Admissibility of Expert Evidence: In a Canadian SRO Context

NATALIJA POPOVIC
Senior Enforcement Counsel, The Investment Industry Regulatory Organization of Canada (IIROC),

Abstract: NOTE The views expressed herein are those of the author and do not necessarily reflect those of IIROC. The paper will consider the admissibility of expert evidence as it relates to professional discipline tribunal hearings of the Investment Industry Regulatory Organization of Canada [IIROC], the national self-regulatory organization for investment advisors in the Canadian securities industry. Various issues have been identified in the case law that bear upon expert evidence and its admissibility. Cases in administrative law as well as civil and criminal contexts will be considered. The issues discussed in this paper, include: the relaxing of the rule against an expert giving opinions on the ultimate issue; whether expert evidence is based upon hearsay and if so whether it goes to weight rather than admissibility; issues related to bias of the expert witness, such as independence of the expert, and the expert as advocate; and the use of in-house experts. In addition, IIROC case law will be reviewed with a discussion of the differences in treatment of expert evidence presented to address securities related issues of a technical nature as contrasted with expert evidence presented to address standards in the securities industry.

I. Canadian Law

A. The Supreme Court of Canada: R. v. Mohan

It is a well-established principle of Canadian law that the starting point for an analysis of when expert evidence should be admitted, in administrative as well as civil and criminal proceedings, is the 1994 Supreme Court of Canada (“SCC” or “the Court”) decision in R. v. Mohan.

In summary, the SCC held that:

“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.”

i. Relevance

While relevance is a threshold requirement and a question of law for the trier of fact to determine, other considerations have an impact upon the ultimate decision to allow the evidence to be admitted.

The Court in Mohan described a cost benefit analysis that must be conducted as part of the consideration of relevance. Although relevance may be logically found to exist, it may still be excluded 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

2 Mohan, para 17
misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.”

In a 2008 British Columbia Supreme Court case, *R. v. Violette*,[4] the court elaborated on the probative value of expert evidence and noted that 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.”

Accordingly, the first criterion of relevance must satisfy both the logical relevance component and the extent to which admission of the evidence will not have a negative impact upon the hearing which could in turn outweigh the relevant nature of the evidence.

### ii. Necessity

The second criterion is necessity as referenced by the SCC in *R. v. Abbey* in 1982:

“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.)”

The Court in *Mohan* cautioned that the evidence must be more than merely helpful, which sets too low a standard. Rather the evidence must be necessary to enable the “…trier of fact to appreciate the matters in issue due to their technical nature.”

As put another way in *Violette*:

“…it is not sufficient that the evidence is merely "helpful" to the jury. Rather, it must provide information "which is likely to be outside the experience and knowledge of a judge or jury"; Mohan at 413. At the same time, necessity need not be judged by too strict a standard; absolute necessity is not required.”

In Canadian administrative law, tribunals have held that expert evidence is not always necessary. An administrative tribunal can, and often does, rely on its own expertise where it is comprised of experts in a particular field. Where this is the case, a court will generally defer to such a panel.

In 2010, an administrative tribunal of the Ontario Securities Commission (OSC) released a pair of decisions, *Re Biovail Corp.*,[11] and *Re Magna International Inc.*,[12] where it clearly held that on certain matters it had specialized expertise and did not require the evidence or opinion of an expert. An expert’s opinion could possibly be relevant or useful, but not necessary.

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3 Mohan, para 18
5 Violette, para 30
7 Abbey, under “Opinion Evidence”
8 Mohan, para 22
9 Violette, para 45
11 Biovail Corp. (Re), 2010 LNONOSC 729 [Biovail]
12 Magna International Inc. (Re), 2010 LNONOSC 439 [Magna]
13 Biovale, para 80 and see Magna 2010, para 40; see also Magna International Inc. et al. (Re), 2011 LNONOSC, para 138.
The OSC relied on the *Biovail* decision in 2012 in the *Re Donald* case, where it reiterated that given its own expertise the testimony of an expert was not required. The OSC noted:

“The Commission is a tribunal that is comprised of members with specialized expertise. Although we considered the expert evidence of Dr. Comment, we note that, as the Panel hearing this matter, we are responsible for the ultimate determination of materiality in this case.”

Similarly, in the 2012 IIROC decision in *Re Northern Securities Inc.*, the Panel commented on the applicability of *Mohan* as well as on the level of expertise of IIROC panels:

“It is also clear from the case law that the said [Mohan and Abbey] criteria are applicable to all triers of fact and are not limited to a judge and jury situation.”

And

“It is well established law that disciplinary tribunals of self-regulatory organization such as IIROC are considered to be expert in their particular fields…..[and] whether an expert witness is "necessary" to assist the panel in its deliberations must be decided on a case by case basis.”

### iii. Absence of Exclusionary Rule

The third criterion is the absence of an exclusionary rule. If there is an exclusionary rule in play, it may mean the exclusion of evidence even though the evidence may meet the requirements of the other criteria in *Mohan*.

### iv. Properly Qualified Expert

The last of the four *Mohan* criterion is a requirement for a properly qualified expert which is described as “…[a] witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.”

### B. Issues Related to Admissibility of Expert Evidence

#### i. Opinion on the Ultimate Issue

In *R. v. Alcantara*, in 2012 the Alberta Court of Queen’s Bench referenced a 1994 SCC case that commented that the ultimate issue rule was no longer the basis for exclusion of an expert’s evidence:

“The Supreme Court of Canada further emphasized in Burns that the "ultimate issue rule", once considered to bar expert testimony on the very matter before the court, is no longer strictly applied. McLachlin J. (as she then was) observed at page 201 that, "While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court".

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14 Donald (Re), 2012 LNONOSC 546 [Donald]
15 Donald, para 28
16 Re Northern Securities Inc. 2012 IIROC 35 [Northern Securities]
17 Northern Securities, para 9
18 Northern Securities, para 13
19 For example, the evidence may offend the similar fact evidence rule and be inadmissible on that basis.; see JMD (Re) [2005] N.S.U.R.B.D. No. 32, para 102
20 Mohan, para 27
22 Alcantara, para 121
The OSC, in 2008, however, restricted the evidence of an expert in relation to his opinion on ultimate issues at a hearing. The OSC commented:

“The role of an expert witness is to provide the court or tribunal with special knowledge or expertise beyond the knowledge or expertise of the court or tribunal. It is not the role of an expert to express an opinion on domestic law or the ultimate issues before the Court or tribunal.”

In 2012 the OSC again limited the extent to which an expert’s evidence would be considered in Donald. The OSC, cautioned:

“While we admitted Dr. Comment’s evidence at the hearing, we did so based on his expertise as a financial economist. We give no weight to his opinion as to the materiality of the Four Facts, which is a question to be decided by the Panel.”

Hearing panels therefore may not exclude expert evidence on the sole basis that it opines on the ultimate issue in question. The case law suggests that a further analysis is required and while the expert’s evidence may be admitted it may be limited or restricted in part.

ii. Hearsay

A related issue is whether expert evidence is based upon hearsay. As a general rule an expert:

“….may rely on his learning, his continuing education, he may refer to texts, periodicals, discussions with others in his field. He is not restricted to opinions based solely on his own personal experiences and observations.”

Further, as noted in Violette, an expert:

“….may base his or her opinion on second hand information. However, where that second hand information is not established before the trier of fact, the weight of the opinion may recede according.”

The question of reliance on hearsay goes to weight and not admissibility. In Alcantara, the court noted:

“It is clear, as a result of the majority decision in R. v. Lavallee, [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97 (S.C.C.), that an expert opinion is admissible, even if based on hearsay. The hearsay is admissible to show the information on which the expert opinion is based, and not as proof of the facts stated. Before any weight can be given to an expert opinion based on hearsay, the facts on which the opinion is based must be proven by admissible evidence…To put it another way, in assessing the weight to be given to an expert opinion, the trier of fact is required to take into account that it is based in part on hearsay: see R. v. Burns, [1994] 1 S.C.R. 656, 89 C.C.C. (3d) 193 (S.C)”

Consistent with this approach the OSC in the 2009 decision in Re Suman, allowed admittedly hearsay evidence of an analysis performed by an expert as it had been thoroughly crossed examined upon and noted that while it would be admitted, “…..the weight to be accorded to such evidence must be determined by the panel.”
Accordingly, expert evidence based on hearsay is an issue of weight and not admissibility. The tribunal must decide the weight to be given to the evidence, in the context and as part of a review of all of the evidence presented.

### iii. Bias and Independence of the Expert

An issue that must be addressed when expert evidence is being considered is the independence and neutrality of the expert. One of the key cases in relation to this issue is the 1993 UK “Ikarian Reefer” case, named for the freighter that was the subject of an insurance dispute.\(^{30}\)

In a 2007 Newfoundland and Labrador Supreme Court - Trial Division (NFLD) case\(^{31}\), the court referenced the *Ikarian Reefer* case and the factors to be considered by counsel when using expert evidence as follows:

> “…the product should be independent and unbiased, it should be limited to matters within the expert’s expertise, the expert should set out the basis for his or her opinion, all material facts should be included, and all provisional opinions should be identified as such.”\(^{32}\)

While the discussion about independence of the expert in the *Ikarian Reefer* case was in the context of a civil action, the principles have been found equally applicable and have been applied by administrative tribunals in Canada.\(^{33}\)

The independence or objectivity of an expert was also considered by the Ontario Superior Court in 2009 in *Alfano v. Piersanti*\(^{34}\) where the court held that:

> “The court expects objectivity on the part of the expert. In other words, he or she cannot "buy into" the theory of one side of the case to the exclusion of the other side. To do so, poses the danger that could taint the court's understanding of the issues that must be decided with impartiality and fairness to both sides. The fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court.”\(^{35}\)

Several other Canadian administrative tribunals, both at federal and provincial levels, have adopted the *Mohan* and *Ikarian Reefer* concepts of the independence of the expert when considering expert evidence.\(^{36}\)

In some cases an expert has been disqualified on the basis of a presumed, not actual, bias, or lack of independence, because of an existing relationship between the expert and one of the parties.\(^{37}\) In another case bias, in relation to two police officers that worked in the same office, was a factor only going to weight.\(^{38}\)

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\(^{32}\) Loblaws Inc., para 73


\(^{34}\) Alfano (Trustee of) v. Piersanti (2009), 176 A.C.W.S. (3d) 152 [Alfano]

\(^{35}\) Alfano, para 6-7


In the criminal context, courts have held that a “lack of objectivity, neutrality and independence has a significant impact on the weight to be afforded that expert.” 39

A similar comment is found in R. v. Gager 40, a 2012 Ontario case, where the court noted, with reference to SCC cases in 2010 and 2011, that:

“Even where there is no dispute as to the expertise of a witness, a perceived bias on the part of a proposed expert witness may require the court to exclude the witness’ evidence: R. v. Docherty, [2010] O.J. No. 3460 (S.C.J.). However, as Wein J. observed at paragraph 12, "little precedent exists for legal rejection of expert opinion evidence on the basis of bias or the apprehension of bias." That said, a helpful précis of the law on this subject is found in R. v. L.K., [2011] O.J. No. 2553 (S.C.J.), at paragraph 9ff. At paragraph 9, Trotter J. stated "bias or partiality is not explicitly identified as a pre-condition for qualification as an expert witness. But it is certainly implicit in more than one of the Mohan factors.”” 41

In a 2012 decision of the Ontario Superior Court of Justice, Henderson v. Risi 42, the court held that a challenge to expert evidence on the basis of a connection to a party is essentially a challenge to the reliability of the evidence, and not an issue of admissibility. The court relied upon case law that held, at least in a civil context, that reliability cannot be assessed until the court hears the whole of the evidence:

“In summary, in civil cases, if expert evidence meets the Mohan criteria for admissibility, it is admissible. Bias or partiality in expert evidence which is based on the expert having a connection with a party or issue or a possible predisposition or approach in the case is a reliability issue which is best determined when the whole of the expert evidence is considered in the context of all of the trial evidence. As such, the issue is one of weight and not admissibility.” 43

The independence of the expert and his or her evidence is essential. Independence must exist and must be shown to exist; failing which less weight may be given to the expert’s evidence.

iv. Bias and Expert as Advocate

The issue of independence is linked to the notion that the expert must not become an advocate for one party or another. Cases have cautioned that the expert must refrain from partisan advocacy “in the guise of” 44 expert opinion; or that an expert’s report cannot be “advocacy dressed up as” 45 an expert’s opinion.

In 2007 in the Loblaw case, the Newfoundland court held that:

“The expert witness is thus in a unique position, a witness upon whom the unqualified judge may rely in making a finding that may have significant import for the parties to the litigation.

Because of this potential reliance and because the expert is by definition one who has been qualified to lend specialized assistance to the court, an expert owes a particular duty to the court. This is a duty not just to tell the truth, which is a duty of all witnesses, but a duty to be true to his or her profession or discipline when

39 Klassen, para 31-32
41 Gager, para 188
42 Henderson v. Risi 2012 ONSC 3459 [Henderson]
43 Henderson, para 14
44 Klassen, para 70
45 Fellowes, McNeil, para 674
offering opinions within that discipline. Thus, regardless of which party may produce a particular expert, the fact that such expert is qualified to give opinion evidence means that the opinion will be founded only in the training and experience of the expert and not in the exigencies of litigation or in the interest of the party in question.”

In a pithy statement, the Alberta Court of Appeal in 2010 noted that an expert witness is “…. less a 'witness for a party' than a 'witness for the court'”.

In 2000 the Alberta Court of Queen’s Bench summarized the impact on credibility when an expert morphs into an advocate, as follows:

“Put simply, where an expert assumes the role of an advocate, he or she can no longer be viewed as an expert in the legally correct sense; instead his or her evidence "must be viewed as advocating the care of a party with the attendant diminishment in the credibility.”

An expert called by a party must not lapse into the role of advocate for that party. If this happens the expert’s evidence will be diminished and the expert will lose credibility with the tribunal.

v. Bias and In House Expert

Where the expert is close to the investigation, such as working within the organization that is prosecuting the matter, such circumstances will go to the weight to be given to his or her evidence. The trier of fact has to consider other evidence and apply common sense. In any event, evidence of such a witness should be avoided. As noted, in the police context, by the Queen’s Bench of Manitoba in Klassen;

“Clearly, the degree to which the expert is separated from the investigation is significant. Ideally, the expert should not be an employee of the investigating police service. At minimum, if he works for the same department, he should work independently from the investigating officers. The degree to which the expert is insulated from the investigation should be considered by the court before attaching weight to the expert’s evidence. Reliance on the opinion of a witness who carries with him the appearance of bias should be avoided.”

In a similar vein, the British Columbia Provincial Court concluded in 2010 that in circumstances where: “….the single most important investigator, the lead investigator, is also the person called upon to be the impartial and independent and objective expert, in my view those roles are simply incompatible...”

II. IIROC Case Law

A. Expert Evidence on Technical Issues

Of the IIROC cases that considered expert evidence, the majority of the experts addressed technical issues; for example what constitutes “free riding”, block trading analysis, or leveraged exchange traded funds. This reflects a logical approach in that the expert can provide assistance to a Panel on an area of technical expertise that Panelists are not likely to have.

46 Loblaws, para 71
48 Jacobson v. Sveen, 2000 ABQB 215 at paras. 32-36
49 Klassen, para 31
In the *Re Deeb*\(^{51}\) case in 2012, expert evidence was admitted on what constituted “free riding”, meaning that securities were purchased without sufficient cash in the relevant accounts. In that case IIROC asserted, and the Panel accepted as correct, that the criteria for the admissibility of expert evidence are set forth in *Mohan* and *Abbey*.\(^{52}\) In its decision, the Panel determined that only the first two of the *Mohan* criteria, relevance and necessity, were relevant in *Deeb*. The Panel also accepted that in terms of the criterion of necessity, the standard is more than just “helpful”\(^{53}\).

The *Deeb* Panel referred to the earlier *Northern Securities* case, in relation to its own acceptance of the applicability of the *Mohan* criteria in the case of administrative tribunals.

The *Deeb* Panel concluded that the expert’s evidence was not necessary to it but that it could still:

“...admit the expert evidence even if it does reach the level of necessity; and the Panel felt that the evidence would be instructive on these issues and quite helpful to it in making its decision... The Panel decided not to exclude the [expert’s report] and his testimony on the ground that it was not necessary.”\(^{54}\)

In 2012 in the *Northern Securities* case a Panel decided a motion brought by IIROC asking that the Panel exercise its discretion and decline to admit the Respondents’ expert’s report into evidence.\(^{55}\)

The Panel affirmed the application of the *Mohan* criteria focusing on the questions of necessity and a properly qualified expert; as well as the *Abbey* commentary that an expert’s function is to provide the trier of fact with a ready-made inference where necessary.\(^{56}\) The Panel also confirmed that the standard of what is necessary is something more than “helpful”.\(^{57}\)

In its conclusion, the *Northern Securities* Panel, while not questioning the expert evidence, decided that the evidence was not necessary to it as:

“It is well established law that disciplinary tribunals of self-regulatory organization such as IIROC are considered to be expert in their particular fields.....[but] whether an expert witness is “necessary” to assist the panel in its deliberations must be decided on a case by case basis... the Panel members had sufficient subject matter expertise to decide the issues....”\(^{58}\)

**B. Expert Evidence on Standards Issues**

Several IIROC cases dealt with experts that addressed compliance and related standards; for example, what constitutes proper supervision.

In the 2002 case of *Re Shanks*\(^{59}\), IIROC introduced the expert evidence of an associate professor at the University of Calgary, in relation to standards issues; specifically with respect to portfolio risk and the appropriateness of the securities and trading strategies in one of the client accounts in issue. In that case, however, the hearing Panel did not give

\(^{51}\) *Re Deeb* 2012 IIROC 54 [Deeb]
\(^{52}\) Deeb, para 9-10
\(^{53}\) Deeb, para 11
\(^{54}\) Deeb, para 18
\(^{55}\) Northern Securities, para 2
\(^{56}\) Northern Securities, para 5-6
\(^{57}\) Northern Securities, para 7
\(^{58}\) Northern Securities, para 13-15
\(^{59}\) *Shanks (Re)*, [2002] I.D.A.C.D. No. 27 [Shanks]
any weight to his testimony as he acknowledged he was not an expert in the particular matters in question.\textsuperscript{60}

The Panel in \textit{Shanks} did, however, consider the evidence of the Respondent’s expert, also on standards issues, namely trading, securities regulation and supervision. The Panel found his testimony provided an industry perspective on many of the issues which were being considered.\textsuperscript{61}

In the 2008 case of \textit{Re Van Hee}\textsuperscript{62} both IIROC and the Respondent proffered experts’ reports. Both experts gave evidence about standards of supervision.\textsuperscript{63} While no objection was made by either side in relation to the other side’s expert’s evidence, the Respondent did object to the qualification of the IIROC’s expert in one of the three areas where qualification was sought. The Panel agreed to limit the qualification of this expert to a very particular question in relation to the issue of exercise of discretion and options supervision.\textsuperscript{64}

In its decision the Panel cautioned, in relation to the expert evidence overall, that:

“While expert opinion evidence was allowed at the Hearing, the ultimate decision turns on the judgment of this Panel as to whether or not the Respondent's supervisory efforts were reasonable in the circumstances of this case.”\textsuperscript{65}

It is interesting to note that in \textit{Van Hee} the decision considered the expertise of the Panelists themselves to be quite extensive and accordingly concluded, in part, that:

“Any absence of a detailed definition of the supervisory responsibilities for any particular factual matrix does not prevent this Panel from considering whether there has been a failure to supervise in the facts of this case. In that regard, this Panel is guided by the following portions of the decision in Re: Gareau, [2005] I.D.A.C.D. No. 25, which was quoted in Re: Youden, and which states:

Also with respect to appropriate standards, superior courts in Canada have made clear that members of self-governing professions are uniquely and best qualified to establish the standards of professional conduct. Thus, hearing panels of three, two of whom are members or former members of the profession, possess a specialized knowledge with respect to both ethics and standards that can be applied in a particular case.”\textsuperscript{66}

In the 2013 decision in \textit{Re Budik}\textsuperscript{67}, the Panel admitted evidence of an expert with 28 years of experience in the “investment/securities field”\textsuperscript{68}, which may reasonably be inferred as expertise in compliance or standards issues. The expert’s report was found to have been of great assistance to the Panel which accepted the evidence and explicitly agreed with most of the expert’s findings.\textsuperscript{69}

\textsuperscript{60} Shanks, para 4
\textsuperscript{61} Shanks, para 5
\textsuperscript{62} Van Hee (Re), 2008 LNIROC 25 [Van Hee]
\textsuperscript{63} Van Hee, para 48
\textsuperscript{64} Van Hee, para 49-50
\textsuperscript{65} Van Hee, para 46
\textsuperscript{66} Van Hee para 47
\textsuperscript{67} Budik (Re), 2013 IIROC 19 [Budik]
\textsuperscript{68} Budik, para 90
\textsuperscript{69} Budik, para 91-98
C. Absence of Expert Evidence

In the 2012 case *Re Carbonelli* \(^{70}\), the issue of the absence of an expert was important. The Panel noted its concern that it did not have any expert evidence before it in relation to the following standards issues:

“We were provided with no expert evidence to assist this Panel with whether or not the internal controls that were established were "adequate"...or what a "reasonable and diligent supervisor" would be expected to do.” \(^{71}\)

And

“Expert evidence would have been helpful [in relation to Rule 2600] to this Panel on the issue of whether or not the internal controls of Evergreen were adequate and what a "reasonable and diligent" supervisor would be expected to do in the circumstances of this case.” \(^{72}\)

In the end, the charges were dismissed.

In the case of *Re Castonguay* \(^{73}\) the Panel commented that because of an absence of expert evidence on standards issues at the hearing, it was left with concerns about finding a breach of the standard. \(^{74}\) In the result, the Panel dismissed both charges.

In both of these cases the hearing Panels indicated that expert evidence on standards issues would have been beneficial to them.

D. No Requirement for Expert Evidence

A different approach was taken in *Re Brodie* \(^{75}\), where a motion in relation to expert evidence was decided in 2012.

Prior to the hearing, the Respondent brought a motion for an order that IIROC should be directed to produce an expert report on the suitability of the investments he recommended to his clients. In denying the motion, the Panel commented:

“First, it is not for the panel to decide what evidence that IIROC introduces at the hearing. There is no obligation on IIROC to introduce the opinion of an expert and thus we see no reason to order such course of action. If it should be determined that expert evidence is necessary and it has not been introduced, then the consequence will likely be that IIROC has not proved the first allegation in the Revised Notice of Hearing. That, however, has yet to be determined.” \(^{76}\)

This Panel, though deciding that expert evidence was not required in that particular case, clearly acknowledged the possibility that if such evidence was ultimately necessary, but had not been presented, the allegation may not have been proven. The Panel leaves the decision as to whether to call such evidence to IIROC.

Following the hearing on the merits, IIROC was successful on all charges. The hearing Panel commented that no expert evidence had been called and, with reference to the earlier motion, reiterated that: “We did not think it appropriate to tell counsel for IIROC how to present their case.” \(^{77}\)”

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\(^{70}\) Carbonelli and Conway, 2012 IIROC 56 [Carbonelli]

\(^{71}\) Carbonelli, para. 116

\(^{72}\) Carbonelli, para. 117

\(^{73}\) Castonguay 2012 IIROC 73

\(^{74}\) Castonguay, para 38

\(^{75}\) Brodie (Re), 2012 LNIROC 52 [Brodie]

\(^{76}\) Brodie, para 4

\(^{77}\) Brodie (Re), 2013 IIROC 12, para 47
Along similar lines, the Panel in *Re Myatovic*\(^ {78} \), also decided in 2012, held that it was not necessary for IIROC to present expert evidence.

On the issue of the lack of an expert witness, the Panel noted:

> “In his closing submissions, counsel for Ms. Lowe submits that the evidence of IIROC Staff is incomplete as not bringing forward an expert witness….We find that neither the testimony of the suggested expert witness nor of the accounts on the other side of the transaction necessary for the IIROC Staff to establish the elements referred to above.”\(^ {79} \)

### E. Conclusion

The Supreme Court of Canada’s jurisprudence in relation to the criteria that must be considered when considering the admissibility of expert evidence has been recognized and affirmed by IIROC administrative tribunals as applicable to their professional discipline hearings.

The IIROC case law reviewed indicates that the treatment of expert evidence by IIROC hearing panels will be informed, *inter alia*, by the nature of the evidence, including whether it addresses technical or standards issues in the securities industry.

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**Natalija Popovic** is Senior Enforcement Counsel for the Investment Industry Regulatory Organization of Canada, IIROC, the national regulator of its member investment firms and investment advisors. She has over 20 years of legal experience, is currently a member of the Ontario Bar and was also called to the Bar of Bermuda. For several years Ms. Popovic practiced commercial litigation, including professional discipline for the accounting profession, at a downtown Toronto law firm. Ms. Popovic subsequently relocated to Bermuda where she worked in compliance at the Bank of Butterfield. Upon returning to Toronto, Canada, Ms. Popovic has worked in professional discipline and securities regulation at The Toronto Stock Exchange, Market Regulation Services Inc. and IIROC. Ms. Popovic has worked as a volunteer for the Ontario Bar Association; as a lecturer for the Law Society of Upper Canada; as an Articling Principal and student mentor; with the Junior Achievement Program, as a moot court judge at the University of Toronto, and as a committee member for St. Joseph’s Health Care Centre. She is a frequent presenter at conferences on issues of professional discipline and regulation.

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\(^{78}\) *Myatovic (Re), 2012 LNIIROC 47 [Myatovic]*

\(^{79}\) *Myatovic, para 333-334*