

Tightening the Reigns on Expert evidence; judicial gatekeeping in the Canadian context

Jennifer Glougie

BC Labour Relations Board
and BC Employment Standards Tribunal
Canada

Abstract

Expert evidence is both immensely important to legal adjudication and equally dangerous (Chin, 2019). Adjudicators must balance the potential risks and benefits of admitting expert evidence and decide whether the potential benefit outweighs the risks. In Canada, the test in *R. v. Mohan* which says that expert evidence will only be admissible where it is (1) relevant, (2) necessary, (3) not excluded by another exclusionary rule, and (4) given by a properly qualified expert. Even where an expert report is admissible, the adjudicator has the discretion to give it little or no weight where its potential prejudicial effect outweighs its probative value. In other words, even where an expert is properly qualified and all of the other threshold criteria are met, an adjudicator may disregard an expert's evidence if, in their view, that evidence may do more harm than good. The *Inquiry into Pediatric Forensic Pathology in Ontario* demonstrated that the Canadian legal system remains vulnerable to flawed expert testimony and that the courts' approach to expert evidence contributed to more than a dozen wrongful convictions, based on the expert testimony of a now-disgraced forensic pathologist. As a result, Canadian courts have enhanced their scrutiny of expert evidence, both with respect to the nature of the evidence and the nature of the expert's opinion, by tightening admissibility requirements and reinforcing the judge's gatekeeping role. In terms of the nature of the evidence, the courts now distinguish between scientific expertise and expertise based on specialized knowledge or experience (*R. v. Abbey*), with the latter being scrutinized more closely. This paper considers how these judicial gatekeeping enhancements have been applied to expert social science evidence in Canada and discusses their potential implications for expert forensic linguists. While 'scientific' in the academic sense, courts tend to consider expert social science evidence, including that given by linguists, to be specialized knowledge and, therefore, subject to greater scrutiny at the admissibility stage. In terms of the expert's duty, the courts have acknowledged a variety of biases that may affect the admissibility of or weight given to an expert report, including: lack of independence, adversarial or selection bias, association bias, professional credibility bias, noble cause distortion, and confirmation bias. I discuss issues forensic linguists may face giving expert evidence in Canada in light of these enhancements and identify potential pitfalls they may encounter in crafting expert reports.