NOVA SCOTIA COURT OF APPEAL

Citation: ***Abbott and Haliburton Company v. WBLI Chartered Accountants***, 2013 NSCA 66

Date: 20130524
Docket: CA 397520
Registry: Halifax

Between:

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 Limitee; 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; La 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

Appellants

AND: White Burgess Langille Inman,
carrying on business as WBLI Chartered Accountants

First Respondent

AND: R. Brian Burgess

Second Respondent

Judges:	MacDonald, C.J.N.S.; Oland and Beveridge, JJ.A.
Appeal Heard:	December 12, 2012, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal dismissed in part, per reasons for judgment of Beveridge J.A.; Oland J.A. concurring; MacDonald C.J.N.S. dissenting by separate reasons.
Counsel:	Wanda M. Severns and Renée Fougere (Student at Law), for the appellants Alan L. W. D'Silva, Erica Tait, and Aaron Kreaden, for the respondents

Dissenting Reasons for judgment: (MacDonald, C.J.N.S.)

OVERVIEW

[1] Expert witnesses occupy an uncomfortable seat when testifying in Canadian courts. This is because they appear to have divided loyalties. On one hand, they are there to assist the court by offering advice in areas where special knowledge is required. Here their loyalty is to the court, which understandably commands a level of objectivity. On the other hand, the court typically does not select them. Instead they are retained by and testify on behalf of one of the combatants. This suggests a lack of objectivity and perhaps even advocacy. Not surprisingly, therefore, they are often accused of being biased. Some are even called "hired guns".

[2] Typically, an expert's objectivity is tested by way of cross-examination by the opposing party. This then allows the judge to calibrate the weight, if any, to accord the proffered opinion. However, in exceptional circumstances, a proposed expert's independence or impartiality may appear to be so suspect that he or she will be prevented from testifying from the outset. In this appeal, we explore what it would take to justify such a measure.

[3] Before turning to the background facts, I confirm that I will use the terms "independence", "impartiality" and "objectivity" interchangeably. In doing so, I realize the potential for nuances as highlighted in some of the authorities. For example, see Judge (formerly Professor) David M. Paciocco in "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), *34 Queen's L.J.* 565 - 610, at ¶ 9 to 12. However, any subtle differences with these terms are of no account in this appeal. The same is true for the relevant converse concepts such as "partiality" and "bias". I will use them interchangeably as well.

BACKGROUND

[4] This is a professional negligence case. The appellants all operate building supply stores throughout Atlantic Canada. Back in 1980, they (or their predecessors) joined forces to incorporate a bulk buying agent, namely A.W.A.R.D. Wholesalers and Retailers Distributors Limited ("AWARD"). The

plan was simple. AWARD would centralize its members' purchases to enhance their collective buying power. This resulted in manufacturer and distributor rebates that would, in turn, be distributed to the members at a level proportional to their respective purchases.

[5] AWARD retained the respondent accounting firm (and its predecessor) as its external auditors, mandated to prepare its annual financial statements. Since 1995, the respondent Burgess has been the firm's lead audit partner on this file. This relationship continued until 2005, with the completion of the 2004 statements.

[6] Then in 2006, AWARD, under a new board, retained a new accounting firm, Grant Thornton LLP, to do its 2005 statement. This report alleged serious problems with AWARD's books. Specifically, the appellants allege that between 1995 and 2004, rebate money had been mis-allocated by AWARD's management and that the respondents were negligent in failing to recognize and report this in its financial statements. As a result, the appellants say they are out over $17 million, thus prompting the present action.

[7] The respondents deny any wrongdoing. Instead they attribute any reporting discrepancies to the fact that Grant Thornton was engaged in a fundamentally different type of accounting exercise. They explain in their statement of defence:

> ¶50 Contrary to paragraph 12 of the Further Amended Statement of Claim, WBLI/Burgess deny that there are numerous differences between the review engagement report prepared by Grant Thornton LLP (the "Grant Report") with respect to the financial statements for the financial year ended December 31, 2005 (the "2005 Review Statements") and the Audited Financial Statements for the financial year ended December 31, 2004 (the "2004 Audited Financial Statements"). The review engagement was, by definition, a review of the financial statements prepared to a review standard, which was (and is) very different than an audit standard. Further, the differences between the 2005 Review Statements and the 2004 Audited Financial Statements are mainly that: (a) the 2005 Review Statements were prepared on a liquidation basis, not a going concern basis, as AWARD was in the process of winding up; and (b) each addressed different financial years.

[8] In due course, the respondents applied to have the action dismissed summarily. The motion included several alternative requests for relief that I need not get into for the purposes of this appeal.

[9] To defend this motion, the appellants commissioned an expert in forensic accounting, namely Susan Dorothy MacMillan. She too is a partner at Grant Thornton. She reviewed all the relevant materials, including the documents filed in the action. Her report, supporting the appellants' position, was filed with the court by way of an affidavit (as opposed to the conventional format prescribed by our *Civil Procedure Rules*).

[10] The respondents then applied by way of preliminary motion to have this report expunged from the record. In a nutshell, they assert the following. This action comes down to a battle between two accounting firms and how each approached their assigned tasks. Ms. MacMillan's firm is therefore one of the combatants and could well be exposed to its own liability should its approach not be accepted by the court. In fact, as a Grant Thorton partner, Ms. MacMillan could be personally liable. Therefore, Ms. MacMillan could never be viewed as an impartial expert witness when she has a direct financial stake in the outcome of the case.

[11] Justice Arthur W. D. Pickup of the Supreme Court shared the respondents' concern and expunged the report (thereby preventing Ms. MacMillan from offering expert evidence in the summary judgement motion). His decision is reported at 2012 NSSC 210. Pickup J. concluded that this was one of those "clearest of cases where the reliability of the expert . . . does not meet the threshold requirements for admissibility." Furthermore, he felt that he had sufficient evidence to make this decision by way of preliminary motion.

[12] In the same preliminary motion, the respondents also sought to expunge all, or at least major portions, of an affidavit filed by one of the appellant owners (Mr. Fred O'Hearn of Lumbermart Limited), alleging that it contained inadmissible hearsay, irrelevant assertions and/or inadmissible opinion evidence. Again the judge agreed and expunged that affidavit from the record as well.

[13] This decision (2012 NSSC 210) has prompted the instant appeal.

ISSUES AND STANDARD OF REVIEW

The Grounds of Appeal

[14] The appellants identify the following grounds of appeal in their factum:

> (a) Pursuant to the *NSCPR*, Rule 38.02, and with respect to the above referred decision, a mistake in law was made in considering and applying Rule 55.04 of the *NSCPR*, which Rule was not in the Respondent's Pleadings; thereby prejudicing the Appellant's right to notice and to prepare a fair hearing; and, or in the alternative;
>
> (b) With respect to the above referred decision and in reference to the Expert Opinion, a mistake in law was made in misapplying Rule 39 of the *NSCPR*, which rule refers to the content of the affidavit, and does not reference the credibility of the deponent, nor does it consider the substance of the evidence, thereby causing extreme prejudice to the Appellant in the Summary Judgment Hearing; and; or in the alternative;
>
> (c) With respect to the above referred decision and in reference to the Expert Opinion, a mistake in law was made in misapplying the test for the admissibility of expert evidence, based on independence, for the purpose of an interlocutory motion and a Summary Judgment Hearing; and, or in the alternative;
>
> (d) With respect to the above referred decision and in reference to the Expert Opinion, a mistake in fact and law was made in misapplying and misinterpreting the evidence of the expert, Ms. Susan MacMillan; regarding the evidence she used for the purposes of the Summary Judgment Hearing and its impact on her independence thereby causing extreme prejudice to the Appellant in the Summary Judgement Hearing; and, or in the alternative;
>
> (e) With respect to the above referred decision and with reference to the Affidavit of Mr. Fred O'Hearn, that a mistake in fact and law was made in wholly striking said affidavit, pursuant to *NSCPR*, *Rule* 39, thereby prejudicing the Appellant in the Summary Judgment Hearing.

[15] However, because this is an interlocutory appeal, the appellants must first obtain leave to appeal. See: the *Judicature Act*, R.S.N.S. 1989, c. 240, s. 40. Thus they must establish that these grounds at least raise an "arguable issue" for us to

consider them further. See: *Hartling v. Nova Scotia (Attorney General)*, 2009 NSCA 130 at ¶ 135-137.

[16] In my view, grounds (a) and (e) above fail to meet the "arguable issue" threshold. For example, by ground (a) the appellants challenge the judge's reference in his analysis to *Civil Procedure Rule* 55. This provision covers the use of expert evidence and directs all proposed experts to file a report in a prescribed format. Here, as noted, the appellants simply filed an affidavit setting out Ms. MacMillan's opinion. Therefore, the respondents sought relief under *Civil Procedure Rule* 39, which covers the use of affidavit evidence. In the course of his analysis, the judge considered whether *Rule* 55 was at play. He ultimately concluded that it was not and proceeded to resolve the matter under *Rule* 39. Thus *Rule* 55 played no role in this matter and simply because the judge alluded to it (presumably out of an abundance of caution) does not make it an arguable issue on appeal.

[17] Likewise there is no potential to ground (e) above. The O'Hearn affidavit was rife with inadmissible hearsay, innuendo and opinion evidence that the judge properly expunged, leaving nothing relevant or discernable. There is no arguable issue to this ground of appeal.

[18] The remaining three grounds collectively challenge the judge's decision, on a preliminary motion, to render an expert's opinion inadmissible as a result of alleged bias. As noted, this is an exceptional form of relief. Therefore, in my view, leave ought to be granted but only on that one issue.

The Appropriate Standard of Review

[19] Since this is an interlocutory appeal of a discretionary order without a terminating effect, we would intervene only in the face of an error in legal principle or a patent injustice. See: *Aliant Inc. v. Ellph.com*, 2012 NSCA 89 at ¶ 7.

[20] Here, the legal principles involve the extent to which a proposed expert must be seen to be impartial and the recourse open to the court when such issues are raised. When identifying and applying such principles, the judge must be correct. See: *R. v. B.G.*, [1990] 2 S.C.R. 57 at ¶ 28, and *R. v. Mohan*, [1994] S.C.J. 36 at ¶ 18. At the same time, a decision to exclude evidence involves more than

the correct application of legal principles. It also involves the factual findings and the exercise of discretion. In these two categories, the judgment under appeal is entitled to deference. For example, we would defer to the judge's factual findings, unless these reflect palpable and overriding error. See: *Housen v. Nikolaisen*, [2002] S.C.J. 31 at ¶ 1. This would include, for example, whether the proposed expert lacked independence. See**:** *Carmen Alfano Family Trust (Trustee of) v. Piersanti*, 2012 ONCA 297, where O'Connor A.C.J.O. offers:

> ¶113 An appellate court will accord deference to a trial judge's decision to exclude evidence of an expert on the basis that the proposed evidence lacks independence. On reviewing such a decision, an appellate court will look to whether the trial judge applied the proper legal principles and whether the trial judge's conclusion was supported by the evidence. Absent such an error, an appellate court will not interfere.

[21] As well, the first instance judge will often be called upon to exercise discretion when considering the pros and cons of proposed evidence. This cost-benefit analysis also commands deference. See: *R. v. D.D.*, 2000 SCC 43 at ¶ 12-13.

[22] This approach has been adopted by our court on numerous occasions. For example, Beveridge J.A. in *Geophysical Services Inc. v. Sable Mary Seismic Inc.*, 2012 NSCA 33, leave to appeal to SCC denied, [2012] SCCA No. 245, observes:

> ¶116 Admissibility of evidence is a question of law. A trial judge must be correct in his or her identification and application of the law on the admissibility of evidence, but deference is afforded to trial judges with respect to issues such as discretionary rulings or factual findings that may impact on ultimate admissibility (see *R. v. West*, 2010 NSCA 16). ...

[23] See also: *R. v. Roach*, 2011 NSCA 95; *MacIntyre v. Cape Breton District Health Authority*, 2011 NSCA 3; and *Haché v. Lunenburg County District School Board*, 2004 NSCA 46.

ANALYSIS

The Use of Expert Evidence

[24] Before assessing the decision under appeal, it would be helpful to first review the principles surrounding the use of expert evidence. I begin with the basics. Opinion evidence should be presumptively excluded. The reason for this is simple. Cases should be decided on the facts as perceived by the judge (or the jury) and not by what a third party may think of the facts. The exception is when special expertise is needed to decipher the facts. Then and only then do we turn to experts. In such circumstances, the four criteria established by the Supreme Court of Canada in *R. v. Mohan*, *supra,* must be met. They are:

(a) The proffered evidence must first of all be relevant to one of the issues facing the court. This criterion engages the cost-benefit analysis discussed above where often the court must balance competing interests;

(b) The evidence must be necessary to assist the trier of fact. This involves more than being merely helpful. Instead, it must be necessary for the trier of fact to appreciate the technical issues at play;

(c) The evidence must not otherwise offend another exclusionary rule; and

(d) The proposed expert must be properly qualified to offer the opinion sought.

[25] Interestingly, the *Mohan* criteria do not include a stand-alone requirement of independence and impartiality. However, as I will now elaborate, that has not prevented Canadian courts from inferring the same.

[26] For example, the Ontario Court of Appeal in *R. v. Abbey*, 2009 ONCA 624, highlighted the need for impartiality and independence by placing them under *Mohan's* relevance umbrella. Interestingly, Doherty J.A. does so after first dividing the concept of relevance into two categories, legal and logical:

> ¶83 The relevance criterion for admissibility identified in *Mohan* refers to legal relevance. To be relevant, the evidence must not only be logically relevant but must be sufficiently probative to justify admission: see *Mohan* at pp. 20-21; *K. (A.)* at paras. 77-89; Paciocco & Stuesser at pp. 198-99.

¶84 When I speak of relevance as one of the preconditions to admissibility, I refer to logical relevance. I think the evaluation of the probative value of the evidence mandated by the broader concept of legal relevance is best reserved for the "gatekeeper" phase of the admissibility analysis. Evidence that is relevant in the sense that it is logically relevant to a fact in issue survives to the "gatekeeper" phase where the probative value can be assessed as part of a holistic consideration of the costs and benefits associated with admitting the evidence. Evidence that does not meet the logical relevance criterion is excluded at the first stage of the inquiry: see e.g. *R. v. Dimitrov* (2003), 68 O.R. (3d) 641 (C.A.), at para. 48, leave to appeal to S.C.C. refused (2004), [2004] S.C.C.A. No. 59, 70 O.R. (3d) xvii.

¶85 My separation of logical relevance from the cost-benefit analysis associated with legal relevance does not alter the criteria for admissibility set down in *Mohan* or the underlying principles governing the admissibility inquiry. I separate logical from legal relevance simply to provide an approach which focuses first on the essential prerequisites to admissibility and second, on all of the factors relevant to the exercise of the trial judge's discretion in determining whether evidence that meets those preconditions should be received.

¶86 As indicated above, it was not argued that Dr. Totten's evidence did not meet the preconditions to admissibility. Nor is it suggested that it was not logically relevant to identity, a fact in issue. The battle over the admissibility of his evidence was fought at the "gatekeeper" stage of the analysis. At that stage, the trial judge engages in a case-specific cost-benefit analysis.

¶87 The "benefit" side of the cost-benefit evaluation requires a consideration of the probative potential of the evidence and the significance of the issue to which the evidence is directed. When one looks to potential probative value, one must consider the reliability of the evidence. *Reliability concerns reach not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the expert's expertise and the extent to which the expert is shown to be impartial and objective.* [FN8]

[Emphasis added.]

> [FN8] There are many civil cases in which an expert's evidence has been excluded or given no weight because of that expert's bias: see Guy Pratte, Nadia Effendi & Jennifer Brusse, "Experts in Civil Litigation: A Retrospective on Their Role and Independence with a View to Possible Reforms" in The Hon. Todd L. Archibald & The Hon. Randall Scott Echlin, *Annual Review of Civil Litigation*, 2008 (Toronto: Thomson Carswell, 2008) 169, at pp. 182-88. See also David Paciocco, "Taking a 'Goudge' out of Bluster and

> Blarney: an 'Evidence-Based Approach' to Expert Testimony", (2009) 13 Can. Crim. L.R. 135 at 150-153.

[27] See also: *United City Properties Ltd. v. Tong*, 2010 BCSC 111, where Romilly J. refers to virtually all Canadian cases and academic writings on this topic.

[28] Furthermore, and central to this appeal, a proposed expert's lack of independence may sometimes appear serious enough to warrant its exclusion from the outset. For example, the Ontario Court of Appeal in *Carmen*, *supra* confirmed:

> ¶110 In most cases, the issue of whether an expert lacks independence or objectivity is addressed as a matter of weight to be attached to the expert's evidence rather than as a matter of the admissibility. Typically, when such an attack is mounted, the court will admit the evidence and weigh it in light of the independence concerns. Generally, admitting the evidence will not only be the path of least resistance, but also accord with common sense and efficiency.
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> ¶111 *That said, the court retains a residual discretion to exclude the evidence of a proposed expert witness when the court is satisfied that the evidence is so tainted by bias or partiality as to render it of minimal or no assistance.* In reaching such a conclusion, a trial judge may take into account whether admitting the evidence would compromise the trial process by unduly protracting and complicating the proceeding: see *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 91. *If a trial judge determines that the probative value of the evidence is so diminished by the independence concerns, then he or she has a discretion to exclude the evidence.*
>
> [Emphasis added.]

[29] There are also several trial level decisions supporting this proposition. Goepel J. in *Beazley v. Suzuki Motor Corp.*, 2010 BCSC 480, highlights several examples and in the process attempts to reconcile when such evidence will be ruled inadmissible and when it will simply be left as a question of weight:

> ¶20 Canadian courts appear to have taken different positions on the issue of whether an expert witness' bias or perceived bias will disqualify him or her from giving evidence at trial. Some courts have held that for expert evidence to be admissible, the expert must be seen to be absolutely neutral and objective. Other courts have concluded that a lack of objectivity, neutrality and independence are matters that only impact the weight to be afforded that expert. Romilly J. in

> *United City Properties Ltd. v. Tong*, 2010 BCSC 111 at paras. 35-68, has exhaustively reviewed the jurisprudence.
>
> ¶21 The cases are not easily reconciled. Where there is a personal relationship between the proposed expert and the party, where the expert has been personally involved in the subject matter of the litigation or where the expert has a personal interest in the outcome, the expert has not been allowed to testify. Examples of such cases are *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Gen. Div.); *Royal Trust Corporation of Canada v. Fisherman* (2000), 49 O.R. (3d) 187 (Sup. Ct. J.); *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (Sup. Ct. J.); and *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617. In cases where the relationship between the expert and the party is more institutional in nature, the evidence has been admitted subject to weight. Examples of such cases are *R. v. Klassen*, 2003 MBQB 253 and *R. v. Inco Ltd.* (2006), 80 O.R. (3d) 594 (Sup. Ct. J.).

[30] Academic writing is also instructive. Here again the same theme emerges – allegations of bias are most often left as a question of weight for the trier of fact but, where the allegations of bias are serious enough and the lack of objectivity is obvious enough, the evidence should be excluded at the outset. For example, Judge Paciocco, in *Jukebox Testimony*, *supra,* offers this:

> ¶39 Should the law attempt to exclude biased expert evidence, or admit it and discount it? Certainly, if the bias is profound enough that the expert witness will probably be unable to discharge the obligation to the court or tribunal to be objective and impartial, and if that bias is capable of being identified efficiently before the witness has testified, the evidence should be excluded. Otherwise, bias or partiality should affect the weight the evidence is to receive.

[31] When struggling to reconcile this approach with *Mohan's* silence, Judge Paciocco, like Doherty J.A. in *Abbey*, would park the requirement for objectivity under the relevance criterion:

> ¶43 The *Mohan* test is not well designed to cope with bias, partiality or influence. At no stage of the *Mohan* test do courts ask, "Is this testimony affected by bias or partiality?" Its first requirement, the necessity component, really has little to do with bias. Necessity looks at the subject matter being testified to and at whether the trier of fact knows enough about that subject matter to go it alone. It is arguable that the more extreme form that the necessity test was given in D.D. would accommodate a bias inquiry. According to D.D., a court should ask the broad question of whether the evidence is important enough to warrant the risks

> its admission will present, arguably including the prospect of bias. Even so interpreted, necessity is not a natural "bias meter": it gives no dedicated focus to partiality. Where it does factor bias in, the necessity standard measures the risk of bias solely against the need for the evidence, rather than against all of those factors favouring admission. Similarly, in its conventional application, the "expert qualification" component of M*ohan* looks at the knowledge of the expert, not at conscious or unconscious influences affecting the expert.
>
> ¶44 Mohan's prohibition on experts including otherwise inadmissible information in their reports or testimony does not address bias either. This prohibition will not cause the exclusion of biased testimony, because there is no general rule of evidence that makes biased testimony inadmissible; the law of evidence treats bias, interest and corruption as matters going to the weight of the evidence.
>
> ¶45 The component of the conventional *Mohan* test that seems on its face to be most promising is the "relevance" inquiry, because it includes a cost-benefit analysis and it is the foundation for the threshold reliability inquiry that Daubert requires and Bernstein references. Although reliability should be a broad-ranging concern in qualifying expert evidence, it has been the practice of courts to apply the threshold reliability inquiry to the reliability of the scientific theory or method, and not to the reliability of the witness. Moreover, the current practice is to confine dedicated inquiries into reliability to cases where novel science is offered or where a foundation is presented raising new concerns about the reliability of a previously trusted scientific technique. As a result, the *Mohan* test does not serve as an effective surrogate test for identifying evidence rendered unreliable by bias, partiality or influence.

[32] In light of all the above, it is clear to me that courts retain a residual discretion to exclude expert evidence on account of perceived bias. The more challenging question, however, is when this remedy should be applied. Here I return to two authorities cited above for guidance. For example, as noted in *Carmen*, *supra*, O'Connor A.C.J.O. at ¶ 111 suggests that such orders should be reserved for those cases where "the evidence is so tainted by bias or partiality as to render it of minimum or no assistance". Then Judge Paciocco offers a two-step analysis that would, (a) put the burden on the moving party to establish (on the balance of probabilities) "a realistic concern that the witness is biased", and (b) would see it excluded only if "it is probable that the expert will be unable to present expert testimony independently and impartially":

> ¶52 Balance of probabilities is the ordinary standard for admissibility imposed by the law of evidence. This is a fitting threshold to use for excluding expert evidence, for two reasons. For one, it is the familiar and ordinary standard of exclusion; for another, where actual bias is probable, the risk of admitting the expert testimony will have become too great to run. To tackle expert bias or partiality sensibly, a two-stage approach should therefore be adopted:
>
> - Since experts are presumed to be impartial, the admissibility inquiry need not concern questions of independence and partiality unless the party opposing admissibility shows there to be a realistic concern that the witness is biased.
>
> - Even where a realistic potential for bias has been demonstrated, the testimony of expert witnesses should be admitted unless it is probable that the expert will be unable to present the expert testimony independently and impartially.
>
> ¶53 In the result, in most cases bias, interest and influence would be treated as they should be: as matters affecting the weight to be given to the expert evidence.

[33] As I will now explain, the judge in this case was on solid ground by either approach.

The Decision Under Appeal

[34] With this backdrop, I turn to the judge's decision.

[35] At the outset I would say that Justice Pickup produced a careful and comprehensive decision. In fact, as his first issue, he astutely questioned whether he could even grant the relief requested:

> ¶66 *This motion raises three issues:*
>
> 1) *Can a motions judge strike an expert's affidavit/report prior to trial on the basis that the affidavit is not independent and unbiased?*
>
> 2) Should such a motion be brought under Rule 39 or Rule 55?
>
> 3) Should Ms. MacMillan's affidavit be struck?

> Issues 1 and 2 are interrelated and will be dealt with together.
>
> [Emphasis added]

[36] Furthermore, the judge well understood the appellants' position, namely that instead of ruling the evidence inadmissible, any concerns should simply be a question of weight:

> ¶69 The plaintiffs argue that Rule 39 cannot be used to strike an expert's opinion on the basis of a lack of independence or bias. The plaintiffs contend that "admissibility" in Rule 39 is limited to submissions that are not appropriate for an affidavit, such as hearsay or irrelevance.
>
> ¶70 In the alternative, the plaintiffs contend that Ms. MacMillan's affidavit meets the threshold requirements for admissibility, and any concerns that exist regarding independence and impartiality go only to weight. The plaintiffs cite *R. v. Transport (1973) Ltee*, [2002] O.J. No. 3286, 2002 CarswellOnt 2768 (Ont. Ct. J.), for the proposition that an expert's affiliation with a party does not disqualify his/her evidence. The plaintiffs submit that the degree of affiliation between Ms. MacMillan and her partners at Kentville Grant Thornton does not disqualify her evidence. They further submit that Ms. MacMillan's affidavit does not contravene her profession's standards for conflicts because Kentville Grant Thornton was not doing work for AWARD contemporaneous to the work conducted by Ms. MacMillan.

[37] As noted above, the judge was also careful to make sure that the motion proceeded under the correct *Rule* in light of the appellants' unusual decision to file the report by way of an affidavit under *Rule* 39:

> ¶71 Can a motions judge strike an expert's affidavit/report prior to trial on the basis that the affidavit/report is not independent and unbiased? Should such a motion be brought under Rule 39 or Rule 55?
>
> ¶72 There are a number factors that complicate the analysis of the issues that are raised in this case. Firstly, counsel for both parties are not from Nova Scotia and do not practice regularly under our *Civil Procedure Rules*. Perhaps as a result, their submissions tended to focus on the legal question of whether Ms. MacMillan's evidence was admissible and the factual question of whether she is independent and impartial. Counsels' submissions did not focus on whether the Rules permit such an affidavit to be struck at this stage of the proceeding by a motions judge.

> ¶73 Secondly, the normal practice in this court is for an expert's opinion to be in the form of a report which is put before the court as an exhibit to a short affidavit by the expert. It is not the normal practice, as happened in this case, for an expert's opinion to be contained entirely in an affidavit. As a result, the case law has tended to focus on challenging an expert's report and not an expert's affidavit; the interrelationship between Rule 39 and Rule 55 has not been raised in any reported decision.
>
> ¶74 Lastly, the practice in this court has been to address issues with expert opinions before the trial judge and not on interlocutory motions. This does not necessarily mean that the Rules exclude such motions, but there is a paucity of cases dealing with preliminary challenges to an expert's opinion evidence.
>
> ¶75 There are two Rules relevant to this motion, Rule 39 and Rule 55. Rule 39 allows a party to use affidavit evidence subject to admissibility. Rule 39.04, which was cited earlier, provides a mechanism for striking part or all of an affidavit.

[38] The judge too was well aware of the purpose of expert evidence and, in my view, correctly identified the need for independence and impartiality, a point the appellants conceded:

> ¶80 Before turning to an interpretation and applications of Rules 39 and 55 in the context of this case, it is helpful to be reminded of the purpose, and test for admissibility, of expert evidence. The purpose of expert evidence is to assist the trier of fact in the search for the truth by providing an opinion on a material issue that the trier of fact would otherwise not be able to assess. In *R. v. Mohan*, [1994] 2 S.C.R. 9, the Supreme Court of Canada established four factors for determining the admissibility of expert testimony: 1) relevance 2) necessity in assisting the trier of fact 3) the absence of any exclusionary rule and 4) a properly qualified expert.
>
> ¶81 The author of Expert Evidence, 2nd ed (Markham, ON: LexisNexis, 2009) at 257-264 suggests a slightly broader framework for determining admissibility:
>
> 1) What is the opinion?
>
> 2) Is there any exclusionary rule?
>
> 3) Is the witness a properly qualified expert?

> 4) Is the witness reliable?
>
> 5) What is the probative value of the evidence?
>
> 6) What is the prejudicial effect of the evidence?
>
> ¶82 From these admissibility requirements it can be seen that there are three broad categories on which expert evidence can be attacked. There are the standard attacks that can be made on any affidavit, as outlined in the Waverley decision, such as the assertion that the evidence contains hearsay or irrelevant statements. There are also attacks that are specific to expert opinion evidence. These include challenges to the evidence itself and challenges to the person proffering the evidence. The former challenge could be an argument that the scientific or sociological evidence proffered by the expert is too novel to be reliable. *The latter challenge could be that the expert is insufficiently independent and impartial to properly assist the court* or that the expert is insufficiently qualified to proffer the evidence.
>
> . . .
>
> ¶99 There is no disagreement between the parties that in Nova Scotia an expert's report must be, and be seen to be, independent and impartial (*Lunenburg Industrial Foundry and Engineering Ltd. v. Commercial Union Assurance Co. of Canada*, 2005 NSSC 62 at para. 32; *Tingley v. Wellington Insurance Co.*, 2008 NSSC 317 at para. 16; *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315 at para. 22).
>
> [Emphasis added]

[39] The judge also correctly acknowledged his role as a "gatekeeper" mandated that he exclude expert evidence from the outset when appropriate:

> ¶83 In *Morriscey v. Zwicker*, 2001 NSCA 56, at para. 29, the Court of Appeal emphasized the importance of the judge as a gatekeeper for admitting expert evidence: "The judge stands as the gatekeeper to determine all issues of admissibility. Nowhere is that more important -- or difficult -- than when considering the evidence of experts." In Morriscey, the gatekeeper was the trial judge, not a motions judge. There seems to be some disagreement in the case law about which judge is best positioned to make a determination regarding the admissibility of expert evidence.

[40] Furthermore, the judge was well aware that concerns about bias are typically considered as questions of weight as opposed to admissibility. For example, during submissions, he reminded respondents' counsel of this, using as an example the typical RCMP expert testifying on behalf of the Crown:

> ... for example, RCMP officers, we get them in the drug trial coming in, experts, they work for the RCMP, they're there for the Crown; they're giving evidence as to, you know, the guy with the baggies and the weight scale, that this is all indications of - - of trafficking. Usually when they're cross-examined, it goes to weight because they're always asked about the fact that they work for the RCMP and, if, you know, - That's similar type situation. It's usually a weight situation. And so what I'm saying is here, superimposed on a summary judgment, that's why I'm having some difficulty, and maybe you can - - as you've said, you'll - - you'll try to clear this up. ... [AB, vol. 8, p. 224]

[41] As well, the judge properly sounded a note of caution when the request to exclude evidence comes by way of a preliminary motion:

> ¶84 In Ontario, motions judges have the discretion to strike expert evidence on an interlocutory motion, but that discretion must be exercised with caution. In *Andersen v. St. Jude Medical Inc*, (2002), 29 C.P.C. (5th) 234 (Ont. Sup. Ct. J.), the defendants in a proposed class action moved to strike an expert's report on the basis that its contents were irrelevant to the motion for certification. In dismissing the motion, Cullity J. held that a motions judge had discretion to grant such relief, but refused in the circumstances of the case, stating, at para. 10 and 17:
>
> > I accept that, in a clear case, parts of an affidavit may be expunged as irrelevant, or otherwise inadmissible, prior to the hearing of the certification motion. If, in other cases, it appears at the hearing of the motion to certify that unnecessary expense and delay has been caused by delivering affidavits that are relevant only to a trial of the action, appropriate sanctions will be available.
> >
> > ...
> >
> > In civil cases, the court will often be entitled to admit evidence conditionally and a decision whether to deal with questions relating to the admissibility of the contents of affidavits in advance on a motion to strike, or to defer the question to the hearing of the motion or application for which the evidence is tendered, must, I believe, lie in the court's discretion.

> Any apparent inconsistency in the authorities that were cited is probably explicable on that basis.

¶85 In *Harrop (Litigation Guardian of) v. Harrop*, 2010 ONCA 390 at paras. 2-3, a case dealing with a challenge to expert evidence rather than the expert, the Ontario Court of Appeal held that a motions judge has the jurisdiction to rule on admissibility, but that this should be done with caution:

> In our view, the policy considerations relevant to this issue all point to the trial judge determining this question. It avoids the risk of a multiplicity of proceedings in any given case. It ensures a full context in which the decision can be made. It avoids the risk of preliminary steps being taken for purely tactical reasons. And it avoids creating different appeal rights depending on whether the decision is made by a motion judge as an interlocutory order or the trial judge.
>
> Thus, even if a motion judge has such jurisdiction, it should be exercised only in the rarest of cases. Nothing has been shown to us to put this case in that category.

¶86 Outside Nova Scotia, there is a line of cases that suggests attacks on the reliability of an expert, not his/her evidence, can be made on a preliminary basis (See eg *Fellowes; Bank of Montreal v. Citak*, [2001] O.J. No. 1096, 2001 CarswellOnt 944 (Ont. Sup. Ct. J.), though this decision was made by the appointed trial judge on a pre-trial basis; *Ivaco Inc, Re*, [2007] O.J. No. 2115, 2007 CarswellOnt 3320 (Ont. Sup. Ct. J.); *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42; *Hutchingame v. Johnstone*, 2006 BCSC 271). There is also a line of cases that suggest such concerns should be left to the trial judge and generally admitted subject to weight (See eg *Loblaws Inc v. United Dominion Industries Ltd.*, 2007 NLTD 45; *Carleton Condominium Corp No 21 v. Minto Construction*, [2001] O.J. No. 5124, 2001 CarswellOnt 4558 (Ont. Sup. Ct. J.), aff'd [2004] O.J. No. 597, 2004 CarswellOnt 583 (Ont. C.A.)).

[42] Nonetheless, he, correctly in my view, concluded that he had the ability to make such an order in appropriate circumstances:

> ¶95 Lastly, a purposive analysis also supports allowing advanced rulings on the admissibility of expert evidence in certain situations. In *Lawrence v. Lawrence Estate*, [1997] B.C.J. No. 1009, 1997 CarswellBC 954 (B.C.S.C.) at para. 8, the British Columbia Supreme Court held:

> ... it is appreciated that a party, or indeed the parties, may wish to know whether or not an expert's report will be admitted into evidence, as soon as possible, and prior to trial. And I see no reason presently why a motion such as the present one cannot be brought prior to trial, provided all relevant trial evidence can be placed before the Chambers judge and full submissions can be made.
>
> ¶96 I am satisfied that where all relevant trial evidence can be placed before a motions judge and full submissions made, there is no reason why an advanced ruling on admissibility of an expert's evidence cannot be given. The purpose of the Rules is for the "just, speedy, and inexpensive determination of every proceeding" (Rule 1.01). In my view, justice requires, as Cullity J. held in *Andersen*, that such a remedy be reserved for the clearest of cases; however, if a complete record is before the motions judge, and a clear case exists, speedy and inexpensive determinations of proceedings would be thwarted if admissibility had to wait until trial. These requirements will likely only appear when the challenge is to the reliability of the expert and not to the qualifications of his/her evidence.
>
> ¶97 In summary, a textual, contextual, and purposive interpretation of Rule 39 and Rule 55 supports the conclusion that a party may bring an interlocutory motion to challenge an expert's affidavit on the basis that it is inadmissible in whole or in part.

[43] In summary, the judge properly articulated the relevant legal principles surrounding the admission of expert evidence. Furthermore, as I will now explain, the judge properly applied those principles.

[44] At the outset, the judge concluded that Ms. McMillan's reliability was "so impugned that [her] evidence does not meet the threshold requirements for admissibility". Specifically, he was struck by her acknowledgement that had she known her partners would be testifying at trial, she would have had to reconsider her retainer:

> ¶100 Ms. MacMillan gave extensive testimony in direct and cross-examination regarding her retainer and the work done by her partners at Kentville Grant Thornton. It is unlikely that any more information will be available at trial regarding her independence.
>
> ¶101 In my view, the affidavit of Ms. MacMillan in this case falls well short of the requirement that expert's evidence must be seen to be independent. This is one of those clearest of cases where the reliability of the expert is so impugned

> that their evidence does not meet the threshold requirements for admissibility. Ms. MacMillan admitted, in response to a hypothetical question on cross-examination, that she would have had to reconsider her retainer if she had known that one of her partners would be testifying in the trial. ...

[45] The evidentiary basis for this conclusion can be found in Ms. MacMillan's cross examination:

> Q. Okay. If someone told you that the Grant Thornton and partners from the Kentville office were going to testify about the 2005 review engagement they did in this case and that evidence was going to form part of the negligence claim against WBLI would that have precluded you from being a witness in this case?
>
> A. One is, I think what, and again this is hypothetical, right?
>
> Q. Yes.
>
> A. Okay. I would, I mean, I would certainly have had to look at it in that context and which I didn't because that was not what I was asked to do.
>
> Q. Okay. And can you answer the hypothetical?
>
> A. Well, I mean, you've got to look at all the - - I've got - - I guess I've got to think about that because that was never part of the, and so would - - would I think about whether I could then be retained - -
>
> Q. Yes.
>
> A. - - to be as an expert witness?
>
> Q. Yes.
>
> A. I think I would think - - I would have a long hard think - - thinking about that.
>
> Q. And what conclusion would you come to?
>
> A. Probably that no, I wouldn't.

[46] More importantly, the judge was satisfied that a reasonable person would see her as being in a conflict of interest and "constrained" from disagreeing with her partners:

> ¶102 The problem Ms. MacMillan faces is that this is not a hypothetical example. The work of Kentville Grant Thornton forms part of the plaintiffs' statement of claim and case for negligence. Interestingly, Ms. MacMillan seems to have incorporated some of the work of the Kentville office of Grant Thornton as part of her opinion, as reflected in paras. 62 and 76 of her affidavit. The moment that work is put to the court as evidence Ms. MacMillan will be in an apparent conflict of interest. It does not matter that she might have reached the same conclusion as her partners. It also does not matter that the work was not done contemporaneously. What matters is that a reasonable observer would see that she is constrained from providing a contrary view. A contrary view would expose her partners, and therefore herself, to the prospect of liability, regardless of whether Kentville Grant Thornton had an ongoing retainer with the plaintiffs.

[47] In my view, all of these factual conclusions are amply supported by the evidence and do not reflect palpable and overriding error.

[48] Therefore, in the end, the judge, reasonably in my view, exercised his discretion to strike the affidavit:

> ¶106 In this case, all the evidence that would be available at trial is before the court. This is also one of those clearest of cases where the motion to strike remedy is warranted. The affidavit of Ms. MacMillan lacks the requisite independence to meet the threshold of admissibility. She is in an apparent conflict of interest in that she cannot take an opposing view to one party's advocate without exposing her partners and herself to potential liability. For this reason her opinion is not independent and her affidavit should be struck.

[49] In short, by ruling this evidence inadmissible, the judge engaged in the classic cost-benefit analysis. For example:

- He properly reserved this type of relief for the "clearest of cases".

- He was convinced that her conflict of interest would be apparent to the reasonable person. The same reasonable person would also find her constrained from having a view different from her partners.

- He was convinced that he had enough evidence to make this call at this early stage in the process. Here, he was struck by Ms. MacMillan's concession that she would have had to reconsider the retainer had she known that one of her partners would be testifying at the trial.

[50] Therefore, I would not disturb this decision under either of the two tests noted above. In other words, it is clear that, on sound evidence, (a) the judge found this proposed evidence to be "so tainted by bias or partiality as to render it of minimum or no assistance" (*Carmen*), and (b) that it was "probable that the expert [would] be unable to present expert testimony independently and impartially" (*Jukebox Testimony*).

[51] Before concluding, let me acknowledge that the appellants have placed great emphasis on the fact that this decision was made in the context of a summary judgement application where the merits of the case would not be tested. In other words, because they only had to establish a genuine issue for trial at this stage of the process, it would be up to the ultimate trial judge, and not this motions judge, to test the merits of this proposed expert evidence. Respectfully, as I will now elaborate, this submission confounds the test for admitting evidence with the test for summary judgment.

[52] I agree that ultimately it will be for the trial judge to assess the merits of the case. However, if the appellants wish to place evidence before the court in order to defend the respondents' summary judgement motion, it must present **admissible** evidence. Proposed evidence that does not get past the admissibility gatepost is not evidence for anyone to weigh. Therefore, by correctly applying legal principles to exclude this proposed evidence, the motions judge was not delving into the merits of the case; nor was he weighing evidence. He was simply rejecting potential evidence. That is a completely separate task and the fact that he performed this task in the context of a summary judgement application, respectfully, changes nothing.

[53] In fact, the judge made this clear when appellants' counsel cautioned the court against weighing the evidence at that stage of the proceedings:

> MR. MURPHY: ... And I don't know what - - what else to say to you expect that this is turning into a decision based on - - or all of the arguments so far has

> been really a situation where you're weighing the evidence, whether you think it's credible because of where she came from. She came from Grant Thornton.
>
> THE COURT: No, we're not - - no no, we're not dealing with credibility. But that's not the grounds that the affidavit is being challenged, and I think that's clear. It's not credibility. It's independence.
>
> MR. D'SILVA: My Lord, I don't want to interrupt my friend but I do want to just reiterate the point that our argument can be made without even referring to the affidavit.
>
> ...
>
> THE COURT: Yeah, but see I think the difference is, and when you look at Paragraph 41 that you're referring to, this isn't a weight issue. Weight doesn't go to, I don't think, maybe you disagree with me but, to admissibility. Admissibility is admissibility. And once you get it admitted, if it's an expert opinion, once it gets in then weight can - - can deal with it. But what's being raised here, in my view, is a fundamental issue of admissibility, so I'm not sure I would deal with it as to weight. I think I have to deal with it as to admissibility. Do you follow me what I'm saying?

[54] In fact, the judge accurately noted that, without this gatekeeper function, the summary judgement process would be open to abuse:

> ¶98 The ramification of not allowing a motions judge to strike such evidence, in the clearest of cases, is that the court will lose the benefit of the summary judgment process. Unlike in Ontario, where a summary judgment judge can assess and weigh evidence, the summary judgment judge in Nova Scotia must take each party's evidence at face value. Thus, even expert's evidence that is clearly inadmissible can be sufficient to create the appearance of a genuine issue for trial. This runs counter to the Rules' stated purposes of speed and efficiency. Moreover, while I acknowledge that in the vast majority of cases the trial judge will be best placed to make these decisions, there are situations where the expert evidence is so offensive that a interlocutory remedy must be available. In these situations, the ramifications of allowing the matter to proceed to trial, only to see the obvious result of the impugned evidence being struck or given no weight, far outweigh the risks of allowing a motions judge the discretion to strike the evidence on an interlocutory basis.

[55] In short, it makes no difference that the judge excluded this evidence in the context of a summary judgement application.

DISPOSITION

[56] I would grant leave as noted above but would dismiss the appeal with costs on appeal of $3,000, together with reasonable disbursements to be agreed upon or taxed.

MacDonald, C.J.N.S.

Reasons for judgment:

INTRODUCTION

[57] Partial witnesses testify in courts every day. If impartiality and independence were necessary attributes for a witness, there would be no litigation. Parties, friends, family, corporate officials – all would be excluded from the witness stand. Who would be left to swear or affirm to tell the truth? How would necessary information be communicated to the judge or jury? To ask these questions is to state the obvious: partial witnesses are the bread and butter for triers of fact. It is their job to sort out where the truth lies, at least through the lens of the appropriate onus or burden of proof.

[58] For those that pretend to be impartial, the great engine of truth, cross-examination, ferrets out biases or relationships that might affect the weight of the testimony being offered.

[59] In this case, the respondent convinced the motions judge that the appearance of independence was a necessary hallmark or attribute for every expert witness. Absent meeting some undefined threshold of apparent independence, an expert witness' proposed evidence is inadmissible. Applying this test, the motions judge found the evidence of Ms. Susan MacMillan, FCA, CFE, CFI, to be inadmissible on a summary judgment motion. I have had the privilege of reading, in draft, the reasons of my colleague, the Chief Justice. With respect, I am unable to agree with his conclusion to dismiss the appeal and his reasons for that result.

[60] In my opinion, the motions judge erred in law in finding Ms. MacMillan's evidence inadmissible. He applied the wrong test. I would also add, even if it could be said that a judge, on summary judgment motion, could find proposed expert opinion evidence to be inadmissible on the basis of a lack of impartiality, independence, bias, or similar label, the motions judge committed palpable and overriding error in finding such a test to have been met. I would therefore grant leave to appeal, allow the appeal and strike that part of his order that pertains to the admissibility of Ms. MacMillan's affidavit.

BACKGROUND

[61] To put the legal issues into context it is important to briefly set out the factual background to the legal dispute between the parties.

[62] The appellants are independently owned building supply stores and are former shareholders and members of a federally incorporated company, Wholesale and Retail Distribution Limited, commonly known as AWARD.

[63] AWARD was incorporated to act as a buying agent for its members. Its mandate was to centralize purchasing. AWARD earned rebates from manufacturers and distributors based on volume. The rebates were to be distributed to each shareholder based on their respective purchases. AWARD paid the suppliers. Each member was then supposed to reimburse AWARD. Because of the obvious risk in such an arrangement, each member had to demonstrate its financial health. Irrevocable letters of credit were required before a retailer could become a member of and a shareholder in AWARD.

[64] Brian Burgess is a chartered accountant. He is the principal in the firm WBLI Chartered Accountants, and from the inception of AWARD, the partner in charge of providing accounting, audit and other services for that company.

[65] AWARD operated with apparent success from its incorporation in 1980 until 2005. Despite the financial safeguards that were supposed to be in place, AWARD failed. Some of its members had not paid AWARD for their purchases. Demands were made on its shareholders to make up the deficiency. The total loss claimed by the appellants in terms of rebates not distributed and monies paid by them on dissolution amounted to over $15 million.

[66] The appellants sued WBLI and Mr. Burgess for their claimed losses. The basis of the action was that Mr. Burgess, as external auditor, owed certain duties, he breached those duties, causing the appellants damage. WBLI and Mr. Burgess denied owing any duty to the shareholders of AWARD, and in any event, acted appropriately as independent external auditors and did not breach the requisite standard of care in doing their work.

[67] On August 12, 2010 the defendants filed a motion seeking security for costs and a variety of other remedies. One was a request for summary judgment, that is, a dismissal of the entire claim. It was supported by a detailed affidavit from Mr. Burgess denying any deviation from professional accounting standards.

[68] In response, the appellants filed two affidavits. One was from Fred O'Hearn. Mr. O'Hearn is the principal of one of the appellants, Lumbermart Ltd. The other affidavit was from Ms. MacMillan, sworn September 16, 2010. Her affidavit set out: her qualifications, terms of retainer, a summary of her findings; details of her opinion of the ways that she believed the defendants had failed to maintain independence from the management of AWARD, and had departed from Generally Accepted Accounting Principles (GAAP) and Generally Accepted Auditing Standards (GAAS). Her opinion covered the years 1993 to the end of December 2004. I will add details about her opinion later where necessary.

[69] The defendants responded. They filed a competing expert's affidavit from Jim Mucilli, sworn November 20, 2010, disputing that the defendants had failed to maintain independence or meet GAAP and GAAS. For reasons that are not entirely clear, the summary judgment motion was not scheduled to be heard until March 26 and 27, 2012. The parties filed detailed briefs for the motion.

[70] The motion for summary judgment was not heard then, and remains unheard. Instead, the defendants brought a motion to strike the affidavits of Mr. O'Hearn and Ms. MacMillan. This motion was heard by the Honourable Justice Arthur Pickup on the March 2012 dates. Ms. MacMillan was cross-examined. Justice Pickup reserved his decision. In written reasons of June 1, 2012, he concluded that the O'Hearn affidavit should be struck as being fundamentally defective.

[71] With respect to the affidavit of Ms. MacMillan, Justice Pickup found that for an expert's report to be admissible, it must be, and be seen to be, independent and impartial. In his view, the opinion by Ms. MacMillan fell well short of the requirement of being seen to be independent. Her affidavit was also excluded.

[72] The appellants seek leave to appeal, and if granted, appeal from the order that struck the affidavits of Mr. O'Hearn and Ms. MacMillan. I agree with the

Chief Justice about the tests to be applied by this Court on the question of leave to appeal, and with respect to the standard of review on an interlocutory appeal.

[73] I also agree with my colleague that leave to appeal should be denied with respect to the appellants' complaints that the motions judge committed reversible error in relying on *Civil Procedure Rule* 55.04, and in striking the O'Hearn affidavit.

[74] My colleague would grant leave on the complaint that the motions judge erred in excluding Ms. MacMillan's affidavit, but dismiss the appeal on the basis that the motions judge articulated and applied the correct legal principles, and made no palpable and overriding error.

[75] As set out earlier, I must respectfully disagree. The motions judge adopted a legal test unsupported by the authorities or policy. I am also of the view that he committed palpable and overriding error in how he applied the test he did articulate.

DID THE MOTIONS JUDGE ARTICULATE AND APPLY THE CORRECT LEGAL TEST?

[76] It is the common law that governs the admissibility of expert evidence. The principles are uncontroversial. They were authoritatively settled in the decision of the Supreme Court of Canada in *R. v. Mohan*[1]. A party proposing to call expert evidence must satisfy four criteria: relevance; necessity in assisting the trier of fact; the absence of any exclusionary rule; and a properly qualified expert. There is no suggestion in these criteria that a party must also demonstrate that the proposed expert satisfies some additional criteria about being independent, objective, free from bias or appearance thereof. Nonetheless, trial judges have a discretion to exclude proffered expert opinion evidence if, on a cost-benefit analysis, the potential prejudicial effect outweighs its probative value (see Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3rd ed. (Toronto: LexisNexis, 2009) at paras. 12.104-112); and the discussion by Doherty J.A. in *R. v. Abbey* at paras. 75-96).

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[1] [1994] 2 S.C.R. 9

[77] Here the motions judge recognized that to determine admissibility he had to apply common law principles (paras. 80, 94). He also recognized that normally a ruling on admissibility would be made by the trial judge, but to protect the integrity of the summary judgment process, he reasoned that he had the jurisdiction to make an interlocutory ruling where the expert evidence is so offensive that a remedy must be available (para. 98).

[78] Justice Pickup found this was such a case. I have no difficulty with the general notion that a motions judge has the jurisdiction to make a ruling on the admissibility of evidence that is being sought to be introduced at the hearing of a motion. But here the motions judge did not apply the correct legal test for the admission of expert opinion evidence. It is clearly set out in *R. v. Mohan*.

[79] The essence of the motions judge's decision is found in two key paragraphs (99 and 101). He said that to be admissible an expert's report "must be, and be seen to be independent and impartial" (para. 99).

[80] I will consider in more detail later the reasons he gave for his conclusion; for now it is sufficient to simply quote it:

> [101] In my view, **the affidavit of Ms. MacMillan in this case falls well short of the requirement that expert's evidence must be seen to be independent**. This is one of those clearest of cases where the reliability of the expert is so impugned that their evidence does not meet the threshold requirements for admissibility.
>
> [my emphasis]

[81] I know of no binding or persuasive authority that sets such a standard for admission of expert evidence. It is not the law. The motions judge said that the parties agreed that an expert's report must be, and be seen to be independent and impartial (para. 99). It is not at all clear to me that the appellants agreed this was the test. In any event, the motions judge cited three cases for the test he applied: *Lunenburg Industrial Foundry and Engineering Ltd v. Commercial Union Assurance Co. of Canada*, 2005 NSSC 62 at para. 32; *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315 at para. 22; *Tingley v. Wellington Insurance*, 2008 NSSC 317 at para. 16. I will now turn to these cases to illustrate that they do not support the test articulated and applied by the motions judge.

[82] In *Lunenburg v. Commercial Union,* an insured and two insurers disputed who was responsible, under insurance policies, for losses suffered by Lunenburg. The trial judge was Warner J. One of the insurers sought to introduce opinion evidence from a semi-retired insurance executive on issues surrounding the interpretation of the insurance contracts. Justice Warner ruled the opinion evidence inadmissible. He did so by applying the *Mohan* criteria, finding that the evidence was not necessary (para. 30) and that the witness was not a properly qualified expert (para. 33). No mention was made of a need for a party to establish that a proffered expert must be 'seen to be independent'.

[83] Justice Warner did cite (at para. 32) the case of "*The Ikarian Reefer*" [1993] 2 Lloyd's Rep 68 (Q.B.D.) for the proposition that experts must demonstrate independence and objectivity in forming and tendering their opinions. I will discuss this case later.

[84] In *Ocean v. Economical Mutual* there is no mention of a need to be 'seen to be independent'. The plaintiff authored two "expert reports". One was in excess of 150 pages. The second was in excess of 5,000. Smith A.C.J. was the scheduled trial judge. She heard a motion to strike or exclude the reports, or to at least have them comply with the *Civil Procedure Rules*. Ms. Ocean's first report suggested that she suffered from Post-Traumatic Stress Disorder. The second report set out affidavits of others, legal arguments and submissions from blogs.

[85] Ms. Ocean's qualifications to be an expert in anything were doubtful to say the least. The only claims she made to an expertise were as a "researcher", or as an "expert on her life". Associate Chief Justice Smith ruled that the "reports" were not expert's reports and not admissible. Smith A.C.J. added that, "An expert witness is expected to be objective and independent of the litigation" (para. 22). Since Ms. Ocean was the plaintiff, she also failed on that score.

[86] In *Tingley v. Wellington Insurance* the plaintiffs sought admission of file materials and reports written by six physicians without calling them as witnesses. There was no issue about any of these physicians being, or appearing to be, objective and independent. The plaintiff argued the documents were admissible as business records under the common law or by statute or under the principled exception to hearsay. MacAdam J. ruled the materials admissible pursuant to the

Evidence Act, and at common law, as an exception to the hearsay rule, but he would not permit admission of their opinions unless the witnesses testified (para. 40).

[87] The defendant had argued that *Civil Procedure Rule* 31 (then in force) gave them the right to cross-examine the physicians on their opinions. Justice MacAdam agreed. In the course of coming to this conclusion, he cited a number of cases to say that the ability to cross-examine is integral to the court's ability to adequately assess an expert's opinion. This is undoubtedly correct. Justice MacAdam cited the same case as Warner J. in *Lunenburg v. Commercial Union, The Ikarian Reefer*, [1993] 2 Lloyd's Rep 68 (Q.B.D.), and quoted some of the comments made by the trial judge in that case, Cresswell J. Justice MacAdam quoted his reasons as follows:

> The duties and responsibilities of expert witnesses in civil cases include the following:
>
> 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 expertise ... . An expert witness in the High Court should never assume the role of an advocate.
>
> 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion ... .
>
> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise ... .
>
> [my emphasis]

[88] I have no difficulty with most of the general observations by Justice Cresswell about an expert's duties, but it must be stressed that they are merely that – general observations. They are no substitute for the proper application of the common law criteria for admissibility of expert opinion evidence.

[89] The one observation made by Cresswell J. that, with respect, I find problematic, and which has caused the problem here, is his comment that an expert must be seen to be independent. This was the bar to admission announced by Justice Pickup. Where did this come from?

[90] The case of *The Ikarian Reefer* had nothing to do with the admissibility of expert opinion evidence. The ship, the Ikarian Reefer, ran aground. The next day there was a fire. The insurers refused to pay, claiming the fire was deliberately set. The trial lasted 87 days. There were many experts. Cresswell J. was of the view that a misunderstanding on the part of some of the experts about their duties and responsibilities contributed to the length of trial. He set out seven paragraphs describing what he viewed as an expert's duty or responsibility. Only two are germane to our discussion. I will quote in full those two paragraphs (p. 81):

> The duties and responsibilities of expert witnesses in civil cases include the following:
>
> 1. Expert evidence presented to the Court should, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v. Jordan*, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce).
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd. v. Commercial Union Assurance Co. Plc.*, [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and Re J. [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.[2]

[91] As is seen in this quote, Justice Cresswell cites Lord Wilberforce of the House of Lords in *Whitehouse v. Jordan* for the proposition that an expert should be, and should be seen to be, independent. Legal reasoning from Lord Wilberforce would, of course, ordinarily be accorded considerable weight. But what was it he actually said, and in what context?

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[2] I note that the decision by Cresswell J. was overturned by the Court of Appeal ([1995] 1 Lloyd's Rep. 455). The Court set aside his key factual findings and found that the owners had deliberately ran the ship aground and the fire was not accidental. The court made no comment about Justice Cresswell's *obiter* observations on the duties and responsibilities of experts.

[92] *Whitehouse v. Jordan*, [1981] 1 All E.R. 267 was a case about medical negligence. Mr. Jordan was Senior Registrar at a hospital and in charge of the delivery of baby boy. The boy suffered brain damage. Experts testified for and against the claim Mr. Jordan breached requisite standard of care.

[93] The plaintiff was successful at trial. The Court of Appeal reversed, finding negligence had not been proven. The House of Lords upheld that result. There were five judgments written by the Law Lords. Lord Wilberforce made one comment concerning expert evidence. It was about the apparent degree of consultation between expert witnesses and counsel. He wrote this:

> One final word. I have to say that I feel some concern as to the manner in which part of the expert evidence called for the plaintiff came to be organised. This matter was discussed in the Court of Appeal and commented on by the Master of the Rolls. **While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that 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. To the extent that it is not, the evidence is likely to be not only incorrect but self defeating**.
>
> I would dismiss the appeal.
>
> [my emphasis]

[94] Of the four other Law Lords, only one (Lord Fraser of Tullybelton), expressed agreement with what he referred to as Lord Wilberforce's "observation" about "the organization of the expert evidence" from the plaintiff.

[95] I can also agree with Lord Wilberforce's observation for this simple reason: what party wants their evidence, expert or otherwise, tainted by even an appearance of not being independent? To do so invites the risk a trier of fact may find it unpersuasive. But that general observation does not translate into a stand-alone ground to throw otherwise admissible expert evidence out the window.

[96] The notion of requiring an expert's evidence to be, and to be seen to be, independent and impartial is to liken an expert to a judicial decision maker. Such a test is strongly reminiscent of the famous maxim of Lord Hewart C.J. : "[it] is of

fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259). It is of course this rationale that informs the test for reasonable apprehension of bias and potential disqualification of a decision maker, or subsequent nullification of a decision tainted by it (see: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484). However, I fail to see how a reasonable apprehension that an expert may not be independent or impartial can play a role in a judge, acting as a gatekeeper, to exclude evidence on that basis. Such an approach is unsupported by principle or authority.

[97] It is easy to see that the concepts of reasonable apprehension of bias and lack of independence are close cousins, if not siblings, or perhaps even twins. Neither requires proof or a finding of actual bias or lack partiality; all that is needed is the existence of a relationship or other circumstances that raise the concern of favouritism for one side or the other.

[98] My colleague's reasons presuppose that the motions judge here made a determination that the proffered evidence of Ms. MacMillan lacked some undisclosed degree of independence. With respect, I cannot agree.

[99] I earlier quoted extracts from the reasons by the motions judge where he expressly said Ms. MacMillan's evidence fell short of the requirement that the evidence of experts "must be seen to be independent". The motions judge explained his views, repeating his appearance of lack of independence analysis:

> [102] The problem Ms. MacMillan faces is that this is not a hypothetical example. The work of Kentville Grant Thornton forms part of the plaintiffs' statement of claim and case for negligence. Interestingly, Ms. MacMillan seems to have incorporated some of the work of the Kentville office of Grant Thornton as part of her opinion, as reflected in paras. 62 and 76 of her affidavit. **The moment that work is put to the court as evidence Ms. MacMillan will be in an apparent conflict of interest**. It does not matter that she might have reached the same conclusion as her partners. It also does not matter that the work was not done contemporaneously. **What matters is that a reasonable observer would see that she is constrained from providing a contrary view**. A contrary view would expose her partners, and therefore herself, to the prospect of liability, regardless of whether Kentville Grant Thornton had an ongoing retainer with the plaintiffs. [my emphasis]

[100] All of the motions judge's analysis is focussed on the appearance of a lack of independence. My colleague's reasons do not address the actual test used by the motions judge. For the reasons already outlined, the motions judge used the wrong legal test.

[101] Even if we assume, as it seems my colleague has done, that the motions judge decided Ms. MacMillan lacked the requisite, but uncertain degree of independence or impartiality, does this make a difference? In these circumstances the answer is yes, and no.

[102] Yes, because the motions judge made no finding that Ms. MacMillan was not impartial. He could hardly do so since the respondents specifically conceded that they did not allege that she was biassed. They made that clear before they cross-examined Ms. MacMillan. Nothing changed following that examination.

[103] No, because in these circumstances the case law does not support exclusion of otherwise admissible expert evidence based on a demonstration of a lack of independence. My colleague says he uses the terms "independence", "impartiality" and "objectivity" interchangeably (¶ 3). He acknowledges, as explored by Judge Paciocco, that there are differences in these terms, but labels them as subtle and of no account in this case or in any given case. I am unable to agree that these differences are unimportant. I will return to this distinction later. Before doing so, I want to mention why there is a general concern about expert evidence.

[104] There has been considerable debate about the dangers of experts overstepping their proper roles and becoming advocates for the party that has retained them (see for example: *McWilliams Canadian Criminal Evidence*, 4th ed, loose-leaf (Aurora, Ont: Thomson Reuters Canada Ltd. 2010) (pp. 12-64.8-74); William G. Horton & Michael Mercer, *The Use of Expert Witness Evidence in Civil Cases* (2005), 29 Advocates' Q. 153; Paul Michell & Renu Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635; David M. Paciocco,"Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565).

[105] This is no academic debate. The dangers are real. Seemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in

miscarriages of justice (see The Honourable Fred Kaufman, *Report of the Commission on Proceedings Involving Guy Paul Morin* (Toronto: Ontario Ministry of Attorney General, 1998); The Honourable Stephen T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Toronto: Ministry of Attorney General, 2008).

[106] The need for experts to be impartial and objective in the preparation of their reports and in their testimony is no less pressing for the due administration of justice in the civil realm (see Rt. Honourable Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (Department of Constitutional Affairs, UK: July 1996), online: Department of Constitutional Affairs http://www.dca.gov.uk/civil/final/index.htm; The Honourable Coulter A. Osborne, *Civil Justice Reform Project: A Summary of Findings & Recommendations* (Toronto: Ministry of Attorney General, 2007), online: www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp).

[107] Both reports recommended amending the rules of court to require experts to acknowledge and certify their understanding that it is their duty to assist the court, and this duty overrides any obligation to the person instructing them and paying their fees. The *Civil Procedure Rules* in the United Kingdom and Ontario were revised to reflect this recommendation.

[108] Nova Scotia recently adopted a completely new set of rules: *Nova Scotia Civil Procedure Rules*. They came into force January 1, 2009. *Rule* 55, "Expert Opinion", reflects the same concerns and recommendations as the Woolf and Osborne Reports: experts must, in their reports, state that they are providing an objective opinion for the assistance of the court, and apply independent judgment (*Rule* 55.04). There are other requirements, but these are the relevant ones.

[109] Significantly, *Rule* 55.01 makes it clear that nothing in *Rule* 55 affects the rules of evidence that govern the admissibility of expert opinion evidence. Having said that, I do not dispute that a trial judge has the discretion, in an appropriate case, to exclude proffered expert evidence due to actual bias or partiality. Remember, it is the undisclosed lack of neutrality and independence of an expert that creates the most danger to the adjudicative process. Apparent bias or partiality will usually be left to the trier of fact to consider. That is their role. As Professor Paciocco (now Paciocco J.) observed:

> 47 Even though there are an appreciable number of cases that claim the authority to exclude biased expert evidence, there is relatively "[l]ittle Canadian precedent ... for [outright] legal rejection of expert opinion evidence on the basis of bias, lack of impartiality, or inappropriate affiliation." **Most judges who identify problems of bias do not exclude expert witnesses; instead, they simply consider partiality or influence to affect the weight of the evidence, leading them in some cases to reject the evidence entirely**. While there is room for controversy over whether and how bias should affect admissibility, there is absolutely no room to disagree with the proposition that "a lack of objectivity, neutrality and independence has a significant impact on the weight to be afforded that expert," and that **bias and partiality will typically be dealt with through the weighing process**.
>
> [my emphasis]

[110] I now return to the analysis of my colleague and explain why, with respect, his analysis misses the mark. It does so by apparently conflating the appearance of lack of independence with actual lack of impartiality and bias. I will elaborate.

[111] The Chief Justice sets out the *Mohan* criteria and observes that they do not include a stand-alone requirement of "independence and impartiality". He suggests that this has not prevented Canadian courts from inferring one (¶25). To illustrate, he refers to *R. v. Abbey*, *United City Properties Ltd. v. Tong*, *Carmen Alfano Family Trust v. Piersanti, and Beazley v. Suzuki Motor Corp.* These cases do not support the exclusion of evidence because of a lack of independence. They do discuss the dangers of, and consequent potential to exclude, proffered expert evidence where the expert acts as an advocate for a party or is otherwise in fact biased.

[112] *R. v. Abbey* is not about excluding evidence due to any lack of independence or even impartiality of an expert. The trial judge excluded evidence the Crown wanted the jury to hear about the potential meaning of a teardrop tattoo that the respondent acquired within a few months of the murder of a rival gang member. The Court concluded the trial judge erred, quashed the acquittal and ordered a new trial.

[113] The excluded evidence was to come from three gang members, Dr. Mark Totten, an acknowledged expert in the culture of Canadian street gangs, and a

police officer with extensive experience with Toronto street gangs. Doherty J.A., for the Court, decided that the trial judge erred in not admitting the evidence of the gang members and Dr. Totten. The admissibility of the officer's testimony would be decided at the new trial.

[114] Justice Doherty did not need to, nor did he, discuss the requirement that experts must be independent or impartial. The defence did not dispute that Dr. Totten was qualified, nor that the meaning of the teardrop tattoo was not the proper subject of expert evidence. They argued that the proffered opinion was not sufficiently reliable – admission would risk prejudice to the trial process. The trial judge agreed, and excluded on the basis of his gatekeeper function (para. 55).

[115] This is made clear in the reasoning quoted and relied upon by the Chief Justice. Some of it bears repeating. Justice Doherty wrote:

> 86 As indicated above, it was not argued that Dr. Totten's evidence did not meet the preconditions to admissibility. Nor is it suggested that it was not logically relevant to identity, a fact in issue. The battle over the admissibility of his evidence was fought at the "gatekeeper" stage of the analysis. At that stage, the trial judge engages in a case-specific cost-benefit analysis.
>
> 87 The "benefit" side of the cost-benefit evaluation requires a consideration of the probative potential of the evidence and the significance of the issue to which the evidence is directed. When one looks to potential probative value, one must consider the reliability of the evidence. **Reliability concerns reach not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the expert's expertise and the extent to which the expert is shown to be impartial and objective**.
>
> [my emphasis]

[116] In *United Properties*, Justice Romilly referred to a number of authorities, and some of the academic discussion, on the potential to exclude expert evidence via a cost-benefit analysis. He did not suggest that the law supported exclusion on the basis of lack of independence. However, actual bias or assuming the role of an advocate may disqualify an expert.

[117] Romilly J. was faced with objections to three experts. The opposition to admission for two of them was that their respective opinions were biased and they

were merely acting as advocates. Justice Romilly observed that actual bias or acting as an advocate can lead to exclusion (*Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Gen. Div.); *R. v. Bedford* (2000), 143 C.C.C. (3d) 311 (Ont. C.A.).

[118] Justice Romilly acknowledged that some authorities might be interpreted as saying independence from a conflict of interest through connections with a party is a precondition for admissibility (*Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187 (S.C.J.). However, he concluded that this is not the accepted approach. Instead, the existence of a relationship, either institutional or personal does not disqualify; it goes to weight. The authorities he cited included: *R. v. Klassen*, 2003 MBQB 253; *R. v. Jackman*, 2008 ABPC 213; *R. v. Castillo*, 2004 MBQB 45; *Stoddart v. Canada (National Parole Board)*, 2004 FC 1350; *R. v. INCO Ltd*. (2006), 80 O.R. (3d) 594 (S.C.J.); as well as his own judgments in *Shearsmith v. Houdek*, 2008 BCSC 997 and *R. v. Violette*, 2008 BCSC 920. I agree.

[119] The other authorities referred to by my colleague, the Chief Justice, do not say otherwise. In *Alfano (Trustee of) v. Piersanti*, [2009] O.J. No. 1224, the plaintiffs challenged the admissibility of reports prepared by an expert. They alleged the expert lacked independence, and had assumed the role of an advocate. Acting as the gatekeeper, the trial judge, Justice E. M. MacDonald excluded the evidence on the basis that the expert had become a spokesperson, committed to advancing the theory of his client – hence an advocate (para. 11). The principles applied by the trial judge were clear. She said:

> 5 The essence of the challenge to Mr. Anson-Cartwright's impartiality was summarized by Mr. Diamond in his closing submissions. Mr. Anson-Cartwright is very experienced. His qualifications to give opinions in matters such as those that are in issue in this case were not challenged. As Mr. Diamond put it Mr. Anson-Cartwright was familiar with the "dos and don'ts of being an expert". Mr. Diamond referred to the decision of Bellamy J. in Eastern Power Ltd. v. Ontario Electricity Financial Corp. 2008 Carswell Ont. 5635 (S.C.J.). She stated at para. [292]:
>
> > The purpose of **expert** evidence is to assist the trier of fact to understand evidence outside of his or her range of experience so that a correct conclusion can be reached: R. v. D. (D.), [2000] 2 S.C.C. It is commonly

> recognized that, in order to be of assistance to the trier of fact, **experts** must remain objective ...
>
> 6 I accept this as a correct statement of the role of an expert. The court expects objectivity on the part of the expert. In other words, he or she cannot "buy into" the theory of one side of the case to the exclusion of the other side. To do so, poses the danger that could taint the court's understanding of the issues that must be decided with impartiality and fairness to both sides. The fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court. If it becomes apparent that an expert has adhered to and promoted the theory of the case being advocated by either Plaintiffs or Defendants, he or she becomes less reliable and is not an expert in the way that the role has been defined in the recent and well known jurisprudence.

[120] This ruling was, as pointed out by my colleague, appealed. The Ontario Court of Appeal upheld the decision by the trial judge in reasons penned by O'Connor A.C.J.O. He noted that the trial judge found that the expert's reports were, in fact, tainted by a lack of impartiality (para.100). Where O'Connor A.C.J.O. spoke of a lack of independence, it is clear he did so in the context of actual bias. For example, he wrote:

> 105 In determining whether an expert's evidence will be helpful, **a court will, as a matter of common sense, look to the question of the expert's independence or objectivity. A biased expert is unlikely to provide useful assistance**.
>
> ...
>
> 108 **When courts have discussed the need for the independence of expert witnesses, they often have said that experts should not become advocates for the party or the positions of the party by whom they have been retained. It is not helpful to a court to have an expert simply parrot the position of the retaining client**. Courts require more. The critical distinction is that the expert opinion should always be the result of the expert's independent analysis and conclusion. While the opinion may support the client's position, it should not be influenced as to form or content by the exigencies of the litigation or by pressure from the client. An expert's report or evidence should not be a platform from which to argue the client's case. As the trial judge in this case pointed out, "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court."

[121] Indeed the excerpts from Associate Chief Justice O'Connor's reasons quoted by my colleague echo the suggestion by Romilly J. in *United City Properties*: typically the concern that an expert lacks independence or even objectivity goes to weight rather than admissibility (para. 28); it is when a court is satisfied that the evidence is, in fact, so tainted by bias or partiality, so as to render it of no or minimal assistance, it can be excluded.

[122] It bears repeating at this stage: there was no finding by the motions judge here that the proposed evidence by Ms. MacMillan was, in fact, biased or not impartial, or she was otherwise acting as an advocate for the appellants. It was the so-called ***appearance*** of a lack of independence that caused the motions judge to rule her evidence inadmissible.

[123] The last authority relied upon by my colleague does not support the view that an appearance of bias (or lack of independence) is sufficient to exclude. If appearance of bias or apparent lack of independence were the test, then the trial judge in *Beazley v. Suzuki Motor Corp*. would surely have decided other than he did.

[124] In *Beazley*, the plaintiffs alleged that Suzuki and GM were negligent in the design and manufacture of a 1994 4x4 Geo Tracker. The defendants planned to tender at trial the report of Mr. Wood, a professional engineer. He had been employed with GM for 32 years. His duties included testing and analysis of chassis, tires, wheels and related components. The plaintiffs objected, arguing that given Mr. Wood's employment with GM, there was a reasonable apprehension of bias that disqualified him as an expert – also expressed as not passing the requirement of independence (para. 10). Goepel J. noted the divergent case law in this area, but declined to disqualify Mr. Wood, leaving it to a full *voir dire* at trial to determine the issue of partiality (para. 24).

[125] My review of these, and other authorities, leads me to disagree with the Chief Justice that courts retain a residual discretion to exclude expert evidence "on account of perceived bias" (¶32). The mere appearance or even existence of a conflict due to personal, professional or institutional relationship does not disqualify (see also: *Field v. Leeds City Council*, [2001] CPLR 833 (Eng. C.A.); *Factortame & Others v. Sec of State*, [2002] EWCA Civ 932; and *FGT Custodians Pty. v. Fagenblat*, [2003] VSCA 33).

[126] Therefore, the motions judge, with respect, did not articulate and apply the relevant legal principles. On this basis alone, I would grant leave to appeal, allow the appeal and strike that part of the order that excludes Ms. MacMillan's affidavit.

[127] My colleague says that the motions judge not only articulated the correct legal principles but also applied them correctly. In particular he says the judge "engaged in the classic cost-benefit analysis" (¶49). With respect, I disagree.

[128] There is not one word in the motions judge's decision that says he engaged in any such analysis. If he had attempted to do so, he would have realized his error. The gatekeeper function, where a *trial judge* engages in a cost-benefit analysis, is done to protect the fairness and integrity of the fact-finding process of a trial.

[129] These principles are succinctly and conveniently set out in Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3rd ed. at paras. 12.105 and 12.107:

> §12.105 A trial judge has a residual power to exclude proffered expert evidence that is relevant to a material issue when the probative value of the evidence is overborne by its prejudicial effect. To determine the admissibility of the expert evidence, courts must weigh the strength or cogency of the evidence against its potential prejudice in the sense that it may be used by the trier of fact for an impermissible purpose, may create unfair prejudice against the opponent, or may confuse or mislead the trier of fact thereby rendering the trial unfair or result in an inefficient and costly trial.
>
> ...
>
> §12.107 The trial judge must consider the potential prejudicial effect of the proffered expert evidence. Prejudice does not mean the proffered opinion will have a detrimental effect on the adversary's case. The underlying concern is the potential detrimental effect that the proffered evidence may have on the fairness of the trial or the integrity of the proceedings. The residual power may be exercised for one or more of the following reasons: (1) the proffered opinion may be used by the trier of fact for the wrong purpose; (2) the expert evidence may mislead the trier of fact; or (3) the expert evidence may distort the fact-finding process. The trial judge may also exercise her or his residual authority of the proof of the

> evidence will consume an inordinate amount of court time that is not commensurate with its probative value. A trial judge may examine the extent to which an opinion is founded upon inadmissible hearsay evidence (for example, the unsworn evidence of a party who elects to testify).

[130] The motions judge did not refer to any of these principles.

[131] Since the Chief Justice relies on *R. v. Abbey*, it is instructive to also refer to Justice Doherty's analysis in that case about what is involved in a trial judge's cost-benefit analysis. Justice Doherty discusses the principles at paras. 86-95.

[132] The cost side of the ledger is all about the potential risks of the trier of fact hearing the evidence: the consumption of time, prejudice and confusion. The benefit side requires a consideration of the probative value of the evidence and its reliability. I will quote only three paragraphs from Justice Doherty's reasons:

> 87 **The "benefit" side of the cost-benefit evaluation requires a consideration of the probative potential of the evidence and the significance of the issue to which the evidence is directed**. When one looks to potential probative value, one must consider the reliability of the evidence. Reliability concerns reach not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the expert's expertise and the extent to which the expert is shown to be impartial and objective.
>
> ...
>
> 90 **The "cost" side of the ledger addresses the various risks inherent in the admissibility of expert opinion evidence, described succinctly by Binnie J. in J.-L.J. at para. 47 as "consumption of time, prejudice and confusion". Clearly, the most important risk is the danger that a jury will be unable to make an effective and critical assessment of the evidence**. The complexity of the material underlying the opinion, the expert's impressive credentials, the impenetrable jargon in which the opinion is wrapped and the cross-examiner's inability to expose the opinion's shortcomings may prevent an effective evaluation of the evidence by the jury. There is a risk that a jury faced with a well presented firm opinion may abdicate its fact-finding role on the understandable assumption that a person labelled as an expert by the trial judge knows more about his or her area of expertise than do the individual members of the jury: J.-L.J. at para. 25.

> 91 In addition to the risk that the jury will yield its fact finding function, expert opinion evidence can also compromise the trial process by unduly protracting and complicating proceedings. Unnecessary and excessive resort to expert evidence can also give a distinct advantage to the party with the resources to hire the most and best experts - often the Crown in a criminal proceeding.
>
> [my emphasis]

[133] Here there was no trial. The ruling on admissibility was ancillary to a motion for summary judgment. A judge hearing the motion for summary judgment only needed to determine if there was a genuine issue of material fact requiring a trial. If there was not, then he must determine if the plaintiffs had a reasonable chance of success. I do not mean to suggest that expert evidence that does not meet the *Mohan* criteria should be considered on a motion for summary judgment. Ms. MacMillan's evidence met all of those criteria – it was only the gatekeeper function that the motions judge purported to perform that excluded her affidavit.

[134] Assuming for the moment that a motions judge on a summary judgment motion could, in these circumstances, carry out a cost-benefit analysis, he did not do so. He made no mention of the principles articulated in any of the leading authorities reviewed above. He said nothing about the probative value of Ms. MacMillan's evidence. He focussed on only one indicia of reliability – what he said was her apparent conflict of interest. He made no mention of Ms. MacMillan's clear evidence that she understood her role as an expert and her paramount and overriding duty to assist the court.

[135] On the cost side, there was no suggestion that the motions judge, or the ultimate trier of fact, would be overwhelmed by technical jargon, nor any potential prejudice by admission. Ms. MacMillan's opinion is not about unduly complex or novel scientific matters. It is about accounting standards and whether the respondents met them. This is a field the respondent himself appears to be eminently qualified, not to mention the other accounting expert the respondents' engaged. There was no cost-benefit analysis to which I would owe deference.

PALPABLE AND OVERRIDING ERROR

[136] In light of my earlier conclusions, it is probably unnecessary for me to review how the motions judge erred in how he purported to apply the test he thought was applicable. However, I do so because it ties into the unwelcome consequences of applying the test he articulated.

[137] The judge reasoned that the proffered evidence of Ms. MacMillan fell well short of what he said was the requirement that expert evidence "must be seen to be independent". To buttress his conclusion he cited Ms. MacMillan's responses to a hypothetical question that was put to her. She acknowledged that if Grant Thorton's partners were going to testify about the 2005 review engagement as part of the case against WBLI, she would probably not accept the retainer to be an expert witness (para. 101).

[138] The motions judge then concluded that "...this is not a hypothetical example. The work of Kentville Grant Thornton forms part of the plaintiff's statement of claim and case for negligence". The motions judge also observed: "Interestingly, Ms. MacMillan appears to have incorporated some of the work of the Kentville office of Grant Thornton as part of her opinion, as reflected in paras. 62 and 76 of her affidavit." He then reasoned, "The moment that work is put to the court as evidence Ms. MacMillan will be in an apparent conflict of interest" (para.102).

[139] With respect, the motions judge misunderstood the pleadings and the evidence. The work of Kentville Grant Thornton did not form part of the claim by the appellants against WLBI for negligence. As earlier set out, the appellants claimed that Mr. Burgess owed a duty to maintain independence from the management of AWARD and to conduct his audit of AWARD's financial statements in accordance with GAAP and GAAS.

[140] Ms. MacMillan's affidavit detailed examples where she opined he had not maintained the requisite degree of independence and had failed to conduct his responsibilities in accord with GAAP and GAAS.

[141] I will deal first with the notion that the work of Kentville Grant Thornton forms part of the "plaintiff's claim and case for negligence", then that Ms.

MacMillan incorporated the work of the Kentville office of Grant Thornton as part of her opinion.

[142] The Statement of Claim does refer to the Review Engagement Report done by Grant Thornton for the fiscal year ending December 31, 2005. But this reference is merely part of the narrative as to how the appellants became aware of the claimed accounting deficiencies. The claim by the appellants are for the years 1995 to the end of fiscal year ending December 31, 2004. Kentville Grant Thornton did no accounting work for the years at issue. Here is what is said in the Statement of Claim:

> 12. AWARD contracted the Chartered Accountant firm of Grant Thornton LLP in 2006 and that Firm issued a Review Engagement Report for AWARD for the fiscal year ending December 31, 2005. There are numerous differences between the WBLI AWARD December 31, 2004 audited financial statements and the Grant Thornton AWARD December 31, 2005 Review Report. The Plaintiffs claim that the negligence of WBLI in the preparation of AWARD's financial statements for the material period of time resulted in the representation that AWARD was a profitable company when in fact it was not profitable and was operating in a materially significant deficit position.

[143] There was not a scintilla of evidence that anyone from Kentville Grant Thornton would be called as witnesses at trial. The questions put to Ms. MacMillan about a hypothetical situation were just that, hypothetical. The work done by Grant Thornton in 2006 for the fiscal year ending 2005 is extraneous to the claim of negligence founded on claims of a lack of independence by Mr. Burgess for the years 1995 to 2004 and his failure to adhere to GAAP and GAAS in carrying out the audits of AWARD's financial statements for those years.

[144] The so-called Kentville Grant Thornton Report was not in evidence before the motions judge. The uncontradicted evidence of Ms. MacMillan was that there was no accounting opinion offered in that report (p. 182). In fact, Ms. MacMillan was cross-examined on the potential for the Grant Thornton report for the year ending December 31, 2005 to be used. Her uncontradicted evidence was it was not going to be used in any respect (p. 110).

[145] The motions judge found that Ms. MacMillan "incorporated" some of the work done by the Kentville Grant Thornton office, and this created the problem:

she would be constrained from expressing a contrary view. He said this was found in paras. 62 and 76 of her affidavit.

[146] Ms. MacMillan explained that the number ($7,715,564) set out in para. 62, which is simply repeated in her conclusionary para. 76, came from Kentville Grant Thornton adding up the value of supplier rebates that had been credited by the management of AWARD to the 'Advertising Accounts'. This has nothing to do with professing an accounting opinion or relying on previous accounting analysis by the respondents. It was an exercise in arithmetic.

[147] The so-called 'incorporation' is found in para. 62 of Ms. MacMillan's affidavit. The para is as follows:

> 62. Using the year end working papers files that were prepared by the Company for the years ended December 31,1995 through December 31, 2005, Grant Thornton summarized the value of supplier rebates credited to the "Advertising Accounts" and determined the amount to be $7,715,564. Another effect of the credits was the reduction of various expenses including salaries, bonuses and various travel expenses that had previously been reallocated to advertising expenses.

[148] The claim against the respondents was that the supplier rebates should have been for the shareholder members – not used to offset advertising expenses. Mr. Burgess' stated in his affidavit of August 13, 2010 that there was nothing wrong with the way management used the rebates to offset advertising and marketing expenses; and he had been advised by management that the allocation and use of the rebates had been properly explained at shareholder meetings.

[149] The reliance on how numbers from AWARD working papers were added up would never cause a reasonable observer to believe that Ms. MacMillan would be constrained in any way about her opinion. The motions judge disregarded uncontradicted evidence and misunderstood the evidence in the course of coming to his conclusion that the work done by the Kentville Grant Thornton office had any bearing on the ability of Ms. MacMillan to be impartial and objective – or, to use the test wrongly articulated by the judge, be seen to be independent.

[150] The error is palpable as it is clear. It is overriding as it bore on the core of his reasoning as to why Ms. MacMillan would not be seen to be independent.

[151] I have reviewed the authorities, but what of policy concerns; what would be the consequences of endorsing the approach used by the motions judge? Catastrophic would be too strong an adjective. Counterproductive too mild. The civil administration of justice is criticized for being too slow, too expensive and too cumbersome. Access to justice is impeded by the high cost of litigation. That high cost is not just made up of legal fees. Litigants frequently need to adduce expert opinion evidence. Experts cost money, often a lot.

[152] The approach of the motions judge, endorsed by the Chief Justice, would undoubtedly add to the cost of litigation, furthering inhibiting access to justice for all but rich and institutional litigants. A simple example will demonstrate.

[153] A couple decide on retirement to build their dream home. A structural engineer designs the roof. A reputable builder follows the plans and erects just what they wanted. Within a year serious leaks develop.

[154] The couple hire a local engineer, Mr. Smith, who is a partner in a national engineering firm, to investigate. I will call the firm ABC Engineering. Mr. Smith forms the opinion that the roof design is flawed. It cannot be properly repaired and is in risk of collapsing. He advises the couple that whoever designed the roof was negligent.

[155] Mr. Smith designs a new roof and oversees construction. The couple can ill afford these additional expenses. The couple ask the original structural engineer for compensation. He denies liability. The couple have little choice. They turn to the courts for justice.

[156] Wanting the best qualified expert, they hire Ms. Jones, one of the partners in the Toronto office of ABC. She duly prepares an expert's report setting out her qualifications and opinion that the initial roof was negligently designed and that the roof should have been designed in line with the replacement roof. Perhaps some might fear that her opinion might be discounted because of her relationship with Mr. Smith, but that should go to weight not admissibility.

[157] According to the analysis adopted by the motions judge, and endorsed by my colleague, Ms. Jones would be disqualified as an expert witness because she

would lack the appearance of independence as she would be constrained from voicing a contrary view than that of Mr. Smith. To do so might open herself, and her partners, to what the motions judge said was "the prospect of liability" (para. 101).

[158] Carrying this to its logical conclusion, the couple needing affordable access to justice could not even use Mr. Smith as an expert since he too would expose himself and his partners to a hypothetical risk of liability. The unfortunate couple would then be faced with the prospect of abandoning their litigation or incurring the additional cost of another expert – however impartial, objective and probative the actual opinions of Mr. Smith and Ms. Jones.

SUMMARY AND CONCLUSION

[159] A judge hearing a motion for summary judgment should only hear admissible evidence. Here, the motions judge committed no error in striking the affidavit of Mr. O'Hearn. However, the motions judge did not articulate and apply the correct legal principles in determining if Ms. MacMillan's affidavit was admissible.

[160] The sole test used by the motions judge to exclude her affidavit was that he was satisfied that a reasonable observer would not see her to be independent. This is not the correct test. The *Mohan* criteria set the bar for admission of expert evidence: relevance; necessity in assisting the trier of fact; the absence of any exclusionary rule; and a properly qualified expert.

[161] There is no stand-alone requirement for a party to demonstrate that its expert witness is, or appears to be independent. That is not to say that a trial judge does not have a residual discretion to exclude proffered expert opinion evidence if she is satisfied that an expert is in fact biased, or is acting as an advocate, to such an extent that the potential prejudicial effect outweighs its probative value. Here the proffered evidence was in the context of a motion for summary judgment. The ultimate probative value of her opinion is for the trier of fact.

[162] Furthermore, the motions judge committed reviewable error in finding that a reasonable observer would believe that Ms. MacMillan would be seen as lacking

independence, or that she somehow lacked independence disqualifying her as an expert.

[163] The motions judge erred in excluding the affidavit. Accordingly, I would grant leave to appeal on this ground, allow the appeal and remove the provision in the order that strikes Ms. MacMillan's affidavit.

[164] I would also order that costs of the proceedings below shall be in the cause, and costs on the appeal are payable forthwith to the appellants in the all inclusive amount of $3,500.

Beveridge, J.A.

Concurred in:

Oland, J.A.