

**ALRI**

**CLASS ACTIONS PROJECT**

**ADMISSIBILITY OF STATISTICAL EVIDENCE**

[1] To reach an informed conclusion whether to recommend that Alberta class proceedings legislation include a provision based on section 30 of the Uniform Act, it is useful to consider the following questions. What statistical evidence might be admitted under section 30(1) that would not already be admissible under the general law of evidence?

[2] To the extent that the admissibility of statistics is problematic under the general law of evidence, it is not because of any special suspicion on the part of law makers (whether judges or legislators) about the appropriateness of using statistics in the fact-finding process. The problem, if any, arises because the data underlying statistical information that a party might seek to introduce in court is likely to fall within the judicial definition of hearsay evidence.

[3] In general, the testimony of witnesses can only be used as evidence for what the witness personally observed or heard. If a witness testifies that some other person made an assertion of fact, the substance of the assertion is hearsay. The witness's testimony is admissible for the purpose of proving that the other person made the assertion (if that is in issue), but it is not admissible for the purpose of proving the fact asserted by the other person.

[4] Statistics that a party wishes to introduce into court are likely to involve multiple levels of hearsay. This is so even if the person who conducted the research that underlies the statistics is present in court to give evidence describing how the data was collected and analysed. The raw data on which the researcher's statistical conclusions are reached are likely to consist of statements made by respondents to a survey, and the respondents' assertions are hearsay.<sup>1</sup> Yet another level of hearsay is added if, as will often be the case, a party who wishes to introduce statistical evidence does not have the luxury of being able to do so through the person who actually conducted the relevant research.

[5] There have always been many exceptions to the hearsay rule. However, when the OLRC published its 1982 report, a party seeking to introduce hearsay evidence had the burden of bringing themselves within the strict confines of one of the defined exceptions to the hearsay rule. Statistical information might be introduced as

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<sup>1</sup> There will be at least one level of hearsay if the raw data upon which a statistic is based reflect the answers of respondents to a survey question. If there are 1000 responses to the question, the statistic represents the aggregation of 1000 hearsay statements. Multiple levels of hearsay are likely to arise because serious statistical research generally is conducted by teams, rather than individuals. In theory, to avoid multiple levels of hearsay, each member of the research team – from interviewers to data analysts to team leaders – would have to testify as to their role in the process that created the statistic.

evidence through the “public documents”, “business records” or “expert evidence” exceptions. However, it would by no means have been certain in 1982 that statistical information, even if highly reliable from a scientific perspective, would fall within the four corners of one of the exceptions to the hearsay rule.

[6] In recent years, however, Canadian courts’ traditional approach to the hearsay rule, with its emphasis on rigid categories of exceptions, has been given way to a more functional approach, as emphasized by the following passage from a 1992 judgment of the Supreme Court of Canada:

This Court has not taken the position that the hearsay rule precludes the reception of hearsay evidence unless it falls within established categories of exceptions, such as "present intentions" or "state of mind." Indeed, in our recent decision in *R. v. Khan*, [1990] 2 S.C.R. 531, we indicated that the categorical approach to exceptions to the hearsay rule has the potential to undermine, rather than further, the policy of avoiding the frailties of certain types of evidence which the hearsay rule was originally fashioned to avoid . . .

What is important, in my view, is the departure signalled by *Khan* from a view of hearsay characterized by a general prohibition on the reception of such evidence, subject to a limited number of defined categorical exceptions, and a movement towards an approach governed by the principles which underlie the rule and its exceptions alike. The movement towards a flexible approach was motivated by the realization that, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination . .

This Court's decision in *Khan*, therefore, signalled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity.<sup>2</sup>

These words were not uttered in a case in which the admissibility of statistical evidence was directly in issue. Nevertheless, the broad principle expressed in the passage would have had as much application to statistical information that incorporates hearsay as to any other type of hearsay.

Although the categories of exceptions to the hearsay rule are less important than they once were, it is worth observing that hearsay evidence, including statistical information, will often be introduced through expert testimony. The traditional analysis is that when the expert is allowed to incorporate hearsay statements in their evidence, the statements are admissible for the purpose of indicating the basis of the expert’s opinion on the matter for which their expertise is sought. They are not admissible, however, for the purpose of proving the truth of the assertions in the hearsay statements. This analysis has led to some conceptual quagmires. Suppose, for example, that an expert witness has expressed an opinion about some matter that is in issue in a lawsuit. This opinion rests largely on the expert’s premise that a certain fact, *F*, exists. The premise that *F* exists is based

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<sup>2</sup> *R v. Smith*, [1992] 2 S.C.R. 915 at 928-33.

entirely on hearsay information disclosed in the expert's testimony. The court has received no other evidence of *F*'s existence. Of what value is the expert's opinion on the matter in issue if its foundation is a fact of which there is no evidence other than the hearsay statements?

[7] In *R. v. Abbey*<sup>3</sup> the Supreme Court of Canada provided what proved to be a not entirely satisfactory answer to the foregoing question. The trial judge in *Abbey* had found the accused not guilty by reason of insanity. The trial judge's finding was based largely on expert testimony by a psychiatrist whose evidence incorporated many assertions of fact made to the psychiatrist by the accused. Not only had the judge relied on the psychiatrist's opinion, he had accepted the psychiatrist's testimony as evidence for the assertions made by the accused:

In the present case *Abbey* did not testify. Dr. Vallance testified, in the course of his opinion, as to many events and experiences related to him during several interviews. This testimony, while admissible in the context of the opinion, was not in any way evidence of the factual basis of these events and experiences. The trial judge in his decision fell into the error of accepting as evidence of these facts, testimony which if taken to be evidence of their existence would violate the hearsay rule.<sup>4</sup>

The Supreme Court went on to deal with the weight to be given to an expert opinion that is founded upon factual assertions contained in hearsay statements:

. . . but it was error for the judge to accept as having been proved the facts upon which the doctors had relied in forming their opinions. While it is not questioned that medical experts are entitled to take into consideration all possible information in forming their opinions, this in no way removes from the party tendering such evidence the obligation of establishing, through properly admissible evidence, the factual basis on which such opinions are based. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.<sup>5</sup>

The final sentence in the preceding passage proved to be problematic, and led to the Supreme Court revisiting the relationship between expert testimony and the hearsay rule in *R. v. Lavallee*.<sup>6</sup>

[8] *Lavallee* also involved a psychiatrist whose expert testimony included statements made by a non-testifying accused to the psychiatrist. The Supreme Court held that the trial judge had properly instructed the jury that the psychiatrist's testimony could not be regarded as evidence of the assertions of fact embedded in the hearsay statements. The Court's principal judgment was content

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<sup>3</sup> [1982] 2 S.C.R. 24.

<sup>4</sup> *Ibid.* at 45.

<sup>5</sup> *Ibid.* at 46.

<sup>6</sup> [1990] 1 S.C.R. 852.

to make it clear that an expert opinion is not to be dismissed, or given no weight, because it is based partly on factual premises for which there is no admissible evidence, if it is also based partly on factual premises for which there is some admissible evidence.<sup>7</sup> But the principal judgment does not really address the question of how the trier of fact should deal with hearsay statements that are incorporated in the expert's opinion. Should the trier of fact simply ignore the hearsay statements in deciding how much weight to give to the expert opinion? If so, what is the point of allowing the expert to include the hearsay statements in their testimony?

[9] In a concurring judgment, Justice Sopinka grappled with the issue of what use can be made of hearsay embedded in an expert's testimony. He observed that *Abbey* contains a contradiction, insofar as it suggests that an expert opinion based purely on hearsay is admissible but should be given no weight. The apparent contradiction could be resolved, however, by distinguishing between two types of hearsay that might be incorporated into an expert's testimony:

The resolution of the contradiction inherent in *Abbey*, and the answer to the criticism *Abbey* has drawn, is to be found in the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in *City of St. John*),<sup>8</sup> and evidence that an expert obtains from a party to litigation touching a matter directly in issue (as in *Abbey*).

In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second- or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this Court has taken to the analysis of hearsay evidence in general, exemplified in *Ares v. Venner* . . .

Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point.<sup>9</sup>

Although Sopinka does not expressly say so, the clear implication of his analysis is that where an expert has formed "an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise," there is a factual foundation for the expert's opinion, notwithstanding that it rests on

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<sup>7</sup> *Ibid.* at 896.

<sup>8</sup> *City of Saint John v. Irving Oil Co.*, [1966] S.C.R. 581, 58 D.L.R. (2d) 404.

<sup>9</sup> *Lavallee*, *supra* note 6 at 899-900.

hearsay. In other words, provided that certain conditions are met, the hearsay statements incorporated in the expert's testimony can be treated as admissible evidence of the facts upon which the expert's opinion is based.

[10] What conditions must be met before hearsay statements incorporated into an expert's testimony can be taken as evidence for the factual premises upon which the expert's opinion is based? The answer seems to be provided by the Supreme Court's approach to hearsay evidence in general, as developed in *Ares v. Venner*,<sup>10</sup> *R v. Khan*<sup>11</sup> and *R v. Smith*.<sup>12</sup> Hearsay evidence incorporated in an expert's testimony may be treated as evidence of the facts asserted by the hearsay statements if the latter meets the criteria of reliability and necessity:

Another way of viewing Sopinka, J.'s explanation for the admissibility of expert testimony that is based partly upon hearsay is to consider whether the underlying hearsay would itself be admissible under the normal hearsay rules. In brief, the tests to be applied are whether the evidence is reasonably necessary and reliable.<sup>13</sup>

If the underlying hearsay is admissible under the reliability and necessity tests, it follows that when disclosed in the expert's testimony it can be regarded as evidence of the facts upon which the expert's opinion is based.

[11] We return now to the specific subject of the admissibility of statistical information for the purpose of proving facts in issue in a lawsuit. Let us assume that a party wishes to introduce through expert testimony statistics about the price behaviour of a publically traded security during a certain period. The raw data for the statistics – the particulars of individual trades during the period – is compiled by securities exchanges and made available by them to securities market reporting services. The expert has analysed data provided by one of these reporting services. Since the expert has no personal knowledge of the transactions that underlie the statistics, the expert's testimony rests on a foundation of several levels of hearsay.

[12] This seems clearly to be a case where the hearsay evidence about the raw data underlying the statistical analysis is admissible for the purpose of establishing the factual foundation for the expert's opinion. The hearsay evidence seems to meet both the necessity and reliability criteria for the admission of hearsay evidence. The following passage is suggestive of how the criterion of "necessity" will be interpreted:

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<sup>10</sup> [1970] S.C.R. 608, 12 C.R.N.S. 349, 14 D.L.R. (3d) 4, 73 W.W.R. 347.

<sup>11</sup> [1990] 2 S.C.R. 531.

<sup>12</sup> *Smith*, *supra*, note 2.

<sup>13</sup> *Ferguson v. Ranger Oil*, [1997] A.J. No. 100 at para. 15.

. . . it was strenuously contended in the course of the argument before us that the opinion of the expert appraiser called by the city to testify as to the land value per square foot of the expropriated property was inadmissible on the ground that it was hearsay evidence which was based upon calculations made from unrecorded interviews which the appraiser had had with forty-seven persons who had been parties to sales of land in the area. . . .

Counsel on behalf of the City of Saint John pointed out that if the opinion of a qualified appraiser is to be excluded because it is based upon information acquired from others who have not been called to testify in the course of his investigation, then proceedings to establish the value of land would take on an endless character as each of the appraiser's informants whose views had contributed to the ultimate formation of his opinion would have to be individually called.<sup>14</sup>

[13] The foregoing passage comes from a case decided by the Supreme Court of Canada before it explicitly adopted the criteria of necessity and reliability for admission of hearsay evidence. Nevertheless, in *Ferguson v. Ranger Oil* the Alberta Court of Appeal cited this passage as an application of the “necessity” criterion:

Ritchie, J. [in *City of Saint John*] noted . . . the argument that, if such evidence was not admitted, “proceedings to establish the value of land would take on an endless character.” This can be viewed as a reference to the “necessity” test.<sup>15</sup>

This suggests that the measure of necessity in this context is not whether it would be *possible* to get first-hand evidence of the relevant facts, but whether it would be *practical* to require this mode of proof. Given this interpretation of necessity, it seems to be beyond reasonable doubt that hearsay-based statistical evidence of prices for a publically traded security would satisfy the necessity criterion.

[14] The raw data underlying the price statistics for the hypothetical security also seem to meet the reliability criterion for the admission of hearsay evidence. The criterion was elaborated in the following manner by the Alberta Court of Appeal in applying the rationale of *Ares v. Venner* to broaden the business records exception to the hearsay rule:

These hearsay records are not to be accepted in evidence merely to avoid the inconvenience of identifying a witness or because many witnesses would be involved, or even because otherwise no evidence would be available. Rather, they can be admitted only if they have come into existence under circumstances which makes them inherently trustworthy. Where an established system in a business or other organization produces records which are regarded as reliable

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<sup>14</sup> *City of Saint John v. Irving Oil Co.*, *supra* note 8 at 413-14 (D.L.R.).

<sup>15</sup> *Ferguson*, *supra* note 13 at para.16.

and customarily accepted by those affected by them, they should be admitted as prima facie evidence.<sup>16</sup>

Information about transactions in a securities market that is routinely collected and compiled by a securities exchange or other organization satisfies the test of an established system that produces records that are regarded as reliable by those affected by them.

[15] We return finally to section 30(1) of the Uniform Class Actions Act. It provides that, for the purpose of determining the amount or distribution of an aggregate damages award, the court may “admit as evidence statistical information that would not otherwise be admissible as evidence . . . if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.” What evidence might be admitted under this section that would not be admissible under the general law of evidence? In our view it is highly improbable that *any* statistical evidence that was held to be inadmissible under the general law of evidence court would be admitted under section 30(1).

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<sup>16</sup> *R. v. Monkhouse* (1987), 56 Alta. L.R. (2d) 97 at 105. This case went beyond *Ares v. Venner*, *supra* note 10, in holding that a business record could be admissible even if the person recording the information did not have personal knowledge of what was recorded: *ibid.* at 104.