

SUPREME COURT OF NOVA SCOTIA

Citation: *Brocke Estate v. Crowell*, 2013 NSSC 259

Date: 2013-08-15

Docket: Ken No. 310335

Registry: Kentville

Between:

**ANNA GARDNER, ADMINISTRATOR OF THE ESATE OF JOHN GARY
JOSEPH BROCKE
(DECEASED JANUARY 17, 2009)**

Plaintiff

v.

ARTHUR CROWELL and GAYE CROWELL

Defendants

Judge: The Honourable Justice Pierre L. Muisse

Heard: June 26, 2013

**Final Written
Submissions:** July 31, 2013

Counsel: Plaintiff represented by Brian Hebert
Defendants represented by Debbie Brown

A. INTRODUCTION

- [1] On January 17, 2009, John Brocke was operating a motor vehicle which was involved in a collision with a motor vehicle operated by Gaye Crowell and owned by Arthur Crowell. Mr. Brocke died as a result of the injuries he sustained in that collision.
- [2] His widow, Anna Gardner, on April 24, 2009, filed a Notice of Action and Statement of Claim alleging negligence against the Crowells, and seeking damages. The trial of the Action is to be heard by a judge and jury.
- [3] The damages sought include Ms. Gardner's alleged: out-of-pocket expenses reasonably incurred; loss of support; and, loss of guidance, care and companionship.
- [4] Mr. Brocke was an artist. The Plaintiff filed expert reports offering opinions relating to: the income Mr. Brocke would have earned as an artist had he lived; an actuarial analysis of lost support and valuable services, including present value; and, the emotional and psychological impact of Mr. Brocke's death on Ms. Gardner.
- [5] The Defendants filed reports from one expert, rebutting the opinions the Plaintiff provided from an art gallery owner and addressing issues relating to the value of the art that may have been produced by Mr. Brocke.
- [6] Each party seeks a declaration that the expert opinions filed by the other party are inadmissible.
- [7] The Defendants filed a formal motion to exclude the Plaintiff's expert reports. The Plaintiff, in its responding submissions, requested that the Defendants' expert reports be excluded. She did not file a formal motion. However, it was agreed that the Court could determine the issue of the admissibility of the Defendant's expert opinion evidence in the absence of such a formal motion being filed.

B. ISSUE

The only issue to be determined is:

1. What, if any, portion of the expert reports is inadmissible?

C. LAW AND ANALYSIS

1. LAW RELATING TO ADMISSIBILITY OF EXPERT EVIDENCE

[8] As noted by Chief Justice MacDonald, at paragraph 24 of *Abbott and Haliburton Co. Ltd. v. White Burgess Langille Inman (c.o.b. WBLI Chartered Accountants)*, 2013 NSCA 66:

“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.”

[9] *R v. Mohan*, [1994] 2 S.C.R. 9, is still the leading case in Canada on admissibility of expert evidence.

[10] The Court, in *Mohan*, at paragraphs 17 to 28, listed and discussed the four criteria which must be fulfilled before expert opinion evidence will be admitted. They are the following:

- a) It must be relevant.
- b) It must be necessary to assist the trier of fact.
- c) It must not contravene “any exclusionary rule” of evidence.
- d) The expert must be properly qualified to provide the opinion in question.

[11] At paragraph 18, the Court noted that, even if the evidence is “logically relevant”, in that it is “so related to a fact in issue that it tends to establish it”, it may still be excluded: if its “prejudicial effect” outweighs its “probative value”; “if it involves an inordinate amount of time which is not commensurate with its value”; or, “if it is misleading in the sense that its effect on the trier of fact,

particularly a jury, is out of proportion to its reliability”. The Court referred to this second stage of the relevance criteria assessment as a “cost benefit analysis”.

[12] At paragraph 19, the Court provided the following words caution to be kept in mind while conducting the cost benefit analysis:

“19 There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. As La Forest J. stated in *R. v. Béland*, [1987] 2 S.C.R. 398, at p. 434, with respect to the evidence of the results of a polygraph tendered by the accused, such evidence should not be admitted by reason of "human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science". The application of this principle can be seen in cases such as *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348, in which Moldaver J. applied a threshold test of reliability to what he described, at p. 353, as "a new scientific technique or body of scientific knowledge". Moldaver J. also mentioned two other factors, *inter alia*, which should be considered in such circumstances (at p. 353):

- (1) Is the evidence likely to assist the jury in its fact-finding mission, or is it likely to confuse and confound the jury?
- (2) Is the jury likely to be overwhelmed by the "mystic infallibility" of the evidence, or will the jury be able to keep an open mind and objectively assess the worth of the evidence?"

[13] At paragraph 21, in discussing the necessity criteria, the Court quoted, with approval, from page 42 of *R. v. Abbey*, [1982] 2 S.C.R. 24, as follows:

“With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. ‘An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary’ (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)”

[14] Then, at paragraph 22, the Court noted that the proposed expert evidence being “helpful” was not enough to satisfy the “necessity” requirement. It went on to state (with references omitted):

“However, I would not judge necessity by too strict 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’. ... [T]he evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. ... [T]his Court ... stated that in order for expert evidence to be admissible, ‘[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] Paragraphs 25 and 28 of *Mohan*, read in conjunction, indicate that, when the expert evidence in question goes to an ultimate issue, the “criteria of relevance and necessity” ought to be more strictly applied.

[16] Also at paragraph 28, the Court stated that “expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets the basic threshold of reliability and whether it is essential”. The Court in *Egli (Committee of) v. Egli*, 2003 BCSC 1716, at paragraphs 14 and 15, indicated a similar approach should be taken where the opinion involves “a high degree of subjectivity”. Though *Egli* dealt with admissibility of the recorded opinion of an expert who was not available to testify, the approach, in my view, also applies where the expert is available to testify.

[17] Our Court of Appeal recently, in *Abbott and Haliburton Co. Ltd. v. White Burgess Langille Inman (c.o.b. WBLI Chartered Accountants)*, dealt with the question of exclusion of expert opinions for bias.

[18] Justice Beveridge, for the majority, at paragraph 76, listed the four Mohan criteria and stated:

“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.”

[19] In addition, at paragraph 88, he noted that the duties and responsibilities of experts outlined in jurisprudence were “no substitute for the proper application of the common law criteria for admissibility of expert evidence”. The particular

jurisprudence he referred to, in paragraphs 81 to 87, included *Lunenburg Industrial Foundry and Engineering Ltd v. Commercial Union Assurance Co. of Canada*, 2005 NSSC 62, and *Tingley v. Wellington Insurance*, 2008 NSSC 317, both of which were cited by the Defendants in support of their motion to exclude, and both of which referred to *The Ikarian Reefer*, [1993] 2 Lloyd's Rep 68 (Q.B.D.), where Cresswell J. stated:

“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”

[20] Justice Beveridge, at paragraph 90, highlighted that “*The Ikarian Reefer* had nothing to do with the admissibility of expert opinion evidence”.

[21] At paragraphs 89 to 96 he emphasized that appearance or reasonable apprehension of bias, including that arising from excessive consultation between the expert and the client or lawyer, was not a stand-alone ground to exclude expert evidence.

[22] He discussed the dangers of an expert becoming an advocate for a party, and, thus, partial to that party.

[23] At paragraph 109, he stated:

“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. ... Apparent bias or partiality will usually be left to the trier of fact to consider. That is their role.” [emphasis by bolding in the original]

[24] However, he went on to quote, with approval, the following comment of Professor Paciocco (now Paciocco J.):

“[B]ias and partiality will typically be dealt with through the weighing process.”

[25] Also, at paragraph 30, Chief Justice MacDonald, in his dissenting opinion, commented on the usual treatment of bias and partiality as follows:

“... [A]llegations 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:

para. 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.”

[26] In his summary, at paragraph 161, Justice Beveridge stated:

“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.”

[27] At paragraph 128, he explained that:

“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.”

[28] At paragraphs 115, 129 and 132, to outline principles and factors relevant to this cost-benefit analysis, he referred to excerpts from the decision of Doherty, J.A., in *R. v. Abbey*, 2009 ONCA 624, and from Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3rd ed., as follows:

“115 ... Justice Doherty wrote:

86 ... 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. [Justice Beveridge's emphasis by bolding]

....

129 These principles are succinctly and conveniently set out in ... *The Law of Evidence in Canada* ... at paras. 12.105 and 12.107:

ss.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.

...

ss.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).

....

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., [2000] 2 S.C.R. 600, 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. [Justice Beveridge's emphasis by bolding]"

[29] As stated at paragraph 10 of *Ballam v. Li*, 2003 NSSC 158:

"As a general caution when dealing with expert evidence I note the comments of Binnie J. in *R. v. J.(J-L.)* (2000), 148 C.C.C. (3d) 487 (S.C.C.) with respect to the trial judge's role as "gatekeeper":

"[This] Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility."

2. EXPERT OPINION EVIDENCE OF EDITH M. YEOMANS

[30] Edith M. Yeomans has been an Accredited Senior Appraiser of Fine Art with the American Society of Appraisers since 1999. She provided an

“appraisal report to conclude the fair market value for original works of art that would have been created by ... John Brocke ... had he lived”. It is dated June 26, 2012.

[31] There is no dispute that she is a properly qualified expert.

[32] The Defendants challenge the admissibility of her expert opinion on the following grounds:

- a) It is unnecessary.
- b) “It relies on the unfounded assumptions stated in Nicholas Metivier’s reports as it relates to Brocke’s future works, both with respect to size and quantity.”
- c) It is based, at least in part, on the mistaken assumption that Mr. Metivier “agreed to represent Brocke through his gallery”, which she saw as “essential for re-establishing the market for this artist and the value of his paintings”. In addition, there were no completed works to inspect and the incomplete works in Mr. Brocke’s studio indicated he was moving into producing different work than he historically had. These factors render the opinion speculative and without foundation.
- d) It may confuse the jury.
- e) Its prejudicial effect would outweigh its probative value.

[33] In my view, the fair market value of works of art is something which “is likely to be outside the experience and knowledge of a judge or jury” and “ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge”. That is particularly so where the value to be determined is that of works of art that would have been produced in the future, in the course of re-establishing a career as a gallery artist, after a lengthy hiatus. In my view, the jury could not properly make such an assessment based only on the sales Mr. Brocke made as a gallery artist in the late 1980’s and early 1990’s, along with a recent resale. Therefore, Ms. Yeomans’ expert evidence is necessary.

[34] Ms. Yeomans’ report refers only to the report prepared by Mr. Metivier for the Canadian Cultural Property Export Review Board (“CCPERB”) for the purpose of attributing a value, for income tax purposes, to two Brocke paintings

donated to the Glenbow Museum in Calgary (*Via La Butte and Aurora*). It does not refer to the reports Mr. Metivier prepared for the case at hand.

[35] The Metivier report prepared for the CCPERB described the “scenario/business plan” he provided to the Plaintiff’s lawyers. That description envisioned that Brocke’s first exhibition at Metivier’s gallery would have been in 2011 and provided a pricing strategy according to a range of three specified painting sizes. It did not list any assumptions regarding the quantity of future works to be produced.

[36] Ms. Yeoman relied on Mr. Metivier’s report to the CCPERB only as one of the multiple comparison values she used in arriving at her opinion. The ultimate valuations in that report of the two existing paintings are what she relied upon in arriving at her opinion, not Mr. Metivier’s future pricing strategy for anticipated future works of specified sizes.

[37] It is noteworthy that the CCPERB did not accept Mr. Metivier’s valuation of \$65,000 for *Via La Butte*, nor his valuation of \$90,000 for *Aurora*. Given the evidence of Jeffery Spalding that the “CCPERB usually accepts the opinions of respected art dealers and appraisers” and “sometimes elevate the FMV to be higher than the amount suggested”, it is significant that the CCPERB reduced Mr. Metivier’s suggested valuations to \$60,000 and \$80,000 respectively. Ms. Yeomans use of valuations which were determined to be excessive, even for income tax purposes, is a factor which does diminish the reliability of her opinion and can be included in the assessment of whether the prejudicial effect of her report outweighs its probative value.

[38] Ms. Yeomans, at page 6 of her report, identifies the relevant market for Brocke works as “the commercial gallery retail level”. She does so partly on the assumption that, “[i]n 2009, Nicholas Metivier agreed to represent Brocke through his gallery, thereby keeping the artist firmly in the primary market”. At page 9, she stated: “In my opinion, the proposed representation of John Brocke by Nicholas Metivier Gallery was essential in re-establishing the market for this artist and the value of his paintings.”

[39] In my view, representation in the Metivier Gallery is part of the hypothetical scenario upon which Ms. Yeomans’ opinion is based. At page 3 of her report she noted that her opinion is given in relation to a future hypothetical situation. The losses sought to be valued are future losses. It will be up to the jury to determine, on the evidence, what the chances are that the hypothetical situation would have materialized had Mr. Brocke lived, and assess Ms.

Yeoman's opinion in light of that determination. [See: Ken Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd Ed, at page 74; and *Conklin v. Smith*, [1978] 2 S.C.R. 1107.] I cannot conclude, at this stage, not having heard all of the trial evidence, that the jury could not find that there was a reasonable chance that Mr. Metivier would have represented Mr. Brocke. As such, I cannot find that the prospect is so speculative or remote as that it could not be established as part of the foundation for the opinion. Further, it is but one element of that foundation, and, as such, its absence would not necessarily render the opinion valueless.

[40] Ms. Yeoman's opinion, as with the other opinions relating to the value of Mr. Brocke's future art, is naturally based on an assumption that he would have continued to produce the same type and quality of works he had in the past. The Defendants point out that the contents of Mr. Brocke's studio, at the time of his death, show that he was moving towards incorporating sculptures and bronze into his paintings, which marked a shift from his past practice. They submit this apparent shift exacerbates the speculative nature of assessment of the value of his future works. It is certainly a factor to consider in determining the likelihood that his future art would attract prices reflective of or evolving from, his past works. However, Nicholas Metivier testified at discoveries that Mr. Brocke still had the same intensity and attention to detail. He was of the view that the addition of sculptures and bronze would be something new and interesting for a first exhibition. Therefore, in my view, the addition of sculptures does not make a valuation based partly on past works of minimal or no value.

[41] Ms. Yeoman's report takes a "market or sales comparison approach" to valuation. She clearly articulated that she used as comparators:

- a) Pricing and sales of the works of artists she considered to be comparable, while explaining why, and to what extent, she considered them to be comparable;
- b) The initial sale prices of Mr. Brocke's paintings adjusted for inflation;
- c) Mr. Metivier's opinion of the fair market value of *Via La Butte* and *Aurora*, which she believed was later certified by the CCPERB;
- d) The valuation, by Curator Asset Management in Toronto, in 2007, for insurance purposes, of the Brocke painting entitled *Kievan Syntax*;

- e) The price paid for the commissioned portrait of Senator Dan Hays; and,
- f) The price agreed to be paid for a commissioned family portrait, including the significance of that price.

[42] Her discussions of the comparators reveal defects and weaknesses which would likely be found to diminish the weight of her opinion. They include the following:

- a) She indicated that there had been an overall decline in the market of about 30% since the fall of 2008. However, she did not explain why she did not deduct that decline from the inflation adjustment of Mr. Brocke's initial sale prices.
- b) The CCPERB reduced the values provided by Mr. Metivier. It did not certify the values he provided.
- c) Valuations for insurance purposes and income tax purposes appear to be a less desirable comparables than an actual recent sale.
- d) There was an actual recent sale of a non-portrait Brocke painting which was not included as a comparable. *Epoch Study III*, which sold for \$18,000 in 1991, resold for \$10,000 in 2004. There was no discussion of that re-sale at a significantly reduced price, nor its impact, if any on the reasonableness of the straight inflation adjusted comparables and of the use of valuations provided for insurance and income tax purposes.
- e) In contrast, the Appendix to Ms. Yeomans' report contains a list of paintings of purportedly comparable artists which all sold above the pre-sale estimate. This suggests a somewhat slanted approach.
- f) The price for the Senator Hays portrait was really about \$25,000, because about \$5,000 of the \$30,000 price was for the frame.

[43] These, and other, apparent defects and weaknesses can be elicited on cross-examination and highlighted for the jury, so that it can consider them in assessing the weight of Ms. Yeomans' opinion. In my view, they do not render the opinion confusing for the jury, and the opinion itself is not confusing for the jury.

- [44] Does the opinion's prejudicial effect outweigh its probative value?
- [45] I will first address factors relevant to determining probative value.
- [46] Determining the value of art which Mr. Brocke would have completed and produced had he lived is a central component of determining the support Ms. Gardner has lost.
- [47] When Ms. Yeomans wrote her report she had been an accredited art appraiser for 13 years and had been involved in appraising art for about 24 years. As such, she has a significant level of relevant expertise.
- [48] She takes what appears to be a relatively objective approach. For example, while she used Christopher Pratt and Ivan Eyre as comparables, she acknowledged, at pages 12 and 13, the fact that they were at, or near, the "pinnacle" of their career was a distinguishing feature. In addition, at page 20, she noted that Mr. Metivier's proposed plan was "just that and increases in prices on an annual basis may not be justified within the context of the health of the art market overall".
- [49] Her report was based on the understanding that Mr. Metivier would be representing Mr. Brocke, and Ms. Yeoman did not change her opinion when she discovered that there was no agreement that would occur. However, in her Letter of Amendment dated June 17, 2013, she explained why it did not change her opinion. She noted she had received new information that Mr. Brocke was contacted by Ivan Karp, the founder and director of OK Harris Gallery in New York. According to her, he is a dealer which artists are anxious to meet with and hope to get representation from. The fact he contacted Mr. Brocke indicates to her that there was important international interest in Brocke's work, making it probable he "would have been able to successfully rejoin the art market after his prolonged absence". Given that explanation, in my view, Ms. Yeoman maintaining her opinion does not show a lack of objectivity.
- [50] Some of the omissions, as already indicated suggest a slight slant towards providing an opinion more favourable to the Plaintiff. However, that is not significant enough to conclude she lacks objectivity. She clearly outlines her methodology and the basis for her opinion, so that it can be critically assessed by the jury.
- [51] The weaknesses and defects in her report, some of which I have already discussed, do diminish the reliability of her opinion. Also, if the jury does not find there is a reasonable chance that the scenario relied upon by Ms. Yeomans

would have materialized that will further diminish the reliability and weight of the opinion. However, at this threshold stage, I cannot find that her report is unreliable. In my view its probative value is of some significance.

[52] I will now address factors relevant to determining prejudicial effect.

[53] There is some danger that the opinion's emphasis on the importance of Mr. Metivier's representation of Mr. Brocke might be interpreted by the jury as bolstering his credibility. However, it can be instructed not to use it for that purpose, and to simply treat the comments regarding Mr. Metivier and his plan as a hypothetical which must be proven to the requisite standard. Otherwise, the opinion is not such as to import a real danger of impermissible use.

[54] As indicated above, the jury can follow Ms. Yeoman's approach and critically assess the defects and omissions to arrive at their own conclusion, despite the subjective nature of art valuation. As such, there is no substantial danger her opinion will: distort the fact-finding process; confuse or mislead the jury; or, result in the jury abdicating its fact-finding role.

[55] It will likely take some time to fully cross-examine Ms. Yeoman to illustrate the weaknesses and defects in her report. However, the expert opinion is on a central point and its probative value is of some significance. Therefore, in my view, that time is commensurate with the probative value of the evidence, and it will not unduly protract the proceedings.

[56] Consequently, I cannot find that the prejudicial effect Ms. Yeoman's evidence outweighs its probative value.

[57] There is no separate exclusionary rule that renders it inadmissible. I find it to be admissible.

3. EXPERT OPINION EVIDENCE OF NICHOLAS METIVIER

[58] Nicholas Metivier has been the owner and director of Nicholas Metivier Gallery in Toronto since 2004. Prior to that, he worked at the Mira Godard Gallery ("MGG") for twenty-two years. He provided three expert opinion reports on the future value and production level of paintings by Mr. Brocke. They are dated September 8, 2009, October 14, 2009, and July 12, 2011.

[59] The Defendants challenge the admissibility of his expert opinions, and those of the of the other experts of the Plaintiff who provide opinion evidence relating to loss of Mr. Brocke's earning capacity, on the basis that "speculative future earnings" are not a proper head of damages because they "could not possibly be considered a pecuniary loss to his estate" which is required for a claim under the Nova Scotia *Fatal Injuries Act: MacLean v. MacDonald*, 2001 NSSC 83. However, it is noteworthy that in *MacLean v. MacDonald* the Court was not dealing with a claim for lost support, since the deceased was a child.

[60] I agree with the Plaintiff that the probability that Mr. Brocke would have lost income as an artist in the future, if it is established, and the amount of that loss, must be established to determine the loss of support, if any, suffered by his widow, which is a proper head of damages. The probability of earning a certain income level from a career which had not yet materialized at the time of death is a proper consideration to determine such loss of future income: *Conklin v. Smith*, [1978] 2 S.C.R. 1107. Therefore, the type of expert evidence sought to be introduced is proper.

[61] The Defendants also challenge the admissibility of Mr. Metivier's expert opinion on the following grounds:

- a) The two opinion letters submitted in 2009 contain no supporting documentation and do not explain how he arrived at his conclusions regarding future values and production. The absence of such materials and explanation renders the opinions of such minimal assistance to the court, and so unreliable, that, as was found in *Ballam v. Li*, the time it will take to introduce the evidence, and the danger of it being too readily accepted by a jury without a critical analysis, outweigh the probative value of the evidence. The potential for the opinions to confuse or mislead the jury, and for the jury to abdicate its role to the expert is too great.
- b) Mr. Metivier's reports were prepared by the lawyers for the Plaintiff and signed by Mr. Metivier. He indicated in discoveries that the first two reports were "reasonably accurate". He agreed to sign the reports to assist, at no charge, because of "the tragedy of the situation". As such, his opinions are not the independent creation of an objective expert and are unreliable. Therefore, they should be excluded as being more prejudicial than probative.

- c) The third report was prepared after the Defendants' expert provided a rebuttal to the first two reports. The third report is not proper rebuttal to the Defendants' expert. It is merely "advocacy dressed up as an expert report" which is "designed to support the earlier conclusions/opinions provided by Metivier" after-the-fact, as was the case in *Gagne v. Canada*, 2002 TCJ No. 61, where the Court took "no account" of the values arrived at by the expert. It was prepared by the Plaintiff's current lawyer, based on an exchange of emails with Mr. Metivier, and on the report Metivier prepared for the donations to the Glenbow Museum. As such, it "is not an objective, independent report prepared by an expert".
- d) He makes no reference to the 2004 secondary sale of the *Epoch III Study* at a price well below the original 1991 purchase price, again indicating a lack of objectivity.
- e) The opinions are based on mere speculation as to future values, production and sales. He had seen only digital images of the unfinished works in Mr. Brocke's studio. He did not have information in relation to how long Mr. Brocke had been working on any specific piece.
- f) "The jury is equally capable of predicting how many, if any, pieces of work the deceased would have created and/or sold in any given year. They can make these predictions based on factual evidence that will be before the Court in the form of records of his past sales while working full-time as an artist and while represented by the Mira Godard Gallery." Therefore, his opinion evidence regarding future production and/or sales is unnecessary.
- g) His standing by his opinion regarding production, and saleability, in the face of new information indicating limited productivity, and a shift to inclusion of sculptures and bronze in his paintings, without explaining why that new information does not change his opinion, shows he is acting as an advocate, as opposed to an objective expert.
- h) His opinion is based on Mr. Brocke having produced enough quality works for him to represent Mr. Brocke, and on Mr. Brocke agreeing to be represented by him. The foundation for this scenario is a single phone call from Mr. Brocke in 2007. In that call Mr. Brocke advised

him he was working again and asked him to come by when he was down. He said he would. There was no further contact until Mr. Brocke's widow contacted him following Mr. Brocke's death in 2009, at which time, there were no finished works apart from the commissioned portrait of Senator Hays. The extrapolation from that 2007 phone call "is so speculative and removed from reality that its prejudicial effect would far outweigh its probative value".

- i) His opinion is so connected to himself, and dependent upon what he would have done to promote Mr. Brocke, that he is unable to provide an independent expert opinion, rendering it unreliable.

[62] In response, the Plaintiff submits the following:

- a) The Plaintiff's lawyers being involved in the preparation of the reports does not make them inadmissible. The important question, as outlined in *Williams et al. v. British Columbia et al.*, 2005 BCSC 131, is whether the opinions are those of the expert or of the lawyer. The discovery evidence shows that the opinions are his. He was "measured and thoughtful" in his answers and even retracted overreaching statements. He had not prepared an expert report before and he was doing it for free. So he left it to the lawyers to prepare based on his correspondence with them. He reviewed the reports, made corrections, directed the addition that he was 100% certain of his opinion, and signed the reports.
- b) "Involvement of counsel goes to weight: *Jansenn Pharmaceutical v. Apotex*, 2011 FCA 247."
- c) He is independent as he is not representing Mr. Brocke and "has no financial or personal interest in the outcome of the case". The fact he agreed to help because of the "tragic nature of Mr. Brocke's death" does not make him less independent. He demonstrated his independence by stating the Plaintiff knew nothing about art.
- d) He was laying out a scenario as hypothetical assumed facts supported by facts on which there is direct evidence.
- e) As a particular example, his assumptions that Brocke's future works would sell were based on: evidence of their saleability in the early 1990's, during the recession; a strengthening private collector market;

recent inquiries about his work; and seeing photos of Brocke's unfinished work which he liked.

- f) He can rely on unproven facts obtained within his field of expertise: **R. v. S.A.B.**, [2003] 2 S.C.R. 678. If some of the facts relating directly to the matter in issue are unproven it merely diminishes the weight of the opinion.
- g) His standing by his opinion, which was within his area of expertise, does not make him an advocate.
- h) It is indicative of his independence that his values were: "substantially accepted" by the CCPERB; substantially the same as those arrived at by Ms. Yeomans; and, used by the Defendants' expert, Elizabeth Noble, in her opinion.
- i) There is no evidence of actual bias and any potential bias should go to weight only.
- j) The opinions will not be confusing for the jury and can be properly assessed by it.
- k) The presentation of the opinions will not take unduly long because the facts forming the basis of them will be presented in any event.
- l) "Without the benefit of all of the evidence to be presented at trial it is premature to say that anything has been proven and, in particular, that Brocke was attempting to 're-enter the market with a new form of work'."
- m) An expert opinion may be admitted even though it contains some "speculation" or "intelligent guesswork": **Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.**, 2011 ONCA 418.
- n) The jury can be relied upon to consider the weaknesses in his opinion and properly assess the weight to attach to it.

[63] I agree with the Defendants that it is relevant to consider: the chronology of Mr. Metivier's three reports; the information he had when he signed each of them; and, the interrelation amongst them.

[64] The opinions and information in the reports can be divided into the following five categories relating to Mr. Brocke's artwork:

- a) Future Production and Prices;
- b) Future Saleability;
- c) Past Gallery Experience;
- d) Rebuttal of Opinion Regarding Lack of Appreciation in Value of Brocke Paintings and The Incorporated Opinion Prepared for the CCPERB;
- e) General Comments Regarding the Sale of Art in Canada; and,
- f) Rebuttal Opinion Regarding Impact of Taking Extended Time Away from Painting.

[65] I will address each category I turn.

a) Future Production and Prices

[66] In my view, the jury is able to determine what Mr. Brocke's future production would have been, or the chances he would have reached a particular production level, based on evidence of his production level while working full-time with the Mira Godard Gallery and while working full-time in his home studio (i.e. from 4 to 24 hours per day, according to Mr. Metivier's discovery evidence based on hearsay from Ms. Gardner). There is no need for expert opinion evidence to assist them with that fact-finding task. In addition, at discoveries, Mr. Metivier acknowledged he did not have "a clue" how much time Mr. Brocke spent on any particular unfinished work in his studio, and that he did not know how many works Mr. Brocke would or could have produced per year. As such, his "opinion" on production was either a guess or wishful thinking, which is of little or no assistance.

[67] However, the fair market value of art, particularly future fair market value, is something which, in my view, is "likely to be outside the experience and

knowledge of a judge or jury”. It is a subject matter about which a jury is “unlikely to form a correct judgment ... if unassisted by persons with special knowledge”. Therefore, expert opinion evidence is necessary to assist the jury in determining what prices would have been paid for Mr. Brocke’s future works of art.

[68] I am not aware of any exclusionary rule outside of the opinion evidence rule this that is infringed by this category of Mr. Metivier’s evidence, and none has been submitted to me.

[69] Mr. Metivier has been an art gallery director since 1989 and an art gallery owner since 2004, providing art appraisals and valuations for estates, insurance and donations. In that capacity he has gained specialized knowledge and experience which enables him to provide opinion evidence to assist a court in making a determination on art values. In my view, in circumstances such as the case at hand, where the artist has passed away, that includes future values even though providing an opinion on them necessarily involves projections into the future and some “speculation” or “intelligent guesswork”.

[70] That same knowledge and experience may enable him to provide expert evidence in relation to productivity of artists generally; but, not specifically in relation to Mr. Brocke’s future productivity.

[71] Evidence of the prices Mr. Brocke would have received for his future works of art, and the number of pieces he would have produced, tends to establish, and is thus “logically relevant” to, the income he would have earned, and the support Ms. Gardner would have received from that income. The issue, in relation to future prices, is whether it meets the second stage of the relevance criteria assessment, which is the cost-benefit analysis. I will also include the opinion on future productivity in the analysis, even though I have found the evidence to be unnecessary.

[72] I will first address the benefit side of the analysis.

[73] Evidence relating to future values and productivity is central to determining lost income, and ultimately lost support. However, a number of factors negatively impact the reliability, and thus the probative value, of Mr. Metivier’s expert evidence.

[74] In my view, a combination of factors establishes that Mr. Metivier is actually biased in his opinion regarding future values and productivity.

[75] First of all, his opinion is based on his own approach to “working with” his artists and his own pricing and promotion plan.

[76] He indicated, in his third report, he would have had the first exhibition of Mr. Brocke’s works in 2011 (which he explained in discoveries as being 2 years after starting to represent him presumably in 2009). He would have started pricing at the levels they established at the Mira Godard Gallery and increased them by about 10% per year, over a 10 year period. “Brocke would have been able to produce 3 to 6 works per year depending on scale and complexity. Within 10 years ... he would have been producing 3 larger scale works of art annually.”

[77] At discoveries he emphasized how his approach differed from that of Mira Godard, and was impliedly better than hers. That makes his opinion even more self-promoting. It is based on him doing a better job at working with Mr. Brocke, and at marketing his artwork, than Mira Godard did.

[78] Examples of his discovery evidence revealing his self-promotion and his self-perceived superiority over the Mira Godard Gallery include the following:

- a) At Page 99: “I’m a much more open person than my old boss.”
- b) At page 101: “He just wanted to tell me ... I know you have a good gallery and you’re on your own now, Hallelujah, talk to me. ... [H]e didn’t phone up Mira Godard again. ... Or he didn’t phone her director, Gisella.”
- c) At page 110: “I’m very successful at what I do and I’ve got 30 years experience and a lot of energy and enthusiasm.”
- d) At pages 112 and 113: “I would have viewed that relationship as a slow start with a three to four year window of really getting things going. With the intention of working with John, which Mira never did. ... And this is a role that a dealer plays, can play with the artist. Encouraging ideas, encouraging them to look at production in a slightly different way to help them produce more freely. ...

Mira did not know how to – Mira, Mira had an amazing ability to – she held power. She walks in the room like a queen. She was the best dealer in Canada. He was putty in her hand. And he was excited. And he made the work that he wanted to work. She never, with any artist –

she was not a warm nurturing type of person. She was, Here's the bar. I'm letting you into the private club because you can reach that bar.

My approach is very different.”

[79] Secondly, the values in question for Brocke's artwork were established by the Mira Godard Gallery while Mr. Metivier was the director of that gallery and, according to his third report, at page 4, “was personally involved with the promotion and sales of Brocke's paintings”. He opined that those values would remain, with adjustments for inflation, without any discussion of the overall art market since that time, nor of the fact that a secondary sale of a Brocke painting was, in 2004, completed at a price significantly lower than the price at which it originally sold in 1991. By using those values, and moving up from them, he is essentially boasting the lasting value of the work of a gallery which he directed, and of his own work in promoting and selling Mr. Brocke's works.

[80] Thirdly, the first two reports do not explain the foundation or rationale for the conclusions stated therein. They are merely state bare conclusions as to future values and productivity. When he wrote those two reports he had no information regarding the contents of Mr. Brocke's studio and his lack of productivity. He indicated at page 102 of the transcript of his discovery examination that he did not question Ms. Gardner about how much time Mr. Brocke committed to his artwork because: “[He] was dealing with a distraught widow. ... Who was having a tough enough time keeping it together. [He] wanted to help. ... No place for business.” His third report was written 2 to 3 months short of 2 years after the first two. By then, he had seen photographs of the unfinished works in Mr. Brocke's studio; but, still had no details regarding his productivity. His third report includes some explanation for his conclusions, which are the same conclusions he reached almost 2 years earlier, with no information regarding Mr. Brocke's works-in-progress and current productivity, and no attempt to obtain such information. It is an attempt to justify earlier unexplained and apparently poorly informed conclusions. Mr. Metivier has a natural interest in maintaining his initial conclusions, even though he testified at discoveries that they were only “reasonably accurate” and “very general”.

[81] Lastly, at least at the time of writing his third report, Mr. Metivier was aware that *Epoch III* Study, which sold in 1991 for \$18,000, less a 10% decorator's fee, resold on the secondary market in 2004 for \$10,000, inclusive of taxes and delivery. He attaches correspondence referencing that sale to his third report. However, he does not address the sale in his report. One would expect an unbiased expert, who is not acting as an advocate, who chooses to

exclude that actual sale from his analysis, to explain why. He did not do so. He simply ignored it.

[82] Section 7.5 of the American Society of Appraisers (“ASA”), Principles of Appraisal Practice and Code of Ethics (April 2012 Revision) provides as follows:

“If an appraiser, in the writing of a report or in giving an exposition of it before third parties or in giving testimony in a court action suppresses or minimizes any facts, data, or opinions which, if fully stated, might militate against the accomplishment of his client’s objective or, if he ... places an improper emphasis on any relevant facts for the purpose of aiding his client in accomplishing his objective, he is, in the opinion of the Society, an advocate. Advocacy, as here described, affects adversely the establishment and the maintenance of trust and confidence in the results of professional appraisal practice and the Society declares that it is unethical and unprofessional.”

[83] Section 4.3 provides:

“When an appraiser is engaged by one of the parties in a controversy, it is unethical for the appraiser to suppress any facts, data, or opinions which are adverse to the case his client is trying to establish; or, to overemphasize any fact, data, or opinions which are favorable to his client’s case; or in any other particulars to become an advocate. It is the appraiser’s obligation to present the data, analysis, and value without bias, regardless of the effect of such unbiased presentation on his client’s case.”

[84] Mr. Metivier’s statement of experience and qualifications does not indicate he is a member of the ASA. However, in my view, the comments in Sections 7.5 and 4.3, though they do not have the force of jurisprudence, are apt and applicable to the case at hand; and, they inform the assessment of whether Mr. Metivier is biased in his opinion.

[85] He knew of the one actual resale we have knowledge of. Yet he left it out of his comparables, without explanation. He appears to have used: sale prices for Brocke paintings in the late 1980’s and early 1990’s, adjusted for inflation; the price of commissioned portraits; and, valuations for income tax purposes which were based on his own appraisal report. He indicated he reviewed auction sales of other artists and Mr. Brocke’s own valuation of the “replacement cost” of *Kievan Syntax* for insurance purposes. The actual resale result runs contrary to the other valuations and the interests of the client. In my view, this shows Mr. Metivier is acting as an advocate and revealing his bias.

[86] Mr. Metivier, at discoveries, indicated he had never previously predicted what an artist would have produced had he lived. He did not know what Mr.

Brocke could or would have produced in the future. He did not have a clue how much time Mr. Brocke spent on any particular unfinished work. It was brought to his attention that, other than the Senator Portrait, there were no completed works in Mr. Brocke's studio at the time of his death. This was perhaps as long as two years after Mr. Brocke called him to tell him he was back working full-time. In addition, only preparatory work had been done for an \$80,000 family portrait commission. Yet he "stood by" his original estimate that Mr. Brocke would have started by producing six smaller pieces per year and progressed to three larger pieces per year. He did not even modify by building in transition periods. When asked to explain he became defensive, suggesting that the Defendants' lawyer was asking the same question several times (which in my view was not the case), and evading the issue by saying the CCPERB accepted his valuations within 10%. This demonstrates further lack of objectivity and an advocacy approach on his part.

[87] Another factor negatively impacting reliability is the absence of any clear methodology to arrive at the opinion. He indicates information he considered and looked at. He refers to his conversation with Mr. Brocke in 2007 in which he says he "sensed that [Mr. Brocke] had creative energy and focus". He refers to his knowledge of Mr. Brocke's previous works and his "inventory" at time of death (which apart from a commissioned portrait was all unfinished). He expresses confidence that "had [Mr. Brocke] moved forward he could have earned a good living as an artist". Then he outlined his marketing and pricing plan, in conjunction with his unfounded estimate of productivity. His opinion is the product of his sense of where Mr. Brocke was headed, and what appears to be is optimistic plan for rebuilding Mr. Brocke's career. It is not the outcome reached after following any clear methodology .

[88] The fact that all three reports were written by the Plaintiff's lawyers, based on correspondence between them and Mr. Metivier, does not, in itself render the opinions inadmissible. However, particularly where, as in the case hand, the expert indicates that the core of the opinions, as drafted by the lawyers, is only "reasonably accurate", that detracts from the reliability of the opinions. It may also have fostered circumstances leading to Mr. Metivier simply providing a bare opinion based on his "sense", and leaving it to the lawyers to put into a proper form of opinion, then only adding some supporting information once challenged on rebuttal.

[89] Mr. Metivier does have a lot of experience and knowledge in the art world in Canada. Were it not for his approach and interest in self-promotion, that would increase the reliability of his opinion.

[90] However, based on the factors I have noted, in my view, Mr. Metivier's opinion on Mr. Brocke's future productivity, and the values of his future art works, is very unreliable, and, therefore, of minimal probative value.

[91] I will now address the cost side of the analysis, which focuses on the prejudicial effect of the evidence.

[92] His reports do not provide any objective basis for his opinion regarding future production. His opinion regarding future values is essentially based on his marketing plan for Mr. Brocke. As indicated by Ms. Yeomans his "plan is just that", a plan. Therefore, in my view, his opinion cannot be critically assessed by the jury.

[93] There is the expert evidence of Ms. Yeomans which highlights Mr. Metivier's significant stature in the art world in Canada. That raises a danger that the jury will accept his future production predictions without critical assessment, thus abdicating their role as triers of fact.

[94] Even if Mr. Metivier does not testify as an expert, he will still be a fact witness. It would not take a lot of extra time to present his opinion evidence on direct examination, even if he were permitted to do so in the form of oral evidence, rather than a written report, which permission the Plaintiff has indicated she will be seeking. However, his cross-examination to highlight the many weaknesses and defects in his opinion would, more likely than not, consume a significant amount of time. In addition, a significant amount of time would be consumed by the examination and cross-examination of the Defendants' expert's rebuttal to Mr. Metivier's opinion. In my view, the time required to deal with Mr. Metivier's opinion regarding future productivity and values is not commensurate with its minimal probative value.

[95] The trial in the case at hand is to be heard by a judge and jury. Opinions regarding art involve a high degree of subjectivity; and, the opinions regarding future production and pricing go to the ultimate issue of lost income. Therefore, the "criteria of relevance and necessity" are to be strictly applied.

[96] Based on these factors, I am of the view that the prejudicial effect of Mr. Metivier's opinion evidence regarding future production and prices would outweigh its probative value. Therefore, I find it inadmissible.

b) Future Saleability

[97] Mr. Metivier's opinion regarding the future saleability of Mr. Brocke's artwork is limited to the following statement:

"I am personally aware of collectors who are prepared to buy Brocke paintings if they are available. However, no Brocke paintings are available on the secondary market. Had he survived and continued to paint there is no doubt that collectors would buy his paintings."

[98] The last sentence of that statement expresses his opinion based on the first two sentences, which are merely factual assertions which he can relate as a fact witness. In my view, the jury can assess that fact evidence and determine on their own whether or not there would be a future market for Mr. Brocke's artworks. They do not need Mr. Brocke's assertion that collectors would buy Mr. Brocke's paintings based on the fact that collectors would now buy them if they were available. That mere assertion does not add any probative value to the fact evidence that there are collectors prepared to buy Brocke paintings.

[99] In my view, Mr. Metivier's opinion regarding future saleability is unnecessary and has no or minimal probative value. Therefore, it is inadmissible.

c) Past Gallery Experience

[100] Mr. Metivier's evidence regarding Mr. Brocke's past gallery experience is found at pages 3 and 4 of his third report, under the headings: "The significance of the fact that the Mira Goddard Gallery represented John Brocke?"; and, "The role the Mira Godard Gallery had in building the market for Brocke's paintings".

[101] The only clear opinions of Mr. Metivier expressed in those segments of his report are that: "Mira Godard did a wonderful job establishing a market for Brocke's paintings"; and, "By any standards the sale of a painting for \$52,000 [in 1990] by a 39-year-old artist was extraordinary."

[102] Mr. Metivier can provide fact evidence of what Mira Godard did to establish that market and of the market that was established. The jury can determine for themselves whether or not she did a wonderful job. They do not need Mr. Metivier's opinion on that point.

[103] Other than saying the Brocke painting which sold for \$52,000 in 1990 was “the most expensive painting painting in the Four Seasons’ collection”, Mr. Metivier does not provide any other “standards” against which to gauge whether that sale was “extraordinary”. It is a bare, unsupported opinion which is of minimal or no value to the jury. It’s potential to mislead and usurp the function of the jury outweighs its probative value.

[104] Therefore, those two opinions are inadmissible.

[105] In the second paragraph on page 4 he relates the view that Mira Godard agreeing to represent Mr. Brocke herself demonstrates her purported opinion that Mr. Brocke “was an artist of exceptional talent and value”. He appears to be relating Ms. Godard’s opinion, not his own. She is deceased. There has not been any evidence to establish that it meets the threshold reliability for admission.

[106] If he is not relating her purported express opinion, but rather the opinion implied by her actions, then he can simply relate those actions, with the necessary circumstantial evidence, to the jury; and, the jury can determine what inference is to be drawn from those actions and circumstances.

[107] Further, given that Mr. Metivier was director of the Mira Godard Gallery and personally involved in promoting and selling Mr. Brocke’s paintings, any opinion of his regarding the significance of representation by that Gallery is biased for the reasons discussed above. As a result, it is unreliable, such that its probative value is outweighed by the risk the jury will accept it without question because of his stature in the art world in Canada.

[108] However, Mr. Metivier, subject to rules of evidence outside the rules relating to admissibility of expert opinion evidence, can provide sufficient fact evidence regarding the Mira Godard Gallery’s representation of Mr. Brocke to determine its significance, and the market it established for Mr. Brocke’s paintings.

d) Rebuttal of Opinion Regarding Lack of Appreciation in Value of Brocke Paintings and the Incorporated Opinion Prepared for the CCPERB

[109] At pages 4 and 5 of his third report, Mr. Metivier provides a rebuttal to the opinion of the Defendants’ expert, Elizabeth Nobles, that Mr. Brocke’s paintings would not have appreciated in value since the early 1990’s. He

incorporates in his opinion the report he prepared for the CCPERB in relation to two paintings being donated to the Glenbow Museum, and notes that the CCPERB did not fully accept his valuations. He also supports his view that the value of Mr. Brocke's art has increased with a reference to the \$80,000 commissioned portrait Mr. Brocke agreed to paint before his death.

[110] As I have already indicated, expert evidence regarding art values is necessary to assist a judge or jury. That obviously also applies to changes in art value over time as well. I am not aware of any applicable exclusionary rule outside those relating to expert evidence. Mr. Metivier is qualified to give expert evidence on art values, and changes in art values.

[111] Current appraised values of previous works by Brocke, and recent contract prices for commissioned portraits by him, are relevant to the current value of his artwork, and, thus logically relevant to an assessment of art that would have been produced by him in the future.

[112] The question that remains is whether it crosses the threshold of the cost-benefit analysis.

[113] I will first look at the benefit side of the analysis.

[114] The central issue is determining what Mr. Brocke's paintings would have sold for in the future. Current appraised values of existing art and commission prices agreed to be paid for future art are a step towards that central determination, and thus probative.

[115] The potential probative value depends on reliability. Mr. Metivier explains his comparison methodology, both in his rebuttal and in the CCPERB appraisal report. He has a significant level of expertise. The portion of his opinion addressing the value of *Via La Butte* and *Aurora*, to some extent, impliedly relies upon the continued value of the work of the Mira Godard Gallery. However, it is in relation to existing paintings. Therefore, subject to one exception which I will discuss shortly, it does not rely on his promotion and marketing plan for Mr. Brocke. Therefore, its self-promoting effect is minimal. In addition, the opinion is in relation to appreciation in value since the 1990's, of his existing works. Mr. Metivier would have a tendency to exaggerate the values of such existing works to provide support for his earlier unsupported opinion in the form of a plan to increase prices by 10% per year. However, unlike a comment on value or market for future works, past appreciation in value is not as critical to support his existing opinion, particularly since he had

indicated he would start at pricing level Mr. Brocke reached while with the Mira Godard Gallery. As such, I cannot find that he is actually biased in relation to these opinions.

[116] The one exception I was referring to is the portion at the third page of the appraisal for the CCPERB. At that page Mr. Metivier: refers to being contacted by Ms. Gardner to prepare a report on the future for Mr. Brocke's career ; the "scenario/business plan [he] gave the lawyers; and, his marketing and promotion strategy. That portion is self-promoting and unreliable as already discussed. In my view it is also irrelevant to the opinion as to the value of *Via La Butte* and *Aurora*, and as to the increase in value for Mr. Brocke's works. Mr. Metivier was addressing values at the time, not future values. Therefore, being asked to provide a report for Ms. Gardner and his plan for Mr. Brocke's hypothetical future career, that could never materialize because Mr. Brocke was deceased, are irrelevant to those opinions of Mr. Metivier. As such they are to be removed from the report prepared for the CCPERB.

[117] I will now address the cost side of the analysis.

[118] Mr. Metivier's approach or methodology allows the jury to make a critical assessment of his opinion. There are weaknesses in the opinion, such as: the fact the appraisal for the CCPERB was for income tax purposes, not an actual sale; his valuations were not accepted by the CCPERB; and, the appraisal was prepared after his first two opinion letters regarding future productivity and values, bringing into play a tendency to support the earlier opinions. However, those can be highlighted on cross-examination and also critically assessed by the jury. The danger they will abdicate their role and rely only on Mr. Metivier's expertise, if his opinion evidence is narrowed in this way, is not significant, particularly where his opinion is a rebuttal.

[119] In my view, this evidence will lengthen the proceedings; but, not unduly so, in comparison with the probative value of the evidence and the value in having more than one opinion, of sufficient threshold reliability, to assess.

[120] Considering these points, I am of the view that the probative value of this evidence outweighs its prejudicial effect. Therefore, I find Mr. Metivier's evidence rebutting the opinion evidence that Mr. Brocke's art would remain at the values it reached in the 1990's, and his appraisal opinion for the CCPERB, with the irrelevant portions removed, to be admissible.

e) General Comments Regarding the Sale of Art in Canada

[121] Under the heading “How paintings are sold and priced in Canada.”, Mr. Metivier provides a general opinion regarding the sale of art in Canada. That is outside the knowledge and experience expected of jurors, and thus necessary. It is not subject to any non-expert exclusionary rule. Mr. Metivier is qualified to provide it. It is relevant in the sense that it provides the jury with background it needs to properly assess the factual and opinion evidence before it. It does not import the same reliability concerns as obtain in relation to his opinions on future productivity and values. There does not appear to be any danger of misuse or misconception by the jury. It ought to take very little trial time as, for the most part, it appears uncontroversial. It is of sufficient probative value to warrant the trial time it will take. Therefore, in my view, it is admissible.

f) Rebuttal Opinion Regarding Impact of Taking Extended Time Away From Painting

[122] At page 5 of third report, Mr. Metivier, provides a rebuttal to Ms. Nobles’ opinion regarding the impact of Mr. Brocke taking extended time away from painting on the market for his paintings.

[123] In my view, a jury is not likely to be able to formulate a proper inference in relation to that impact without the assistance of an expert able to give expert opinion evidence in relation to the art market. Therefore, Mr. Metivier’s opinion is necessary. In my view, he is qualified to give such evidence, and I am not aware of any applicable exclusionary rule outside the opinion evidence rule. Mr. Brocke did take an extended hiatus from at least from painting as a commercial gallery artist. The jury will have to assess the impact of that on the market for his paintings. It is a factor which helps establish values for his paintings going into the future. Therefore, the evidence is logically relevant. Once again, the issue is whether it meets the threshold cost-benefit analysis test.

[124] I will examine the benefit side of the analysis first.

[125] Market impact relates to lost income, which is a central issue in the case at hand. Therefore, if the opinion is sufficiently reliable it can have more than minimal probative value.

[126] The factors relevant to reliability include those which follow.

[127] Mr. Metivier opines, contrary to Ms. Nobles' opinion, that Mr. Brocke's absence from painting would not impact him the same way it did Robert Young and Michael Thomson (i.e. resulting in a reduction in market value) because they "appeal to a different market segment". He does not explain what that market segment is, nor why it results in a different impact. It is simply given as a reason with no analysis. When he signed the third opinion report he had already prepared two prior reports providing an opinion that, among other things, the value of Mr. Brocke's artwork would increase by 10% per year under his development and promotion plan. I found him to be biased in that opinion. His opinion regarding the impact of Brocke's extended absence on the market for his artwork is essentially an extension of, or a further justification for, the biased opinion regarding future values he already gave. It is a stepping stone to the portion of his opinion which I found to be inadmissible. Mr. Metivier has an interest in providing support for the previous plan he put forward with incomplete information and without providing any supporting rationale. He also refers to the prices recently obtained or agreed upon by Mr. Brocke for two portrait commissions as apparent support for his view that the market for Mr. Brocke's paintings has been maintained. However, commissioned portraits are different from the type of paintings Mr. Brocke has sold in the past and different from the other unfinished works in his studio. The valuation opinions of Ms. Yeomans and Ms. Nobles are based on Mr. Brocke's realist paintings. It is the market for those that is particularly relevant, not the market for portraits. None of the opinions have been based on Mr. Brocke making a career painting commissioned portraits. As such, commissioned portraits are a sub-optimal comparison and gauge. In my view these factors diminish the reliability and probative value of his opinion.

[128] However, his gallery represents Mr. Thompson and he is the one who appraised one of his works for the CCPERB as having decreased in value. Therefore, his knowledge and experience positions him well to make the comparison.

[129] Nevertheless, I am of the view that, considering all of these reliability factors, the opinion, as expressed, and minimally supported, is of limited reliability.

[130] On the cost or prejudice side of the analysis, the factors which follow are relevant.

[131] There is not enough information and analysis for the jury to critically assess: whether Young and Thompson are in a “different market segment”; if so, what segment that is; and, whether it is a proper basis for distinguishing Young and Thompson as comparables. That creates a danger they may accept the opinion of an expert of Mr. Metivier’s stature without question, thus abdicating their role as triers of fact. However, the jury can recognize that the commissioned portraits are not the best comparables to assess the market impact of Mr. Brocke’s hiatus from painting, and assess the opinion accordingly. In addition, this portion of Mr. Metivier’s opinion is unlikely to take a significant amount of time.

[132] Nevertheless, the prejudicial effect on the fairness and integrity of the trial of presenting the jury with an opinion they cannot properly critically assess, in my view, outweighs the limited reliability and probative value of the opinion. Therefore, Mr. Metivier’s opinion regarding the impact of Mr. Brocke taking extended time away from painting on the market for his paintings is inadmissible.

[133] That, of course, does not prevent him from providing otherwise admissible fact evidence contained in that segment of his report.

4. EXPERT OPINION EVIDENCE OF JEFFREY SPALDING

[134] Jeffrey Spalding has been an art museum/gallery director and/or curator since 1999, and an art professor since 1977. He provided an expert opinion report dated May 31, 2012, in the form of answers to specific questions posed by the Plaintiff.

[135] There is no dispute as to his qualifications as an expert to provide opinion evidence in relation to art. The issue of whether evidence of lost income earning capacity was relevant has been addressed. With the exception of the rule against oath helping, which I will address, the Defendants do not suggest there is any other applicable exclusionary rule outside the expert evidence rules. The arguments relating to the admissibility of Mr. Spalding’s opinions focus on necessity and relevance, including whether the probative value of the evidence outweighs its prejudicial impact on the fairness and integrity of the trial.

- [136] The Defendants suggest that the portions of his report which summarize information in other articles and reports is unnecessary because those documents can simply be put before the Court. However, the Plaintiff points out, in my view correctly, that such an approach would run contrary to the hearsay rules unless the materials were adopted by an expert at trial.
- [137] There were no submissions to the effect that Mr. Spalding was bias or acting as an advocate.
- [138] His first opinion was in relation to the question: “Was John Brocke an exceptional Canadian artist?” The Defendants argue that opinion should not be admitted because Mr. Spalding acknowledges the answer is subjective and the objective evidence supporting a conclusion that the art museum community agrees that he was (i.e. collection by museum and acceptance for donation by the CCPERB) can be put before the jury and they can determine whether he was an exceptional artist.
- [139] The question presents as leading and unfair. However, it was brought into play by the statement in Ms. Nobles’ 2010 report that: “It is only the exceptional and rare artist whose works have appreciated greatly over the past 16 years” By opining that Mr. Brocke’s works have not appreciated, she is impliedly opining that he was not an exceptional and rare artist. It is only fair that a rebuttal to that be permitted, if it meets the admissibility criteria.
- [140] The fact that an opinion is subjective does not make it inadmissible. However, it imports the need to strictly scrutinize whether it is necessary and meets the reliability threshold.
- [141] In my view, the jury could not, without expert assistance, properly assess Mr. Brocke’s stature as an artist. It needs expert evidence to determine whether he fit in the exceptional category or not.
- [142] Mr. Spalding’s level of expertise adds to the probative value of the opinion. However, it only goes to a single factor considered by Ms. Nobles among many others. As such, its overall probative value is minor.
- [143] Mr. Spalding acknowledges that there may be differences of opinion on that question and that each one is necessarily subjective. Therefore, the jury would not be misled into thinking there is only one answer. Mr. Spalding explains the relevance and significance, to answering this question, of collection of his works by museums and approval, by the CCPERB, of donations of works. The jury could not be expected to understand the relevance

and significance of that, without expert help. The opinion is laid out and explained in a way which the jury can understand and critically assess, particularly with the benefit of cross-examination to highlight defects. However, the opinion being given, standing on its own, as opposed to being part of an assessment of market value, risks confusing the jury into thinking that it is a central determination they must make. That would result in the question taking on more importance than it merits and overshadowing more central and significant questions. If the jury rejects Ms. Nobles' statement, then they do not need to determine whether or not Mr. Brocke was an exceptional artist at all. If that occurs, the opinion will be of little or no use to it. A proper caution to the jury may adequately manage the risk the opinion will distract them from their ultimate task. However, the fear that it may not, would likely result in lengthy cross-examination to challenge the opinion. That risks rendering the trial time the opinion would consume not commensurate with its probative value.

- [144] Considering these points, and considering the subjective nature of the opinion, I am of the view that the probative value of his opinion regarding whether Mr. Brocke was an exceptional artist would be outweighed by its prejudicial effect.
- [145] However, he answers question #6 by referring to his answer to question #1. Question #6 is: "What is the significance of the valuation of Via La Butte and Aurora by the Canadian Cultural Properties Review Board?" The jury could not be expected to understand the significance without expert assistance. That valuation is referred to in other expert opinions, so the jury will have to assess its significance. The same concerns regarding that opinion taking on a larger role than it deserves, and consuming excessive trial time, do not, in my view, obtain. Provided any references to Mr. Brocke being an exceptional artist are removed, in my view, the probative value of the portion of Question #1 which answers Question #6 outweighs its prejudicial effect and is admissible.
- [146] The Defendants submit that his answer to Question #2 is a bare assertion of opinion without any underlying factual foundation being provided, and, as such is of no value to the trier of fact. The Plaintiff submits that an expert can "rely on background information obtained in the course of his experience and career and base an opinion on it" with "the absence of independent proof of such facts going to weight". I agree with the principle advanced by the Plaintiff. However, it is important to note that the authorities supporting it (Cudmore, *Civil Evidence Handbook*, referring to *R. v. Lavallee*, [1990] 1 S.C.R. 852) reveal that the underlying facts, assumptions or foundation are noted in the opinion. A different situation obtains when there is an absence of any stated

basis. In such a situation there is no ability to gauge the real strength of the opinion. The expert is simply saying: “Trust me because of my expertise.” As such it makes the opinion less reliable, and more prejudicial.

[147] I agree with the Defendants that the opinion expressed in Question #2 is merely a bare expression of opinion without any real foundation or basis for the opinion. I am of the view that its prejudicial effect clearly outweighs its probative value and that it is inadmissible.

[148] In Question #3 he was asked: “How do John Brocke’s skill and works compare to that of Alex Colville, Christopher Pratt and Ivan Eyre?”

[149] I agree with the Defendants that he does not answer the question. He points out they were all represented by the MGG, but that all but Mr. Brocke are “nearing the apex of their creative lives”. In my view, an opinion that does not address the question posed has no probative value on the particular issue in question and would only provide confusion for the jury as to what opinion they were assessing. I find it is inadmissible.

[150] Answering that “artists never retire” to Question #4 regarding “the likely retirement age for an artist like John Brocke” is rhetorical, prejudicial and unhelpful. It cannot be critically assessed by the jury. Its prejudicial effect outweighs its probative value. I find the answer to that question is inadmissible.

[151] The opinion information provided for Question #5 is already contained in the answer to Question #6 which I have found to be admissible. As such, it is a duplication and unnecessary.

[152] His answers to Questions #7 (Who was Mira Godard?) and Question #8 (What is the significance, if any, of the fact that John Brocke was represented by the Mira Godard Gallery?) do little to assist the jury in determining Mr. Brocke’s lost income. Mr. Brocke has not been with the MGG since the early 1990’s. It is the value of his works now and in the future which is important. There is evidence of those values. The values established by the MGG are well documented and will be made available to the jury. It does not need to assess what the MGG would have done for Mr. Brocke. It has already been established. Mr. Spalding’s opinion glorifies Mira Godard and, in turn, the “stable” of artists she purportedly carefully selected. He does not present his opinion in an objective and balanced manner. He engages in no analysis. He merely boasts the virtues of the MGG. In my view, the prejudicial effect of the

opinions in Questions #7 and #8 outweighs their probative value. I find them to be inadmissible.

[153] Question #9 is: “Who is Nicholas Metivier?” Question #10 is related and is: “What is the significance, if any, of Nicholas Metivier’s willingness to represent John Brocke as an artist at his gallery?”

[154] In response to Question #9, Mr. Spalding provides a brief stream of glowing accolades for Mr. Metivier, his reputation and his work at the MGG, then at his own gallery. In response to Question #10, he again applauds Mr. Metivier and his gallery, while indicating that the MGG is struggling without him. He finishes with the sentence: “His embrace of Brocke indicates his personal endorsement of the lasting values of the artist’s merits.”

[155] The Defendants submit these opinions are inadmissible because the amount to bolstering another expert or oath helping.

[156] The rule against oath helping is to prevent admission of opinions, direct or implied, on whether or not a witness is being truthful. Evidence legitimately admissible for another purpose is not inadmissible simply because it confirms the evidence of another witness, nor if in addition to the legitimate purpose it amounts to oath helping, provided the prejudicial effect does not outweigh the probative value. In certain circumstances expert evidence may be led to help the trier of fact assess credibility, without commenting on credibility. Evidence of a prior consistent statement of a witness has also been categorized as oath helping and excluded except in certain circumstances, such as rebutting an allegation of recent fabrication.

[157] In my view, the evidence in question is not a comment on, or even about, credibility. In addition, it contains no prior statements of Mr. Metivier. Therefore, it does not offend the rule against oath helping. To the extent they may have the effect of bolstering the expert evidence of Mr. Metivier, that can be considered amongst the prejudicial effects, and is not a stand-alone ground to exclude.

[158] There will be evidence at trial regarding the chances that Mr. Brocke would have continued to paint and have been represented by Mr. Metivier. Ms. Yeomans’ opinion placed a lot of emphasis on that happening. Such a scenario will likely be considered by the jury. To properly assess what it would mean in terms of future earnings, the jury will require expert opinion evidence in relation to Mr. Metivier’s reputation and the significance of his representation of

Mr. Brocke. It cannot look at documented evidence of the impact of such representation because it has not happened. However, the opinions are not directly related to a central issue. As such their probative value is somewhat diminished.

[159] The opinions are written in exaggerated and evocative language, and contain only accolades for Mr. Metivier, his work and his reputation. They do not engage in a balanced analysis. As such they demonstrate a diminished level of objectivity and are of diminished reliability.

[160] There is a danger the opinions will bolster Mr. Metivier's evidence and render the jury more inclined to accept it without carefully considering it, despite directions to the contrary. They do not include any real analysis, which the jury could critically assess. They also do not include any specific facts to support the general assertions made in them. Therefore, the jury cannot properly assess the accuracy of the assertions. This raises a real risk that the jury will too readily accept such a glowing and positively framed opinion from a person permitted to testify as an expert, without being able to properly assess it, thus abdicating their role. However, this portion of his opinions ought not consume a great deal of trial time.

[161] Considering these factors, I am of the view that the prejudicial effect of the opinions in response to Questions #9 and #10 outweighs their probative value. I find them to be inadmissible.

[162] In Question #11 he is asked: "What is the significance, if any, of the fact that Mira Godard agreed to pay John Brocke a commission of 40%?" He responds by saying: "None really." He goes on to say the usual commission is 50% so that it "might" imply that Mira cut a specific atypical deal." This opinion is neither helpful, nor necessary. Mr. Metivier can provide fact evidence in relation to the usual commission at the time and whether it was an "atypical deal". Therefore, it is inadmissible.

[163] Mr. Spalding acknowledges that the answer to Question #12 is "so variable, case by case, as to not have much use for the jury". Therefore, it has insufficient probative value and is inadmissible.

[164] In Question #13 he is asked: "What is the significance, if any, of a private person paying John Brocke \$80,000 for a commissioned portrait?" He responds: "Fabulous and significant. Who else is receiving such a sum for a portrait?" He comments that it is an "open market" in which there are a lot of choices. Then

he adds: “To agree to pay such a considerable price indicated that the general acceptance of the value of the artist’s unique talents need to be recognized by out of the ordinary rate schedules.”

[165] That commission is used as a comparable in other expert opinions. It is one which the jury will have to consider in determining future pricing. They need an expert to properly assess whether such a commission has any bearing on the market price that could be expected for his other paintings. Therefore, a reliable and fairly presented opinion could have real probative value.

[166] However, in my view, this opinion is not reliable. It contains bare, exaggerated assertions with no methodology, specified foundation, or analysis. It cannot be critically assessed. It really only says it was a high price for a portrait, without discussing the size and nature of the portrait, nor comparing it with prices paid for similar portraits.

[167] I find that its prejudicial effect outweighs its probative value and it is inadmissible.

[168] In his answer to Question #14, Mr. Spalding acknowledges he cannot give an opinion on whether incorporating sculptures would positively or negatively affect the market value of his works. As such it has no probative value. The comment that it indicates Mr. Brocke “was still actively evolving and growing” is not necessary. It is an inference the jury can determine whether to draw on its own. Therefore, the opinion in this question is inadmissible.

[169] In response to Question #15 he provides an opinion on the average costs John Brocke would incur to produce his paintings.

[170] This is something which would likely be outside the knowledge of a jury. Therefore, it is necessary. It is logically relevant to determining net income for the purposes of calculating lost support. Production cost is an important component of determining net income. Therefore, if otherwise reliable, the opinion is relatively probative. Mr. Spalding presents his opinion in what appears to be a balanced and objective way. In addition to teaching art he has also been painting and exhibiting art since the 1970’s. So he has a significant level of relevant expertise. He considers a range of factors in arriving at his opinion. It is easily understandable and can be critically assessed by the jury. It ought to take little trial time. In my view, its probative value far outweighs its prejudicial effect and it is admissible.

[171] In response to Question #16, he provides an opinion in relation to whether the CCPERB accepts valuations from both art appraisers and art dealers, and the difference, if any, between the valuations provided by art appraisers and those provided by art dealers. I have not seen any indication that there are any art appraiser valuations for the CCPERB to be considered by the jury, and compared with art dealer valuations for the CCPERB. Therefore, at this stage the relevance of the opinion has not been established and it is inadmissible.

[172] He acknowledged he was unable to provide an opinion in relation to Question #17.

[173] In Question #18 he is asked: “In your opinion what is the highest amount that John Brocke’s paintings could have sold for at some point during his lifetime? What is the percentage chance of this happening?” However, he does not address the question. He comments that “realist painters have tended to do really well later in life, giving as examples Eyre, Pratt, Colville and David Blackwood. He listed some high Colville prices. He spoke of the new-painting prices for the works of Takao Tanabe who showed with the MGG. He then spoke of Mr. Brocke’s slow and meticulous, resulting in a paucity of works which “can” drive up prices. He conducts no further analysis of the information and provides no real opinion. Therefore, in my view, it is of essentially no assistance to the jury and is inadmissible.

5. EXPERT OPINION EVIDENCE OF ELIZABETH NOBLE

[174] Elizabeth Noble has been a fine art appraiser since 1996. Prior to that, commencing in 1985, she was a corporate art consultant, selecting and/or commissioning art for over 100 corporate offices, hotels and businesses. She provided two expert opinion reports on behalf of the Defendants.

[175] The first is dated August 25, 2010. It provides an opinion: partly in relation to “what Mr. Brocke might have earned in the future should he have returned to painting”; and, partly as rebuttal of the first two reports prepared by Mr. Metivier.

[176] The second is dated October 13, 2011. It is a rebuttal to the report of Mr. Metivier dated July 11, 2011, which was itself, in rebuttal to Ms. Nobles’ August 2010 report.

[177] It is agreed that any portions of her report relating only to rebutting any portions of Mr. Metivier's opinions which are found to be inadmissible, are themselves inadmissible.

[178] Given my conclusions regarding the inadmissibility of many of Mr. Metivier's opinions, the following portions of Ms. Nobles' opinions are inadmissible rebuttal:

- a) All the opinions in her 2011 report except those at page 4, which contains Ms. Nobles' rebuttal to Mr. Metivier's rebuttal opinion regarding whether Mr. Brocke's works would have appreciated in value since the 1990's, including the opinions in his appraisal for the CCPERB which he incorporated by reference. In addition, there is one comment at page 6, under the "Further Comments" section which relates to Mr. Metivier's report to the CCPERB and is admissible. That is the comment which states: "Neither Christopher Pratt's not {sic} Ivan Eyre are comparable to Brocke in terms of national recognition, awards, exhibition history, or bibliography." However, the references, at page 4, to Mr. Metivier's plan, are rebuttals to that inadmissible part of Mr. Brocke's opinion. As such, they are not admissible.
- b) All references and responses in her 2010 report to Mr. Metivier's opinions regarding future productivity, prices and saleability, many of which are interspersed within the admissible portions.
- c) The first three rebuttals to comments by Mr. Metivier at pages 5 to 8 of her 2010 report, with one exception. At pages 7 and 8 she makes comments distinguishing Mr. Brocke's reputation from that of Christopher Pratt. She then refers to that distinction in her admissible rebuttal at page 4 of her 2011 report, without repeating it. In my view, trial fairness, and the desire to encourage streamlining of expert reports in such a manner, require that the comments distinguishing Pratt's reputation be admitted as part of the admissible rebuttal in her 2011 report.
- d) The section entitled "Auction Prices for Artists who Metivier compared to Brocke" at page 10 of her 2010 report.

[179] The portion of her 2010 report commencing at page 8 which is noted as being in rebuttal to Mr. Metivier's opinion regarding the future market he

would develop for Mr. Brocke, and which compares Mr. Brocke with Young and Thompson, is referred to at page 10 under the heading “Opinion as to what John Brocke might have earned in the future” as the basis for that opinion. Therefore, it is admissible as part of that opinion, rather than as rebuttal, with the exception of the portions which refer or respond to Mr. Metivier’s predictions of, or plans for, future Brocke price increases. That includes the paragraph presenting Thompson’s works “as evidence that only paintings by a very few artists achieve prices in the \$100,000 plus range”.

[180] The Plaintiff objects to the admissibility of the remainder of Ms. Nobles’ opinion evidence. She advances the following grounds relating to that remaining opinion evidence:

- a) Ms. Noble, in her Discovery evidence, indicated that it was not her role to include, in her rebuttal of Mr. Metivier’s opinions, evidence that would support his opinion. For example she includes negative commentary on Mr. Brocke’s work, while leaving out positive commentary. She refers to downturns in the art market after 1991, but does not mention that the value of Mr. Brocke’s art was increasing. Therefore, she is an adversarial witness, who did not understand that her role was to present an impartial report for the benefit of the Court. Section 4.3 of the *ASA, Principles of Appraisal Practice and Code of Ethics*, quoted above, requires her to be open and candid.
- b) The only comparables in her report are Brocke’s past works.
- c) She based her opinion on that of Mr. Metivier, without saying so in her report, demonstrating a lack of candour and seriously impairing her credibility.
- d) Her appraisal method is based on general market trends which is of no use to the Court.
- e) Her presentation of examples of two artists whose art prices decreased is irrelevant whether or not Mr. Brocke’s would increase, and, she failed to mention artists whose art prices increased during the relevant time period.
- f) She exaggerates Mr. Brocke’s absence from the commercial art world, indicating it was 30 years. Her implication that his energy levels would be reduced from when he was in his thirties is unfounded and

beyond her area of expertise. It fails to recognize some artists paint into their nineties.

- g) Her statement that Mr. Brocke had no curatorial recognition is misleading because the Glenbow Museum acquired two of his works after his death and one before his death.
- h) She indicated the Alberta Art Foundation, the University of Lethbridge and the University of Calgary had none of Mr. Brocke's paintings in their collection. According to the report of Jeffery Spalding, they do have some of his works. That demonstrates a lack of credibility and diligent search.
- i) She notes Mr. Metivier's error regarding the price paid for the painting part of the Senator Hays portrait without opining on its significance.
- j) She refers to Mr. Metivier comparing Mr. Brocke to Ivan Eyre and notes that, in 1990, Mr. Eyre's prices were higher than they are now, without conducting her own comparative analysis.
- k) Rebutting Mr. Metivier's comparison of Mr. Brocke's skills with those of Christopher Pratt, by discussing their respective reputations is not proper rebuttal.
- l) "Expert reports [such as that of Ms. Nobles] that do little more than point out inconsistencies and possible biases in another expert's report are inadmissible: *Sordi v. Sordi*, 2009 CarswellOnt 8779 (O.S.C.J.)."
- m) Expert reports, such as that of Ms. Nobles, that "delve into the weighing and analyzing of the evidence", and stray beyond the role of an expert into an advocate, are appropriately excluded: *Brough v. Richmond*, 2003 BCSC 512. Section 7.5 of the ASA, *Principles of Appraisal Practice and code of Ethics*, quoted above, provides that it is unethical for an appraiser to act as an advocate.
- n) Section 7.5 provides that it is unethical to provide "hasty and unconsidered opinions", which is what Ms. Nobles has done.

[181] The Defendants argue that Ms. Nobles' opinions are admissible, with the exception of those portions which merely relate to the rebuttal of those portions

of Mr. Metivier's opinions which are found to be inadmissible. They provide the following grounds for their position:

- a) Ms. Noble understood and fulfilled her role as an independent and impartial expert. Each report contains a confirmation of her independence and impartiality, as well as that her valuation is based on her research and analysis of the comparative market data. Also, at discoveries, she confirmed her understanding that she was to provide an objective opinion, and that she would have said if she agreed with Mr. Metivier's opinion.
- b) She "clearly notes the value approach she used in her report – the sales comparison approach." She stated in discoveries this involved comparing the careers and practices of comparable artists, with that of Mr. Brocke, rather than an "art piece to art piece" comparison. She was of the opinion that his career was comparable to that of Robert Young and Michael Thompson, whose works were selling for approximately what they sold for in the 1990's. She gave reasons for choosing them as comparables.
- c) The comments of Ms. Nobles regarding her reliance on Mr. Metivier's opinion, referred to by the Plaintiff, is taken out of context. Her discovery evidence shows she was saying she took into account Mr. Metivier's comments that he would price Mr. Brocke's works at the same level they had been selling at the Mira Godard Gallery.
- d) She did not provide her own future values for future works by Mr. Brocke because she found them to be "pure speculation".
- e) Ms. Nobles' second report rebuts specific assertions by Mr. Metivier. She outlines her reasoning and the facts relied upon. The specific rebuttals do not transform her opinions into arguments.
- f) She prepared her report in conformity with the International Society of Appraisers ("ISA"), *Uniform Standards of Professional Appraisal Practice*. She is not a member of the ASA.

[182] Before embarking on the Mohan and cost-benefit analysis, I will address the Plaintiff's submission that it was not proper rebuttal for her to rebut Mr. Metivier's comparison of Mr. Brocke's skills with those of Christopher Pratt, by discussing their respective reputations. Mr. Metivier's comparison of Mr.

Brocke's skill level to that of Mr. Pratt was not done in a vacuum. It was done so that he could be used as a comparable in determining art values. Reputation is also noted as being a relevant consideration in determining art values. As such, in my view, it was proper rebuttal for Ms. Nobles to highlight the difference between Mr. Brocke's reputation and that of Mr. Pratt as a distinguishing feature.

[183] The remaining portions of Ms. Nobles' opinions relate to the current value of Mr. Brocke's artworks had he lived and continued to paint. As I have already indicated, the jury requires expert opinion evidence to assist them in that area. Ms. Nobles is qualified to provide such an opinion. I am not aware of any applicable extraneous exclusionary rule. Such opinion evidence is, as already noted, logically relevant to the question of lost future income.

[184] I will pause to address the Plaintiff's submissions that:

- a) Her appraisal method is based on general market trends which is of no use to the Court; and,
- b) Her presentation of examples of two artists whose art prices decreased is irrelevant to whether or not Mr. Brocke's would increase.

[185] General market trends were just one of the factors she considered in formulating her opinion. In my view, considered in conjunction with other factors, it is a relevant, and likely important, factor to consider. She provided examples of two artists whose art prices decreased and who she considered to be proper comparables. The jury may not ultimately accept them as proper comparables. However, in her opinion they are. Therefore, they are, in my view, relevant to her assessment.

[186] The question which remains is whether its prejudicial effect outweighs its probative value.

[187] Valuation evidence is central to determining lost income. Therefore, provided it is sufficiently reliable it has significant probative value. The factors relevant to reliability include those which follow.

[188] Ms. Nobles explained the "sales comparison approach to valuation" she used. She noted the aspects of Mr. Brocke's career upon which she based her opinion. She considered general market trends. She compared Mr. Brocke to other artists who took time away from painting. She indicated what her opinion

was based on. These reveal that she followed a methodology in arriving at her opinion, rather than simply providing a conclusion with no specified rationale or foundation.

[189] In her rebuttal to Mr. Metivier's rebuttal of her initial opinion regarding Mr. Brocke's works not having appreciated in value since the 1990's she outlined the reasons why, in her opinion, the basis for Mr. Metivier's rebuttal opinion was flawed. She had already provided her own conclusion, and the basis for it. It was not necessary to repeat it. Though she did not specifically say so, she, in effect, was indicating why the points raised by Mr. Metivier did not alter her original opinion. The significance of Mr. Metivier's error regarding the price paid for the Senator Hays portrait ought to be obvious. It lowers the values relied upon by Mr. Metivier, which detracts support for his opinion and tends to confirm her initial opinion. Her reference to Mr. Metivier comparing Mr. Brocke to Ivan Eyre and noting that, in 1990, Mr. Eyre's prices were higher than they are now, is also self-evident. It indicates that even if Eyre is a proper comparison, the fact that his prices dropped since the 1990's supports her opinion that Mr. Brocke's prices would not have appreciated, and counters Mr. Metivier's opinion to the contrary. Considering this rebuttal, in conjunction with her original opinion, in my view, it does more than "point out inconsistencies and possible biases", and it does not amount to delving "into the weighing and analyzing of the evidence", and straying "beyond the role of an expert into an advocate", as was the case in *Brough v. Richmond*. In that case, the Court found the expert was in essence commenting on the "credibility or reliability" of a fact witness. That is not the same as referring to evidence to explain why it did not lead the expert to the same conclusion as that of the opposing party's expert. Considered in conjunction with the initial opinion, one can see the same methodology is continued.

[190] Given her experience as an art appraiser and consultant, Ms. Nobles possesses a significant level of expertise in the area of art valuation.

[191] The comments she made on discovery to the effect that it was not her role to include, in her rebuttal of Mr. Metivier's opinions, evidence that would support his opinion, is concerning and raises the danger she was acting as an advocate. However, she did confirm her understanding that she was to provide an objective opinion, and that she would have said if she agreed with Mr. Metivier's opinion. I must consider, as well, that her discovery examination started at about 10 a.m. and continued, with a one hour and ten minute break for lunch, to about 3:30 p.m. Throughout the examination there are many instances where the examiner would not let her explain, clarify or finish her responses. It

got to the point where she told the examiner that she felt he was “badgering” her and that it was making her “feel anxious”. Her response regarding her role on rebuttal was towards the end of her examination. Evidence was put to her with the suggestion it would have supported Mr. Metivier’s opinion, and impliedly should have been included by her. However, she explained that she did not consider that evidence relevant because of the speculative nature of determining Mr. Brocke’s future works. There was no confirmation of any particular evidence which would have supported Mr. Metivier’s opinion which she should have included. These points, considered together, in my view, suggest that Ms. Nobles was not completely cognizant of her role as an objective expert. However, they do not demonstrate that she was acting as an advocate. Her diminished understanding of her objective role detrimentally affects the reliability of her opinion. However, it was not shown that she left something out because it supported Mr. Metivier’s opinion, rather than because she did not feel it was relevant. In her opinion, the value of Mr. Brocke’s art was not increasing, so she would not state that. As such, it does not substantially diminish the reliability of her opinions.

[192] I agree with the Defendants that the reference to Ms. Nobles basing her opinion on that of Mr. Metivier, without saying so in her report is taken out of context. A review of the discovery evidence does show she was saying she took into account Mr. Metivier’s comments that he would price Mr. Brocke’s works at the same level they had been selling at the Mira Godard Gallery. In my view, that does not demonstrate a lack of candour, nor impair her credibility, or reliability.

[193] I agree with the Plaintiff that Ms. Nobles could have conducted more research, and that would have made her opinions more reliable. However, I cannot agree that her opinions were “hasty and unconsidered”. I already discussed her methodology and what she considered. She reviewed significant materials in formulating her opinion. Some relevant information was not provided by the Plaintiffs in time, so it could not be considered, through no fault of Ms. Nobles. Therefore, in my view, the availability of additional research avenues is something which has more impact in determining weight, than at this threshold determination of reliability.

[194] Considering these factors, I find Ms. Nobles’ opinions to be somewhat reliable and of more than minimal probative value.

[195] I will now examine the prejudicial effect of the evidence on the fairness or integrity of the trial.

[196] The methodology, rationale and bases for Ms. Noble's opinions, in my view, can be followed and critically assessed by the jury. Cross-examination can highlight: any relevant considerations or information, including other comparables, she neglected; any underlying factual assumptions that turn out to be exaggerated or not supported by the evidence; any flaws in her reasoning; and, any other defects in her opinion. The Plaintiff has three experts to assist her in crafting such a cross-examination. The jury can consider such defects in determining how much weight to accord to her opinions. There are other expert opinions which differ from hers. Her evidence is, in my view, not complicated or misleading. It is relatively straightforward. Considering these points, in my view, there is no significant danger that the jury will accept her opinion without critical assessment, and abdicate its role as triers of fact.

[197] If the length of the discovery examination is any indication, the cross-examination of Ms. Nobles will likely take a fair amount of trial time. However, given that it is relatively reliable and related to a central issue, in my view, the time it will consume is "commensurate with its probative value".

[198] Considering these factors, I am of the view that the probative value of Ms. Nobles' remaining opinion evidence outweighs its prejudicial effect, and, that it is therefore admissible.

6. EXPERT OPINION EVIDENCE OF JESSIE SHAW GMEINER

[199] Jessie Shaw Gmeiner, an actuary who has provided expert opinion evidence a multitude of times throughout Atlantic Canada, prepared an actuarial report dated October 28, 2011, on behalf of the Plaintiff, to "place a lump sum dollar value on the financial loss sustained by" her.

[200] The Defendants submit her opinion evidence should be excluded or limited to the presentation of the actuarial tables on the grounds which follow. It relies on Mr. Metivier's plan as its underlying assumption, which is too speculative to be used and effectively argues the Plaintiff's position thus lacking objectivity and having a prejudicial effect. She also engages in presenting argument against Ms. Nobles' opinion which is beyond her role. It is not necessary to assist the jury. They can assess the damages based on direction from the judge.

[201] The Plaintiff submits the opinion should be admitted on the grounds which follow. Actuarial evidence is necessary in cases of future loss of support. There

is some evidence to support her underlying assumptions. Whether, and to what extent, those assumptions are proven at trial will affect the weight of the opinion. In determining income loss based on a future career scenario not yet in stream, a reasonable chance of the scenario materializing is all that is needed to bring it into play, with the jury being left to determine what that chance is. The portion of the report challenging Ms. Noble's report can be excised.

[202] At pages 17 and 18 of her report she engages in argument countering the conclusions reached by Ms. Nobles in her report regarding the value of Mr. Brocke's artwork and his future productivity. In my view, she is not qualified to provide expert evidence in relation to art values and future productivity of artists. In addition, her comments amount to arguing the Plaintiffs case, revealing some straying into advocacy and lack of objectivity. Therefore, those portions of her report challenging Ms. Nobles' opinion are clearly inadmissible and are to be struck.

[203] In *MacNeil v. Gillis* (1995), 138 N.S.R.(2d) 1 (N.S.C.A.), the Court, at paragraph 240, stated:

“Although an assessment of damages in fatal injuries cases is not a mathematical exercise, nevertheless, the application of reasonable assumptions and the use of actuarial calculations are clearly necessary as a base in order to determine what would be reasonable compensation for loss of future financial support arising from the death of a spouse in any given case.”

[204] I also add that, in my view, without the assistance of an actuary, the jury is unlikely to form a correct judgement regarding the use and application of contingencies. I agree with the Plaintiff that actuarial evidence is necessary in the case at hand.

[205] However, it is not necessary that the actuarial evidence rely on Mr. Metivier's plan in estimating likely future output, which is what Ms. Gmeiner noted at page 2 that she did. Then, at page 14, she stated that “in estimating what income Mr. Brocke may have realized from his work subsequent to 2009, [she] relied on the report dated July 12, 2011 from Nicholas Metivier.” She then proceeded to quote the entire portion of Mr. Metivier's report which outlines his: marketing and development plan; estimates as to future pricing; and, opinion as to production. I have already found those portions of Mr. Metivier's opinion evidence to be inadmissible.

[206] In my view, the prejudicial effect of Ms. Gmeiner endorsing Mr. Metivier's plan, and choosing it over the opinion of Ms. Nobles is significant. At page 30

of her report, Ms. Gmeiner specifies that the assumptions in her report “were selected by [her] and, in [her] opinion, are appropriate for the purposes of the calculations set out”. That implies that she considers the opinion of Ms. Nobles to be less appropriate. She is not an expert in the field of art and her selecting one opinion over the other, imports the risk of improperly influencing the jury in their determination of which, if any, art expert opinion to accept. Further, the mere additional repetition of the Metivier plan has the prejudicial effect of tending to reinforce its credibility and reliability.

[207] She notes, at page 18 of her report, that the calculations have been structured “to readily permit a variation in the number and size of paintings produced and the value of same, should alternate calculations be required”. Therefore, she can use any reasonable scenario to illustrate to the jury how the calculations work. Both scenarios she uses fall within the range of Mr. Metivier’s production estimates. The difference between the two is that one uses only inflation increases, while the other uses Mr. Metivier promotion plan price increases. She does not have to use scenarios which import Mr. Metivier’s estimates of production and/or pricing. It adds no probative value to the actuarial opinion. The jury is to determine the probability of lost future income from the sale of art based on their own analysis of the evidence, and of the opinions of the art experts assisting them.

[208] Considering these points, I am of the view that the prejudicial effect of selecting Mr. Metivier’s plan (including production estimates) over the opinion of Ms. Noble, and using it for her calculation examples, outweighs its probative value. Therefore, I find those portions of her opinion evidence which promote the acceptance of Mr. Metivier’s plan are inadmissible. However, to assist the jury in better understanding the actuarial calculation process, I would permit the substitution of neutral examples to demonstrate the calculation process.

7. EXPERT OPINION EVIDENCE OF JERILYNNE ERICKSON

[209] Jeri Lynne Erickson has been a psychotherapist/counsellor since 1991. She provided an expert opinion report dated May 30, 2012 as to:

1. The nature of the relationship between Ms. Gardner and her husband, John Brocke, prior to his death;

2. The impact that her husband's death had on Ms. Gardner and how she is coping with that; and,
3. Whether Ms. Brocke will require ongoing counselling and, if so, the frequency, duration and cost of future counselling sessions."

[210] The Defendants object to the admissibility of the report on the grounds which follow. The jury can assess the evidence of fact witnesses, including Ms. Gardner, and determine the nature of the relationship between her and Mr. Brocke without the assistance of an expert. Therefore, the expert opinion on that point is not necessary. The remainder of the opinion is irrelevant because neither cost of care, nor grief, are compensable heads of damages under the *Fatal Injuries Act* or the *Survival of Actions Act*. Such evidence would have a prejudicial effect.

[211] The Plaintiff submits that the evidence is admissible on the grounds which follow. It is relevant to loss of care, guidance and companionship because the effect of the loss is "one measure of the depth of the relationship". Although Ms. Gardner cannot claim for grief, she may claim for grief counselling. In support of this last contention, she quotes from Cooper-Stephenson, *Personal Injury Damages in Canada*, at page 654. The passage quoted refers to recovery for grief counselling being expressly authorized by the applicable statutes in Alberta and Saskatchewan. Any prejudicial effect can be managed through a proper instruction to the jury.

[212] I agree with the Defendants that the jury does not need expert evidence to determine the nature of the relationship between Ms. Gardner and Mr. Brocke. In my view, they can reasonably be expected to possess the knowledge and experience required to make that determination based on the fact evidence of Ms. Gardner and anyone else who had direct knowledge of their relationship. Therefore, the expert evidence on that point is not necessary.

[213] Ms. Erickson's opinion, regarding the impact of Mr. Brocke's death, how Ms. Gardner is coping, and the need for ongoing counselling, focuses on the grief she has experienced. Contrary to the Plaintiff's submissions, I am of the view that neither grief, nor grief counselling, are compensable in wrongful death cases in Nova Scotia: *Rowe v. Brown*, 2008 NSSC 13, paragraphs 44 to 48. Grief and loss of care, guidance and companionship are separate issues. One might expect little or no care, guidance or companionship from the deceased and yet suffer extreme grief, such as with the loss of a child who was living abroad. Conversely, a person may be so self-absorbed and self-centered,

or so challenged in some way, that they required constant care, guidance and companionship prior to the wrongful death, yet are unable to grieve. Also, a widowed person who was the partner providing the most care, guidance and companionship in the relationship could easily suffer the greater grief on the loss of the other. It would, in my view, be unusual for a widowed spouse not to experience grief. Therefore, in my view, expert evidence relating to grief has minimal probative value in relation to the question of loss of care, guidance and companionship.

[214] In my view, only one sentence in the report touches on the question of loss of care, guidance and companionship. It is at the end of the second paragraph on page 4 and states:

“Because she is someone who is guided by her heart, in my opinion the crippling loss of her deep love forces her to face life with her greatest strength not available to her.”

[215] This sentence was included as part of the discussion on Ms. Gardner’s grief. It is not the culmination or product of any analysis relating to loss of care, guidance or companionship. As such it is minimally probative.

[216] The jury is unable to critically assess this one sentence in the opinion because there is no process or methodology outlined to explain how she concluded Ms. Gardner is guided by her heart, nor why that, in particular, is something “which forces her to face life with her with her greatest strength not available” now that she has lost Mr. Brocke. In addition, there is no process or methodology explained to show how she concluded Mr. Brocke was “her greatest strength”. It appears to be simply a sentence, thrown into the middle of her discussion on grief, using evocative language. As such, it is of diminished reliability and cannot be properly critically assessed by the jury.

[217] The opinion recites a lot of information that appears to have been provided to Ms. Erickson by Ms. Gardner. It is likely that much of that information will be consistent with the fact evidence at trial. That means it will be evidence of a prior consistent statement, and, thus, oath helping. That raises the danger of the jury using the evidence for an impermissible purpose and distorting the fact-finding process.

[218] In my view, the probative value of the evidence is minimal, and the trial time the opinion will consume is not commensurate with that probative value, even if it only takes a few hours.

[219] Considering these factors, I am of the view that the prejudicial effect of Ms. Erickson's opinion outweighs its probative value. Therefore, I find it to be inadmissible.

D. CONCLUSION AND ORDER

[220] Based on the foregoing, I find the following portions of expert opinion evidence to be **inadmissible**:

1. Mr. Metivier's opinion evidence:
 - a. Regarding future production, prices and saleability;
 - b. That "Mira Godard did a wonderful job establishing a market for Brocke's paintings", and, "By any standards the sale of a painting for \$52,000 [in 1990] by a 39-year-old artist was extraordinary";
 - c. Regarding the significance of representation by the Mira Godard Gallery; and,
 - d. Regarding the impact of Mr. Brocke taking extended time away from painting on the market for his paintings.
2. The portion of Mr. Metevier's evidence rebutting the opinion evidence that Mr. Brocke's art would remain at the values it reached in the 1990's, and his appraisal opinion for the CCPERB, at the third page of the appraisal for the CCPERB, where Mr. Metivier: refers to being contacted by Ms. Gardner to prepare a report on the future for Mr. Brocke's career ; the "scenario/business plan [he] gave the lawyers"; and, his marketing and promotion strategy.
3. The opinion of Mira Godard, related by Mr. Metivier.
4. All of Jeffrey Spalding's Report except:
 - a) The portion of Question #1 which answers Question #6 , with any references to Mr. Brocke being an exceptional artist removed; and,

- b) The opinion he gave in response to Question #15.
5. The following portions of Ms. Nobles' rebuttal opinions:
 - a. All the opinions in her 2011 report **except** those at page 4, which contains Ms. Nobles' rebuttal to Mr. Metivier's rebuttal opinion regarding whether Mr. Brocke's works would have appreciated in value since the 1990's, including the opinions in his appraisal for the CCPERB which he incorporated by reference. In addition, there is one comment at page 6, under the "Further Comments" section which relates to Mr. Metivier's report to the CCPERB and is admissible. That is the comment which states: "Neither Christopher Pratt's not {sic} Ivan Eyre are comparable to Brocke in terms of national recognition, awards, exhibition history, or bibliography." However, the references, at page 4, to Mr. Metivier's plan, are rebuttals to that inadmissible part of Mr. Brocke's opinion. As such, they are not admissible.
 - b. All references and responses in her 2010 report to Mr. Metivier's opinions regarding future productivity, prices and saleability, many of which are interspersed within the admissible portions.
 - c. The first three rebuttals to comments by Mr. Metivier at pages 5 to 8 of her 2010 report, with one exception. At pages 7 and 8 she makes comments distinguishing Mr. Brocke's reputation from that of Christopher Pratt which are admissible.
 - d. The section entitled "Auction Prices for Artists who Metivier compared to Brocke" at page 10 of her 2010 report.
 - e. The portions, in the segment of her 2010 report commencing at page 8 which is noted as being in rebuttal to Mr. Metivier's opinion regarding the future market he would develop for Mr. Brocke, which refer or respond to Mr. Metivier's predictions of, or plans for, future Brocke price increases, including the paragraph presenting Thompson's works "as evidence that only paintings by a very few artists achieve prices in the \$100,000 plus range".
 6. The portions of Jessie Shaw Gmeiner's report

- a. Challenging Ms. Nobles' opinion; and,
- b. Promoting Mr. Metivier's plan (including production estimates), selecting it over the opinion of Ms. Noble, and using it for her calculation examples, thus promoting its acceptance.

7. The entire report of Jeri Lynne Erickson.

[221] I ask that the Defendant's counsel prepare the order.

E. COSTS

[222] If the parties cannot agree on the costs of this motion, arguments on that issue may be submitted in writing.

Muise, J