Date: 2013 03 11
Docket: S-1-CV2007000247

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JAMES DOUGLAS ANDERSON and SAMUEL ANDERSON
on behalf of themselves, and all other members of a class
having a claim against Bell Mobility Inc.

Plaintiffs

AND

BELL MOBILITY INC.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Keith Landy and D. Fogel	Counsel for James Douglas Anderson and Samuel Anderson
Robert Deane and Brad Dixon	Counsel for Bell Mobility Inc.

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] This is an application by Bell Mobility Inc. under rule 278.6 of the Rules of Court objecting to the admissibility of expert evidence presented by the plaintiff to determine whether, one, there is a custom or usage in Canada that when a mobile customer is charged a 911 fee that the user will be connected to a live operator; and, two, whether there is an area in Canada where a 911 fee is charged for no live operator.

[2] The expert evidence goes to the heart of common issue number two which reads "Do the service agreements of Bell Mobility have an implied term based on custom usage or as the legal incidents of a particular class or kind of contract, to provide 911 live operator service?"

THE LAW OF EXPERT EVIDENCE

[3] In *R.* v. *Mohan*, [1994] 2 S.C.R. 9, the Supreme Court of Canada established four basic criteria that a party tendering expert opinion evidence must establish on a balance of probabilities: One, relevance; two, necessity in assisting the trier of fact; three, the absence of any exclusionary rule; and, four, a properly qualified expert.

[4] Expert evidence as stated in the *R.* v. *Abbey*, 2009 ONCA 624, at paragraph 71, is presumptively inadmissible unless the party tendering it can establish its admissibility on the balance of probabilities. However, the role of the trial judge as gatekeeper is a matter of discretion that the trial judge must exercise even if the four preconditions are met. This involves a cost benefit analysis. And in the 2009 R. v. Abbey case, it states at Paragraph 87, and I quote:

> The benefit side of the cost benefit evaluation requires a consideration of the probative potential of the evidence and the significance of the issue to which the evidence is directed. When one looks to potential probative value, one must consider the reliability of the evidence. Reliability concerns reach, not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the experts expertise and the extent to which the expert is shown to be impartial and objective.

[5] This application focuses, on among other things, the methodology used by Mr. Grant in arriving at his opinion. The issue is addressed in some detail in the Supreme Court of Canada decision in *R.* v. *Lavallee*, [1990] 1 S.C.R. 852 discussing an earlier decision cited as *R.* v. *Abbey*, [1982] 2 S.C.R. 24.

[6] Sopinka J. at page 899 describes the sound medical practice of a physician relying on the observations of colleagues in the form of second - or third - hand hearsay, which is admissible, as opposed to other sources that may be suspect, and I quote at page 900:

> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with Abbey, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely

> based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight. In this respect, I agree with the statement of Wilson J. at page 896, as applied to circumstances such as those in the present case.

[7] And that quotation is as follows:

> As long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may tribute to the opinion.

[8] The relevant case in this context is *St. John (City of)* v. *Irving Oil Co.*, [1966] S.C.R. 581 where an expert land appraiser relied upon 47 unrecorded interviews of persons who had been parties to sales of land in the area. Ritchie J. concluded at Paragraph 39, and I quote:

> The nature of the source upon which such an opinion is based cannot, in my view, have any affect on the admissibility of the opinion itself. Any frailties which may be alleged concerning the information upon which the opinion was founded are in my view only relevant in assessing the weight to be attached to that opinion, and in the present case this was entirely a question for the arbitrators and not one upon which the Appeal Division could properly rest its decision.

[9] Although the caselaw recently has emphasized the gatekeeper function and role of the trial judge in restricting the use of expert evidence, I note that Laskin J. in *Chasczewski Estate* v. *528089 Ontario Inc.* 2012 ONCA 97 stated at Paragraph 32:

> The bar for qualifying an expert is not high. The only requirement is that the expert must "have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify": *R.* v. *Mohan*, [1994] 2 S.C.R. 9 (S.C.C.), at p. 25. This special knowledge must go beyond that of the trier of the fact". (Authorities omitted).

DISPOSITION

[10] The expert proposed in this case is Iain Grant, the principal of SeaBoard Research Inc.

[11] I am going to read from the material provided to explain who SeaBoard Research is, and I quote:

> Seaboard Research Inc. along with its affiliated company SeaBoard Group is a research group that has studied the Canadian telecommunications marketplace for over three decades. SeaBoard is widely quoted in Canadian and international media on communication matters and is viewed as – and debates on public policy. SeaBoard's prime product is research reports. The company has a long history of looking at the industry, its custom, practice, billing and pricing, performance metrics, and similar questions in preparing reports offering perspectives on those questions. We often perform international comparisons to assess how Canada's carriers fare when compared to carriers in other jurisdictions and we look at how well customers of Canada's carriers are served by Canada's communications service providers.
>
> SeaBoard reports are widely circulated within the Canadian communications industry and are often cited before regulatory tribunals such as the Canadian Radio-Television Telecommunications Commission, Competition Bureau and various provincial bodies. SeaBoard reports are distributed to the company's clients through annual subscription and are also made available to students and staff affiliated with several of the country's leading law and business schools.

[12] I take that from Exhibit 5 For Identification at page 7.

[13] Mr. Grant is very clear that he is not an expert on the mechanics and plumbing of 911 services and that he is a consultant or researcher, and this is his first assignment in the area of 911 service.

[14] Page 9 of the report, SeaBoard describes their approach to answer the two questions I posed at the outset as follows:

> SeaBoard reviewed the Court filings, including affidavits of both plaintiffs and the defendant, our own experience in matters pertaining to 911, and gathered material pertaining to deployment, use and management of 911 services in Canada from systems vendors, implementation consultants, and public safety groups. We followed up this research with interviews with people responsible for management and/or deployment of 911 services in various jurisdictions across the country. We also discussed 911 deployment matters with public safety officials in a number of jurisdictions to obtain a sense of perspective from the recipients of 911 calls, the people who are tasked with the responsibility of responding to them. We set out to determine the practices by other (i.e. not Bell Mobility) Canadian companies which provide mobile services in areas that were comparable to Canada's North. For example, we examined mobile 911 implementations in jurisdictions adjacent to the Northwest Territories that share similar geographic and demographic challenges. We also explored how 911 services are provided and charged for in other places that are considered non-metropolitan areas to

> determine whether the Bell Mobility Inc. practice in the handling of 911 calls in Canada's North reflected practices in other non-metropolitan areas.

[15] In cross-examination, Mr. Grant indicated that he interviewed 13 persons with knowledge of 911 services in Canada. For example, Dave Neale, a former wireless executive of Rogers and Telus from the early 1990s to 2007, or Mark Halon, a senior executive of Bell Aliant with experience in Ontario, Quebec, and the Maritimes. He could not recall the specific information received from each person and acknowledged a mistake about northern B.C., for example, which he corrected in an addendum to his report.

[16] He also researched the internet and relied on newspaper articles including a quote from a spokesperson for the Canadian Wireless Telecommunications Association.

[17] R. v. Abbey 2009 ONCA 624 is, again, instructive. The Crown wished to elicit evidence on the meaning of the teardrop tattoo used by a Toronto street gang. The trial judge refused to allow the evidence of three gang members, a police officer with extensive street gang experience, and Dr. Totten, an acknowledged expert on the culture of Canadian street gangs. Doherty J.A. stated that the three witnesses should have been allowed to testify. With respect to Dr. Totten, he said at Paragraph 142 under the heading - - The Distinction Between Threshold Reliability and Ultimate Reliability:

> In performing the "gatekeeper" function, a trial judge of necessity engages in an evaluation that shares some of the features with the evaluation ultimately performed by the jury if the evidence is admitted. The trial judge is, however, charged only with the responsibility to decide whether the evidence is sufficiently reliable to merit its consideration by the jury. The integrity of the trial process requires that the trial judge not overstep this function and encroach onto the jury's territory. In assessing threshold reliability, I think trial judges should be concerned with factors that are fundamental to the reliability of the opinion offered and responsive to the specific dangers posed by expert opinion evidence. Trial judges, in assessing threshold reliability, should not be concerned with those factors which, while relevant to the ultimate reliability of the evidence, are common with those relevant to the evaluation of evidence provided by witnesses other than experts. For example, I would not think that inconsistencies in an expert's testimony, save perhaps in extreme cases, would ever justify keeping the expert's opinion from the jury. Juries are perfectly able to consider the impact of inconsistencies on the reliability of a witness's testimony.

[18] With specific reference to evidence of Dr. Totten, Doherty J.A. stated the following at Paragraph 149:

> Experts, in forming their opinions, often rely on information gathered using techniques and methods common to their field of expertise, even though that information is not proved within the four corners of the case in which the opinion is offered. The reliability of the information received by Dr. Totten in the interview process was obviously crucial to the ultimate weight to be assigned to his opinion. It was, however, a matter for the jury and not a reason to exclude the opinion: See *St. John (City of)* v. *Irving Oil Ltd*., [1966] S.C.R. 581, at page 592.

[19] I conclude that the expert opinion of Iain Grant is admissible because it has sufficient threshold reliability and that it is relevant to the common issue number two on custom or usage. It is necessary to assist me as the trier of fact, as it is beyond my experience or that of any trial judge. No exclusionary rule has been identified and Mr. Grant is suitably qualified, although I have yet to rule on the precise wording of his qualifications.

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VEALE J.

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REASONS FOR JUDGMENT
OF THE HONOURABLE JUSTICE R.S. VEALE