

CANADA / JUDGMENT

A.N.H. v. L.D.G.

2018 BCSC 2003

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 2003 A.N.H. v. L.D.G. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: A.N.H. v. L.D.G., 2018 BCSC 2003 Date: 20181001 Docket: E45924 Registry: Vernon Between: A.N.H. Claimant And L.D.G. Respondent Before: The Honourable Mr. Justice Abrioux Ruling re: Admissibility of Affidavit of Stephen Cousins The Claimant, appearing in person: A.N.H. Counsel for Respondent: C. Chisholm Counsel for FMEP: A.M. Accettura Place and Date of Hearing: Vernon, B.C. September 25, 2018 Place and Date of Judgment: Vernon, B.C. October 1, 2018

- [1] A.N.H. seeks to have the affidavit of Stephen Cousins (the "Affidavit") admitted into evidence at this hearing. The Affidavit was sworn December 16, 2014, filed January 15, 2015, and is 39 pages in length and contains approximately 825 pages of exhibits.
- [2] Mr. Cousins is a chartered accountant and was A.N.H.'s accountant, both personally and for his company, for several years. He was also the accountant for the AID Party and the British Columbia Patriot Party (BCPP), both of which A.N.H. was involved with.
- [3] This hearing pertains to an application by A.N.H. to vary his income for support purposes, which was found by Justice Cole as \$610,000, and the associated relief in relation to the support he has or should have paid to the children and L.D.G. The hearing will also include a review of L.D.G.'s need for support, including her attempts to become self-supporting as ordered by the trial judge.
- [4] The Supreme Court of Canada recently confirmed the legal framework for assessing the admissibility of expert evidence in *R. v. Bingley*, 2017 SCC 12: B. Is the Evidence Admissible Expert Opinion?
- [13] The modern legal framework for the admissibility of expert opinion evidence was set out in *Mohan* and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182. This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into "trial by expert" and that the trier of fact maintains the ability to critically assess the evidence: see *White Burgess*, at paras. 17-18. The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.

- [14] The expert evidence analysis is divided into two stages. First, the evidence must meet the four Mohan factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. Second, the trial judge must weigh potential risks against the benefits of admitting the evidence: *White Burgess*, at para. 24.
- [15] If at the first stage, the evidence does not meet the threshold Mohan requirements, it should not be admitted. The evidence must be logically relevant to a fact in issue: *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 82; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 47. It must be necessary "to enable the trier of fact to appreciate the matters in issue" by providing information outside of the experience and knowledge of the trier of fact: *Mohan*, at p. 23; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 57. Opinion evidence that otherwise meets the Mohan requirements will be inadmissible if another exclusionary rule applies: *Mohan*, at p. 25. The opinion evidence must be given by a witness with special knowledge or expertise: *Mohan*, at p. 25. In the case of an opinion that is based on a novel scientific theory or technique, a basic threshold of reliability of the underlying science must also be established: *White Burgess*, at para. 23; *Mohan*, at p. 25.
- [16] At the second stage, the trial judge retains the discretion to exclude evidence that meets the threshold requirements for admissibility if the risks in admitting the evidence outweighs its benefits. While this second stage has been described in many ways, it is best thought of as an application of the general exclusionary rule: a trial judge must determine whether the benefits in admitting the evidence outweigh any potential harm to the trial process: *Abbey*, at para. 76. Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded: *Mohan*, at p. 21; *White Burgess*, at paras. 19 and 24.
- [17] The expert opinion admissibility analysis cannot be "conducted in a vacuum": *Abbey*, at para. 62. Before applying the two-stage framework, the trial judge must determine the nature and scope of the proposed expert opinion. The boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized: see *Abbey*, at para. 62; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 46.
- [5] As laid out in *Bingley*, *White Burgess* requires that the first task in determining threshold admissibility is to determine the nature and scope of the expert evidence in question. I will set out most of the headings in Mr. Cousins' report: · Review of tax returns and supporting documents of A.N.H. and the company; · Review of corporate and personal debt to C.H.; · The sale of A.N.H.'s personal property; · Review of certain company, and personal accounts; · 100% utilization of patients who are referred to the company for dental treatment; · "A shareholders loan and then withdraws tax free"; · Severe financial stressors; · Access to almost unlimited amounts of money; · Political contributions between the BCPP and the AID party; · The May 15, 2014 finding that A.N.H. was in contempt of court; · CRA Informant L.D.G.; · ATIP (access to information and privacy directorate) - CRA; · Concerns about the closure of the dental practice and/or office; · Review of A.N.H.'s TFSA, RRSP accounts; · Tax ramifications to A.N.H. with shareholder's loan account; · Sources of income for A.N.H. and the Company from October 31, 2012 to the present; · Contractor agreement dated August 8,

2012; · Financial Literacy and Functionality.

- [6] When I apply the legal framework to which I have referred, I conclude that the Affidavit should not be admitted into evidence. It does not comply with the first stage of the White Burgess analysis, being threshold admissibility. In particular, the evidence for the most part is not logically relevant to a fact in issue, nor is it necessary "to enable the trier of fact to appreciate the matters in issue": Bingley, para. 15.
- [7] Much of the evidence from the Affidavit is directed at challenging the findings of fact made by the trial judge, including the contempt finding made in May 2014. Furthermore, the circumstances pertaining to the AID party, the BCPP, the analysis of L.D.G. as a CRA informant and other sections of the Affidavit do not pertain to issues to be considered at this hearing.
- [8] I mention "for the most part" since there are some portions of the Affidavit which relate to issues which I may have to consider, including the fact that A.N.H. withdrew funds which were treated as shareholders' loans and the volume of business for the dental practice. However, the evidence pertaining to those issues will be difficult to extricate from approximately 900 pages of the Affidavit. Further, I have the current evidence of two employees, as opposed to the somewhat outdated Affidavit from December 2014, to assist me with this issue. I will also be hearing from C.H. regarding the implications of A.N.H. receiving funds for many years in the form of draws, as opposed to employment income.
- [9] Accordingly, the Affidavit is not received into evidence. "Abrioux J."

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