IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Lunenburg Industrial Foundry and Engineering Ltd. v. Commercial Union Assurance Company of Canada, 2005 NSSC 62

Date: 20040927
Docket: SH 220046
Registry: Halifax

Between:

Lunenburg Industrial Foundry and Engineering Limited, Royal and Sun Alliance Insurance Company of Canada, Kingsway General Insurance Company, Sovereign General Insurance Company and Markel Insurance Company

Plaintiffs

v.

Commercial Union Assurance Company of Canada and AON Reed Stenhouse Inc.

Defendants

Judge:	The Honourable Justice Gregory M. Warner
Heard:	September 27, 2004, in Halifax, Nova Scotia
Written Release of Oral Decision:	March 24, 2005
Counsel:	W. Augustus Richardson, Counsel for Royal & Sun Alliance Insurance Company of Canada & all other insurance plaintiffs. Hugh Wright & David J. Demirkan, counsel for Commercial Union Assurance Company of Canada Nancy G. Rubin & Colin D. Piercey, counsel for AON Reed Stenhouse Inc. Peter Kinley, President of Lunenburg Industrial Foundry & Engineering Ltd - self represented.

By the Court (Orally):

[1] Commercial Union sought to introduce the opinion evidence of Reginald A. Wolfe, a semi-retired insurance executive, as to whether the Defendant's boiler and machinery policy (B&M Policy) covered damage caused in February 1998 to a marine railway; in particular

(a) whether a marine railway was a “hoist” or “conveyor” (which were excluded from coverage);

(b) whether the incident was an “Accident” as defined in the policy;

(c) the general principles of insurance interpretation, including as to overlapping coverage.

[2] The plaintiffs (Royal Insurance, AON and Lunenburg Industrial Foundry) oppose the introduction of this evidence.

[3] Admissibility was argued in chambers on September 27, 2004. I ruled that Mr. Wolfe's opinion evidence was not admissible, and advised that I would provide written reasons at a later date. These are those written reasons.

THE LAW

[4] The rules of evidence control the presentation of facts before the court. The goal of the law of evidence in civil cases involves the search for the truth and the enhancement of the efficiency of the trial process (see the

Introduction in The Law of Evidence in Canada by Sopinka, Lederman and Bryant, 2nd Ed. (Toronto: Butterworths, 1999)).

[5] In recent years the Supreme Court of Canada has abandoned what Estey J. described in **Gratt v. R [**1982] 2 S.C.R. 819 as the "large number of cumbersome rules, with exclusions, and exceptions to the exclusions and exceptions to the exceptions", in favour of a flexible principled case by case approach. With the principled approach, the law has been simplified, but a more contextual and factual analysis is required. This approach requires the exercise of discretion in balancing the goals of the law of evidence on a case by case basis.

[6] The admission of expert evidence is an exception to the rule against witnesses testifying as to their opinion. Expert testimony is received only in exceptional cases where the court would be unable to reach its own conclusion in the absence of assistance from experts with special knowledge.

[7] The Supreme Court of Canada in **R. v. Mohan** [1994] 2 S.C.R. 9, examined the criteria for admission of expert opinion evidence and established a four part pre-condition to admissibility: (1) relevance, (2) necessity, (3) absence of an exclusionary rule, and (4) a properly qualified expert.

Relevance

[8] The evidence of the expert witness must relate to a fact in issue, such that the establishment of that fact is more likely than if the expert evidence were not given. In **Mohan**, the Supreme Court warned that evidence may be accepted by the jury as being "virtually infallible" and as having more weight than it deserves if it is dressed up in scientific language that the jury does not easily understand. The Court cited two questions put by Moldaver, J., (as he then was) in **R. v. Melaragni** (1992) 73 C.C.C. (3d) 348 when he asked, first, whether the evidence was more likely to assist the jury in its fact finding or to confuse and confound and, second, whether the jury was likely to be overwhelmed and unable to keep an open mind and objectively assess the evidence.

[9] A second limitation on the admission of relevant expert evidence is the cost/benefit analysis that was further reviewed by the Ontario Court of Appeal in **R. v. K.(A.)** [1999] O.J. 3280, where the reliability of the evidence and its impact was weighed. The Court framed the issue in several questions, including:

> (c) Although relevant, is the evidence sufficiently probative to warrant its admission?
>
> (i) To what extent is the opinion founded on proven facts?
>
> (ii) To what extent does the proposed expert opinion evidence support the inference sought to be made from it?
>
> . . .
>
> (iv) To what extent is the evidence reliable?

[10] There is clearly a logical relationship between Mr. Wolfe's proposed opinion and the issue at trial; one of the Plaintiffs' complaints (dealt with under other headings) is that Wolfe's evidence is simply a legal opinion on the "ultimate issue", and does not speak to a factual matter related to the legal issue.

[11] The rules for interpreting insurance contracts requires the Court to first decipher the words according to their common (non-technical) meaning; then, in the event of ambiguity, to apply aids to interpretation that mitigate against the insurer, and any technical terms that are special to B&M Policies. These rules of interpretation marginalize the relevance of Mr. Wolfe's opinion. The very basis for its admissibility - specialized technical knowledge that is not available without expert evidence, is the basis for its exclusion under the rules for interpreting insurance contracts.

[12] This Court had indicated to the parties, before the Application, that evidence of when, and how, and for what reason, the wording in the policies came to

be, might be relevant if the proposed expert could be shown to have the kind of specific and specialized knowledge of those events and changes. Mr. Wolfe's report (including his CV) and discovery showed no such research or knowledge. In light of the determinations made at trial, it is doubtful that even that type of expertise would have been relevant.

[13] To the extent that the issue at trial is primarily the interpretation of the words used in their plain meaning (or, if ambiguous, a meaning against the drafter, who in this case is the Defendant), the opinion of Mr. Wolfe is not relevant.

Necessity

[14] The second **Mohan** prerequisite replaced the earlier standard of "helpfulness" established by **R. v. Abbey** [1982] 2 S.C.R. 24, with a requirement of necessity. At paragraph 22, Sopinka, J., said:

> The word "helpful" is not quite appropriate and sets too low a standard . . . . What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury" . . . . the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature . . . . "[t]he subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge".

[15] These statements were put in the form of questions by the Ontario Court of Appeal in **R. v. K.(A.),** (supra), at paragraph 92, as follows:

(a) Will the...evidence enable the [court] to appreciate the technicalities of a matter in issue?

(b) Will it provide information which is likely to be outside the experience of the [court] ?

(c) Is the [court] unlikely to form the correct judgment about a matter in issue if unassisted by the expert opinion evidence?

The Alberta Court of Appeal in **R. v. R.A.N.** (2001) 277 A.R. 288 at paragraph 17 made the same point.

[16] The necessity criteria has been extensively canvassed by the Supreme Court of Canada again in **R. v. D.D.** [2000] 2 S.C.R. 275 by both the minority and majority and is succinctly summarized at paragraph 57 of the majority decision which reads in part as follows:

> . . . When should we place the legal system and the truth at such risk by allowing expert evidence? Only when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts. As Mohan tells us, it is not enough that the expert evidence be helpful before we will be prepared to run these risks.

[17] The Defendant argues that Wolfe's evidence meets the necessity criteria because:

(a) B&M policies are “an arcane area of knowledge not familiar to most people”, and a “ category of insurance so specialized and so unfamiliar to

most insurance brokers", and "the use of these words and combination of words rely on connotations that are specific to the specialized category of insurance that is the B&M Policy; they are not common in everyday usage"; therefore, a Court is likely to be misled in interpreting the words, unless expert evidence is admitted. In support, the Defendant cites **Nuvo Electronics Inc v. London Assurance et al** [2000] O.J.2241, (O.S.C.J.) and **Ultramar Canada Inc. v. Mutual Marine Office Inc. et al** [1994] S.C.J. 1306 (T.D.).

(b) While the concern that the specialized knowledge of an expert like Mr. Wolfe would overwhelm the trier of fact, or distort the trial process, may be relevant to a trial in front of a jury (for which several decisions are cited), it is not the same for trials before judges alone. The Defendant cites **Master's Association of Ontario v. Ontario (Attorney General)** [2001] O.J. 1444 (Div. Ct.) at paragraph 14.

(c) It argues that caution should be exercised in excluding expert evidence on the basis of a cost-benefit analysis, citing Rosenberg, J.A., in **R v. M.(B)** [1998] O.J. 4359 (O.C.A.). Rosenberg cited McLachlin, J., (as she then was) in **R. v. Seaboyer; R. v. Gayne** [1991] 2 S.C.R. 577, to the effect such

> evidence should be excluded only where the prejudicial effect substantially outweighs the probative value.

The Plaintiffs argue that referring on the historical evolution of B&M policies (which they argue Mr. Wolfe is not qualified to comment on) and other extrinsic aids is only permitted if an ambiguity is found in the policy; they point out that it is Wolfe's position that there is no ambiguity. The Plaintiffs further note that Wolfe conducted no independent investigation of facts or material that are not otherwise available to the Court; rather, he relied upon the same materials as were available to the Court.

[18] Wolfe's report, and his discovery examination, confirm that he interpreted the relevant portion of the B&M Policy based on information that is generally available without reliance upon an expert. In particular, he determined what a marine railway was by downloading from the internet a descriptive introduction contained on the website of Crandall Dry Dock Engineering (the firm that had constructed and provided maintenance for the marine railway which is the subject matter of this litigation). He determined what the word "hoist" meant by downloading the definition from the internet website of Britannica Encyclopaedia. The facts he relied on were those in

the same report (Dr. Leslie Russell's report) that was received and relied upon by the Court.

[19] Mr. Wolfe's discussion of the words in the policy and the relationship between these words were obtained from non-technical public sources. There was no reference in the report to any other specialized original sources of information that might have made his evidence helpful, if not necessary.

[20] There was no information in Mr. Wolfe's report that is likely to be outside the experience and knowledge of the trier of fact, or that an ordinary person was unlikely to form a correct judgment about, if unassisted by someone with Mr. Wolfe's experience.

[21] Technical knowledge of the insurance industry and the B&M policy is not the basis for interpreting insurance contracts.

[22] Our **Civil Procedure Rule 31.08** requires Mr. Wolfe's report to contain his full opinion , including the essential facts upon which the opinion is based, and a summary of the grounds for each opinion. The threshold assessment of admissibility begins with Mr. Wolfe's report. His report does not disclose the essential facts and grounds for each opinion, other than the above noted references to the internet articles, which are readily available to and understandable by persons without expertise.

[23] To the extent that specific knowledge of when, and how, and for what reason, the wording in the relevant policies came to exist, a review of the report and the discovery transcript discloses no such specific knowledge of the facts or circumstances or history. In light of the determinations made subsequently at the trial, it is clear that such knowledge would not have been determinative of the proper interpretation of the B&M Policy.

Absence of an Exclusionary Rule

[24] Counsel for Royal Insurance and for AON argued strenuously that the evidence that Commercial Union seeks to tender through Mr. Wolfe is evidence on the interpretation of domestic law and therefore should not be admitted. In support, they refer to:

(a) The Law of Evidence in Canada, 2nd Ed., at paragraph 12.83, where the writers say that such matters are not matters upon which the court will receive opinion evidence;

(b) **R. v. Century 21 Ramos Realty Inc** [1987] O.J. 178 (OCA);

(c) "**Civil Evidence Handbook"** (Toronto: Thomson, 2004) by Gordon D. Cudmore, which reads in part:

> The interpretation of a document is a question of law and is not a subject for evidence. Conclusions based on evidence are a function of the court, and not of witnesses. Evidence by a witness consisting of conclusions based on the witness's interpretation of a document is irrelevant and therefore inadmissible.

Cudmore cites **Century 21 Achiever's Real Estate Group Inc. v. Tsang** (1992) 3 Alta. L.R. (3d) 21, as authority for this position.

(d) **MacDonnell v. M&M Developments Ltd**,(1997) 164 N.S.R. (2d) 81, where Saunders, J., (as he then was) held at paragraph 14 that the Court would not receive opinion evidence on title to land which is a question of law, holding that such was an issue for the trial judge who must interpret the title documents and apply the law unaided by any opinion, except the views expressed by counsel in argument.

[25] The Plaintiffs also object to the admission of expert evidence to interpret contracts and policies. They cite **Gorgichuk v. American Home Assurance Co.**, [1985] O.J. 1134 (OHC), at paragraph 16 and 17, as deciding that expert evidence (by an English Professor) was not admissible to aid in the interpretation of an insurance policy; **Canadian National Railway Co. v. Volker Stevin Contracting Ltd.** [1991] A.J. 1054 (ACA) as deciding that courts should not let scientific and engineering witnesses give opinions as to the nature of contruction contracts and how to interpret them; **Hovisepian v.**

West fair Foods Ltd. 2003 ABQB 641, in which case the court struck portions of an affidavit containing opinions on the interpretation of the word "liquidation" (a supposed technical term) and on the application of a legal principle; and **United Canso Oil & Gas Ltd. v. Washoe Northern Inc.**,(1990) 78 Alta.L.R. (2d) 79 (ABQB), in which the court allowed an expert to give opinion evidence as to the business background of, but not to interpret, the conveyancing agreements in issue.

[26] The Plaintiffs also objected to the admissibility of Mr. Wolfe's opinion because it deals with the "ultimate issue" before the Court.

[27] The Defendant cites paragraph 25 of **Mohan**, paragraph 53 in **R. v. D.D.**, and **R. v. Burns** [1994] 1 S.C.R. 601, to establish that the "ultimate issue" rule no longer exists.

[28] While the court does not accept that **R. v. Burns** supports the Defendant's position (McLaughlin J. said "expert evidence on *matters of fact* should not be excluded"), the above cases, **R. v. J.(J.-L)**, [2000] 2 S.C.R. 600 at paragraphs 37 and 56, and paragraphs 12.70 - 12.75 in The Law of Evidence in Canada, state that courts now recognize that it is not an absolute exclusionary rule barring testimony, but rather a rule that the closer the

testimony gets to the ultimate issue, the stricter the court will apply the requirements of relevance and necessity before admitting it.

[29] To the extent that the **Mohan** prerequisites have replaced the exclusionary rule for receiving opinion evidence on matters of domestic law and contract interpretation, this court applies the statements of Binnie J. in **R. v. J.(J.-L.)** that opinions near the ultimate issue require special scrutiny, and their purpose is not to substitute the expert for the trier of fact.

[30] The issues in the case at bar are primarily legal issues, not factual issues. Nothing in Mr. Wolfe's background or report establish a basis for believing that his evidence is necessary in order for the court to come to the correct interpretation of the relevant policies.

A Properly Qualified Expert

[31] The Court in **Mohan** described an expert as a person "who is shown to have acquired special or peculiar knowledge through study or experience with respect to the matters on which he or she undertakes to testify". It is trite to say that the expert's usefulness is limited by the extent to which his or her knowledge exceeds the capacity of someone who is not an expert to draw the necessary inferences from the technical facts presented. Any such

qualifications would, of course, be irrelevant if the rules of interpretation depended not upon expertise or technical knowledge but rather on the understanding of an ordinary person using nontechnical terms.

[32] An important qualification to receiving opinions from experts is that they demonstrate independence and objectivity in tendering and forming their opinions as described in a decision known as "**The Ikarian Reefer**" [1993] 2 Lloyd's Rep 68 (Q.B.D.). This decision has been adopted by several Canadian Courts including, **Amertek Inc. v. Canadian Commercial Corp.** [2003] O.J. 3177 (OSCJ), and **Tsilhqot'in Nation v. Canada (Attorney General)** 2005 BCSC 131.

[33] Mr. Wolfe's report and discovery did not demonstrate that his opinions were based on special or peculiar knowledge; a review of his discovery transcript, showed his research to be superficial and lacking an objective and systematic approach. To the extent that his opinions were legal opinions, his training and experience did not qualify him to give such opinions. He did not show knowledge of the specific historical or background information that might have been helpful to the court, and his proposed evidence was not of that nature. In short, he did not meet the threshold of a qualified expert.

CONCLUSION

[34] For the purposes of making its determination the court has before it the expert report and curriculum vitae of Reginald P. Wolfe dated December 2, 2002, prepared and filed in accordance with **Civil Procedure Rule 31.08(1)** and the transcript of the discovery on May 7, 2004, of Mr. Wolfe.

[35] The proposed expert opinion evidence of Mr. Wolfe does not meet the threshold for admissibility set out in **Mohan** for the reasons set out above.

Warner J.