

THE CRITERIA FOR THE ADMISSIBILITY OF EXPERT OPINION EVIDENCE IN THE CONTEXT OF PROFESSIONAL DISCIPLINARY HEARINGS

The admissibility of expert opinion evidence in the context of professional disciplinary proceedings has, surprisingly, not been the subject of extensive judicial consideration. Moreover, the judicial consideration on the criteria for the admissibility of expert opinion evidence is conflicted. Specifically, the question of whether the criteria set out in the seminal case of *R. v. Mohan*¹ in determining the admission of expert evidence is applicable in an administrative hearing has been given conflicting judicial treatment.

In 1994, the Supreme Court of Canada, in *R. v. Mohan*, set out the following general criteria for the admissibility of expert opinion evidence:

1. The evidence is relevant to some issue in the case;
2. the evidence is necessary to assist the trier of fact;
3. the evidence does not violate an exclusionary rule; and
4. the witness is a properly qualified expert.

In Alberta, judicial consideration suggests that the *Mohan* criteria does not apply in determining the admission of expert evidence in an administrative hearing. It seems that the trend is for any expert evidence to be admitted so long as it is relevant and any issue with respect to necessity or qualifications goes to the weight to be attributed to the evidence but not to its admissibility.

In 2010, the Alberta Court of Appeal held that *Mohan* has no application in administrative hearings² and on that basis dismissed the Appellant's submission that the rules of expert evidence set down in *Mohan* had been violated by the Commission. After referring to an earlier decision of the Court of Appeal wherein it stated that *Mohan* has no application in administrative hearings, the Court stated the following: "David Jones and Anne de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at 306, note that while the *Mohan* criteria do not apply in the administrative context, consideration of the criteria may lead a tribunal to accord more or less weight to the evidence.

¹ *R. v. Mohan* [1994] 2 S.C.R. 9.

² *Alberta (Securities Commission) v. Workum*, [2010] A.J. No. 1468 (C.A.) at paras. 81 – 84.

In its earlier decision, the Alberta Court of Appeal held that an agency's failure to formally qualify an expert according to the rules laid down in *R. v. Mohan* did not preclude the admissibility of his opinion.³ In doing so, the Court said: "*This argument departs from established principles of administrative law. As a general rule, the strict rules of evidence do not apply to administrative tribunals, unless expressly prescribed ... While rules relating to the inadmissibility of evidence (such as the Mohan test) in a court of law are generally fixed and formal, an administrative tribunal is seldom, if ever, required to apply those strict rules*".⁴ After rejecting the applicability of *Mohan* and specifically the pre-condition of qualifying the expert, the Court then went on to characterize the Appellant's argument as one of weight and stated "... In an administrative context, "[r]elevant expert evidence is admissible. Any frailties in the facts or hypothesis upon which an opinion is based, or in the qualifications of the expert, affect the weight of the evidence, but not its admissibility".⁵

It would seem that the authors, Macauley & Sprague, in *Hearings before Administrative Tribunals*, agree with the approach taken by the Alberta Court of Appeal when they state: "Obviously, as an administrative agency is not bound by the civil rules of evidence, the same strict standards do not apply to the admission of expert evidence as apply in judicial proceedings. In fact, since many agencies themselves are subject experts, if the rule were applied strictly expert evidence would be received less often than in courts."⁶

Alberta's jurisprudence on the issue of the applicability of *Mohan* has not, however, been followed in Ontario.

The Ontario Divisional Court and a panel of the Law Society Discipline Committee seem to have applied the *Mohan* criteria in considering the issue of the admissibility of expert opinion evidence in the context of a professional disciplinary proceeding.

In 2005, the Ontario Divisional Court held that the opinion evidence of a proposed defence expert should have been admitted by a discipline panel of the Royal College of Dental Surgeons of Ontario. The Divisional Court found that the proposed expert's knowledge and experience in the area of interpreting the Guidelines (and whether the dentist's treatment fell within or outside of those Guidelines), went well beyond that of the members of the Discipline Committee panel

³ *Alberta (Workers' Compensation Board) v. Appeals Commission* (2005), 258 D.L.R. (4th) 29 (Alta. C.A.).

⁴ *Ibid.* at para. 63.

⁵ *Ibid.* at para. 67.

⁶ Macauley & Sprague, *Hearings before Administrative Tribunals*, 3rd Edition at p. 17-14

which included a lay person.⁷ The Court stated “Given that Dr. Krueger had no personal experience with TMD treatment, and the second of the three people on the panel was a lay person, it is difficult to understand why Dr. Mulroneo would not be recognized as an expert whose evidence might be helpful to an understanding of the technical issues. There is no dispute that Dr. Mulrooney’s proposed expert testimony satisfied the first three criteria enunciated in *R. v. Mohan*, [1994] 2 S.C.R. 9: relevance, necessity in assisting the trier of fact, and absence of any exclusionary rule. The Discipline Committee found, however, that he was not a “properly qualified expert”. It seems obvious that Dr. Mulrooney’s knowledge and experience in the area of interpreting the Guidelines, and whether Dr. Sigesmund’s treatment fell within or outside of those Guidelines, went well beyond that of the members of the Discipline Committee panel.”⁸ The Court ultimately concluded that the Discipline Committee erred in its refusal to allow the expert to give relevant expert evidence.

In 2009, a Law Society Disciplinary Panel held that expert opinion evidence in the area of real estate law met the *Mohan* test of necessity where the panel “...determined that estate administration is a complex, highly technical and specialized area of law. The relevant practices in this specialized area of law went beyond the knowledge and expertise of the Panel. It followed that the proposed expert evidence was necessary because it would be of assistance to the Panel in providing relevant information and appreciating the technicalities of estate administration that were outside the Panel's knowledge and experience.”⁹

On the criteria of necessity, the Supreme Court held that the opinion must be “necessary in the sense that it provides information which is likely to be outside the experience or knowledge of the judge or jury.” The Court explained that the expert evidence must be necessary in order to allow the fact finder: 1) to appreciate the facts due to their technical nature, or; 2) to form a correct judgment on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge.¹⁰

If the trier of fact is able to reach a conclusion without the assistance of experts, the opinion evidence is superfluous and thus is unnecessary.¹¹

⁷ *Sigesmund v. Royal College of Dental Surgeons of Ontario*, (2005) O.J. 3267 (Ont. Div. Ct.), at paras. 34 -38

⁸ *Ibid.* at paras. 34 & 35.

⁹ *LSUC v. Anderson*, 2009 L.S.D.D. No. 3, at para. 38.

¹⁰ Sopinka, *The Law of Evidence in Canada*, 2nd Ed., © 1999 Lexis Nexis Canada Inc., at p. 620.

¹¹ *Ibid.*

It must be demonstrated that the expert possesses special or peculiar knowledge in the area beyond the triers of fact, acquired by academic study or by practical experience, to be able to assist the Court.¹²

Whether or not the Mohan criteria are as strictly applicable in the administrative context, it is important to bear in mind those criteria in ensuring that a Discipline Panel is not deprived of relevant expert evidence but also in ensuring that the Panel retains a “gate-keeping” function in ensuring that irrelevant expert evidence is not admitted. For example, in cases of an allegation that a professional member has failed to maintain the standard of practice of the profession, I would suggest that prosecuting counsel as a general rule seek to introduce expert evidence regarding what standard the member must maintain or run the risk of having failed to prove an element of the allegation. As another example, in cases of defending professionals before their regulatory body, I would suggest carefully scrutinizing the referring documentation and allegations against a member in considering the admissibility of expert opinion evidence with a view to determining precisely what facts are in issue in a hearing and thereby determining the relevance (if any) of the expert opinion. Justice Galligan, in *Golomb v. College of Physicians and Surgeons of Ontario*, states:

*It follows from the requirement that the charge must be particularized to that extent that an accused must not be tried on a charge of which he has not been notified. It also follows that evidence ought to be confined to the charge against him. Evidence relating to other suggestions of misconduct should not be presented because it could have a very serious prejudicial effect upon the tribunal and it is evidence relating to conduct which he is not prepared to defend.*¹³

In circumstances where the allegation of professional misconduct referred is that the member failed to apply applicable statutes, regulations and codes, should an opinion that the member failed to maintain the standard of practice of the profession be admissible? I suggest not.

In conclusion, it seems that different approaches have been taken towards the test for the admissibility of expert opinion evidence in other regions of the country though, in Ontario, the criteria established in *R. v. Mohan* seems to have been applied. Regardless of whether the *Mohan* criteria will be strictly applied in all cases, when acting as counsel in professional disciplinary proceedings, the criteria in *Mohan* provide a helpful and important framework to keep in focus issues that may be relevant to the admissibility of expert opinion evidence.

¹² James T. Casey, *The Regulation of the Professions in Canada*, © 1994 Carswell, at 11.13.

¹³ *Golomb v. College of Physicians and Surgeons of Ontario* [1976] O.J. No. 1707 (Div. Ct.), at para. 33.

Neil J. Perrier

March 2011