

2018

Halifax No. 463399

SUPREME COURT OF NOVA SCOTIA

Between:

**LORNE WAYNE GRABHER**

Applicant

and

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF  
NOVA SCOTIA as represented by the Registrar of Motor Vehicles**

Respondent

**Submissions of Lorne Wayne Grabher  
on Motion to Strike Affidavit of Professor Carrie A. Rentschler**

Justice Centre for Constitutional Freedoms

**Attention: Jay Cameron**

#253, 7620 Elbow Dr. SW

Calgary, Alberta T2V 1K2

[jcameron@jccf.ca](mailto:jcameron@jccf.ca)

Ph: 403.909.3404

Counsel for the Applicant, Lorne Wayne Grabher

## **Overview**

1. The Applicant applies to strike the report of Professor Carrie A. Rentschler, filed by the Respondent December 15, 2017 (the "Report") pursuant to *Nova Scotia Civil Procedure Rules* (the "Rules") 39, 55 and 88.
2. The Applicant has filed a Motion to challenge the impartiality, relevance, necessity and biased nature of the Report, as well as the qualifications of Professor Rentschler.
3. According to the Supreme Court of Canada, an expert report must be logically relevant to the matter being adjudicated, necessary to the adjudication of the litigation, given by an expert who is impartial, independent and unbiased, and who's method of reasoning is reliable for the purpose of formulating an expert opinion. In addition, a second stage test analyses the benefit of admitting the evidence versus the potential risks.
4. The Respondent seeks to have Professor Rentschler qualified as an expert in these proceedings. Professor Rentschler's unsigned report is attached to her unsworn/unaffirmed Affidavit filed December 15, 2017.
5. The Applicant submits the Report does not pass the tests established by the Supreme Court of Canada or the *Rules* for the admission of expert evidence. Professor Rentschler has demonstrated marked bias and partiality, advanced legal opinions while possessing no legal training, focused on logically irrelevant factors in the formulation of her opinion, utilized a flawed methodology for the formulation of her opinion, and does not refer to data or other facts in support of her opinion. The Applicant submits the Report is not only unnecessary for the adjudication of this case, but its admission would be improper and harmful.
6. The Applicant respectfully submits the Report should be struck, with costs of this Application awarded to the Applicant.

## **Factual Background**

7. The Crown filed the Affidavit (with the Report as an Exhibit) on December 15, 2017. Neither the Affidavit nor the Report are signed, as required by the *Rules*. The Report does not say that Professor Rentschler will answer questions posed in regard to her Report, contrary to the *Rules*.

## **Issues**

8. Should the Affidavit of Professor Rentschler be struck?

## **Argument**

### **A. The Law on Expert Testimony**

9. Due to the special dangers in regard to expert testimony to taint the trial process, the Supreme Court of Canada recently tightened the law in regard to the admission of expert opinion evidence: *White Burgess Langille Inman v. Abbott and Haliburton Co.*<sup>1</sup>
10. The Court laid out two stages of analysis in regard to the admissibility of expert evidence.
11. First, the threshold stage, where a judge analyses whether or not the evidence is:
  - a. Logically relevant;
  - b. Necessary to assist the trier of fact;
  - c. Not subject to an exclusionary rule;
  - d. Given by an expert who is properly qualified, which includes the requirement that the expert be willing to fulfil the duty to the court to provide evidence that is:
    - i. Impartial;
    - ii. Independent;
    - iii. Unbiased;
    - iv. And for opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose.<sup>2</sup>
12. Second, the evidence must pass the “gatekeeper” stage, where the trial judge must weigh the benefit of admitting the evidence against its potential risks, considering such factors as:
  - a. Relevance;
  - b. Necessity;
  - c. Reliability; and
  - d. An absence of bias.<sup>3</sup>
13. According to the Court, expert witnesses “have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so.”<sup>4</sup> The

---

<sup>1</sup> 2015 SCC 23 (“*White Burgess*”), at para. 16. [TAB 1]

<sup>2</sup> *Ibid.*, at para. 54.

<sup>3</sup> *Ibid.*, at para. 54.

<sup>4</sup> *Ibid.*, at para. 2, also see para. 10.

common law approach outlined by the Supreme Court of Canada in this case is subject to the further restrictions which are present in the *Rules*.

### **Relevant Rules of Procedure**

14. The *Rules* also govern the admissibility of expert opinions in Nova Scotia.

**39.04 (1)** A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.

(2) A judge must strike a part of an affidavit containing either of the following:

(a) information that is not admissible, such as an irrelevant statement or a submission or plea.

(5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

**39.05** A party who files a scandalous, irrelevant, or otherwise oppressive affidavit is subject to the provisions of Rule 88 - Abuse of Process.

**39.08(2)** An Affidavit must contain:

(d) a jurat showing that an oath or affirmation was administered, and the date and place when and where the witness personally appeared before the authority administering it;

(e) the printed name and official capacity of the authority administering the oath or affirmation.

**39.09 (1)** A party who files an affidavit that includes an exhibit must ensure that the authority who administers the oath or affirmation marks the exhibit so it is clear that it is the exhibit referred to in the affidavit.

(2) An exhibit is adequately marked if the following are placed on, or attached to, the exhibit and the exhibit is signed by the authority administering the oath or affirmation:

(d) a reference to the witness' oath or affirmation;

(e) the date the affidavit is sworn or affirmed.

**55.02** A party may not offer an expert opinion at the trial of an action or hearing of an application in court unless an expert's report, or rebuttal expert's report, is filed in accordance with this Rule.

**55.03** – Expert reports must be filed in accordance with the Order of a Judge.

55.04(1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:

(d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert.

**88.02** – A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:

(f) an order expunging an affidavit or other court document or requiring it to be sealed.

## **B. The Report fails the legal test for admissibility of expert evidence**

### **i. Three reasons why the Report is not logically relevant**

15. First, the Respondent has already publicly stated that Donald Trump has nothing to do with the decision to cancel the licence plate of the Applicant, which bore his surname "GRABHER" for 27 years (the "Plate").<sup>5</sup>

16. Much of the Report, however, deals with Donald Trump: his words, his alleged actions, his appearance on a TV soap opera, his political campaign, and his presidency. The Applicant submits that the Report's salaciously myopic focus on Donald Trump demonstrates Professor Rentschler's lack of objectivity in regard to the matter at hand, and evidences a fixed obsession that renders the author's opinions in regard to the Plate unreliable. There is no evidence in the Report that Nova Scotians are as obsessed with, or interested in, Donald Trump as Professor Rentschler appears to be. There is no evidence that the Registrar considered Donald Trump in her decision to cancel the Plate. There is no evidence that the individual who originally complained about Mr. Grabher's last name was concerned with Donald Trump. Further, the Respondent's Affidavits have been filed. Apart from Professor Rentschler, none of the Crown's Affiants have mentioned Donald Trump.

17. Second, the Registrar is the sole person granted authority to determine whether or not personal plates are offensive, or "may be offensive". According to section 5 of the N.S. Personalized Number Plate Regulation:

---

<sup>5</sup> See *Affidavit of Lorne Grabher*, filed January 15, 2018, Exhibit "B".

The Registrar may refuse to issue personalized number plates to an applicant in any of the following circumstances: **(iv) in the opinion of the Registrar**, contains a combination of characters that expresses or implies a word, phrase or idea that is or may be considered offensive or not in good taste.”

18. Whether Professor Rentschler thinks that the Plate is offensive or not is irrelevant to these proceedings. Her opinion has no more legal authority and is no more legally relevant than any other layperson’s opinion vis-a-vis the decision of the Registrar. Professor Rentschler’s opinion is a misuse expert opinion and tendered to distort the fact finding process of this Honourable Court.<sup>6</sup> The Applicant could also file expert opinions from professors with lengthy *curriculum vitae*, each expressing the opinion that the Plate is **not** offensive.
19. A judge will determine whether it was lawful to terminate the Plate in accordance with the rule of law, the Regulation, and the Constitution. A judge will determine whether the Plate “is or may be considered offensive” in the context of the facts of this case (such as the uninterrupted lawful use of the Plate for 27 years) and will determine whether section 5(f) of the Regulation is constitutional. A judge does not require the Report, or the opinion of academics without legal training to make a determination on these issues.
20. Enabling the public to be certain about the law is one of the purposes and benefits of the rule of law. Legislation and associated regulations are established so that the public and the government will know what the law is. The Constitution, including the *Canadian Charter of Rights and Freedoms*, requires that government respect the fundamental freedoms of Canadians. Public officials, such as the Registrar, do not have untrammelled discretion, and cannot whimsically determine day-by-day what the law is.<sup>7</sup> Professor Rentschler’s subjective opinion as to whether or not the Plate is offensive is entirely irrelevant. The question to be determined is what the law is, and whether it was followed.
21. Third, professor Rentschler’s assertions that the Plate supports, or is an example of, “rape culture”<sup>8</sup>, and that the Plate supports violence against women and “endangers women,” are not supported by any empirical evidence of any kind.<sup>9</sup> The Report’s contentions in this regard are

---

<sup>6</sup> See *R. v. Mohan*, [1994] 2 S.C.R. 9 (“*Mohan*”), at para. 23. [TAB 2]

<sup>7</sup> See *Roncarelli v. Duplessis*, [1959] S.C.R. 121. [TAB 3]

<sup>8</sup> Report, p. 12.

<sup>9</sup> See *Mohan*, quoting Justice LaForest in *R. c. B eland*, [1987] 2 S.C.R. 398, at p. 434, “with respect to the evidence of the results of a polygraph tendered by the accused, such evidence should not be admitted by reason of “human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science”.

unfounded and irresponsible. These contentions, absent evidence, are demonstrable proof of bias by Professor Rentschler.

22. The Plate was in lawful use for 27 years. If the Plate endangered the community in any way, as Professor Rentschler contends, there would be empirical evidence to support contentions of harm. The Report contains no empirical evidence of any kind to show that the Plate endangers women or is a “clear example of rape culture”, however. The Report merely contains bald assertions of supposed harm, without providing proof or evidence. This is not the role of an expert.
23. Lastly, the wilder and more fanciful statements of Professor Rentschler require mention. Nothing connects “aggrieved white masculinity” to the Plate.<sup>10</sup> The assertion in the Report that the Mr. Grabher’s surname infers the words, “by the pussy”,<sup>11</sup> is irresponsible, gratuitous, biased, and unsupported. Not only are such assertions partial, biased, lacking in objectivity and irrelevant, the Applicant submits that the Crown’s filing of a Report containing such unsubstantiated assertions is an abuse of process pursuant to Rule 88.

## ii. Report Not Necessary

24. Only expert evidence that is necessary to a case is admissible. According to the Supreme Court of Canada, the purpose of expert witnesses is to “explain the effect of facts of which otherwise no coherent rendering could be given.”<sup>12</sup>
25. The Court has also held that “an expert’s opinion must be necessary in the sense that it provides information that is likely to be outside the experience and knowledge of a judge or jury.”<sup>13</sup> If, on proven facts, a judge or jury can form an opinion without help then the opinion of an expert is unnecessary.<sup>14</sup>
26. The Report is not necessary to adjudicate this case. The trial judge does not need to accept the subjective and personal opinions of Professor Rentschler regarding Donald Trump to determine whether the Registrar acted lawfully. The trial judge does not require Professor Rentschler’s conjecture to determine if the Plate communicates “aggrieved white masculinity” or Professor Rentschler’s imaginings about what words which are not present on the Plate should nevertheless be inferred to accompany the Plate.

---

<sup>10</sup> Report, p. 11.

<sup>11</sup> Report, p. 12.

<sup>12</sup> *Kelliher (Village) v. Smith (1931)*, [1931] S.C.R. 672 (“*Kelliher*”), at para. 18. [TAB 4]

<sup>13</sup> *R. v. Abbey*, [1982] 2 S.C.R. 24 (“*Abbey*”), at para. 44. [TAB 5]

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

### iii. Professor Rentschler Not Properly Qualified

27. If a trial judge determines that the Report is logically relevant and necessary, the trial judge must still consider whether or not the expert is qualified to advance the opinions in the Report.<sup>15</sup> A witness who is not properly qualified to provide specialized advice to the court should not be tendered. Experts are only permitted to offer opinions within the scope of their expertise.<sup>16</sup>

28. The Report contains legal conclusions,<sup>17</sup> such as the following:

- a. the Plate “would commonly be considered offensive”, and is an “offensive public speech act”<sup>18</sup> that “condones violence against women”;<sup>19</sup>
- b. a personalized licence plate, such as the Plate, is “government expression”;<sup>20</sup>
- c. the Plate, and all personalized licence plates, are the same as any other government issued signage – it is the expression of the government;<sup>21</sup>
- d. the government’s authority increases the strength of communications on personalized licence plates;<sup>22</sup>
- e. the Plate connects the government with those who verbally abuse women;<sup>23</sup>
- f. a transcribed portion of a 2005 video proves that Donald Trump is guilty of sexual assault, and “gets away with it” due to being a celebrity.<sup>24</sup>

29. The Report asserts that the Plate would “commonly be considered offensive.” This is a bald assertion without substantiation.

30. Professor Rentschler is not a lawyer, and a review of her *curriculum vitae* evidences no legal training. She is unqualified to offer a legal opinion on whether a personalized or “vanity” licence plate is government expression, or personal expression, or both. She is unqualified to offer an opinion on

---

<sup>15</sup> See *White Burgess*, at para. 16.

<sup>16</sup> *R. v. K. (A.) (1999)*, 45 O.R. (3d) 641 (Ont. C.A.), leave to appeal refused (2000), 2000 CarswellOnt 1818 (S.C.C.). [TAB 6]

<sup>17</sup> See section 5 of the *Personalized Number Plates Regulations*: “The Registrar may refuse to issue personalized number plates to an applicant in any of the following circumstances: (iv) in the opinion of the Registrar, contains a combination of characters that expresses or implies a word, phrase or idea that is or may be considered offensive or not in good taste.”

<sup>18</sup> Report, p. 3.

<sup>19</sup> Report, p. 12.

<sup>20</sup> Report, p. 3.

<sup>21</sup> Report, p. 3.

<sup>22</sup> Report, p. 6.

<sup>23</sup> Report, p. 6.

<sup>24</sup> Report, p. 8.



free speech from a legal perspective, including the implications of the *Charter*.

31. Similarly, Professor Rentschler’s “expert” opinion that Donald Trump committed actual criminal acts against women<sup>25</sup> in the United States at some point in the past is her personal diatribe, irrelevant to these proceedings, and devoid of legal foundation or legal merit. Even if Professor Rentschler had training in Canadian or American criminal law, it is irrelevant to the adjudication of this case whether or not a foreign dignitary did or did not sexually assault someone.
32. Further, Professor Rentschler has no training in interpreting legislation. Her conclusion that the Plate is “offensive” is a legal conclusion, with which the Registrar of Motor Vehicles disagreed 26 consecutive times when it reissued the Plate each year. The Crown is asking this Honourable Court to accept Professor Rentschler’s opinion that the Plate is “offensive” for the purpose of establishing that the Registrar was correct in law to cancel the Plate, in response to a single anonymous complaint. According to the Supreme Court of Canada:

...expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. **The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.**<sup>26</sup>

33. The opinion evidence of Professor Rentschler goes to one of the “ultimate issues” in this case: whether or not the Plate is offensive. Her unqualified opinion should not be permitted to usurp the role of the trial judge.<sup>27</sup> Her methodology and qualifications should be subjected to the highest level of scrutiny when determining to accept the Report or any part of it. In the respectful submission of the Applicant, Professor Rentschler is unqualified to offer expert opinion on a legal question, as she has done.

#### iv. **The Report is a breach of Rule 88**

34. The Report is more akin to a celebrity gossip tabloid than a legal document. The sustained and pervasive focus on Donald Trump, the allegations of a link between the Plate and “aggrieved white masculinity”, “rape culture”, the supposed endangerment of women, and the assertion of Professor Rentschler that the words “by the pussy” are inferred by the

---

<sup>25</sup> Report, p. 8

<sup>26</sup> *Mohan*, at para. 32 [emphasis added]

<sup>27</sup> *Ibid*, para. 28

Plate, are unsubstantiated and scandalous. The Applicant submits that the Report is irrelevant, scandalous and oppressive within the meaning of Rule 88, that the Report is an abuse of process, and should be struck.

35. Further, experts are only permitted to offer testimony in the scope of their expertise.<sup>28</sup> Professor Rentschler repeatedly speculates in the Report as to how she thinks people will perceive the Plate. She conducted no surveys or experiments, and points to no empirical data for her “findings”. Her testimony in regard to how Nova Scotians perceive the Plate is entirely speculative,<sup>29</sup> as well as not within the realm of her expertise (Professor Rentschler has no training as a psychologist or psychiatrist). Her testimony in regard to these issues is therefore irrelevant.

**v. Affidavit and Report do not conform to the Rules**

36. The Report is unsigned, contrary to Rule 55.04(1). The Affidavit to which the Report is an Exhibit is neither sworn nor affirmed, and does not contain an executed jurat, contrary to Rules 39.08(2) and 39.09(1). Neither the Affidavit nor the Report is properly “evidence” in this proceeding.

**Conclusion**

For the reasons set out above, the Applicant requests that the Report of Professor Rentschler be struck in its entirety, and costs of this Motion awarded to the Applicant. In the alternative, the Applicant requests that such portions of the Report be struck as this Honourable Court deems just and appropriate, and that costs be awarded to the Applicant.

All of which is respectfully submitted this 15<sup>th</sup> of January 2018.




---

Jay Cameron  
Justice Centre for Constitutional Freedoms  
Counsel for the Applicant, Lorne Wayne Grabher

---

<sup>28</sup> See, for example, *R. v. Woods (1982)*, 65 C.C.C. (2d) 554 (Ont. C.A.) where a pharmacologist qualified to express opinion about the effect of particular drugs on the mind was not permitted to testify regarding the accused’s awareness because such expertise required a psychiatrist. [TAB 7]

<sup>29</sup> Contrary to what Professor Rentschler claims, polls in the province of Nova Scotia overwhelmingly support the Plate.