EXPERT WITNESS EVIDENCE IN CIVIL CASES

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The use of expert evidence is being subjected to ever increasing scrutiny by the courts and such testimony appears to be meeting with more resistance than has previously been the case. In our adversarial system, it is perhaps inevitable that experts are often recruited to serve as advocates for the cause of the party who retained them. Often, an expert is put forward to clothe the inferences, even speculations, that a party would like the trier of fact to adopt with a measure of legitimacy and objectivity which such extrapolations from provable facts would not otherwise possess. There is a serious issue as to whether such evidence is unhelpful, or even dangerous. The involvement of an expert in a matter may also backfire by creating for counsel requirements to disclose information and produce documents that they may otherwise not be required to disclose. Finally, there is the problem of the time and money that must be spent dealing with "expert" evidence in an already over-burdened court system.

The purpose of this paper is to explore the following issues:

1. Under what circumstances can an expert witness be called to give evidence;

2. What level of independence is required of an expert witness; and

3. To what extent may experts be required to disclose communications, preliminary findings or draft reports which precede the preparation of their final report and which might otherwise be privileged?

1. OVERVIEW

(1) Admissibility

The principles set out in the Supreme Court of Canada's decision in *R. v. Mohan*[1] determine whether or not a party's application to tender the testimony of an expert witness will be granted. According to *Mohan*, in order for an expert's opinion to be admissible four criteria must be satisfied: (a) the testimony must be relevant; (b) it must be necessary; (c) there must be no exclusionary rule prohibiting its admission; and (d) the expert must himself or herself be properly qualified to give the opinion.

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[1] (1994) 114 D.L.R. (4th) 419 [1994] 2 S.C.R 9.89 C.C.C. (3D) 402

The admission of expert evidence is an exception to the rule against witnesses testifying as to their opinion. Expert testimony is received only in exceptional cases where the jury or judge would be unable to reach their own conclusions in the absence of assistance from experts with special knowledge.[2] Judges measure the usefulness of expert evidence against the reality that expert evidence is time consuming and expensive, and will not allow a party to call unnecessary evidence of experts which does not meet the test of necessity.[3]

(2) Independence

There are clear rules governing the conduct of expert witnesses. These rules govern not only the manner in which an expert is to come to his or her opinion, but also the manner in which an expert is to deliver that opinion on the witness stand.

Regardless of whether the case is being heard before an administrative tribunal or a court, expert witnesses are expected to understand that they must present an impartial and objective opinion of the inferences to be drawn from the facts. A party to any legal proceeding who seeks to proffer expert testimony to serve its own purposes should not lose sight of the obligations the requirement of objectivity imposes, both on the expert in question and the party who retains him or her.

(3) Privilege

The rules with respect to what materials compiled and prepared by the expert must be made available to opposing counsel have become much clearer in recent years and favour extremely broad disclosure. Nevertheless, a definitive statement of the rules at the appellate level is still needed.

Given the trend in recent case law and the influence of the requirements of independence and objectivity, counsel would be well advised to approach all communications with experts on the assumption that they will be disclosed, in substance if not through documentary disclosure, if the expert is called to testify.

2. APPLICABLE LEGAL PRINCIPLES

(1) Admissibility

The first step in discussing the admissibility of expert opinion evidence is the examination of the criteria in *R. v. Mohan.*[4]

Given the importance of this four-part test in the introduction of expert testimony, each element is discussed in detail below.

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[2] *R. v. D. (D.)*, [2000] 2 S.C.R. 275, 191 D.L.R. (4th) 60, [2000] 2 S.C.R. 275, 136 O.A.C.201
[3] *Mayfield v. Mayfield* (2001), 18 R.F.L. (5th) 328 (Ont. S.C).
[4] *Supra* footnote 1.

(a) Relevance

As with all types of evidence tendered at a legal proceeding, the evidence of an expert witness must be related to a fact in issue such that the establishment of that fact is more likely than if the expert evidence were not given.[5] In addition, the probative value of the evidence must be weighed against its prejudicial effect.[6] Expert testimony leads to unique concerns regarding prejudice. As the Supreme Court stated in *Mohan*:

> 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.[7]

This special concern led the court to apply the two-part analysis previously seen in the Ontario Court, General Division, in *R. v. Melaragni*[8]:

> (a) Is the evidence likely to assist the jury in its fact-finding mission, or is it likely to confuse and confound the jury?
>
> (b) 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?[9]

Further consideration of the 'cost/benefit' analysis that arose in Mohan was seen in the Ontario Court of Appeal case of *R. v. K. (A.)*[10], where the following questions were listed as being helpful to the analysis:

> 1) To what extent is the opinion founded on proven facts?
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> 2) To what extent does the proposed expert opinion evidence support the inference sought to be made from it?
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> 3) To what extent is the matter that the proposed evidence tends to prove an issue in the proceedings?
>
> 4) To what extent is the evidence reliable?
>
> 5) What is the level of complexity of the proposed expert evidence? Is it easily understood or is it likely to confuse the average juror?
>
> 6) To what extent is it controversial? Will it require lengthy cross-examination by the other party or the calling of other experts in response?[11]

Therefore, both the reliability of the testimony, and its impact on the proceedings, will be considered in weighing the relevance and overall benefits of expert testimony.

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[5] R. J. Delisle, *Evidence: Principles & Problems*, 5th ed. (Scarborough, Ont.: Carswell, 1999).
[6] *Ibid*.
[7] *Supra* note 1 at 428.
[8] (1992), 73 C.C.C. (3d) 348 (Ont. Ct. (Gen. Div.). at p.353
[9] *Ibid*. at 353.
[10] (1999), 45 O.R. 3d 641, 176 D_L.R. (4th) 665, 137 C.C.C. (3d) 225 (C.A.), leave to appeal quashed 184 D.L.R. (4th) vii.
[11] *Ibid*. at paras. 80-88.

(b) Necessity to the Trier of Fact

The Supreme Court in *Mohan* replaced the earlier standard of 'helpfulness' established by *R. v. Abbey*[12] with the requirement of necessity by stating that:

> The word "helpful" is not quite appropriate and sets too low a standard. 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"… the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature… the 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.[13]

R. v. K. (A.),[14] provided the following alternative questions:

> 1) Will the proposed expert opinion evidence enable the trier of fact to appreciate the technicalities of a matter in issue? or
>
> 2) Will it provide information which is likely to be outside the experience of the trier of fact? or
>
> 3) Is the trier of fact unlikely to form a correct judgment about a matter in issue if unassisted by the expert opinion evidence?[15]

A similar approach was taken in *R. v. N. (R.A.)*,[16] where the Alberta Court of Appeal, citing *Mohan*, stated that:

> [t]o be necessary, the evidence must provide information which is likely to be outside the expertise and knowledge of the trier of fact. The subject matter of the proposed expert evidence must be such that ordinary people would be unlikely to form a correct conclusion without the assistance of an expert with special knowledge.[17]

It has been argued that that the decision of the Supreme Court in *R. v. D. (D.)*[18] may have altered the test to be used in the determination of the necessity requirement.[19] This suggestion arises from the fact that the court, in the course of its decision, adopted the following quotation from Professor Paciocco:

> As the *Mohan* Court explained, the four-part test serves as a recognition of the time and expense that is needed to cope with expert evidence. It exists in

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[12] [1982] 2 S.C.R. 24, 138 D.L.R (3d) 202, 68 C_C.C. (2d) 394.
[13] *Supra* note 1, at 429.
[14] *Supra* note 10.
[15] *Ibid.* at para. 92.
[16] (2001), 277 A.R. 288, 152 C.C.C. (3d) 464, 242 W.A.C. 288 (C.A.).
[17] *Ibid*. at para. 17.
[18] *Supra* note 2.
[19] P. L. Roy, "Is an Expert Appropriate?" (paper presented at the Law Society of Upper Canada Continuing Legal Education Seminar, Administrative Law and Practice*: Beyond the Basics*, Chair: Melanie L. Aitken, Osgoode Hall, Toronto, 21 March 2002) [unpublished].

> appreciation of the distracting and time-consuming thing that expert testimony can become. It reflects the realization that simple humility and a desire to do what is right can tempt triers of fact to defer to what the expert says. It even addresses the fact that with expert testimony, lawyers may be hard-pressed to perform effectively their function of probing and testing and challenging evidence because its subject matter will often pull them beyond their competence, let alone their expertise. This leaves the trier of fact without sufficient information to assess its reliability adequately, increasing the risk that the expert opinion will be simply attorned to. When should we place the legal system and the truth at such risk by allowing expert evidence? *Only when lay persons are apt to come to a wrong conclusion without expert assistance*, or where access to important information will be lost unless we borrow from the learning of experts. As *Mohan* tells us, it is not enough that the expert evidence be helpful before we will be prepared to run these risks. That sets too low a standard. It must be necessary.[20]

Although a slight distinction, between 'lay persons are apt to come to a wrong conclusion'; and 'ordinary people are unlikely to form a correct judgment', does exist, it would seem to be an overstatement to claim that '[t]he test suggested by Professor Paciocco and adopted by the Supreme Court in *R. v. D. (D.)* appears to… establish a much higher threshold than that suggested by Justice Sopinka in *Mohan*.'[21] Further, although the argument could be raised in court that the bar has now been raised, *R. v. D.(D.)* repeatedly quoted *Mohan* as the source of the necessity test. Finally, it was only in the included quotation (which was itself in a summary section) that any variation at all was seen from the precise wording of *Mohan*, and the included quotation was meant to be a summary of the law arising from *Mohan*. Therefore, it is unlikely that the Court intended to establish an even stricter standard of necessity than had been laid down by *Mohan*. [22]

(c) The Absence of an Exclusionary Rule

Expert testimony, with the obvious exception of the rule against opinion evidence, is subject to the same exclusionary principles as other testimony. As the Court said in *Mohan*: "Compliance with criteria (a) [relevance], (b) [necessity] and (d) [a properly qualified expert] will not ensure the admissibility of expert evidence if it falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself.[23]

For example, in *Mohan*, the Court undertook a detailed analysis of the rule against evidence as to a person's disposition to commit an act or crime, as it stood then, to determine the admissibility of the evidence of a psychiatric expert.

A common problem with the testimony of experts is that they must often rely upon hearsay evidence in the development of their opinions. Courts have, over the years, dealt with the

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[20] *Supra* note 2. At pp. 82 and 83 (emphasis added), quoting from D. Paciocco, "Expert Evidence:Where Are We Now? Where Are We Going?" (1998). at pp. 16-17

[21] *Supra* note 19, at 3-20.

[22] For Case that quotes from both *Mohan* and *R v. D.(D)* at length see *Johnstone v. Brighton* (2004) R.F.L. (6th) 288, 2004 CarswellOnt 3229 (Ont. S.C.J.) The standard of necessity and the cost benefit analysis set out in R v. D(D) are expressly affirmed after quoting extensively from both cases, including setting out the expert from Professor Paciocco referred to in the paper

[23] *Supra* note 1 at 430.

reliance upon hearsay in a variety of ways. This has ranged from accepting the evidence in its entirety,[24] to admitting the evidence, but giving it weight only where the facts upon which the opinion is based were found to exist,[25] to refusing to admit the evidence at all.[26] In *R. v. Lavallee,*[27] Wilson J., for the majority of the Supreme Court of Canada, interpreted *Abbey* to stand for the following four-part test:

> 1) An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
>
> 2) This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
>
> 3) Where the [expert] evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
>
> 4) Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.[26]

The test above has been followed for the most part in the subsequent case law.[27] The test arose from the argument that if an entire expert opinion were based on inadmissible hearsay, the opinion would be entitled to no weight, but would still be admissible, a possibility which is seemingly contradictory.

In the course of concurring with the result of Wilson J. in *Lavallee*, Sopinka J. attempted to resolve what he saw as this self-contradictory[28] aspect of the *Abbey* decision. He commented that there had to be a "practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in *City of Saint John*,) and evidence that an expert obtains from a party to litigation touching a matter directly in issue (as in *Abbey*)".[29]

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[24]Courts accepted the evidence based upon the premise that the commonly-accepted methods necessitated dependence on hearsay, and refusing the evidence would deny courts of opinions in situations where they were required. *R. v. Lupien*, [1970] S.C.R. 263, 9 D.L.R. (3d) 1, [1970] 2 C.C.C. 193; see also St. John (City) V. Irving Oil Co., [1966] S.C.R. 581.58 D.L.R. (2d) 404

[25] *R. v. Abbey, supra,* note 13, at p.46:"While…experts are entitled to take into consideration all possible information in forming their opinions, this in no way removes from the party tendering the evidence the obligation of establishing, through properly admissible evidence, the factual basis on which such opinions are based. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist."

[26] *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97, 138 O.A.C. 201 *sub nom*. *Marchand v. Public General Hospital Society of Chatham*, 43 C.P.C (5th) 65 (C.A.), leave to appeal to S.C.C. refused 156 O.A.C. 358n; *Sackville Manor Ltd. v. Halifax (County),* [1997] N.S.J. No. 206 (QL). 160 N.S.R. (2d) 156 (C.A.).

[27] [1990] 1 S.C.R. 852. 55 C.C.C. (3d) 97. [1990] 4 W.W.R.1.

[26] *Ibid*. at p.893.

[27] See: *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham supra* footnote 26, at para 60; *R. v. L.* (M.C.)(1997), 193 A.R.304 at para 36. 135 W.A.C.304 (C.A.) application for leave to appeal to the Supreme Court of Canada refused [1997] S.C.C.A. No.171; *R v. Newman* (1994). 115 Nfld. & P.E.I.R. 197 (C.A.) at para 141; and *R v. Giesbrecht* (1993), 85 Man. R. (2d) 69, 91 C.C.C. (3d) 230, at p.231, 41 W.A.C 69 (C.A.), affd [1994] 2 S.C.R. 482.91 C.C.C. (3d) 230, 70 W.A.C. 309.

[28] *Supra* note 27 at 898: "it seems to me that the very special facts in *Abbey*, and the decision required on those facts, have contributed to the development of a principle concerning the admissibility and weight of expert opinion evidence that is self-contradictory."

[29] *Ibid*.

The above comment, and in fact, the entire debate over the internal contradictions of *Abbey* may be moot, as both *Lavallee* and *Abbey* were decided prior to the adoption of the "principled approach"[30] to the evaluation of hearsay evidence introduced in *Khan*[31], *Smith*[32] and *B. (K.G.).*[33] It seems obvious that the court should relax the application of the approach set out in *Lavallee* in cases in which the underlying hearsay evidence is accepted as complying with the principles of necessity and reliability expressed in the *Khan* and *Smith* cases. However, courts will likely continue to be alert for situations in which expert evidence is being used to prove material and controverted facts for which direct evidence should be made available and subjected to the crucible of the trial process.

Parties will want to ensure that there is a clear distinction at all times between the facts upon which the opinion is based and the opinion itself. In addition, opinion evidence should not be used as a way of establishing facts which can be proven by more direct evidence.[34]

(d) A Properly Qualified Expert

The Court in *Mohan* described a 'properly qualified' expert as a person who "is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify."[35]

(e) Novel Science

The admission of a scientific expert's evidence is also dependant on the nature of the science to which the expert is testifying. Differing factors will be considered in cases where an expert intends to base his or her opinion on novel science, as compared to cases where an expert bases his or her opinion on established scientific principles. In proffering an expert opinion, a witness must not only have a scientific basis for that opinion, but must state in the opinion what that basis is. In the context of an opinion based on established and recognized scientific techniques, it will be up to the court to determine, based on the *Mohan* factors, whether evidence might be admitted, and if so, what weight it shall be accorded.

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[30] In *R. v. Starr*, [2000] 2 S.C.R. 144 at para. 153, 190 D.L.R. (4th) 591, 147 C.C.C. (3d) 449, the majority (Iacobucci, Major, Binnie, Arbour and LeBel JJ.) described the current hearsay analysis in the following manner:
Recently, as noted in *Smith*, *supra* at p. 932, this Court has moved in a new direction by adopting a principled approach to hearsay 'governed by the principles which underlie the rule and its exceptions alike'. According to this approach, hearsay evidence may be admissible, notwithstanding the inapplicability of the categorical exceptions on the facts of the case, provided the criteria of necessity and reliability set out in *Khan* are met.
The majority went on to say that it would compromise trial fairness and raise the spectre of wrongful convictions if the Crown were allowed to introduce unreliable hearsay evidence against the accused, even if it fell within an existing exception. McLachlin C.J. (Bastarache J. concurring), dissenting on a different point, agreed that existing exceptions would have to meet the new standards of necessity and reliability, only L'Heureux-Dubé and Gonthier JJ. dissented on this point. See D. Stuart, Starr and Parrott: Favouring Exclusion of Hearsay to Protect Rights of Accused, [2001] 39 C.R. 5th 284.

[31] *R v. Khan* [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, 41 Q.A.C.353.

[32] *R v. Smith* [1992] 2 S.C.R. 915.94 D.L.R. (4th) 590, 75 C.C.C. (3d) 257.

[33] *R v. B. (K.G.).[*1993] 1 S.C.R. 740, 79 C.C.C. (3d) 257.61 Q.A.C.1

[34] See *Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd*. (1995), 37 C.P.C. (3d) 119.95 F.T.R. 43 (T.D.) at para. 4: "under the rubric of opinion, facts are asserted which do not need to be proven by an expert because there is other evidence which establishes them."

[35] *Supra* note 1 at p.431.

Expert opinion based on a novel scientific principle or technique will be subject to 'special scrutiny', as stated by the Supreme Court in *R. v. J. (J.-L.)*[36] the trial judge must exercise a "gatekeeper role" particularly when novel scientific principles or techniques are involved. In that case, the accused attempted to prove he was not sexually deviant through the use of expert testimony. The expert had used a novel scientific technique in measuring the accused's response to images and sounds of sexual activity. The court revisited *Mohan*, and stated:

> Mohan kept the door open to novel science, rejecting the "general acceptance" test formulated in the United States in *Frye v. United States*[37], and moving in parallel with its replacement, the "reliable foundation" test more recently laid down by the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[38,39]

Quoting *Daubert*, the court set out the following factors to consider in determining the admissibility of expert opinion when the techniques underlying it are novel:

> (1) whether the theory or technique can be and has been tested:
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> Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.
>
> (2) whether the theory or technique has been subjected to peer review and publication:
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> [S]ubmission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected.
>
> (3) the known or potential rate of error or the existence of standards; and,
>
> (4) whether the theory or technique used has been generally accepted:
>
> A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.
> . . .
> Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique which has been able to attract only minimal support within the community," . . . may properly be viewed with skepticism.[40]

The *Daubert* analysis allowed courts to attempt to avoid what was seen by some as the "potentially capricious" nature of the *Frye* analysis, namely that it "excludes scientifically reliable evidence which is not yet generally accepted, and admits scientifically unreliable evidence which, although generally accepted, cannot meet rigorous scientific scrutiny."[41] The approach in *Daubert* requires that courts have an expanded role in the analysis of expert

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[36] [2000] 2 S.C.R. 600,192 D.L.R. (4th) 416, 148 C.C.C. (3d) 487.
[37] 293 F. 1013 (D.C. Cir. 1923)
[38] 509 U.S. 579 (1993)
[39] *Supra* note 38 at para. 33.
[40] *Ibid*.
[41] Bruce R. Parker, Michele R. Kendus & David S. Gray, "A Decade of Daubert, Keeping the Gate Closed on Junk Science" (paper presented to the International Association of Defence Counsel Annual Meeting, June 30, 2003) [unpublished].

evidence, as they must move beyond establishing whether or not a methodology is generally accepted, and actually evaluate the methodology for scientific integrity. This is consistent with the expanded role of the courts as gatekeepers of expert testimony established by *Mohan*.

Although the Supreme Court of Canada and the US Supreme Court claim to have rejected the approach in the *Frye* case, in fact a synthesis of US and Canadian case law, including Frye is possible. Ultimately, it is a lack of "general acceptance" that brings expert evidence into the category of novel science and qualifies it for special scrutiny. When novel science is subjected to special scrutiny, any deficiencies in terms of scientific procedures and validated results, as more specifically articulated in *Daubert,* will raise concerns regarding its "reliability".

In turn, it is the lack of reliability of such evidence that leads to the conclusion that it is unhelpful. This is because the admission of such evidence would result in the trier of fact potentially placing unjustified "weight" on the evidence. In that sense, consideration given to the evidence and any evidence led to rebut it in the trial process would result in costs that are not commensurate with its value. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this approach. [42]

In *R v. Terceira*[43]*,* Finlayson J.A. declined to lay down a structure that must be adhered to at every *voir dire* held to determine the admissibility of evidence involving novel scientific theory or technique. Rather, he called for a flexible approach for the purposes of efficiency.[44] In addition, Finlayson J.A. confirmed that the standard of proof with respect to the admissibility of novel science evidence is on a balance of probabilities, as opposed to a new standard of proof specifically for novel scientific theory or technique.[45] Finally, Finlayson J.A. emphasized that the analysis must focus on the methodology used to arrive at the purported conclusions of the evidence, as opposed to an assessment of its perceived reliability.[46]

The recent Supreme Court of Canada decision of *R.v. Trochym*[47] continues with the clear trend of judicial scrutiny with respect to novel scientific techniques. Applying the principals of *Mohan* and *J. (J-L),* the court rejected the admissibility of evidence of memory revived by hypnosis. The court found that "while hypnosis has been the subject of extensive study and peer review, much of the literature is inconclusive or highly contradictory regarding the reliability of the science in the judicial context".[48]

(f) Conclusion re Admissibility

Although refined from time to time to fit specific facts, the four *Mohan* principles are still the law in Canada with respect to the admissibility of expert testimony.[49] The opinion of a properly

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[42] *Supra* note 1 at p. 25.
[43] *R v. Terceira* (1998), 38 O.R. (3d) 175, 123 C.C.C. (3d) 1, 107 O.A.C. 15 (C.A.), aff'd [1999] 3 S.C.R. 866, 142 C.C.C. (3d) 95, 129 O.A.C. 283.
[44] *Ibid*. at p. 190.
[45] *Ibid*. at p. 196.
[46] *Ibid*. at p. 184.
[47] *R. v. Trochym*, 2007 SCC 6,
[48] *Ibid.* at para. 61.
[49] *R v. Osmar* (2007), 44 C.R. (6th) 276, 217 C.C.C. (3d) 174, 220 O.A.C. 186, 84 O.R. (3d) 321, 150 C.R.R. (2d) 301 (Ont. C.A.);*R v. Abbey* (2007), CarswellOnt 376 (S.C.J.) (also discusses novel science and duties of the expert); *R v. Woodcock* (2006), CarswellOnt 8350

qualified expert must be viewed as being relevant and necessary to the trier of fact, and must not violate an exclusionary rule in order to be admissible. It is only in the determination of what the precise meaning of each of the four *Mohan* principles will be in each case that room for argument remains.

(2) Independence

An important consideration of many courts in the course of admitting and weighing expert testimony is the independence exhibited by the expert in the preparation of his or her report. In this respect, the *Ikarian Reefer*[52] decision of the English Court of Queen's Bench (Commercial Court) is frequently cited. In the *Ikarian Reefer*, in the course of deciding the legal obligations arising from a shipboard fire, the Court listed what it considered to be the most important principles to be used in evaluating the duties and responsibilities of expert witnesses in a civil trial. Although not adopted in all respects in Canada, the *Ikarian Reefer* principles promote transparency and independence for experts.

(a) The Ikarian Reefer

The *Ikarian Reefer* provides a detailed list of the criteria under which an expert should both act and be seen to act. Although the Court in the *Ikarian Reefer* explicitly limited the criteria to civil cases, it appears that much, if not all, of the guidance provided in that case is equally applicable in all types of proceedings, including administrative hearings,[50] civil trials, and criminal prosecutions. In Canada the case has often been referred to and quoted incompletely,[51] and is difficult to find. As a result, the relevant section of the judgment is set out below:

> I will refer to some of the duties and responsibilities of experts in civil cases because I consider that a misunderstanding on the part of certain of the expert witnesses in the present case as to their duties and responsibilities contributed to the length of the trial.
>
> B. THE DUTIES AND RESPONSIBILITIES OF EXPERT WITNESSES
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> The duties and responsibilities of expert witnesses in civil cases include the following:

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[52] *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd. ("the Ikarian Reefer")*, [1993] 2 Lloyd's Rep 68 (Q.B.D. (Comm. Ct.))

[50] In fact, the principles of the *Ikarian Reefer* have been utilized by administrative tribunals in Canada. See *Ivan Biuk Construction Ltd. v. Kitchener (City) Committee of Adjustment*, [2000] O.M.B.D. No. 1123. See also Practical Directions, Guidelines and Forms for the Environmental Assessment Board and the Environmental Appeal Board (Queen's Printer for Ontario, 1998).

[51] See *Perricone v. Baldassarra* (1994), 7 M.V.R. (3d) 91 (Ont. Ct. Gen. Div.) at para. 21, referring to the five guidelines from the *Ikarian Reefer*; *Fellowes, McNeil v. Kansa General International Insurance Company Ltd* (1998), 40 O.R. (3d) 456 at para. 10, 37 C.P.C. (4th)20 (Gen. Div.) referring to 'only two of the seven duties and responsibilities of experts', aff'd in part on other grounds 22 C.C.L.I. (3d) 1, leave to appeal to S.C.C. granted [2000] S.C.C.A. No. 543; notice of discontinuance of appeal filed May 8, 2002. See *Peter Lombardi Construction Inc. v. Colonnade Investments Inc.* (2000), 51 O.R. (3d) 551, 6 C.L.R. (3d) 244 (S.C.) referring to "[s]ome of these duties"; and *Jacobson v. Sveen* (2000), 262 A.R. 367, 3 C.P.C. (5th) 165 (Q.B.), referring to only the seventh duty and responsibility.

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 assumption 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.

5) If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that

6) the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

7) If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal

8) representatives) to the other side without delay and when appropriate to the Court.

9) Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.[55]

(b) The Ikarian Reefer in Canada

At the time of the revision of this article a total of 29 cases in Canadian jurisprudence consider and adopt some or all of the principles from the *Ikarian Reefer.* Of the 28 cases, 12 are from Ontario courts;[52] five are from the Alberta Court of Queen's Bench;[53] two are from the Saskatchewan Court of Queen's Bench[54]; two are from the British Columbia Supreme Court;[55] two are from the Manitoba Court of Queen's Bench;[56] two from the Newfoundland and Labrador

[55] *Supra* note 52 at 99

[52] *Amertek Inc. v. Canadian Commercial Corp.,* [2003] O.J. No. 3177 (QL) (S.C.), rev'd on other grounds (2005) 5 B.L.R. (4th) 199 (Ont. C.A.), ("Amertek"). *Fellowes, McNeil, supra* footnote 54; *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.* (2001), 15 C.L.R. (3d) 23, 47 R.P.R. (3d) 32 (S.C.J.); *Bank of Montreal v. Citak, supra,* footnote 50; *Rudberg v. Ishaky,* [2000] O.J. No. 376 (QL), 94 A.C.W.S. (3d) 848 (S.C.); *Peter Lombardi Construction Inc. v. Colonnade Investments Inc., supra,* note 54; *Baynton v. Rayner,* [1995] O.J. No. 1617 (QL); 55 A.C.W.S. (3d) 946 (Gen. Div.); *Perricane v. Baldassarra, supra,* note 54; *MacDonald v. Sun Life Assurance Co. of Canada,* 2005 CarswellOnt 9910 (S.C.J.); *R v. Fournier*, 2005 CarswellOnt 2926 (S.C.J.).; *R v. Inco Ltd.* (2006), 80 O.R. (3d) 594 (S.C.J.).; and *R. v. Norton*, 2007 CarswellOnt 1425 (Ct. Jus.), [2007] O.J. No. 811.

[53] *Jacobson v. Sveen, supra,* note 54; *Hamblin v. Ben* (2003), 33 C.P.C. (5th) 150, 344 A.R. 282 (Q.B.); *Teichgraber v. Gallant,* [2003] A.J. No. 70 (QL), 119 A.C.W.S. (3d) 764 (Q.B.); *Dansereau Estate v. Vallee* (1999), 247 A.R. 342, 33 E.T.R. (2d) 71 (Q.B.); and *Graham Construction & Engineering (1985) Ltd. v. LaCaille Developments Inc.*, 2006 ABQB 898, 70 Alta. L.R. (4th) 181 (A.B.Q.B.).

Supreme Court;[57] one from the Nova Scotia Supreme Court;[58] and three from the Federal Court.[59] The general conclusion of all of these cases is that an expert witness must act independently and not as an advocate.

Canadian cases that have adopted the *Ikarian Reefer* decision reiterate the primacy of objectivity and independence in tendering and forming expert opinions.[60] On this point, the Ontario Court General Division has stated:

> An expert witness is called to provide assistance to the court in understanding matters which are beyond the expertise of the trier of fact. Such a witness is not to be an advocate for one party, but an independent expert. Expert witnesses are of course paid a fee by the party calling them, which in itself may be considered to affect their independence. The court will examine the demeanor of an expert in the way the evidence is given, in particular whether the expert takes on the role of an advocate for one side, or remains objective, in weighing the evidence and attributing value to the opinion. If the expert does adopt the attitude of a neutral, then the fact that he is being paid or that the defendant is his client will cause little or no concern, but that will not be the case if he appears to lose his neutrality. In that case the value of his evidence can diminish significantly.[61]

If an expert merely adopts the views of his or her client, and does not further investigate before coming to his or her opinion, the expert is 'building on a foundation of sand, not rock'[62]. Based upon this poor foundation, the expert will not be able to demonstrate independence and will thus taint the whole of his or her opinion.

When testifying in front of an administrative tribunal, an opinion witness can expect to be required to be impartial and objective. If presented with an expert witness who has acted as an advocate for one side over another, some administrative tribunals can:

(a) decline to accept the opinions or evidence;
(b) admit the evidence, but accord it little weight;
(c) intervene to ensure objectivity;

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[54] *Kozak v. Funk,* [1996] 1 W.W.R. 107, 136 Sask. R. 12, 28 C.C.L.T. (2d) 81 (Q.B.); and *Martin v. Inglis,* [2002] 9 W.W.R. 500, 218 Sask. R. 1 (Q.B.).
[55] *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia,* [2003] B.C.J. No. 917 (QL), 121 A.C.W.S. (3d) 882 (S.C.); and *Xeni Gwet'in First Nations v. British Columbia*, 2005 BCSC 131, CarswellBC 216 (S.C.).
[56] *Prarie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.* (2000), 146 Man. R. (2d) 284, 7 B.L.R. (3d) 40 (Q.B.); and *Bauer (Litigation Guardian of) v. Seager,* [2000] 11 W.W.R. 621, 147 Man. R. (2d) 1 *sub nom. Bauer v. Seager.*
[57] *Day v. Karagianis* (2005) NLTD 21, CarswellNfld 18 (T.J.); and *Loblaws Inc. v. United Dominion Industries Ltd.,* 2007 NLTD 21, CarswellNfld 71 (T.J.).
[58] *Lunenberg Industrial Foundry & Engineering Ltd. v. Commercial Union Assurance Co. of Canada,* 2005 NSSC 62, 21 C.C.L.I. (4th) 140, 231 N.S.R. (2d) 378, 733 A.P.R. 378, 10 C.P.C. (6th) 376, CarswellNS 574 (S.C.).
[59] *Merck & Co. v. Apotex Inc.* (2004) FC 567, 32 C.P.R. (4th) 203 (F.C.T.D.)., 253 F.T.R. 178, CarswellNat 1014 (F.C.T.D.); *Biovail Pharmaceuticals Inc. v. Canada (Minister of National Health and Welfare)* (2005) FC 9. 37 C.P.R. (4th) 487 F.C.T.D., 267 F.T.R. 243 (T.D); and *Dimplex North America Ltd. v. CFM Corp.* (2006) FC 586, 54 C.P.R. (4th) 435, CarswellNat 1365 (T.D).
[60] See *Fellowes, McNeil v. Kansa General International Insurance Co*., *supra* note 54 at para. 10: "Experts must not be permitted to become advocates. To do so would change or tamper with the essence of the role of the expert, which was developed to assist the court in matters which require a special knowledge or expertise beyond the knowledge of the court."
[61] *Interamerican Transport Systems Inc. v. Canadian Pacific Express & Transport Ltd*., [1995] O.J. No. 3644 (Gen. Div.) (QL) at para. 61.
[62] *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (Sup .Ct.) (QL) at para. 5.

(d) note the conduct and provide an adverse comment in the decision; or
(e) report the conduct to the relevant professional association or licensing body responsible for compliance with standards of conduct.[63]

Further, it was held in *Emil Anderson Construction Co. v. British Columbia Railway Co.*[64], that an expert report was inadmissible where it was prepared by an expert under legal direction rather than by lawyers with the benefit of expert advice and, in part, was more appropriate as argument than as evidence.

This strong judicial preference for experts who are truly independent is also seen in *Amertek Inc. v. Canadian Commercial Corp.*[65]. In *Amertek*, O'Driscoll J. was forced to choose between conflicting expert reports and made the following commentary:

> [The Plaintiff's expert] prepared his reports and gave his evidence in a very professional manner – "you ask for my expert opinion on the topic, here it is, let the chips falls [*sic*] where they may". He has no links or ties with any of these litigants… In my view, [Defendant's expert's] field and depth of learning are not as vast as [the Plaintiff's expert]. Moreover, it is troubling that [he] has ties to the client who called him as a professional witness. Since 1985, [he] has been U.S. legal counsel to [the Defendant] in at least fourteen (14) U.S. cases and he testified that he saw [the Defendant] as a valuable client and a source for future work referrals… Hopefully, it was only because this was his maiden voyage that [Defendant's expert] strayed from the role and path of the expert witness and took on the role of advocate when, on two occasions, he commented on the evidence of [a witness] by saying: "That does not ring true with me".[66]

(3) Privilege

The Ontario Rules of Civil Procedure[67] have specific provisions dealing with the obligations on a party to disclose information and procedure documents. The rules have further specific provisions pertaining to a party's obligations with respect to the handling of expert reports. In general, the rules distinguish between documentary discovery, governed by Rule 30, and oral discovery, governed by Rule 31.

The exception to the requirement that documents be produced under Rule 30 depends upon the presence of a claim for privilege:

> *Disclosure*
> 30.02
> (1)Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.
>
> *Production for Inspection*
> (2)Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in roles 30.03 to 30.10, unless privilege is claimed in respect of the document.

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[63] *Supra* note 53.
[64] (1987), 15 B.C.L.R. (2d) 28 (S.C.).
[65] *Supra* note 56.
[66] *Ibid*. at para. 450.
[67] R.R.O 1990, Reg. 194.

The limitation on oral disclosure is narrower under Rule 31. An examined party may only refuse to disclose their "knowledge, information and belief" as it pertains to an expert opinion if they are prepared to give an undertaking not to call an expert as a witness at trial:

> 31.06 (1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relating to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4)…
>
> (3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,
>
> (a) the findings, opinions and conclusion of the expert relating to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
>
> (b) the party being examined undertakes not to call the expert as a witness at the trial.

Rule 53.03 describes the time by which parties must serve expert reports in advance of a trial:

> (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony.
>
> (2) A party who intends to call and an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony.

Thus, providing a party undertakes not to call a witness at trial, any documents created by the expert in the preparation of a report will be protected from production. Further, all "knowledge, opinion and belief" of an examined party that arises as a result of communications with that expert will not need to be disclosed to the extent that they constitute "findings, opinions and conclusions" of the expert that were "made or formed for contemplated or pending litigation", as they will be protected from disclosure by the operation of Rule 31.06(b).[68]

If a party wishes to rely on an expert report however, Rule 53.03 will operate to require production 90 (or 60) days prior to trial. As the party will be calling the expert at trial, Rule 31.06 will no longer operate to make all "findings opinions and conclusions" of the expert immune from disclosure at examinations for discovery.

(a) Production of Communications, Draft Reports and Preliminary Findings

Although the rules seem clear on their surface, there is room for argument over what precisely constitutes "findings, opinions and conclusions" of an expert, and to what extent production of a report will cause other documents to be producible. For example, what happens if a party receives a report that does not give sufficient detail of the expert's work to support cross-examination? Also, what obligation is there on a party to produce (or at minimum disclose) early drafts of an expert report which may have contained inconsistent, or even contradictory

[68] It is important to note that Rule 31.06 only operates to protect from disclosure "knowledge, opinion and belief" of a party which constitute "findings, opinions and conclusions" of the expert. All other "knowledge, opinion and belief" of a party will, subject to the *Rules*, be discoverable.

conclusions? The case law, unfortunately, does not provide much guidance. Canadian jurisprudence surrounding the issue of whether draft expert reports must be produced is inconsistent.[69] In addition, the distinction between disclosure and production is sometimes not clear, leading to uncertainty between whether there is an obligation to disclose information contained in a draft report, and when the draft report itself must be produced.[70]

The determination as to whether any document is producible is dependent upon the presence of a privilege. In the context of an expert's report the privilege claim would be based on litigation privilege. In the past it was argued that litigation privilege was one "of the two categories of solicitor-client privilege", and as such had similarly broad and sweeping power.[71] This possibility, however, was considered and denied by the Ontario Court of Appeal in *Chrusz*[72]. In defining litigation privilege, Carthy J.A. stated:

> … there is nothing sacrosanct about this form of privilege. It is not rooted, as is solicitor-client privilege, in the necessity of confidentiality in a relationship…
> The "zone of privacy" is an attractive description but does not define the outer reaches of protection or the legitimate intrusion of discovery to assure a trial on all of the relevant facts. The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client…[73]

Carthy J.A. then went on to determine that the proper test for the presence of litigation privilege is the dominant purpose test. In defining the dominant purpose test, Carthy J.A. quoted the judgment of Lord Wilberforce in *Waugh v. British Railways Board*[74]: "[o]n principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it…"[75]

When a solicitor hires an expert to produce a report or an opinion based on a set of facts, it will most often be done in the context of a litigation file, and the dominant purpose test will be satisfied. As a result, litigation privilege and the *Rules* will protect any report produced and any communication undertaken in the production of that report from disclosure or production, if the party undertakes not to call that expert at trial.
Although litigation privilege will likely be satisfied in the commissioning of an expert report by counsel, there remain questions with respect to the reach of the privilege, and the timing of any undertaking. For example:

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[69] Stephen R. Morrison "Drafts of Experts' Reports: An Analysis" (2000) 50 C.L.R. (2d) 76.
[70] Hilik Elmaliah "Production of Experts' Notes and Raw Test Data at the Discovery Stage in Ontario" (1999) 21 Adv. Q. 226. See: *Browne (Litigation Guardian of) v. Lavery (2002),* 58 O.R. (3d) 49, where the court ordered the production of an expert's report based upon rule 31.06(3), see also *Award Developments (Ontario) Ltd. v. Novoco Enterprises Ltd* (1992), 10 O.R. (3d) 186 (Gen. Div.). Contrast with *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) [*Chrusz*] at 332: "Rule 31.06 provides for discovery of the name and address and the findings, conclusions and opinions of an expert, unless the party undertakes not to call that expert at trial… The actual production of an expert's report is required under rule 53.03(1)…"
[71] Elmaliah., *ibid* at p.228.
[72] *Supra* note 74, all three justices of the Court were in agreement on the relative scope of litigation privilege as compared with solicitor/client privilege.
[73] *Ibid*. at 331.
[74] [1979] 2 All E.R. 1169 (H.L.).
[75] *Supra* note 74 at 332.

- In what circumstances will the litigation privilege in respect of an expert report be waived, and to what extent?
- At what point must a party undertake not to call an expert at trial, and at what point can this undertaking be requested?

(i) Waiver of Privilege

If party commissions an expert report and produces it to all of the other parties to a proceeding in compliance with Rule 53.03, to what extent does this production waive any litigation privilege attaching to any other documents relating to the report or on which it is based, and to what extent are previous draft reports subject to an order for production?

A leading case on this issue is *Vancouver Community College v. Phillips, Barratt*.[76] In *Vancouver Community College*, an expert witness was called to testify, and opposing counsel sought to force production of all relevant documents in the witness's possession, including draft reports, working papers, and written communications passing between the expert and counsel.[77] Plaintiff's counsel asserted that these documents were protected by litigation privilege, while defendant's counsel argued that by calling the expert to testify any such privilege had been waived.

Finch J. ruled that once an expert was converted from confidential advisor to witness, the requirement of objectivity removes any partisanship from the expert. As a result, Finch J. stated:

> It seems to me that in holding out the witness's opinion as trustworthy, the party calling him impliedly waives any privilege that previously protected the expert's papers from production. He presents his evidence to the court and represents, at least at the outset, that the evidence will withstand even the most rigorous cross-examination. That constitutes an implied waiver over papers in a witness's possession which are relevant to the preparation or formulation of the opinions offered, as well as to his consistency, reliability, qualifications and other matters touching on his credibility.[78]

Finch J. summed up his position by stating:

> When an expert witness who is not a party is called to testify, or when his report is placed in evidence, he may be required to produce to counsel cross-examining all documents in his possession which are or may be relevant to matters of substance in his evidence or to his credibility, unless it would be unfair or inconsistent to require such production. Fairness and consistency must be judged in the circumstances of each case.[79]

The decision in *Vancouver Community College* placed a potentially onerous burden on counsel, as the category of documents that are or may be relevant to the substance of the expert's report or his credibility is quite broad.[80] A subsequent decision in *Delgamuukw v. British Columbia*[81] served to narrow the scope of documents that counsel would be required to produce under

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[76] (1987), 20 B.C.L.R. (2d) 289, 27 C.L.R. 11.38 L.C.R. 30 (S.C.)
[77] See *Vancouver Community College v. Phillips Barratt* (1987), 28 C.L.R. 277 (B.C.S.C.) at p.278.
[78] *Supra* note 80 at para. 28.
[79] *Ibid.* at para. 34.
[80] See R.M. Bell, "Drafts of Experts' Reports: How Far Does the Obligation to Produce Extend?" (1992) 13 Advocates' Q. 353 at 359.
[81] (1988), 55 D.L.R. (4th) 73 at pp.77-78, 32 B.C.L.R. (2d) 156 (S.C.)

Vancouver Community College. In *Delgamuukw*, counsel for both parties requested guidance regarding pre-trial disclosure of expert opinion evidence. McEachern C.J.S.C. held:

> Generally speaking, I accept that documents and communications which may relate to the substance of the evidence or to the credibility of the witness must be disclosed when he enters the witness-box. In this connection credibility must be given a limited or narrow construction because almost anything *might* relate to credibility and this aspect of the matter must not be an open door to free-roaming cross-examination. What the American cases call the "work product of counsel" [(*i.e.,* the lawyer's brief)] should be protected, even if it has been conveyed to the witness, unless it appears that it is likely to affect the evidence or the credibility of the witness.[82]

Based on British Columbia case law, it appears that an expert's underlying factual assumptions, including test results and calculations may be producible before trial. Once an expert takes the stand, moreover, privilege is waived over much of the remainder of the expert's file, including drafts, working papers, reference materials and correspondence.[83] One commentator has noted that, "this raises obvious tactical considerations and on some occasions may cause counsel to re-evaluate whether it is worthwhile to have an expert testify at all."[84]

In Ontario, the law had, until recently, been quite different. Until recently, the leading case on this issue was *Bell Canada v. Olympia & York Developments*,[85] in which the Ontario High Court explicitly refused to follow *Vancouver Community College*. The facts in *Bell Canada* were similar to those in *Vancouver Community College*, as a party to the action sought the production of all material supplied by counsel to an expert who had been called to testify. Among the material sought to be produced were drafts of reports that were made by other experts and supplied by counsel to the expert before he had arrived at his opinion.

In arriving at the decision not to allow production, Eberle J. reasoned that if privilege in respect of communications to an *expert* could be disclosed in testing his or her credibility, the same must also be true with respect to a *party*:

> To whatever extent a party calling an expert to the witness stand represents him to be credible, it must apply as well to the calling of the party to the witness stand as a witness. If it necessarily follows that calling an expert to the witness stand ends any privilege formerly attaching to communications between him and the solicitors, I have difficulty in seeing how the same principle would not operate to open up communications between the client and the solicitors, from the moment the client steps into the witness-box.
>
> …
>
> I conclude, therefore, that the conclusion reached in the [*Vancouver Community College*] case is not consistent with the well-established, and I think universally applied, solicitor-and-client privilege.[86]

As a result of this conclusion, Eberle J. restricted the extent to which privilege was waived:

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[82] *Ibid.* at 77-78.
[83] See Don J. Holubitsky, "Experts: A Necessary Evil", (2001) *3(3)* The Saskatchewan Advocate 18.
[84] *Ibid*.
[85] (1989), 68 O.R. (2d) 103, 33 C.L.R.258, 36 C.P.C. (2d) 193 (H.C.J).
[86] *Ibid.* at 106, 107. This reasoning seems to have been overruled by the judgment of the Ontario Court of Appeal in *Chrusz*, *supra* note 74, where it was determined that the type of privilege involved in a relationship between a solicitor and his or her client is fundamentally different from that between a solicitor and an expert hired to provide an opinion in contemplation of litigation.

> The facts upon which an opinion is based are normally to be found in the report itself. In any event, the facts must be proved or, if not, the opinion may be weakened. On the other hand, if, in coming to his opinion, an expert ignores relevant facts, his opinion may equally be weakened. If there are relevant facts, it is for the opposing parties to prove them.[87]

Eberle J. later refined his position in *Beausoleil v. Canadian General Insurance*[88], where, after counsel brought his attention to a previous authority he held that when counsel disclosed to an expert privileged documents that contained facts which influenced the expert's opinion, there was an implied waiver of privilege.

The judgment of Eberle J. in *Bell Canada* received support in subsequent judgments.[89] Recent cases, however, indicate that the law in Ontario has moved closer to the British Columbia position.[90]

Piché v. Lecours Lumber,[91] involved a request by plaintiff's counsel for the production of an expert witness' whole file after the expert had begun providing testimony. After canvassing both the *Bell Canada* and *Vancouver* cases Loukidelis J. derived the following four principles:

> (1) Principles of waiver relating to a privilege claim for documents in an expert's file cannot be said to have been waived simply by calling that witness to give evidence;
> (2) The privilege can be waived in respect of those facts or premises in the expert's file which have been used to base the expert's opinion and which came to the expert's knowledge from documents supplied to that expert;
> (3) Whether there is a privilege or not can be ascertained by one of two ways. As in [*Ocean Falls v. Worthington (Canada)*[92]], the judge can examine the documents or materials for which privilege is claimed. Another way is for counsel, through cross-examination of the expert, to determine whether all or part of the file is privileged; and
> (4) As a general rule, if facts are supplied that are not found in other evidence, or if certain assumptions are asked to be made in the instructing documents, privilege claimed for those facts or assumptions should be considered waived.[93]

Under *Piché*, communications from counsel to expert would not be producible unless they contained facts or premises that had been used to base an expert's opinion. Likewise, a draft report would not be producible except possibly where counsel made notations of fact or premises on it, supplied the draft back to the expert, and the facts or premises were then used to base the expert's opinion. *Piché* did not go so far as to require the production of draft reports generally.

In the case of *Aviaco International Leasing Inc. v. Boeing Canada Inc.*[94] defendant's counsel asked for the production of drafts of the plaintiff's expert report in the course of conducting its discovery. In determining that draft reports constituted findings and were thus subject to a *production* obligation under Rule 31.06(3),[95] Nordheimer J. stated:

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[87] *Ibid.* at 108.
[88] [1993] O.J. No. 2200 (Gen. Div.) (QL).
[89] See *Kelly v. Kelly* (1990) 42 C.P.C. (2d) 181 (Ont. Unif. Fam. Ct.); *Caputo v. Imperial Tobacco Ltd*., [2002] O.J. No 3767 (QL).
[90] See S.R. Morrison, "Drafts of Experts' Reports: An Analysis" (2000) 50 C.L.R. (2d) 76.
[91] (1993), 13 O.R. (3d) 193 (Gen. Div.) [*Piché*].
[92] (1985), 69 B.C.L.R. 124 (S.C.).
[93] *Supra* note 95 at 201.
[94] [2002] O.J. No. 3799 (Sup. Ct.) (QL) [*Aviaco*].

> With respect, I do not agree with the conclusion reached [in *Kelly*[96]]. In my view, draft reports represent, at the very least, preliminary findings, opinions and conclusions of the expert and therefore fall within the scope of the rule. Such an interpretation of the rule would appear to accord with the general principle that the *Rules of Civil Procedure* are to be 'liberally construed' – see rule 1.04(1). It also seems to me, for the reasons expressed by Ferguson J. in *Browne*[97], that a party ought to be able to explore with an expert whether he or she changed her views from draft to draft, and, if so, why. It is all part of testing the expert's conclusions. It is also important that this material be produced in advance of the trial so that the trial is not interrupted while such material is reviewed.[98]

MacAdam J. of the Nova Scotia Supreme Court also relied on *Browne* in *Flinn*[99], a case concerning a motion for discovery of certain documents at the pre-trial stage.[100] In finding that reliance on an expert report constituted a waiver in privilege in all materials relied upon by that expert in preparing the report, MacAdam J. made the following statement concerning the limitation on litigation privilege when an expert is consulted:

> It is somewhat unclear as to what counsel for the plaintiff means by stating their communications to the expert involved a discussion of "tactics and strategy". Since the expert is presumably being proffered as an "independent expert" and intended to be qualified to give opinion evidence, I share the concern raised by counsel for the defendant as to the propriety of discussing with such an independent expert questions of "tactics and strategy".[101]

MacAdam J. drew the following conclusion as to the limitations on the requirement to disclose documents given to the expert for the purposes of report writing:

> The resolution of the question as to whether these otherwise confidential documents are to be disclosed depends on whether in any way, they formed part of the foundation or basis of the expert's opinion and report, or were, at least, considered by or provided to, the expert prior to the preparation of her report. If they did, then they must be disclosed. To the extent any of the materials only relate to the views of the plaintiff's expert on any report or opinion of defendant's expert, these are matters involved in the solicitor's brief and are therefore protected from production.[102]

Even facts and data not used in an earlier draft or the final report may be subject to an obligation to produce. Consider, for example, the ruling of Rouleau J. in *Arbesman and Meighen, Demers*[103], where in the course of deciding an appeal from a Master's decision that portions edited from an expert's notes prior to production were not findings of the expert, he stated:

> It is the function of an expert to sift through and consider all of the factual information and data provided before formulating an opinion. The expert may well decide not to use some of the information and data received and, in a sense, that information or data is not then being relied on

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[95] This finding does not seem to be in compliance with the intention of Rule 31, *supra* note 72.
[96] *Supra* note 93.
[97] *Supra* note 74.
[98] *Supra* note 98 at para. 16.
[99] *Supra* note 74.
[100] This reliance was made notwithstanding the recognition by MacAdam J. in *Flinn, ibid*. at para 11: "[t]he Rule in Ontario is, in its wording, broader and more specific as to the production required of a party who has signalled an intention to call an expert at trial."
[101] *Ibid.* at para. 29.
[102] *Ibid*. at para. 33.
[103] [2003] O.J. No. 2075 (Sup. Ct.) (QL).

> by the expert in reaching the conclusions expressed in the report. This decision not to use or rely on that information or data is, in my view, as much a part of the findings of the expert as the factual information and data which has been made a part of the report. To the extent that the decision [in *Ontario (Attorney General) v. Ballard Estate*[104]] is not limited to facts and data relied on, it has expanded Master Sandler's definition of findings as set out in *Allen v. Oulahen*[105].[106]

Rouleau J. then determined that only the portions of the memoranda and hand-written notes in question which contained expressions of opinion or views of third parties were not findings for the purpose of Rule 31 and were not subject to production.[107]

The Ontario Court of Appeal's decision in *Conceicao Farms Inc. v. Zeneca Corp.*[108] deals with the issue of disclosure of a lawyer's record of oral communications between the lawyer and an expert. At issue in this case was a memorandum written by the defendant's previous counsel, which summarized a telephone conversation between herself and the defendant's primary expert witness. At trial, counsel for the defendant stated that when he took carriage of the file, there was nothing in the file to indicate that prior counsel had spoken with the expert. However, several months after the trial ended and the decision had been rendered, in the course of preparing cost submissions, counsel for the plaintiff discovered what they viewed as an inconsistency between the defendant's counsel's statements and the docket entries of the defendant's prior counsel. The docket entries showed that prior counsel had retained the expert and had recorded and transcribed a lengthy telephone conversation between counsel and the expert.

The plaintiff brought a motion before the trial judge seeking production of the memorandum and sought to appeal the decision on the basis that the length of the conversation and the time spent preparing a transcript of such suggested that the expert provided an oral report.[109] The appellant argued they did not have the opportunity to properly test the expert's conclusions without this foundational memorandum.[110]

The respondent opposed production on the basis that the memorandum was the work product of the respondents' former counsel.[111] They argued that notes, letters, memoranda and other materials prepared by counsel in the contemplation of litigation is protected by litigation privilege, and such privilege is not waived by production of the expert's report.[112]

In Chambers, Gilles J.A. called for a broad approach to disclosure, so as to provide opposing counsel with access to the foundation of an expert's opinion and to correspond with the narrowing of litigation privilege in the area of expert reports.[113] Thus, while Gilles J.A. did not conclude that the memorandum contained a preliminary expert opinion, it did contain

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[104] [1996] O.J. No. 919 (G.D.) (QL).
[105] (1992), 10 O.R. (3d) 613 (G.D.).
[106] *Supra* note 107 at para. 12.
[107] *Supra* note 73.
[108] (2006), 82 O.R. (3d) 229, 272 D.L.R. (4th) 532 (C.A. in chambers). [An application for leave to appeal was filed with S.C.C. and dismissed]
[109] *Ibid.* at para. 21.
[110] *Ibid.*
[111] *Ibid.* at para. 22.
[112] *Ibid.*
[113] *Ibid.* at para. 32.

foundational information for the final opinion. As such, production of the memorandum was ordered.[114]

On appeal, the Ontario Court of Appeal declined to decide the precise extent to which foundational information is discoverable.[115] The court stated that while the rule does not yet extend as far as tentatively suggested in *Browne,* it does entitle opposing counsel to discovery on foundational information of an expert's final opinion.[116] However, the Court of Appeal held that the right to discovery of foundational information does not afford a right to disclosure after trial. The rule applies to the discovery stage of litigation.[117]

In addition, the Court of Appeal made some concluding remarks in *obiter* regarding the effect of the right to disclosure of foundational information on the sphere of litigation privilege. Stating that this case does not suggest a need to modify the rule surrounding litigation privilege where experts are concerned, the court stated as follows:

> Taking as a given that a document protected by litigation privilege and part of counsel's work product contains the foundation for an expert opinion, there is no need to remove the privilege for the document itself to do justice. The foundational information in the document is available under rule 31.06(3), if it is sought on discovery. Removing the privilege for the document itself is not necessary to obtain that information, but does run the risk of requiring disclosure of properly privileged information that is often intertwined with discoverable information in the lawyer's work product.[118]

The narrowing of litigation privilege with respect to experts applies not only to notes in possession of counsel, but also to all documents in possession of the expert. Two recent Ontario decisions confirm that all notes made by an expert in preparation of his or her opinion must be disclosed. In *St. Elizabeth Home Society v. Hamilton (City)*, Harris. J. drew on the principle that "there is no property" in an expert witness who testifies to conclude that privilege cannot be claimed, and disclosure must be made of "all factual information and data obtained by Rudson [the expert] in his notes – whether or not such information was ultimately relied upon – for the purpose of arriving at his opinions and conclusions."[119] Similarly, in *LeCocq Logging Inc. v. Hood Logging Equipment Canada Inc.*, the court found that serving an expert report on the opposing party constitutes waiver of litigation privilege with respect to the expert's notes.[120]

A recent Alberta Court of Queen's Bench decision reflects a similar conclusion regarding notes and documents in the possession of experts. Further, the case law in this jurisdiction suggests that the ambit of disclosure is broadened to include documentation of communications between the solicitor and the expert. In *Chernetz v. Eagle Copters Ltd.,* the plaintiffs brought a motion for an order requiring the defendants to produce all documents in the possession of the chartered

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[114] *Ibid.* at para. 43.
[115] *Ibid.* at para. 14.
[116] *Ibid.*
[117] *Ibid.* at para. 18.
[118] *Ibid*. at para. 21.
[119] [2004] O.J. No. 1418 (S.C.J.) at para. 14.
[120] (2005), 14 C.P.C. (6th) 287 (Ont. S.C.J.) at para. 17.

accountant retained to give an expert opinion that are relevant to the expert report filed on behalf of the plaintiff.[121] Such documents consisted of correspondence to and from counsel, notes on meetings and telephone conversations with counsel and other experts, and claim review notes.[122] The court made the following comments with regards to waiver of privilege with respect to documents in the possession of the expert:

> Communications between an expert and instructing counsel and working notes created by the expert initially are privileged as having been created for the dominant purpose of use in litigation. When and if the expert takes the stand to testify, the privilege is lost as to those documents that the expert reviewed in forming his opinion, whether the expert relied on, rejected or disregarded the information in those documents. The privilege also is lost on communications between the expert and instructing counsel to the extent that those communications are relevant to the expert's opinion. For example, those communications may limit or otherwise set the parameters for the opinion. The opposing party, on cross-examination, is entitled to explore such documents and communications. This conclusion is consistent with the decision of the British Columbia Supreme Court in *Vancouver Community College v. Phillips, Barratt* (1987), 20 B.C.L.R. (2d) 289 (B.C. S.C.). [123]

Accordingly, the Alberta Court of Queen's Bench expressly concluded that the introduction of an expert's report or opinion into evidence at trial creates an all-encompassing waiver of litigation privilege.[124]

Another Alberta Court of Queen's Bench decision came to a similar conclusion with respect to notes made by medical professionals in the course of examining the plaintiff for the purposes of an expert report.[125] In ordering full disclosure of all such documentation, the court points out that the role of experts is to assist the court and not to advocate for their client.[126] The court stated that "when all material made available to the expert is not made available to the court, the opinion given by the expert is suspect."[127]

In British Columbia, a decision of Master Hyslop suggests that communications between counsel and an expert may not be producible to the extent that the communication does not contain facts or assumptions upon which the ultimate opinion is based. In ordering that a letter sent from counsel to the expert asking various questions was privileged, Master Hyslop relied on a decision of the Yukon Supreme Court addressing the issue of communications between experts and solicitors. This court found that "letters from a solicitor to an expert are generally not produced because they do not contain facts or assumptions".[128] It then set out the following summary with respect to the production of letters from instructing solicitors:

> "If [letters from solicitors to experts] contain facts and assumptions, they should

[121] 2005 ABQB 712, 385 A.R. 238, 28 C.P.C. (6th) 175
[122] *Ibid,* at para. 3.
[123] *Ibid.* at para. 10
[124] *Ibid.* at para. 11.
[125] *Guiterrez v. Jeske,* 2005 ABQB 953, [2006] A.W.L.D. 619
[126] *Ibid.* at paras. 10-12.
[127] *Ibid.* at para. 12.
[128] *Trans North Turbo Air Ltd. v. North 60 Petro Ltd.*, [2002] Y.J. No. 73 (Y.T. S.C.) at para. 25.

> be produced. If they are not providing facts and assumptions, then they should not be produced. Nor should they be produced if they contain trial strategy issues, unless the trial strategy is somehow intertwined with the facts and assumptions of the expert. The circumstances of each case will determine whether letters from instructing solicitors listed in expert reports should be produced."[129]

On the other hand, in the very recent case of *Bazinet v. Davies Harley Davidson*, [2007] O.J.No.2420 Power J. in the Ontario Superior Court of Justice decided that where an expert report was produced in the litigation any privilege which may have existed in reports by other experts is waived if those reports were shown to the expert whose report was produced if the later used and considered those reports.

It is clear that case law calls for a case-by-case approach when determining whether privilege has been waived once an experts opinions are placed in evidence.

(ii) Timing of Disclosure

A problem often arises for counsel when they are requested under Rule 31.06. to either provide the "findings, opinions and conclusions" of any expert they have consulted, or undertake not to call that expert at trial. Unfortunately for counsel, examinations for discovery often provide much of the evidence upon which an expert will wish to form his or her opinion. As a result, counsel may not feel that they are sufficiently informed of the potential outcome of an expert's investigation to know whether to undertake not to call them.
Jenkyns v. Kassam[130] concerned the plaintiff's attempt to force disclosure of expert findings, opinions or conclusions at examination for discovery. Counsel for the defendant objected to the suggestion that an election be made under the *Rules* to state findings, opinions or conclusions, or, in the alternative to undertake not to call the expert. In the course of the judgment, Master Beaudoin quoted the following statement by counsel for the plaintiff:

> … I'm just indicating that any preliminary discussions I've had with any experts would be only for the purpose of educating generally and not for the purpose of obtaining any opinion because it would be premature to obtain that opinion without having all of the facts.

Master Beaudoin relied on the earlier determination by Master Clark in *Cheaney v. Peel Memorial Hospital*[131] in holding that findings, opinions and conclusions must be disclosed, regardless of whether they have been transmitted orally or in writing, and whether or not counsel chooses to categorize them as preliminary or final. Master Beaudoin then decided, however, that where counsel uses the advice of an expert solely in order to inform themselves with regard to the matters that are in dispute, those discussions are not caught by Rule 31.06(3).

Jenkyns v. Kassam makes it clear that an election does not necessarily have to be made at the examination for discovery with respect to an expert witness. As *Hosh (Litigation guardian of) v. Black*[132] makes clear, however, the election may not be put off indefinitely. As Master Beaudoin stated in *Hosh*:

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[129] *Ibid.* at para. 27.
[130] [2002] O.J. No. 4995 (Sup. Ct.) (QL).
[131] (1990), 73 O.R. (2d) 794 (S.C.).
[132] [2003] O.J. No. 2374 (Sup. Ct.) (QL) [*Hosh*].

> If counsel feels unable to make the election at discovery, they cannot be permitted to postpone such a decision indefinitely and an opposing party can expect a reasonable timeline for such an election, whether that is achieved by an undertaking of counsel or by Court order. [Previous jurisprudence has contemplated that] there would be such a duty on the part of counsel pursuant to the ongoing disclosure requirements of Rule 31.09.[133]

Master Beaudoin then gave the following guidelines with respect to expert witness information at discovery:

> At discovery, a party must answer whether or not they have engaged an expert.
> A party can be asked if they have received any preliminary findings, opinions or conclusions, even oral ones. These findings, opinions or conclusions must be disclosed unless the party undertakes not to call that expert at trial. At discovery, a party can be put to their election to not call their expert at trial and they can maintain any privilege over any report so long as that election is made. Counsel can decline to answer the question on their undertaking to advise the examining party of their election within a reasonable period of time; generally in advance of the settlement conference. In the absence of such an undertaking, the Court can require a party to answer the question or set a time limit for the election. This is a necessary adjunct to the Court's power to set a date for the delivery of an expert's report in advance of the time periods prescribed by Rule 53.03.[134]

v) Strategic Considerations

According to recent commentary, trial counsel have developed three distinct strategies as a means of limiting disclosure in a proceeding, including:

1. Limiting the information provided to their expert, but allowing the expert latitude in drafting the report (thus, limiting disclosure by limiting any waiver through provision of information);
2. Instructing the expert to write his or her report only after detailed oral consultation with counsel (thus, producing only one formal draft and limiting other communication exchanged to oral summaries); and
3. Instructing experts to destroy drafts (thereby, removing any earlier, contradictory documentary information).[139]

With trend of the case law in Canada, and the *Ikarian Reefer* principles discussed above as a guide, each of these strategies has potentially significant drawbacks on both the admissibility of the report itself, and the protection of any information from disclosure or discovery.

With respect to strategy one, the minimization of the information given to an expert must be balanced against the necessity for an expert to have sufficient information to come to an informed opinion on the subject in question. For example, if counsel withheld from an expert information which he or she did not want disclosed as there was a fear that it would be damaging to the case, and that information subsequently became known to the other side through alternative measures, the credibility of the report would likely be severely compromised. Alternatively, if the amount of information disclosed to an expert were insufficient, the expert

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[133] *Ibid.* at para. 17.
[134] *Ibid.* at para. 21.
[139] Heather C. Devine "Are there limits to disclosure of experts' findings?" *The Lawyers Weekly* (10 October, 2003) at 17.

would be required to disclose that fact in his or her report and would be subject to cross-examination in that regard.

With respect to strategy two, the utility of limiting communication between counsel and an expert to oral summaries seems questionable, given the recent case law. Although this will minimize any obligation for production, any communications between counsel and an expert that constitute "findings, opinions or conclusions" will be subject to disclosure, whether oral or written.

Finally, strategy three raises both ethical and tactical concerns. In jurisdictions where the production of draft reports is required, the deliberate counselling of their destruction by a lawyer may be viewed as improper and lead to professional and procedural sanctions. In any event, the destruction of earlier draft reports to hide the fact that the expert and counsel worked together in editing a report will serve only to protect the earlier drafts from production requirements. Excised material can constitute "findings, opinions and conclusions" for the purposes of disclosure. Further, the fact that counsel was involved in the editing process of a report in any meaningful way may be discovered in the course of cross-examination. This fact may well affect the admissibility of the report, given its impact on the perceived independence of the expert.

Having said all of the above, many experts follow the practice of not retaining copies of drafts once they are replaced. In practice, it is very difficult, especially in complex cases, to preserve a record of every change that is made to a report and there is no obligation that an expert do so. On the other hand, in an age of electronic record keeping and easy duplication, prior drafts of any report are bound to exist and therefore to be potentially subject to production. The fact that prior drafts are very likely to exist and may be required to be produced, is a fact which should be taken into account in managing the relationship between counsel and an independent expert.

While an expert should only be accountable for the views reached in the report, it is prudent that the expert be prepared to explain and, if necessary, to justify major changes which have occurred in his or her assumptions, findings or conclusions.

3. Conclusion

The requirement to disclose and/or to produce expert reports (and draft reports) in the context of ongoing litigation is an area that is in need of clarification by the adoption of comprehensive rules relating to expert evidence and the issues discussed in this paper. This need has been widely discussed both in case law and in commentary. Unless and until this is achieved, counsel would be advised to be cautious in their dealings with experts who may be called to testify. In particular, caution should be exercised in involving an expert who is expected to testify at trial in strategic or tactical discussions or decisions which may arise in the course of the litigation.