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SCC tightens rules on expert evidence admissibility

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Expert evidence of questionable independence can be more readily challenged following a recent Supreme Court decision that tightens the rules of admissibility, counsel say.

Justice Thomas Cromwell's 7-0 judgment April 30, in *White Burgess Langille Inman v. Abbott and Haliburton Co.* [2015] S.C.J. No. 23, elaborates on the Supreme Court's four-part threshold test for determining whether to admit disputed expert evidence in civil and criminal trials, and provides guidance on trial judges' residual discretion, as evidentiary "gatekeepers," to screen out proposed expert evidence whose value does not justify the risk of confusion, time and expense that may result from its admission. The court also held that an appearance of conflict of interest, by itself, does not render an expert's evidence inadmissible.

Murphy

The basic two-step inquiry the high court created a decade ago for determining the admissibility of expert evidence in the leading case of *R. v. Mohan* [1994] S.C.J. No. 36, sparked conflicting case law.

Justice Cromwell's explanation of the law and *Mohan's* legal framework, as well as the components of an expert's duties to courts and tribunals, will be useful, therefore, to adjudicators and civil and criminal litigators.

"I think what Justice Cromwell did was he finished, and elaborated, what was set out in *Mohan* for expert testimony, and made it clearer," said Brian Murphy of Forte Law in Moncton, N.B., who with Jon Laxer represented the successful respondents. "It all boils down to the three words that he keeps using about expert evidence being 'fair, non-partisan and objective.' It's clear now that the expert owes a duty to the court first and foremost."

Notably, the court makes new law by establishing that an expert must take an independent approach if his or her evidence is to be admissible, *i.e.* independence is a threshold precondition for admissibility, not simply an issue to be considered in assessing the weight of the evidence. The aphorism "he who pays the piper, calls the tune" does not apply to parties putting forward expert evidence.

The case attracted the intervention of the Attorney General of Canada and the Criminal Lawyers' Association (CLA), who both have reason to be pleased with the court's judgment.

"Especially the government of Canada is breathing a sigh of relief because the spectre that they were worried about was that in every breathalyzer case the breathalyzer technician, who works for the government of Canada, is not separate from the prosecutor who works for the government of Canada," said Murphy. "And they were worried that in every technical case — [for example] Environment Canada, Health Canada they're always giving evidence and much of that litigation is involving governments — so they were extremely worried" that such testimony could be deemed inadmissible for appearing to involve a conflict of interest.

Murphy said the guidelines in the judgment favour neither plaintiffs nor defendants. In his view, experts can't have much contact with counsel. "Another impact, I do think, is that there will be no more smearing…of a person who is routinely giving evidence for one side or the other," he said. "I think this probably means more expert opinion evidence will be deemed admissible than perhaps was trending in some of the courts across the country."

The CLA's counsel, Matthew Gourlay of Toronto's Henein Hutchison, predicted the case will "have a kind of deterrent effect" against counsel offering up experts who can easily be attacked as lacking independence and impartiality.

"I think it will have a positive effect in encouraging prosecutors to tender higher quality evidence from genuinely independent witnesses," he said, adding that the case could affect the Crown's practice of calling police officers to testify as expert witnesses.

"That often happens in drug cases, for instance, where an officer will be called to testify about the customs of the drug trade," he

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said. "Certainly there is nothing in the judgment to indicate it would put an end to that practice, but it will certainly give some fodder to the defence to attack such an opinion when it is given by an officer who is very closely connected to the investigation, and not sort of independent of the prosecution or the investigative team."

Ending a debate in Canadian courts, Justice Cromwell held that "a proposed expert's independence and impartiality goes 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."

Justice Cromwell emphasized that experts owe their primary duty to the court, and this duty is "to give fair, objective and non-partisan opinion evidence."

Failure to meet this threshold requirement, means "their evidence should not be admitted."

He went on to explain that an expert's evidence must "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.

"The acid test is whether the expert's opinion would not change regardless of which party retained him or her."

The Supreme Court dismissed the appeal of a firm of accountants in Nova Scotia that is being sued for several million dollars by its former clients. The plaintiff building supply companies allege negligent auditing cost them millions. The plaintiffs sued their former auditors after retaining Grant Thornton of Kentville, N.S. The new auditors perceived alleged problems with their predecessors' work.

The defendants tried to get the action thrown out summarily, before trial, in 2010. This prompted the plaintiffs to hire a forensic accounting expert at the Halifax office of Grant Thornton. After her review, the forensic auditor concluded that the ex-auditors had not complied with their professional obligations.

The defendants then applied to strike out her affidavit on the ground that she was not impartial, since the case basically boiled down to a battle of professional opinion between them and Grant Thornton. If her firm's approach was not accepted, she, as a partner, could be personally liable, and thus she had an interest in the litigation's outcome, the defendants argued.

The motions judge largely agreed and struck out the forensic accountant's affidavit in 2012. The Nova Scotia Court of Appeal reversed 2-1 in 2013. The majority held that while a court does have discretion to exclude expert evidence due to actual bias or partiality, the test adopted by the motions judge—that an expert must be, and must be seen to be, independent and impartial—was wrong in law.

Justice Cromwell agreed with the majority's conclusion that the motions judge erred in determining that the expert was in a conflict of interest that prevented her from giving impartial and objective evidence.

There was "no basis disclosed in this record" to find that the forensic expert's evidence should be excluded because she was not able or willing to provide the court with fair, objective and non-partisan evidence, Justice Cromwell held.

At press time, counsel for the defendants could not be reached for comment.

Bolus drinking focus of pair of appeal cases

MICHAEL BENEDICT

Two recent appeal court decisions from different provinces dealing with the rare and complex defence of bolus drinking highlight the difficulties of establishing this defence and clarify the presumptions a trial judge is allowed to make. In both cases, decided on April 15, the appeal courts ordered a new trial.

In *R. v. Saul* [2015] B.C.J. No. 672, the B.C. high court said the trial judge made several material errors in accepting the bolus-drinking defence in a case that involved a fatality. Meanwhile, the Court of Appeal for Ontario ordered a retrial in *R. v. Kahl* [2015] O.J. No. 1868 because the trial judge's conviction failed to consider evidence that would have supported the defendant's claim that he chugged some whiskey after he caused a four-vehicle accident.

Bolus drinking is generally considered to be rapid alcoholic drinking just before one is stopped for allegedly driving while impaired. Indeed, the Supreme Court of Canada defined it as "the consumption of a large amount of alcohol within 30 minutes of the alleged driving offence (*R. v. St-Onge Lamoureux* [2012] S.C.J. No. 57)." In such a situation, the driver may have a permissible blood-alcohol level at the time of arrest, despite later testing over the legal limit as the alcohol further enters the system.

However, as in Kahl, bolus drinking can also refer to what is otherwise known as intervening drinking, or consuming sufficient amounts of alcohol after the incident leading to arrest, subsequently producing a criminal blood alcohol level.

Kahl was a self-described alcoholic who was driving to a Toronto prison to serve the last segment of an intermittent sentence. According to the Ontario high court decision, he typically drank a mickey of whiskey just before entering prison "to help him survive the weekend in jail." Kahl testified that he had nothing to drink before the accident but consumed seven to 10 ounces right afterward, realizing the police would be taking him to jail.

The trial judge disbelieved Kahl and also ignored expert testimony that rapidly consuming 10 ounces of whiskey could have supported his bolus or intervening drinking defence, while accepting the expert's opinion that seven ounces was insufficient to substantiate bolus drinking in this case. But the Ontario Appeal Court found: "The central issue was the credibility of the appellant and his account of bolus drinking right after the accident. Relying on the seven-ounce toxicological opinion evidence to disbelieve his claim, but wholly ignoring the 10-ounce opinion evidence that was capable of supporting his claim constituted a failure to consider evidence relevant to a material issue, and thus a misapprehension of the evidence."

Toronto criminal appeal lawyer Mark Halfyard, who argued for Kahl, said the decision signifies the importance of the accused's testimony in a defence involving post-driving bolus drinking, as opposed to prior bolus drinking where the accused would often not testify.

"If a person testifies that he drank after the accident, it becomes a credibility issue," Halfyard said.

> An ordinary person doesn't guzzle a bottle of vodka before jumping into a car. There has to be some evidentiary foundation.
>
> **Enzo Rondinelli**
> Lafontaine & Associates

While an accused would not have to testify to establish bolus drinking before an arrest, the B.C. case affirms that the accused has to provide some evidentiary basis for such a defence. Otherwise, the Crown is put in the untenable position of having to establish a negative—that no bolus drinking took place—in order to prove its case.

In dealing with this conundrum, the courts over the years have established that a trial judge is entitled to the "common sense" presumption of no bolus drinking, absent any evidence that it took place. According to *Saul*, "The application of the common sense inference does not place an onus on the accused to prove that he or she had engaged in bolus drinking but rather gives rise to a 'practical evidentiary burden' on an accused to point to *some evidence*...that at least puts the possibility that the accused had engaged in bolus drinking into play."

Writing for the court, Justice Daphne Smith termed the trial judge's finding that bolus drinking might have taken place as "conjecture or speculation" since it was based on the possibility that there might have been hard liquor in the car, the accused might have stopped to drink in a nearby town or was drinking in the car. "There was no evidentiary basis for any of these findings," Justice Smith wrote. Instead, the trial judge should have relied "on the common sense inference of how people normally drink to find that the assumption of no bolus drinking had been proved."

Or, as Osgoode Hall Law adjunct professor Enzo Rondinelli put it: "An ordinary person doesn't guzzle a bottle of vodka before jumping into a car. There has to be some evidentiary foundation."

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