Federal Court  Cour fédérale

Date: 20160922

Docket: T-1261-10

Citation: 2016 FC 1076

Toronto, Ontario, September 22, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS AND ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS (UK) IN CANADA

Plaintiffs / Defendants by Counterclaim

and

THE CANADIAN INSTITUTE OF CHARTERED ACCOUNTANTS, CHARTERED PROFESSIONAL ACCOUNTANTS OF CANADA, INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO, ORDRE DES COMPTABLES PROFESSIONNELS AGREES DU QUEBEC, CHARTERED PROFESSIONAL ACCOUNTANTS OF BRITISH COLUMBIA AND CHARTERED PROFESSIONAL ACCOUNTANTS OF ALBERTA

Defendants

and

INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO, ORDRE DES COMPTABLES PROFESSIONNELS AGREES DU QUEBEC, CHARTERED PROFESSIONAL ACCOUNTANTS OF BRITISH COLUMBIA AND CHARTERED PROFESSIONAL ACCOUNTANTS OF ALBERTA

Plaintiffs by Counterclaim

ORDER AND REASONS

I. Background

[1] This is a motion on behalf of the Defendants in the main action to have the expert reports [the Reports] of Law Professors Poonam Puri and Stéphane Rousseau declared inadmissible. The Defendants are also seeking an order to bar Professors Puri and Rousseau from testifying as expert witnesses at trial.

[2] This motion arises within the greater context of the Plaintiffs' argument that the Defendants are not "public authorities" as contemplated by subparagraph 9(1)(n)(iii) of the *Trade-marks Act*, RSC, 1985, c T-13 (*Loi sur les marques de commerces*, LRC (1985), ch T-13) [the Act]:

9(1) No person shall adopt in connection with a business, as a trade-mark or otherwise, any	9(1) Nul ne peut adopter à l'égard d'une entreprise, comme marque de commerce

mark consisting of, or so nearly resembling as to be likely to be mistaken for […]	ou autrement, une marque composée de ce qui suit, ou dont la ressemblance est telle qu'on pourrait vraisemblablement la confondre avec ce qui suit […]
(n) any badge, crest, emblem or mark […]	n) tout insigne, écusson, marque ou emblème […]
(iii) adopted and used by any public authority, in Canada as an official mark for goods or services	(iii) adopté et employé par une autorité publique au Canada comme marque officielle pour des produits ou services

[3] Justice Rennie explains the importance of the benefits provided by this provision in *Council of Natural Medicine College of Canada v College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia*, 2013 FC 287 at para 32 [*Chinese Medicine*]:

> This provision grants protection to a public authority that adopts and uses an official mark. The public authority gains exclusive use of a mark that, unlike a trade-mark, is not tied to specific wares or services. All others are prohibited from adopting a mark that so nearly resembles as likely to be mistaken for it in connection with a business. It is not necessary for the public authority to demonstrate the distinctiveness of a proposed official mark or any secondary meaning, and there is no requirement that public notice be given of a request to the Registrar.

[4] Professor Puri provides evidence about the Defendants in common law jurisdictions, while Professor Rousseau does so for the civil law province of Québec. Both Reports describe the respective home statutes governing the Defendants. The Reports then examine elements that factor into the question of control of the Defendants, including board composition, funding and other indicia of corporate governance. Ultimately, the Reports make findings on the significance

of control exercised by the government, which is a key factor in assessing whether the Defendants are public authorities within the meaning of the Act.

[5] The Defendants argue that this matter should be disposed of now, rather than at trial; they contend that deferring a decision on the admissibility of the experts to trial would be unduly prejudicial. The Defendants put forth two primary arguments on the inadmissibility of the Reports, namely that they are: (i) unnecessary, and (ii) subject to a rule of exclusion, as opinions on domestic law. Given the factual context, I agree with the Defendants, and will therefore exclude the Reports, and their authors, from the upcoming trial. My reasons follow.

II. Analysis

[6] Key legal tests have been established by the jurisprudence for each of the issues raised in this motion, namely for (A) "public authorities" under the Act, and (B) the admission of expert evidence.

A. *The Legal Test for a Public Authority*

[7] "Public authorities" as contemplated by subparagraph 9(1)(n)(iii) of the Act, enjoy ease of registration of their mark, as set out above. A "public authority" is not defined under the Act. However, the Federal Court of Appeal, in *Ontario Association of Architects v Ontario Association of Architectural Technologists*, 2002 FCA 218 at paras 51-52 and 62 [*Architects*], held that a public authority must (i) be subject to significant government control and (ii) benefit

the public. If this two-part test is met, the organization benefits from the protections under subparagraph 9(1)(n)(iii) of the Act.

[8] The first part of the test -- significance of government control -- is informed by considering how or to what extent "the government, directly or through its nominees, […] exercise[s] a degree of ongoing influence in the body's governance and decision-making similar to that often found in legislation dealing with statutory bodies that regulate the practice of a profession in which only those whom they license may engage, such as architecture and the law" (*Architects* at para 62).

[9] More recently, in *Chinese Medicine*, Justice Rennie summarized the indicia of government control underlying the first element of *Architects*' two-part "public authority" test, as:

> (1) The power to review the activities of the body;
>
> (2) The power to request that the body undertake necessary and desirable activities to implement the intent of its enabling legislation;
>
> (3) The power to advise the body on the implementation of the statutory scheme;
>
> (4) The power to approve the exercise of the body's regulation-marking; and
>
> (5) The power to appoint members to the board and various committees.
>
> *Chinese Medicine* at para 36

B. *Legal Test for the Admissibility of Expert Opinion Evidence*

[10] In *R v Mohan*, [1994] 2 SCR 9 at 20 [*Mohan*], the Supreme Court of Canada set out what has become the standard four part-test that must first be considered when determining the admissibility of expert evidence. Under *Mohan*, the evidence must be (i) relevant; (ii) necessary to assist the trier of fact; (iii) not subject to any exclusionary rule; and (iv) adduced by a properly qualified expert.

[11] Only criteria (ii) and (iii) are the subject of this motion, as the Defendants felt they neither needed to address relevance nor qualifications to have the evidence struck. *Mohan* establishes a conjunctive test: if one of its four criteria fails, the evidence is not admissible and no further analysis is required.

[12] On the other hand, if the evidence meets all four *Mohan* criteria, the Court must nevertheless exercise its gatekeeper role by assessing the pros and cons of admitting or excluding evidence (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 24 [*Burgess*]). *Burgess*' "gatekeeper" (second) component of the expert's admissibility analysis need not be traversed in this case, because the Plaintiffs fail to satisfy two of the conjunctive *Mohan* criteria: necessity, and the exclusionary rule (of domestic law).

C. *Necessity*

[13] Expert evidence must go beyond the realm of helpfulness to be deemed "necessary". As stated by the Supreme Court, citing earlier British authorities on evidence (albeit in the context

of a criminal jury trial), "[a]n 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 an expert is unnecessary" (*Mohan* at 24, quoting *Director of Public Prosecutions v Jordan*, [1977] AC 699 at 718 and *R v Turner*, [1975] QB 834 at 841).

[14] While Courts should not apply the principle of necessity too rigorously, an overly liberal application may lead to what Justice Sopinka described as "a contest of experts with the trier of fact acting as referee in deciding which expert to accept" (*Mohan* at 24).

[15] *Mohan* further states that the criterion of necessity may be more strictly applied in cases where the expert evidence provides an opinion on the ultimate issue (*Mohan* at 24). Here, the expert evidence directly opines on the ultimate legal issue, as will be explained below.

[16] Recently, Justice Taylor considered the admissibility of expert evidence in *McQuaid v Prince Edward Island*, 2016 PESC 26 at para 29, emphasizing that it should be used to elucidate the Court in areas where it does not have expertise. The Court stated that expert evidence "generally means evidence given by a person who, through education, training or experience, has more knowledge about a subject than the average person and who, as a result, can assist the Court in matters for which the Court is not trained".

[17] Indeed, other Courts have commented on the necessity of expert evidence being exceptional, rather than admitted by default. In other words, there must be a factual and technical

need for it. In *R v DD*, 2000 SCC 43 [*DD*], Justice Major, writing for the majority of the Supreme Court of Canada, reaffirmed the *Mohan* principle that expert evidence must do more than merely help or assist the Court (*DD* at paras 46-47).

[18] Historically at common law, witnesses could only give factual evidence based on their experience and knowledge. However, as *DD* explains, the law has since evolved to allow expert opinions in "exceptional cases" where it is "necessary to provide 'a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate'" (*DD* at paras 50-51, citing *R v Abbey*, [1982] 2 SCR 24 at 42).

[19] In *Masterpiece v Alavida Lifestyles*, 2011 SCC 27 at paras 75-76 [*Masterpiece*], Justice Rothstein, relying on *Mohan*, held that "[t]endering factual context expert evidence in trade-mark cases is no different than tendering expert evidence in other contexts", and that judges play an important gatekeeper role to ensure that unnecessary evidence is not admitted.

[20] In short, the admission of expert opinion evidence is the exception, not the rule. If a Court is able to reach a conclusion based on the facts and their application to the law, without the opinion of experts, then those expert opinions are inadmissible. If, on the other hand, in exceptional cases the Court is unable to reach an informed conclusion based on the facts without the input of experts, those opinions are admissible.

[21] As the Plaintiffs argue that the Reports are necessary, they bear the burden of demonstrating this criterion (Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*,

Alan W. Bryant, Sidney N. Lederman, Michelle K. Fuerst, 4th ed, (Toronto: Lexis Nexis, 2014) at 12.41 [*The Law of Evidence*]). The Plaintiffs, in an effort to satisfy their onus to demonstrate necessity, argue that the Reports: (i) assist the Court in understanding the operation of provincial statute; (ii) save the Court's time and resources; and (iii) are accurate and complete.

[22] While the Reports may be helpful to the extent that they provide an overview of the parties' governing instruments, funding information, and assessment of other publicly available information, I do not find them necessary. Mere helpfulness does not constitute necessity for the admission of expert evidence.

[23] Contrary to the Plaintiffs' first argument, while this Court may not review provincial statutes as often as those in the Federal domain, the interpretation of provincial statutes nonetheless falls squarely within the Court's jurisdiction as a superior court of record (s. 3, *Federal Courts Act*, RSC 1985, c F-7).

[24] As to the Plaintiffs' second argument of efficiency, they rely on *Muir v Alberta*, [1995] AJ No 658 [*Muir*], where the trial judge made the comment that it was more efficient to have a law professor introduce evidence through an expert report than to have the Court review the same 900 documents and make its own factual findings.

[25] *Muir*, however, does not persuade me to accept the Plaintiffs' arguments for two reasons. First, the Alberta Court published *Muir* prior to the publication of *DD, Masterpiece* and *Burgess*, a fact which diminishes its persuasive value. Given today's case law, the "cost-benefit analysis"

undertaken by the judge in *Muir* (at paras 14-15) is now more appropriate at the (*Burgess)* second stage, as opposed to discussing it during the first (*Mohan*).

[26] In my view, efficiency no more constitutes necessity than does helpfulness. And in any event, the fact that the Reports summarize the factual backdrop does not mean that the trial itself will be more efficient, given the costs and "contest of experts" that invariably ensue.

[27] Third, I cannot support the admission of the Reports simply because they are (according to the Plaintiffs) complete and accurate. Neither completeness nor accuracy renders expert reports necessary. These particular Reports provide an overview of the Defendants' governance and funding structure, taking into account the relevant legislation, professional codes of conduct, bylaws, annual reports and other publicly available information. Based on this information, both Reports opine on the significance of government control, which is the first part of the two-fold *Architects* legal test of a "public authority". In my view, the Court must perform this analysis, and such argument is better left for counsel at trial.

[28] After considering counsel's submissions, I do not find that the Reports meet *Mohan*'s necessity criterion and are, for that reason alone, inadmissible. While additional commentary on *Mohan*'s other criteria is not formally required given that I do not find the Reports necessary, I will nonetheless address the exclusionary rule criterion raised by the Defendants, namely that of domestic law. On that point, I conclude that the Reports fail to meet that arm of the *Mohan* test as well.

D. *Exclusionary Rule on Domestic Law Evidence*

[29] It is a well-established principle that opinion evidence on domestic legal questions usurp the Court's role as the expert of law, and is thus inadmissible (*Eurocopter v Bell Helicopter Textron Canada Limitée*, 2010 FC 1328 at para 11).

[30] As noted in *The Law of Evidence* at 12.164-5, judges are to determine compliance with legal definitions, for which expert witnesses should not give evidence. Certain subject matters go to the very heart of judicial decision-making, and courts should be wary of expert witnesses providing advice as to how to decide those issues.

[31] When a legal professional testifies, the line between admissible and inadmissible evidence often blurs, given the nature of a legal professional's background. Certainly, this does not mean that legal professionals may never testify as experts: when providing insights into the political, historical and social context of the matter, the expert's testimony may be admissible (*Québec (Procureur général) c Canada*, 2008 FC 713 at paras 161-163, aff'd 2009 FCA 361, 2011 SCC 11 [*Québec*]). However, at paragraph 161 of *Québec*, Justice de Montigny cautioned about the Court's ability to accept such testimony, warning about masked legal conclusions:

> […] The role of experts is not to substitute themselves for the court but only to assist the court in assessing complex and technical facts. It must never be forgotten that, ultimately, it is the court that must decide questions of law. As the British Columbia Supreme Court wrote in *Surrey Credit Union v. Willson* (1990), 45 B.C.L.R. (2d) 310 (B.C. S.C.), cited by my colleague Mr. Justice Teitelbaum in *Samson Indian Nation & Band v. Canada* (2001), 199 F.T.R. 125 (Fed. T.D.), at paragraph 21:
>
> > Expert opinions will be rendered inadmissible when they are nothing more than the reworking of the argument of counsel participating in the case. Where an argument clothed in the guise of an expert's opinion is tendered it will be rejected for what it is. [emphasis added]

[32] In *Québec*, this Court accepted most of the expert's evidence as it provided contextual (historical, philosophical and social) background on the youth juvenile system in Canada. Justice de Montigny, however, held that part of the expert's evidence, which dealt with a division of powers (constitutional) issue, was inadmissible as it was strictly legal in nature, was the type of argument counsel should be making rather than a witness, and thus the Court "was in at least as good as position as the witness" to undertake the analysis (at para 167).

[33] Similarly, the Federal Courts have rejected evidence when it purports to answer a legal question in several other cases. For instance, in *Es-Sayyid v Canada (Minister of Public Safety & Emergency Preparedness)*, 2012 FCA 59 at para 41, the Court considered whether the trial judge had a reasonable apprehension of bias, for which a law professor prepared an expert report. The Court excluded this evidence, concluding that it answered a legal question, and was analogous to a memorandum of fact and law.

[34] Likewise, in *Brandon (City) v R*, 2010 FCA 244 [*Brandon*], the Court held that evidence on the determination of rights and obligations flowing from provincial and municipal statute should be excluded because such questions are legal in nature and should be decided by the judge alone. The Court noted that even had the fact witness rather been called as an expert, his evidence as to the effect of domestic law would have been inadmissible (*Brandon* at para 27). A similar result ensued from the FCA's review of the trial judge's decision to admit a lawyer's evidence regarding bifurcation of patent litigation in *Dywidag Systems International Canada Ltd v Garford Pty Ltd*, 2010 FCA 223 at paras 10-11.

[35] The Plaintiffs argue that the exclusionary rule does not apply because (i) the degree of government control under the *Architects* test is a question of mixed fact and law; (ii) the ultimate legal issue is not the significance of government control, but rather the public authority status; and (iii) in the past Canadian courts have admitted expert evidence on domestic law. I am not persuaded by any of these arguments.

[36] First, while the Plaintiffs are correct in their contention that (a) government control is a mixed question of fact and law from an administrative law perspective (*See You In-Canadian Athletes Fund Corp v Canadian Olympic Committee*, 2007 FC 406 at para 63), and (b) in certain circumstances, factual opinion evidence on a given point may then answer the ultimate legal issue (David M. Paciocco & Lee Struesser in *The Law of Evidence*, 4th ed (Toronto: Irwin Law Inc, 2005) at 176), I nonetheless find "significant government control" to be a technical term in law: it is a legal exercise, which should be reserved for the province of the judiciary, not for experts.

[37] In her report, Professor Puri begins by explaining her mandate:

> I am advised by counsel that in assessing the degree of governmental control, I am to consider whether any control is "significant" or not. When assessing whether any control is significant, I have been told to consider whether the government, directly or through its nominees, supervises the activities or operation of the body or otherwise exercises a degree of ongoing influence over the body's governance and decision-making (Defendants' Motion Record, Vol 1, p 17 [DMR]).

[38] In ultimately coming to her conclusion on the significance of government control, Professor Puri considers the following criteria: (i) board governance and decision-making; (ii)

government funding; (iii) government reporting; (iv) ongoing governmental supervision, membership, discipline, and development of international rules and regulations; (v) public accounting; and (vi) standard setting and government oversight.

[39] Professor Rousseau uses similar language and criteria in his report, and draws a conclusion on the significance of government control [see: DMR, Vol 1, p 262].

[40] While the Reports do not explicitly rely on *Architects*, the definition of "significant" applied by Professors Puri and Rousseau is similar to that constructed by the Federal Court of Appeal in *Architects*.

[41] The Reports do not only offer background on the interaction between the Defendants and the public realm or their governing statute; they go beyond factual or contextual considerations, and draw legal conclusions on whether the degree of government control meets the threshold of "significant", based on the criteria developed in the case law. It is my view the Reports ultimately provide a legal opinion of the test established in *Architects*. Accepting their conclusions would not sit well with the jurisprudence of this Court.

[42] Second, the Plaintiffs argue that because the Reports are only providing opinions on a part of the *Architects* test, they do not speak to the ultimate legal issue. The Plaintiffs assert the ultimate issue is the "public authority" status, not "significant government control."

[43] I find this reasoning to be a distinction without a difference. The Reports provide legal opinions on the outcome of a part of the common law test, which will play a vital role in determining the Defendants' rights under the Act. The test is conjunctive, meaning that the Reports' conclusions on significant government control, if accepted, would be dispositive. In other words, if indeed the Defendants are found not to be subject to significant government control, they cannot be considered public authorities under the Act. This determination goes to the core of the Court's role at trial.

[44] Third, the Plaintiffs cite a series of cases where expert evidence was accepted to further the courts' understanding of:

i. professional and ethical standards (*New Brunswick v Rothmans Inc*, [2009] NBJ No 60);

ii. contextual background on section 127 of the *Securities Act*, RSO 1990, c S5, in light of the regulatory jurisdiction of the Securities Commission, and remedial powers of the Court in the context of class action litigation (*Fisher v IG Investment Management Ltd*, 2012 ONCA 47 at paras 48-49 [*Fisher*]);

iii. the harmonization of national securities regulation (*Québec (Procureure générale) v Canada (Procureure générale)*, 2011 QCCA 591 at para 96 [*Procureure*]);

iv. norms of practice for notaries (*Roberge v Bolduc*, [1991] 1 SCR 374); and

v. compliance with GST legislation, and professional and ethical obligations of Chartered Accountants in Alberta (*Hyland v Royal Alexandra Hospital*, 2000 ABQB 458 at para paras 10-15 [*Hyland*]).

[45] With respect, I find none of these cases helpful in relation to the admission of expert reports, as they do not purport to answer a question of law. Rather, the evidence at issue merely offers background information on contextual and factual factors peripheral to the ultimate legal question, similar to when the Court allowed the majority of the expert's testimony in *Québec*.

[46] One exception to this observation may be the last case enumerated above, *Hyland*, where the Alberta Court of Queen's Bench noted that evidence was admitted to consider compliance with GST legislation. However, I also note that each case turns on its facts and, as such, it is difficult to comment on why the judge in *Hyland* relied on the GST legislation evidence and why counsel did not object.

[47] For whatever reason the Court permitted the evidence into trial in *Hyland* over fifteen years ago, *Hyland* is not a binding authority on this Court anyway. I rely on the more recent jurisprudence from the Supreme and Federal Courts, as cited above.

[48] For this same rationale, I also note that it is irrelevant that Professors Puri and Rousseau have provided expert evidence before the courts, including appellate courts, in the past (see *Fisher* at paras 48-49 and *Procureure* at para 96, cited above). If the judges were satisfied that the expert evidence otherwise met the *Mohan* criteria based on the factual and legal backdrop at issue in those cases, it is not for me to say differently, particularly without a full record of what transpired and what was adduced into evidence. In this case, based on the particular facts and law at issue, I find the Reports to be expert opinions in the guise of legal argument: they answer the first part of a two-part domestic legal test, which lies at the heart of this litigation.

E. *Prejudice*

[49] Both the Defendants and Plaintiffs made submissions for and against the prejudice that would result from the admission or rejection of the expert evidence. As my findings under the

Mohan test are dispositive of their admissibility, I need not consider the principles set out in *Burgess*.

III. Conclusion

[50] In light of all of the above, the Defendants' motion to declare the Reports inadmissible is granted. The Reports are declared inadmissible in their entirety and their authors will not be permitted to appear at trial for the Plaintiffs as expert witnesses. Costs are awarded to the Defendants.

ORDER

THIS COURT ORDERS that:

1) The Reports are declared inadmissible and the Plaintiffs are barred from presenting Professors Poonam Puri and Stéphane Rousseau as expert witnesses at trial; and

2) Costs for this motion are payable to the Defendants in any event of the cause.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1261-10
STYLE OF CAUSE:	ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS ET AL v THE CANADIAN INSTITUTE OF CHARTERED ACCOUNTANTS, ET AL v INSTITUTE OF CHARTERED ACCOUNTS OF ONTARIO ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 7, 2016
ORDER AND REASONS:	DINER J.
DATED:	SEPTEMBER 22, 2016

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