Expert Witness Caselaw Update

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The first part of 2015 will be noted for judicial consideration of expert witnesses in Canadian jurisprudence. A series of cases from the Ontario Court of Appeal to the Supreme Court of Canada have clarified the role of the expert witness, the delivery of expert reports and the disclosure of expert's draft reports. This article seeks to highlight Canada's most recent case law on these subjects and illustrate how Saskatchewan has been on the right path all along.

Duty of Expert Witnesses– Saskatchewan

In 2013, Saskatchewan's Revised Rules of Court introduced Rule 5-37 setting out the duty of an expert witness:

> (1) In giving an opinion to the Court, an expert appointed pursuant to this Division by one or more parties or by the Court has a duty to assist the Court and is not an advocate for any party.
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> (2) The expert's duty to assist the Court requires the expert to provide evidence in relation to the proceeding as follows:
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> (a) to provide opinion evidence that is objective and non-partisan;
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> (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
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> (c) to provide any additional assistance that the Court may reasonably require to determine a matter in issue.
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> (3) If an expert is appointed pursuant to this Division by one or more parties or by the Court, the expert shall, in any report the expert prepares pursuant to this Division, certify that the expert:
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> (a) is aware of the duty mentioned in subrules (1) and (2);
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> (b) has made the report in conformity with that duty; and
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> (c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

Rule 5-37 had no equivalent in Saskatchewan's former Rules of Court. It crystalized Justice Klebuc's decision in *Kozak v. Funk* (1995), [1996] 1 WWR 107, 136 Sask R 12, 28 CCLT (2d)81 (QB) ("*Kozak*") wherein the Defendants objected to the qualification of a forensic accountant tendered by the Plaintiff to give expert evidence with respect to, inter alia, the value of the Plaintiff's past and future loss of income.

Kozak adopted the principles of the English Court of Queen's Bench (Commercial Court) *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd.* ("the Ikarian Reefer"), [1993] 2 Lloyd's Rep 68 (Q.B.D. (Comm. Ct.)). In the course of deciding the legal obligations arising from a shipboard fire, the Court in *Ikarian Reefer* listed what it considered to be the most important principles to be used in evaluating the duties and responsibilities of expert witnesses in a civil trial. Although not adopted in all respects in *Kozak*, the *Ikarian Reefer* principles promoted transparency and independence for experts by providing a detailed list of the criteria under which an expert should both act and be seen to act. Although the Court in the *Ikarian Reefer* explicitly limited the criteria to civil cases, it appears that much, if not all, of the guidance provided in that case is equally applicable in all types of proceedings, including administrative hearings[1], civil trials[2], and criminal prosecutions.[3] In *Kozak*, Justice Klebuc summarized these principals as:

> Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the

exigencies of litigation.

An expert should provide independent assistance to the court by objective unbiased opinion in relation to matters within his or her expertise. An expert witness should never assume a role of advocate.

An expert should state the facts or assumptions on which the opinion is based and should not omit to consider material facts which detract from that opinion.

An expert should make it clear when a particular question or issue falls outside of the expert's expertise.

If an expert's opinion is not properly researched because insufficient data is available, this must be stated with an indication that the opinion is no more than a provisional one.

Since *Kozak*, it has been well-established in Saskatchewan that expert witnesses have a special duty to the Court to provide fair, objective and non-partisan assistance. Canadian Courts have disagreed, however, on how and when to deal with concerns raised about the independence of expert witnesses. In particular whether independence and impartiality should be considered at the threshold admissibility stage, or only in the weight given to the evidence.

***White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23**

The Supreme Court in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 ("*White Burgess*"), has clarified that independence concerns should be considered at the threshold admissibility stage, but that threshold requirement is not onerous. The expert must simply be aware of his/her primary duty to the Court and able and willing to carry it out.

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The facts of *White Burgess* are straightforward–a group of shareholders retained a new accounting firm to perform various accounting work regarding their company. The new accounting firm revealed what the shareholders alleged was negligent work performed by the company's former accountants. The shareholders commenced an action in professional negligence against their former accounting firm.

The shareholders brought a summary judgment motion supported by a report of a forensic accounting partner at the new accounting firm. The defendants applied to strike the partner's affidavit on the basis that she was not an impartial expert witness because the claim was essentially about a difference of opinion between two accounting firms and, as the firm that discovered the alleged irregularities had a financial interest in the outcome of the litigation and, as a partner, the witness had a personal financial interest.

The trial judge struck the expert's affidavit in its entirety on the basis that the expert "must be, and be seen to be, independent and impartial."[4] The majority of the Nova Scotia Court of Appeal found the trial judge erred in law and that the affidavit should not have been struck. The Supreme Court of Canada agreed with the Court of Appeal.

The Supreme Court restated and clarified the two-stage test for admissibility of expert opinion evidence as follows:

(a) the evidence must meet four threshold admissibility issues:
(i) relevance;
(ii) necessity in assisting the trier of fact;
(iii) absence of an exclusionary rule;
(iv) a properly qualified expert; and
(b) if the first step results in a conclusion that the evidence is admissible, the judge may still exclude evidence on the basis of a cost-benefit analysis which

determines whether the evidence "is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from admission."[5]

Justice Cromwell for the Supreme Court concluded that there are three related concepts which comprise the duty of expert witnesses: impartiality, independence, and absence of bias. An expert must provide evidence that is objective, the product of the expert's independent judgment, and does not unfairly favour one party's position over another.

Concerns about independence and impartiality are properly considered both under the qualified expert branch of the threshold admissibility test and in the second-stage cost-benefit analysis. At the threshold admissibility stage, the standard is not onerous: is the expert aware of his/her primary duty to the court and able and willing to carry it out? Absent a challenge, the expert's attestation or testimony to this effect will be sufficient to satisfy the admissibility threshold.

White Burgess provided some useful information about factors that could render evidence inadmissible. For example, the appearance of bias or the mere fact that an expert has an interest or connection with the litigation or a party is not sufficient to render the expert's evidence inadmissible. Likewise, a mere employment relationship between the expert and a party is insufficient to render the expert's evidence inadmissible. The opposing party must show that it is clear that the expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Factors that could be of concern include whether there is a direct financial interest of the expert in the outcome, or whether there is a familial relationship of the expert to a party.

Once passed the threshold test, any remaining concerns about an expert's independence or impartiality can be taken into account in the second stage (cost-benefit) of weighing the benefits and risks of receiving the evidence.

In *White Burgess*, the expert testified that she understood and was able to comply with her duty to the court and therefore meets the threshold qualification. The Supreme Court found the claim, that the accountant would incur liability if the shareholders were unsuccessful in the lawsuit, was speculative and there was no basis that the expert was hired to take a position dictated by the shareholders. In short, there was no reason to exclude her evidence as inadmissible.

What Constitutes an Expert– Saskatchewan

Rule 5-39 of Saskatchewan's Rules of Court sets out the requirements of the contents of an Expert Opinion as follows:

5-39(1) An expert's report must:
(a) contain, at a minimum, the following information or any modification agreed on by the parties:
(i) the expert's name, address and qualifications;
(ii) the information and assumptions on which the expert's opinion is based; and
(iii) a summary of the expert's opinion; and
(b) be served as required by rule 5-40.
(2) An expert's report must be accompanied by a statement of the party tendering the expert, or that party's lawyer, in Form 5-39 identifying the area of expertise in which the expert is tendered to offer an opinion.

Across Canada questions have been raised as to whether experts engaged by, or on behalf of, a party to provide opinion evidence must strictly comply with Rules of Court or whether the Rules ought to be construed more broadly to allow all witnesses with special expertise to provide opinion evidence. This issue has seemed to be settled for some time in Saskatchewan.

In *North Pacific Roadbuilders Ltd. v AECOM Canada Ltd,* 2012 SKQB 522 Justice Laing noted that under Queen's Bench Rule 284D, expert witness was not defined. The purpose of requiring a notice of expert opinion intended to be introduced at trial is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial. Documents that are relevant to a matter in trial, despite being prepared by a professional person who previously rendered service to a party, will be disclosed pursuant to the old Rule 212. Justice Laing held that the as long as the witness's evidence is restricted to what is contained in the report, there is

no reason to require a separate expert witness notice and no basis to claim prejudice due to lack of notice. The opposing party will have the information required for orderly trial preparation.

At paragraph 6, Justice Laing held:

> A distinction was drawn between a "treatment" expert and a "litigation" expert in *Buckingham v Schledt*, 2011 ABQB 786....In this case, the defence sought to call one of the medical specialists who had prepared a report on the plaintiff at the request of the plaintiff's general practitioner, which report had not been prepared for the purposes of litigation. The plaintiff had a number of objections, including the fact that no notice had been provided by the defence. McMahon J., at paragraphs 4 and 5, with respect to this argument stated: [4] I conclude that compliance with Rule 5.34 [notice requirement] is not required. Treatment performed and recommended or not recommended is necessarily based upon the physician's diagnosis, observations and testing, all of which results in his opinion. The opinion is not provided in the context of litigation. Some authorities describe this distinction as "treatment opinion" as against "litigation opinion". *Burgess v Wu*, [2003] OJ No 4826 at para 80; *Beasley v Barrand*, [2010] OJ No 1466 at para 64. [5] It is different from opinion sought from experts for the sole purpose of giving evidence at trial or to opine upon the work or opinions of others. Rule 5.34 applies to the latter only.

As the witness in *North Pacific Roadbuilders* only explained his reports and therefore was not acting as an expert witness within the meaning of Rule 284D or a professional or other expert within the meaning of s. 21 of *The Evidence Act* no special expert witness notice was required.

Westerhof v. Gee Estate, 2015 ONCA 26

In *Westerhof v. Gee Estate*, 2015 ONCA 26 ("*Westerhof*"), the Ontario Court of Appeal decided that participant experts and non-party experts may give opinion evidence without complying with Rule 53.03. In other words, a fact witness who is considered an expert may give opinion evidence without filing an expert report or fulfilling any of the other requirements normally applicable to litigation experts. The decision narrows the scope and application of the rules on experts who are engaged by a party to provide evidence including the requirement to file an expert report.

Westerhof involved a personal injury claim resulting from a motor vehicle accident. The action proceeded to trial before a jury. It was ultimately dismissed by the trial judge on the basis that the plaintiff's injuries had not met the Insurance Act threshold.

The plaintiff appealed, in part on the ground that the trial judge had erred in various evidentiary rulings that had had the effect of limiting the expert evidence that was heard by the jury. This brought into question the extent to which Ontario's rule 53.03 had to be complied with. The rule reads as follows (emphasis added):

> 53.03(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
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> ...
>
> (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:
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> 1. The expert's name, address and area of expertise.
> 2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
> 3. The instructions provided to the expert in relation to the proceeding.
> 4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
> 5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
> 6. The expert's reasons for his or her opinion, including
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> i. a description of the factual assumptions on which the opinion is based,
> ii. a description of any research conducted by the expert that led him or her to form the opinion, and
> iii. a list of every document, if any, relied on by the expert in forming the opinion.
>
> 7. An acknowledgement of

expert's duty (Form 53) signed by the expert.

In *Westerhof* the Plaintiff relied on the opinions of his treating doctors and specialists. However the treating doctors were not retained medical experts. The trial judge found that because of the wording of Rule 53; opinion evidence from the treating physicians and their records were not admissible.

On Appeal the court looked at cases that had considered rule 53.03 since its enactment in 2010. The jurisprudence revealed that trial judges drew a distinction between experts retained for purposes of the litigation, to whom rule 53.03 applied, and experts who are engaged, in some manner, in treatment and to whose evidence the rule either does not apply or applies more loosely.

The Court acknowledged that treating physicians are in a somewhat different category from other witnesses, but only in that they are in a position to provide fact evidence as to their observations of the injured plaintiff and a description of the treatment provided. Such evidence is not an opinion and therefore, rule 53.03 is not engaged. However the court observed, "[i]t is when the witnesses seek to offer opinions as to the cause of the injury, it's [sic] pathology or prognosis that the evidence enters into the area of expert opinion requiring compliance with rule 53.03." [para. 23]

Disclosure of Communication between Experts and Counsel– Saskatchewan

Saskatchewan's leading decision on disclosure of communication between experts and counsel is *Martin v. Inglis,* 2002 SKQB 24 (CanLII) ("*Martin*"). At issue in *Martin* was whether a doctor's working file, including copies of any working notes, draft reports, opinions, instructions, or correspondence between the doctor and counsel for the plaintiff should be disclosed and produced to the defendant. Here, Justice Hrabinsky concluded at paragraph 19:

> When an expert witness is called to testify at trial:
> (1) A litigant and his/her counsel do not necessarily waive all privileged documents within their possession.
> (2) Privilege is waived in respect of those facts or premises in the expert's file which have been used to base the expert's opinion and which came to the expert's knowledge from documents supplied to the expert.
> (3) The documents in their possession to be produced are those which may be relevant to matters of substance in the expert's evidence or his credibility.
> (4) As to the expert's credibility, I agree with Sopinka, Lederman & Bryant in *The Law of Evidence in Canada, supra*, at p. 671 that ". . . caution should be exercised before that becomes the basis for wide-ranging disclosure of all solicitor-expert communications and drafts of reports. . . ."
> (5) If the facts and premises were used as the basis or underpinning for the expert's opinion, the privilege would impliedly be waived.
>
> [20] I find that whether there is a privilege or not can be ascertained in two ways. Firstly, a judge can examine the documents or material for which privilege is claimed and make a determination. Secondly, counsel through cross-examination of the expert may be able to determine what, if any, documents and materials are privileged.

In light of the *Martin* decision, many in Saskatchewan would argue that draft expert opinions are generally subject to privilege and are not producible. However, in practice many practitioners seek verbal opinions from potential experts before requesting that they put their opinion to paper. The Ontario Court of Appeal decision in *Moore v. Getahun*, 2015 ONCA 55 ("*Moore*") may soon cause lawyers in Saskatchewan to change that practice.

***Moore v. Getahun*, 2015 ONCA 55**

Moore provides clarity on the issue of communications between counsel and experts. In its ruling, Ontario's Court of Appeal emphasized the professional and ethical obligations of counsel, as well as the adversarial process, including cross-examination, as safeguards to protect and ensure an expert's duty to provide objective and unbiased opinion evidence that is of assistance to the trier of fact.

The decision has clarified or reaffirmed the law on several issues, including: (1) discussions between counsel and experts regarding draft reports; (2) the production of draft reports, notes and records prepared by an expert; (3) the use of written

reports that are not in evidence; and (4) findings regarding a breach of the standard of care that was not pleaded or argued.

The expert in *Moore* was a retired orthopedic surgeon, who opined that the defendant surgeon had properly used a full circumferential cast to treat the plaintiff's broken wrist. During cross-examination it was determined that the expert had spoken with counsel before finalizing his report, in a 90-minute conference call. The expert made no substantive changes in the report after conversing with counsel.

The Court of Appeal held that communications between counsel and experts are necessary to ensure the efficient and orderly presentation of expert evidence as well as the timely, affordable and just resolution of claims. The court noted that the 2010 amendments to Ontario's Rules of Civil did not impose any new duties on experts, only codified those that had already existed in common law. The Court of Appeal commented that the trial judge's criticism was misguided and wrong. Justice Sharpe remarked at paragraph 62:

> I agree with the submissions of the appellant and the interveners that it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.

Ultimately, the court concluded that consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands his or her duties and reviewing a draft report enables counsel to ensure that the report (1) meets the requirements of the Rules, (2) addresses and is restricted to the relevant issues and (3) is written in a manner that is accessible and comprehensible.

With respect to the production of draft reports, notes and records prepared by an expert, the court held that litigation privilege applies. Therefore these items need not be disclosed or produced to the opposing party. However, since litigation privilege is not absolute, this rule is subject to two caveats:

> (a) First, the findings, opinions and conclusions, including "foundational information," must still be produced in accordance with the Rules.
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> Second, litigation privilege cannot be used to shield improper conduct. Thus, where a party can show reasonable grounds that communication by counsel with the expert interfered with the expert's duties, the court can order disclosure.

The court also confirmed that a report which is provided to the trial judge as an aide-memoire only is not in evidence and, while it can be used to cross-examine the expert on inconsistencies, it is not open to the trial judge to put any weight on anything that was not cross-examined upon. This is a matter of trial fairness. An expert is entitled to be confronted with any apparent inconsistencies and given an opportunity to respond.

Conclusion

The recent decisions from the Supreme Court of Canada and Ontario's Court of Appeal underscore one of the important roles that litigators play in the courtroom. While expert witnesses are present to aid the court in understanding technical subject matters, lawyers are a critical part of that communication. Lawyers have a duty to ensure experts understand their obligations and to ensure that experts communicate in a way that will be understood by the court. In synthesizing that language, lawyers must assess relevant details to ensure that expert reports and testimony relate to the critical issues of a case. ⚖

Footnotes:

1 *Ivan Biuk Construction Ltd. v. Kitchener (City) Committee of Adjustment*, [2000] OMBD No. 1123
2 *Kozak, supra.*
3 *R. v. Parisien*, 2011 ONCJ 354 (CanLII)
4 *White Burgess*, para 8.
5 *Ibid*, para. 24.