Citation: 2012 TCC 94
2011-5(IT)G

BETWEEN:

ANDRÉ DROUIN,

APPELLANT,

AND

HER MAJESTY THE QUEEN,

RESPONDENT,

[OFFICIAL ENGLISH TRANSLATION]

TRANSCRIPT
OF AMENDED REASONS FOR JUDGMENT

Let the attached certified copy of the reasons for the four orders given at the hearing in Montréal, Quebec, on February 27, 2012, be filed. I have revised the transcript certified by the official stenographer in order to improve the style and clarity of the reasons, by adding paragraph numbers and accents and correcting typographical errors.

"Paul Bédard"
Bédard J.

Signed at Ottawa, Ontario, April 10, 2012.

Translation certified true
on this 3rd day of June 2014

François Brunet, Revisor

AMENDED REASONS FOR ORDER

[1] Further to the voir-dire, the Court must determine whether the report and testimony of Michel Gagnon (Gagnon) as an expert witness specializing in management and franchising **are** admissible.

[2] On December 19, 2011, the respondent served a report on the appellant signed by Gagnon, called [TRANSLATION] "Counter-expertise to report by Jean-François Ouellet on Section VI: Granting and operating the franchise" along with a certificate as required under Rule 145(1)(*b*) of this Court to the effect that it represents evidence that the proposed witness is prepared to give in the matter ("the report").

[3] Gagnon's mandate was essentially to comment on section VI, [TRANSLATION] "Granting and operating the franchise" of the report by Jean-François Ouellet, served on the respondent on December 6, 2011.

[4] The respondent is asking this Court to admit as evidence the report and the testimony of Gagnon as an expert witness specializing in management and franchising. The appellant objects.

The issue

[5] Are Gagnon's report and testimony admissible as evidence?

Respondent's submissions

[6] I must first note that the respondent's submissions on this subject are rather brief. In fact, once Gagnon's qualifications were submitted to the Court, the respondent invoked the admissibility criteria for an expert witness, developed by the Supreme Court of Canada (SCC) in *R. v. Mohan*, [1994] 2 S.C.R. 9, to justify her position.

Appellant's submissions

[7] The appellant essentially submits that Gagnon's testimony as an expert witness, as well as his report, are of no use to the Court and are not admissible pursuant to the criterion of necessity developed by the SCC in *Mohan, supra*.

Applicable law

[8] With regard to the applicable law, I refer once again to the analysis I conducted in my reasons given orally today with respect to my decision on the inadmissibility as evidence of Denys Goulet's testimony and report.

Application of the law to the facts

[9] Our analysis will therefore only focus on the criterion of necessity developed by the SCC in *Mohan*, *supra*, since the other criteria are not being challenged in this case.

[10] With regard to the necessity of assisting the trier of fact, the first question is whether the expert provides information necessary to appreciate the matters in issue given their technical nature (see *R. v. Burns*, [1994] 1 S.C.R. 656; *R. v. Mohan*, *supra*; *R. v. Lavallée*, [1990] 2 S.C.R. 852; *R. v. Abbey*, [1982] 2 S.C.R. 24 and *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672).

[11] Although necessity means that the evidence must not be simply helpful, it should also not be judged "by too strict a standard" (*Mohan*, *supra*, at p. 23).

[12] *Mohan* aims to ensure that the dangers related to expert evidence are not taken lightly. Mere relevance and/or helpfulness is not sufficient. The question is whether the expert provides information that that is likely outside the ordinary experience and knowledge of the trier of fact (see *R. v. D.D.*, [2000] 2 S.C.R. 275, at p. 98 and *Mohan*, *supra*, at p. 23).

[13] In the present case, the appellant submits that a very limited portion of Gagnon's report addresses the specific issue that Ouellet addresses in section VI of his report, regarding the appellant's decision to contract out operations of his franchise to an agent.

[14] As for the other aspects covered in the report, the appellant submits that Gagnon ventures into and makes statements on a number of subjects such as the appellant's investment decision and the benefits of the franchise system from Prospector's point of view, all of which are clearly beyond his mandate and do not contribute to the decision-making process of this Court.

[15] However, the appellant draws his conclusions after carefully reading the report. We are now at the stage of determining the admissibility of the proposed testimony and the content of Gagnon's report is not to be considered at this stage of the proceedings. Indeed, an analysis of certain parts of Gagnon's report, whose testimony has not been heard, would not be appropriate to dismiss the entire report.

[16] On its face, the report tells us that Gagnon’s mandate was to comment on Ouellet's report regarding section VI: Granting and operating the franchise, in relation to the André Drouin case.

[17] I must disagree with the hasty conclusions drawn by the appellant and cannot come to the conclusion that Gagnon's testimony would be useless in the circumstances. It is the court's duty to proceed with a probative analysis of the report, once the expert has been heard on the content of his report.

[18] For these reasons, I recognize Gagnon as an expert.

AMENDED REASONS FOR ORDER

Bédard J.

[1] Further to the voir-dire, the Court must determine whether the report and testimony of Denys Goulet (Goulet) as an expert mandated to comment on the fair market value (FMV) of the franchise (the franchise) acquired by André Drouin (the appellant), to commercialize solutions developed by Prospector International Networks Inc., its subsidiaries and partners (collectively, Prospector) **are** admissible.

[2] On December 6, 2011, the respondent served on the appellant a report signed by Goulet called [TRANSLATION] "Justice Canada – CRA: André Drouin and Her Majesty the Queen - 2011-5(IT)G" with a certificate as required under Rule 145(1)(*b*) of this Court to the effect that it "represents evidence that the proposed witness is prepared to give in the matter". This report, sent on December 6, 2011, was then amended on December 23, 2011 (the report).

[3] The report provided an opinion on the following issue:

> [TRANSLATION]
> Our mission is to carry out the work required to issue a formal opinion on the fair market value of the investment made by André Drouin (hereinafter, the Appellant) by acquiring a franchise and a series of user and distribution licences for a software suite from Prospector International Networks Inc. dated December 28, 2007.

[4] The respondent, after Goulet's qualifications were listed, asked this Court to admit his testimony and report in the present case as a business valuation expert witness. Not surprisingly, the appellant strongly objected on the basis of on certain facts revealed on cross-examination, which seem to be at the heart of the present debate and will likely require our attention.

Issues

First issue

[5] Are Goulet's report and testimony admissible in evidence? Is the Court justified in allowing the admissibility of the report and testimony of Denys Goulet as a business valuation expert witness?

Second issue

[6] Can the Court, if it concludes that it is relevant to do so, split the report and authorize Mr. Goulet to testify as an expert on only part of the report?

Respondent's submissions

[7] First, the respondent's submissions are, to say the least, extremely brief. Once Goulet's qualifications, which will be analyzed in detail later, were submitted to the Court, the respondent simply invoked the criteria for admissibility of an expert witness established by the Supreme Court of Canada (SCC) in *R. v. Mohan*, [1994] 2 S.C.R. 9, in support of her position.

[8] Again according to the respondent, the training, expertise and work experience of Goulet, as with the mandate that he was granted and the specialized field of business valuation, are all factors that sufficiently justify the admission of his testimony as an expert, in the light of the criteria propounded by the SCC in *Mohan, supra*. The respondent adds that shortcomings and weaknesses in an expertise only affect the probative value of the expert's testimony and not its admissibility. The following cases were cited in support of this argument: *R. v. Marquard*, [1993] 4 S.C.R. 223, at para. 35; *Halford v. Seed Hawk inc.*, 2006 FCA 275, at para. 17 and *Bouchard v. D'Amours*, 2001 CanLII 14425 (QC CA), at paras. 11 and 12.

[9] Moreover, the respondent contends that it would be formalistic to dismiss the report of an expert simply because it contains findings that stray from the given mandate (see *Marquard, supra*, at para. 37).

Appellant's submissions

[10] The appellant submits that Goulet's testimony as an expert witness as well as his report on the FMV of the franchise are simply inadmissible for the following reasons.

[11] The first reason raised by the appellant is about the misrepresentations regarding his qualifications. The appellant first notes that there are some inaccuracies in Goulet's CV. More specifically, the appellant pointed out inconsistencies, during Goulet's cross-examination, regarding his teaching experience and his involvement as an expert in *Jobin* and *Sports 755*.

[12] The appellant reminded the Court that expert witnesses have a well regarded position at a trial and as such are held to a higher standard of diligence and honesty.

[13] The second reason raised by the appellant is the lack of relevant expertise. The appellant contends that Goulet cannot be considered an expert witness because of a lack of computer expertise. Indeed, the appellant argues that Goulet does not have the knowledge required to properly assess the technical and functional qualities of the software being marketed by Prospector with respect to other technological solutions available in 2007.

[14] In support of his submission, the appellant reminded the Court that Goulet himself admitted that, in his opinion, to properly assess a business that commercializes new software, it is necessary to be able to correctly identify the characteristics and particularities of that software.

[15] The third reason raised by the appellant is inadequate research. The appellant also contends that the research on which the conclusions noted in Goulet's report are based are clearly inadequate. By his own admission, Goulet did not see the software, nor did he ask to see it. The expertise required to assess the intrinsic qualities of the software and its innovative character was provided by Goulet's colleague, who is not mentioned in his report, or present before the Court. The appellant therefore opines that Goulet was negligent in his obligation under section 4 of the CICBV practice standard 110, to ensure "a comprehensive review and analysis of the business, its industry and all other relevant factors, adequately corroborated..."

[16] The fourth reason raised by the appellant is the usurpation of the Court's jurisdiction. The appellant argues that even if the author was mandated to give an opinion on the FMV of the franchise, Goulet's report addresses other conclusions that are directly under the exclusive jurisdiction of the Court.

[17] When questioned on the subject, Goulet clearly stated that his mandate was not only to assess the fair market value of the franchise acquired by the appellant, but also to probe the reasons that justified the purchase.

[18] The fifth reason raised by the appellant is the lack of value of his testimony. Lastly, the appellant submits that Goulet's testimony and his report are useless in this case. It was admitted that the appellant was always working at arm's length with Prospector. Therefore, the appellant contends that the FMV of the franchise is necessarily the price the appellant paid to acquire it. Moreover, the test under paragraph 20(1)(*a*) of the *Income Tax Act* (ITA) refers to the concept of capital cost and not (the) FMV.

[19] Additionally, the appellant stated that, in his opinion, the FMV has nothing to do with the concept of a sham, which is a result of the parties' intention at the time they entered into a contract and not the FMV of the property in question.

Applicable law

Role of the expert witness

[20] The fundamental rule is that, opinion evidence is inadmissible. As a starting point, the law is well-settled: opinion evidence is *prima facie* inadmissible. It is the sovereign jurisdiction of the trial judge to assess the facts determined at trial and to draw the appropriate inferences and conclusions (see comments by Lord Mansfield in *Carter v. Boehm* (1766) 3 Burr 1905, at p. 1918).

[21] The testimony of an expert is an exception to this fundamental rule in that it allows the expert to conduct his own assessment of the facts and present his own interpretation to the Court.

[22] As the SCC explained in *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672, at p. 684, "[t]he object of expert evidence is to explain the effect of facts of which otherwise no coherent rendering can be given."

[23] Since *Kelliher*, the SCC has repeated many times, in particular in *R. v. Lavallée*, [1990] 2 S.C.R. 852, at p. 889, that expert testimony is "to assist the fact-finder in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of the lay person" (see also *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 866).

[24] Thus, it is undeniable that this type of testimony represents a risk to the administration of justice and the courts should therefore not admit it without understanding its value and necessity. The concern that the role of the trier of fact might be usurped has been addressed many times by the SCC, but rarely with as much brevity and eloquence as in *R. v. Mohan*, *supra*, where Justice Sopinka concludes (at p. 24):

> There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.

[25] The SCC restated this principle in *R. v. J.-L.J.*, [2000] 2 S.C.R. 600, and Justice Binnie even granted the role of "gatekeeper" to the trier of facts (at pp. 613 and 630):

> In the course of *Mohan* and other judgments, the Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.
>
> ...
>
> The trial judge's discharge of his gatekeeper function in the evaluation of the demands of a full and fair trial record, while avoiding distortions of the fact-finding exercise through the introduction of inappropriate expert testimony, deserves a high degree of respect.

[26] The fact the expert evidence must be assessed in the light of its potential to derail the fact-finding process partially explains why its use is governed by strict guidelines (see *R. v. Mohan*, *supra*, at p. 24, restated in *R. v. DD*, [2000] 2 S.C.R. 275, at p. 298).

Admissibility criteria for expert testimony

[27] To make the gatekeeper role easier for the trier of facts, the SCC has propounded a list of criteria that, in this case, must be used to assess the admissibility of the expert opinion. The landmark case regarding the admissibility of expert testimony is, without a doubt, *Mohan*, *supra*, decided by the SCC. In this decision, the highest court in the land adopted a four-step test that governs the admissibility of expert testimony (at p. 20):

> 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;

(d) a properly qualified expert.

[28] Moreover, each of the four criteria must be met for the Court to allow the testimony of an expert.

[29] A cost-benefit analysis is also an essential ingredient of the analysis of the first two criteria, relevance and necessity.

Relevance

[30] Evidence is relevant "where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence" (*R. v. J.-L.J., supra*, at pp. 622-623). As the concept of relevance is a low threshold, *Mohan*, *supra,* included a cost-benefit analysis in the relevance requirement to determine whether its value is worth the cost, with regard to its impact on the trial process (at pp. 20-21) :

> Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as question of law. Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See *McCormick on Evidence* (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *Morris v. The Queen*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

[31] Additionally, when the trier of fact considers the cost-benefit analysis that could alter the relevance of expert evidence, it is reasonable for him to consider the extent to which the proposed opinion is founded on unproven facts. On this, in *R. v. K. (A.),* 45 O.R. (3d) 641, Justice Charron stated the following (at paras. 80-81):

> **(c) Although relevant, is the evidence sufficiently probative to warrant its admission?**

> 80 In other words, the evidence, although relevant, will not be admitted unless its probative value outweighs its prejudicial effect. Both the probative value of the evidence and its potential prejudicial effect will depend on a number of factors. The particular inquiries that should be made will depend on the particular facts of the case. The following questions may be useful to consider. The list is by no means exhaustive.
>
> (i) To what extent is the opinion founded on proven facts?
>
> 81 Although the expert is entitled to take into consideration all possible information in forming his or her opinion, the weight to be given to the opinion will depend on the extent to which the facts upon which the opinion is based are proven: see R. v. Abbey.

Necessity in assisting the trier of facts

[32] In *Mohan*, *supra*, Justice Sopinka concluded that expert testimony must be more than merely helpful. He stated that, to be necessary, the expert evidence must be necessary "in the sense that it provide information 'which is likely to be outside the experience and knowledge of a judge or jury'... [T]he evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature" (at p. 23).

[33] The expert evidence must therefore assist the trier of facts by providing specific knowledge that the ordinary person does not have. "Its purpose is not to substitute the expert for the trier of fact. What is asked of the trier of facts is an informed judgment, not an act of faith" (*R. v. J.-L.J., supra*, at p. 628*)*.

Properly qualified expert

[34] Before testifying, an expert witness must be qualified as an expert by the Court in matters on which the opinion is to be given: *R. v. Mohan*, *supra*, at p. 25.

[35] On this, the law is now well settled: the shortcomings in an expertise affect the value of the testimony and not its admissibility: *R. v. Marquard, supra*, at para.

[36] Additionally, the mere fact that another person could have possibly been more qualified to testify on a particular topic constitutes another consideration to review when granting the probative weight of expert testimony and not a concern at the admissibility stage: *McLean (Litigation Guardian of) v. Seisel* (2004), 182 O.A.C. 122 (C.A.) at p. 140.

[37] However, the courts must make a distinction between the situation described above and that in which, for example, an expert with impressive qualifications does not have particular expertise in the relevant specific field: *Vigoren v. Nystuen*, 2006 SKCA 47, 266 D.L.R. (4th) 634 (C.A. SK.).

Absence of any exclusionary rule

[38] Meeting the three criteria above from the test set out in *R. v. Mohan* will not ensure the admissibility of expert evidence if it falls afoul of an exclusionary rule, separate and apart from the opinion rule itself. In other words, the expert evidence must not be excluded under the application of any other rule: *R. v. Mohan, supra,* at p. 25.

Application of the law to the facts

Absence of any exclusionary rule

[39] From the start, the fourth criterion from *Mohan, supra*, regarding the admissibility of an expert witness, the absence of any exclusionary rule, does not seem to be problematic in the present case. At any rate, counsel for the appellant did not raise any exclusionary rule distinct from the opinion rule.

[40] As a result, it is appropriate to promptly continue our analysis of the third *Mohan* criterion and to review the qualifications of the expert proposed to the Court.

A properly qualified expert

[41] Mr. Goulet's CV indicates that he has been active in the field of financial counselling for 20-some years and he currently heads the business valuation and legal accounting sector of one of the most important accounting firms in Quebec. In the course of his career, he has carried out or coordinated hundreds of business valuation missions and financial expertise assessments for various purposes. He is not only a member of the Canadian Institute of Chartered Business Valuators (CICBV) but has also been on its board of directors since 2006 and its executive committee since 2011. He is very active within the association of business valuators and is frequently invited to be a guest speaker by teaching institutions or professional associations.

[42] It seems, therefore, that, with regard to business valuation, Goulet definitely has "special knowledge and experience going beyond that of the trier of fact" (*R. v. Marquard*, *supra*, at para 35).

[43] It was brought to the Court's attention that Goulet's business valuation experience in the computing field is limited. In fact, he was allegedly hired only once as a special advisor to senior management at a major telecommunications company. The economic fields in which he was apparently very active in the past revolved more around food, restaurants, hospitality, forest products, finances, manufacturing and retail.

[44] However, I agree with the respondent when she states that an expert witness's shortcomings are relevant to the probative value to be granted to the expert testimony and are not an element that applies during the inquiry as to admissibility: *R. v. Marquard, supra*, at para 35.

[45] As for the inaccuracies in Goulet's CV that the appellant raised during his cross-examination, I am of the view that they were not made by Goulet for the purpose of establishing his credibility with the Court. I feel that, with regard to his teaching experience, Goulet simply made small inadvertent errors. I also feel that Goulet sincerely believed that the judge had accepted his opinion in *Jobin* and *Sports 755*. Goulet's good faith is not in question and I could not disqualify him as an expert for errors that were, in the end, committed in good faith or inadvertently.

[46] I find that Goulet has sufficient expertise to enlighten the trier of fact and his qualifications are sufficient to meet the third criterion of the test established in *Mohan, supra*.

Relevance

Logical relevance

[47] Clearly, when the time comes to determine the relevance of an expert witness in the light of *Mohan*, *supra*, the first step is to establish the logical relevance of the evidence, the extent to which this point is related to the fact it is likely attempting to establish.

[48] As mentioned above, the appellant submits that Goulet's testimony and report are useless in this case since it was admitted that, at all times, André Drouin had an arm's length relationship with Prospector and as a result, the FMV of the Franchise is necessarily the price the appellant paid to acquire it.

[49] Moreover, the appellant states that the test at paragraph 20(1)(*a*) ITA refers to the concept of capital cost and not the FMV.

[50] Nonetheless, the Minister is not questioning the way the tax attributes the taxpayer requested were calculated, such as the capital cost allowance (CCA). In fact, it is the actual entitlement to these tax attributes that the respondent is challenging and thus the mechanics behind the calculation under paragraph 20(1)(*a*) ITA would thereby be irrelevant. This case is not about the capital cost used to calculate the CCA claimed: the issue is whether the appellant actually operated a business.

[51] Moreover, the appellant states that he felt the FMV of the assets has nothing to do with the concept of a sham, which is dependent on the parties' intent at the time they entered the contract and not on the underlying FMV of the item in question.

[52] However, the SCC in *Stubart Investments Limited v. R.*, [1984] 1 S.C.R. 536 tells us that the elements required for there to be a sham are the following: (1) an intention of the parties to the transaction (2) to create a false impression (3) that their rights and obligations are different from their actual legal rights and obligations.

[53] In *Stubart*, the SCC clearly stresses the element of deceit. In his reasons, Justice Estey explains that this element is the "heart and core of a sham" (at para 53).

[54] As a result, an analysis of the franchise the taxpayer acquired showing that its FMV was significantly lower than the price paid to obtain it could certainly be logically relevant during the evaluation of one of the fundamental elements of the sham raised by the respondent, namely the parties' intent to deceive.

Cost-benefit analysis

[55] However, although the evidence is logically relevant at first glance, the analysis does not end there as other considerations also influence the inquiry regarding admissibility. Expert evidence that is otherwise logically relevant still bears the weight of the general requirement that its probative value outweigh its prejudicial effects (see SCC decisions *R. v. Mohan*, *supra*; *R. v. J.-L.J.*, *supra*, and *R. v. D.D.*, *supra*). This further inquiry may be described as a cost-benefit analysis.

[56] As with the other criteria from *Mohan*, the probative value and prejudicial effect are case specific. The *Mohan* analysis necessarily places great confidence in the trier of fact's ability to carry out his gatekeeper function and this function deserves, as the SCC itself stated, great respect: *R. v. J.-L.J.*, *supra*, at p. 630.

[57] During his cross-examination, Goulet admitted to the Court that he does not personally have any specific computer knowledge. Strangely, Goulet then indicated that, in his opinion, in order to properly assess a business that markets new software, it is necessary to be able to properly identify what this software represents, and therefore to understand who the programs are designed for and their inherent level of innovation (see paras 213, 240, 241 and 280 to 290 of the transcript).

[58] When he drafted his report, Goulet would therefore have relied on the expertise of Maxime Rousseau, an information technology security specialist from his firm. However, the name Maxime Rousseau does not appear anywhere in Goulet's report and he was not present to attest to his knowledge before the Court (see paras 213, 240, 241 and 280 to 290 of the transcript)

[59] When the trier of fact considers the cost-benefit analysis that could affect the relevance of expert testimony, it is fully acceptable for him to examine the extent to which the proposed opinion is based on unproven facts: see *K. (A.)*, *supra*, at paras 80-81 (Justice Charron). In fact, probative value must be determined by reviewing the reliability, significance and persuasiveness of the expert testimony: *R. v. D.D.*, supra, at p. 295.

[60] In a case such as the case at bar, I agree with the observations of Justice Bowie in *Petro-Canada v. Canada*, 2003 D.T.C. 94 (TCC) (partially amended on appeal, but not on this issue (2004 D.T.C. 6329 (FCA); application for leave to appeal denied (337 N.R. 397)), which state the following (at paras 103-104):

> [103] Throughout both the written statement of his evidence and his oral evidence, Mr. O'Dwyer makes frequent reference to both factual material that has been provided to him

> by "consultants", and also to matters of judgment as to which he had sought opinions from those "consultants", and then adopted their judgments as his own. One such instance appears in the passage I have quoted at paragraph 100, but it is only one of many. The "consultants" it appears, are two individuals who have been engaged from time to time in, among other things, advising as to the value of seismic data. Whatever the level of their expertise might be, they were not at the trial, they did not give evidence, and counsel for the Appellant had no opportunity to cross-examine them.
>
> [104] Opinion witnesses, at least in civil proceedings, have a certain latitude to base their opinions upon information that they have gathered outside the courtroom, and which is not formally proved. It becomes part of the general body of knowledge that contributes to the expertise of the witness. No such latitude is available in respect of matters of judgment or opinion, however. The reason that certain witnesses may express opinions is because they possess knowledge and expertise, acquired through study and experience, that will assist the Court. They may consult recognized texts and reference materials in formulating and in defending their opinions, but they may not simply reiterate the opinions of others, with or without attribution. The opinion evidence of Mr. O'Dwyer in this case is tainted by his wholesale adoption of the advice of those he consulted, not simply as to the facts of transactions, but as to matters which are primarily matters of judgment, such as the establishment of a copy price, and the appropriate levels of discount to be applied to large volume sales. However, I know nothing of the qualifications of these consultants, I have had no opportunity to assess their competence, and, most importantly, they have not been subject to cross-examination. In my view, their opinions pervade the evidence of Mr. O'Dwyer to such an extent, and so inextricably, as to destroy any probative value that it might otherwise have.

[61] The Federal Court of Appeal did not find any error in this approach.

[62] In another decision with a similar factual background as the present case, this Court ruled, per Judge Couture, that it is possible for a business valuation expert to call upon the expertise of a third party when he cannot personally assess one of the elements of the asset to be valuated. He adds, however, that it is essential for this third party to be clearly identified and that his skills be shown to the Court's satisfaction before it can accord any probative value to the proposed report (see *Taylor Estate v. Minister of National Revenue*, [1990] 2 C.T.C. 2304, at paras 36-37):

> To support and justify his theory of the fair market value of the shares as of October 3, 1981 based on the return or sustainable profit of the business method, the witness explained that he also proceeded to determine the break-up value of the business. However, no admissible evidence was filed to establish that the market value of the company's assets was correct. The witness merely said that:
>
> > the market value of the moveable and immoveable property had been determined on the basis of information provided by persons in the firm and then determined also what was buildings and what was land on the basis of the municipal assessment.
>
> A statement of this kind is not admissible evidence and for this reason I cannot assign any probative value to this feature of the report. An expert is permitted to complete his valuation on the basis of a valuation prepared by another expert when among the property to be valued by him is property that he does not have the requisite skill to value. Moreover, for a valuation prepared by a second expert to be admitted as evidence, the qualifications of the second expert must be clearly established to the satisfaction of the Court and also the author of the report be at least accessible to the other party so that it may examine or cross-

> examine him in order to determine whether his expert opinion is correct. Absent testimony from the author, the Court cannot assign any probative value to this valuation.

[63] Later, Judge Couture continued his reasoning as follows (at paras 57 and 62) :

> In preparing a valuation to be used as evidence in court, a valuer may not accept figures that he did not check or take facts for granted over the correctness of which he has no control. Expert testimony must be the product of the expert's personal opinion based on established facts the existence of which is proved, and not on conjectures or information he receives from third persons.

[64] I certainly agree with the respondent that the SCC has repeatedly stated that the nature of the sources on which an expert opinion is based cannot affect its admissibility (see, in particular, *R. v. Marquard*, *supra*, and *Saint John (City) v. Irving Oil Co.*, [1966] S.C.R. 581). However, I also feel that, no matter what it is, a source must be clearly identified in the expert report. On this, Judge Dussault's comments in *Mathew v. R.*, [2001] 4 C.T.C. 2101 are of particular interest (at para 29) :

> [29] None of the authorities referred to by the Respondent's counsel refute this general principle. Although I recognize that the nature of the source upon which an expert opinion is based cannot affect the admissibility of the opinion itself, as stated by the Supreme Court of Canada in the Saint John case, I am of the opinion that that source, regardless of its nature, has to be clearly stated. Similarly, I agree with the Respondent's counsel that deficiencies in the expert opinion that may result from reliance on inaccurate assumptions are only relevant in assessing the weight of the opinion, as the Supreme Court of Canada stated in the Warsing case, supra. However, I am also of the opinion that the unknown character of the assumptions relied on is relevant to the determination of the admissibility of the expert opinion. In my view, the fact that the opinion is based on the expert's own findings of fact (as appears to be the case with Mr. Taylor's report), which are unknown to the Court, is an issue that relates to its admissibility. It seems obvious to me that the admission of the expert evidence in the present case would, as a result of the extreme difficulty in determining what assumptions were actually relied on and how accurate they were as well as which ones were not considered, leave the Court wondering when assessing the weight to be attached to that evidence. In no way can this meet the test of clear and unambiguous hypothetical facts.

[65] If not to accord some value to the expert opinion, a determination must still be made about the facts on which it is based: *R. v. Abbey*, [1982] 2 S.C.R. 24, *supra*; *R. v. J.-L.J.*, *supra*, and *R. v. D.D.*, *supra*). As Justice Lawton stated in *R. v. Turner* (Terence), [1975] 1 Q.B. 834, at p. 840, this "elementary principle is frequently overlooked."

[66] In the present case, Goulet did not make any mention of his computer security co-worker in his report and this co-worker was not present to attest to his knowledge to the satisfaction of the Court. However, once again, Goulet freely admitted that it is essential to properly understand and identify the characteristics and particularities of the software developed by Prospector to be able to accurately valuate the franchises they offer on the market.

[67] More specifically, Goulet admitted on cross-examination that Rousseau's opinions regarding the qualification of software, the innovative character of the software programs

and their utility compared to other products available on the market at the relevant times constituted an integral and inseparable part of his report.

[68] However, an expert opinion that relies significantly on other people's opinions that are unproven and the content of which is contentious and outside the knowledge of the person who is seeking to qualify it is devoid of probative value.

[69] The reliability-effect factor is of particular importance when assessing the admissibility of expert evidence and, as a result, I feel that it is appropriate to conclude that Goulet's proposed expert testimony fails this exercise.

The necessity in assisting the trier of fact

[70] Now, we shall determine the admissibility of the expert evidence that the respondent wishes to introduce in the light of this last criterion, the necessity in assisting the trier of fact.

[71] The first question is whether the expert is providing information necessary for the trier of fact to assess the issue given its technical nature: *R. v. Burns*, *supra*; *R. v. Mohan*, *supra*; *R. v. Lavallée*, *supra* and *R. v. Abbey*, *Kelliher (Village of) v. Smith*, *supra*.

[72] According to *Mohan*, the risks associated with expert evidence must not be taken lightly. Mere relevance or "helpfulness" is not enough. The issue is whether the expert is providing information likely to be outside the ordinary experience and knowledge of the trier of fact: *R. v. D.D.*, *supra*, at p. 298 and *R. v. Mohan*, *supra*, at p. 23.

[73] Logically, Justice Sopinka indicated the need for expert evidence to be "assessed in light of its potential to distort the fact-finding process" (*R. v. Mohan*, *supra*, at p. 24).

[74] In this case, when questioned on the scope of his mandate, Goulet stated that he paid particular attention to the economic reality underlying the transactions that the appellant conducted. More specifically, he clearly noted that his mandate consisted not only of assessing the FMV of the franchise the appellant acquired but also of examining the reasons that justified this purchase. Indeed, for him, these two assignments were interrelated and interdependent (see paras. 251 to 255 of the transcript).

[75] But, Justice McIntyre, for the SCC in *R. v. Béland*, [1987] 2 S.C.R. 398, stated the following with regard to the circumstances that require expert testimony (at para 16):

> The function of the expert witness is to provide for the jury or other trier of fact an expert's opinion as to the significance of, or the inference which may be drawn from proved facts in a field in which the expert witness possesses special knowledge and experience going beyond that of the trier of fact. The expert witness is permitted to give such opinions for the assistance of the jury. Where the question is one which falls within the knowledge and experience of the triers of fact, there is no need for expert evidence and an opinion will not be received.

[76] This comment is completely in line with another SCC case, *R. v. Abbey*, *supra*, in which Justice Dickson, later Chief Justice, stated, at p. 42:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)

[77] It is true that the respondent cites *Marquard* to submit that it would be overly formalistic to dismiss the testimony of an expert merely because the witness provides an opinion beyond the field of expertise for which he was qualified: *R. v. Marquard*, *supra*, at para. 37.

[78] However, even that SCC case stands for a rejection of Goulet's testimony. This Court, per Judge Dussault, could not have been more clear in *Mathew v. R.*, *supra* on this subject (at para. 30):

> [30] Moreover, I think that the Marquard case, supra, relied on by the Respondent's counsel, is a further argument for refusal of the evidence in question. In that case, the issue was whether the expert witnesses, as practising physicians, possessed some special knowledge related to the burns and child abuse with respect to which they testified and which were alleged to lie outside their field of expertise. The Supreme Court of Canada found that while they were not medical specialists in burns, there could be no doubt that "as practising physicians they possessed an expertise on burns which is not possessed by the ordinary untrained person." It is in this context that the Court stated that "[t]he only requirement for the admission of expert opinion is that the 'expert witness possesses special knowledge and experience going beyond that of the trier of fact"'. As stated by the Appellants' counsel, the evidence at issue contains several conclusions of fact and law in respect of which Mr. Taylor does not possess any special knowledge and experience going beyond that of the trier of fact. Mr. Taylor readily admitted as much when questioned by the Appellants' counsel with respect to no less than 30 such conclusions.

[79] During his cross-examination, the expert proposed by the respondent deliberately stated that not only did he examine the underlying economic reality of the transactions at the heart of this case, but also that this review was necessarily inseparable from his consideration of the FMV of the franchise.

[80] As a result, I believe that it is sufficient for me to cite the following comment made by the SCC in *Adam v. Campbell*, [1950] 3 D.L.R. 449 (SCC) in order to seriously question the need for such testimony:

> Neither experts nor ordinary witnesses may give their opinions upon matters of legal or moral obligation, or general human nature, or the manner in which other persons would probably act or be influenced.

[81] The goal of expert testimony is to assist the trier of fact by providing specific knowledge. It does not substitute the expert for the trier of fact. As a result, Goulet's

proposed testimony as an expert before this Court cannot be justified in the light of the necessity test.

[82] We will now address the second question, which is as follows: can the Court, if it finds it relevant do to so, separate Goulet's report and only authorize him to testify as an expert on part of his report?

[83] In my opinion, the answer must be in the negative. To justify my position, I believe it is sufficient to reproduce the following reasons, both concise and flawless, given by Judge Dussault:

> [35] With respect to counsel for the Respondent's alternative argument to the effect that Mr. Taylor should be permitted to testify on limited matters within his area of expertise, I agree with the submissions of counsel for the Appellants. To accept Mr. Taylor's testimony on limited matters confined to market rates of return or proper calculation of rates of return would be to engage in a completely different exercise than the one Mr. Taylor undertook and which was from the outset an unauthorized fact-finding mission. First of all, such acceptance would imply, as counsel for the Appellants said, that Mr. Taylor could "disabuse himself" of the clearly inadmissible evidence contained in his report. This would appear to be more easily said than done and the result would probably be more theoretical than practical. Secondly, notice was given pursuant to section 145 of the *Tax Court of Canada Rules (General Procedure)* that the evidence Mr. Taylor was going to give was that contained in his report. Based on his evaluation of the type of evidence contained in the report, counsel for the Appellants proceeded to trial on the assumption that the report could not be admitted in evidence and that a rebuttal opinion was not necessary in the circumstances. After nine days of trial we are at a point where counsel for the Respondent is asking the Court to at least accept Mr. Taylor's testimony on limited matters within his area of expertise. In my opinion, procedural fairness embodied in section 145 of the Rules requires that the report filed and served represent the evidence that the expert is prepared to give in the matter. The 30 days' notice ensures that the other party can prepare his case accordingly (*Mathew v. R.*, supra, at para. 35)

[84] For all these reasons, I feel that Goulet's testimony and report are not admissible as evidence.

AMENDED REASONS FOR ORDER

Bédard J.

[1] Now, we will address the appellant's objection to the hearing of the following seven witnesses the respondent called to testify: Van Khiem Ngo, Dave Rioux, Christian Thériault, Gino Villeneuve, Marc Ghannoum, Charles Godbout and Pascale Cauchi.

Background

[2] The appellant has appealed from a reassessment dated August 27, 2009, in which the Minister of National Revenue (the Minister) disallowed the business loss deduction of $85,875.33 for the 2008 taxation year.

[3] The appellant signed a franchise contract with Prospector International Networks Inc. (Prospector International) for the sale and marketing of computer software.

[4] From his income in the 2008 taxation year, he deducted a business loss composed of interest and amortization expenses, which were allegedly related to the operation of this franchise.

[5] The appeal raises the following issues:

(a) Did the appellant operate a business during the 2008 taxation year?
(b) Did the appellant purchase the franchise for the purpose of operating a business?
(c) Was the amount the appellant paid for the franchise reasonable?

[6] The respondent's theory is essentially based on allegations of a sham with respect to the contracts involving the purchase and operation of the franchise.

[7] On January 17, 2012, a few days before the trial began, the respondent informed the appellant of her intention to call as witnesses five other Prospector International franchisees, as well as two financial advisors who had sold franchises. and were also franchisees themselves.

[8] From the first days of the hearing, the appellant made a preliminary objection to the admission into evidence of these seven testimonies. The parties were asked to submit written representations on the subject and the Court agreed to wait until the appellant's evidence could be assessed before rendering its order.

[9] Until now, the trial had been going on for three weeks, focusing on the appellant's evidence. Five witnesses were called to testify, including the appellant himself. He came to testify about his own experience, his intentions and the facts surrounding the purchase of his franchise. Claude Duhamel, president of the Réseau and representative of Prospector International also testified, particularly with regard to the circumstances surrounding the signing of contracts with franchisees.

Issue

[10] The Court must determine whether the impugned testimonies are admissible as evidence.

Appellant's position

[11] The appellant objects to this testimony on the ground that it is irrelevant and inadmissible and it would be unjust and unfair for both the appellant and the witnesses to allow the respondent to offer this in evidence.

1. Testimony is inadmissible because irrelevant prima facie

[12] First, he submits that the testimony of the seven witnesses are inadmissible in evidence because it is irrelevant *prima facie* with regard to the alleged facts and issues of the case. A sham requires proof of intent to mislead by the parties to the contract, namely the appellant and Prospector. Moreover, according to article 1434 CCQ, a contract binds and affects only the parties to that contract. Therefore, the appellant is of the view that the intent of the other franchisees when they concluded contracts with Prospector, the circumstances surrounding the signing of these contracts and the representations that may have been made to these franchisees are not relevant either to interpret the appellant's contract or to determine its effects. This statement is all the more relevant because the franchisees did not use the same financial advisor as the appellant.

[13] In support of his submissions, he also cites *Kiwan v. R.*, 2004 TCC 136, where Justice Dussault states "that the evidence of the activities of third parties is neither admissible nor relevant to decisions concerning the activities of the Appellants."

2. Testimony constituting similar fact evidence not admissible

[14] Additionally, the appellant submits that the testimony constitutes similar fact evidence, which is generally inadmissible given its prejudicial nature which normally outweighs its probative value.

[15] On this, he cites *R. v. Balla*, 2010 BCSC 486 and *R. v. Handy*, 2002 SCC 56, both criminal cases whereby the courts warned against the potential prejudice of such evidence. These decisions would also apply in civil matters: *Johnson v. Bugera*, 1999 BCCA 170 which cited *Mood Music Publishing Co. v. The Wolfe Ltd.*, [1976] Ch 119, [1976] 1 All ER 763.

[16] The appellant admits that similar fact evidence is admissible under certain exceptional conditions that, in his opinion, are not met in this case.

[17] For example, he refers to *Kiwan, supra*, in which this Court allowed the testimony of four third parties that had fraudulently received charitable donation receipts from the same organization as the appellants. He distinguishes the facts in that case from the present case in that no evidence shows or indicates there is a fraudulent or criminal scheme. He adds that if

the Minister wished to invoke the scheme, he had the responsibility to make the allegation in his Reply to the Notice of Appeal.

[18] He also cites, by way of example, *Petit* v. *R.* 2003 TCC 713 where this Court allowed the evidence submitted by the Revenue Quebec auditor regarding the le *modus operandi* of a tax shelter promoter with no registration number with which the appellant was dealing directly. He brought the Court's attention to the fact the documents about other taxpayers who had invested in the same product and through the same promoter had been withdrawn from evidence.

3. Admitting the testimony into evidence would compromise procedural fairness

[19] The appellant submits that, to assess the admission of similar evidence, the "fundamental question that must be determined is whether the probative value of the evidence outweighs its prejudicial effect" (*R.* v. *Arp,* [1998] 3 S.C.R. 339). He also cites *O'Brien v. Chief Constable of South Wales Police* [2005] UKHL 26, at para 6, which describes the importance of procedural fairness more generally.

[20] On the one hand, the appellant states that the respondent cannot claim that the impugned testimony has probative value, when her counsel admitted at the hearing that they never spoke to the witnesses.

[21] On the other hand, he submits that admitting this testimony as evidence would cause serious procedural unfairness to him and the witnesses.

[22] First, the Minister is seeking to amend the *de facto* proceedings to include the scheme, which is contrary to rule 49 of the *Tax Court of Canada Rules (General Procedure)* (the Rules) that requires the Reply to the Notice of Appeal to include "the findings or assumptions of fact made by the Minister when making the assessment." He cites *Johnston v. MNR.*, [1948] S.C.R. 486 (at pp. 489-490) and *Canada v. Anchor Pointe Energy Ltd.* 2007 FCA 188 (at paras 27 to 29). He submits that this approach is contrary to fairness, which requires the parties to be able to clearly understand what they will have to prove in order to adequately prepare for the hearing, particularly in a case such as this one, where the taxpayer is facing the State, with its unlimited resources and considerable power: *Walsh* v. *R.*, 2008 TCC 282 (at para 22), *Cudmore v. The Queen*, 2010 TCC 318, *Canderel Ltd. v. Canada*, [1994] 1 FC 3 (CA), *Ketteman v. Hansel Properties*, [1988] 1 All ER 38 (HL), *Special Risks Holdings Inc. v. The Queen* (1984), 38 D.T.C. 6054 (FCTD).

[23] The appellant adds that it is impossible for his counsel to adequately prepare for this testimony without having had an opportunity to question the witnesses in advance. Such a process would lead to a delay in the proceedings and would add to the burden of the appeal. He cites *Kajat* v. *Arctic Taglu (The)* (CA), [2000] 3 F.C. 96, (at para 21) where the Federal Court of Appeal restated the importance of advising the opposing party when similar fact evidence is to be offered.

[24] Moreover, the appellant argues that the respondent used her significant access to information powers to select witnesses that are favourable to her case, which would give her an unfair advantage over the appellant who does not have this same level of information regarding the other franchisees. In his opinion, the sample is not representative of the hundreds of franchisees and the seven financial advisors, which could mislead the Court. He adds that he should have an opportunity to select franchisees that would be favourable to his case.

[25] He submits that the admission of the impugned testimony would also lead to procedural unfairness for the franchisee witnesses, in that their testimony could be used against them in their own appeals. He is of the view that the respondent is placing them in a vulnerable position without their having their own counsel, especially since their testimony could have criminal consequences. According to the doctrine and the case law, prejudice to the witness is to be considered when assessing prejudice: Claude Marseille, *La règle de la pertinence en droit de la preuve civile québécois*, éditions Yvon Blais, 2004, at pp. 38-40.

4. Admitting the testimony into evidence would result in an abuse of procedure

[26] He adds that the admission of the impugned testimony would compromise the proportionality of the proceedings, and increase the complexity and length of the appeal. The examinations for discovery, testimony of additional witnesses selected by the appellant and the potential that these witnesses will be called back to the stand would require adjournments, long delays and significant costs, which must be considered in the assessment of the admissibility of similar fact evidence.

[27] He also opines, contrary to the respondent's submissions, that it is unlikely that an hour is sufficient to complete the examination of each witness, considering the appellant himself testified for at least a day and a half.

[28] In that respect, he cites *R.* v. *Mohan*, [1994] 2 S.C.R. 9 (cited at para. 24 of *Mathew v. The Queen*, 2001 D.T.C. 742 (TCC)), where the Supreme Court of Canada addressed the cost-benefit analysis when assessing the admissibility of evidence and restated that the principle of proportionality of the proceedings is codified in article 4.1 of the CCQ. He also cites *O'Brien v. Chief Constable of South Wales Police*, [2005] UKHL 26 (at para. 6).

[29] The appellant adds that the admission of the testimony would turn an individual appeal into a commission of inquiry. However, under section 231.4 of the *Income Tax Act*, rules are provided specifically for this type of proceeding, which were not respected in this case.

Respondent's position

[30] The respondent recalls the basic principle of article 2857 CCQ, which provides that "all evidence of any fact relevant to a dispute is admissible and may be presented by any

means." She adds that this principle is a consequence of the right to be heard and aims to meet the main objective of any trial, seeking the truth.

[31] She submits that the evidence that would be submitted by the franchisees and the financial planners is relevant both to refute the appellant's evidence and to prove the facts alleged in the Reply to the Notice of Appeal.

[32] In particular, the respondent wants the witnesses she summoned to testify to show, among other things, that (at para 3 of the respondent's written representations)

> [TRANSLATION]
> (a) They acquired the same type of franchise as that involved in the present case;
> (b) The contracts signed by the appellant and the promissory notes he allegedly received, were shams;
> (c) André Drouin, did not operate a business any more than the other franchisees did, because this business was non-existent;
> (d) Réseau Prospector and MarketX Services Inc. did not operate a business on behalf of André Drouin or the other franchisees;
> (e) The structure implemented by Groupe Prospector was established based on taxrebates the franchise purchasers could obtain;
> (f) The franchise vendors indicated to future buyers that purchasing a Prospector franchise would give them a tax benefit greater than the amount paid;
> (g) André Drouin, as with the other franchisees, was not taking any financial risk;
> (h) The activities related to the Prospector franchises had no commercial aspect and did not offer any possibility of making a profit other than tax savings;
> (i) The price noted in the contracts does not represent the actual amount the franchisee paid.

[33] The respondent submits that the impugned testimony directly addresses the same facts as those affecting the appellant, namely the tax implications of purchasing a Prospector franchise. Therefore, it is circumstantial evidence and not similar fact evidence.

[34] She adds that if the testimony were considered similar fact evidence, it would still be admissible since the probative value outweighs the prejudicial effect on the opposing party.

[35] As to the admissibility of this type of evidence, she cites *Kajat v. Arctic Taglu (The)*, *supra*, which cites the admissibility rule propounded in *Mood Music Publishing Co. v. DeWolfe Ltd.*, *supra*.

[36] She contends that the impugned testimony would be of significant probative value, considering the high degree of similarity between the facts at issue and the facts to which the franchisees and financial advisors would testify (*Kajat v. Arctic Taglu (The)*, *supra*, citing Justice Cory in *R. v. Arp*, *supra*).

[37] She also contends that the admission of the testimony would not result in prejudice to the appellant or the proposed witnesses that would call for the exclusion of the testimony.

[38] She submits that the witnesses are compellable even though they filed an objection with the CRA regarding their own tax case. Moreover, she notes that none of them is a party to a criminal proceeding and, at any rate, under section 5 of the *Evidence*

Act none of the testimonies given before the Tax Court of Canada could be used against them in a criminal proceeding.

[39] Regarding the notice, she submits that under the Rules, she had no obligation to communicate the names of the witnesses prior to the trial. She adds that regardless, the appellant has known since at least January 17, 2012, that the witnesses were subpoenaed by the respondent. Moreover, she submits that the failure to give notice does not necessarily warrant exclusion (*Kajat v. Arctic Taglu (The)*, *supra*). She submits that the right to examine the witnesses as requested by the appellant is not automatic, and the Court's prior authorization is required.

[40] In response to the appellant's arguments, she adds that he cannot claim that the Reply to the Notice of Appeal does not inform him of the burden he has to meet because the elements the respondent is seeking to have submitted to evidence are to prove the allegations the respondent has the burden to prove. Allowing the objection would entail a serious barrier to her ability to meet her burden.

[41] The respondent adds that the appellant was able to anticipate the presence of the other franchisees and financial planners at the hearing considering the terms of her reply, which refers to franchisees in a general manner. The appellant himself admitted at paragraph 25 of his notice of appeal that many franchises were sold through financial advisors. He could therefore certainly expect the presence of other franchisees to rebut the evidence he presented.

[42] She feels that around one hour per witness would be needed, which is not excessive or disproportionate considering the volume of the appellant's evidence.

Analysis and conclusion

[43] The two parties do not agree on the nature of the evidence the impugned testimony represents. The appellant submits that it is similar fact evidence while the respondent submits that is it simply circumstantial evidence.

[44] It is appropriate to reproduce paragraphs 22 to 24 of the respondent's written submissions, which read as follows:

> [TRANSLATION]
> 22. The respondent submits that the testimonies of the franchisees and the financial planners are entirely relevant according to the criteria of the Supreme Court because these people were involved in transactions identical to those involving the appellant and thus will give evidence that may increase the likelihood that the contracts signed by the appellant and the promissory note allegedly given to him are in fact shams.
>
> 23. The testimonies of the franchisees and the financial planners will also increase the likelihood that representations were made to the Prospector franchise buyers to the effect that buying a franchise would give them a tax benefit in excess of the amount paid by them.
>
> 24. The testimonies of the franchisees and the financial planners will also increase the likelihood that no businesses were actually carried on through Prospector franchises.

[45] It seems clear to me after reading these paragraphs that the impugned testimony will constitute similar fact evidence. In fact, the testimony will address transactions that were conducted between Prospector and each of the witnesses and not the transaction between Prospector and the appellant.

[46] At any rate, similar fact evidence is a type of circumstantial evidence: "Circumstantial evidence often is in the form of similar fact evidence" (Cudmore, *Civil Evidence Handbook*, 1994, at p. 2:41).

[47] The test used to determine the admissibility of similar fact evidence in civil cases was propounded in *Mood Music Publishing Co. v. DeWolfe Ltd.*, *supra*, and was cited in *Kajat v. Arctic Taglu (The)*, *supra*, which both parties cited:

> [21] This is similar fact, sometimes referred to as similar act evidence. It is admissible in civil cases:
>
> ... if it is logically probative, that is if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it.

[48] It must therefore be determined first whether the evidence is "logically probative" or "logically relevant" in determining the matter in issue. Then, the prejudicial effects of this testimony must be determined and it must be decided whether its relevance outweighs the prejudicial effects.

Is the evidence "logically probative"?

[49] I was not provided with any additional information regarding the meaning to grant to the expression "logically probative". I noted, among others, a case in which the Supreme Court of Canada provides more explanations on the meaning to give this expression, namely *R. v. Fontaine*, 2004 SCC 27:

> Where mental disorder automatism is raised as a defence, an assertion of involuntariness on the part of the accused, supported by the logically probative opinion of a qualified expert, will normally provide — as it did in this case — a sufficient evidentiary foundation for putting the defence to the jury. By "**logically probative**", I simply mean relevant — that is, evidence which, if accepted by the jury, would tend to support the defence of mental disorder automatism. Accompanying instructions in law will make it clear to the jury that the burden remains on the accused to establish the defence to the required degree of probability.

[50] In *R. v. Blackman*, [2008] 2 SCR 298, cited by the respondent, the Supreme Court of Canada, per Justice Cory, cited from *Arp*, *supra*, regarding the expression "logically relevant"

> The reality that establishing threshold relevance cannot be an exacting standard is explained by Professors D. M. Paciocco and L. Stuesser in *The Law of Evidence* (4th ed. 2005), at p. 29,

and, as the authors point out, is well captured in the following statement of Cory J. in *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38:

> To be **logically relevant**, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue".

[51] Moreover, in *Arp*, Justice Cory decided that the degree of similarity between the alleged acts and the acts sought to be introduced as evidence should be a consideration, as long as the improbability of coincidence was established

> ... where similar fact evidence is adduced to prove a fact in issue, in order to be admissible, the trial judge should evaluate the degree of similarity of the alleged acts and decide whether the objective improbability of coincidence has been established. Only then will the evidence have sufficient probative value to be admitted.

[52] In this same decision, Justice Cory suggests that "as a general rule if there is such a degree of similarity between the acts that it is likely that they were committed by the same person then the similar fact evidence will ordinarily have sufficient probative force to outweigh its prejudicial effect and may be admitted."

[53] We must clarify that this was a criminal case, in which the similar fact evidence was adduced to establish identity. However, as the appellant correctly states, the same similar fact evidence principle applies in criminal and civil matters.

[54] In *Handy, supra*, on which the appellant relied, the Supreme Court of Canada also had to rule on the admissibility of similar fact evidence. It determined that the probative value of this evidence was to be assessed on the purpose for which it was produced:

> 69 McLachlin J. speaks in *B. (C.R.), supra*, of the "value of the evidence in relation to an issue in question" (p. 732 (emphasis added)). McIntyre J., in *Sweitzer, supra*, emphasized that whether or not probative value exceeds prejudicial effect can only be determined in light of the purpose for which the evidence is proffered (p. 953). The importance of issue identification was also emphasized in *D. (L.E.), supra*, at p. 121; *C. (M.H.), supra*, at p. 771; *R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 358; *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, at p. 731; *R. v. Lepage*, [1995] 1 S.C.R. 654, at para. 35; and *Arp, supra*, at para. 48.

[55] In *Blackman, supra*, to which the respondent cited, the Supreme Court stated that the assessment of relevance is "an ongoing and dynamic process". Also, "[r]elevance can only be *fully* assessed in the context of the other evidence at trial." This statement is all the more relevant given that the evidence could assist the court when determining the probative value of the testimony.

[56] These decisions show that "logically probative" or "logically relevant" evidence is evidence that tends to "increase or diminish the probability of the existence" of a fact or issue. Therefore, a high similarity between the facts in a case and the facts a party seeks to have admitted as evidence favours the probative value of these facts.

[57] The parties also cited a few cases in which this Court applied the similar fact evidence rule. Both parties commented on *Kiwan*. I agree with the respondent that this decision must be interpreted as allowing evidence of the state of affairs or context and not only evidence of a scheme. Justice Dussault's words in *Kiwan* indicate that the scheme is *one* case in which similar fact evidence can be relevant:

> This was all within a context that is impossible to ignore. It does not, however, mean that all donors were issued fake receipts. As counsel for the Appellants maintained, we cannot blame the Appellants nor other taxpayers, for that matter, for the reprehensible activities of third parties and conclude that they too were involved in the scheme. We need not refer to many decisions to recognize that the evidence of the activities of third parties is neither admissible nor relevant to decisions concerning the activities of the Appellants. However, in my opinion, evidence of the state of affairs or the context, such as, in the case at hand, the existence of a large-scale scheme carried out over a number of years, is both admissible and relevant.

[58] In my opinion, *Petit, supra*, is of little use with regard to the issue of admissibility of testimony as similar evidence. Justice Lamarre asked that evidence be removed that was strictly about the other taxpayers who had invested in the same franchise as the appellant. The judgment does not offer any explanation about the reasons for the judge's request. It seems that none of these other taxpayers were present at the hearing, and their statements were reported by another witness.

[59] In this case, the appellant submits that the respondent cannot argue that this evidence has probative value since she never spoke to the witnesses.

[60] As for the respondent, she argues that the testimony has significant probative value considering the high degree of similarity between the transactions with Prospector and all the franchisees. She submits that they are relevant because they aim to refute the appellant's evidence and establish that the contracts and promissory notes signed by the franchisees and the franchisor are shams.

[61] In my opinion, the appellant cannot criticize the respondent for not speaking to the witnesses, who are clearly hostile. The respondent identified the claims in her Reply to the Notice of Appeal that the testimony would attempt to prove and the specific issues these facts aim to prove, which is sufficient.

[62] In this case, the probative value of the evidence to be presented flows essentially from the high similarity between the contractual relationships between Prospector and the appellant and Prospector and the other franchisees. These similarities are apparent upon reading paragraph 26 of the Reply to the Notice of Appeal (see subparagraphs (d), (f), (h), (i), (q) and (v)). They also emerge from the evidence the appellant presented over the past three weeks: the franchisor provided a form contract to a dozen financial advisors who sold the franchises to their clients. All the franchisees signed the same documents, with only a very few exceptions.

[63] Clearly, the appeal only involves Mr. Drouin and the intent of the other franchisees to deceive the tax authorities could not lead to a finding on Mr. Drouin's intent. The Court does not intend to hold a trial for the other franchisees. The respondent's theory resides on allegations of a sham. As the appellant submitted, in order for a transaction to be considered a sham, the parties to that transaction must have taken acts "which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights (if any) which the parties intended to create." (*Snook v. London & West Riding Investments Ltd.*, [1967] 1 All ER 518, cited in *Minister of National Revenue v. Cameron*, [1974] S.C.R. 1062, at p. 1068 and in *Stubart Investments Ltd. v. R.*, 1984 CarswellNat 690, [1984] 1 S.C.R. 536, [1984] C.T.C. 294, 53 N.R. 241, [1984] 1 S.C.R. 536, 10 DLR (4th) 1, 84 D.T.C. 6305.

[64] The respondent must therefore prove the intention of both the appellant and Prospector International (or its representatives). To this end, the testimony would tend in particular to prove the representations made to the financial advisors and the franchisees.

[65] Moreover, in civil matters, the courts have allowed evidence of transactions between a party to the litigation and a third party. In this case, Prospector is not exactly a party to the litigation between the Minister and the appellant but it seems that counsel for the appellant themselves admitted during the examinations that it is a company involved in the case. The allegation of a sham between the franchisor and the franchisee Drouin makes any evidence about the franchisee and his network relevant.

What are the prejudicial effects?

[66] The second step is to weigh the probative value of this evidence against its prejudicial effects.

[67] I agree with the appellant that evidence that is likely to create a prejudicial effect could warrant an exclusion despite its relevance. As noted by the Supreme Court of Canada in *Mohan, supra*:

> Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.

[68] The judge has broad discretion with regard to allowing all types of evidence. This is even truer for similar fact evidence.

[69] As Justice Binnie noted in *Handy, supra*, citing the High Court of Australia in *Pfennig*, "[o]ne of the difficulties...is the absence of a common basis of measurement: 'The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial.' The two variables do not operate on the same plane."

[70] In this case, I must decide whether, as the appellant claims, admitting the testimony as evidence is unfair and unjust to the point of outweighing its relevance

1. Amendment to proceedings

[71] The appellant submits that submitting this testimony is the respondent's way of amending the proceedings *de facto* to include the "*Kiwan*" strategy. The respondent maintains that this testimony is to prove the allegations at paragraph 26 of her Reply to the Notice of Appeal.

[72] On this, I noted some inconsistencies between the respondent's written submissions and the Reply to the Notice of Appeal. For example, in the written representations, the respondent explains that she wants to show, among other things, that André Drouin, *as the other franchisees*, did not run any financial risk (subparagraph 3(g)). Strangely, she refers to the claim at subparagraph 26(n) of the Reply to the Notice of Appeal, which only refers to the appellant.

[73] The same can be said for subparagraphs 3(c) and (d) of the written submissions which refer to subparagraph 26(l) of the reply: these allegations involve only the appellant and the management mandate between Réseau or Market X Services Inc. and the appellant only.

[74] However, it is true that certain allegations in paragraph 26 of the reply, in particular subparagraphs (q), (v), and (w), that the respondent is seeking to prove, are allegations that refer to the franchisees in general.

[75] Therefore, I cannot come to the same radical conclusion as the one the appellant is suggesting. The respondent's representations indicated that she is validly seeking to prove the facts alleged in the reply, which is her burden, and, as she claims, will attempt to prove the allegations of a sham. The respondent is also entitled to the opportunity to refute the appellant's evidence, in particular, regarding the circumstances surrounding the contract agreements, on which the president, Mr. Duhamel, testified.

[76] I will, however, criticize the drafting of the respondent's reply to the notice to appeal. The few paragraphs that refer to Groupe Prospector and the franchisees as a group could have been highlighted instead of being concealed among the allegations regarding only the appellant.

2. Reasonable notice

[77] The case law has also recognized the importance of giving the opposing party reasonable notice so it can refute the similar fact evidence. It is a major element to take into consideration when assessing prejudicial effects.

[78] The respondent submits that [TRANSLATION] "the appellant was able to anticipate the presence of the franchisees and financial planners at the hearing because the Reply to the

Notice of Appeal states that many individuals purchased franchises from Groupe Prospector through vendors...and therefore these individuals are likely to provide evidence related to the argument of a sham raised by the respondent." She referred to subparagraphs 26 (d), (f), (i), (v) and (w) of her Reply to the Notice of Appeal. She also noted in her written submissions that [TRANSLATION] "the appellant has known since at least January 17, 2012, that the witnesses were subpoenaed by the respondent." This statement was not challenged by the appellant.

[79] After carefully reviewing the paragraphs in question from the Reply to the Notice of Appeal, I am of the view that they do not constitute clear notice of the similar fact evidence the respondent wishes to produce. Moreover, notice given five days prior to the start of the hearing is certainly not reasonable notice. I therefore find that the appellant did not have a reasonable amount of time to properly prepare for this evidence.

[80] I will take the liberty once more of criticizing the drafting of the respondent's Reply to the Notice of Appeal. The parties to a dispute both benefit from clear and explicit pleadings. The principle that the other party cannot be taken by surprise implies that the pleadings must be drafted carefully. I must say we now have a borderline case.

[81] I refer to *Kajat* v. *Arctic Taglu (The)*, *supra*, more specifically, to paragraph 22, to which both parties made reference, and which states the following:

> [22] **While we accept that no advance notice of this evidence was given, we are not persuaded that the lack of notice by itself establishes that its admission was unfair or oppressive**. The object of notice is to ensure that the opposing party has a fair opportunity to investigate the incidents that are alleged to be similar, to prepare for cross-examination and, where warranted, to adduce contrary evidence. **No objection was taken at trial to the absence of notice, and no attempt was made to delay or adjourn the trial to give the defendants additional preparation time. There is no reason to believe that the Trial Judge would have failed to give such additional time if it had been requested**. It is now too late for the defendants to complain of lack of notice.

[82] The appellant distinguishes that case from the present case in that the lack of notice was not mentioned at an appropriate time, during the trial.

[83] It is true that these comments by the Federal Court of Appeal were made in a different context, in which the party complaining on appeal that there was a lack of notice had not raised any objection nor asked for an adjournment at the trial. However, I interpret the Court's words to mean that a lack of notice is not sufficient to qualify the admission of similar fact evidence as unfair or oppressive. I also understand that in the absence of notice, the judge must provide for an adjournment in order to provide the opposing party with time to prepare.

[84] That being said, considering the scope that the appellant's evidence has taken on, and adjournments needed for the administration of the hearing until now, I do not see how I could easily refuse an additional adjournment for the purpose of allowing the respondent to present her own evidence.

3. Prejudice to other witnesses

[85] The appellant also submits that the testimony by other franchisees in this appeal could have negative consequences on their own appeals and possibly in criminal proceedings. The respondent replies that section 5 of the *Evidence Act* protects the franchisees against the use of their testimony in criminal proceedings. Moreover, there is nothing preventing the franchisees' statements from being used against them in their own appeals. They are still compellable witnesses.

4. Abuse of process

[86] The appellant submits that the testimony constitutes an abuse of process in that it would be excessive, disproportionate and would substantially increase the complexity of the appeal. He also submits that in addition to extending the hearing, the testimony would be of no real use to the Court.

[87] I agree with the appellant that the "likelihood that the evidence offered and the counter proof will consume an undue amount of time" must be taken into consideration (see *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577).

[88] The hearing of the appeal would certainly need to be extended. Considering the lack of notice, there would be adjournments and additional costs to allow the appellant to prepare for the seven examinations. There is also the possibility that the appellant, as he suggested, would ask to question other franchisees in order to refute the testimony, so that the Court would have an overall view that is more representative of the 300-some franchisees, since he claims that the respondent would have made a biased selection of witnesses. On this, I agree with the respondent that each party has the right to select its witnesses based on their theory of the case and their ability to refute the opposing party's evidence.

[89] At this stage, it must be noted that the partial presentation of the appellant's evidence took 11 days and consisted of five testimonies to date. If we are to rely on the document [TRANSLATION] "Appellant's opening remarks" submitted to the Court, at least five other witnesses are to be called to testify, including three expert witnesses. Following these three weeks, the trial has already been adjourned for two weeks so that the Court could rule on this objection and on the witnesses' qualifications.

[90] As noted above, I cannot easily refuse an additional adjournment that would be to allow the respondent to present her evidence. As the Federal Court of Appeal states in *Kajat v. Arctic Taglu (The), supra*, the adjournment would remedy the lack of notice. I also cannot easily prevent a party from presenting its evidence, under the pretext that the other plans to refute it by calling new witnesses.

Weighing relevance and the prejudicial effects

[91] I must therefore determine whether the prejudicial effect of these seven testimonies outweigh their probative value.

[92] I first found that the proposed testimony was relevant, particularly since the appellant's evidence shows a great similarity between the contracts of the franchisees and the circumstances surrounding the signing of these contracts, through financial advisors.

[93] First, although I find the method the respondent chose to draft her pleadings deplorable, I do not think we can draw the extreme conclusion that the respondent is seeking to amend her pleadings; she is seeking to prove certain allegations in her reply with regard to all the franchisees.

[94] A fundamental principle of our justice system is that the rules of procedure are a tool that aims to seek the truth. This objective comes from the fundamental principle of relevance, which is the basis of the rules of evidence: see *Morris v. The Queen*, [1983] 2 S.C.R. 190 and *R. v. Corbett*, [1988] 1 S.C.R. 670. Thus, a result that would prevent the trier of fact from discovering the truth by the exclusion of relevant evidence with no serious reason to justify this exclusion would undoubtedly conflict with our fundamental conception of justice and what constitutes a fair trial.

[95] Moreover, regarding the lack of notice, I understand from *Kajat v. Arctic Taglu (The)* that an adjournment can suffice to remedy a lack of notice, and I am inclined to allow an adjournment if the appellant makes such a request.

[96] With regard to the effects on the duration of the hearing, I feel that they should be assessed in view of the context and the total duration of the trial. In this case, as noted above, the appeal has already taken three weeks and the appellant has not closed his case. The additional costs must also be considered in the overall context. As a result, I cannot conclude that allowing the testimony of the witnesses proposed by the respondent would skew the proportionality of the present case.

[97] Additionally, the prejudice on the witnesses themselves is relative. Clearly, these witnesses are compellable and are at the least protected from the use of their testimony in criminal proceedings.

[98] With regard to the prejudice caused by the similar fact evidence in civil matters, it is worth noting that certain authors feel that it would be more difficult to invoke the concept of prejudice to exclude evidence in a civil case than in a criminal case. On this, Royer states the following in his treatise *La preuve civile*, 4th edition, Cowansville: Éditions Yvon Blais, 2008, at p. 885:

> [TRANSLATION]
> In civil law, evidence of similar acts or omissions is also more easily admissible since the reason for its exclusion cannot generally be that it is prejudicial to a party and the degree of proof required to convince the court is not as high. Moreover, the basic principle is that evidence of any fact relevant to the case is admissible.

[99] That being said, I do not find that the prejudice that will continue once the appellant has the opportunity to prepare for the testimony is sufficient compared to the high relevance of this evidence. It is clearly a major legal battle and allowing this testimony would not entail consequences that are out of proportion in this case.

Conclusion

[100] For these reasons, the appellant's objection is dismissed.

AMENDED REASONS FOR ORDER

Bédard

[1] Now, we will address the case of Jean-François Ouellet. Further to the voir-dire, the Court must determine whether the report and testimony of Jean-François Ouellet ("Ouellet") as an expert witness specializing in strategic marketing are admissible.

[2] On December 6, 2011, the appellant served on the respondent a report signed by Ouellet, called [TRANSLATION]"Report by Jean-François Ouellet, Ph.D., M.B.A." with a certificate as required under rule 145(1)(*b*) of this Court, stating that it represents evidence that the proposed expert witness is prepared to give in the matter (the report).

[3] The report offers an opinion on the commercial viability of the business owned by a Prospector International Inc. (Prospector) franchisee, more specifically, regarding (1) the software products provided by Prospector, (2) the commercialization of these products by the franchise as "software as service", and (3) contracting out the franchise operations by the franchisee to an agent.

[4] While the appellant, further to the summary of Ouellet's qualifications, asks the Court to allow his testimony and his report in the present case as an expert witness in strategic marketing, the respondent, not surprisingly, objects. The objection raised by the respondent regarding Ouellet's testimony and report is based on certain facts revealed during his cross-examination, which seem to be at the core of this controversy and likely call for our attention.

[5] First, the respondent discovered, during Ouellet's cross-examination, that he has a somewhat limited computer knowledge, in that he only took the equivalent of one year of computer courses, given between 1995 and 1998 as part of the BA in computer engineering at Laval University. Moreover, under cross-examination, Ouellet admitted that, since 1998, he has not developed any software and he is not a specialist in encryption or tracking.

[6] Lastly, when cross-examined on his mandate, Ouellet stated that he paid particular attention to the commercial viability of the business of a Prospector franchisee and, consequently, the expectation of profit of such a business.

Issue

[7] Are Ouellet's report and testimony admissible in evidence?

Appellant's submissions

[8] First, it must be noted that, for once, the appellant's submissions are brief. Indeed, once Ouellet's qualifications, which will be the subject of a detailed analysis, were submitted to the Court, the appellant simply invoked on the criteria for the admission of

expert evidence as developed by the Supreme Court of Canada (SCC) in *R. v. Mohan*, [1994] 2 S.C.R. 9, to justify his position.

[9] Still according to the appellant, the training, expertise and experience of Ouellet's past work, the type of mandate he was given and the specialized field that strategic marketing represents are all factors that sufficiently justify the admission of his testimony as an expert, in the light of the principles laid down by the SCC in *Mohan*, *supra*.

[10] Lastly, the appellant submits that Ouellet is not usurping the duties of the trier of fact but rather is informing him through his objective opinion about the innovative, radical and trend-setting nature of the method of commercialization implemented. He opines that Ouellet's informed point of view would allow the Court to better understand the significant challenge of commercializing software, which contributed to the delay in marketing the software and, lastly, better understand the root causes that the franchisees contracted out the operation of the franchises.

Respondent's submissions

[11] The respondent essentially submits that Ouellet's testimony and report are not admissible for the following reasons.

[12] First, the respondent argues that Ouellet lacks relevant expertise, as he is not qualified to give an opinion on the commercial viability of the business of a franchise considering his limited knowledge about computers and franchising, and his lack of business valuation knowledge.

[13] The respondent then submits that Ouellet's testimony usurps the trier of fact's jurisdiction by giving his opinion on the reasonable expectation of profit related to the operation of a franchise, and that he makes a statement on the appropriateness of certain business decisions; this, in itself constitutes findings of fact with no true technical meaning. The respondent, citing *Mohan*, *supra*, and *Atco Electric Ltd. v. R.*, 2007 TCC 243, submits that the criterion of necessity is not met.

Applicable law

[14] With regard to the applicable law, I refer to the analysis I conducted for the reasons I gave orally today in my decision on the admissibility of the testimony and expert report of Denys Goulet.

Application of the law to the facts

[15] Our analysis will focus on two of the criteria developed by the SCC in *Mohan*, *supra*, namely the qualification of the expert and the necessity of the expertise; the other criteria were not at issue in this case.

Qualification of the expert

[16] We shall first review the criterion of the expert's qualification. Ouellet holds a bachelor's in business administration and a master's in business administration (MBA). He also has a Ph.D. in management science (marketing) from the Université Pierre-Mendès, France, in Grenoble, France, and a post-doctoral degree in innovation management from the Massachusetts' Institute of Technology (MIT) Center for Innovation in Product Development in Boston.

[17] Since 2004, Ouellet has been teaching marketing at HEC Montréal, where he became an associate professor in 2008. He has also been working as a specialized consultant in strategic marketing since 2003 and is the academic associate of a marketing research firm. His research work is often published in journals that are recognized in the field, and by specialized publishers.

[18] I am of the view that Ouellet most certainly has "special knowledge and experience going beyond that of the trier of fact" (*R. v. Marquard*, [1993] 4 S.C.R. 223, at para. 35) regarding the innovativeness of the commercialization method used and the inherent challenges with marketing the software developed by Prospector.

[19] The respondent, I will recall, submits that Ouellet cannot be qualified as an expert witness in this case, considering his limited computer knowledge. On this, it is worth noting that shortcomings in an expert testimony are relevant to determining its probative value and not its admissibility (see *Marquard*, *supra*).

[20] In this case, Ouellet said he first and foremost examined the commercial viability of a Prospector franchise with regard to the type of commercialization used and a franchisee's contracting out operations to an agent. He was presented as a strategic marketing specialist whose research focuses mainly on innovation management from a marketing perspective and on assessing the market for radically innovative products. I find, therefore, that the lack of computer expertise is not a determining factor in itself with regard to the admissibility of Ouellet's testimony as an expert.

[21] The respondent insists on Ouellet's limited knowledge in the area of franchising and his lack of expertise in business valuation. Ouellet was never presented as a business valuator. He is a strategic marketing and innovation management specialist, whose main skill is evaluating the potential of an innovative product. The organizational and financial aspects of a structure are part of his expertise since he specializes in the optimization of marketing innovative products.

[22] I find that Ouellet has sufficient expertise to assist the trier of fact on the innovative and radical character of the commercialization method used and the related challenges. His qualifications could allow the Court to better understand the potential value of an innovative product, the difficulties with its commercialization and the market for which it is targeted.

[23] For all these reasons, Ouellet's qualifications are sufficient to meet the third criterion developed by the SCC in *Mohan*, *supra*.

Necessity in assisting the trier of fact

[24] Regarding the necessity in assisting the trier of fact, the question is first whether the expert provides information necessary to understand the issue given its technical nature (see *R. v. Burns*, [1994] 1 S.C.R. 656; *R. v. Mohan*, *supra*; *R. v. Lavallée*, [1990] 2 S.C.R. 852; *R. v. Abbey*, [1982] 2 S.C.R. 24 and *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672). Although "necessity" means the evidence must not simply be helpful, it should also not be judged by too strict a standard (see *Mohan*, *supra*, at p. 23).

[25] *Mohan* aims to ensure that the dangers related to expert testimony are not taken lightly. Mere relevance or helpfulness is not sufficient. The issue is whether the expert provides information that is likely outside the ordinary experience and knowledge of the trier of fact (see *R. v. D.D.*, [2000] 2 S.C.R. 275, at p. 298 and *Mohan*, *supra*, at p. 23).

[26] In the present case, when asked about his mandate, Ouellet stated that, as indicated in his report, he focused on the commercial viability of a business of a Prospector franchisee. However, during this review, he became interested in the reasonable expectation of profit a Prospector franchisee might have.

[27] As a result, the respondent submits that Ouellet's report is of no use since it usurps the Court's jurisdiction because reasonable expectation of profit, like the appropriateness of decisions made, falls under the sovereign jurisdiction of the trier of fact.

[28] I feel that a distinction must be made between situations where, for example, an expert bases the fundamental findings of his report on an assessment of the facts or the law, from a situation such as the one in this case.

[29] In the case before us, Ouellet states he commented on the potential value of an innovative product and the market for which it was targeted. His observations are presented as the result of an objective look at the method of commercialization used and its inherent challenges.

[30] Nothing indicates that his assessment of the reasonable expectation of profit for a franchise was predominant in his overall analysis. Similarly, nothing indicates that his assessment of the appropriateness of the decisions made was the focus of his findings.

[31] In this case, we have a situation that fits perfectly into the SCC pronouncements in *Marquard*, *supra*, in that it would be excessively formalistic to dismiss the expert testimony for the mere reason that the witness gave an opinion that extends beyond the field of expertise for which he was qualified (see *Marquard*, *supra*, at para. 37).

[32] I cannot accept the respondent's arguments and come to the conclusion that Ouellet's testimony would be of no use in the circumstances. Should Ouellet usurp the

Court's jurisdiction during his testimony, the respondent would only have to make the relevant objections at the appropriate time.

[33] You will understand that my decision is that Ouellet's testimony and report are admissible in evidence.

Translation certified true
on this 3rd day of June 2014

François Brunet, Revisor