(b) identify the balance of the evidence to be filed; and

(c) state when the balance of the evidence will be filed.

13A. Expert Evidence

13A.01 Where a party intends to engage one or more experts to give evidence in a proceeding on issues that are relevant to the expert's area of expertise, **Rule 13** applies to that evidence.

13A.02 An expert shall assist the OEB impartially by giving evidence that is fair and objective.

13A.03 An expert's written evidence shall, at a minimum, include the following:

(a) the expert's name, business name and address, and general area of expertise;

(b) the expert's qualifications, including the expert's relevant educational and professional experience in respect of each issue in the proceeding to which the expert's evidence relates;

(c) the instructions that party provided to the expert in relation to the proceeding and, where applicable, to each issue in the proceeding to which the expert's evidence relates;

(d) the specific information upon which the expert's evidence is based, including a description of any factual assumptions made and research conducted, and a list of the documents relied on by the expert in preparing the evidence;

(e) in the case of evidence that is provided in response to another expert's evidence, a summary of the points of agreement and disagreement with the other expert's evidence; and

(f) an acknowledgement of the expert's duty to the OEB in **Form A** to these Rules, signed by the expert.

13A.04 In a proceeding where two or more parties have engaged experts, the OEB may require two or more of the experts to:

(a) in advance of the hearing, confer with each other for the purposes of, among others, narrowing issues, identifying the points on which their views differ and are in agreement, and preparing a joint written statement to be admissible as evidence at the hearing; and

(b) at the hearing, appear together as a concurrent expert panel for the purposes of, among others, answering questions from the OEB and others as permitted by the OEB, and providing comments on the views of another expert on the same panel.

13A.05 The activities referred to in **Rule 13A.04** shall be conducted in accordance with such directions as may be given by the OEB, including as to:

(a) scope and timing;

(b) the involvement of any expert engaged by the OEB;

(c) the costs associated with the conduct of the activities;

(d) the attendance or non-attendance of counsel for the parties, or of other persons, in respect of the activities referred to in paragraph (a) of **Rule 13A.04**; and

(e) any issues in relation to confidentiality.

13A.06 A party that engages an expert shall ensure that the expert is made aware of, and has agreed to accept, the responsibilities that are or may be imposed on the expert as set out in this **Rule 13A** and **Form A**.

14. Disclosure

14.01 A party who intends to rely on or refer to any document that has not already been filed in a proceeding shall file and serve the document 24 hours before using it in the proceeding, unless the OEB directs otherwise.

14.02 Any party who fails to comply with **Rule 14.01** shall not put the document in evidence or use it in the cross-examination of a witness, unless the OEB otherwise directs.

14.03 Where the good character, propriety of conduct or competence of a party is an issue in the proceeding, the party is entitled to be furnished with reasonable information of any allegations at least 15 calendar days prior to the hearing.

TAB 2

FORM A

Proceeding:…….

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is .....(*name)*. I live at ..... (*city)*, in the ..... (*province/state*) of ..... .

2. I have been engaged by or on behalf of ..... (*name of party/parties)* to provide evidence in relation to the above-noted proceeding before the Ontario Energy Board.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
   (a) to provide opinion evidence that is fair, objective and non-partisan;
   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and
   (c) to provide such additional assistance as the Board may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date .....

_____
Signature

TAB 3

2015 SCC 23, 2015 CSC 23
Supreme Court of Canada

White Burgess Langille Inman v. Abbott and Haliburton Co.

2015 CarswellNS 314, 2015 CarswellNS 313, 2015 SCC 23, 2015 CSC 23, [2015] 2 S.C.R. 182, [2015] S.C.J. No. 23, 1135 A.P.R. 1, 18 C.R. (7th) 308, 251 A.C.W.S. (3d) 610, 360 N.S.R. (2d) 1, 383 D.L.R. (4th) 429, 470 N.R. 324, 67 C.P.C. (7th) 73, J.E. 2015-767

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants and R. Brian Burgess (Appellants) and Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, formerly Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited and Woodland Building Supplies Limited (Respondents) and Attorney General of Canada and Criminal Lawyers' Association (Ontario) (Interveners)

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Wagner, Gascon JJ.

Heard: October 7, 2014
Judgment: April 30, 2015
Docket: 35492

Proceedings: affirming *Abbott and Haliburton Co. v. White Burgess Langille Inman* (2013), *(*sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants)* 330 N.S.R. (2d) 301, 1046 A.P.R. 301, 361 D.L.R. (4th) 659, 2013 CarswellNS 360, [2013] N.S.J. No. 259, 2013 NSCA 66, 36 C.P.C. (7th) 22, Beveridge J.A., MacDonald C.J.N.S., Oland J.A. (N.S. C.A.); reversing in part *Abbott and Haliburton Co. v. White Burgess Langille Inman* (2012), 26 C.P.C. (7th) 280, *(*sub nom. *Abbott & Haliburton Co. Ltd. v. WBLI Chartered Accountants)* 317 N.S.R. (2d) 283, 1003 A.P.R. 283, 2012 CarswellNS 376, 2012 NSSC 210, Arthur W.D. Pickup J. (N.S. S.C.)

Counsel: Alan D'Silva, James Wilson, Aaron Kreaden, for Appellants
Jon Laxer, Brian F. P. Murphy, for Respondents
Michael H. Morris, for Intervener, Attorney General of Canada
Matthew Gourlay, for Intervener, Criminal Lawyers' Association

Subject: Civil Practice and Procedure; Evidence; Public; Torts

Headnote

Evidence --- Opinion — Experts — Expert reports — Admissibility

Shareholders brought professional negligence action against former auditors — Shareholders had retained different accounting firm which they claimed revealed problems with auditors' work — Auditors brought motion for summary judgment to have action dismissed — Shareholders retained forensic accounting partner from accounting firm to prepare report — Her affidavit set out opinion that auditors did not comply with professional obligations — Auditors applied successfully to strike out affidavit on grounds that affiant was not impartial witness — Majority of Court of Appeal concluded that motions judge erred in excluding affidavit — Auditors appealed — Appeal dismissed — Expert's lack of independence and impartiality goes to admissibility of evidence in addition to being considered in relation to weight to be given to evidence if admitted — Duty owed by expert witness is that expert must be fair, objective and non-partisan — Absent challenge to expert's independence and impartiality, expert's attestation or testimony recognizing and accepting duty will generally be sufficient to establish that threshold is met — Burden is then on party opposing admission of evidence to show that there is realistic concern that expert's evidence should not be received because expert is unable and/or unwilling to comply with that duty — If opponent does so, burden to establish on balance of probabilities this aspect of admissibility threshold remains on party proposing to call evidence — Record in this case amply sustained result reached by majority of Court of Appeal that affiant's evidence was admissible on summary judgment application.

Evidence --- Opinion — Experts — Qualification of expert — Miscellaneous

Shareholders brought professional negligence action against former auditors — Shareholders had retained different accounting firm which they claimed revealed problems with auditors' work — Auditors brought motion for summary judgment to have action dismissed — Shareholders retained forensic accounting partner from accounting firm to prepare report — Her affidavit set out opinion that auditors did not comply with professional obligations — Auditors applied successfully to strike out affidavit on grounds that affiant was not impartial witness — Majority of Court of

Appeal concluded that motions judge erred in excluding affidavit — Auditors appealed — Appeal dismissed — Concerns related to expert's duty to court and willingness and capacity to comply with it are best addressed initially in "qualified expert" element of framework from case law — Proposed expert witness who is unable or unwilling to fulfill this duty to court is not properly qualified to perform role of expert — Situating this concern in "properly qualified expert" ensures courts will focus expressly on important risks associated with biased experts — If expert evidence is found to meet basic threshold, judge must still take concerns about expert's independence and impartiality into account in weighing evidence at gatekeeping stage — Relevance, necessity, reliability and absence of bias can helpfully be seen as part of sliding scale where basic level must first be achieved in order to meet admissibility threshold and thereafter continue to play role in weighing overall competing considerations in admitting evidence — Potential helpfulness of evidence must not be outweighed by risk of dangers materializing that are associated with expert evidence — Record in this case amply sustained result reached by majority of Court of Appeal that affiant's evidence was admissible on summary judgment application.

Civil practice and procedure --- Summary judgment — Evidence on application — Affidavit evidence — Based on information and belief

Shareholders brought professional negligence action against former auditors — Shareholders had retained different accounting firm which they claimed revealed problems with auditors' work — Auditors brought motion for summary judgment to have action dismissed — Shareholders retained forensic accounting partner from accounting firm to prepare report — Her affidavit set out opinion that auditors did not comply with professional obligations — Auditors applied successfully to strike out affidavit on grounds that affiant was not impartial witness — Majority of Court of Appeal concluded that motions judge erred in excluding affidavit — Auditors appealed — Appeal dismissed — Motions judge hearing summary judgment application under Nova Scotia rules must be satisfied that proposed expert evidence meets threshold requirements for admissibility at first step of analysis, but generally should not engage in second step cost-benefit analysis — That cost-benefit analysis, in anything other than most obvious cases of inadmissibility, inevitably involves assigning weight or potential weight to evidence — Record in this case amply sustained result reached by majority of Court of Appeal that affiant's evidence was admissible on summary judgment application — There was no finding by motions judge that affiant was in fact biased or not impartial or that she was acting as advocate — To the extent motion judge was concerned about "appearance" of impartiality, this factor played no part in test for admissibility — There was agreement with majority of Court of Appeal that motions judge committed palpable and overriding error in determining that affiant was in conflict of interest that prevented her from giving impartial and objective evidence.

Preuve --- Opinion — Experts — Rapports d'expert — Recevabilité

Actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie — Actionnaires avaient engagé un autre cabinet comptable qui, selon eux, a révélé des erreurs par les vérificateurs précédents — Vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action — Actionnaires ont fait appel à une associée

en juricomptabilité du cabinet pour qu'elle rédige un rapport — Son affidavit exposait ses constatations que les vérificateurs ne se sont pas acquittés de leurs obligations professionnelles — Vérificateurs ont présenté avec succès une requête en radiation de l'affidavit au motif que l'associée en question n'était pas un témoin expert impartial — Juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit — Vérificateurs ont formé un pourvoi — Pourvoi rejeté — Manque d'indépendance et d'impartialité d'un expert joue au regard tant de l'admissibilité de son témoignage que de la valeur du témoignage, s'il est admis — Obligation du témoin expert est d'être juste, objectif et impartial — En l'absence d'une contestation concernant l'indépendance et l'impartialité de l'expert, le critère est généralement satisfait dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte — Il incombe alors à la partie qui s'oppose à l'admission du témoignage de l'expert de démontrer un motif réaliste de le juger inadmissible au motif que l'expert ne peut ou ne veut s'acquitter de son obligation — Si elle réussit, la charge de démontrer, selon la prépondérance des probabilités, qu'il a été satisfait à ce critère d'admissibilité incombe toujours à la partie qui entend présenter le témoignage — Dossier en l'espèce appuyait largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage contenu dans l'affidavit était admissible pour l'instruction de la requête en jugement sommaire.

Preuve --- Opinion — Experts — Compétence de l'expert — Divers

Actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie — Actionnaires avaient engagé un autre cabinet comptable qui, selon eux, a révélé des erreurs par les vérificateurs précédents — Vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action — Actionnaires ont fait appel à une associée en juricomptabilité du cabinet pour qu'elle rédige un rapport — Son affidavit exposait ses constatations que les vérificateurs ne se sont pas acquittés de leurs obligations professionnelles — Vérificateurs ont présenté avec succès une requête en radiation de l'affidavit au motif que l'associée en question n'était pas un témoin expert impartial — Juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit — Vérificateurs ont formé un pourvoi — Pourvoi rejeté — C'est sous le volet « qualification suffisante de l'expert » du cadre établi par la jurisprudence qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter — Témoin expert proposé qui ne peut ou ne veut s'acquitter de cette obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle — En abordant cette préoccupation sous le volet de la « qualification suffisante de l'expert », les tribunaux pourront s'attacher à évaluer les risques importants que présentent les experts qui ont un parti pris — Si le témoignage de l'expert satisfait aux critères, le juge doit malgré tout tenir compte des réserves émises quant à l'indépendance et à l'impartialité de l'expert lorsqu'il évalue la preuve à l'étape où il exerce son rôle de gardien — Il peut être utile de concevoir la pertinence, la nécessité, la fiabilité et l'absence de parti pris comme autant d'éléments d'un examen en deux temps, qui entrent en ligne de compte à la première étape, celle qui sert à déterminer s'il est satisfait aux critères d'admissibilité, et jouent également un rôle à la deuxième, dans la pondération des considérations concurrentes globales relatives à l'admissibilité

— Au bout du compte, le juge doit être convaincu que les risques liés au témoignage de l'expert ne l'emportent pas sur l'utilité possible de celui-ci — Dossier en l'espèce appuyait largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage contenu dans l'affidavit était admissible pour l'instruction de la requête en jugement sommaire.

Procédure civile --- Jugement sommaire — Preuve en instance — Preuve par affidavit — Fondé sur des renseignements et sur une opinion

Actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie — Actionnaires avaient engagé un autre cabinet comptable qui, selon eux, a révélé des erreurs par les vérificateurs précédents — Vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action — Actionnaires ont fait appel à une associée en juricomptabilité du cabinet pour qu'elle rédige un rapport — Son affidavit exposait ses constatations que les vérificateurs ne se sont pas acquittés de leurs obligations professionnelles — Vérificateurs ont présenté avec succès une requête en radiation de l'affidavit au motif que l'associée en question n'était pas un témoin expert impartial — Juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit — Vérificateurs ont formé un pourvoi — Pourvoi rejeté — Juge saisi d'une requête en jugement sommaire en vertu des règles de procédure de la Nouvelle-Écosse doit être convaincu que le témoignage de l'expert proposé satisfait aux critères d'admissibilité à la première étape de l'analyse; en règle générale, il doit toutefois se garder de passer à la seconde étape, celle de l'analyse coût-bénéfices — Cette analyse, sauf dans les cas d'inadmissibilité les plus manifestes, appelle inévitablement l'attribution d'une valeur, ou, à tout le moins, d'une valeur possible, à la preuve — Dossier en l'espèce appuyait largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage contenu dans l'affidavit était admissible pour l'instruction de la requête en jugement sommaire — Juge des requêtes n'a pas conclu que le témoin avait un parti pris, qu'il n'était pas impartial ou qu'il se faisait le défenseur des actionnaires — Même si, selon le juge des requêtes, il fallait une « apparence » d'impartialité, ce facteur ne constituait pas un critère d'admissibilité — On s'entendait avec les juges majoritaires de la Cour d'appel que le juge des requêtes a commis une erreur manifeste et dominante en concluant que le témoin était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial.

Shareholders brought a professional negligence action against the former auditors of their company. The shareholders started the action after retaining a different accounting firm to perform various accounting tasks and which they claimed revealed problems with the auditors' work. The auditors brought a motion for summary judgment to have the action dismissed. The shareholders retained a forensic accounting partner from the accounting firm to review materials and to prepare a report. Her affidavit set out her opinion that the auditors had not complied with their professional obligations. The auditors applied to strike out her affidavit on the grounds that she was not an impartial witness. The motions judge essentially agreed and struck out the affidavit. The majority of the Court of Appeal concluded that the motions judge erred in excluding the affidavit. The auditors appealed.

Held: The appeal was dismissed.

Per Cromwell J. (McLachlin C.J.C. and Abella, Rothstein, Moldaver, Wagner and Gascon JJ. concurring): Following the dominant view of Canadian cases, an expert's lack of independence and impartiality goes to the admissibility of evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. Such an approach is more in line with the basic structure of the law relating to expert evidence and with the importance jurisprudence has attached to the gatekeeping role of trial judges.

The duty owed by an expert witness is that the expert must be fair, objective and non-partisan. The appropriate threshold flows from this duty. Absent challenge to the expert's independence and impartiality, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that the threshold is met. The burden is then on the party opposing the admission of the evidence to show that there is realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. Exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide fair, objective and non-partisan evidence. Anything less should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence. The concept of apparent bias is not relevant to the question of whether an expert witness will be unable or unwilling to fulfill its primary duty to the court.

Concerns related to the expert's duty to the court and willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the framework from case law. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of expert. Situating this concern in the "properly qualified expert" ensures courts will focus expressly on the important risks associated with biased experts. If the expert evidence is found to meet the basic threshold, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. 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 role in weighing the overall competing considerations in admitting the evidence. The potential helpfulness of the evidence must not be outweighed by the risk of the dangers materializing that are associated with expert evidence.

A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but generally should not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight or potential weight to the evidence.

The record amply sustained the result reached by the majority of the Court of Appeal that the affiant's evidence was admissible on the summary judgment application. There was no finding by the motions judge that the affiant was in fact biased or not impartial or that she was acting as an advocate. The motions judge recognized that the affiant was aware of the standards and

requirements that experts be independent. The affiant testified that she owed an ultimate duty to the court in testifying as an expert witness. To the extent the motions judge was concerned about the "appearance" of impartiality, this factor played no part in the test for admissibility. The fact that one professional firm discovered what it thought was or may be professional negligence did not disqualify it from offering that opinion as an expert witness. There was no more than a speculative possibility of the accounting firm incurring liability if its opinion was not ultimately accepted by the court. An expert does not lack the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professions in reaching his or her own opinion. There was agreement with the majority of the Court of Appeal that the motions judge committed a palpable and overriding error in determining that the affiant was in a conflict of interest that prevented her from giving impartial and objective evidence.
Les actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie. Les actionnaires ont intenté l'action après avoir engagé un autre cabinet comptable pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. Les actionnaires ont fait appel à une associée en juricomptabilité du cabinet pour qu'elle examine tous les documents pertinents et rédige un rapport. Son affidavit exposait ses constatations que les vérificateurs ne se sont pas acquittés de leurs obligations professionnelles. Les vérificateurs ont présenté une requête en radiation de l'affidavit au motif que l'associée en question n'était pas un témoin expert impartial. Le juge des requêtes s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié l'affidavit. Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit et ont accueilli l'appel. Les vérificateurs ont formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Cromwell, J. (McLachlin, J.C.C., Abella, Rothstein, Moldaver, Wagner, Gascon, JJ., souscrivant à son opinion) : Conformément au courant prédominant dans la jurisprudence canadienne, le manque d'indépendance et d'impartialité d'un expert joue au regard tant de l'admissibilité de son témoignage que de la valeur du témoignage, s'il est admis. Cette façon de voir semble s'accorder davantage avec l'économie générale du droit en ce qui concerne les témoignages d'experts et l'importance que la jurisprudence accorde au rôle de gardien exercé par les juges de première instance.

L'obligation du témoin expert est d'être juste, objectif et impartial. Le critère d'admissibilité découle de cette obligation. En l'absence d'une contestation concernant l'indépendance et l'impartialité de l'expert, le critère est généralement satisfait dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte. Il incombe alors à la partie qui s'oppose à l'admission du témoignage de l'expert de démontrer un motif réaliste de le juger inadmissible au motif que l'expert ne peut ou ne veut s'acquitter de son obligation. Si elle réussit, la charge de démontrer, selon la prépondérance des probabilités, qu'il a été satisfait à ce critère d'admissibilité incombe toujours à la partie qui entend présenter le témoignage. La décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les cas manifestes où l'expert proposé ne peut ou ne

veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité devrait être déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission. La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal.

C'est sous le volet « qualification suffisante de l'expert » du cadre établi par la jurisprudence qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter. Le témoin expert proposé qui ne peut ou ne veut s'acquitter de cette obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. En abordant cette préoccupation sous le volet de la « qualification suffisante de l'expert », les tribunaux pourront s'attacher à évaluer les risques importants que présentent les experts qui ont un parti pris. Si le témoignage de l'expert satisfait aux critères, le juge doit malgré tout tenir compte des réserves émises quant à l'indépendance et à l'impartialité de l'expert lorsqu'il évalue la preuve à l'étape où il exerce son rôle de gardien. Il peut être utile de concevoir la pertinence, la nécessité, la fiabilité et l'absence de parti pris comme autant d'éléments d'un examen en deux temps, qui entrent en ligne de compte à la première étape, celle qui sert à déterminer s'il est satisfait aux critères d'admissibilité, et jouent également un rôle à la deuxième, dans la pondération des considérations concurrentes globales relatives à l'admissibilité. Au bout du compte, le juge doit être convaincu que les risques liés au témoignage de l'expert ne l'emportent pas sur l'utilité possible de celui-ci.

Le juge saisi d'une requête en jugement sommaire en vertu des règles de procédure de la Nouvelle-Écosse doit être convaincu que le témoignage de l'expert proposé satisfait aux critères d'admissibilité à la première étape de l'analyse; en règle générale, il doit toutefois se garder de passer à la seconde étape, celle de l'analyse coût-bénéfices. Cette analyse, sauf dans les cas d'inadmissibilité les plus manifestes, appelle inévitablement l'attribution d'une valeur, ou, à tout le moins, d'une valeur possible, à la preuve.

Le dossier en l'espèce appuyait largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage contenu dans l'affidavit était admissible pour l'instruction de la requête en jugement sommaire. Le juge des requêtes n'a pas conclu que le témoin avait un parti pris, qu'il n'était pas impartial ou qu'il se faisait le défenseur des actionnaires. Le juge des requêtes a reconnu que le témoin connaissait les normes et exigences voulant que l'expert soit indépendant. Le témoin était conscient à titre de témoin expert de sa principale obligation envers le tribunal. Même si, selon le juge des requêtes, il fallait une « apparence » d'impartialité, ce facteur ne constituait pas un critère d'admissibilité. Le cabinet professionnel qui découvre ce qu'il estime être une négligence professionnelle ou ce qui pourrait l'être n'est pas d'emblée interdit de donner son opinion en tant que témoin expert. Il n'y avait rien de plus qu'une hypothétique possibilité que le cabinet soit tenu responsable si, en fin de compte, le tribunal n'avait pas retenu son opinion. Un expert ne satisfait pas au critère de la qualification suffisante, dans la mesure où il est question de son obligation de rendre un témoignage juste, objectif et impartial, simplement parce qu'il se fonde sur le travail d'autres professionnels pour se faire une opinion. On s'entendait avec les juges majoritaires de la Cour d'appel que le juge des requêtes a commis une erreur manifeste et dominante en concluant

que le témoin était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial.

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Words and phrases considered:

impartiality

Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance.

. . . . .

Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it

reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638- 39.

Termes et locutions cités:

impartialité

Le témoin expert a l'obligation particulière d'apporter au tribunal une aide juste, objective et impartiale.

(....)

Trois concepts apparentés sont à la base des diverses définitions de l'obligation de l'expert, à savoir l'impartialité, l'indépendance et l'absence de parti pris. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services (P. Michell et R. Mandhane, « The Uncertain Duty of the Expert Witness » (2005) 42 *Alta. L. Rev.* 635, p. 638-639).

APPEAL by auditors from judgment reported at *Abbott and Haliburton Co. v. White Burgess Langille Inman* (2013), 2013 NSCA 66, 2013 CarswellNS 360, 36 C.P.C. (7th) 22, 1046 A.P.R. 301, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, [2013] N.S.J. No. 259 (N.S. C.A.), allowing appeal, as to exclusion of certain affidavit evidence, from judgment striking out affidavit.

POURVOI formé par des vérificateurs à l'encontre d'un jugement publié à *Abbott and Haliburton Co. v. White Burgess Langille Inman* (2013), 2013 NSCA 66, 2013 CarswellNS 360, 36 C.P.C. (7th) 22, 1046 A.P.R. 301, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, [2013] N.S.J. No. 259 (N.S. C.A.), ayant accueilli un appel concernant l'exclusion en preuve d'un affidavit interjeté à l'encontre d'un jugement ayant radié l'affidavit.

Comment

White Burgess Langille Inman v. Abbott and Haliburton Co. comprehensively restates the law on admissibility of expert evidence in civil and criminal cases. A unanimous Supreme Court adopts the key feature of the judgment of Doherty J. in *R. v. Abbey*, 2009 ONCA 624, 68 C.R. (6th) 201 (Ont. C.A.) by holding that the admissibility analysis has two stages — a set of threshold

preconditions to admissibility and a discretionary gatekeeper stage (see para. 22, adopting *Abbey*). The Court also resolves a longstanding question in the Canadian case law by holding that defects in an expert witness's independence and impartiality can go to admissibility and not only to weight (para. 45). In fact, on examination, the Court's analysis indicates that problems of independence and impartiality may properly be considered at three separate stages in the analysis of expert evidence. First, the question whether proposed expert witnesses are able and willing to comply with their duties to the court can be addressed at the threshold stage of the admissibility analysis under the "qualified expert" requirement (para. 53). Second, even when the expert is qualified, questions about independence and impartiality can be taken into account at the gatekeeper stage (para. 54). But this too is a question of admissibility to be considered by the trier of law. What may be obscured by the Court's emphasis on admissibility is the third stage when these concerns enter the analysis: independence and impartiality can also be considered by the trier of fact where the evidence is admitted (para. 45).

Given that *White Burgess Langille Inman* will become the starting point for argument on the admissibility of expert evidence, it is somewhat disappointing that the Court did not provide an easily accessible summary of the admissibility analysis. Instead, one must carefully read through the judgment to piece together the features of the admissibility framework. One might attempt to summarize that framework as follows:

> Expert evidence is admissible when
>
> > 1) it meets the threshold requirements of admissibility, which are that
> >
> > > a. the evidence must be logically relevant;
> > >
> > > b. the evidence must be necessary to assist the trier of fact;
> > >
> > > c. there must be no other exclusionary rule;
> > >
> > > d. the expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the duty to the court to provide evidence that is
> > >
> > > > i. impartial,
> > > >
> > > > ii. independent and
> > > >
> > > > iii. unbiased; and
> > >
> > > e. for opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose;
>
> and

2) it passes scrutiny at the gatekeeper stage, and the trial judge determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as

a. relevance,

b. necessity,

c. reliability, and

d. absence of bias (see para. 54).

Certain features of this framework will require clarification and amplification in the future. For example, the Court's reference to reliability as a threshold requirement "in the case of an opinion based on novel or contested science or science used for a novel purpose" (para. 23) leaves open the status of the reliability tests for non-scientific evidence that were extensively discussed in *Abbey*. While some questions remain, the framework outlined in *White Burgess Langille Inman* renews and clarifies the structure of the admissibility analysis for expert evidence.

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Cromwell J. **(McLachlin C.J.C. and Abella, Rothstein, Moldaver, Wagner and Gascon JJ. concurring):**

I. Introduction and Issues

1 Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.

2 Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

3 Applying these principles, I agree with the conclusion reached by the majority of the Nova Scotia Court of Appeal and would therefore dismiss this appeal with costs.

II. Overview of the Facts and Judicial History

A. Facts and Proceedings

4 The appeal arises out of a professional negligence action by the respondents (who I will call the shareholders) against the appellants, the former auditors of their company (I will refer to them as the auditors). The shareholders started the action after they had retained a different accounting firm, the Kentville office of Grant Thornton LLP, to perform various accounting tasks and which in their view revealed problems with the auditors' previous work. The central allegation in the action is that the auditors' failure to apply generally accepted auditing and accounting standards while carrying out their functions caused financial loss to the shareholders. The main question in the action boils down to whether the auditors were negligent in the performance of their professional duties.

5 The auditors brought a motion for summary judgment in August of 2010, seeking to have the shareholders' action dismissed. In response, the shareholders retained Susan MacMillan, a forensic accounting partner at the Halifax office of Grant Thornton, to review all the relevant materials, including the documents filed in the action, and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out Ms. MacMillan's affidavit on the grounds that she was not an impartial expert witness. They argued that the action comes down to a battle of opinion between two accounting firms — the auditors' and the expert witness's. Ms. MacMillan's firm could be exposed to liability if its approach was not accepted by the court and, as a partner, Ms. MacMillan could be personally liable. Her potential liability if her opinion were not accepted gives her a personal financial interest in the outcome of the litigations and this, in the auditors' submission, ought to disqualify her from testifying.

6 The proceedings since have been neither summary nor resulted in a judgment. Instead, the litigation has been focused on the expert evidence issue; the summary judgment application has not yet been heard on its merits.

B. Judgments Below

(1) Nova Scotia Supreme Court: 2012 NSSC 210, 317 N.S.R. (2d) 283 (N.S. S.C.) (Pickup J.)

7 Pickup J. essentially agreed with the auditors and struck out the MacMillan affidavit in its entirety: para. 106. He found that, in order to be admissible, an expert's evidence "must be, and be seen to be, independent and impartial": para. 99. Applying that test, he concluded that this was one of those "clearest of cases where the reliability of the expert ... does not meet the threshold requirements for admissibility": para. 101.

(2) Nova Scotia Court of Appeal: 2013 NSCA 66, 330 N.S.R. (2d) 301 (N.S. C.A.) (Beveridge J.A., Oland J.A. Concurring; MacDonald C.J.N.S., Dissenting)

8 The majority of the Court of Appeal concluded that the motions judge erred in excluding Ms. MacMillan's affidavit. Beveridge J.A. wrote that while the court has discretion to exclude expert evidence due to actual bias or partiality, the test adopted by the motions judge — that an expert "must be, and be seen to be, independent and impartial" — was wrong in law. He ought not to have ruled her evidence inadmissible and struck out her affidavit.

9 MacDonald C.J.N.S., dissenting, would have upheld the motions judge's decision because he had properly articulated and applied the relevant legal principles.

III. Analysis

A. Overview

10 In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met, however, concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. This common law approach is, of course, subject to statutory and related provisions which may establish different rules of admissibility.

B. Expert Witness Independence and Impartiality

11 There have been long-standing concerns about whether expert witnesses hired by the parties are impartial in the sense that they are expressing their own unbiased professional opinion and whether they are independent in the sense that their opinion is the product of their own, independent conclusions based on their own knowledge and judgment: see, e.g., G. R. Anderson, *Expert Evidence* (3rd ed. 2014), at p. 509; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 783. As Sir George Jessel, M.R., put it in the 1870s, "[u]ndoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them": *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358 (Eng. Rolls Ct.), at p. 374.

12 Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D. (D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275 (S.C.C.), at para. 52. As observed by Beveridge

J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice": para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.*, at para. 106; see the Right Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

13 To decide how our law of evidence should best respond to these concerns, we must confront several questions: Should concerns about potentially biased expert opinion go to admissibility or only to weight?; If to admissibility, should these concerns be addressed by a threshold requirement for admissibility, by a judicial discretion to exclude, or both?; At what point do these concerns justify exclusion of the evidence?; And finally, how is our response to these concerns integrated into the existing legal framework governing the admissibility of expert opinion evidence? To answer these questions, we must first consider the existing legal framework governing admissibility, identify the duties that an expert witness has to the court and then turn to how those duties are best reflected in that legal framework.

C. The Legal Framework

(1) The Exclusionary Rule for Opinion Evidence

14 To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences — that is, the opinions — that they drew from them. As one great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness": J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524; see also C. Tapper, *Cross and Tapper on Evidence* (12th ed. 2010), at p. 530. While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading: see, e.g., *R. v. Graat*, [1982] 2 S.C.R. 819 (S.C.C.), at p. 836; *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-137 "General rule against opinion evidence".

15 Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Prof. Tapper put it, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them": p. 530; see also *R. v. Abbey*, [1982] 2 S.C.R. 24 (S.C.C.), at p. 42.

(2) The Current Legal Framework for Expert Opinion Evidence

16 Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

17 We can take as the starting point for these developments the Court's decision in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.). That case described the potential dangers of expert evidence and established a four-part threshold test for admissibility. The dangers are well known. One is that the trier of fact will inappropriately defer to the expert's opinion rather than carefully evaluate it. As Sopinka J. observed in *Mohan*:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. [p. 21]

(See also *D.D.*, at para. 53; *R. c. J. (J.-L.)*, 2000 SCC 51, [2000] 2 S.C.R. 600 (S.C.C.), at paras. 25-26; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272 (S.C.C.), at para. 46.)

18 The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 (Ont. C.A.), at para. 90, leave to appeal refused, [2010] 2 S.C.R. v (note) (S.C.C.). The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J. (J.-L.)*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D. (D.)*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D. (D.)*, at para. 55); the risk of admitting "junk science" (*J. (J.-L.)*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387 (S.C.C.), at para. 76.

19 To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed

expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect — a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J. (J.-L.)*, at para. 28.

20 *Mohan* and the jurisprudence since, however, have not explicitly addressed how this "cost-benefit" component fits into the overall analysis. The reasons in *Mohan* engaged in a cost-benefit analysis with respect to particular elements of the four threshold requirements, but they also noted that the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects: p. 21. The jurisprudence since *Mohan* has also focused on particular aspects of expert opinion evidence, but again without always being explicit about where additional concerns fit into the analysis. The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role.

21 So, for example, the necessity threshold criterion was emphasized in cases such as *D. (D.)*. The majority underlined that the necessity requirement exists "to ensure that the dangers associated with expert evidence are not lightly tolerated" and that "[m]ere relevance or 'helpfulness' is not enough": para. 46. Other cases have addressed the reliability of the science underlying an opinion and indeed technical evidence in general: *J. (J.-L.)*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239 (S.C.C.). The question remains, however, as to where the cost-benefit analysis and concerns such as those about reliability fit into the overall analysis.

22 *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

23 At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J. (J.-L.)*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J. (J.-L.)*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D. (D.)*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290 (Ont. C.A.), at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396 (Ont. C.A.), at para. 72.

24 At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J. (J.-L.)*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

25 With this delineation of the analytical framework, we can turn to the nature of an expert's duty to the court and where it fits into that framework.

D. The Expert's Duty to the Court or Tribunal

26 There is little controversy about the broad outlines of the expert witness's duty to the court. As Anderson writes, "[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world": p. 227. I would add that a similar duty exists in the civil law of Quebec: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at para. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011) c. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, *art. 22* (not yet in force); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), at pp. 14 and 121.

27 One influential statement of the elements of this duty are found in the English case *National Justice Compania Naviera SA v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Eng. Comm. Ct.). Following an 87-day trial, Cresswell J. believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in *obiter dictum* duties and responsibilities of experts, the first two of which have particularly influenced the development of Canadian law:

> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ....
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise .... An expert witness in the High Court should never assume the role of an advocate.
>
> [Emphasis added; citation omitted; p. 81.]

(These duties were endorsed on appeal: [*"Ikarian Reefer" (The), Re*] [1995] 1 Lloyd's Rep. 455 (Eng. C.A.), at p. 496.)

28 Many provinces and territories have provided explicit guidance related to the duty of expert witnesses. In Nova Scotia, for example, the *Civil Procedure Rules* require that an expert's report be signed by the expert who must make (among others) the following representations to the court: that the expert is providing an objective opinion for the assistance of the court; that the expert is prepared to apply independent judgment when assisting the court; and that the report includes everything the expert regards as relevant to the expressed opinion and draws attention to anything that could reasonably lead to a different conclusion (r. 55.04(1)(a), (b) and (c)). While these requirements do not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible, they provide a convenient summary of a fairly broadly shared sense of the duties of an expert witness to the court.

29 There are similar descriptions of the expert's duty in the civil procedure rules in other Canadian jurisdictions: Anderson, at p. 227; *The Queen's Bench Rules (Saskatchewan)*, r. 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 11-2(1); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 4.1.01(1); *Rules of Court*, Y.O.I.C. 2009/65, r. 34(23); *An Act to establish the new Code of Civil Procedure*, art. 22. Moreover, the rules in Saskatchewan, British Columbia, Ontario, Nova Scotia, Prince Edward Island, Quebec and the Federal Courts require experts to certify that they are aware of and will comply with their duty to the court: Anderson, at p. 228; Saskatchewan *Queen's Bench Rules*, r. 5-37(3); British Columbia *Supreme Court Civil Rules*, r. 11-2(2); Ontario *Rules of Civil Procedure*, r. 53.03(2.1); Nova Scotia *Civil Procedure Rules*, r. 55.04(1)(a); Prince Edward Island *Rules of Civil Procedure*, r. 53.03(3)(g); *An Act to establish the new Code of Civil Procedure*, art. 235 (not yet in force); *Federal Courts Rules*, SOR/98-106, r. 52.2(1)(c).

30 The formulation in the *Ontario Rules of Civil Procedure* is perhaps the most succinct and complete statement of the expert's duty to the court: to provide opinion evidence that is fair, objective and non-partisan: r. 4.1.01(1)(a). The Rules are also explicit that this duty to the court prevails over any obligation owed by the expert to a party: r. 4.1.01(2). Likewise, the newly adopted *Act to establish the new Code of Civil Procedure of Quebec* explicitly provides, as a guiding principle, that the expert's duty to the court overrides the parties' interests, and that the expert must fulfill his or her primary duty to the court "objectively, impartially and thoroughly": art. 22; Chamberland, at pp. 14 and 121.

31 Many of the relevant rules of court simply reflect the duty that an expert witness owes to the court at common law: Anderson, at p. 227. In my opinion, this is true of the Nova Scotia rules that apply in this case. Of course, it is always open to each jurisdiction to impose different rules of admissibility, but in the absence of a clear indication to that effect, the common law rules apply in common law cases. I note that in *Nova Scotia, the Civil Procedure Rules* explicitly provide that they do not change the rules of evidence by which the admissibility of expert opinion evidence is determined: r. 55.01(2).

32 Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

E. The Expert's Duties and Admissibility

33 As we have seen, there is a broad consensus about the nature of an expert's duty to the court. There is no such consensus, however, about how that duty relates to the admissibility of an expert's evidence. There are two main questions: Should the elements of this duty go to admissibility of the evidence rather than simply to its weight?; And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?

34 In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

(1) Admissibility or Only Weight?

(a) The Canadian Law

35 The weight of authority strongly supports the conclusion that at a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence.

36 Our Court has confirmed this position in a recent decision that was not available to the courts below:

> It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker (J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at No. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), chap. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 22 (not yet in force)). However, these factors generally have an impact on the probative

> value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily "disqualify" the expert (L. Ducharme and C.- M. Panaccio, *L'administration de la preuve* (4th ed. 2010), at Nos. 590-91 and 605). For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case (D. M. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565, at pp. 598-99).
>
> (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, at para. 106)

37 I will refer to a number of other cases that support this view. I do so by way of illustration and without commenting on the outcome of particular cases. An expert's interest in the litigation or relationship to the parties has led to exclusion in a number of cases: see, e.g., *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Ont. Gen. Div.) (proposed expert was the defendant's lawyer in related matters and had investigated from the outset of his retainer the matter of a potential negligence claim against the plaintiff); *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2000), 49 O.R. (3d) 187 (Ont. S.C.J.) (expert was the party's lawyer in related U.S. proceedings); *R. v. Docherty*, 2010 ONSC 3628 (Ont. S.C.J.) (expert was the defence counsel's father); *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394 (N.S. S.C.) (expert was also a party to the litigation); *Handley v. Punnett*, 2003 BCSC 294 (B.C. S.C.) (expert was also a party to the litigation); *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (Ont. S.C.J. [Commercial List]) (expert was effectively a "co-venturer" in the case due in part to the fact that 40 percent of his remuneration was contingent upon success at trial: para. 7); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (Ont. Master) (expert's retainer agreement was inappropriate); *Hutchingame v. Johnstone*, 2006 BCSC 271 (B.C. S.C.) (expert stood to incur liability depending on the result of the trial). In other cases, the expert's stance or behaviour as an advocate has justified exclusion: see, e.g., *Carmen Alfano Family Trust v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62 (Ont. C.A.); *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617 (B.C. S.C.); *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19 (Ont. S.C.J.).

38 Many other cases have accepted, in principle, that lack of independence or impartiality can lead to exclusion, but have ruled that the expert evidence did not warrant rejection on the particular facts: see, e.g., *United City Properties Ltd. v. Tong*, 2010 BCSC 111 (B.C. S.C.); *R. v. Inco Ltd.* (2006), 80 O.R. (3d) 594 (Ont. S.C.J.). This was the position of the Court of Appeal in this case: para. 109; see also para. 121.

39 Some Canadian courts, however, have treated these matters as going exclusively to weight rather than to admissibility. The most often cited cases for this proposition are probably *R. v.*

Klassen, 2003 MBQB 253, 179 Man. R. (2d) 115 (Man. Q.B.), and *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77 (N.L. C.A.). *Klassen* holds as admissible any expert evidence meeting the criteria from *Mohan*, with bias only becoming a factor as to the weight to be given to the evidence: see also *R. v. Violette*, 2008 BCSC 920 (B.C. S.C.). Similarly, the court in *Gallant* determined that a challenge to expert evidence that is based on the expert having a connection to a party or an issue in the case or a possible predetermined position on the case cannot take place at the admissibility stage: para. 89.

40 I conclude that the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence. I note that while the shareholders submit that issues regarding expert independence should go only to weight, they rely on cases such as *INCO* that specifically accept that a finding of lack of independence or impartiality can lead to inadmissibility in certain circumstances: R.F., at paras. 52-53.

(b) Other Jurisdictions

41 Outside Canada, the concerns related to independence and impartiality have been addressed in a number of ways. Some are similar to the approach in Canadian law.

42 For example, summarizing the applicable principles in British law, Nelson J. in *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367 (Eng. & Wales H.C. [T. & C.C.]), underlined that when an expert has an interest or connection with the litigation or a party thereto, exclusion will be warranted if it is determined that the expert is unwilling or unable to carry out his or her primary duty to the court: see also H. M. Malek et al., eds., *Phipson on Evidence* (18th ed. 2013), at pp. 1158-59. The mere fact of an interest or connection will not disqualify, but it nonetheless may do so in light of the nature and extent of the interest or connection in particular circumstances. As Lord Phillips of Worth Matravers, M.R., put it in a leading case, "[i]t is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence": *Factortame Ltd. v. Secretary of State for the Environment, Transport & the Regions (Costs) (No.2)* (2002), [2002] EWCA Civ 932, [2003] Q.B. 381 (Eng. C.A.), at para. 70; see also *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Eng. Comm. Ct.); *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Eng. Ch. Div.); *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067 (Eng. Ch. Div.), at paras. 312-17.

43 In Australia, the expert's objectivity and impartiality will generally go to weight, not to admissibility: I. Freckelton and H. Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (5th ed. 2013), at p. 35. As the Court of Appeal of the State of Victoria put it: "... to the extent that it is desirable that expert witnesses should be under a duty to assist the Court, that

has not been held and should not be held as disqualifying, in itself, an 'interested' witness from being competent to give expert evidence" (*FGT Custodians Pty Ltd. v. Fagenblat*, [2003] VSCA 33 (Australia Vic. Sup. Ct.), at para. 26 (AustLII); see also Freckelton and Selby, at pp. 186-88; *Collins Thomson Ltd. v. Clayton*, [2002] NSWSC 366 (New South Wales S.C.); *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485 (New South Wales S.C.); *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500 (Australia Fed. Ct.)).

44 In the United States, at the federal level, the independence of the expert is a consideration that goes to the weight of the evidence, and a party may testify as an expert in his own case: *Rodriguez v. Pacificare of Texas Inc.* (1993), 980 F.2d 1014 (U.S. C.A. 5th Cir. 1993), at p. 1019; *Tagatz v. Marquette University* (1988), 861 F.2d 1040 (U.S. C.A. 7th Cir. 1988); *Apple Inc. v. Motorola, Inc.* (2014), 757 F.3d 1286 (U.S. C.A. Fed. Cir.), at p. 1321. This also seems to be a fair characterization of the situation in the states: *Corpus Juris Secundum*, vol. 32 (2008), at p. 325: "The bias or interest of the witness does not affect his or her qualification, but only the weight to be given the testimony.".

(c) Conclusion

45 Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *J. (J.-L.)*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility" (para. 28).

(2) The Appropriate Threshold

46 I have already described the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law has come to accept ... that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L. R.* 135, at p. 152 (footnote omitted). The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.

47 Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. As Prof. Paciocco aptly observed, "if inquiries about bias or partiality become routine during *Mohan voir dires*, trial testimony will become nothing more

than an inefficient reprise of the admissibility hearing": "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565 ("Jukebox"), at p. 597. While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.

48 Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

49 This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

50 As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer

would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

51 Having established the analytical framework, described the expert's duty and determined that compliance with this duty goes to admissibility and not simply to weight, I turn now to where this duty fits into the analytical framework for admission of expert opinion evidence.

F. Situating the Analysis in the Mohan Framework

(1) The Threshold Inquiry

52 Courts have addressed independence and impartiality at various points of the admissibility test. Almost every branch of the *Mohan* framework has been adapted to incorporate bias concerns one way or another: the proper qualifications component (see, e.g., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166 (Ont. S.C.J.); *R. v. Demetrius* [2009 CarswellOnt 2548 (Ont. S.C.J.)], 2009 CanLII 22797; the necessity component (see, e.g., *Docherty; Alfano*); and during the discretionary cost-benefit analysis (see, e.g., *United City Properties*; *Abbey* (ONCA)). On other occasions, courts have found it to be a stand-alone requirement: see, e.g., *Docherty*; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011 (B.C. S.C.); *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (Ont. S.C.J. [Commercial List]); *Prairie Well Servicing Ltd. v. Tundra Oil & Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284 (Man. Q.B.). Some clarification of this point will therefore be useful.

53 In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework: S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at s. 12:30.20.50; see also *Deemar v. College of Veterinarians (Ontario)*, 2008 ONCA 600, 92 O.R. (3d) 97 (Ont. C.A.), at para. 21; Lederman, Bryant and Fuerst, at pp. 826-27; *Halsbury's Laws of Canada: Evidence*, at para. HEV-152 "Partiality"; *The Canadian Encyclopedic Digest* (Ont. 4th ed. (loose-leaf)), vol. 24, Title 62 — Evidence, at § 469. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts: Hill, Tanovich and Strezos, at s. 12:30.20.50; Paciocco, "Jukebox", at p. 595.

(2) The Gatekeeping Exclusionary Discretion

54 Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, 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.

G. Expert Evidence and Summary Judgment

55 I must say a brief word about the procedural context in which this case originates — a summary judgment motion. (I note that these comments relate to the summary judgment regime under the Nova Scotia rules and that different considerations may arise under different rules.) It is common ground that the court hearing the motion can consider only admissible evidence. However, under the Nova Scotia jurisprudence, which is not questioned on this appeal, it is not the role of a judge hearing a summary judgment motion in Nova Scotia to weigh the evidence, draw reasonable inferences from evidence or settle matters of credibility: *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348 (N.S. C.A.), at paras. 42-44, 87 and 98; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385 (N.S. C.A.), at paras. 6 and 12. Taking these two principles together, the result in my view is this. A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but should generally not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight — or at least potential weight — to the evidence.

H. Application

56 I turn to the application of these principles to the facts of the case. In my respectful view, the record amply sustains the result reached by the majority of the Court of Appeal that Ms. MacMillan's evidence was admissible on the summary judgment application. Of course, the framework which I have set out in these reasons was not available to either the motions judge or to the Court of Appeal.

57 There was no finding by the motions judge that Ms. MacMillan was in fact biased or not impartial or that she was acting as an advocate for the shareholders: C.A. reasons, at para. 122. On the contrary, she specifically recognized that she was aware of the standards and requirements that experts be independent. She was aware of the precise guidelines in the accounting industry concerning accountants acting as expert witnesses. She testified that she owed an ultimate duty to the court in testifying as an expert witness: A.R., vol. III, at pp. 75-76; C.A. reasons, at para. 134. To the extent that the motions judge was concerned about the "appearance" of impartiality, this factor plays no part in the test for admissibility, as I have explained earlier.

58 The auditors' claim that Ms. MacMillan lacks objectivity rests on two main points which I will address in turn.

59 First, the auditors say that the earlier work done for the shareholders by the Kentville office of Grant Thornton "served as a catalyst and foundation for the claim of negligence" against the auditors and that this "precluded [Grant Thornton] from acting as 'independent' experts in this case": A.F., at paras. 17 and 19. Ms. MacMilllan, the auditors submit, was in an "irreconcilable conflict of interest, in that she would inevitably have to opine on, and choose between, the actions taken and standard of care exercised by her own partners at Grant Thornton" and those of the auditors: A.F., at para. 21. This first submission, however, must be rejected.

60 The fact that one professional firm discovers what it thinks is or may be professional negligence does not, on its own, disqualify it from offering that opinion as an expert witness. Provided that the initial work is done independently and impartially and the person put forward as an expert understands and is able to comply with the duty to provide fair, objective and non-partisan assistance to the court, the expert meets the threshold qualification in that regard. There is no suggestion here that Grant Thornton was hired to take a position dictated to it by the shareholders or that there was anything more than a speculative possibility of Grant Thornton incurring liability to them if the firm's opinion was not ultimately accepted by the court. There was no finding that Ms. MacMillan was, in fact, biased or not impartial, or that she was acting as an advocate for the shareholders. The auditors' submission that she somehow "admitted" on her cross-examination that she was in an "irreconcilable conflict" is not borne out by a fair reading of her evidence in context: A.R., vol. III, at pp. 139-45. On the contrary, her evidence was clear that she understood her role as an expert and her duty to the court: *ibid.*, at pp. 75-76.

61 The auditors' second main point was that Ms. MacMillan was not independent because she had "incorporated" some of the work done by the Kentville office of her firm. This contention is also ill founded. To begin, I do not accept that an expert lacks the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professionals in reaching his or her own opinion. Moreover, as Beveridge J.A. concluded, what was "incorporated" was essentially an exercise in arithmetic that had nothing to do with any accounting opinion expressed by the Kentville office: C.A. reasons, at paras. 146-49.

62 There was no basis disclosed in this record to find that Ms. MacMillan's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. I agree with the majority of the Court of Appeal who concluded that the motions judge committed a palpable and overriding error in determining that Ms. MacMillan was in a conflict of interest that prevented her from giving impartial and objective evidence: paras. 136-50.

IV. Disposition

63 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

TAB 4

2017 SCC 12, 2017 CSC 12
Supreme Court of Canada

R. v. Bingley

2017 CarswellOnt 2407, 2017 CarswellOnt 2406, 2017 CSC 12, 2017 SCC 12, [2017] 1 S.C.R. 170, [2017] 1 R.C.S. 170, [2017] S.C.J. No. 12, 135 W.C.B. (2d) 356, 146 O.R. (3d) 704 (note), 345 C.C.C. (3d) 306, 35 C.R. (7th) 1, 407 D.L.R. (4th) 383, 4 M.V.R. (7th) 1

Carson Bingley (Appellant) and Her Majesty The Queen (Respondent) and Criminal Lawyers' Association (Ontario) and Canadian Civil Liberties Association (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown JJ.

Heard: October 13, 2016
Judgment: February 23, 2017 *
Docket: 36610

Proceedings: affirming *R. v. Bingley* (2015), 325 C.C.C. (3d) 525, 126 O.R. (3d) 525, 20 C.R. (7th) 351, 2015 ONCA 439, [2015] O.J. No. 3171, 2015 CarswellOnt 8987, 335 O.A.C. 328, 80 M.V.R. (6th) 1, E.A. Cronk J.A., E.E. Gillese J.A., Grant Huscroft J.A. (Ont. C.A.); affirming *R. v. Bingley* (2014), 2014 CarswellOnt 6888, 2014 ONSC 2432, [2014] O.J. No. 2468, McLean J. (Ont. S.C.J.)

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Jasmine T. Akbarali, Stuart A. Zacharias, for Intervener, Canadian Civil Liberties Association

Subject: Criminal; Evidence

Headnote

Evidence --- Opinion — Experts — Admissibility — Miscellaneous

Accused was suspected of drug impaired driving — Drug recognition expert (DRE) performed drug recognition evaluation — Accused was charged with driving while impaired by drug — At trial, Crown relied on s. 254(3.1) of Criminal Code to establish admissibility of DRE's testimony without voir dire — Judge allowed DRE to testify as expert without voir dire, then acquitted accused — On appeal, acquittal was overturned and new trial ordered — At second trial, judge held s. 254(3.1) did not allow for automatic admissibility of DRE's evidence and acquitted accused — Crown appealed — Court held s. 254(3.1) rendered DRE's opinion automatically admissible — Accused appealed — Court of Appeal held DRE's opinion evidence was admissible without voir dire and dismissed appeal — Accused appealed — Appeal dismissed — Section 254(3.1) does

not provide for automatic admissibility of DRE opinion evidence — Because s. 254(3.1) does not speak to admissibility, common law rules of evidence apply — Trial judge erred in concluding that because DRE was not expert in scientific foundation of various elements of test, none of his opinion evidence was admissible — DRE is expert for purpose of applying 12-step evaluation — Where requirements for admissibility of expert evidence at common law are met and probative value of evidence outweighs prejudicial effect, trial judge is not required to hold voir dire to determine admissibility Criminal Code, R.S.C. 1985, c. C-46, s 254(3.1).

Preuve --- Opinion — Experts — Recevabilité — Divers

On soupçonnait l'accusé de conduire avec les facultés affaiblies par l'effet d'une drogue — Expert en reconnaissance de drogues (ERD) a procédé à une évaluation en reconnaissance de drogues — Accusé a été inculpé de conduite avec les facultés affaiblies par la drogue — Lors du procès, le ministère public a invoqué l'art. 254(3.1) du Code criminel comme fondement de l'admissibilité du témoignage de l'ERD sans que l'on ait à tenir un voir-dire — Juge a permis à l'ERD de témoigner comme expert sans au préalable tenir de voir-dire, puis a acquitté l'accusé — En appel, l'acquittement a été annulé et un nouveau procès a été ordonné — Lors du second procès, le juge a estimé que l'art. 254(3.1) ne prévoyait pas l'admissibilité automatique du témoignage de l'ERD, puis a acquitté l'accusé — Ministère public a interjeté appel — Cour a estimé que l'art. 254(3.1) rendait l'opinion de l'ERD automatiquement admissible — Accusé a interjeté appel — Cour d'appel a estimé que le témoignage d'opinion de l'ERD était admissible sans voir-dire et a rejeté l'appel — Accusé a formé un pourvoi — Pourvoi rejeté — Article 254(3.1) ne prévoit pas l'admissibilité automatique de l'opinion de l'ERD — Comme l'art. 254(3.1) ne traite pas de l'admissibilité des éléments de preuve recueillis, les règles de preuve en common law s'appliquent — Juge du procès a eu tort de conclure que, parce que l'ERD n'était pas un expert à l'égard des assises scientifiques des divers éléments de l'évaluation, aucune partie de son témoignage d'opinion n'était admissible — ERD est un expert pour ce qui est d'effectuer l'évaluation en 12 étapes — Lorsque les critères pour l'admissibilité du témoignage d'expert en common law sont respectés et que la valeur probante du témoignage l'emporte sur son effet préjudiciable, le juge du procès n'est pas obligé de tenir un voir-dire pour statuer sur l'admissibilité de la preuve.

The police were called after the accused was seen driving erratically and striking a car. The officer noted signs of impairment and conducted a roadside screening device test, which the accused passed. The officer then called for a field sobriety test. A certified drug recognition expert (DRE) under the Criminal Code conducted a standard field sobriety test, which the accused failed. The accused was arrested for driving while impaired by a drug. At the police station, the DRE conducted a drug recognition evaluation, during which the accused admitted he had smoked marijuana and taken two Xanax (alprazolam) in the previous 12 hours. The DRE concluded that the accused was impaired by a drug.

At trial, the Crown called the DRE to explain the results of his drug recognition evaluation as evidence of the accused's impairment. The Crown relied on s. 254(3.1) of the Criminal Code to establish the admissibility of the DRE's testimony, arguing that no voir dire was required.

The judge allowed the DRE to testify as an expert regarding the results of the drug recognition evaluation without a voir dire, but acquitted the accused. On appeal, the acquittal was overturned and a new trial ordered.

At the second trial, the judge held that s. 254(3.1) did not allow for the automatic admissibility of the DRE's evidence, then considered whether the DRE's evidence was admissible as expert opinion evidence pursuant to the Supreme Court of Canada's decision in *R. v. Mohan* He held that the DRE could not be qualified as an expert because he was not trained in the science underlying the drug recognition procedure and concluded that the evidence was not admissible lay opinion. The accused was acquitted again, but the Crown successfully appealed.

The summary conviction appeal judge held that s. 254(3.1) rendered a DRE's opinion automatically admissible and that in any event, it would be admissible lay opinion. The accused appealed to the Court of Appeal, which held that the DRE's opinion evidence was admissible without a voir dire, and dismissed the appeal. The accused appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per McLachlin C.J.C. (Abella, Moldaver, Côté and Brown JJ. concurring): Section 254(3.1) of the Criminal Code does not provide for the automatic admissibility at trial of DRE opinion evidence. Section 254(3.1) gives the police investigative tools to enforce laws against drug-impaired driving; however, it does not dictate whether evidence obtained through the use of those investigative tools will be admissible. When Parliament intends to make evidence automatically admissible, it says so expressly. Because s. 254(3.1) does not speak to admissibility, the common law rules of evidence apply.

Due to concessions made by the accused, the only issue was whether a DRE has special expertise under the Mohan test. While the trial judge would normally determine whether an expert has special expertise at a voir dire, s. 254(3.1) and the accompanying legislative and regulatory scheme conclusively answer that question. A DRE is a "drug recognition expert", certified as such for the purposes of the scheme. The DRE is an expert for the purpose of applying the 12-step evaluation and determining whether that evaluation indicates drug impairment for the purposes of s. 254(3.1). Such expertise has been conclusively and irrebuttably established by Parliament.

The trial judge erred in concluding that, because the DRE was not an expert in the scientific foundation of the various elements of the test, none of his opinion evidence was admissible. The DRE's expertise is not in the scientific foundation of the test but in the administration of the test itself. Knowledge of the underlying science is not a precondition to the admissibility of a DRE's opinion. Such knowledge is required only where the science is novel, in order to ensure that the reliability of the evidence is established. In this case, the reliability of the 12-step evaluation came from the statutory framework itself.

Where, as here, the Mohan requirements for admissibility are met and the probative value of the evidence outweighs its prejudicial effect, the trial judge is not required to hold a voir dire to determine admissibility. As the DRE's evidence was admissible as expert evidence, it was unnecessary to consider whether it could also be admissible as lay opinion.

Per Karakatsanis (dissenting) (Gascon J. concurring): The appeal should be allowed and the acquittal reinstated. Parliament has not determined that the 12-step DRE evaluation is sufficiently reliable to be admitted as evidence of drug impairment at trial. Parliament has endorsed the reliability of the 12-step evaluation as an investigative tool, not an evidentiary shortcut at trial. Absent statutory language that clearly designates DRE evaluations as admissible evidence, a basic threshold of reliability of the tests must be established through precedent or evidence on a voir dire. Without the ability to test the reliability of the scientific foundation of a DRE evaluation, the trial judge would be unable to assess the probative value of such evidence and the trier of fact would be unable to assess the weight of such evidence.

Given the unsettled nature of the case law and the relatively recent reception of DRE evidence into Canadian courts, it was open to the trial judge to treat the proposed testimony as an opinion based on novel science. Although he recognized the DRE's special expertise in administering the 12-step evaluation for the purpose of requesting a bodily sample and thereby advancing the police investigation, the trial judge found that the DRE was not trained on the reliability of the 12-step evaluation. Because the Crown did not call a different expert for this purpose, there was a lack of evidence about the reliability of the regime. The trial judge was therefore entitled to exclude the DRE's evidence.

La police a reçu un appel après que l'accusé eût été vu en train de conduire de façon irrégulière et heurter un véhicule. Une policière a constaté que l'accusé présentait des signes d'affaiblissement des facultés et lui a fait subir un alcootest, lequel a donné des résultats non incriminants. La policière a alors demandé à l'accusé de se soumettre sur place à un test de sobriété. Un expert en reconnaissance de drogues (ERD) certifié sous le régime du Code criminel lui a fait subir sur place un test de sobriété standard que l'accusé a échoué. L'accusé a été arrêté pour conduite avec les facultés affaiblies par la drogue. Au poste de police, l'ERD a effectué une évaluation en reconnaissance de drogues au cours de laquelle l'accusé a reconnu avoir fumé de la marijuana et avoir pris deux comprimés de Xanax (ou alprazolam) dans les 12 heures précédentes. L'ERD a conclu que l'accusé avait les facultés affaiblies par la drogue.

Lors du procès, le ministère public a fait témoigner l'ERD pour qu'il explique en quoi les résultats de l'évaluation en reconnaissance de drogues prouvaient l'affaiblissement des facultés de l'accusé. Le ministère public a invoqué l'art. 254(3.1) du Code criminel comme fondement de l'admissibilité du témoignage de l'ERD, faisant valoir qu'aucun voir-dire n'était requis.

Le juge a permis à l'ERD de témoigner comme expert relativement aux résultats de l'évaluation en reconnaissance de drogues sans au préalable tenir de voir-dire, mais il a acquitté l'accusé. En appel, l'acquittement a été annulé et un nouveau procès a été ordonné.

Lors du second procès, le juge a estimé que l'art. 254(3.1) ne prévoyait pas l'admissibilité automatique du témoignage de l'ERD, puis s'est demandé si ce témoignage était admissible à titre de témoignage d'opinion d'un expert suivant l'arrêt rendu par la Cour suprême du Canada dans l'affaire R. c. Mohan. À son avis, l'ERD ne pouvait pas être reconnu comme expert, car il n'avait pas de formation sur les principes scientifiques à la base de la procédure de reconnaissance de drogues

et a conclu que ce témoignage ne constituait pas une opinion de profane admissible. L'accusé a de nouveau été acquitté, mais le ministère public a interjeté appel avec succès.

Le juge d'appel des poursuites sommaires a statué que l'art. 254(3.1) rendait l'opinion de l'ERD automatiquement admissible et que, de toute façon, il s'agissait d'une opinion de profane admissible. L'accusé a interjeté appel auprès de la Cour d'appel, laquelle a estimé que le témoignage d'opinion de l'ERD était admissible sans voir-dire et a rejeté l'appel. L'accusé a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

McLachlin, J.C.C. (Abella, Moldaver, Côté, Brown, JJ., souscrivant à son opinion) : L'article 254(3.1) ne prévoit pas l'admissibilité automatique du témoignage d'opinion de l'ERD. L'article 254(3.1) fournit aux policiers des outils d'enquête leur permettant de faire respecter les dispositions interdisant la conduite avec les facultés affaiblies par la drogue, mais ne précise pas si les éléments de preuve obtenus grâce à ces outils seront admissibles au procès. Lorsque le législateur entend rendre une preuve automatiquement admissible, il le dit expressément. Comme l'art. 254(3.1) ne traite pas de l'admissibilité des éléments de preuve recueillis, les règles de preuve en common law s'appliquent.

En raison des concessions faites par l'accusé, la seule question à résoudre en l'espèce consistait à déterminer si l'ERD possédait une expertise particulière en vertu des critères énoncés dans l'arrêt Mohan. Bien que le juge du procès détermine normalement si l'expert possède une expertise particulière lors d'un voir-dire, l'art. 254(3.1) et le régime législatif et réglementaire qui l'accompagne satisfont de façon concluante à l'exigence relative à l'expertise. L'ERD est un « expert en reconnaissance de drogues », certifié comme tel pour l'application du régime. L'ERD est un expert pour ce qui est d'effectuer l'évaluation en 12 étapes et de déterminer si celle-ci indique un affaiblissement des facultés par l'effet d'une drogue pour les besoins de l'art. 254(3.1). Son expertise a été établie de façon concluante et irréfragable par le législateur fédéral.

Le juge du procès a eu tort de conclure que, parce que l'ERD n'était pas un expert à l'égard des assises scientifiques des divers éléments de l'évaluation en question, aucune partie de son témoignage d'opinion n'était admissible. L'ERD n'est pas un expert des assises scientifiques de l'évaluation, mais plutôt dans l'accomplissement de l'évaluation elle-même. La connaissance des principes scientifiques sous-jacents ne constitue pas une condition préalable à l'admissibilité de l'opinion d'un ERD. La connaissance de ces principes n'est nécessaire que s'il est question d'un domaine scientifique nouveau afin de s'assurer que la fiabilité du témoignage soit établie. Dans le cas présent, la fiabilité de l'évaluation en 12 étapes découlait du régime législatif lui-même.

Si, comme en l'espèce, les critères d'admissibilité de l'arrêt Mohan sont respectés et il ne fait aucun doute que la valeur probante du témoignage l'emporte sur son effet préjudiciable, le juge du procès n'est pas obligé de tenir un voir-dire pour statuer sur l'admissibilité de la preuve. Comme le témoignage de l'ERD était admissible en tant que témoignage d'expert, il n'était pas nécessaire de se demander si cette preuve pourrait également être admissible à titre d'opinion de profane.

Karakatsanis, J. (dissident) (Gascon, J., souscrivant à son opinion) : Le pourvoi devrait être accueilli et l'acquittement rétabli. Le législateur fédéral n'a pas prévu que l'évaluation en 12 étapes

de l'ERD est suffisamment fiable pour être admise au procès comme preuve de l'affaiblissement des facultés par l'effet d'une drogue. Il a simplement reconnu la fiabilité de cette évaluation en vue de fournir un outil d'enquête, et non un raccourci en matière de preuve au procès. En l'absence d'un texte législatif indiquant clairement que les évaluations des ERD sont admissibles en preuve, le degré minimal de fiabilité des tests effectués doit être établi soit par voie jurisprudentielle, soit au moyen d'éléments de preuve dans le cadre d'un voir-dire. S'il est incapable de vérifier la fiabilité du fondement scientifique de l'évaluation de l'ERD, le juge du procès ne sera pas en mesure d'apprécier la valeur probante d'une telle preuve et le juge des faits sera incapable de déterminer le poids à y accorder.

Comme la jurisprudence n'est pas encore bien établie et vu le caractère relativement récent de l'admission de témoignages d'ERD devant les tribunaux canadiens, il était loisible au juge du procès de considérer le témoignage proposé comme une opinion fondée sur des principes scientifiques nouveaux. Bien que le juge du procès ait reconnu l'expertise spéciale de l'ERD lorsqu'il s'agit d'effectuer l'évaluation en 12 étapes en vue de demander des échantillons de substances corporelles, et de faire avancer ainsi l'enquête policière, il a conclu que celui-ci n'avait pas reçu de formation sur la fiabilité de l'évaluation en 12 étapes. Comme le ministère public n'a pas fait entendre un expert différent sur cette question, la preuve relative à la fiabilité du régime était insuffisante. Le juge du procès pouvait donc exclure le témoignage de l'ERD.

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Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324 (2003), 2003 SCC 42, 2003 CarswellOnt 3500, 2003 CarswellOnt 3501, 2003 C.L.L.C. 220-062, (sub nom. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324)* 230 D.L.R. (4th) 257, (sub nom. *Social Services Administration Board (Parry Sound) v. Ontario Public Service Employees Union, Local 324)* 308 N.R. 271, (sub nom. *Social Services Administration Board (Parry Sound District) v. Ontario Public Service Employees Union, Local 324)* 177 O.A.C. 235, 7 Admin. L.R. (4th) 177, (sub nom. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324)* [2003] 2 S.C.R. 157, 31 C.C.E.L. (3d) 1, 47 C.H.R.R. D/182, 67 O.R. (3d) 256 (S.C.C.) — referred to

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Statutes considered by *McLachlin C.J.C.*:

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Generally — referred to

s. 254 — referred to

s. 254(3.1) [en. 2008, c. 6, s. 19(3)] — considered

s. 254(3.4) [en. 2008, c. 6, s. 19(3)] — considered

s. 723(5) — considered

s. 729(1) — considered

Statutes considered by *Karakatsanis J.* (dissenting):

Criminal Code, R.S.C. 1985, c. C-46

s. 254(3.1) [en. 2008, c. 6, s. 19(3)] — considered

s. 254(3.4) [en. 2008, c. 6, s. 19(3)] — considered

s. 258(1)(c) — considered

Regulations considered by *McLachlin C.J.C.*:

Criminal Code, R.S.C. 1985, c. C-46

Evaluation of Impaired Operation (Drugs and Alcohol) Regulations, SOR/2008-196

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APPEAL by accused from judgment of Court of Appeal, reported at *R. v. Bingley* (2015), 2015 ONCA 439, 2015 CarswellOnt 8987, [2015] O.J. No. 3171, 80 M.V.R. (6th) 1, 20 C.R. (7th) 351, 325 C.C.C. (3d) 525, 126 O.R. (3d) 525, 335 O.A.C. 328 (Ont. C.A.), regarding admissibility of testimony of drug recognition expert at trial without voir dire.

POURVOI formé par l'accusé à l'encontre d'un jugement rendu par la Cour d'appel et publié à *R. v. Bingley* (2015), 2015 ONCA 439, 2015 CarswellOnt 8987, [2015] O.J. No. 3171, 80 M.V.R. (6th) 1, 20 C.R. (7th) 351, 325 C.C.C. (3d) 525, 126 O.R. (3d) 525, 335 O.A.C. 328 (Ont. C.A.), concernant l'admissibilité du témoignage d'un expert en reconnaissance de drogues sans la nécessité de tenir un voir-dire.

Criminal Reports - Comments

Busy trial judges will no doubt welcome that *Bingley* has decided that D.R.E. opinion evidence is admissible without a voir dire.

The approach of the majority judgment however leads to concerns about the Court's approach to the admissibility of expert evidence. The majority rejects the decision of the Ontario Court of Appeal in the Court below that the Criminal Code provisions make this evidence automatically admissible. Instead whether this expert evidence is admissible must, decided the majority, be determined by common law standards. This is a welcome safeguard. However the review by the Court of this new approach to determining impairment through non-alcoholic drugs seems extraordinarily accepting and limited.

Very recently Justice Cromwell speaking for a unanimous Court in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, 18 C.R. (7th) 308 (S.C.C.), thoroughly reviewed the Court's approach to the admissibility of expert evidence, adopting "with minor adjustments" the two step inquiry adopted by Doherty J.A. in *R. v. Abbey*, 2009 ONCA 624, 68 C.R. (6th) 201 (Ont. C.A.). To the first step of the four Mohan factors Cromwell J. added the need to assess

Cromwell J. relied on the authority of *R. c. J. (J.)*, 2000 SCC 51, 37 C.R. (5th) 203 (S.C.C.), and *R. v. Trochym*, 2007 SCC 6, 43 C.R. (6th) 217 (S.C.C.). He also stressed the importance of the reliability factor at the "second discretionary gatekeeper step". In Bingley the reliability inquiry seems to be obliterated by the mere assertion that the 12-step evaluation procedure came from the *Criminal Code* framework. Once the Court decided that the common law admissibility rules applied, it was surely necessary to incorporate a meaningful reliability analysis?

There is much to be said in favour of the dissenting opinion of Justice Karakatsanis that the D.R.E. challenge should have been seen to involve novel science and the courts should have first engaged in a searching reliability test before establishing admissibility for years to come. The generally approach to expert evidence adopted in White Burgess has been seriously undercut.

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***McLachlin C.J.C.* (Abella, Moldaver, Côté and Brown JJ. concurring):**

1 The issue on this appeal is narrow: Can a drug recognition expert ("DRE") testify about his or her determination under s. 254(3.1) of the *Criminal Code*, R.S.C. 1985, c. C-46, without a *voir dire* to determine the DRE's expertise? I conclude that in this case a *voir dire* was not required. I would therefore dismiss the appeal and confirm the order of the Ontario Court of Appeal for a new trial.

I. Facts

2 The appellant, Carson Bingley, was observed driving erratically, pulling into a parking lot, and striking a car. The police were called. Constable Jennifer Tennant arrived and interviewed Mr. Bingley. She testified that his eyes were "glossy" and bloodshot, and that he stumbled and slurred his words. She conducted a roadside screening device test, which Mr. Bingley passed. Constable Tennant then called for a field sobriety test. Constable Tommy Jellinek, a certified DRE under the *Criminal Code*, conducted the standard field sobriety test. Mr. Bingley failed the test, and was arrested for driving while impaired by a drug. Constable Jellinek took Mr. Bingley to a police station and conducted a drug recognition evaluation. During the evaluation, Mr. Bingley admitted he had smoked marijuana (cannabis) and taken two Xanax (alprazolam) in the previous 12 hours. Constable Jellinek concluded that Mr. Bingley was impaired by a drug. Based on his conclusion that Mr. Bingley was impaired, Constable Jellinek ordered a urinalysis under s. 254(3.4), which revealed the presence of cannabis, cocaine and alprazolam.

3 At trial, the Crown called Constable Jellinek to explain the results of his drug recognition evaluation as evidence of Mr. Bingley's impairment. The Crown relied on s. 254(3.1) of the *Criminal Code* as establishing the admissibility of Constable Jellinek's testimony, and argued that no *voir dire* was required.

II. Relevant Statutory Provisions

4 The relevant subsections of s. 254 of the *Criminal Code* are as follows:

> **Evaluation**
>
> **(3.1)** If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under paragraph 253(1)(a) as a result of the consumption of a drug or of a combination of alcohol and a drug, the peace officer may, by demand made as soon as practicable, require the person to submit, as soon as practicable, to an evaluation conducted by an evaluating officer to determine whether the person's ability to operate a motor vehicle, a vessel, an aircraft or railway equipment is impaired by a drug or by a combination of alcohol and a drug, and to accompany the peace officer for that purpose.
>
> . . . . .
>
> **Samples of bodily substances**
>
> **(3.4)** If, on completion of the evaluation, the evaluating officer has reasonable grounds to believe, based on the evaluation, that the person's ability to operate a motor vehicle, a vessel, an aircraft or railway equipment is impaired by a drug or by a combination of alcohol and a drug, the evaluating officer may, by demand made as soon as practicable, require the person to provide, as soon as practicable,

(a) a sample of either oral fluid or urine that, in the evaluating officer's opinion, will enable a proper analysis to be made to determine whether the person has a drug in their body; or

(b) samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine whether the person has a drug in their body.

III. Judgments Below

5 The judge at the first trial allowed Constable Jellinek to testify as an expert regarding the results of the drug recognition evaluation without a *voir dire*, but acquitted Mr. Bingley. On appeal, the acquittal was overturned and a new trial ordered (2012 ONSC 1186 (Ont. S.C.J.)). The Crown again sought to admit Constable Jellinek's evidence pursuant to s. 254(3.1). At the second trial, the judge held that s. 254(3.1) did not allow for the automatic admissibility of Constable Jellinek's evidence. He then considered whether Constable Jellinek's evidence was admissible as expert opinion evidence pursuant to *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.). He held that Constable Jellinek could not be qualified as an expert because he was not trained in the science underlying the drug recognition procedure. He also concluded that the evidence was not admissible lay opinion. He acquitted Mr. Bingley. The Crown successfully appealed the second acquittal. The summary conviction appeal judge held that s. 254(3.1) rendered a DRE's opinion automatically admissible and that in any event, it would be admissible lay opinion (2014 ONSC 2432 (Ont. S.C.J.)).

6 The Court of Appeal held that Constable Jellinek's opinion evidence was admissible without a *voir dire*. Section 254(3.1) allows a DRE "to determine" whether an individual is impaired due to a drug or a combination of drugs and alcohol. It is implicit that this determination is automatically admissible as opinion evidence, the court opined. Parliament created a detailed regime and satisfied itself of the science of the drug recognition evaluation prescribed by the *Evaluation of Impaired Operation (Drugs and Alcohol) Regulations*, SOR/2008-196 ("Regulations"); this suffices to determine admissibility. The Court of Appeal accordingly ordered a new trial (2015 ONCA 439, 126 O.R. (3d) 525 (Ont. C.A.)).

IV. Issues

7 The admissibility of Constable Jellinek's opinion evidence depends on the answers to three questions. First, does s. 254(3.1) of the *Criminal Code* provide for the automatic admissibility of DRE opinion evidence? Second, if it does not, is Constable Jellinek's testimony admissible as expert opinion pursuant to the common law rules of evidence? Third, if Constable Jellinek's evidence is not admissible expert opinion evidence, is it admissible as lay opinion evidence?

V. Analysis

8 Driving while impaired by drugs is a dangerous and, sadly, common activity, prohibited by the *Criminal Code*. Parliament long ago established a regime to enforce the law against alcohol-impaired driving, with breathalyzer testing and analyst certification at its centre. Enforcing the offence of drug-impaired driving was more elusive.

9 To meet the need to enforce the law against drug-impaired driving, Parliament set up a regime to test for drug impairment in 2008. The centrepiece of the regime is a 12-part evaluation for drug impairment, established by the Regulations, to be administered by police officers called DREs. [1] DREs receive special training and certification. Section 254(3.1) of the *Criminal Code* provides law enforcement, for the first time, with the power to compel a person to submit to a drug recognition evaluation when there are reasonable grounds to believe that a person has driven while impaired by drugs or by a combination of drugs and alcohol. If the 12-step evaluation administered by a DRE provides him or her with reasonable grounds to believe that the person is impaired by a drug, s. 254(3.4) allows the police to take tests of oral fluid, urine or blood, to determine whether the person in fact has drugs in his or her body.

10 The Crown argues that s. 254(3.1) has supplanted the common law and that a DRE's determination is admissible at trial against the accused as evidence of impairment by drug. Mr. Bingley contends that the determination is only admissible if the DRE is established as an expert on a *voir dire*, pursuant to *Mohan*. To put it succinctly, the central issue on this appeal is whether s. 254(3.1) makes the DRE's opinion evidence *automatically admissible* (the Crown's position) or whether a *special hearing is required to determine admissibility*, as required at common law under *Mohan* (Mr. Bingley's position). In the alternative, the Crown argues that Constable Jellinek's evidence should be admitted as lay opinion evidence.

A. Have the Common Law Rules of Evidence Been Displaced?

11 Clear and unambiguous language is required to displace common law rules, including rules of evidence: see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), at p. 1077; *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157(S.C.C.), at para. 39; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306 (S.C.C.), at paras. 29-30. The Crown argues that the words "to determine" in s. 254(3.1) are clear enough to do this. I do not agree. Section 254(3.1) calls on the DRE to form an opinion about whether a person is impaired by drug. It does not follow that the opinion will be automatically admissible at trial.

12 The purpose of s. 254(3.1) confirms that a DRE's opinion is not automatically admissible at trial. Section 254(3.1) gives the police investigative tools to enforce laws against drug-impaired driving. It does not dictate whether evidence obtained through the use of those investigative tools will be admissible at trial. When Parliament intends to make evidence automatically admissible,

it says so expressly: see, e.g. *Criminal Code*, ss. 723(5) (hearsay evidence) and 729(1) (analyst certificate on conditional sentence breaches). As section 254(3.1) does not speak to admissibility, the common law rules of evidence apply.

B. Is the Evidence Admissible Expert Opinion?

13 The modern legal framework for the admissibility of expert opinion evidence was set out in *Mohan* and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 (S.C.C.). This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into "trial by expert" and that the trier of fact maintains the ability to critically assess the evidence: see *White Burgess*, at paras. 17-18. The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.

14 The expert evidence analysis is divided into two stages. First, the evidence must meet the four *Mohan* factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. Second, the trial judge must weigh potential risks against the benefits of admitting the evidence:*White Burgess*, at para. 24.

15 If at the first stage, the evidence does not meet the threshold *Mohan* requirements, it should not be admitted. The evidence must be logically relevant to a fact in issue: *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 (Ont. C.A.), at para. 82; *R. c. J. (J.)*, 2000 SCC 51, [2000] 2 S.C.R. 600 (S.C.C.), at para. 47. It must be necessary "to enable the trier of fact to appreciate the matters in issue" by providing information outside of the experience and knowledge of the trier of fact: *Mohan*, at p. 23; *R. v. D. (D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275 (S.C.C.), at para. 57. Opinion evidence that otherwise meets the *Mohan* requirements will be inadmissible if another exclusionary rule applies: *Mohan*, at p. 25. The opinion evidence must be given by a witness with special knowledge or expertise: *Mohan*, at p. 25. In the case of an opinion that is based on a novel scientific theory or technique, a basic threshold of reliability of the underlying science must also be established: *White Burgess Langille Inman*, at para. 23; *Mohan*, at p. 25.

16 At the second stage, the trial judge retains the discretion to exclude evidence that meets the threshold requirements for admissibility if the risks in admitting the evidence outweighs its benefits. While this second stage has been described in many ways, it is best thought of as an application of the general exclusionary rule: a trial judge must determine whether the benefits in admitting the evidence outweigh any potential harm to the trial process: *Abbey*, at para. 76. Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded: *Mohan*, at p. 21; *White Burgess Langille Inman*, at paras. 19 and 24.

17 The expert opinion admissibility analysis cannot be "conducted in a vacuum": *Abbey*, at para. 62. Before applying the two-stage framework, the trial judge must determine the nature and scope of the proposed expert opinion. The boundaries of the proposed expert opinion must be carefully

delineated to ensure that any harm to the trial process is minimized: see *Abbey*, at para. 62; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272 (S.C.C.), at para. 46.

18 The only issue in this case is whether Constable Jellinek has special expertise as required by the fourth *Mohan* factor. Mr. Bingley concedes that the proposed evidence is logically relevant, necessary, and not subject to any other exclusionary rule. Nor does Mr. Bingley argue that the evidence should be excluded because its prejudicial effect outweighs its probative value. On the facts of this case, these were appropriate concessions.

19 The basic requirement of expertise for an expert witness is that the witness has expertise outside the experience and knowledge of the trier of fact. The question is whether Constable Jellinek, the DRE in this case, met this requirement. In my view, he did.

20 The DRE, literally, is a "drug recognition expert", certified as such for the purposes of the scheme. It is undisputed that the DRE receives special training in how to administer the 12-step drug recognition evaluation and in what inferences may be drawn from the factual data he or she notes. It is for this limited purpose that a DRE can assist the court by offering expert opinion evidence.

21 While a DRE's evaluation certainly has an investigative purpose, their application of the 12-step drug recognition evaluation and determination of impairment is relevant evidence and can assist the trier of fact. The DRE's opinion is based on his or her specialized training and experience in conducting the evaluation. By reason of this training and experience, all DREs undoubtedly possess expertise on determining drug impairment that is outside the experience and knowledge of the trier of fact.

22 This conclusion is not negated by the fact that a DRE is not trained in the science underlying the development of the 12-step evaluation. The test for expertise is merely knowledge outside the experience and knowledge of the trier of fact. Knowledge of the underlying science is not a precondition to the admissibility of a DRE's opinion. The scope of a DRE's expertise is in the application of the prescribed 12-step evaluation, not in its scientific foundation. Expert witnesses are not barred from assisting the court with their special knowledge simply because they are not trained in the underlying science of the field. Such knowledge is required only where the science is novel.

23 In his analysis, the trial judge focused on the reliability of the underlying science and determined that, as novel science, the DRE opinion evidence could not be admitted without a witness being able to explain the scientific validity of the evaluation. The purpose of the special rule for novel scientific evidence is to ensure that the reliability of the underlying technique or procedure used in forming the opinion has to be established by precedent, evidence, or statute.

24 In this case, the reliability of the 12-step evaluation comes from the statutory framework itself. Parliament has determined that the 12-step evaluation performed by a trained DRE constitutes evidence of drug impairment. It may not be conclusive, but it is evidence beyond the experience and knowledge of the trier of fact.

25 My colleague concludes that as s. 254(3.1) and the Regulations do not "clearly designat[e]" DRE opinion evidence admissible in evidence, reliability must be otherwise established. I cannot agree. It is true that s. 254(3.1) and the Regulations do not provide for the automatic admissibility of DRE opinion evidence. But that does not end the inquiry. The Regulations set out a uniform evaluative framework that a DRE must follow in order to reach a conclusion regarding drug impairment for the purposes of s. 254(3.1). Parliament is entitled to establish such a framework, and in doing so, establish that the 12-step drug evaluation is sufficiently reliable for the purposes of determining impairment. No further evaluation of the reliability of the steps mandated by the Regulations is required. Any challenge to the underlying effectiveness of the evaluation would require a challenge to the legislative framework itself.

26 Allowing a DRE to give relevant opinion evidence outside the experience and knowledge of the trier of fact is not "an unqualified endorsement of the underlying science" of the 12-step drug evaluations, as my colleague suggests (para. 46). Reliability is not assessed in a vacuum. Parliament has established, through the adoption of the Regulations, that the 12-step drug evaluation is sufficiently reliable for the purpose of a DRE's determination of impairment under s. 254(3.1). The scope of a DRE's expertise is limited to that determination, and it is only for the purpose of making that determination that Parliament has established the 12-step drug evaluation's reliability.

27 Mr. Bingley conceded that all the *Mohan* requirements other than special expertise were met and does not argue that the evidence should be excluded under the second stage of the admissibility analysis. Parliament has established the required expertise. It follows that the DRE's evidence is admissible in this case. To put it another way, the only purpose of a *voir dire* in this case would be to determine whether Constable Jellinek has expertise over and above an ordinary person. Normally, the judge determines this on evidence adduced at the *voir dire*. But s. 254(3.1) and the legislative and regulatory scheme that accompanies it conclusively answer the question of expertise. The DRE is established by Parliament to possess special expertise outside the experience and knowledge of the trier of fact. He is thus an expert for the purpose of applying the 12-step evaluation and determining whether that evaluation indicates drug impairment for the purposes of s. 254(3.1). His expertise has been conclusively and irrebuttably established by Parliament.

28 This compels the following conclusion. In the case at bar all the threshold requirements for admissibility of *Mohan* are established. Where it is clear that all the requirements of a common law rule of admissibility are established (the four *Mohan* threshold requirements for admissibility

are met and there is no question that the probative value of the evidence outweighs its prejudicial effect), the trial judge is not obliged to hold a *voir dire* to determine the admissibility of the evidence. To so require would be otiose, if not absurd, not to mention a waste of judicial resources.

29 It is important to reiterate that a DRE's s. 254(3.1) determination is a result of administering the prescribed evaluation. That is the only expertise conferred on a DRE. The trial judge has an "ongoing duty to ensure that expert evidence remains within its proper scope": *Sekhon*, at para. 46. If opinions beyond the expertise of a DRE are solicited, a *Mohan voir dire* to establish further expertise may be required.

30 The statutory framework does not undermine a trial judge's important role as gatekeeper to safeguard the trial process and ensure that it is not distorted by improper expert opinion evidence. The trial judge always maintains residual discretion to exclude evidence if its probative value is outweighed by its prejudicial effect. Limitations, such as the absence of a standardized approach to weighing the various tests in reaching a determination, may affect the probative value of a DRE's opinion evidence. A DRE may be unable to explain how he or she made the determination based on the application of the 12-step evaluation. If the probative value of an individual DRE's evidence is so diminished that the benefits in admitting the evidence are outweighed by the potential harm to the trial process, a trial judge retains the discretion to exclude that evidence. I reiterate here that the focus of the analysis must be on the DRE's administration of the evaluation, not on the reliability of the steps underlying the evaluation, which have been prescribed by Parliament.

31 It is also important to note that the determination of the DRE is not conclusive of the ultimate question of whether the accused was driving while impaired by a drug. The DRE's task is to determine whether the evaluation indicates drug impairment. The DRE's evidence does not presume the ultimate issue of guilt; it is merely one piece of the picture for the judge or jury to consider.

32 That Parliament has established the reliability of the 12-step drug evaluation by statute does not hinder the trier of fact's ability to critically assess a DRE's conclusion of impairment or an accused person's right to test that evidence. Cross-examination of the DRE may undermine his or her conclusion. Evidence of bias may raise doubt about the officer's conclusion. The officer may fail to conduct the drug recognition evaluation in accordance with his or her training. A DRE may draw questionable inferences from his or her observations. Bodily sample evidence obtained under s. 254(3.4) may refute the DRE's assessment, as may evidence of bystanders or other experts. It will always be for the trier of fact to determine what weight to give a DRE's opinion. Any weight given to a DRE's evidence will necessarily respect the scope of the DRE's expertise and the fact that it is not conclusive of impairment.

33 The trial judge correctly found that the DRE in this case was an expert for purposes of administering the 12-step evaluation and determining whether Mr. Bingley was driving while

impaired for the purpose of requiring further testing. He erred, however, in concluding that because the officer was not an expert in the scientific foundation of the various elements of the test, none of his opinion evidence was admissible. The DRE's expertise is not in the scientific foundation of the test but in the administration of the test itself. As the other criteria for admissibility are not in issue, Constable Jellinek's opinion evidence should have been admitted.

C. Lay Opinion Evidence

34 Given my conclusion that Constable Jellinek's opinion evidence is admissible in this case, it is unnecessary to consider whether it could also be admissible as lay opinion. I say only this: Constable Jellinek formed his opinion through the application of specialized training and experience in performing a prescribed drug recognition evaluation. In those circumstances, his evidence cannot be characterized as lay opinion.

VI. Conclusion

35 I would dismiss the appeal and confirm the order for a new trial.

Karakatsanis J. **(dissenting) (Gascon J. concurring):**

I. Overview

36 Expert opinion evidence can provide judges and juries with important, sometimes vital knowledge. But it can also risk complicating the trial process and potentially distort the truth-seeking function of the court. At its worst, dubious expert evidence has contributed to wrongful convictions. To guard against these dangers, the common law has developed the analytical framework first set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.), to ensure that the risks of admitting expert testimony do not outweigh its benefits.

37 I agree with the Chief Justice on a number of fronts. Like the Chief Justice, I do not believe that s. 254(3.1) of the *Criminal Code*, R.S.C. 1985, c. C-46, has displaced the ordinary common law requirement for a *voir dire* on admissibility of expert opinions. I also agree with her that as a gatekeeper, the trial judge must evaluate whether the opinion should be admitted according to the *Mohan* criteria. Finally, I agree with the Chief Justice that the Drug Recognition Expert (DRE) is an expert only for the limited purpose of administering the 12-step evaluation. In this limited sense, the DRE possesses expertise beyond the ordinary knowledge of the trier of fact.

38 I cannot agree, however, that Parliament has determined that the 12-step evaluation, when properly administered, is sufficiently reliable to be admitted as evidence of drug impairment at trial. In my view, it was open to the trial judge to refuse to admit the proposed opinion in the absence of evidence on the reliability and validity of the science underlying the 12-step evaluation.

39 As the Crown submits, evaluations performed by DREs pursuant to s. 254(3.1) of the *Criminal Code* rely on a science-based regime. As the DRE in this case acknowledged in cross-examination, the reliability of his opinion depends on the validity of the various tests and the reliability of the inferences he has been taught to draw from the results. Many of the "clues" and "cues" DREs rely on when making their overall determination would not obviously indicate impairment to a lay person. Tests such as the horizontal gaze nystagmus test or the lack-of-convergence test, which involve looking for irregularities in eye movements, are only reliable indicators of drug impairment if the science on which they are based is valid.

40 Parliament has endorsed the reliability of the 12-step evaluation as an investigative tool, not for the purpose of an evidentiary shortcut at trial. Without the ability to test the reliability of the scientific foundation of the evaluation, the trial judge — acting as gatekeeper — will be unable to assess the probative value of such evidence, and the trier of fact will be unable to assess the weight of such evidence. In my view, courts retain discretion to require — through evidence or precedent — confirmation that the science behind DRE evaluations meets the necessary level of reliability before admitting the evidence at trial. I would allow the appeal and reinstate the acquittal.

II. Analysis

A. The Mohan Criteria

41 Expert evidence based on novel science or on science used for a novel purpose is subject to special scrutiny: *Mohan*, at p. 25; *R. c. J. (J.)*, 2000 SCC 51, [2000] 2 S.C.R. 600 (S.C.C.), at paras. 33 and 35-36. Such evidence must meet a basic threshold of reliability before it can be admitted: *Mohan*, at p. 25. Caution is warranted because it can be difficult for triers of fact to effectively assess the frailties of specialized expert evidence. As Sopinka J. warned in *Mohan*, at p. 21:

> 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.

42 Scientific techniques may still be considered novel even where their use is well established outside of the courtroom: *J. (J.)*, at para. 35. Techniques that are reliable enough for one purpose, such as measuring improvements in a therapeutic setting, may still not be reliable enough to be used as a diagnostic tool in court proceedings: *ibid.*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239 (S.C.C.), at para. 37.

43 In order to admit expert opinions based on scientific techniques or knowledge into evidence, trial judges must have assurance that the underlying science is sufficiently reliable. Where its use in court proceedings is well established, judges will often be able to rely on a history of prior admissibility: *Trochym*, at para. 31. In contrast, a basic threshold of reliability of evidence based on

novel science must be established on a *voir dire* because the reliability and validity of its underlying premises cannot be assumed.

B. The DRE Statutory Scheme

44 I agree with the Chief Justice that opinions based on novel science are subjected to special scrutiny to ensure that reliability has been established by precedent, evidence, or statute. I cannot conclude, however, that the statutory scheme contains such an endorsement of the 12-step evaluation.

45 Like the Chief Justice, I see the purpose of s. 254(3.1) as being to provide police with further investigative tools to enforce laws against drug-impaired driving. When read together with s. 254(3.4), the subsection permits an evaluation that can provide the DRE with reasonable grounds, and the authority, to request a sample of bodily fluid to "enable a proper analysis to be made".

46 Clearly, Parliament views DRE evaluations as reliable enough for this investigative purpose. However, I remain deeply uncomfortable with the notion of extending this purpose, grounded in enhancing police *investigative* tools, to include an unqualified endorsement of the underlying science when the Crown seeks to enter DRE evaluations as *evidence* in court.

47 Not all expert opinions formed on the basis of valid police investigative tools are admissible into evidence. Polygraph evidence, for example, is not admissible: *R. c. Béland*, [1987] 2 S.C.R. 398 (S.C.C.), at pp. 416-19. Despite recognition that polygraph examinations are far from infallible, polygraphs remain valid police investigative tools: *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3(S.C.C.), at paras. 95 and 100.

48 Concerns about the reliability of the underlying science are particularly heightened when, as here, the scientific foundation is not self-evident and the proposed expert evidence goes to key elements of the crime before the court. Although there is no longer an absolute bar on opinions on the ultimate issue before the trier of fact, the closer the expert evidence approaches the ultimate issue, the greater the need for special scrutiny: *Mohan*, at p. 25; *J. (J.)*, at para. 37.

49 Thus, absent statutory language that clearly designates DRE evaluations as admissible evidence, a basic threshold of reliability of the tests must be established through precedent or evidence on a *voir dire*.

50 Even otherwise admissible evidence may be excluded at a second discretionary gatekeeping step, where a trial judge evaluates the potential benefits and risks of the proposed expert evidence before admitting it at trial: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 (S.C.C.), at para. 24. "[R]elevance, reliability and necessity" must be weighed against the dangers of "consumption of time, prejudice and confusion": *J. (J.)*, at para. 47.

51 The probative value of the evidence necessarily involves an assessment of the reliability of the underlying science: *Trochym*, at para. 28. Without evidence relating to the science, or the ability to cross-examine the expert about the science, how does the gatekeeper critically assess the probative value against the potential prejudice of the evidence, to ensure that it enhances, rather than distorts, the fact-finding process? (See *White Burgess*, at paras. 17-18.)

52 And without the ability to test its scientific foundation, how will the trier of fact ultimately assess the weight of the evaluation? The evidence has the potential to be highly prejudicial. In the context of a jury trial for impaired driving causing death, for example, there is a real danger that an opinion, coming from a police officer certified as a "Drug Recognition Expert", about whether the accused was impaired by a drug, would be given undue weight.

53 Nor can cross-examination of DREs effectively assist in understanding the probative value of the evidence and the strength of the inference that should be drawn from the opinion. Because a DRE's area of expertise is limited to administration of the prescribed evaluation rather than the scientific knowledge necessary to explain its effectiveness, cross-examination is unlikely to leave triers of fact with a real understanding of the weight that should be attached to the evidence.

54 Accused persons have a right to test the strength of the evidence against them. For those charged with alcohol-impaired driving, s. 258(1)(c) of the *Criminal Code* clearly designates breath sample results as "conclusive proof" of an accused's blood alcohol level (provided certain preconditions are met). Since there is no equivalent provision for DRE determinations, accused persons should not have to bring a constitutional challenge in order to question the strength of the 12-step evaluation.

55 The Chief Justice recognizes that Parliament has not displaced the common law rule requiring a *voir dire* on the admissibility of expert evidence. One important reason for this rule is to ensure that any novel science underpinning the expert's opinion is reliable. And yet, my colleague's reasons dispense with any inquiry into the reliability and validity of the 12-step evaluation. This displaces an important safeguard in our common law rule, without clear language to this effect. It effectively leads to the automatic admissibility of the evaluation upon proof it was properly administered. In my view, there is no clear indication that this was Parliament's intent.

C. The Insufficient Evidence of Reliability Before the Trial Judge

56 The Crown relies on a reference by a witness at a parliamentary committee hearing to a study finding that DRE evaluations are 98.6 percent reliable. But proposed expert testimony based on novel science is subject to a more searching assessment of reliability: see *J. (J.)*, at para. 33. If the evaluation techniques are in fact highly reliable, then I expect that it would not be long before the reliability of the underlying scientific regime would be well established through precedent and a *voir dire* on this issue would rarely be required. However, we are not there yet.

57 Given the unsettled nature of the case law and the relatively recent reception of DRE evidence into Canadian courts, it was open to the trial judge to treat the proposed testimony as an opinion based on novel science. Although he recognized the DRE's special expertise in administering the 12-step evaluation for the purpose of requesting a bodily sample (i.e., advancing the police investigation), the trial judge found the DRE lacked the necessary qualifications to offer an opinion on impairment in court. The trial judge's reasons indicate that neither threshold reliability nor the adequacy of the officer's qualifications were conceded.

58 As the DRE was not himself trained on the reliability of the 12-step evaluation, the Crown could have called a different expert for this purpose. As it did not, there was a lack of evidence about the reliability of the regime. The trial judge was therefore entitled to exclude the DRE's opinion on the results of his evaluation.

59 In my view, the reliability of the tests, and the trial judge's discretion to exclude the evidence, were key issues before the trial judge and live issues before this Court. The trial judge had the discretion to require — through evidence or precedent — confirmation that the science behind DRE evaluations met the basic threshold of reliability before admitting the evidence at trial.

III. Conclusion

60 Accordingly, I would allow the appeal and reinstate the acquittal.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

* A corrigendum issued by the court on February 28, 2017 has been incorporated herein.

1 Regulations are based on the procedure set out by the International Association of Chiefs of Police ("IACP"), and DREs must be accredited by that organization: Regulations, s. 1. The procedure set out by the IACP was referred to in legislative debates that led to the adoption of s. 254(3.1) of the *Criminal Code* as the intended drug evaluation scheme: see House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 72, 1st Sess., 39th Parl., May 30, 2007, at pp. 1-2; House of Commons, Legislative Committee on Bill C-2, *Evidence*, No. 3, 2nd Sess., 39th Parl., October 31, 2007, at pp. 7-8.

TAB 5

FORM A

Proceeding: Centra Gas Manitoba Inc. Fiscal 2025 General Rate Application

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is Dale Friesen. I live at Winnipeg, in the Province of Manitoba.

2. I have been engaged by or on behalf of an organization known as Industrial Gas Users ("IGU") to provide evidence in relation to the above-noted proceeding before the Public Utility Board of Manitoba.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
   (a) to provide opinion evidence that is fair, objective and non-partisan;
   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and
   (c) to provide such additional assistance as the Board may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date October 15, 2024

Signature Dale Friesen of
InterGroup Consultants