may involve complications of double hearsay evidence and is subject to the rules governing the admission of learned works. With the exception of providing learned works, the practice of providing one expert with the opinion of another for the purpose of relying on it is rare.

In providing information and in ensuring the expert obtains all relevant information, counsel should be mindful of the following overarching matters:

- Like all assumed facts and assumptions, those taken from discovery transcripts, literature searches, independent investigations, and other sources described above must be included in the outline of assumed facts contained in the final report and must be proved through independent admissible evidence.
- Counsel must consider that the facts on which the opinion is based may be rejected in whole or in part by the trier of fact. Where important facts are contested, counsel may want to provide the expert with an alternative set of assumed facts on which to obtain another opinion, in the event that the adverse party's version of the facts is accepted.
- In all areas where counsel deals with the expert, care must be taken to not compromise the expert's independence and to be fully alive to the risks and hazards in that regard. On this issue, the reader is strongly advised to consult chapter 4 (Expert Opinions and Ethical and Professional Responsibility Issues).
- Ethical issues also arise when preparing experts, including obligations to ensure that the confidentiality of documents and discovery transcripts is maintained.
- Counsel's choices will have financial, evidentiary, and tactical implications.

II. SOURCES OF THE EXPERT'S INFORMATION [§5.3]

A. THE EXPERT'S RELIANCE ON HEARSAY IN FORMING THEIR OPINIONS [§5.4]

1. RELIANCE ON HEARSAY GENERALLY PERMISSIBLE [§5.5]

An expert's reliance on hearsay as a source of information when forming their opinions on relevant matters does not, by itself, imperil the admissibility of their expert opinion evidence. For instance, Sopinka J. in *The Expert: A Practitioner's Guide* (Carswell, 1995)

recognizes the acceptability and admissibility of hearsay in forming an expert opinion. He states at 1§4:

> An expert's skill or knowledge is almost always based upon the distilled assertions of others who are not before the court. Strictly speaking, such information is hearsay, but the courts have long recognized that it is acceptable for such hearsay to form a component of the knowledge which an expert uses to formulate his or her opinion.

2. HEARSAY NOT ADMISSIBLE AS PROOF OF FACTS ASSERTED IN OUT-OF-COURT STATEMENTS [§5.6]

An expert opinion that relies on hearsay evidence is admissible but, like hearsay evidence generally, not for the purpose of establishing the truth of the contents of the hearsay evidence. Rather, the inclusion of hearsay in an expert's report is permitted to show how the hearsay contributed to the formation of the expert's opinion.

In *R. v. Abbey*, 1982 CanLII 25 (SCC), the court found the trial judge erred in accepting as true the hearsay evidence relied on by the expert psychiatrist. The psychiatrist's testimony on the accused's mental state was based on his conversations with the accused, who did not testify.

In *R. v. Lavallee*, 1990 CanLII 95 (SCC), Wilson J. distilled the ratio of *Abbey* into four principles (at para. 66):

(1) An expert opinion is admissible if relevant, even if it is based on second-hand evidence.

(2) This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.

(3) Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.

(4) Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

3. INDEPENDENT PROOF OF FACTS IN INCORPORATED HEARSAY ADDS TO WEIGHT ACCORDED TO EXPERT OPINION [§5.7]

The courts have interpreted *R. v. Abbey*, 1982 CanLII 25 (SCC) and *R. v. Lavallee*, 1990 CanLII 95 (SCC) to stand for the principle that the weight to be given to an expert's opinion will depend on the extent to which the facts underlying the expert opinion have been proven. Therefore, as is the case with assumed facts, to the extent that hearsay relied on by an expert is borne out by separate admissible evidence,

the expert's opinion will be accorded greater weight. Conversely, to the extent that hearsay relied on by an expert either is not supported by separate admissible evidence or is contradicted by it, the weight accorded to the expert's admissible opinion will be diminished (*Abbey*; *Lavallee*). The court requires independent proof when the information relied on by an expert to form their opinion cannot be or was not tested in court (*R. v. Pahl*, 2016 BCCA 234).

In *Lavallee*, the court attempted to clarify what weight an expert opinion based on hearsay evidence should be accorded. The case involved the testimony of a psychiatrist, based in part on conversations with the accused, not in evidence. Using the information he gathered himself, the expert explained why the accused might sincerely have believed that she needed to shoot the victim in self-defence. According to Wilson J., the expert's reliance on hearsay evidence significantly impeded the trier of fact's ability to reasonably rely on the expert opinion. Justice Wilson cited the trial judge's charge to the jury (at para. 69):

> If the premises upon which the information is substantially based has not been proven in evidence, it is up to you to conclude that it is not safe to attach a great deal of weight to the opinion. An opinion of an expert depends, to a large extent, on the validity of the facts assumed by the evidence of the expert.

In *R. v. Saul*, 2015 BCCA 149, the court faced the question of whether the trial judge erred in failing to consider an expert toxicologist's evidence. The court restated that there is a distinction between the admissibility of an expert's opinion evidence and the weight that the opinion is given (at para. 27). The court observed (at para. 29) that the assessment of the weight to be given to an expert's opinion is explained in *R. v. Gibson*, 2008 SCC 16. In *Gibson*, the Supreme Court of Canada stated (at para. 58):

> Relevance is distinct from foundation. Even admissible expert evidence cannot be given any weight without a proper factual foundation: as this Court stated in *R. v. Abbey* … , "the facts upon which the opinion is based must be found to exist" (*per* Dickson J. at p. 46). In *R. v. Lavallee* … , the Court added that as long as there is some admissible evidence to establish a foundation for it, the expert's opinion may be accepted. The purpose of the factual foundation requirement is to ensure that expert evidence is reliable.

The Court of Appeal further observed in *Saul* (at para. 30): "Failure to prove the factual assumptions upon which the opinion is based may result in little, if any, weight being given to the opinion". Proof of the underlying assumption requires some or sufficient admissible evidence

to support the assumption. The court further stated (at para. 37), "If the evidence supports the assumption, it is then up to the trier of fact to determine how much weight to give the opinion. Generally speaking, the more the assumption is borne out by the evidence, the greater the weight will be given to the opinion" (see also para. 64).

4. SOURCE OF OUT-OF-COURT STATEMENTS CONSIDERED IN ASSIGNING WEIGHT [§5.8]

An apparent contradiction flows from *R. v. Abbey*, 1982 CanLII 25 (SCC) and *R. v. Lavallee*, 1990 CanLII 95 (SCC) insofar as, on the analyses in those cases, and the decision of Wilson J. in *Lavallee* particularly, a report entirely based on unsupported hearsay could still theoretically be admissible but entitled to no weight. In his concurring judgment in *Lavallee*, Sopinka J. sought to resolve the contradiction as follows, by refining the approach to take cognizance of differing sources of hearsay assertions (at paras. 82 to 84):

> The resolution of the contradiction inherent in *Abbey*, and the answer to the criticism *Abbey* has drawn, is to be found in the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in [*Saint John (City) v. Irving Oil Company Ltd.*, [1966] SCR 581, 1966 CanLII 64 (SCC)]), and evidence that an expert obtains from a party to the litigation touching a matter directly in issue (as in *Abbey*).
>
> In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second- or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this Court has taken to the analysis of hearsay evidence in general, exemplified in *Ares v. Venner*, [1970 CanLII 5 (SCC)]. In *R. v. Jordan*, [1984 CanLII 635 (BC CA)], a case concerning an expert's evaluation of the chemical composition of an alleged heroin specimen, Anderson J.A. held, and I respectfully agree, that *Abbey* does not apply in such circumstances. (See also *R. v. Zundel*, [1987 CanLII 121 (ON CA)], at p. 52, where the court recognized an expert opinion based upon evidence "... of a general nature which is widely used and acknowledged as reliable by experts in that field.")

> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight. In this respect, I agree with the statement of Wilson J. at p. 896, as applied to circumstances such as those in the present case:
>
> > ... as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.

The gloss introduced by Sopinka J. has been picked up in subsequent cases that have also relieved against the apparent requirement in *Abbey* and *Lavallee* (per Wilson J.) that *all* facts assumed by an expert (or asserted by hearsay statements relied on by an expert) must be proven before the expert's opinion can be ruled admissible. *R. v. Saul*, 2015 BCCA 149 is one of those cases. In *Saul*, the B.C. Court of Appeal interpreted *Lavallee* to hold that "as long as there is some admissible evidence to establish a foundation for it, the expert's opinion may be accepted" (at para. 29).

The court in *Mazur v. Lucas*, 2010 BCCA 473 interpreted the principles in *Lavallee* and *Abbey* and reviewed developments in the law. It held that when deciding what weight to place on expert evidence, the trier of fact must assess the extent to which the expert relied on hearsay evidence and factual assumptions, and the reliability of those hearsay statements and assumptions. The court was asked to determine the admissibility of hearsay evidence of other experts contained in an expert's report. The court summarized the law on the admissibility of expert reports containing hearsay evidence as follows (at para. 40):

- An expert witness may rely on a variety of sources and resources in opining on the question posed to him. These may include his own intellectual resources, observations or tests, as well as his review of other experts' observations and

> opinions, research and treatises, information from others—this list is not exhaustive. …
>
> - An expert may rely on hearsay. One common example in a personal injury context would be the observations of a radiologist contained in an x-ray report. Another physician may consider it unnecessary to view the actual x-ray himself, preferring to rely on the radiologist's report.
> - The weight the trier of fact ultimately places on the opinion of the expert may depend on the degree to which the underlying assumptions have been proven by other admissible evidence. The weight of the expert opinion may also depend on the reliability of the hearsay, where the hearsay is not proven by other admissible evidence. Where the hearsay evidence (such as the opinion of other physicians) is an accepted means of decision making within the expert's expertise, the hearsay may have greater reliability.
> - The correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is not to withdraw the evidence from the trier of fact unless, of course, there are some other factors at play such that it will be prejudicial to one party, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction or instruction to a jury.

There is a distinction between evidence within an expert's expertise and evidence of a contested issue that was obtained from a party to the litigation (*R. v. Fontaine*, 2004 SCC 27; *Tayner v. Brard*, 2016 BCSC 1738 at para. 122). The court ought to require independent proof of hearsay statements relied on by an expert that were obtained from a party or other persons who have an interest in the result of the litigation (*Nayyar v. Manufacturers Life Insurance Co.*, 2012 BCCA 501).

See also *Ranger Oil Ltd. v. Ferguson*, 1997 ABCA 52; *Wong v. Campbell*, 2020 BCSC 243; *Preston v. Kontzamanis*, 2015 BCSC 2219; *Lush v. Connell*, 2012 BCCA 203, leave to appeal refused 2012 CanLII 66231 (SCC); and *R. v. Warsing*, 2002 BCCA 131.

Moreover, as argued in the article W.G. Horton and M. Mercer, "Expert Witness Evidence in Civil Cases" (2004, rev. 2007), *Adv. Q.* 29, www.wgharb.com/wp-content/uploads/expert-witness-160907.pdf:

> [T]he entire debate over the internal contradictions of *Abbey* may be moot, as both *Lavallee* and *Abbey* were decided prior to the adoption of the "principled approach" to the evaluation of hearsay evidence introduced in [*R.v. Khan*, 1990 CanLII 77 (SCC); *R. v. Smith*, 1992 CanLII 79 (SCC); and *R. v. B.*

> *(K.G.)*, 1993 CanLII 116 (SCC)]. It seems obvious that the court should relax the application of the approach set out in *Lavallee* in cases in which the underlying hearsay evidence is accepted as complying with the principles of necessity and reliability expressed in the *Khan* and *Smith* cases. However, courts will likely continue to be alert for situations in which expert evidence is being used to prove material and controverted facts for which direct evidence should be made available and subjected to the crucible of the trial process.

Hearsay will also be subject to greater scrutiny where the subject matter of the expert opinion is close to the ultimate issue to be decided by the court (*R. v. Giles*, 2016 BCSC 294 at para. 51).

For further case law on how the courts assess expert opinion that relies on hearsay evidence, see *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2019 BCSC 275; *Bank of China v. Fan*, 2015 BCSC 590; and *Gillespie v. Yellow Cab Company Ltd.*, 2014 BCSC 1745, affirmed 2015 BCCA 450. For further discussion, see "Hearsay" in chapter 8.

5. QUOTATIONS FROM LEARNED TREATISES IN EXPERT OPINIONS [§5.9]

Quotations from opinions expressed in learned treatises that are included in expert opinion evidence constitute a special category of hearsay. These second-hand opinions are admissible expert evidence in their own right if they are adopted by the testifying expert, including during cross-examination. See *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.*, 1995 CanLII 3385 (BC SC), affirmed 1997 CanLII 2886 (BC CA), leave to appeal refused [1997] S.C.C.A. No. 216 (QL); *R. v. Bornyk*, 2015 BCCA 28; *R v. Marquard*, 1993 CanLII 37 (SCC); and *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, 2020 BCSC 1310 at paras. 114 and 2097. For a more detailed discussion, see "The Expert's Reliance on Authoritative Works" to "Cross-examination on Authoritative Works" in this chapter.

6. UNIQUE APPROACH TO HEARSAY DEVELOPED IN ABORIGINAL RIGHTS AND TITLE LITIGATION [§5.10]

Courts must approach the rules of evidence in Aboriginal rights and title litigation in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims (*R. v. Van der Peet*, 1996 CanLII 216 (SCC)). This unique area of litigation often involves hundreds of years of history and may require the use of unconventional fact-finding techniques (*Newfoundland and Labrador (Attorney General)*