

# Blurred Lines: A Critical Examination of the Use of Police Officers and Police Employees as Expert Witnesses in Criminal Trials

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## ABSTRACT

There is a two-step inquiry in determining whether expert opinion evidence is admissible. The party calling the evidence must first satisfy the threshold requirements of admissibility, demonstrating that the expert evidence is relevant, necessary, not precluded by any exclusionary rule, and that it is provided by a properly qualified expert. If this threshold stage is satisfied, the court progresses to the second stage, the discretionary gatekeeping step, wherein the trial judge assesses whether the expert evidence is sufficiently beneficial to justify admission, meaning that the benefits flowing from admission outweigh any potential harm. The Supreme Court of Canada has clarified that experts must be impartial, independent, and unbiased. These factors must be considered at both steps of determining the admissibility of expert evidence and are also relevant to the determination by the trier of fact as to how much weight should be placed upon admissible expert testimony. That there are three potential

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points in the trial process at which expert objectivity is considered underscores the importance of ensuring that expert evidence is impartial, independent, and free of bias. This paper analyzes recent Canadian case law in relation to the use of expert witnesses and determines that structure-related concerns ultimately pertaining to bias have played a significant role in court determinations as to the admissibility of expert evidence. Guided by this finding, the authors propose a new two-stream expert structure in order to present a model for proactively reducing concerns relating to impartiality, independence, and bias about experts called by the Crown.

**Keywords:** Evidence; Expert Evidence; Opinion Evidence; Expert Witness; Duty of Expert; Impartial Evidence; Independent Evidence; Unbiased Evidence; Threshold Inquiry; Gatekeeper Inquiry; Mohan Criteria; *White Burgess*; Police Witness; Police Expert; Expert Bias

*“Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.”*

– Sir George Jessel<sup>1</sup>

## I. INTRODUCTION

There is a two-step inquiry in relation to determining whether expert opinion evidence is admissible in trials.<sup>2</sup> Firstly, the party calling the evidence must satisfy the threshold requirements of admissibility, demonstrating that the expert evidence is relevant, necessary, not precluded by the existence of any exclusionary rule, and that it is provided by a properly qualified expert.<sup>3</sup> If this threshold stage is satisfied, the court progresses to the second stage, the discretionary gatekeeping step, wherein the trial judge must assess whether the expert evidence is sufficiently beneficial to justify admission, meaning that the benefits flowing from admission outweigh any potential harm.<sup>4</sup> The Supreme Court of Canada has clarified that experts must be impartial, independent, and

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<sup>1</sup> Then Master of the Rolls, from *Lord Abinger v Ashton* (1873), 17 LR Eq 358 at 374.

<sup>2</sup> *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at paras 19–24 [*White Burgess*].

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

unbiased – and that these factors must be considered at both steps of determining the admissibility of expert evidence.<sup>5</sup> In fact, concerns about these factors are also relevant to the determination by the trier of fact as to how much weight – if any – should be placed upon admissible expert testimony.<sup>6</sup> The fact that there are three potential points in the trial process at which expert objectivity is considered underscores the importance of ensuring that expert evidence is impartial, independent, and free of bias.<sup>7</sup> This paper analyzes recent Canadian case law in relation to the use of expert witnesses and determines that structure-related concerns ultimately pertaining to bias have played a significant role in court determinations as to the admissibility of expert evidence. Guided by this finding, this paper proposes a new two-stream expert structure in order to present a model for proactively reducing concerns relating to impartiality, independence, and bias about experts called by the Crown.

## **A. Background: Potential Issues with Having Police Officers and Employees Testifying as Expert Witnesses in Criminal Trials**

Before proceeding to analyze case law relevant to issues of impartiality, independence, and bias, it is necessary to briefly review the bias-focused risks potentially associated with the use of expert evidence in the Canadian court system.<sup>8</sup> As Dr. Jason Chin, Michael Lutsky, and Dr. Itiel Dror outline, these risks include: a relationship bias;<sup>9</sup> potential rewards;<sup>10</sup> pre-existing

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<sup>5</sup> *Ibid* at para 32.

<sup>6</sup> David M Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law, 2020) at 262–63.

<sup>7</sup> *Ibid*.

<sup>8</sup> See generally Bruce A MacFarlane, “Convicting The Innocent: A Triple Failure of the Justice System” (2006) 31:3 *Man LJ* 403 [MacFarlane, “Convicting The Innocent”]; Carla L MacLean, Lynn Smith & Itiel E Dror, “Experts on Trial: Unearthing Bias in Scientific Evidence” (2020) 53:1 *UBC L Rev* 101; Sahana Pal, “Establishing Bias in an Expert Witness: The What, Why and How” (2016) 14 *Intl Comment on Evidence* 43; Mingxiao Du, “Legal Control of Expert Witness Bias” (2017) 21:1–2 *Intl J Evidence & Proof* 69.

<sup>9</sup> Jason M Chin, Michael Lutsky & Itiel E Dror, “The Biases of Experts: An Empirical Analysis of Expert Witness Challenges” (2019) 42:4 *Man LJ* 21 at 26.

<sup>10</sup> *Ibid*.

views and selection bias;<sup>11</sup> contextual bias;<sup>12</sup> bias cascades;<sup>13</sup> and bias snowballing.<sup>14</sup> The potential consequences<sup>15</sup> flowing from these forms of bias are extremely significant in the criminal law context and are particularly concerning with respect to police officers or civilian employees of police agencies who are called to provide expert testimony in court.

Relationship bias or association bias refers to evidence that “[s]imply being assigned a side (even at random) can unconsciously bias an expert toward that side.”<sup>16</sup> If an expert witness is employed by a police agency, this can be “a source of organizational relationship bias.”<sup>17</sup> As Elisabeth Giffin argues, “[a]s a result of a system which allows experts to enter into an employment relationship with one party to a legal proceeding, the expert witness becomes vulnerable to that party’s influence.”<sup>18</sup> This is because “[t]he employment relationship gives rise to a dynamic wherein the expert will be reluctant to do anything which might threaten the working relationship and is likely to develop an unconscious allegiance bias toward [that] party.”<sup>19</sup> Due to the pressures stemming from expert retention and employment arrangements, Giffin argues that “the ‘objectivity’ of party experts is a legal fiction.”<sup>20</sup>

Additionally, there is some evidence that having “[a] financial stake in the outcome of a case... may unconsciously bias the expert in favour of one side.” Interestingly, this factor alone does not necessarily indicate difficulties with having full-time, secure, salaried police officers or employees act as expert witnesses in cases (though there are still concerns police officers or employees may be incentivized toward giving particular evidence, with a view to career advancement considerations); rather, typically, this factor is considered quite relevant for experts who are retained on a per-case basis.

Concerns relating to pre-existing views and selection bias arise where “[a]n expert may be selected because he or she has a particular view on an

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<sup>11</sup> *Ibid* at 26–27.

<sup>12</sup> *Ibid* at 27.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* at 28.

<sup>15</sup> See e.g. MacFarlane “Convicting The Innocent”, *supra* note 8 at 421–31.

<sup>16</sup> Chin, Lutsky & Dror, *supra* note 9.

<sup>17</sup> *Ibid*.

<sup>18</sup> Elisabeth Giffin, “Experts for Hire: A Dangerous Practice Which Increases the Risk of Bias and Disadvantages the Accused” (2018) 26 Dal J Leg Stud 1 at 3.

<sup>19</sup> *Ibid* at 3–4.

<sup>20</sup> *Ibid* at 15.

issue.”<sup>21</sup> These “[p]re-existing views (including whether an accused is guilty or innocent) may result in confirmation bias, as the expert tends to distort information to fit that view”<sup>22</sup> – even if this is done entirely unconsciously.

Contextual bias refers to situations wherein an expert receives (often irrelevant) “[c]ontextual information, such as emotional case facts or whether the accused confessed, [which] has a demonstrable and well-supported impact on decision making.”<sup>23</sup>

The notion of cascading bias refers to the tendency for biases to “not only impact an individual expert at one stage of the investigation, but they can cascade to other aspects of the investigation and also impact other experts and legal professionals.”<sup>24</sup>

Finally, bias snowballing occurs where “forensic examiners are exposed to irrelevant details about the case and then share these details as well as their biased conclusion or case theory with another examiner. Bias then snowballs... because the bias now has a double impact.”<sup>25</sup>

Unfortunately, though bias concerns with regard to expert evidence are “ubiquitous,”<sup>26</sup> research indicates that “[e]xperts may... labour under what psychologists term a ‘bias blind spot’ resulting in the ‘illusion of objectivity.’”<sup>27</sup> For instance, a survey of forensic examiners in 2017 revealed that “approximately 71% agreed that cognitive bias is a cause for concern in forensics, but only 26% agreed that it impacted their own judgments.”<sup>28</sup> Forms of expertise that are based primarily upon intuition, subjectivity, or experience are particularly susceptible to the impact of unrecognized bias.<sup>29</sup>

Independence, which is largely a structurally focused concern,<sup>30</sup> can have a significant impact on whether a witness is partial or impartial, resulting in either a biased or unbiased opinion. Therefore, in order to

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<sup>21</sup> Chin, Lutsky & Dror, *supra* note 9.

<sup>22</sup> *Ibid* at 26–27.

<sup>23</sup> *Ibid* at 27.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid* at 28.

<sup>26</sup> Giffin, *supra* note 18 at 15.

<sup>27</sup> Chin, Lutsky & Dror, *supra* note 9 at 25.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid*; David M Paciocco, “Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts” (2009) 34:2 Queen’s LJ 565 at 578.

<sup>30</sup> White Burgess, *supra* note 2 at para 32.

prevent – or, at the very least, limit – bias<sup>31</sup> from tainting decision-making within the criminal justice system, it is important to institute safeguards that ensure the principles of the law of evidence are upheld. In particular, it is vital to ensure that unduly prejudicial evidence is not admitted for consideration by the trier of fact.

## II. OVERVIEW OF THE CURRENT TEST FOR ADMITTING EXPERT OPINION EVIDENCE: *WHITE BURGESS* REVIEWED

Recognizing that bias-related issues exist and are acknowledged by science,<sup>32</sup> it is important to now examine how these concerns are addressed by Canadian courts.

### A. General Overview

In *White Burgess Langille Inman v Abbott and Haliburton Co.*,<sup>33</sup> the Supreme Court of Canada summarized and clarified the test for admissibility of expert evidence in Canada:

*Mohan* established a basic structure for the law relating to the admissibility of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert.... *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect – a residual discretion to exclude evidence based on a cost-benefit analysis....

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*Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

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<sup>31</sup> It is worth noting that bias—at least to some degree—may be inherent any time humans are involved in decision-making processes. For a discussion about this issue, please see generally: Jerry Kang et al, "Implicit Bias in the Courtroom" (2012) 59:5 UCLA L Rev 1124; Commission of Inquiry into Pediatric Forensic Pathology in Ontario, *Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System*, by Bruce A MacFarlane (Toronto: Ontario Ministry of the Attorney General, 2008) at 20-26, online (pdf): <[www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy\\_research/pdf/Macfarlane\\_Wrongful-Convictions.pdf](http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/pdf/Macfarlane_Wrongful-Convictions.pdf)> [perma.cc/YQ9K-K93J].

<sup>32</sup> Chin, Lutsky & Dror, *supra* note 9.

<sup>33</sup> *White Burgess*, *supra* note 2, generally.

At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose.... Evidence that does not meet these threshold requirements should be excluded....

At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks.... Doherty J.A. summed it up well in *Abbey*, stating that the “trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence.”<sup>34</sup>

While *White Burgess* was a civil case, it has had a significant impact upon the criminal law realm, as many criminal matters – particularly those involving serious offences – involve expert evidence. The factual matrix in *White Burgess* involves professional negligence claims.<sup>35</sup> The lawsuit alleged that a financial audit was performed improperly by the first accounting firm and that this was revealed after a second accounting firm, the Kentville, Nova Scotia, office of Grant Thornton LLP, became involved.<sup>36</sup> When the original auditors brought a motion to have the lawsuit summarily dismissed, the plaintiffs retained Susan MacMillan, a forensic accounting partner at the Halifax, Nova Scotia, office of Grant Thornton LLP, to prepare an expert report for court purposes.<sup>37</sup> Ms MacMillan’s affidavit included her opinion “that the auditors had not complied with their professional obligations.”<sup>38</sup> The original auditors then sought to have Ms MacMillan’s expert evidence excluded on the basis that she was not an impartial expert witness.<sup>39</sup> The original auditors’ argument was that “the action comes down to a battle of opinion between two accounting firms”<sup>40</sup> and that “Ms MacMillan’s firm could be exposed to liability if its approach was not accepted by the court and, as a partner, Ms MacMillan could be personally liable.”<sup>41</sup> As a result of Ms MacMillan’s “personal financial interest in the

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<sup>34</sup> *Ibid* at paras 19–24.

<sup>35</sup> *Ibid* at para 4.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid* at para 5.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*.

outcome”<sup>42</sup> of the case, the original auditors argued that Ms MacMillan ought to be disqualified from acting as an expert witness.<sup>43</sup>

Justice Pickup of the Nova Scotia Supreme Court struck out the forensic accountant’s affidavit on the ground of impartiality, saying that an expert’s evidence “must be, and be seen to be, independent and impartial.”<sup>44</sup> On appeal, the majority of the Nova Scotia Court of Appeal held that this impartiality test imposed by Justice Pickup was wrong at law.<sup>45</sup> The jurisprudence cited by the majority opinion did not contain authority that permitted exclusion of evidence due to perceived bias.<sup>46</sup>

The Supreme Court of Canada’s decision in this matter supported the Nova Scotia Court of Appeal ruling that Justice Pickup erred in law in determining that the forensic accountant was in a conflict of interest that precluded her from providing impartial and objective evidence.<sup>47</sup> In discussing the expert’s duty to the court, Justice Cromwell, writing for a unanimous Supreme Court of Canada, stated that this is comprised of three closely related concepts:

[I]mpartiality, independence and absence of bias. The expert’s opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert’s independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party’s position over another. The acid test is whether the expert’s opinion would not change regardless of which party retained him or her.... These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert’s independence, impartiality and freedom from bias.<sup>48</sup>

With the terms defined, Justice Cromwell then held that these obligations are expected from the expert, after a review of supporting legislation and jurisprudence from across Canada and internationally.<sup>49</sup>

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Abbott and Haliburton Company v WBLI Chartered Accountants*, 2012 NSSC 210 at para 99.

<sup>45</sup> *Abbott and Haliburton Company v WBLI Chartered Accountants*, 2013 NSCA 66 at para 60.

<sup>46</sup> *Ibid* at paras 104–25.

<sup>47</sup> *White Burgess*, *supra* note 2 at para 62.

<sup>48</sup> *Ibid* at para 32.

<sup>49</sup> *Ibid* at paras 26–31.

This set the foundation for the more important question: Do impartiality, independence, and bias concerns go to weight or admissibility?

### *1. First Step*

Ultimately, Justice Cromwell chose to include the possibility of excluding evidence at the admission stage due to concerns relating to bias.<sup>50</sup> The *White Burgess* decision outlined that “[a] proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert.”<sup>51</sup> This means that concerns relating to independence, impartiality, and bias are initially considered under the “properly qualified expert” criterion from the *Mohan* factors at the first step of the admissibility analysis.<sup>52</sup>

To pass this first step “is not particularly onerous and it will likely be quite rare that a proposed expert’s evidence would be ruled inadmissible for failing to meet it.”<sup>53</sup> In order to be considered a properly qualified expert, at least insofar as the factors of impartiality, independence, and lack of bias are concerned, “the expert’s attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.”<sup>54</sup> (Once this occurs, the burden shifts to the opposing party to prove on a balance of probabilities the expert is biased.<sup>55</sup>) The focus at this first step is not on what a reasonable observer would think about possible bias but on “whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.”<sup>56</sup> At this threshold stage, “[a]nything less than clear unwillingness or inability to [fulfill the expert’s duty to the court] should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.”<sup>57</sup>

The threshold stage assessment of the “properly qualified expert” criterion is only the first of three potential points for consideration of

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<sup>50</sup> *Ibid* at para 46.

<sup>51</sup> *Ibid* at para 53.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid* at para 49.

<sup>54</sup> *Ibid* at para 47.

<sup>55</sup> *Ibid* at para 48.

<sup>56</sup> *Ibid* at para 50.

<sup>57</sup> *Ibid* at para 49.

independence, impartiality, and bias issues.<sup>58</sup> As Justice David M. Paciocco, Dr. Palma Paciocco, and Professor Lee Stuesser outline:

Effectively, there are three different points in the analysis when impartiality and independence are to be considered: (1) as an admissibility consideration relevant to the proper qualification of the expert witness (...[s]tage 1 of the two-part admissibility test); (2) as part of the cost-benefit assessment undertaken at the discretionary gatekeeping stage ([s]tage 2 of the two-part admissibility analysis); and (3) when weighing expert evidence that has been admitted.<sup>59</sup>

## 2. *Second Step*

The second point of consideration of bias issues – the discretionary gatekeeping stage of the admissibility analysis – involves the weighing of costs and benefits.<sup>60</sup> As the Supreme Court of Canada explained in *R v Bingley*:

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... Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded.<sup>61</sup>

In *White Burgess*, Justice Cromwell clarified that at this second stage (the discretionary gatekeeping stage) “the judge must still take concerns about the expert’s independence and impartiality into account.”<sup>62</sup> He stated,

At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is

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<sup>58</sup> Paciocco, Paciocco & Stuesser, *supra* note 6.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid* at 272.

<sup>61</sup> *R v Bingley*, 2017 SCC 12 at para 16. Also, note that, as per Paciocco, Paciocco & Stuesser, *supra* note 6 at 272, “[i]n the case of defence evidence at a criminal trial, the standard differs: having satisfied the threshold analysis, the evidence must be admitted unless its prejudicial effects *substantially* outweigh its probative value” [emphasis in original].

<sup>62</sup> *White Burgess*, *supra* note 2 at para 54.

not outweighed by the risk of the dangers materializing that are associated with expert evidence.<sup>63</sup>

As explained by Paciocco, Paciocco, and Stuesser, it is important to consider the objectivity of the expert at the discretionary gatekeeping stage of the admissibility analysis, as “[p]artiality, or a lack of independence, can contribute to a finding that the unreliability of the evidence makes it too costly to admit.”<sup>64</sup>

## B. Third Opportunity for Consideration of Bias-Related Concerns

Finally, even if an expert’s opinion is admitted into evidence (meaning that concerns about bias were not significant enough to prompt exclusion at either stage of the *White Burgess* admissibility analysis), these concerns can still be considered after admission when an assessment is made by the trier of fact as to how much weight should be placed on the expert’s testimony.<sup>65</sup> Support for this proposition is found in *Mouvement laïque québécois v Saguenay (City)*,<sup>66</sup> a decision that was released by the Supreme Court of Canada 15 days prior to the *White Burgess* decision. In *Saguenay*, on behalf of the majority, Justice Gascon wrote:

I agree that the independence and impartiality of an expert are very important factors. It is well established that an expert’s opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker.... However, these factors generally have an impact on the probative value of the expert’s opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily “disqualify” the expert.... For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert’s lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case.<sup>67</sup>

It is open to the trier of fact to give no – or very little – weight to an expert’s testimony based upon concerns relating to bias. After all, though the trial judge is responsible for the admissibility decision stemming from the two-step analysis outlined in *White Burgess*, the trier of fact makes

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<sup>63</sup> *Ibid.*

<sup>64</sup> Paciocco, Paciocco & Stuesser, *supra* note 6 at 274.

<sup>65</sup> *Ibid* at 262–63.

<sup>66</sup> 2015 SCC 16 [*Saguenay*].

<sup>67</sup> *Ibid* at para 106.

determinations with regard to placing weight on evidence.<sup>68</sup> Nevertheless, it is important that the trier of fact is permitted to consider only properly admissible evidence so as to guard against the “risk that the jury ‘will be unable to make an effective and critical assessment of the evidence.’”<sup>69</sup>

### III. NOTEWORTHY CASES SINCE *WHITE BURGESS*

The *White Burgess* case elucidates that expert opinion evidence holds significant potential to prejudice an accused and that this risk is recognized by the courts, by virtue of the fact that the jurisprudential test developed by the Supreme Court of Canada requires weighing bias-related concerns at three separate points – including two prior to any evidence being admitted for consideration by the trier of fact. With that in mind, we now turn to consider subsequent judicial decisions regarding the admission or rejection of expert opinion evidence in order to highlight important considerations that have arisen in recent years in this area.

This section canvasses seven recent cases dealing with a variety of bias- and reliability-related issues, examining how courts have interpreted and applied the *White Burgess* decision. Overall, we determine that structural concerns (including an expert’s past work or involvement with particular agencies) – while not always determinative with respect to a court’s findings with regard to whether a proposed expert witness is independent, impartial, and lacking bias – can have a significant impact on the trajectory of a court’s analysis. This review of cases is helpful with respect to attempting to prevent from the outset structure-related concerns that may otherwise impact upon a *White Burgess* analysis as a party’s potential expert witnesses are considered by the courts.

#### A. *R v Livingston*

In the years following *White Burgess*, several cases serve as noteworthy examples of the application of these principles in relation to criminal cases. The high watermark is seen in *R v Livingston*;<sup>70</sup> this is an example of a case in which structural considerations – namely, the proposed expert’s involvement with the police investigation leading to charges against the

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<sup>68</sup> Paciocco, Paciocco & Stuesser, *supra* note 6 at 274.

<sup>69</sup> *White Burgess*, *supra* note 2 at para 18.

<sup>70</sup> 2017 ONCJ 747 at paras 1–12.

accused individuals in this case – were determinative with respect to the proposed expert being deemed unable to fulfill his duty to the court.

Stemming from the prosecution of two high-ranking public officials in Ontario, the case concerned whether the accused were involved in the willful destruction of computer data.<sup>71</sup> An expert witness for the Crown, well versed in data storage and manipulation, was required to determine the extent of the accused individuals' involvement in deleting the data. Robert Gagnon, a retired Ontario Provincial Police (OPP) officer, was retained as the Crown's expert witness.<sup>72</sup> Despite his retirement, he had been asked by the OPP to return as a technical analyst and participate in a special project; he agreed, and this project resulted in the charges in the *Livingston* case.<sup>73</sup> Mr. Gagnon was given full access to the OPP headquarters,<sup>74</sup> and he was regularly involved in the investigation, from reviewing the search warrant application to receiving regular updates from investigators.<sup>75</sup> On his own volition, Mr. Gagnon assisted the investigative team in determining which charges to lay.<sup>76</sup> Due to Mr. Gagnon's extensive involvement in the investigation, defence counsel objected to his qualification as an expert witness, relying upon the *White Burgess* decision.<sup>77</sup> Crown counsel relied on the comment in *White Burgess* that passing the threshold stage "is not particularly onerous."<sup>78</sup>

In reviewing Mr. Gagnon's potential for acting as an expert, Justice Lipson mentioned that it was not a problem that Mr. Gagnon was specifically selected by the OPP to work on the special project,<sup>79</sup> nor was it an issue that he gave unpaid time to the project<sup>80</sup> (in fact, Justice Lipson viewed this as a positive indication of Mr. Gagnon's "work ethic and... professionalism").<sup>81</sup> Mr. Gagnon's in-court conduct was not problematic; he

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<sup>71</sup> *Ibid.*

<sup>72</sup> *R v Livingston*, 2017 ONCJ 645.

<sup>73</sup> *Ibid* at paras 4–5.

<sup>74</sup> *Ibid* at para 6.

<sup>75</sup> *Ibid* at paras 7–8.

<sup>76</sup> *Ibid* at para 15.

<sup>77</sup> *Ibid* at para 28.

<sup>78</sup> *Ibid* at para 29.

<sup>79</sup> *Ibid* at para 39.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

gave Justice Lipson the impression that he intended to provide non-partisan evidence.<sup>82</sup>

However, Mr. Gagnon's repeated and extensive involvement with the investigation<sup>83</sup> ultimately led Justice Lipson to rule that "there is a realistic concern that [Mr. Gagnon] is unable to provide independent, impartial and unbiased evidence"<sup>84</sup> and that "the Crown did not rebut this concern on a balance of probabilities, failing to satisfy the fourth *Mohan* criterion for threshold admissibility,"<sup>85</sup> meaning that Mr. Gagnon was not considered to be "properly qualified to give expert opinion evidence."<sup>86</sup> As a technical expert, he was hired to provide analysis and interpretation of the data the officers gave him; this should have been a limited, defined role.<sup>87</sup> Yet Mr. Gagnon "played an important role in the uncovering and processing of evidence. He even participated in the execution of a search warrant."<sup>88</sup> As stated by Justice Lipson, "Mr. Gagnon took on an extensive, active and at times a proactive role in the investigation. He provided investigators with strategic and legal advice in their efforts to mount a case against the defendants."<sup>89</sup> The investigating officers and Mr. Gagnon "worked together and toward the same goal – the successful prosecution of [the accused individuals]."<sup>90</sup>

It is impossible to be impartial and unbiased as an expert when one is actively, methodically building a case for one party. Even where a proposed expert says all of the right things, that individual may still not be considered suitable to provide objective, expert opinion evidence due to concerns about bias. In *Livingston*, Justice Lipson succinctly summarized the Crown's duty with respect to attempting to call expert witnesses like Mr. Gagnon:

The Crown has the burden of showing on a balance of probabilities that the proposed expert witness is capable of testifying independently and impartially. The trial judge is required to determine, having regard to both the particular

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<sup>82</sup> *Ibid* at para 41.

<sup>83</sup> *Ibid* at para 43.

<sup>84</sup> *Ibid* at para 68.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid* at para 45.

<sup>88</sup> *Ibid* at para 52.

<sup>89</sup> *Ibid* at para 47, 54.

<sup>90</sup> *Ibid* at para 48.

circumstances of the proposed expert and the substance of the proposed evidence whether the expert is able and willing to carry out his primary duty to the court.<sup>91</sup>

In *Livingston*, though Mr. Gagnon was willing to carry out his duty to the court, Justice Lipson found, after extensive review, that he was unable to do so.<sup>92</sup>

### **B. *R v McManus***

The case of *R v McManus*<sup>93</sup> further asserts that the significant involvement of a proposed expert with regard to police investigations can preclude an individual from providing the court with expert opinion evidence at trial. This case focused on drug trafficking allegations; several hundred grams of marijuana and cocaine were found by police, along with a “debt book” and *The Cocaine Handbook: An Essential Reference*.<sup>94</sup> Drug possession and trafficking charges were laid.<sup>95</sup> In addition to the drugs, the Crown relied upon text messages from cell phones.<sup>96</sup> The Crown’s case required clarification on slang used in the text messages.<sup>97</sup> An officer working on the investigation, Detective Constable (“D.C.”) Bullick, was called as an expert witness on behalf of the Crown.<sup>98</sup> The defence argued that the proposed expert was not impartial and independent.<sup>99</sup>

Writing for a unanimous Ontario Court of Appeal panel, Justice van Rensburg explicitly noted that “D.C. Bullick's position as a police officer did not disqualify him from giving expert evidence.”<sup>100</sup> However, D.C. Bullick had known the accused for an extended period, was involved with investigating him previously, and believed that he was a drug trafficker.<sup>101</sup> In this case, there was little doubt that D.C. Bullick was biased and that he “had a strong interest in seeing that McManus was convicted.”<sup>102</sup> In fact,

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<sup>91</sup> *Ibid* at para 33.

<sup>92</sup> *Ibid* at para 68.

<sup>93</sup> 2017 ONCA 188.

<sup>94</sup> *Ibid* at para 4.

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid* at para 6.

<sup>97</sup> *Ibid*.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid* at para 57.

<sup>100</sup> *Ibid* at para 71.

<sup>101</sup> *Ibid*.

<sup>102</sup> *Ibid*.

D.C. Bullick “prepared his report in response to the preliminary inquiry judge’s comment that the Crown’s case was not strong.”<sup>103</sup>

Justice van Rensburg clearly summarized the difficulties flowing from allowing biased expert evidence to be considered by jurors (with the jury making determinations as to the weight to be attributed to this evidence) in this case:

Instead of ruling the expert opinion evidence inadmissible, the trial judge left the issue of bias to be addressed in D.C. Bullick’s cross-examination before the jury. In doing so, the trial judge failed to appreciate the practical impossibility that would present. To effectively explore the grounds of D.C. Bullick’s bias and partiality, the defence would necessarily have elicited prejudicial bad character evidence about McManus before the jury.<sup>104</sup>

The Ontario Court of Appeal ultimately held that D.C. Bullick’s evidence should have been excluded.<sup>105</sup>

### ***C. R v Patterson***

The case of *R v Patterson*<sup>106</sup> represents a thorough analysis of *White Burgess* in the criminal sphere and outlines that it is beneficial for parties wishing to call expert witnesses to proactively take all reasonable steps to quell possible concerns relating to independence, impartiality, and potential bias from the outset. Mr. Patterson, a lawyer who ultimately represented himself in these legal proceedings, was found staggering to his vehicle, was later pulled over, and an approved screening device test for alcohol intoxication was administered.<sup>107</sup> After failing the roadside screening test, Mr. Patterson was arrested and issued a breath demand.<sup>108</sup> Due to delays stemming from contacting Mr. Patterson’s counsel of choice following his arrest, the breath samples were taken outside the presumptive two-hour period in the *Criminal Code*.<sup>109</sup> Under the impaired driving regime that existed at the time of the offence, the Crown was required to call expert evidence with regard to blood-alcohol content extrapolation during the course of the trial.<sup>110</sup>

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<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid* at para 74.

<sup>105</sup> *Ibid* at para 75.

<sup>106</sup> 2020 NSSC 151.

<sup>107</sup> *Ibid* at paras 8–9.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid* at paras 8–12.

<sup>110</sup> *Ibid* at para 12.

The Crown attempted to call Ms Christine Frenette, an alcohol specialist with the Ottawa-based National Forensic Laboratory Services, as an expert witness in relation to the extrapolation evidence.<sup>111</sup> Ms Frenette's background in this area was extensive, and she had repeatedly previously provided expert evidence in court.<sup>112</sup> During cross-examination, it was clear that "her demeanour and manner of giving evidence appeared to be a model of what would be expected from an expert advanced in these circumstances."<sup>113</sup> However, during submissions with regard to the expert evidence admissibility hearing, the accused highlighted that Ms Frenette had not confirmed her non-partisanship, impartiality and independence to the court.<sup>114</sup> This became the main point of argument in the case. Ultimately, the trial judge opted not to infer that Ms Frenette was impartial, either based on her previous qualification as an expert or her membership to a professional body.<sup>115</sup>

The Crown appealed the trial judge's decision. The summary conviction appeal court determined that "a party seeking to qualify an expert must appreciate that addressing the issue of bias is as important as asking questions about the witness's past education or work history."<sup>116</sup> Although "[t]here is no 'magic incantation' of words that must be used by the witness,"<sup>117</sup> it "is critical... to put into the record information sufficient to demonstrate that the proposed expert recognises and accepts their duty to the Court."<sup>118</sup> When a party "fail[s] to do so, [it] will be left with only the possible inferences which can be drawn from the record as it does exist."<sup>119</sup>

Due to the risks involved with relying upon available inferences, it is best practice for counsel to ask questions of the proposed expert in order to address impartiality, independence, and bias-related issues directly.<sup>120</sup> In *Patterson*, on summary conviction appeal, Justice Hunt considered Ms Frenette's candour during the *voir dire*, her voluntary cooperation with

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<sup>111</sup> *Ibid* at paras 12-13.

<sup>112</sup> *Ibid* at paras 12-19.

<sup>113</sup> *Ibid* at para 22.

<sup>114</sup> *Ibid* at para 25.

<sup>115</sup> *Ibid* at para 31.

<sup>116</sup> *Ibid* at para 83.

<sup>117</sup> *Ibid* at para 84.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid* at para 83.

<sup>120</sup> *Ibid* at paras 86-87.

defence counsel, and her previous qualifications in other cases.<sup>121</sup> However, the record allowed for the trial judge to rationally come to this conclusion (wherein he declined to infer that Ms Frenette was impartial), and a high level of deference was owed on this point.<sup>122</sup>

Ultimately, the *Patterson* case advises counsel that there are not supposed to be magic words that are required to establish an expert's qualifications and that inferences can potentially lead to the same result. However, it is clear from this decision that there are words that can make the qualification process much easier and that it is helpful to parties to take positive steps to address any potential questions relating to bias the court may have.

#### ***D. R v Heimbecker***

The case of *R v Heimbecker*<sup>123</sup> makes it clear that structural concerns – ultimately impacting upon bias considerations – can apply to proposed experts called by the defence as well as by the Crown. In *Heimbecker*, during a drug trafficking sentencing hearing for an Indigenous offender, the defence attempted to introduce expert evidence in relation to *Gladue* factors from a high-profile witness.<sup>124</sup> Canadian Senator Kim Pate was proposed as an expert witness by the defence.<sup>125</sup> Senator Pate had a long and storied past in advocating for women in prison, particularly the negative impacts of imprisonment on Indigenous women and girls.<sup>126</sup> Moreover, as the court recognized, “Senator Pate was the Executive Director of the Canadian Association of Elizabeth Fry Societies from 1992 until she was appointed to the Senate in 2016.”<sup>127</sup> Importantly, in her biography for the Senate of Canada, Senator Pate highlighted her quest to help marginalized women.<sup>128</sup> The most controversial area in which the defence sought to have Senator Pate qualified to give opinion evidence was in relation to “how the prison system does not meet the sentencing principle of denunciation or deterrence”<sup>129</sup> and how “research and study, including research by the

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<sup>121</sup> *Ibid* at paras 94–96.

<sup>122</sup> *Ibid* at paras 98–99.

<sup>123</sup> 2019 SKQB 204.

<sup>124</sup> *Ibid* at para 1.

<sup>125</sup> *Ibid* at para 5.

<sup>126</sup> *Ibid* at paras 7–10.

<sup>127</sup> *Ibid* at para 8.

<sup>128</sup> *Ibid* at para 13.

<sup>129</sup> *Ibid* at para 15.

Department of Justice Canada, has demonstrated that incarceration does not serve as a deterrent, including for young Indigenous women.”<sup>130</sup>

As Justice MacMillan-Brown outlined, Senator Pate testified that “she understood that her duty as an expert witness is a duty owed to the court and that her obligation is to provide fair, objective and non-partisan evidence for the benefit of the court.”<sup>131</sup> In fact, Justice MacMillan-Brown very clearly stated that there is no “[suggestion] that [Senator Pate] would intentionally give evidence in such a way as to sway the court in a particular direction *vis-à-vis* Ms Heimbecker.”<sup>132</sup>

However, in the context of assessing witness objectivity, Justice MacMillan-Brown took issue with Senator Pate’s role as “an activist who continues to work within Canada’s Senate Chamber and beyond to bring widespread attention to the increasing over-representation of Indigenous women in Canada’s prisons,”<sup>133</sup> which was, in fact, something defence counsel attempted to argue in written submissions that assisted with establishing Senator Pate’s expertise.<sup>134</sup> Justice MacMillan-Brown “[had] grave concerns about [Senator Pate’s] ability to fulfill her duty to the court as an independent and impartial witness in light of her three and a half decade old advocacy role.”<sup>135</sup>

Ultimately, Justice MacMillan-Brown was “not persuaded that Senator Pate can so easily shed the cloak of advocate or the mantle of activist”<sup>136</sup> and ruled that “this court cannot be a platform for Senator Pate’s social advocacy.”<sup>137</sup>

## ***E. R v Abbey #2***

Even where courts stop short of finding outright bias, structural considerations can impact the reliability analysis of a proposed expert’s testimony and can result in that testimony being excluded or rejected. The case of *R v Abbey #2* reaffirms and incrementally builds upon the test of expert evidence.<sup>138</sup> This was a lengthy murder case that bounced around the

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<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid* at para 36.

<sup>132</sup> *Ibid* at para 45.

<sup>133</sup> *Ibid* at para 40 [emphasis in original].

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid* at para 45.

<sup>136</sup> *Ibid* at para 46.

<sup>137</sup> *Ibid.*

<sup>138</sup> *R v Abbey*, 2017 ONCA 640 [*Abbey #2*].

court system for over a decade.<sup>139</sup> *Abbey #2* involved a fresh evidence application by defence counsel concerning issues related to the trial judge’s decision to admit expert evidence pertaining to the meaning of a teardrop tattoo.<sup>140</sup> This piece of evidence was crucial to the Crown’s case, as it was relied upon to identify the purported killer.<sup>141</sup>

The current iteration involved the Crown calling one expert, Dr. Mark Totten, whom the Crown discredited as an expert in another case,<sup>142</sup> in relation to his gang-focused research. Notwithstanding its approach to Dr. Totten in the previous unrelated case, the Crown in *Abbey #2* called him as an expert at trial.<sup>143</sup> Ultimately, the Ontario Court of Appeal determined that the fresh evidence – the information used by the Crown to challenge Dr. Totten’s expertise in the previous unrelated case – demonstrated “the unreliability of Totten’s opinion evidence on teardrop tattoos.”<sup>144</sup> Justice Laskin goes into great detail in outlining how Dr. Totten’s research was fundamentally flawed.<sup>145</sup> In spite of the irregularities in his research, Dr. Totten was held not to be biased,<sup>146</sup> though his “trust-me” approach to research clashed with the idea of an “evidence-based approach to the evaluation of the reliability of expert evidence.”<sup>147</sup> This unreliability meant that Dr. Totten’s evidence should have been excluded.<sup>148</sup> *Abbey #2* underscores the importance of avoiding unreliable expert evidence, even if outright bias is not present.<sup>149</sup>

## ***F. R v Millard***

*R v Millard*<sup>150</sup> confirms that if it can be shown that the proposed expert wilfully ignored real possibilities or explanations, especially if there are structural concerns involved that ultimately pertain to bias, this evidence can be properly excluded. *Millard* was a murder case wherein the Crown

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<sup>139</sup> *Ibid* at paras 13–36.

<sup>140</sup> *Ibid* at paras 9–10.

<sup>141</sup> *Ibid* at para 32.

<sup>142</sup> *Ibid* at paras 37–40.

<sup>143</sup> *Ibid* at paras 19–40.

<sup>144</sup> *Ibid* at para 54.

<sup>145</sup> *Ibid* at paras 56–125.

<sup>146</sup> *Ibid* at para 109.

<sup>147</sup> *Ibid* at paras 119–21.

<sup>148</sup> *Ibid* at paras 152–55.

<sup>149</sup> *Ibid* at paras 109, 141.

<sup>150</sup> 2018 ONSC 4410.

sought to introduce expert evidence from D.C. Sutherland in relation to shooting scene reconstruction work.<sup>151</sup> D.C. Sutherland understood what his qualification as an expert entailed:

D.C. Sutherland testified that he understood the concept of bias and that he understood the duty of an expert witness which he described as an obligation to deliver impartial, honest, full, frank and fair evidence. He testified that he understood that his evidence was to be as unbiased as possible. He testified that to the best of his ability he removed any bias from his experimentation, report and testimony.<sup>152</sup>

However, D.C. Sutherland ultimately neglected to include some vital information and analysis in his testimony.<sup>153</sup> D.C. Sutherland stated there were several inconsistencies in the crime scene with suicide, the initially suspected cause of death.<sup>154</sup> Namely, there was a critical piece of evidence that was left out of his explanation and accident recreation, a potential intermediary surface that could have contained gunshot residue.<sup>155</sup>

Under cross-examination, D.C. Sutherland stated he assumed he was viewing an undisturbed, unaltered crime scene when he reviewed the photos.<sup>156</sup> He relied upon photographs of the crime scene.<sup>157</sup> Officers who attended the scene might have disturbed the surrounding area, including the intermediary surfaces.<sup>158</sup> In his analysis and under cross-examination, D.C. Sutherland stated the potential intermediary surface was “discounted.”<sup>159</sup>

D.C. Sutherland was held to have “rejected any evidence”<sup>160</sup> that an intermediary surface could have come into play and that his experiment was guided by one central presumption.<sup>161</sup> Pursuant to defence counsel’s challenge against D.C. Sutherland’s proposed qualification due to bias concerns, Justice Forestell concluded that D.C. Sutherland “was unwilling or unable to interpret this evidence in a way that was inconsistent with his

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<sup>151</sup> *Ibid* at para 3.

<sup>152</sup> *Ibid* at para 11.

<sup>153</sup> *Ibid* at paras 20–35.

<sup>154</sup> *Ibid* at para 12.

<sup>155</sup> *Ibid* at para 13.

<sup>156</sup> *Ibid* at paras 26–30.

<sup>157</sup> *Ibid* at para 27.

<sup>158</sup> *Ibid* at paras 31–33.

<sup>159</sup> *Ibid* at para 34.

<sup>160</sup> *Ibid* at para 53.

<sup>161</sup> *Ibid*.

theory.”<sup>162</sup> Justice Forestell continued by stating that “[t]he failure of a proposed expert to disclose information that would undermine his opinion goes beyond confirmation bias.”<sup>163</sup> In fact, such a failure demonstrates a misapprehension on the part of the prospective expert as to their duty to the court.<sup>164</sup> D.C. Sutherland “was not entitled to discount the theory that an intermediary surface was implicated without disclosing evidence that might bear upon that theory.”<sup>165</sup> As a result, the evidence connected to this aspect of D.C. Sutherland’s testimony was removed at the admissibility stage.<sup>166</sup>

### ***G. R v Morrill***

The case of *R v Morrill*<sup>167</sup> illustrates that where an expert takes steps – especially those relating to structural considerations – to ensure that they remain relatively detached from a party’s interests, this can increase the likelihood of that expert’s testimony being received by the court.<sup>168</sup>

In *Morrill*, the accused faced a number of charges stemming from an incident involving his uncle, whom he threatened to kill.<sup>169</sup> The charges focused on allegations of discharging a firearm towards his uncle, fleeing from police, and shooting at police.<sup>170</sup> The accused pleaded not criminally responsible due to mental disorder.<sup>171</sup>

The defence proposed to call Dr. Curtis Woods, a forensic psychologist, to testify as an expert witness.<sup>172</sup> Dr. Woods had treated the accused previously, and again when he completed an assessment for Mr. Morrill for the purposes of the case.<sup>173</sup> The Crown took issue with Dr. Woods’ involvement, claiming that he was biased in giving expert testimony, after having treated him and having previously prescribed medication (which Mr. Morrill could not afford).<sup>174</sup> Dr. Woods recognized this and attempted to

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<sup>162</sup> *Ibid* at para 65.

<sup>163</sup> *Ibid* at para 67.

<sup>164</sup> *Ibid*.

<sup>165</sup> *Ibid* at para 68.

<sup>166</sup> *Ibid* at para 70.

<sup>167</sup> 2016 ABQB 638.

<sup>168</sup> *Ibid* at para 111.

<sup>169</sup> *Ibid* at para 15.

<sup>170</sup> *Ibid*.

<sup>171</sup> *Ibid* at para 5.

<sup>172</sup> *Ibid* at para 95.

<sup>173</sup> *Ibid* at para 97.

<sup>174</sup> *Ibid* at para 109.

elicit the help of a colleague to provide a second opinion while maintaining his professional distance.<sup>175</sup> The testimony of the colleague corroborated the opinion that Mr. Morrill was not criminally responsible at the time of events.<sup>176</sup> Justice Erb found that Dr. Woods' attempt to distance himself from the accused helped to ensure the objectivity of his testimony and that there was no evidence of bias.<sup>177</sup>

#### IV. TOWARD A NEW TWO-STREAM MODEL FOR EXPERTS

As we have seen from the above cases, structural considerations relating to bias-based concerns play a vital role in a court's determination as to whether an expert's testimony will be received. Courts have made it clear that taking proactive steps to reduce concerns relating to bias is desirable. We propose a new two-stream model for experts, providing a clear structural separation between experts called by the Crown for court purposes and those expertly trained individuals who are vital to police investigations.

It must be recognized that the "unconscious bias which threatens the reliability of expert testimony is not a failing of the experts, nor even of the parties retaining them."<sup>178</sup> Rather, this is a systemic failing within the justice system.<sup>179</sup> As Giffin explains, experts are placed in an unenviable position "in which they are told that they must be independent and impartial, but are simultaneously being paid and instructed by a party with a specific viewpoint which they want supported."<sup>180</sup> Despite "the experts' best intentions and efforts to remain impartial, they may be influenced in ways of which they themselves are unaware and therefore over which they have little control."<sup>181</sup>

A substantial risk of the current setup is that experts may be "unable' to remain fully non-partisan and uninfluenced by the party retaining them due to the nature of the employment relationship in which they are engaged."<sup>182</sup> Some of the cases discussed above since the Supreme Court of Canada's decision in *White Burgess* have indicated that courts are giving

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<sup>175</sup> *Ibid* at 110.

<sup>176</sup> *Ibid* at paras 103-04, 115-22.

<sup>177</sup> *Ibid* at para 111.

<sup>178</sup> Giffin, *supra* note 18 at 4.

<sup>179</sup> *Ibid*.

<sup>180</sup> *Ibid*.

<sup>181</sup> *Ibid*.

<sup>182</sup> *Ibid* at 5.

significant consideration to systemic bias risks and are at times excluding expert evidence on this basis. Although the Supreme Court of Canada held in *White Burgess* that, at the threshold stage, “[a]nything less than clear unwillingness or inability to [fulfill the expert’s duty to the court] should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence,”<sup>183</sup> this should not necessarily be interpreted as an ongoing endorsement of the use of party employees as experts. It is important to bear in mind that there are now three potential opportunities for consideration of independence, impartiality, and bias issues; two of these potential opportunities can lead to outright exclusion of evidence due to bias concerns, while the final one can potentially lead to no weight being attributed to an expert’s testimony even after the evidence is received by the court.<sup>184</sup> Problems relating to potential bias – even unconscious bias resulting from structural pressures and issues – are unlikely to be assumed away or ignored by courts on a prospective basis. Police agencies, public prosecution services, and governments therefore should take proactive steps to safeguard against bias-related pressures and concerns; in addition to being ethical and virtuous, doing so may increase the likelihood that expert evidence is received and utilized by the courts.<sup>185</sup>

Bruce MacFarlane, a legal scholar and former deputy attorney general of Manitoba, has argued that police need to guard against bias on multiple levels.<sup>186</sup> With regard to experts, specifically, he has stated that forensic experts and labs “should be independent from the police.”<sup>187</sup> MacFarlane has suggested that “[i]deally, [this] means an independent, stand-alone organization with its own management structure and budget.”<sup>188</sup> However, if these experts are located within a police agency, they “should minimally be segregated into a specific branch or division, with a separate management structure and budget, physically located away from investigative units.”<sup>189</sup>

Though MacFarlane was initially writing about forensic scientists, the same logic can and should be applied to computer forensic experts,<sup>190</sup> given

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<sup>183</sup> *White Burgess*, *supra* note 2 at para 49.

<sup>184</sup> Paciocco, Paciocco & Stuesser, *supra* note 6.

<sup>185</sup> See discussion of *R v Morrill*, above.

<sup>186</sup> MacFarlane, “Convicting The Innocent”, *supra* note 8 at 444.

<sup>187</sup> *Ibid* at 464.

<sup>188</sup> *Ibid*.

<sup>189</sup> *Ibid*.

<sup>190</sup> At present, digital evidence experts include sworn police officers and civilian members of police agencies. See e.g. *R v Cumberland*, 2019 NSSC 307.

how common it is – and will continue to be – for digital evidence to be used in prosecutions ranging from fraud to murder. Whether the forensic experts are scientists or technological specialists, there is a need to guard against these experts being “too closely linked with law enforcement and the investigative function,”<sup>191</sup> given the risk of “[feeling] aligned with the police.”<sup>192</sup>

We pause to acknowledge that investigators typically do not intend anything nefarious by consulting with experts during the investigative stage. It is sensible for an investigator to seek input from a technical expert where there is uncertainty or where there is an opportunity for gaining valuable insights. However, as explained in *Livingston*, it is problematic for individuals to become significantly involved in an investigation if they hope to be called as expert witnesses at trial. There are certainly cases where investigators need to consult with experts and seek input throughout the investigation.<sup>193</sup> Investigators should be encouraged to do their due diligence with regard to seeking this information from subject matter experts, especially given the utmost importance of guarding against wrongful convictions and against putting innocent individuals through the stress of facing unfounded charges in the first place. However, it is our recommendation that there should be a restructuring of police agencies in light of concerns raised in *White Burgess* and in the ensuing jurisprudence.

Although this is not yet required by the courts, we recommend that police agencies, public prosecution services, and governments take a proactive step by delineating – and then utilizing – two different streams of “experts.” The first of these would be the in-house police expert stream (comprised of sworn officers as well as civilian employees of police agencies). However, rather than testify in court as expert witnesses, these in-house experts would focus solely on assisting with investigations and performing analyses. The second expert stream, comprised of experts that are meant

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<sup>191</sup> MacFarlane, “Convicting The Innocent”, *supra* note 8 at 464.

<sup>192</sup> *Ibid.*

<sup>193</sup> The “swapping” of experts from different jurisdictions could also potentially be useful at this stage (for instance, having an expert from Alberta assisting investigators in New Brunswick at the consultative stage, with no expectation that this expert would be called to testify by the Crown as an expert at trial). This would allow the New Brunswick expert to testify at trial, as they would have no involvement whatsoever at the investigative stage. This could potentially be used as a stopgap measure before our other recommendations are implemented.

exclusively to testify in court, would be entirely separate from police agencies. These experts would have no involvement whatsoever with the investigation and would only perform reviews and provide objective opinions for court purposes.<sup>194</sup> These experts would work within organizations with a completely separate management structure and budgets that are independent from police agencies.<sup>195</sup>

While there are certainly costs involved in switching to this model, these must be weighed against the increased likelihood for resource-intensive and time-consuming appeals stemming from a continuation of the current model, as shown in the canvassed jurisprudence post-*White Burgess*. We argue that it would be beneficial for police agencies, public prosecution services, and governments to recognize where the law is likely headed – toward recognition and denunciation of the concerns of unconscious bias in expert witnesses – and take steps in the near future to do everything possible to ensure that any experts called by the Crown at trial are unquestionably impartial, independent, and unbiased. After all, as articulated by the Supreme Court of Canada in *Boucher v The Queen*:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.<sup>196</sup>

Given the recognition of the many access-to-justice challenges and power-imbalance issues stemming from the current system of using police officers and police employees as expert witnesses in criminal trials (as very few accused individuals have the practical ability to retain experts),<sup>197</sup> a transition to this two-stream expert model presents an opportunity to address multiple structural concerns relating to expert witnesses simultaneously.

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<sup>194</sup> The expectation under this model would be for the Crown to, but for exceptional cases, use experts from this “court stream” rather than private “for-hire” experts.

<sup>195</sup> MacFarlane, “Convicting The Innocent”, *supra* note 8 at 464.

<sup>196</sup> *Boucher v The Queen*, [1955] SCR 16 at 23–24.

<sup>197</sup> Giffin, *supra* note 18 at 8–9.

## V. CONCLUSION

In light of the Supreme Court of Canada's decision in *White Burgess*, along with several lower-court judgments since that seminal case, it is clear that courts are giving significant consideration to bias issues insofar as expert witnesses are concerned. This trend is likely to continue developing, with increased scrutiny being placed on the use of experts whose evidence may potentially be impacted by factors relating to unconscious bias. As Giffin has articulated, "unconscious cognitive bias is not something which can be blocked out by mere willpower on the part of the expert, so although an expert witness may have every intention of maintaining this oath, it can be beyond their reach to do so."<sup>198</sup> As with developing conflict-of-interest rules in the realms of business and government, the criminal justice system should recognize that it is vital to guard against unconscious biases impacting expert witnesses in order to ensure that Canadians have respect for the legal system and the enforcement of society's laws. As the Alberta Court of Appeal has articulated, "[i]t is trite law that justice must be seen to be done as well as being done."<sup>199</sup> In light of recent case law developments, it is time to recognize the potential for systemic risks associated with the current model of using police experts in criminal trials. Appropriate steps must be taken to mitigate these risks. It would be wise to adhere to the old adage: "An ounce of prevention is worth a pound of cure."

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<sup>198</sup> *Ibid* at 5–6.

<sup>199</sup> *Beier v Vermilion River (County) Subdivision and Development Appeal Board*, 2009 ABCA 338 at para 10.