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IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

Citation: 2009NBQB060
Date: 20090320

F/C/88/08

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT
OF THE PROVINCE OF NEW BRUNSWICK

Plaintiff

AND:

ROTHMANS INC., ROTHMANS, BENSON & HEDGES INC.,
CARRERAS ROTHMANS LIMITED, ALTRIA GROUP, INC.,
PHILIP MORRIS U.S.A. INC., PHILIP MORRIS
INTERNATIONAL, INC., JTI- MACDONALD CORP., R.J.
REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS
TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO
CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C.,
B.A.T. INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO
(INVESTMENTS) LIMITED, and CANADIAN TOBACCO
MANUFACTURERS' COUNCIL

Defendants

BEFORE: The Honourable Mr. Justice Thomas E. Cyr

DATE OF HEARING: March 10th, 2009

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DATE OF DECISION: March 20th, 2009
APPEARANCES:

Counsel for the Plaintiff

Philippe J. Eddie, Q.C.
Christopher Correia, Q.C.
Robin Ryan-Bell

Counsel for the Defendants
Rothmans Inc., Rothmans Benson & Hedges Inc.

Charles D. Whelley, Q.C.

Counsel for the Defendants
Altria Group Inc. and Philip Morris U.S.A. Inc.

Rodney J. Gillis Q.C.

Counsel for the Defendant
Philip Morris International Inc.

Robert G. Basque, Q.C.

Counsel for the Defendant
Imperial Tobacco Canada Limited

Thomas G. O'Neil, Q.C.
Deborah A. Glendinning
Mahmud Jamal

CYR, J. :

I. INTRODUCTION

[1] The court is hereby seized of a motion, whereby the moving party is requesting that the court strike or otherwise rule inadmissible two affidavits purported to contain expert opinion evidence filed on behalf of the responding parties who, in turn, intend to rely on these affidavits in support of their own motions to be heard in the foreseeable future. I must determine according to the variable application of the four criteria found in the decision of the Supreme Court of Canada in *R. v. Mohan*, [1994] S.C.J. No. 36 (S.C.C.), whether the aforementioned affidavits should be admitted into evidence or otherwise excluded.

II. FACTS

[2] The defendant, Imperial Tobacco Canada Limited, (Imperial) has filed a motion whereby it claims that the Attorney General of New Brunswick contracted the conduct of this action to a consortium of U.S., Ontario, and New Brunswick lawyers (Crown Counsel Consortium). According to Imperial, the Province has agreed to pay the lawyers a very large contingent fee in the event it is successful in this litigation. In this motion, (C.F.A. motion), Imperial is challenging the constitutionality, legality, and ethical integrity of the contingent fee agreement.

[3] The following defendants, Philip Morris International, Inc., Rothmans Inc., Rothmans, Benson & Hedges Inc., Altria Group, Inc., and Philip Morris U.S.A. Inc. have joined Imperial by filing similar motions. A procedural timetable has been set for the C.F.A. motions.

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The hearing is scheduled to take place on June 16-18, 2009. (See *New Brunswick v. Rothmans Inc.*, [2009] N.B.J. No. 8 (Q.L.).)

[4] These defendants take the position that the Attorney General hired external counsel by way of a contingent fee agreement thereby violating the *Constitution Act, 1867*. Further, that these lawyers are in conflict of interest in prosecuting this action and that the U.S. lawyers retained are and would continue to be engaged in the unauthorized practice of law in the Province of New Brunswick.

[5] They also say that the Attorney General of New Brunswick retained the legal services of the Crown Counsel Consortium authorizing it to act in the public's interest. They believe that it should be removed and that the contingent fee agreement should be declared void for it has a disqualifying conflict of interest between its public duties as counsel for the Attorney General and its private financial interests under the agreement.

[6] In addition, they argue that the Attorney General of New Brunswick had no constitutional authority to enter into the contingent fee agreement and to commit such vast sums of public money to anyone without proper legislative approval. They are of the view that this agreement breaches s. 53 of the *Constitution Act, 1867*, and s. 30 of the *Financial Administration Act*, R.S.N.B., 1973, c.F-11, and that it contravenes accepted public law principles of fiscal management.

[7] Therefore, they allege that they are being sued for potentially billions of dollars by lawyers acting in circumstances which offer them the prospect of enormous wealth in the event of success. Included in this group are foreign lawyers who, according to them, are

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unauthorized to practice law in this jurisdiction. Consequently, they believe that the contingent fee agreement breaches the *Law Society Act, 1996*, S.N.B.1996, c.89, due to the fact that foreign lawyers have been engaged in the unauthorized practice of law and further by failing to comply with the Contingent Fee Rules put in place under s. 83 of the Act.

[8] In support of the C.F.A. motion, Imperial filed *inter alia* the affidavit of Professor H. Patrick Glenn, attaching his expert report (the “Glenn Report”), and the affidavit of Professor Geoffrey C. Hazard Jr., attaching his expert report (the “Hazard Report”).

[9] The other defendants, who have filed C.F.A. motions, are also relying on the “Glenn and Hazard Reports” in support of their respective motions.

III. THE PRESENT MOTION

[10] The plaintiff moves to strike or to have the court rule inadmissible, the “Glenn and Hazard Reports”. The moving party relies on Rules: 27.09 and 39 of the *New Brunswick Rules of Court* and on the inherent jurisdiction of the court as provided by the *Judicature Act 1973*, A.S.N.B., c.J-2.

[11] The defendants maintain that the expert reports are properly admissible as expert evidence and that if the court has any doubt about their admissibility, it should address this issue only with the benefit of the full context and argument of the C.F.A. motions. Consequently, the court should defer the plaintiff’s motion regarding the affidavits, without prejudice, to the hearing of the C.F.A. motions.

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[12] The plaintiff argues that it would be prejudiced by having its motion adjourned. Crucial decisions must be made in light of the procedural timetable set by the court and it should rule on its motion as soon as possible so that the plaintiff may adjust its position accordingly and proceed expeditiously to the hearing of the C.F.A. motions.

[13] I agree with the plaintiff that it is important for the court to address this motion at this time, in light of the procedural timetable previously set by the court, and to provide the plaintiff the opportunity to respond to the C.F.A. motions once this motion is dealt with, if it so wishes to do so, and in order to give the parties the opportunity to prepare adequately for the hearing of the C.F.A. motions.

[14] The plaintiff's position, in support of its motion, is well summarized in para. 4 of the pre-hearing brief as follows:

- a) **Both affidavits fail to meet the requirement of "necessity" laid down by the Supreme Court of Canada for the admissibility of expert evidence;**
- b) **The Glenn Affidavit contains opinion evidence on questions of domestic law which is inadmissible. The Glenn Affidavit seeks to usurp the role of this Honourable Court in determining domestic law and other issues before the Court. Matters of domestic law are exclusively within the expertise of this Honourable Court and are to be determined by it;**
- c) **The Glenn Affidavit contains opinion evidence on the ultimate issue the court must determine on the motion, and is therefore inadmissible;**
- d) **To the extent that the Glenn Affidavit seeks to give evidence on foreign law, it is irrelevant and inadmissible;**
- e) **The Hazard Affidavit contains opinion evidence on questions of foreign law. Foreign law must be specifically pleaded in order for evidence of foreign law to be admissible. No such plea exists in this case;**

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- f) **The opinion of evidence on a question of foreign law that is contained in the Hazard Affidavit is irrelevant. Further, the opinion evidence in the Hazard affidavit seeks to usurp the role of this Court by providing “expert evidence” on the issues to be decided by the Court.**

[15] Moreover, counsel for the Province of New Brunswick submit that the “Glenn and Hazard Reports”, in their entirety, present the views of two legal academics as to what the law is and should be and that they are advocacy documents dressed up as expert opinions. Further, they contend that this is the type of opinion evidence that has been rejected by Canadian courts in the past and that they are, at best, matters for argument. For these reasons, they are not properly the subject matter of evidence to be admitted before the Court.

[16] All defendants who have filed a C.F.A. motion rally behind the position expressed by Imperial in that the expert reports are properly admissible as expert evidence. They argue that many trial and appeal courts, including the Supreme Court of Canada, have admitted expert evidence of this nature on the issue of whether a lawyer has complied with his standard of care and ethical duties, including the duty to avoid conflicts of interest. They contend, as well, that these authorities are completely dispositive of the plaintiff’s objections pertaining to these reports.

[17] In addition, they insist that the reports meet the requirements of relevance and necessity for the admission of expert evidence and that their admission is not precluded by any exclusionary rule. Their position is summarized at paragraph 9 of Imperial’s brief as follows:

- a) **The Reports are *relevant* to the issues on the CFA Motion. Both Reports address the ethical, professional standards, and public policy issues raised when an Attorney General retains outside counsel pursuant to a contingent fee agreement. These are key factual issues that will be disputed at the CFA Motion. Moreover, the Reports are in no way prejudicial. Since the CFA Motion will be heard by a judge without a jury, there is no danger that the**

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Court will be unduly influenced by the experts' opinions. If the Court does not find their opinions persuasive, it can give them little or no weight (below paras. 44-47).

- b) The Reports are also *necessary* to the trier of fact. The Supreme Court has cautioned that necessity is not to be judged by too strict a standard (below para. 48). In accordance with this approach, courts have routinely admitted expert evidence of lawyers on the issue of whether a lawyer has complied with ethical duties, such as the duty to avoid conflicts of interest (below paras. 49-51). As the issues of legal ethics are outside the knowledge and understanding of ordinary people, a judge, as trier of fact, should not rely on his own judgment on such matters, which cannot be cross-examined, when competent expert advice is preferred (below para. 52).
- c) The admission of the expert reports is *not precluded by any exclusionary rule*:
- (i) The Reports do not contain opinion evidence on questions of law. Rather, they address ethical, professional standards, and public policy issues, which, as various courts have recognized, are not rules of law, but rather reflect what members of the legal profession have decided is proper or improper. It is well established that the application of professional standards to a particular case is an issue of fact, for which expert evidence is proper, even though the Court is not bound to accept such evidence (below paras. 59-64)
 - (ii) The Reports are not inadmissible under the “ultimate issue rule”. The Supreme Court of Canada has held that expert evidence is admissible even if it relates directly to the ultimate issue (below para. 72). In any event, the Reports do not address the ultimate issue before the Court, which is whether, in all the circumstances, the Court should exercise its discretion under New Brunswick law to disqualify the Crown Counsel Consortium. The Glenn and Hazard Reports do not address this ultimate issue, but rather address only the factual issues of the applicable ethical, professional standards, and public policies at stake (below paras. 74-76). In short, Professors Glenn and Hazard provide expert testimony bearing on the conflict issue; this Court must then decide, based on New Brunswick law, what to do about any conflict.
 - (iii) If the Hazard Report contains opinion evidence on foreign law (which is denied), it is nevertheless admissible since foreign law must be proven by expert evidence (below paras. 77-82). No pleading of foreign law is required, since this case is governed by domestic rather than foreign law.

[18] Furthermore, Imperial submits that if the Court has any doubts about the admissibility of the expert reports, it should address this issue only with the benefit of the full context and argument of the C.F.A. motion. They maintain that the plaintiff's motion to strike should be dismissed or alternatively be deferred, without prejudice, to the hearing of the C.F.A. motions.

IV. DISCUSSION

(a) Expert opinion evidence

[19] "Admission of expert evidence depends on the application of the following criteria:

- a) **relevance;**
- b) **necessity in assisting the trier of fact;**
- c) **the absence of any exclusionary rule; and**
- d) **a properly qualified expert."**

See *R. v. Mohan, supra*, at para. 17.

[20] Relevance is a threshold requirement for the admission of expert evidence and is a matter to be decided by a judge as a question of law. Expert evidence is *prima facie* admissible if it is so related to a fact in issue that it tends to establish it. However, evidence that is otherwise logically relevant may be excluded if:

- its probative value is overborne by its prejudicial effect;
- it involves an inordinate amount of time which is not commensurate with its value;
- or it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.

See *R. v. Mohan, supra*, at para. 18.

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[21] With respect to the requirement of necessity, it is not enough that the expert evidence might be relevant or “helpful”. The opinion evidence must be necessary for the trier of fact to reach a decision and this requirement will be strictly applied. However, necessity must not be judged by too strict a standard. The expert opinion evidence must be necessary to allow the trier of fact:

- to appreciate the facts due to their technical nature; or
- to form a correct judgment on a matter where ordinary persons are unlikely to do so without the help of those with special knowledge.

See *R. v. Mohan, supra*, at para. 22 and *R. v. D.(D.)*, [2002] 2 S.C.J. No. 44 at para. 47 (S.C.C.).

[22] The Supreme Court of Canada stated in *Mohan* that there is concern inherent in the application of the necessity criterion that experts not be permitted to usurp the functions of the trier of fact. See *R. v. Mohan, supra*, at para. 24.

[23] Although the rule excluding expert evidence in respect of the ultimate issue is no longer of general application, the concerns underlying it remain.

[24] The question of the admissibility of expert evidence requires a case by case analysis of the four *Mohan* criteria. See *R. v. D.(D.)*, *supra*, at para.13.

(b) The Glenn Report

[25] The plaintiff alleges that I should completely disregard Professor Glenn’s Report because it is not the proper subject matter for expert opinion in that it is an attempt to provide the court evidence of domestic law and, on occasion, to refer to the jurisprudence of other countries.

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The lawyers for the Province insist that the report is nothing more than “advocacy dressed up as expert opinion” and that its use to make such submissions is entirely superfluous.

[26] The plaintiff maintains that the “Glenn Report” is not relevant and moreover that it is not necessary in assisting the trier of fact. In putting forward its objections to the “Glenn Report”, it argues that it is inadmissible under three exclusionary rules:

- Firstly, that the report contains opinion evidence on questions of domestic law, which is inadmissible;
- Secondly, that the report contains opinion evidence on foreign law, which is irrelevant and inadmissible;
- And thirdly, the plaintiff asserts that the expert report is inadmissible under the “ultimate issue rule”.

[27] The plaintiff has forcefully advanced the general proposition that a court will not receive evidence from an expert providing opinion evidence about domestic law due to the fact that it is not necessary to assist the trier of fact. The plaintiff has cited cases rejecting expert evidence on legal questions, thereby providing examples where affidavits of law professors and lawyers seeking to tender an expert opinion and purporting to elucidate a supposedly complex area of the law have been rejected by the courts. See *CCH Canadian Ltd. v. Law Society of Upper Canada*, [1999] F.C.J. No. 1647 (F.C.); *Re Canadian Pacific Ltd.*, [1990] O.J. No. 606 (H.C.); *Pente Investment Management Ltd. v. Schneider Corp.*, [1998] O.J. No. 6387 (Gen. Div.); *affd* [1998] O.J. No. 4142 (C.A.); and *Canada Post Corp. v. Smith*, [1994] O.J. No. 2232 (Div. Ct.).

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[28] The general proposition that an expert cannot give evidence on domestic law is not disputed by the defendants. They argue that the true issue is whether Professional Standards and Ethical Rules are rules of law; they submit that they are not. They claim that the application of professional standards of conduct, as they apply to the particular circumstances, are issues of fact to be resolved by the trier of fact.

(i) **Expert evidence is ordinarily required in cases dealing with legal ethics and professional standards**

[29] Courts, on occasion, have stated that in cases involving professional standards of conduct and their application to particular circumstances; it is generally preferable that expert evidence be submitted to assist the court thereby avoiding a situation where the judge, in the absence of such evidence, becomes “his own expert”. See *Zink v. Adrian* (2005), 37 B.C.L.R. (4th) 389, paras. 42-44 (B.C.C.A.); *Payne v. Pearson*, [2005] A.J. 1178, para. 25 (Alta. Prov. Ct.); *Precision Remodeling Ltd. v. Soskin, Soskin & Potasky LLP*, [2008] O.J. 2560, para. 57 (S.C.J.).

[30] Moreover, courts have admitted expert evidence of lawyers on the issue of whether a lawyer has complied with his standard of care and/or ethical duties. See *Noble v. Lourensse*, [2001] N.B.J. 466, paras. 42, 75-76 (Q.B.), affd [2002] N.B.J. 358 (C.A.); *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24, pp. 108-109, 115-116, 120 (Ont. Gen. Div.); *Transamerica Life Insurance Co. of Canada v. Seward* (1997), 33 O.R. (3rd) 604, pp. 610-611 (Ont. Gen. Div.).

(ii) **Ethical and professional standards for lawyers are not rules of law**

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[31] The Ontario Court of Appeal in the case of *Teskey v. Canadian Newspapers Co.*, [1989] O.J. No. 828, (Ont. C.A.) held that the trial judge erred in refusing to admit expert evidence of a lawyer concerning whether the solicitors had a conflict of interest. The following passages found at paragraphs 48 and 49 of the decision are particularly relevant:

48 The proposed evidence of the expert forms part of the record and is contained in a letter from the expert to Ogilvie's counsel. It refers to the Municipal Conflict of Interest Act and cases decided thereunder and also to the Rules of Professional Conduct published by the Law Society of Upper Canada. The letter makes clear that the Act does not apply to the respondents because they are not employees of the township and refers to cases decided under the statute only as examples of the application of conflict of interest principles. It also refers to three of the Rules of Professional Conduct of the Law Society of Upper Canada and comments on each rule and concludes that the respondents breached them both in letter and spirit.

49 The trial judge refused to permit the expert to give evidence on the ground that he would be expressing conclusions of law. It is indisputable that witnesses cannot usurp the prerogatives of the trial judge by giving evidence as to the applicable law. With respect, nevertheless, I am of the opinion that the trial judge erred in holding that the expert's views on the Rules of Professional Conduct should be treated as conclusions of law. Professional standards of conduct are not rules of law but rather reflect what members of a professional have decided is proper or improper.

[32] Accordingly, the application of legal profession standards by a professional law society is distinct from the application of law by the courts. See also *MacMillan Bloedel Ltd. v. Freeman & Co.* (1992), 78 B.C.L.R. (2d) 325, paras. 42-43 (B.C.S.C.); *Transamerica Life Insurance Co. of Canada v. Seward*, *supra*, p. 613.

[33] In the case of *MacDonald Estate v. Martin*, [1990] 3 S.C.R., 1235, pp. 1243-1246) the Supreme Court of Canada confirmed that a court has inherent jurisdiction to remove solicitors who have a conflict of interest and is not bound to apply a code of professional conduct or code of ethics of a legal profession in order to do so. This case strongly supports the approach

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of the Ontario Court of Appeal in the case of *Teskey v. Canadian Newspaper Co.*, *supra*, that legal professional standards and ethical norms contained in codes of professional conduct or codes of ethics are not rules of law. Although they should be considered an important statement of public policy, the court is not bound to follow them.

[34] In my view, the decision in *Teskey v. Canadian Newspaper Co.*, *supra*, remains good law and has not been overruled, expressly or implicitly. Further, the decision of the Court of Appeal of Ontario in that case is entirely consistent with the Supreme Court's decision in *MacDonald Estate v. Martin*, *supra*.

[35] The Supreme Court of Canada's decision in *Mohan* addressed only the general test for the admission of expert evidence. That case dealt with the context of a pediatrician accused of sexually assaulting patients but did not address the issue whether or not legal professional and ethical standards are rules of law as did the court in *Teskey v. Canadian Newspapers Co.*, *supra*. Nor was the case cited in the *Mohan* decision.

[36] The B.C. Supreme Court in the decision of *MacMillan Bloedel Lts. v. Freeman & Co.*, *supra*, and the Ontario General Division decision in *Transamerica Life Insurance Co. of Canada v. Seward*, *supra*, concluded similarly as in the decision in *Teskey v. Canadian Newspapers Co.*, *supra*, that the application of legal professional standards by provincial law societies is distinct from the application of the law by the courts. I believe that these decisions are entirely consistent with the decision of the Supreme Court of Canada in *MacDonald Estate v. Martin*, *supra*.

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[37] The decision in *Teskey v. Canadian Newspapers Co.*, *supra*, is cited approvingly in John Sopinka, Sidney N. Lederman, Alan W. Bryant, *The Law of Evidence in Canada* (1999), p. 640, Footnote 225 where the authors mention that the case stands for authority that Rules of Professional Conduct are admissible for they are not rules of law.

[38] In seeking to avoid the impact of the decision in *Teskey v. Canadian Newspaper Co.*, *supra*, the plaintiff relies heavily on the decision of the Ontario Superior Court of Justice in *Carlingwood Motors Ltd. v. Nissan Canada Inc.*, [2000] O.J. No. 2508. In that case the defendants brought a motion seeking to have a law firm removed as solicitors for the plaintiff due to an alleged conflict of interest. The defendants sought to introduce the expert opinion of a lawyer and bencher of the Law Society of Upper Canada with respect to whether a conflict of interest existed pursuant to their Rules of Professional Conduct. The learned master struck the affidavit of the expert on the basis that the opinion offered served the function of the court to determine the very issues that would be argued on the return of the motion.

[39] This decision distinguishes the one in *Teskey v. Canadian Newspapers Co.*, *supra*, on two grounds: firstly, on the basis that the affidavit purported to be used went to the ultimate issue before the court, and, secondly, on the basis that ethical rules are not information of a technical nature that is outside the knowledge of the court. With respect, I disagree with the approach taken on both grounds, for this decision does not appear to consider the Supreme Court of Canada's pronouncements in the following cases: *R. v. R.(D)*, [1996] 2 S.C.R., para. 39; *R. v. Burns*, [1994] 1 S.C.R. 656, p. 666, where it explicitly held that expert evidence is admissible even if it relates directly to the ultimate issue before the court. The finding that the expert report was inadmissible because ethical rules are within the knowledge of the court is flatly inconsistent

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with the decision in *Teskey v. Canadian Newspapers Co.*, *supra*, and other cases cited above, where this type of expert evidence was found to be admissible. For these reasons, with respect, the Ontario Court of Appeal's decision in *Teskey v. Canadian Newspapers Co.*, *supra*, should be preferred to the decision in *Carlingwood Motors Ltd. v. Nissan Canada Inc.*, *supra*.

(iii) **The Glenn affidavit does not contain option evidence on domestic and foreign law**

[40] Professor Glenn indicates that he was asked to present his opinion on the following question: “What ethical, professional standards, and public policy issues are raised when an Attorney General retains outside counsel pursuant to a contingent fee arrangement?” Professor Glenn notes that he is not aware of any Canadian writings or authorities that have considered the specific question he addresses. He bases his report on the ethical principles and professional standards that apply to government lawyers in Canada. He also considers how foreign jurisdictions have dealt with the question. Professor Glenn opines that there is an “ethical duty of government lawyers to act impartially and in the public interest”, which is “reflected in obligations imposed on government lawyers in common law by the government and under the *Charter*”. He focuses on ethical duties and professional standards of government lawyers which are “reflected in” and “illuminated by” various branches of the law. He refers to legal sources to illustrate ethical and professional standard principles and, in doing so, also refers to various non legal sources and historical materials to shed light on these principles that apply to government lawyers. (Quotations taken from paragraphs 5 and 14 of the “Glenn Report”.)

[41] He concludes that “there are major ethical, professional standards, and public policy issues raised when an Attorney General retains outside counsel pursuant to a contingent fee arrangement”. (Quotation taken from paragraph 43 of the “Glenn Report”.)

[42] The plaintiff is adamant that the “Glenn Report” adds nothing to the analysis of issues to be determined in the C.F.A. motions that could not have been said in a written submission or in an argument. Therefore, it is in no way necessary for the court to arrive at a decision on the C.F.A. motions. According to the plaintiff, the “Glenn Report” is nothing more than a memorandum of legal argument with a *'jurat'* attached to it.

[43] The defendants contend that the “Glenn Report” addresses ethical, professional standards, and public policy issues that are raised when an Attorney General retains outside counsel pursuant to a contingent fee agreement. They allege that these are issues of fact for which it is proper to receive expert evidence.

[44] They recognize that Professor Glenn refers to legal authorities while elucidating the basis of his opinion concerning the ethical, professional standards, and public policy issues addressed in his report. They claim that expert evidence concerning the ethical standard of legal professionals is admissible as relating to an issue of fact, even if it is based on jurisprudence and other legal authorities.

[45] Furthermore, they argue that the “Glenn Report” refers to codes of conduct, jurisprudence, and other authorities that reflect or state the ethical standards of government lawyers. According to them, some of these authorities apply the ethical duty to act impartially and in the public interest in particular circumstances. These authorities serve to clarify issues of

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fact which are relevant to the C.F.A. motions according to them, such as whether government lawyers are subject to an ethical duty of impartiality and, if so, whether public contingent fee agreements are consistent with that duty.

[46] The defendants concede that the “Glenn Report” refers to authorities that could be put before the court other than by way of evidence. They maintain, however, that the report places the authorities in the context of the evolution, nature, and application of the professional ethical standards of lawyers acting for a government or public body. According to them, these are matters within the special expertise of Professor Glenn and outside the knowledge and understanding of the ordinary person. The report is therefore necessary, even if some of the authorities to which it refers to could be put before the court in its absence. Hence, they argue that they are not presented as binding legal authorities and thus, the report is not inadmissible because it refers to these authorities.

[47] In the case of *Stewart v. Canadian Broadcasting Corp.*, *supra*, the court admitted and considered expert evidence from a lawyer concerning whether the defendant solicitor had acted in compliance with his ethical duties to a former client. The following excerpt from paragraph 205 of the decision is particularly relevant:

205 (...) In order to give his opinion, it was frequently necessary for Mr. MacKenzie to address matters of law. This was permitted so that he could develop his opinion respecting factual issues as he saw fit, and so that his evidence would disclose the assumptions or influences which shaped his conclusions. Clearly, Mr. MacKenzie is highly qualified respecting matters of professional conduct, ethics and discipline. It should be noted however that, while his views respecting the law were informative and insightful, domestic law is not the province of the expert witness. It is for the court to determine and apply.

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[48] Similarly, it is possible for the court to consider the expert opinion as it relates to the relevant facts before it even though reference to domestic law is contained in his or her opinion. In this case, Professor Glenn's opinion is relevant and necessary as it relates to the factual determination: i.e. the ethical principles and professional standards that apply to government lawyers in Canada as it relates to the particular facts in this case. His use of domestic law for the purpose of elucidating his opinion on the facts in no way usurps the function of the court. Any other use of domestic law will be ignored due to the fact that it is not in the domain of the expert opinion. Domestic law is for the court to determine and apply.

[49] Reference to domestic and/or foreign law, other than for the purpose of illustrating his opinion on the facts, is not necessary in the case of domestic law and irrelevant in the case of the laws of another jurisdiction.

[50] Moreover, the court is not bound by such expert evidence and is entitled to give it whatever weight it deems appropriate. See *Stewart v. Broadcasting Corp.*, *supra*, at para. 220 ; *Transamerica Life Insurance Co. of Canada v. Seward*, *supra*, at pp. 610-611.

(iv) **Ultimate issue rule**

[51] The defendants, in their C.F.A. motions, seek a declaratory order from the court that the Crown Counsel Consortium has a disqualifying conflict of interest between its duties as counsel for the Attorney General of New Brunswick and its private financial interests under the terms of its contingent fee agreement (C.F.A.) with the Province of New Brunswick represented by the Attorney General through the lawyers he has retained. Additionally, due to the alleged creation of a conflict of interest that, according to them, arises from the use of a contingent fee

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agreement, they contend that the plaintiff may not retain counsel under such an agreement to pursue its claim under the *Tobacco Damages and Health Care Costs Recovery Act*, S.N.B. 2006, c. T-7.5.

[52] The plaintiff insists that the “Glenn Report”, in whole or in part, is inadmissible because it transgresses the “ultimate issue rule”. In support of its argument, it has brought to the court’s attention conclusions drawn by Professor Glenn in paragraph 44 of his report which reads as follows:

44 (...)

The duty of lawyers representing the government to act impartially and according to a 'rigorous conflict of interest standard' is as applicable in civil matters as it is in criminal matters (*Assh*, above, para. 22). This duty is impossible to reconcile with the major incentives for substantial and personal financial gain which arise under a contingent fee arrangement. Nor is it possible for the Attorney General to exercise absolute control over outside counsel in cases which require outside counsel to employ professional judgment and discretion. The conflict of interest that arises when an Attorney General retains outside counsel under a contingent fee arrangement therefore cannot be avoided by the Attorney General exercising absolute control over outside counsel.

[53] The lawyers for the Province maintain that this is an example where Professor Glenn has specifically concluded that there is a conflict in this case and that he thereby seeks to usurp the role of this court by providing expert evidence on the issues the court is asked to decide. Other examples of alleged transgressions of the “ultimate issue rule” found in paragraphs 33-35 of his report have been brought to the court’s attention.

[54] According to the defendants, the “Glenn Report” does not address the ultimate issue before the court. In their opinion, the ultimate issue is not the ethical issue itself but rather the legal consequences of a breach of the ethical standard. They argue that the ultimate issue is

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whether the breach, if found, is serious enough to require judicial intervention in that the court should disqualify the Crown Counsel Consortium in the circumstances.

[55] Alternatively, the defendants maintain that even if the “Glenn Report” addresses the ultimate issue before the court, it is not inadmissible on this basis.

[56] The Supreme Court of Canada has concluded that expert testimony is admissible even if it relates directly to the ultimate issue which must be answered by the trier of fact. In *R. v. Burns*, *supra*, at p. 666, McLachlin J., (as she then was), writing for the court, said:

(...)

His objection is that “the opinion of Dr. Maddess went to the very root of the issue before the learned trial judge” and that “allowing that opinion usurped the function of the trial judge”: the so-called “ultimate issue rule”. However, the jurisprudence does not support such a strict application of this rule. While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court: *Graat v. The Queen*, [1982] 2 S.C.R. 819. See also *Khan v. College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641 (C.A.), at p. 666 (per Doherty J.A.).

[57] Consequently, expert evidence on matters of fact should not be excluded simply because it addresses the very subject that the judge must determine. See also *R v. R.(D)*, [1996] 2 S.C.R. 291, para. 39; *New Brunswick (Minister of Health and Community Services) v. B.H. and W.L* (1994), 153 N.B.R. (2nd) 45, para. 18 (N.B.C.A.).

(v) **The Mohan Criteria**

[58] As previously mentioned, relevance is a threshold requirement for the admission of expert evidence. The “Glenn Report” is pertinent to issues on the C.F.A. motions for it is

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relevant to facts that will be in issue for the court. This will not be enough to meet the relevance criteria. Relevance requires a finding of logical relevance and a determination that the benefits of the evidence outweigh its costs.

[59] The expert opinion must be related to a fact in issue and have some tendency to help resolve that issue. The “Glenn Report” addresses the ethical, professional standards, and public policy issues that are raised when an Attorney General retains outside counsel pursuant to a contingent fee agreement. In this respect, the report refers to key factual issues that are in dispute between the parties and as such are admissible. In this sense, the evidence addresses live and material issues and, at first glance, the inferences are compelling. The evidence appears to be reliable, subject to a final determination by the judge at the hearing of the C.F.A. motions.

[60] I must consider the negative impact the evidence may have on the trial process, which may include the following:

- the risk of uncritical acceptance by the trier of fact of the opinion;
- the risk of the trier of fact in giving the opinion more weight than it deserves;
- the danger that the opinion will be misused;
- the danger that the trier of fact will be overwhelmed or confused.

Due to the fact that the C.F.A. motions will be heard by a judge without a jury, my concerns regarding these possible negative impacts are greatly alleviated.

[61] Further, its use does not involve an inordinate amount of time which is not commensurate with its value. The procedural timetable set for the hearing of the C.F.A. motions addresses the concern of the undue consumption of time regarding the motions and provides for a procedure insuring that these motions are dealt with expeditiously.

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[62] Furthermore, procedural safeguards, such as the opportunity to respond to the plaintiff's affidavits and the right to ask to cross-examine the expert also reduce the risk of a prejudice being caused to the plaintiff.

[63] Consequently, nothing in the report is unfairly prejudicial to the plaintiff or to the Crown Counsel Consortium. For this reason, the *prima facie* admissible report should not be excluded because of any overbearing prejudicial effect.

[64] The opinion of Professor Glenn is necessary in the sense that it provides information on factual issues which is likely to be outside the experience and knowledge of the trier of fact. Courts have found that expert evidence is ordinarily required in proceedings concerning lawyers' professional standards of conduct and their application to particular circumstances. The report is therefore necessary to assist the trier of fact in the C.F.A. motions.

[65] The admission of the "Glenn Report" is not precluded by any exclusionary rule for the following reasons:

- Firstly, ethical and professional standards for lawyers are not rules of law and the application of such standards in particular circumstances is an issue of fact to be resolved by the trier of fact to the extent that the "Glenn Report" addresses ethical, professional standards, and public policy issues that are raised when an Attorney General retains outside counsel pursuant to a contingent fee agreement. These are issues of fact, for which it is proper to receive expert evidence.
- Secondly, reference to cases and legal authorities, domestic and foreign, for the sole purpose of elucidating expert evidence as it relates to factual issues, which are relevant to the C.F.A. motions, do not render the "Glenn Report" inadmissible. Any other use of these legal authorities is, in my view, in the case of domestic law, not necessary and in the case of foreign law, irrelevant.

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- Thirdly, to the extent that the “Glenn Report” may relate directly to the ultimate issue, it is not inadmissible on this basis due to the fact that the judge, and not the expert, makes the final decision on all issues in the case. All transgressions of the ultimate issue rule, “if any”, can be ignored by the trier of fact because the judge, and the judge alone in this instance, makes the final decision on all issues in the case.

[66] The report meets the requirements of relevance and necessity expressed in *Mohan* and the admission of the “Glenn Report” is not precluded by any exclusionary rule. The plaintiff, for the purposes of this motion, has not questioned the qualifications of Professor Glenn. This is subject, however, on a without prejudice basis to present arguments as to what weight should be given to his evidence on the hearing of the C.F.A. motions. Consequently, the four criteria in *Mohan* have been satisfied and the motion to strike and/or otherwise declare inadmissible the evidence of Professor H. Patrick Glenn, sworn on November 24th, 2008 (“Glenn Report”), is hereby denied.

(c) The Hazard Report

[67] Professor Hazard Jr. indicates that he was asked to present his opinions from the perspective of U.S. law concerning the following question: “What ethical, professional standards, and public policy issues are raised when an Attorney General retains outside counsel pursuant to a contingent fee arrangement?” (Quotation taken from paragraph 3 of the “Hazard Report”.)

[68] In paragraph 5 of his report, Professor Hazard Jr. expresses his opinion that, “from a U.S. perspective, significant questions of professional ethics of public policy are presented where an Attorney General retains outside counsel under a contingent fee arrangement to litigate claims of a sort not available to private citizens”. The “Hazard Report” contains an

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overview of the use of such arrangements in the United States and a discussion of how the law in the United States has treated them between public agencies and outside counsel in the context of civil litigation. His report includes an overview of U.S. case law regarding contingent fee arrangements in public body litigation.

(i) **The Hazard Report contains opinion evidence on foreign law and is irrelevant**

[69] The plaintiff moves to strike, or otherwise rule inadmissible, the “Hazard Report” on the ground that it contains opinion evidence on a question of foreign law and is therefore irrelevant.

[70] The plaintiff contends that foreign law, including the law of the United States, is irrelevant to this action and to the C.F.A. motions. The Statement of Claim in this action does not raise any issue of foreign law and does not plead that foreign law shall apply. Also there are no further pleadings in the action at present and the C.F.A. motions filed by the defendants similarly do not claim that foreign law pertains to the action or to the motions.

[71] According to the plaintiff, the “Hazard Report” purports to do nothing more than assist the court in the interpretation of the applicable domestic law by setting up the law and policy considerations relevant to the United States and argues forcibly that, where a witness gives evidence as to foreign law, such evidence, where intended as a fact, is irrelevant where it is merely being adduced to assist the court in its interpretation of domestic law.

[72] The plaintiff further contends that the court is clearly capable, without the evidence of an expert, of considering foreign law and related matters while determining whether,

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according to domestic law, lawyers are in a conflict of interest. Accordingly, the “Hazard Report” adds nothing to the analysis of the issues to be determined on the C.F.A. motions that could not have been said in a written submission or argument. The plaintiff insists that counsel can assist the court in this regards, if they wish, by making legal submissions highlighting foreign case law that it may choose to consider. In short, it is a matter for argument, not evidence.

[73] The defendants maintain that the “Hazard Report” addresses the ethical, professional standards, and public policy issues at stake from a U.S. perspective. According to them, he does not purport to provide an opinion on U.S. law, although he does consider jurisprudential and other sources to illustrate his opinions. Further, they contend that to the extent that the “Hazard Report” contains opinion evidence on foreign law, it is properly tendered through expert evidence.

[74] They argue that the “Hazard Report” is also unquestionably relevant to the issues in the C.F.A. motions due to the fact that a contingent fee arrangement in public body litigation of this scale and magnitude is simply unprecedented in Canadian law. They add that in the United States, by contrast, public contingent fee arrangements are not unfamiliar. The defendants suggest that the “Hazard Report” considers the development of contingent fees as a feature of the U.S. juridical landscape. Therefore, it traces the manner in which contingent fees have been employed in public body litigation in the U.S., and considers if and when these arrangements are consistent with the ethical duty of government lawyers to act neutrally in that country. According to them, Professor Hazard’s views on this issue are informed by both the relevant U.S. jurisprudence and the opinions of U.S. legal scholars. For these reasons, they

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claim that Professor Hazard's Report is thus relevant and necessary to the trier of fact on the C.F.A. motions.

[75] The defendants acknowledge that the requirement to plead foreign law applies where the case or an issue in the case is governed by foreign law. They concede that this matter is governed by domestic law.

[76] Reference to foreign law, according to them, is made due to the fact that the United States appears to be the only common law jurisdiction in the world that has specifically considered the propriety of contingent fee arrangements in litigation brought on behalf of an Attorney General. For this reason, they contend the "Hazard Report" has been filed to assist the court by outlining the U.S. perspective on the issue and not on the basis that U.S. law governs this proceeding.

[77] The defendants have brought to my attention the decision in *Kinsella v. Canada (Minister of Justice)* (2007), 322 N.B.R. (2d) 131 (N.B.C.A.) in support of the principle that foreign law is a question of fact that must be proven by admissible evidence. Further, they have cited the decision of *Berthelot v. Rioux* (1996), 177 N.B.R. (2nd) 144, para. 20 (N.B.Q.B.) in support of their contention that foreign law must be proved with the help of experts. These cases are easily distinguished for they both deal with matters where foreign law was an issue in the proceedings.

[78] No issue of foreign law has been raised in this case and for that reason expert evidence with respect to U.S. law is not relevant to these proceedings.

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[79] Further, as previously mentioned, the defendants concede that the matter is governed by domestic law. No witness, expert, or otherwise can provide an opinion on pure questions of domestic law.

[80] In the case of the “Hazard Report”, the plaintiff has not challenged the qualifications of Professor Hazard Jr.. It does, however, argue forcefully that the evidence is not relevant nor is it necessary for the reasons stated above. I agree with the plaintiff’s position in this regards.

[81] Expert evidence with respect to the ethical, professional standards, and public policy issues from a U.S. perspective are not relevant, nor are they necessary in order for this court to arrive at the factual determination of the appropriate standards applicable in Canada. Nor is the information relevant and/or necessary for this court to arrive at a legal conclusion with respect to whether there exists a disqualifying conflict of interest and whether the Province’s lawyers can continue to act in this case.

[82] As previously stated, no issue of foreign law has been raised in this case and for that reason expert evidence with respect to U.S. laws is not relevant to these proceedings nor is the “Hazard Report” necessary to determine domestic law, which must be left to the court to apply.

[83] The court is clearly capable, without the evidence of an expert, of considering foreign case law and related matters while determining whether, according to domestic law, lawyers are in a conflict of interest. In *MacDonald Estate v. Martin, supra*, at pp. 1243-1246, the Supreme Court of Canada, in considering the appropriate standard to be applied in

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determining whether a law firm was disqualified from acting in litigation by reason of a conflict of interest, made its decision having regard to policy considerations, rules of professional conduct, and varying approaches to the issue found in the case law of several jurisdictions including England, the United States, Australia, and New Zealand. There is no indication that the court required opinion evidence of an expert in order to consider jurisprudence emanating from other jurisdictions, including the United States and other publications, as in the case of a review of U.S. law and an article in the Harvard Law Review. (See *MacDonald Estate v. Martin*, *supra* at pp. 1247-1248.)

[84] Similarly, nothing prevents the defendants, if they wish, to refer to jurisprudence and other publications emanating from other jurisdictions, including the United States, by making legal submissions highlighting the relevant foreign case law and other publications that the court may wish to consider. It is a matter of argument, not evidence!

[85] For these reasons, the “Hazard Report” does not meet the criteria set out in *Mohan* and, consequently, should not be received by the court as expert evidence for the purposes of the C.F.A. motions.

[86] Consequently, I have come to the determination that the affidavit of Geoffrey C. Hazard Jr., sworn on November 24th, 2008 (“Hazard Report”), as it relates to the C.F.A. motions, is inadmissible. My ruling on evidence applies to all defendants who have filed C.F.A. motions as per their agreement that my decision would, by consent, bind all defendants who relied on the “Hazard Report” for the purposes of their respective C.F.A. motion.

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V. SUMMARY

[87] The plaintiff's motion for an order to strike, or otherwise rule inadmissible the affidavit of H. Patrick Glenn, sworn on November 24th, 2008, as it relates to the C.F.A. motions, is hereby denied.

[88] I have determined that the affidavit of Geoffrey C. Hazard Jr., sworn on November 24th, 2008, ("Hazard Report"), as it relates to the C.F.A. motions, is inadmissible for the purposes of those motions. My ruling on evidence, as it relates to the C.F.A. motions, binds all defendants who have filed similar motions.

[89] The court will hear motion(s) for an order regarding examinations under Rule 39.02 according to the procedural timetable previously set by the court or at another time and date agreed by the parties involved in the C.F.A. motions.

DATED at Edmundston, New Brunswick this 20th day of March 2009.

THE HONOURABLE MR. JUSTICE THOMAS E. CYR
Judge of the Court of Queen's Bench of New Brunswick