Law on Experts - Litigation Experts: Summary of Legal Test

Leading case: *White Burgess Langille Inman v Abbott and Haliburton,* 2015 SCC 23 **(**"White Burgess")
(also summarized in *R v Abbey*, 2017 ONCA 640 at paras 46-48 ("Abbey"))

Step 1: Threshold – *White Burgess*, at paras 23, 48.

- Logically relevant: Tends to establish a material fact in issue (*R v Mohan,* [1994] 2 SCR 9, -former leading case-still helpful but it wasn't divided into 2 step analysis)
- Necessary to assist trier of fact: generally outside knowledge trier of fact
- Not subject to any other exclusionary rule
- Properly qualified and able to fulfil expert duty to the court-acquired special or peculiar knowledge through study or experience in matters they undertake to testify about
- Impartial, independent unbiased: absent evidence to the contrary, the witness's attestation (expert duty) is enough at this stage

Step 2: Gatekeeping – *White Burgess,* at paras 19, 24, 30, 34, 40, 48.

Judges have discretionary GATEKEEPER role - Judge does cost-benefit analysis

Generally, ask: Is the probative value overborne by prejudicial effect-i.e., will it mislead trier of fact/ take up too much time? Does one of the factors below make it not worth considering?

- Legal Relevance: Is it sufficiently probative to justify its admission?
    - How cogent is it in proving the issue? Is it on point?
- Necessity: Extent necessary to properly adjudicate the facts and assist the trier of facts
- Reliability: Are their frailties in the methodology, conclusions/logic?
- Absence of bias: The nature and extent of interest or connection with the litigation or party-not the mere fact there is a connection- is the issue.
    - For example, if the witness acts as an advocate for a party, that would show bias (*White Burgess*, at para 49). The question is whether the relationship or interest results in expert being unable or unwilling to carry out primary duty to provide fair, nonpartisan assistance (*White Burgess,* at para 50)

In the past, Judges would admit the evidence, having it go to weight. *White Burgess* directed a clear shift: Judges should not admit proposed expert evidence too readily, saying it should go to weight. (*White Burgess*, at paras 34, 40, 45)