SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Patterson*, 2020 NSSC 151

Date: 20200422
Docket: CRP No. 486430
Registry: Pictou

Between:

Her Majesty The Queen

Appellant

v.

Hugh Edward Patterson

Respondent

DECISION

Judge: The Honourable Justice Jeffrey R. Hunt

Heard: February 14, 2020, in Pictou, Nova Scotia

Written Decision: April 22, 2020

Counsel: Mark Heerema, Crown Counsel, for the Appellant
Hugh Patterson, Solicitor, on his own behalf as Respondent

By the Court:

Introduction

[1] This Summary Conviction Appeal is advanced by the Crown. The self-represented accused was acquitted of a breathalyzer driving offence when an omitted question, in an otherwise routine qualification *voir dire*, resulted in the Court's refusal to qualify the proposed toxicology expert. Without the evidence of the expert, an acquittal followed as a matter of course.

[2] The omitted question pertained to whether the proposed expert witness recognized their overarching duty to be fair and unbiased in their evidence. The Supreme Court of Canada has mandated the consideration of this question when qualifying a proposed expert.

[3] The Trial Judge concluded the omitted question left the record entirely devoid of anything which could satisfy the Court that the witness understood and accepted this obligation.

[4] The Appellant asserts the record contains a number of other means by which the Court could have satisfied itself on this issue. The Judge accepted that the proposed witness was otherwise highly experienced, had been qualified many

times previously, and was offering relevant evidence. The Appellant notes the Supreme Court of Canada called this particular element of the qualification test "not particularly onerous".

[5] The Appellant has now marshalled a series of cases in which Courts in various Canadian jurisdictions have reached different conclusions in similar circumstances. These were not presented to the hearing Judge.

[6] The Respondent strongly argues the trial Court committed no error. He says the Judge demonstrated a detailed understanding of the correct law and applied it without fault. The Respondent says the Court's finding on the qualification issue is entitled to deference.

Standard of Review

[7] In the recent case of *R. v. Potter*, 2020 NSCA 9, the Nova Scotia Court of Appeal has provided clear direction on the applicable standard of review:

> 438 Although the "proper articulation and application" of the law relating to the admissibility of expert evidence is reviewable for correctness, it is well-established that appellate Courts owe deference to the decisions of trial Judges on admitting or rejecting expert evidence. A trial Judge's cost/benefit analysis is also entitled to deference as is the Judge's determination of the weight to be accorded to the expert evidence.
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> 439 However, appellate intervention is appropriate where:
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> > ... a finding of admissibility under *Mohan* is clearly unreasonable, contaminated by error in principle or reflective of a material

> misapprehension of evidence. ... [*R. v. Shafia*, 2016 ONCA 812, para. 230, referring to *R. v. Mohan*, [1994] 2 S.C.R. 9.]

Factual Background

[8] After midnight on the morning of Saturday, April 1, 2017, Cst. Pitts, of the New Glasgow Police Department, says he saw the accused experiencing balance issues while exiting his poorly parked vehicle. The officer remained within sight of the accused and witnessed the accused staggering towards a pizza establishment. He continued his observations. A short time later, Cst. Pitts saw the accused enter his vehicle and drive away. The officer activated his lights and pulled the vehicle over. Upon approach, Cst. Pitts found the Accused eating a slice of pizza. He says the initial food smells soon gave way to the odor of alcohol which he believed was coming from the Accused, the sole occupant of the vehicle.

[9] At 1:08 p.m., the Officer provided a demand for a roadside screen for alcohol. The test was administered shortly thereafter by Cst. Ryan Chisholm. The Accused registered a fail on the test. He was arrested, chartered, cautioned and given a demand for a breath sample. The Accused advised he wished to speak with a lawyer and was transported to the police station in a timely way.

Counsel of choice was difficult to locate, with many unsuccessful attempts being made. After finally speaking with Counsel, the Accused provided two breath samples in the INTOX EC/IR II, one at 0358 hours and one at 0419 hours. Both samples had the same result: 90 milligrams of alcohol in 100 millilitres of blood.

[10] The trial took place on February 15, 2019, in the Nova Scotia Provincial Court sitting in Pictou, Nova Scotia before the Honourable Judge Del W. Atwood. I note that Crown Counsel had changed by the time of the hearing of this appeal.

[11] The trial proceeded initially in a manner that would not distinguish it from the vast bulk of such cases which are dealt with daily by our Courts.

[12] Officers Pitts and Chisholm were called as witnesses and provided testimony relating to the events of April 1, 2017. Ms. Christine Frenette, an alcohol specialist with the National Forensic Laboratory Services in Ottawa, was the next witness for the prosecution. Her testimony was necessary to provide "extrapolation evidence" as the breath samples were taken outside the 2-hour presumptive period in the ***Criminal Code***.

[13] The Crown proposed to qualify Ms. Frenette in the following areas:

> The absorption, distribution and elimination of alcohol in the human body; the extrapolation and interpretation of alcohol concentrations; the effect of alcohol on individuals and their ability to operate a motor vehicle; and the theory and operation of breath testing instruments and screening devices and the interpretation of breath results.

[14] A review of the transcript suggests the two sides may not have confirmed, before the beginning of the trial, what the situation was with respect to the qualification of the expert. It is evident Ms. Frenette's CV and Report had been previously disclosed, as would be expected.

[15] When it became clear the Defence was not consenting to the qualification of the witness, the trial Judge observed they would enter into a *voir dire* on the issue.

[16] It was noted that the witness had cooperated with the Defence by agreeing to be interviewed by him in advance of the trial. There was discussion of a preliminary issue involving whether a particular authoritative text, which the Defendant had discussed with her in their interview, could be put to the witness. It was unclear whether the Defence intended to do so at the qualification stage. The Court doubted this was permissible and asked the Defendant how the witness's qualification was dependant on the contents of the text he intended to refer to. The trial Judge made it clear there would be a clear procedural line between the qualification *voir dire* and the evidence in chief.

[17] The Court set the stage, stating that the witness would be "…subject to a qualificational *voir dire* based on the *Mohan* and *White* principles." He invited the Crown to set out the proposed scope of expertise. He did so and exhibited the witness's CV before embarking on a series of questions pertaining to Ms. Frenette's educational background and employment experience as an alcohol specialist with National Forensic Laboratory Services in Ottawa.

[18] The Crown took the witness through a detailed account of her study and work in the field of toxicology, which was clearly extensive. Ms. Frenette had a high degree of expertise in the field including acting as an instructor for other toxicologists. There were references to her detailed CV. She was questioned about her professional affiliations and memberships.

[19] Crown Counsel then asked the witness about her prior experience in testifying and being qualified as an expert. She advised she had been so qualified ten times throughout the four Atlantic provinces at the Provincial Court level. She indicated there were no instances of her being presented for qualification and rejected by the Court.

[20] The witness was then turned over for cross-examination. Mr. Patterson put a series of questions, including having the witness confirm that her ten prior

instances of qualification had been on behalf of the prosecution. Ms. Frenette advised she had been retained once by the Defence but had not been called to testify.

[21] The witness was cooperative and forthcoming with the Defence during her questioning. She readily accepted suggestions put to her that centered on such issues as the fact that her academic background and writings had first been focused on alcohol chemistry rather than how alcohol is distributed and has effect in the body. There were instances where it appeared the witness could have parried with the Defendant but did not, choosing instead to adopt reasonable suggestions and agree with the Defendant where possible.

[22] In all respects, her demeanour and manner of giving evidence appeared to be a model of what would be expected from an expert advanced in these circumstances.

[23] Finally, the Defence posed a question that the Court suggested was crossing the line from the *voir dire* phase into the witness's evidence in chief. The defence accepted this and ended their examination. There was no re-direct or Defence evidence on the *voir dire*.

[24] In submissions to the Court, the Crown highlighted Ms. Frenette's extensive training and background, noting she clearly had specialized expertise which would be helpful and relevant to the Court.

[25] In the Defence submission, the Defendant, who is a practicing barrister, immediately came to what would soon reveal itself as the truly contentious issue (Appeal Book, Vol 2, pg. 132- line 6):

> **Patterson:** Yes, Your Honour. I guess my submission would be, Your Honour, it's not what we heard from Ms. Frenette that might call into question whether she ought to be qualified, but what we didn't hear. It's my understanding that the witness should be able to inform the Court that they are prepared to give -- to be of assistance to the Court and to give an independent, impartial, non partisan opinion to the Court and that they are aware of that duty, that they understand it, and that they're willing and able to carry it out, and that that should come from the witness as part of the Crown's case on the qualification *voir dire*. And we didn't hear any evidence on that or to that effect. And I think that goes to the quantification of the witness, and it goes to the gatekeeper function of the Court to be satisfied that the witness is prepared to discharge their duties in that fashion and, as I said, understands it, acknowledges it, and the Court is satisfied that they do and that they're prepared to do that. We just haven't heard that, so, I would suggest that the witness ought not be qualified, Your Honour.

[26] At the conclusion of Defence submissions, the Court proceeded directly to a ruling on the qualification question. In his oral decision, the Judge provided a detailed overview of the caselaw. He addressed the requirements of relevance,

necessity and whether the admission of the proposed evidence would offend an exclusionary rule.

[27] He continued as follows (Appeal Book, Vol 2, pg. 134 – line 7):

> **Court:** So, the questions that the Court has to ask itself, based on the *Mohan* judgment, first of all, is the evidence relevant. Secondly, is the evidence necessary. Third, does the evidence offend an exclusionary rule. And finally, is the expert evidence properly qualified. There is no grey area in relation to any of these binary questions. Should the answer to any of them be "no", then the evidence of the witness has to be excluded. And that's based on the judgment of the Ontario Court of Appeal out of the *Queen v. Abbey*.

[28] The Court quickly disposed of issues of relevance, necessity and whether the proffered evidence offended an exclusionary rule. He identified no impediment to qualification based on these elements. Finally, the Court came to the crux of the matter (Appeal Book, Vol 2, pg. 137, line 13):

> **Court:** The final issue -- and this is the point raised by Mr. Patterson -- has the witness been qualified properly. And so, this means essentially this. Is there proof before the Court that the witness has acquired special knowledge through study, work or professional experience in the field in which the witness proposes to testify? And again, I would refer to the *Mohan* decision at paragraph 2. The witness has to be impartial, independent and objective and must provide the Court with the assurance that the witness will adhere to the requirements that the witness provide the Court with independent and impartial advice."

[29] After making reference to the controlling caselaw, the trial Judge continued (Appeal Book, Part 2, pg. 138, line 11):

> **Court:** And that particular point does cause the Court some degree of - an elevated degree of concern. So, in relation to the issue of relevancy, the evidence is relevant. Is it necessary? It's necessary because I can't draw inferences regarding the blood alcohol concentration recorded in the Certificate of Qualified Technician. Does it offend an exclusionary rule? There's no exclusionary rule that appears to be engaged here. Is the expert witness properly qualified?
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> Well the witness certainly has acquired extensive training in the stated fields of distribution and elimination of alcohol in the human body: extrapolation and interpretation of alcohol concentrations; the effect of alcohol on individuals and their ability to operate a motor vehicle; as well as the theory and operation of breath testing equipment, screening devices and interpretation of breath results.
>
> The witness has described her essentially applied science duties in the various fields in which she proposes giving evidence. The witness has described her understudy work as an alcohol specialist between April of 2016 to July of 2017. The witness has described her internally peer-reviewed research and work. The witness has described being qualified ten times in the province of Nova Scotia, New Brunswick, PEI and Newfoundland, her evidence was never rejected. Obviously, there's no bootstrapping because this Court must make its own determination of the witness's qualifications as an expert in the proposed field.

[30] The Court went on to note the importance of the issues of independence and impartiality in a proposed expert witness. He made reference to comments of Nova Scotia Court of Appeal in *R. v. Hood,* 2018 NSCA 18, as it pertained to the evaluation of the expert evidence in that matter. This had been a case heard

at first instance by this trial Judge and he referenced a procedural point from the hearing of that matter (Appeal Book, Vol 2, pg. 140 line 4):

> **Court:** …but I recall specifically that, at the qualifications stage, the witnesses were questioned to ensure that they understood their obligation to provide independent and impartial evidence to the Court. And I don't believe that when the Supreme Court of Canada made that point in *White Burgess Langille Inman*, that it intended that criterion to be a thrown away factor.

[31] This brought the trial Judge to his concluding remarks on the *voir dire* (Appeal Book, Vol 2, pg. 140 line 11):

> **Court:** Now certainly the Court can draw inferences from proven facts, and I would assume that I might draw, as an inference, that Ms. Frenette was properly qualified as an expert in Nova Scotia, New Brunswick, PEI and Newfoundland & Labrador on ten occasions. I'm not sure whether these qualifications followed a contested *voir dire* or were the qualifications admitted. I take into account, as well, the fact that it appears that, of the ten times that Ms. Frenette was qualified, she was qualified as an expert for the prosecution. She was subpoenaed, as I gather it, on the defence side, but apparently was called off.
>
> I simply find that there is not sufficient evidence before the Court that would allow the Court to draw an inference, based on what I've heard so far, that Mr. Frenette recognizes the obligation of giving to – of rendering to the Court independent and impartial evidence. She wasn't asked whether she understood that role or duty. I know, for example, that in qualification *voir dires*, it's not uncommon for witnesses to be asked about memberships in professional bodies and whether those professional bodies impose an obligation upon their membership to ensure that, if they are called upon to fulfill a forensic duty, that they

> recognize a professional responsibility to provide independent and impartial evidence – impartial advice to the Court.
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> So, applying the criteria in *Mohan*, particularly what I consider to be that foundational criterion that the witness understands the obligation to render to the Court independent and impartial advice, I am not satisfied, and therefore, the Court finds that the witness has not been properly qualified and the Court declines to qualify the witness in the proposed field.

[32] Following delivery of this ruling, Crown Counsel sought and was granted a few moments to consider his position.

[33] When the matter reconvened, Crown and the Court had the following exchange (Appeal Book, Vol 2, pg. 142 line 20):

> **Crown:** Thank you, Your Honour. I guess the first thing I will do would be to address Your Honour to see whether or not you will, I guess, reconsider your ruling or invite further comment on your ruling, or whether or not you feel as if you're functus on the point at this point in time.
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> **Court:** Well, I think the – there's certainly a presumption of finality. The issue was live before the Court. I heard from both Counsel in the proper order. Mr. Patterson did not call evidence, and therefore was permitted to address the Court last. The *Mohan* criteria, as amplified by *White Burgess*, is – I mean, it's well known, and I believe that there is a – unless there is a change in circumstances or additional evidence that parties might be seeking to present to the Court, I'm mindful of the fact that the Court must be cautious not to allow case splitting. I feel that the decision of the Court was rendered with the – having received the fulsome submissions of Counsel, and I think it's – once it's pronounced – I mean, I'm not functus in the sense that the

> case is not concluded, but that issue – there's now essentially an issue estoppel because the issue has been litigated and I've rendered my decision.

[34] The Crown asked whether the Court had considered a particular Ontario Court of Appeal case, which he identified as *McManus*. This appears to be a reference to *R. v. McManus*, 2017 ONCA 188. The exchange proceeded as follows (Appeal Book, Vol 2 pg. 144, ln 2):

> **Crown:** …based on that case, there must be evidence before the Court, and there's sort of a – what I would call a burden on the Defence to put a realistic concern before the Court that the expert cannot be independent or unbiased. So, I guess I'm probably seeking Your Honour to at least either revisit the issue or hear further argument. And again, I don't have an awful lot of authority with me here today. And perhaps, you know, if this issue is going to be litigated, if Your Honour allows that, then I would perhaps ask for an adjournment. If Your Honour's ruling is final, then I guess I'll accept it and move on.

[35] Both parties were invited by the Court to make submission on the issue of reopening argument on the *voir dire*. The Judge also questioned whether either party might seek to apply to call "additional evidence" on the *voir dire*. In follow up comments, however, he added a reference to the dangers of case splitting. A review of the transcript reveals the Crown did not seek leave to recall Ms. Frenette for purposes of putting to her the omitted question.

[36] For his part, the Defendant made it clear he was opposed to either new evidence or further argument. He noted that his decision not to call evidence on the *voir dire*, and the contents of the submissions made by him, were dictated by the evidence led by the Crown.

[37] The Court advised it was going to take an adjournment for purposes on considering the Crown application to reopen argument. Before doing so, the Court asked the Crown whether he could point to any authorities permitting the Court to reopen an interlocutory issue such as this, after having already rendered a decision.

[38] The Crown referred once again to the judgment in *McManus* and indicated he had been briefly in contact with colleagues so there was a possibility more could be forthcoming. The Court commented it would retire for purposes of reviewing caselaw and would return with a ruling on the issue of reopening argument.

[39] When Court reopened, the trial Judge delivered a detailed set of oral reasons which included a recapitulation of the principles of *White Burgess*. He concentrated on the issue of the witness's recognition of their duty to be unbiased and how this is brought before the Court.

[40] After referring to case law and academic comment he concluded (Appeal Book Vol 2, pg. 138 line 4):

> **Court:** So, it is clear to me from *White Burgess* that the bare minimum requirement – and indeed it is a bare minimum – is that the expert should attest or testify, recognizing the duty of non-partisan, objective impartiality. I've reviewed my notes of the evidence given by the witness on the *voir dire*. The witness was questioned extensively about the witness's training, academic background, studies and research, but the witness was simply not asked to attest to or testify a recognition of the duty to provide objective, non-partisan and impartial evidence. Absent that, there is no requirement for the – there is no burden on the party opposing to show that there is a realistic concern because that bare threshold, in this case, has not been met by the prosecution.
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> So, in my view, first of all, dealing with the issue of re-litigating interlocutory issues, my review of the law suggests that an interlocutory issue may be reopened if there is a change in circumstance or the discovery of new evidence. But I do not believe that a matter can be re-litigated simply because Counsel now feel that there is an additional point that might have been made or an additional case that might have been argued.
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> Regardless of that, I'm satisfied that the Court's original ruling, based on the clear requirements of *White Burgess*, I feel this is correct. If I'm wrong, well, appellate review may indeed correct that, and that will be as – what will be will be.

[41] No further evidence was called, and shortly thereafter an acquittal was entered on the two count Information alleging offences contrary to s. 253(1)(a) [Impaired Driving] and 253(1)(b) [Over .08 Breathalyzer Offence] as the evidence of the expert was indispensable to the Crown's case on 253(1)(b).

[42] The acquittal on the 253(1)(a) count stands on different grounds. Even if a new trial were to be ordered on the s. 253(1)(b) offence, the s. 253(1)(a) acquittal will stand as there is a separate line of reasoning that pertains to the count.

[43] As the Crown's appeal is built around the application of various authorities, it is necessary to turn to a review of that law. The principles *Mohan* and *White Burgess* are well known and not truly in contention. There is disagreement between the parties as to how these ought to be applied in practice in the circumstances of this case.

Legal Principles

[44] Cromwell, J, in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182 provided a reformulation and restatement of the rules pertaining to the admission of expert evidence, building on the earlier jurisprudence in *R. v. Mohan*, [1994] 2 S.C.R. 9 and *R. v. Abbey*, 2009 ONCA 624.

[45] He clarified the two-stage approach, the first focused on threshold requirements of admissibility; the second stage relating to the trial Judge's discretionary gatekeeper role. Each stage has a specific set of criteria.

[46] The test has been summarized as follows:

> (1) The proposed expert evidence meets the threshold requirements of admissibility, which are:
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> a. The evidence must be logically relevant;
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> b. The evidence must be necessary to assist the trier of fact;
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> c. It must not be subject to any other exclusionary rule;
>
> d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the Court to provide evidence that is impartial, independent and unbiased:
>
> e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,
>
> (2) The trial Judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:
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> a. Legal relevance,
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> b. Necessity,
>
> c. Reliability, and
>
> d. Absence of bias.

[47] In short, if the proposed expert evidence does not meet the threshold requirements for admissibility it is excluded, the analysis goes no further.

[48] If it does meet the threshold requirements, the trial Judge then has a gatekeeper function. The trial Judge must be satisfied that the benefits of admitting the evidence outweigh the costs of its admission. If the trial Judge is so satisfied, then the expert evidence may be admitted; if the trial Judge is not so satisfied, the evidence is excluded even though it passed the threshold requirements.

[49] In the case under appeal, the analysis proceeded only as far as the threshold analysis, failing at the fourth element, which, as we shall review shortly, had been described by Cromwell J, as a not particularly onerous element of the test.

The Expert's Duty to the Court

[50] Many elements of the multi-part test in *White Burgess* have been the subject of repeated analysis by trial and appeal Courts since the decision was rendered in 2015. The point on which this case turns has received relatively less attention and commentary. This makes sense given the Supreme Court's own thoughts on the relatively low bar this particular component was assumed to represent.

[51] In addressing this point, Cromwell, J. wrote as follows:

> 46 I have already described the duty owed by an expert witness to the Court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law has come to accept ... that expert witnesses have a duty to assist the Court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L. R.*135, at p. 152 (footnote omitted). The expert witnesses must, therefore, be aware of this primary duty to the Court and able and willing to carry it out.
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> 47 Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. As Prof. Paciocco

> aptly observed, "if inquiries about bias or partiality become routine during *Mohan voir dires*, trial testimony will become nothing more than an inefficient reprise of the admissibility hearing": "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565 ("Jukebox"), at p. 597. While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.
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> 48 Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. …
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> 49 This threshold requirement is not particularly onerous, and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial Judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the Court…
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> …I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the Court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion but be taken into account in the overall weighing of costs and benefits of receiving the evidence. (emphasis added)

[52] In the subsequent Ontario Court of Appeal decision in *R. v. McManus*, 2017 ONCA 188 the Court addressed this component in some detail. This was the case referred to by the Crown in oral argument before Judge Atwood (Appeal Book, Vol. 2 pg. 144, line 4). Specifically, the portion referred to was taken from the following paragraph:

> 66 An assessment of independence, impartiality, and bias is relevant to the fourth part of the *Mohan* test in determining whether the expert is properly qualified, and also factors into the balancing of benefit and risks of such evidence: *White Burgess*, at paras. 53-54; *R. v. Shafia*, 2016 ONCA 812, at para. 228. A person who opposes the admission of the evidence on the basis of bias has the burden of establishing a "realistic concern" that the witness is unwilling or unable to comply with the duty and the proffering party must rebut this concern on a balance of probabilities to satisfy the *Mohan* test for admissibility: *White Burgess*, at para. 48.

[53] Factually, however, it is important to recognise that in *McManus* the proposed expert, who was a police officer, had been questioned in the *voir dire* with respect to issues of bias and independence. He testified that he understood and accepted his obligations to the Court. He was qualified over the objection of the defendant.

[54] On appeal, the Court was not satisfied that the Trial Judge had appropriately applied the relevant principles. Originally the witness had been an investigator on the file, before his role evolved to that of an expert. The Appeal Court found there were a number of “realistic concerns” with the proposed witness and concluded he should not have been qualified.

[55] The Court discussed the process by which a typical qualification motion will unfold. It was in this context that the above quote referred to by the Crown was made.

[56] The case of *R. v. Dupe*, 2019 ONCJ 320, includes the following comment on the issue of process:

> 10 I understand the inquiry on this point to operate in two stages: first, there should be admissible evidence on the *voir dire* that the proposed witness recognizes that their primary duty is to the court, and an express statement by them that they are willing to accept this duty during their testimony. Absent any particular challenge to such a statement, this aspect of admissibility will then be satisfied.

[57] *R. v. McManus* makes clear (see para 72) that when a realistic concern is raised, even after an attestation of lack of bias by the witness, the onus returns to the moving party to rebut this concern on a balance of probabilities. Failing this, the fourth *Mohan* element for admissibility, as expanded on in *WBLI*, will not be satisfied.

[58] In summary, experts owe a duty to the Court to provide evidence that is fair, objective and non-partisan. Independence and impartiality are to be considered at the threshold stage. In *White Burgess* the Supreme Court of Canada held that a proposed expert's independence and impartiality goes to admissibility and not simply to weight. The analysis of a witness's independence and impartiality is properly undertaken under the "qualified expert" (or fourth element) of the test.

Analysis

[59] How then is a Court to deal with an expert qualification *voir dire* record such as the one in this case? This was a criminal proceeding where, unlike in the civil law context, there is generally no report filed with the Court complete with a mandatory section respecting lack of bias and impartiality. See, for instance, Nova Scotia Civil Procedure Rule 55.04. (On the issue of the report generally not being filed with the Court in a criminal case see the discussions in *R. v. Lehne*, 2019 SKQB 314 and *R. v. Browne*, 2017 ONSC 5059).

[60] In this case, the Judge made it quite clear that the qualification *voir dire* and the witness's evidence in chief were two separate proceedings and would be conducted as such. Clearly this was the correct approach. (See for example *R. v. McDowell*, 2020 CarswellBC 255 (B.C.C.A.)).

[61] Given that the qualification issue is to be determined prior to the Court hearing the evidence in chief, how are we to apply Justice Cromwell's direction that a lack of bias may be derived from the "…particular circumstances of the proposed witness and the substance of the proposed evidence"? This may be challenging where the Court has seen only the CV and limited *voir dire* testimony. The full substance of the evidence may be unknown to the Court.

Is this an invitation to consider the past experience of the witness as an expert and the manner of their giving evidence in the *voir dire*, even where the Crown may have failed to ask the basic question as to bias?

[62] It may be of assistance to review how other Courts have addressed similar situations.

Cases Where the Bias Question was Omitted

***R. v. Bookout*, [2017] S.J. No. 77 (Q.B.)**

[63] In *Bookout*, the Accused was charged with driving while exceeding the legal limited of alcohol in his blood. As was the case in the matter under appeal, the breath samples were taken outside of the 2-hour time period of presumptive accuracy in the *Criminal Code*. Accordingly, the Crown sought to call an alcohol toxicologist employed with the Royal Canadian Mounted Police to provide extrapolation evidence.

[64] In his questioning of the proposed expert the Crown failed to put the question as to whether the witness recognized their overarching duty to the Court. The accused objected to the admissibility of the expert's evidence, pointing primarily to a previous decision in which the objectivity of the expert

was questioned by a Court. The trial Judge allowed the witness to be qualified and the accused was convicted.

[65] The accused advanced a summary conviction appeal. The Chief Justice of the Court of Queen's Bench, Justice Popescul, affirmed the admissibility of the expert evidence:

> 18 The expert evidence sought to be tendered involves relatively well known (at least in Courtrooms throughout the country) mathematical calculations respecting absorption, distribution and elimination of alcohol from the human body. Granted, Ms. Blake was not specifically asked whether she understood and accepted that she had a duty to the Court to provide independent assistance by way of an objective unbiased opinion: however, that understanding was implicit in her testimony. It was apparent that she was there to advise the Court what, in her opinion was the likely blood alcohol level of the appellant at the time of the alleged offence based upon his test results, body weight, etc.

[66] In this case, the Court appears to draw assurance of the lack of bias from an examination of the tone and demeanour of the witness. The fact that the evidence was of a nature very well known in criminal Courts was also relevant.

[67] This case has been cited and relied upon in subsequent decisions touching on this issue.

R. v. Lehne, 2019 SKQK 314

[68] This was another extrapolation case. At trial in the Provincial Court, the proposed witness was not questioned as to her understanding of the duty of

impartiality and independence. She was otherwise highly qualified and evidenced no animosity to the defence. The trial Judge had qualified the witness and accepted her evidence.

[69] On appeal the defendant argued the hearing Judge had erred in qualifying the expert. The Court extensively reviewed the law and the transcript and dismissed the appeal, saying in part:

> 69 Appellant's counsel elected not to cross examine the Crown's proposed expert, Ms. Chan, with respect specifically to her capacity to testify impartially, or, for that matter as to her qualifications at all. There was no evidence to suggest that Ms. Chan was in fact biased or partial, and while he did not explicitly say so in his oral reasons, it is implicit in the trial Judge's ruling that he was satisfied, on the evidence before him, that the proposed expert was objective, independent and free of bias.

[70] This judgment appears to be a further example of a Judge assessing the demeanour of the witness and the totality of the circumstances in assessing whether the fourth element of the test has been met.

R. v. Nuttall, 2016 BCSC 1404

[71] *Nuttall* was a prosecution for terrorism related offences. The accused sought to call an expert in Islamic extremism and related issues. The Crown opposed the qualification on a number of grounds including the fact the witness had not been asked about an expert's duty to the Court with respect to independence:

> 715 In this regard, I find the Crown's submission that Dr. Safi was biased to be unsupported. … While Dr. Safi did not specifically advise the Court that he recognized the duty of an expert to be unbiased, his qualifications and experience, the scholarly nature of his evidence, and his demeanour on the stand satisfy any concerns in that regard.

[72] On appeal to the British Columbia Court of Appeal, the Trial Judge's acquittal of the accused was converted to a stay of proceedings, but without apparent reference to this issue.

R. v. Park, 2020 ONSC 642

[73] In this recently released narcotics distribution case the Crown sought to qualify a police officer as an expert witness. Neither side asked the witness about his duty to be unbiased, or with respect to his obligation to the Court:

> 24 In addressing the issue of whether or not Corner is willing and able to fulfill the duty of an expert to the Court to provide evidence that is impartial, independent and unbiased, I pause to reflect on the fact that nowhere in his report nor in his evidence to the Court in the *voir dire*, did Corner comment on his understanding of his duty to the Court. I raised this issue with counsel at the completion of his evidence, and was somewhat surprisingly told by Crown counsel that this was the first time that he had ever been asked by the Court to make that enquiry of a proposed expert. I allowed the Crown to re-open his case and to ask Corner what he understood his duty was to the Court, and in that regard Corner testified he understood his role was to assist the Court with respect to the charges of Possession for the Purpose of Trafficking in Cocaine and Fentanyl, and that the Court could rely on his opinion based on his years of experience. He further elaborated that his opinion should be fair to all parties.
>
> …
>
> 26 In qualifying an expert in a criminal case (or for that matter any kind of case), the Court cannot presume that someone tendered as an expert understands his or her duty to the Court unless that duty is expressly enunciated, either in his

> or her expert's report and/or during the course of the qualification of that expert in open Court. The failure to have an expert properly qualified in this regard, fails to meet one of the threshold requirements for admissibility laid down by the Ontario Court of Appeal in ***Abbey***.
>
> 27 After I allowed the Crown to recall Corner, he was given the opportunity to express his understanding of an expert's role when giving expert evidence in a trial. Quite succinctly, he testified that his role was to be fair to the parties. Fairness looked at broadly encompasses impartiality, independence and a lack of bias - all of which are expected of an expert offering expert opinion evidence to the Court.
>
> …
>
> 36 During the course of the qualification *voir dire*, I was impressed with Corner's candour and willingness to accept various propositions put to him by defence counsel. Until Corner was recalled, neither counsel asked him about his understanding of what he understood the role of an expert was. Specifically, there was no mention made in specific terms that he understood his primary role was to be impartial, independent and unbiased. Nonetheless, from the manner in which he conducted himself during the *voir dire*, I was satisfied that even though he may not have used the "right verbiage", he would provide the Court with opinion evidence that was not only relevant and necessary, but also evidence that was fair and impartial.

[74] The procedural pathway followed by the Court in this instance is interesting. The Judge himself raised the issue and then allowed the missed question to be put to the witness. In the case under appeal, the Crown did not apply to have the witness recalled for purpose of putting the omitted question.

[75] The Judge appears to suggest that even absent the use of the “right verbiage”, the manner of the witness’s evidence and the candour with which he

or she testified can, in the right circumstances, be enough to get over the low hurdle described by Justice Cromwell.

<u>*R. v. Dupe*, 2019 ONCJ 320</u>

[76] In *Dupe*, the prosecution proposed to call a police officer as an expert witness. The decision states that the officer was a "relatively new drug officer" who had previously taken a one-hour course in relation to providing expert opinion evidence. The Crown did not question the witness in the *voir dire* about her obligation to the Court as an expert. When questioned by the defence on the subject, she stated her role was to give an opinion for the Crown:

> 5 An important exchange, for this ruling, occurred in cross-examination. Mr. Smart asked Constable Cain what she understood her obligations were when coming to Court to provide opinion evidence. She responded, "it was put forward to me by the Crown what they were expecting an expert opinion on." Mr. Smart asked what her instructions from the Crown were, and "what her understanding was about her role in this case", Constable Cain responded, "To offer an expert [opinion] in cocaine, method of use, quantities and pricing, drug indicia, packaging and currency". She readily agreed with the defence counsel that her role in this trial was to "provide an opinion for the Crown".
>
> 6 The Crown did not re-exam constable Cain on her understanding of the impartial role of an expert in a criminal proceeding, nor were any questions asked in this area during direct examination. In submissions, Ms. Nolan stated that, "although I think the general concept is clear that we have to explore that the thresholds are met and that the expert is properly qualified and not partial I don't think there is anything in law, at least that I am aware of, that says that absent express testimony and that express phrase, that "I know my duty is to prepare an impartial report", that is fatal to the Crown in terms of exploring the threshold and making the determination [the Court] has to make".
>
> 7 Mr. Smart strongly disagreed with this submission, noting admonitions from recent appellate jurisprudence with regard to a trial Judge's gatekeeper function in

> this particular area. His position was that Constable Cain's limited drug experience and flawed testimony render her, on this particular evidentiary record, unsuitable for qualification as an expert witness.
>
> II. LEGAL ANALYSIS
>
> 8 Of the four Mohan criteria, the first three are readily established. What is at issue is the fourth – a properly qualified expert…
>
> 9 Contrary to the prosecutor's submissions in this case, the law is now clear that an expert's awareness of this duty is a threshold question during the admissibility inquiry.
>
> ….
>
> 10 .... I have no admissible evidence - either direct or by inference – that Constable Cain understands this primary duty. In fairness to her, the Crown did not ask any questions in this area. When the topic was broached in cross-examination, she testified that her role was to "provide an opinion for the Crown:". While it very well may be that she does understand the proper role of an expert witness, in the present circumstances (a relatively new drug officer from the same investigative unit that arrested the defendant), I am not willing to speculate on what her particular training and understanding in this area is. I leave it to future cases to explore Constable Cain's particular understanding and suitability as an expert witness in this particular area. (emphasis added)

[77] The proposed expert in this case was not qualified by the Court, the concerns were clearly with the substance of the officer's presentation on the *voir dire* and apparent misguided view as to her role, not specifically with the omitted question.

[78] The easiest way to displace the initial onus is for the presenting party to simply ask the bias question of the witness. In the absence of this question it will be a matter of inference in which the party proposing to see the witness qualified will be at the mercy of the record in the particular case. The record in

Dupe appears particularly troubled because of the witness's lack of a track record and apparent view that her role was to support the Crown.

<u>*R. v. Scott*, 2018 BCSC 1739</u>

[79] In *Scott*, the accused was charged with murder. His defence was that as a result of a cumulation of mental health factors, he did not have the required *mens rea* necessary to commit the offence. The defendant proposed to call a psychologist as an expert witness.

[80] The psychologist was not asked the simple question with respect to bias. The Court rejected the proposed evidence, but it is clear from a reading of the decision that the Court was not overly focused on the missed question. The Judge appeared willing to examine the manner and tone of the witness's evidence where the question was omitted. The Court had an unfavourable view of the manner in which the witness testified:

> 107 Where an expert is challenged for bias, partiality, or lack of independence at the qualified expert stage of the analysis, the onus shifts to the party challenging the admissibility of the evidence – here the Crown – to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. Where the Crown succeeds in doing this, the burden to establish on the balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence: *White Burgess* (para. 48 to 53).
>
> 108 Dr. Mate was not asked during his viva voce evidence as to whether he understood his duty to the Court and his willingness to comply with that duty. He

> was, however, vigorously cross-examined by the Crown on many aspects of his opinion and research, and during the course of his evidence was markedly defensive, argumentative and bordering on dismissive or contemptuous of the Crown's approach.
>
> ….
>
> 124. In the end, I am not satisfied that Dr. Mate is a properly qualified expert. His opinion strays into areas not properly within the scope of his expertise and training and significantly, he presented not as an independent and impartial expert who understands his duty to the Court, but rather as an advocate on the issues of childhood trauma and addictions and how those conditions have affected Mr. Scott.
>
> 125 As such, in my view, he is clearly unwilling and/or unable to carry out his primary duty to the Court: *White Burgess* (para. 49).
>
> 126 Accordingly, I find that Dr. Mate is not a properly qualified expert under the Mohan threshold admissibility stage of the analytical framework and his evidence is not admissible.

[81] As was the case in *R. v. Dupe*, supra, the Court in this instance appeared less concerned with the omitted question and quickly moved on to a review of the substance of the demeanour and surrounding circumstances of the proposed evidence.

[82] There are multiple reported cases in which the proposed expert witness was asked the correct question about bias but the Court nonetheless rejected their qualification because the manner of their evidence or testimonial demeanour lead the Court to conclude they did not truly appreciate their duty. These include:

R. v. Heinbecker, 2019 SKQB 204

R. v. Stephan and Stephan, 2019 ABQB 715
R. v. Reddick, 2017 CarswellNfld 545 (P.C.)

Available Inferences

[83] This review of case law makes clear that a party seeking to qualify an expert must appreciate that addressing the issue of bias is as important as asking questions about the witness's past education or work history. When they fail to do so, they will be left with only the possible inferences which can be drawn from the record as it does exist.

[84] There is no "magic incantation" of words that must be used by the witness. What is critical is to put into the record information sufficient to demonstrate that the proposed expert recognises and accepts their duty to the Court.

[85] The issue ought to be addressed directly in the qualification *voir dire*. As was made clear by Justice Cromwell, a simple statement from the witness to the effect they understand and accept their duty to the Court to be fair, objective and non-partisan will usually suffice to meet the initial threshold. The burden will then shift to the opposing party to show there is a realistic concern that the expert's evidence should not be received.

[86] As a fail-safe, parties may wish to consider adopting a practice of including a recital of the witness's understanding of their duty in their CV or report. In the context of a criminal prosecution however, it must be appreciated that the report itself may not be exhibited.

[87] The best practice, however, is to address the issue directly during the witness's evidence in chief in the qualification *voir dire*. This is what the Crown failed to do in this case.

[88] Where this issue is not engaged directly in the *voir dire*, the party seeking to qualify the expert can still seek to have the trial Judge draw an inference from the evidence that is in the record. In such an instance, the party is at risk the trial Judge will conclude the record is deficient and does not support the necessary inference. This was the case in the matter under appeal.

[89] A review of the hearing record reveals that the Learned Trial Judge clearly expressed the correct legal test before turning to the evidence, which was fresh in his mind. He then proceeded at some length to apply the evidence he had just heard to the various elements of the test.

[90] The Crown says the trial Judge failed to consider evidence which could have allowed him to draw the necessary inference. Specifically, and most

importantly, the Crown argues that the ten prior instances of the witness being qualified were not given appropriate weight. Further the Appellant says the Judge failed to adequately consider the absence of evidence of actual bias or animus in her manner of giving evidence.

[91] I have carefully reviewed the Judge's reasons. While given orally, and directly following submissions, they were complete and provided a clear road map to his decision-making pathway.

[92] The trial Judge extensively reviewed the record and concluded the record did not allow him to draw the inference that the witness understood and accepted her duty to the Court. Earlier in this decision I have excerpted his reasons in this regard. They touch on each element of the test. He did weigh the prior instances of qualification. He was concerned about delegating his gatekeeping role to the prior Judges who had qualified the witness previously. This is not an unreasonable consideration. Every instance of qualification must stand on its own record.

[93] It is accurate that this record does contain evidence that could have allowed the trial Judge to draw the inference required to meet the minimal standard described by Justice Cromwell in *WBLI.*

[94] A review of the transcript reveals that Ms. Frenette evidenced no apparent bias or animosity to the defence in her evidence on the *voir dire*. She agreed readily with reasonable defence suggestions under questioning and did not parry with the defence.

[95] It was notable that she had voluntarily cooperated with the Defence in agreeing to a pre-trial interview. This was acknowledged by both the prosecution and defence.

[96] The proposed expert was objectively a highly experienced specialist who had been qualified on multiple occasions in the past and had never been rejected for qualification. However, as noted above, it would be a mistake to allow this factor to displace the gatekeeping role of the trial Judge.

[97] It is also relevant that she was testifying about a matter of absorption and elimination rates for alcohol, a subject well known within criminal Courts. This as a possible factor to be weighed has been commented on previously by other Courts considering the omitted question issue.

[98] While the trial Judge could have drawn the required inference, this determination alone does not answer the question which must be answered by this Court sitting on appeal.

[99] I refer again to the standard of review and remind myself that appellate Courts owe a high degree of deference to the decisions of trial Judges on admitting or rejecting expert evidence.

[100] If the Court articulates and applies the correct test, then an exercise of discretion within the application of that test is not to be disturbed unless clearly unreasonable or contaminated by error in principle. I cannot conclude this is the case. The outcome reached by the trial Judge was not clearly unreasonable in the circumstances.

Summary

[101] The following is a summary of the Court's conclusions:

1. A party seeking to qualify an expert witness must recognize that it is an error not to directly address the issue of whether the witness recognizes and accepts her duty to the Court to be independent, impartial and free of bias. The consideration of this factor in the *voir dire* is mandated by the Supreme Court of Canada and is as important as asking questions about the proposed expert's past education or work history.
2. In civil cases, the *Civil Procedure Rules* prompt a consideration of this issue by requiring a recital on the issue in the expert's report. In criminal cases the practice is not consistent.
3. Parties in the criminal context may wish to consider adopting the practice of having the witness include a written statement to this effect in their CV. In criminal cases, the report itself is not always exhibited.

4. In all cases, however, the best practice is to address the issue directly in the qualification *voir dire*. This is what the Crown failed to do in this case.

5. Where the question is not asked directly in the *voir dire*, the party seeking to qualify the expert can still seek to have the trial Judge draw an inference from the evidence that is in the record. In such an instance, the party is at risk the trial Judge will conclude the record is deficient and does not support the necessary inference.

6. This was the case in the matter under appeal. The trial Judge properly articulated the test and reviewed the evidence. He concluded the record did not allow him to draw the necessary inference.

7. I have assessed the record on the *voir dire* and concluded there was evidence which could have supported the inference. These factors included:

    - The witness evidenced no bias or animosity to the Defence in her evidence on the *voir dire*. She agreed readily with reasonable Defence suggestions under questioning and did not parry with the Defence.

    - She had voluntarily cooperated with the Defence in agreeing to a pre-trial interview.

    - The proposed expert was, objectively, a highly experienced specialist who had been qualified on multiple occasions in the past and had never been rejected for qualification. It would be a mistake to allow this factor to count for too much, but as one of multiple other factors, it has been used in other cases to support the necessary inference.

    - She was testifying on the issue of absorption and elimination of alcohol in the human body, a subject well known within criminal Courts. The familiarity of the Court with this type of evidence has been commented on previously by other Courts weighing the omitted question issue.

8. While there was evidence to support the necessary inference, this is not the end of the matter. A trial Judge's conclusions with respect to the qualification of an expert witness is granted deference. If the Court articulates and applies the correct test, then an exercise of discretion within the application of that test is not to be disturbed unless clearly unreasonable or contaminated by error in principle.

9. The role of the Summary Conviction Appeal Court is not to retry the matter. The nature of appellate review requires the trial Judge's exercise of discretion be left undisturbed.

Disposition

[102] Accordingly, the appeal of the Crown against acquittal is dismissed.

J.