

The Impact of White Burgess Langille Inman V Abbott and Haliburton Co on Recent Alberta Civil Decisions

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Presented by:
Prof. Lisa Silver
University of Calgary
Calgary, Alberta

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**THE IMPACT OF WHITE BURGESS LANGILLE INMAN V ABBOTT AND HALIBURTON CO.
ON RECENT ALBERTA CIVIL DECISIONS¹**

In the recent trilogy of Supreme Court of Canada cases, *Sekhon*², *White Burgess Langille Inman v Abbott and Haliburton Co.*³ [hereinafter *White Burgess*] and *Bingley*⁴, the “threshold” principles relating to admissibility of expert evidence evolves into a robust two-step approach, which enhances the trial judge’s gatekeeper function and requires counsel to be vigilant in their evidentiary duties. This paper will provide a brief summary of the enhanced expert evidence framework and a survey of the recent Alberta decisions implementing that framework.

These decisions are part of the ongoing discourse on the gatekeeper function of the trial judge. They are a recognition of the trial judge’s key role as the justice system’s “guardian of integrity.” Counsel too has a role to play in this enhanced function, which does not end at the admissibility stage but is an ongoing duty throughout the trial. To ensure compliance, counsel must be informed by and conversant with past and present case law in the area. Counsel is expected to act with heightened awareness of the various expert evidence issues from the time an action is “live” until the final determination by the trier of fact and beyond, with an eye to preserving the present and future record in the event of an appeal.

White Burgess “tightens”⁵ and builds on the *Mohan*⁶ criteria for admissibility in an effort to acknowledge and rectify potential miscarriages of justice resulting from the undue reliance on expert evidence in criminal and civil cases.⁷ Although *White Burgess* is a civil action,⁸ it is the integrity of the justice system which is at risk when expert evidence is admitted without careful consideration. *White Burgess* is a culmination of previous case law overlaying onto the *Mohan* criteria the obligation of the trial judge to assess the admissibility of the evidence while exercising the general exclusionary

¹ Lisa A. Silver: BA(Econ), LLB, LLM and Of the Bars of Alberta & Ontario, Professor at University of Calgary, Faculty of Law for the LESA Civil Advocacy Series: Evidence on May 2 & 4, 2017.

² [2014] 1 SCR 272.

³ [2015] 2 SCR 182, 2015 SCC 23.

⁴ 2017 SCC 12 (CanLII).

⁵ *Supra*, note 3, at para 1.

⁶ [1994] 2 SCR 9, 1994 CanLII 80 (SCC).

⁷ *Supra*, note 3, at para 12.

⁸ The case involved a summary judgment application, which in the words of Justice Cromwell at paragraph 6 was “neither summary nor resulted in a judgment.”

discretion of ensuring the “potential helpfulness of the evidence is not outweighed by the risk of the dangers.”⁹

White Burgess approaches expert evidence holistically, providing a meaningful framework for threshold admissibility and for continual assessment of the evidence through the lens of the *Mohan* criteria and the overarching gatekeeper function of the trial judge. *White Burgess* is also a reminder to the trier of fact that the concern for trial fairness does not end with the last witness but is an aspect of the final weight assessment.

Under the *White Burgess* framework, the trial judge, before entering officially into the admissibility assessment, must clearly delineate the scope of the expert’s opinion evidence. Scope is key to ensuring the evidence given does not “stray” outside of the permissible qualified area. Determining scope is an ongoing obligation as threshold admissibility cannot be conducted in a “vacuum” and must continue throughout the trial. The importance of scope can be understood through the consideration of expert evidence as opinion evidence, which provides a “ready-made inference”¹⁰ for the trier of fact on a material issue. Setting boundaries of expert evidence ensures those inferences do not overwhelm the trier of fact or usurp their function as the ultimate arbiters of the facts.¹¹

The first step in admissibility requires an assessment of the *Mohan* criteria, an extension of the Wigmore test for admissibility,¹² wherein the party seeking to admit the evidence must establish on a balance of probabilities that the expert evidence is:

1. Logically relevant;
2. Necessary;
3. Not subject to another exclusionary rule and;
4. Properly qualified expert.¹³

A fifth consideration, where the underlying science of the expert is novel or contested, requires a further reliability assessment.¹⁴ The fourth criteria of “properly qualified expert” is described in detail in *White Burgess* and requires the expert to understand their duty to the court as an independent

⁹ *Supra*, note 3, at para 54.

¹⁰ *R v Abbey*, [1982] 2 SCR 24, 1982 CanLII 25 (SCC) at page 42.

¹¹ *Supra*, note 2, at para 46.

¹² *R v Khelawon*, [2006] 2 SCR 787, 2006 SCC 57 (CanLII) at para 42.

¹³ *Supra*, note 6, at page 20.

¹⁴ *Supra*, note 3, at para 23.