IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ming Sun Benevolent Society v. Philippine Women Centre of B.C.,* 2024 BCSC 2015

Date: 20241105
Docket: S136642
Registry: Vancouver

Between:

Ming Sun Benevolent Society

Plaintiff

And

Philippine Women Centre of B.C. and Wan Yao Chow and Double Happiness Holdings (2007) Ltd.

Defendants

Before: The Honourable Justice Hoffman

Ruling on the Admissibility of Expert Reports

Counsel for the Plaintiff:	E.L. Hansen E. Chen
Counsel for the Defendants:	A. Soliman F. Mukasa, Articled Student
Place and Date of Hearing:	Vancouver, B.C. October 16, 2024
Place and Date of Judgment:	Vancouver, B.C. November 5, 2024

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Introduction

[1] This matter concerns two neighbouring buildings in the Downtown Eastside of Vancouver: 439 Powell Street ("439 Powell") and 451 Powell Street ("451 Powell"). The defendants allege that in July 2013, the brick veneer of the eastern exterior wall of 439 Powell failed and collapsed onto the building at 451 Powell, causing substantial structural damage. The plaintiff alleges that the failure of the brick veneer was caused by the discharge of substantial amounts of water which drained from the sloped roof of 451 Powell into the space between the two buildings. The defendants allege that the failure was due entirely to the plaintiff's failure to properly repair and maintain 439 Powell.

[2] There is both a claim and a counterclaim for damages arising from this event. The key issues before me are why the brick veneer detached and whether the detachment was due to actionable conduct by one of the parties.

[3] The defendants seek to rely on three structural engineering reports prepared by their expert, Derek Smith, only two of which were the subject of admissibility objections:

a) the main report dated December 21, 2022 (the "Main Report");

b) the responsive report dated June 28, 2024 (the "Responsive Report"); and

c) the supplemental report dated September 30, 2024 (the "Supplemental Report").

[4] The Supplemental Report was served on the plaintiff on October 1, 2024, at 4:57 p.m., the sixth day of this trial. The defendants seek leave to file it on the grounds that Mr. Smith has had a material change in his opinion within the scope of Rule 11-6(6) of the *Supreme Court Civil Rules*.

Positions of the Parties

The Defendants' Position

[5] With respect to the main report, the defendants submit that the pleadings put in issue the condition of the western wall of 439 Powell and, thus, Mr. Smith's comments on its condition are relevant to the issues in this action.

[6] The defendants submit that Supplemental Report was necessitated by a material change in Mr. Smith's opinion that rot in the wooden structure of the main floor of 439 Powell caused the floor to drop a total of 3 inches, instead of the 1.5 inches Mr. Smith opined to in the Main Report. In that report, Mr. Smith identifies this downward drop as playing a causative role in the failure of the brick veneer. In the Supplementary Report, Mr. Smith opines that this additional drop of 1.5 inches would have added even more downward vertical load to the brick veneer.

[7] Pursuant to the direction of the Court, Mr. Smith prepared a letter dated October 3, 2024, to explain why he was unable to provide his new opinion any earlier. Mr. Smith explained that over the past month, in the lead-up to the trial, he reviewed all of the site photos and videos in intense detail. It was only when he printed out a "blow-up" of a photo of the wooden floor structure of 439 Powell taken at his site visit in October 2013 that he realized that he had misinterpreted the main floor construction of 439 Powell.

[8] Upon reviewing this enlargement, Mr. Smith noted that there had been two different repairs to the floor over time that involved replacement of the joists and studs. In the Supplemental Report, he opines that the floor dropped 1.5 inches in between the original construction of the building and the first repair, and another 1.5 inches between the first and second repairs, for a total drop of 3 inches. Accordingly, no new facts were drawn to Mr. Smith's attention. The facts relied upon in the Supplemental Report were contained within the materials on which he based his original opinion.

[9] The defendants submit that if the Supplemental Report meets the requirements of Rule 11-6(6), it is admissible regardless of the fact that it was not

served 84 days before trial as referred to in Rule 11-6(3). In the alternative, the defendants seek to have the court exercise its discretion under Rule 11-7(6) to admit the report despite its non-compliance with Rule 11-6(3).

The Plaintiff's Position

[10] The plaintiff objects to portions of the Main Report that comment on the condition of the western wall of 439 Powell (the "Western Wall Opinion"). The plaintiff says that this evidence is not relevant to the issue that the court needs to decide in this matter, namely the cause of the collapse of the eastern exterior wall. The Western Wall Opinion is found in Parts 3 and 6 of the Main Report. The plaintiff says that defendants' pleadings do not allege that any damage occurred as a result of the western elevation of 439 Powell. Since the western wall is not in issue in this litigation, the plaintiff submits that Mr. Smith's evidence in this regard should be excluded.

[11] The plaintiff also objects to the admissibility of the Supplemental Report in its entirety. The plaintiff submits that the Supplemental Report fails to set out a material change in Mr. Smith's opinion and, therefore, does not meet the requirements under Rule 11-6(6). It is submitted that Mr. Smith's opinion is not a material change but rather, merely serves to reinforce his original opinion.

[12] If the Supplemental Report is found to meet the requirements of Rule 11-6(6), the plaintiff takes the position it could only be made admissible under Rule 11-7(6) because it was served less than 84 days before trial. The plaintiff submits none of the grounds for the court to exercise its discretion set out in Rule 11-7(6) can be satisfied in this case.

Analysis

The Main Report

Threshold Admissibility

[13] In order for expert evidence to be admissible at the threshold stage, it must be logically relevant. Logically relevant evidence is evidence that has a tendency, as

a matter of human experience and logic, to make the existence or non-existence of a fact in issue more or less likely than it would be without that evidence: *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd*., 2019 BCSC 275 [*Angel Acres*], citing *R. v. Abbey*, 2009 ONCA 624 at para. 82; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 23 [*White Burgess*].

[14] In a civil action, the pleadings govern what is relevant. The amended response to civil claim filed on September 9, 2024 , alleges the following:

> 18. The collapse … was partly caused by the buildings on [439] Powell having been initially constructed and later repaired using poor, aged, unsuitable, insecure, and substandard techniques, methods and materials.
>
> …
>
> 20. At all material times, the brick veneer on all walls of the buildings at [439] Powell was unstable due to damage and defects internal to [439] Powell…
>
> 21. At all material times, the buildings on [439] Powell had suffered many years of adverse impact from harsh weather and other natural conditions, aging neglect, no maintenance and no repair to damaged parts, leading to acute decay of the buildings' wooden frames, structural damage and unsoundness, and ultimately its collapse onto 451 Powell.
>
> 22. At all material times, the buildings on [439] Powell were susceptible to collapse without external forces due to having sustained acute structural damage over a long period, including from decay/rotting of the wooden frame.
>
> …
>
> 37. At all material times, due to the structural unsoundness, the western and southern walls of [439] Powell were bulging and also faced imminent collapse without warning, as part of the [439] Powell eastern wall had collapsed onto the buildings at 451 Powell.

[15] In the counterclaim, it is alleged at that 439 Powell was not maintained or repaired over many years and that the plaintiff was negligent for failing to properly maintain 439 Powell.

[16] I am satisfied that the Western Wall Opinion is logically relevant. The defendants allege that the plaintiff's failure to maintain and repair 439 Powell generally was a main cause of the collapse of the eastern wall. The condition of the

western wall is therefore logically relevant to the issue of the extent to which the property, as a whole, was maintained.

Gatekeeping Analysis

[17] I turn now to a consideration of the second gatekeeping stage of the admissibility analysis for expert evidence. At this stage, I must balance the potential risks and benefits of admitting the Western Wall Opinion and decide whether the potential benefits justify the risks: *White Burgess* at para. 24. In other words, I must decide whether the Western Wall Opinion is sufficiently beneficial to the trial process to warrant its admission despite its potential harm to the trial process if admitted: *Abbey* at para. 76.

[18] The plaintiff argues that even if the Western Wall Opinion passes the logical relevance threshold, it should nonetheless be excluded at the gatekeeping stage because its prejudicial effect outweighs its probative value.

[19] The plaintiff asserts that in his Main Report, Mr. Smith uses his observations of the eastern wall of 439 Powell to inform his assessment of the western wall. It is further submitted that to the extent that asserted relevance of this opinion is that an inference should be drawn from these opinions as to the condition of the eastern wall, the defendants will be unable to elicit this evidence because Mr. Smith's Main Report does not draw an inference in that direction.

[20] The defendants submit that the Western Wall Opinion is relevant to their allegations regarding the maintenance and structural soundness of 439 Powell generally.

[21] In *Angel Acres* at paras. 187–195, Davies J. reviewed at length the admissibility considerations at the gatekeeping stage. With respect to the consideration of relevance, Davies J. relied upon the following principles enunciated by Doherty J.A. in *Abbey*:

> [189] At paras. 85 to 87 Doherty J.A. then considered the different issues engaged in the consideration of relevance at the threshold stage and at the gatekeeping stage. He wrote:

> [85] My separation of logical relevance from the cost-benefit analysis associated with legal relevance does not alter the criteria for admissibility set down in *Mohan* or the underlying principles governing the admissibility inquiry. I separate logical from legal relevance simply to provide an approach which focuses first on the essential prerequisites to admissibility and second, on all of the factors relevant to the exercise of the trial judge's discretion in determining whether evidence that meets those preconditions should be received.
>
> [86] As indicated above, it was not argued that Dr. Totten's evidence did not meet the preconditions to admissibility. Nor is it suggested that it was not logically relevant to identity, a fact in issue. The battle over the admissibility of his evidence was fought at the "gatekeeper" stage of the analysis. At that stage, the trial judge engages in a case-specific cost-benefit analysis.
>
> [87] The "benefit" side of the cost-benefit evaluation requires a consideration of the probative potential of the evidence and the significance of the issue to which the evidence is directed. When one looks to potential probative value, one must consider the reliability of the evidence. Reliability concerns reach not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the expert's expertise and the extent to which the expert is shown to be impartial and objective.
>
> [Emphasis added in *Angel Acres*.]

[22] While the reliability of evidence must be considered at the gatekeeping stage, this determination is limited to whether evidence is worthy of being heard, not whether it should ultimately be accepted: *Angel Acres* at para. 190, citing *Abbey* at para. 89. My task at the gatekeeping stage is to consider the benefits and detriments the admission of the impugned evidence may have with respect to the trial process: *Angel Acres* at para. 190; see also *Abbey* at para. 76. The detriments to be considered are whether the admission of the evidence will consume undue time, cause prejudice or create confusion: *Angel Acres* at paras. 14, 52; *R. v. J.-L.J.*, 2000 SCC 51 at para. 47.

[23] The plaintiff’s arguments regarding reliability are limited to the concern that the defendants may attempt to use it to draw an inference as to the condition of the eastern wall of 439 Powell. The plaintiff says that since Mr. Smith does not draw such an inference, doing so would stretch his opinion beyond the four corners of his report.

[24] In my view, it remains to be seen at this stage how the defendants will ultimately rely on the Western Wall Opinion, given their lack of maintenance theory as articulated in the pleadings. The reliability of and foundation for the Western Wall Opinion can be fully tested on cross-examination. Further, the use to which it can be put and the weight it should be accorded will be the subject of final argument.

[25] I am also not persuaded that the admission of this evidence would cause prejudice to the plaintiff. The plaintiff did not allege that the reception of this evidence would increase litigation costs or cause undue confusion. Rather, the plaintiff argued that the Western Wall Opinion invites reasoning based on the general character of the building such that it amounts to similar fact evidence and is presumptively inadmissible. Counsel for the plaintiff was unable to point to any authority for the proposition that the similar fact evidence rule applies to the character of a building in the same way as it does to the conduct of a person. In any event, this concern is anticipatory. It is not yet clear to what purpose the Western Wall Opinion will be put, given the allegations in the pleadings that 439 Powell was not properly maintained.

The Supplemental Report

Material Change

[26] The first issue to consider is whether the Supplemental Report falls within the scope of Rule 11-6(6).

[27] Rule 11-6(6) provides as follows:

> **Supplementary report of own expert**
>
> (6) If, after an expert's report is served under subrule (3) (a) or (4), the expert's opinion changes in a material way and the party who served the report intends to tender that expert's report at trial despite the change,
>
> (a) the expert must, as soon as practicable, prepare a supplementary report and ensure that that supplementary report is provided to the party, and
>
> (b) the party must promptly serve that supplementary report on every other party of record.

[28] In *Perry v. Vargas*, 2012 BCSC 1537, Savage J. held that:

> [10] Rule 11-6(6) was not intended to allow experts to add either fresh opinions or bolster reasons upon reviewing for the first time or further reviewing material under the guise of there being a material change in their opinion. To provide otherwise would surely defeat the purpose of the notice provisions contained in Rules 11-6(3) and 11-6(4) and the requirement of R. 11-7(1).

[29] The plaintiff says that there is no material change in Mr. Smith's opinion in respect of the question posed to him, namely what caused the brick veneer on the eastern exterior load bearing wall of 439 Powell to fail and collapse. As set out in the Main Report, Mr. Smith's opinion is that the wood frame of the eastern wall dropped due to wood rot and that this downward movement caused the brick veneer to buckle and collapse. The plaintiff submits that Mr. Smith's new conclusion that the wall dropped an additional 1.5 inches merely reinforces or bolsters of his original opinion as set out in the Main Report.

[30] The defendants say that the change is material because it relates to how much the eastern wall actually settled, which is a determinative factor in understanding why the brick veneer buckled and eventually collapsed.

[31] I find that Mr. Smith's new opinion that the eastern wall of 439 Powell settled an additional 1.5 inches is not a material change for the purposes of Rule 16-6(6). It falls squarely into the type of opinion that Savage J. found was not contemplated by that rule: *Perry* at para. 10.

[32] Mr. Smith's new opinion is based on a photo that he has had in his possession since October 2013. Very recently, he further reviewed an enlargement of that photo. No suggestion was made that Mr. Smith lacked the technical capability to view an enlarged version in either October 2013, when he received the photo, or December 2022, when he prepared the Main Report.

[33] In my view, Mr. Smith's new observations serve only to bolster the opinion he gave in the Main Report that wood rot at the bottom of the eastern wall created downward forces on the brick veneer which caused the collapse. As such, the Supplemental Report does not fall within Rule 11-6(6).

[34] While this finding is sufficient to dispose of the plaintiff's admissibility objection, if I am in error in this regard, I will now consider the balance of the arguments raised by the parties.

Applicability of the Time Limit for Service of an Expert Report

[35] The next issue to consider is whether the requirement to serve an expert report 84 days before trial, as set out in Rule 11-6(3), applies to supplementary reports served pursuant to Rule 11-6(6).

[36] The relevant portions of Rule 11-6 are as follows:

> **Service of report**
>
> (3) Unless the court otherwise orders, at least 84 days before the scheduled trial date, an expert's report, other than the report of an expert appointed by the court under Rule 11-5, must be served on every party of record, along with written notice that the report is being served under this rule,
>
> (a) by the party who intends, with leave of the court under Rule 11-3 (9) or otherwise, to tender the expert's report at trial, or
>
> (b) if 2 or more parties jointly appointed the expert, by each party who intends to tender the expert's report at trial.
>
> …
>
> **Supplementary report of own expert**
>
> (6) If, after an expert's report is served under subrule (3) (a) or (4), the expert's opinion changes in a material way and the party who served the report intends to tender that expert's report at trial despite the change,
>
> (a) the expert must, as soon as practicable, prepare a supplementary report and ensure that that supplementary report is provided to the party, and
>
> (b) the party must promptly serve that supplementary report on every other party of record.
>
> **Requirements for supplementary report**
>
> (7) A supplementary report under Rule 11-5 (11) or under subrule (5) (a) or (6) (a) of this rule must
>
> (a) be identified as a supplementary report,
>
> (b) be signed by the expert,
>
> (c) include the certification required under Rule 11-2 (2), and

> (d) set out the change in the expert's opinion and the reason for it.

[37] The defendants submit that the 84-day notice period set out in Rule 11-6(3) does not apply to reports served under Rule 11-6(6). This is because Rule 11-6(6)(a) imposes a positive duty on an expert to prepare a supplementary report as soon as practicable when their opinion changes in a material way. The defendants argue that applying the 84-day notice requirement to a supplementary report would render Rule 11-6(7)—which sets out the requirements for a supplementary report—redundant. This is because none of the requirements in Rule 11-6(7) include an 84-day service requirement.

[38] The plaintiff argues that by operation of Rule 11-7(1), the 84-day notice period applies to all expert reports, including supplementary reports prepared pursuant to Rule 11-6(6). Rule 11-7(1) provides as follows:

> **Reports must be prepared and served in accordance with rules**
>
> (1) Unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed by the court under Rule 11-5, must not be tendered at trial unless
>
> (a) that evidence is included in a report of that expert that has been prepared and served in accordance with Rule 11-6, and
>
> (b) any supplementary reports required under Rule 11-5 (11) or 11-6 (5) or (6) have been prepared and served in accordance with Rule 11-6 (5) to (7).
>
> [Emphasis added.]

[39] Counsel for the plaintiff also pointed to the decision of Saunders J. in *Anderson v. Pieters*, 2016 BCSC 889 at para. 65, where Saunders J. found that a Rule 11-6(6) supplementary report served less than 84 days before trial can only be admitted into evidence if the requirements of Rule 11-7(6) are satisfied.

[40] I reject the defendants' contention that the Supplemental Report is exempt from the requirement that it be served at least 84 days before trial. It is well established that the purpose of Part 11 of the *Rules* is to provide for the orderly and

fair exchange of expert opinion evidence. In *Sove v. Froment*, 2022 BCSC 735, MacNaughton J. held that:

> [7] As this Court has made clear in a number of decisions, the rules with respect to the delivery and mandatory content of expert reports are intended to ensure that all expert reports are tendered in a timely way so that no party is ambushed or surprised at trial. Disputes over late-filed reports are to be avoided.

[41] This echoes the finding of Burnyeat J. in *Amini v. Khania,* 2014 BCSC 697 at para. 21, that "the very purpose of Rule 11-6 is that all expert reports should be tendered in a way that neither side can be ambushed at trial" (emphasis in original).

[42] I recognize that there will be many situations where an expert may have a material change in their opinion less than 84 days before trial. In those circumstances, if a party elects to rely on the original report, there is a positive duty on the party tendering the report to have the expert prepare a supplementary report. Rule 11-7(6) is the mechanism by which leave must be sought to tender the latter. This rule gives the court discretion to allow an expert to provide evidence when one or more requirements of Part 11 of the *Rules*, including the minimum prescribed notice, has not been met.

[43] Rule 11-7(6) provides as follows:

> **When court may dispense with requirement of this Part**
>
> (6) At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more requirements of this Part have not been complied with, if
>
> (a) facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and served within the time required by this Part,
>
> (b) the non-compliance is unlikely to cause prejudice
>
> (i) by reason of an inability to prepare for cross-examination, or
>
> (ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to tender evidence in response, or
>
> (c) the interests of justice require it.

[Emphasis added.]

[44] The wording of sub-paragraph (a), underlined above, supports the conclusion that a supplementary report served less than 84 days before trial can only be tendered by satisfaction of at least one of grounds in Rule 11-7(6).

Admission of Expert Evidence that Does Not Comply with Part 11 of the Rules

[45] I turn now to a consideration of whether the defendants can establish one of the grounds of Rule 11-7(6). I will consider each basis in turn.

(a) Due Diligence

[46] In *Perry* at para. 16, Savage J. held that Rule 11-7(6)(a) focuses on the conduct of the party seeking to tender the report. It requires that party to have exercised due diligence in fact finding: *Perry* at para. 16; *Sove* at para. 21.

[47] I am satisfied that the facts upon which Mr. Smith now seeks to rely could have, with the exercise of due diligence, been learned in time to have been included in the Main Report. Mr. Smith's change of opinion occurred due to his re-review of a photograph that was available to him in October 2013. As such, Rule 11-7(6)(a) is not an available basis to admit the Supplemental Report.

(b) Prejudice

[48] Rule 11-7(6)(b) focuses on the prejudice to the party against whom the evidence is tendered: *Perry* at para. 18. As Savage J. stated in *Perry* at para. 19, "delivering expert reports on the eve of trial is antithetical to the purpose of the *Rules* regarding expert reports, which seek to ensure the parties have reasonable notice of expert opinions".

[49] Here, the Supplemental Report was served in the evening of the sixth day of trial, right before the plaintiff's structural engineering expert was set to testify. This put the plaintiff into a difficult position in the midst of trial. Counsel for the plaintiff had no time to prepare a cross-examination on the Supplemental Report or to consult

with the plaintiff's expert, Dr. Peer, for the purpose of responding to the Supplemental Report.

[50] Counsel for the defendants says that any prejudice to the plaintiff can be remedied because this trial is scheduled to continue in January and the plaintiff's expert can simply be recalled then to respond to the Supplemental Report. However, recalling Dr. Peer does not remedy the prejudice to the plaintiff in the form of increased costs and the further lengthening of this trial.

[51] Further, receipt of the Supplemental Report, at this late stage and after the plaintiff has opened its case, causes irremediable prejudice in terms of the steps the plaintiff has already taken in putting in its case. Those steps may have been different had the information in the Supplemental Report been included in Main Report. The plaintiff is entitled to prepare and lead its case on the basis of the opinion evidence it was given proper notice of under Rule 11, the purpose of which is to avoid ambush by trial.

[52] I find that there is no basis to submit the Supplemental Report pursuant to Rule 11-7(6)(b).

(c) Interests of Justice

[53] With respect to Rule 11-7(6)(c), Savage J. held in *Perry* as follows:

> [22] In my view the discretion provided for in R.11-7(6)(c) must be exercised sparingly, with appropriate caution, and in a disciplined way given the express requirements contained in Rules 11-6 and 11-7. That is, the "interests of justice" are not a reason to simply excuse or ignore the requirements of the other Rules. There must be some compelling analysis why the interests of justice require in a particular case the extraordinary step of abrogating the other requirements of the *Supreme Court Civil Rules*. None was provided.

[54] The defendants baldly submit that it is in interests of justice for the court to have the benefit of Mr. Smith's Supplemental Report. This submission fails to provide a compelling reason why the interests of justice require the court to admit evidence that merely reinforces an earlier opinion that was already advanced in the Main Report.

[55] Even if the Supplemental Report could be said to fall within the scope of Rule 11-6(6), I am not persuaded that there is any basis to admit it under Rule 11-7(6).

Conclusion

[56] With respect to the objections to the Main Report, I rule that the Western Wall Opinion is admissible, subject to the plaintiff's arguments about the weight to be attached to it.

[57] I find that the Supplemental Report is inadmissible for lack of a material change or, in the alternative, late service and failure to satisfy the grounds for admission under Rule 11-7(6).

"Hoffman J."