

The Importance of Remaining Unbiased

Canadian court reinforces principles of conduct for lawyers and their expert witnesses

BY ART LINTON



Recent court decisions in Ontario have paved the way for greater liability for expert witnesses while providing clear boundaries on the appropriate working relationship with the counsel who retains them.

IRWA members are regularly called upon to provide expert testimony before courts and tribunals. While extensive preparation is required, an expert does not typically prepare their draft in a vacuum. A certain level of communication with counsel is required. Ultimately, the hearing requires that the expert provide independent and objective evidence. So the question arises as to what amount of communication is appropriate between counsel and the expert during the drafting stage. This was an issue considered by the Ontario Superior Court of Justice earlier this year.

A controversial 2014 decision in *Moore v. Getahun* 2014 ONSC 237 left Ontario lawyers and expert witnesses in a state of conflict and uncertainty regarding the preparation and use of expert reports before courts and tribunals. A year later, clarity was provided when the Ontario Court of Appeal released the long awaited decision in *Moore v. Getahun* 2015 ONCA 55. Issued on January 29, 2015, the unanimous decision fully clarifies the relationship between counsel and experts.

The Court's Position

Two things were apparent from the Superior Court's aggressive position in this case, as well as from the thorough guidance in the subsequent ruling of the Court of Appeal. First, courts are frustrated with experts and counsel whom they believe may use the editing process to influence expert reports in favor

of their client. They have now demonstrated that they are prepared to act to sanction any perceived collusion. Secondly, the Court of Appeal has been careful to provide clear guidance to both counsel and experts as to their responsibilities regarding expert testimony. This guidance provides a standard that courts, tribunals and professional disciplinary bodies can use to assess the conduct of counsel and the expert witnesses in future cases.

Counsel and expert witnesses should now be fully alert to the possibility of court sanctions and to the danger of subsequent disciplinary action by their professional regulators should their conduct step outside the boundaries set by the Court of Appeal.

In this case, the Superior Court concluded that, "...counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable." Moreover, the court stated, "The practice of discussing draft reports with counsel is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality."

That decision gave rise to extensive concern among the litigation bar and experts who testify at trials or before tribunals. Many felt strongly that appropriate consultation between counsel and expert is essential to ensure that expert witness reports comply with the Rules, as well as the expert's common law duties. It has also been argued that effective communication with counsel helps experts understand the legal concepts at issue so they might better assist the court to integrate complex expert evidence.

On appeal, the Canadian Defence Lawyers' association asserted the ruling was "unprecedented, unsupported in law and seriously flawed." The Advocates' Society presented the court with its Principles Governing Communications with Testifying Experts and a Position Paper on Communication with Testifying Experts. The Holland Access to Justice Group argued that the ruling impaired "normal, reasonable and prudent litigation practices, would substantially increase the cost of litigation, would do a disservice to the Court in terms of hearing fulsome, well-organized, and appropriate evidence, and ultimately result in a chilling and significantly restrictive effect on access to justice."

Each of the six interveners permitted at the Court of Appeal challenged the Superior Court judgment as simply wrong. The Court of Appeal agreed, finding that, “if accepted, the trial judge’s decision would represent a major change in practice. It is widely accepted that consultation between counsel and expert witnesses ... is necessary to ensure the efficient and orderly presentation of expert evidence and the timely, affordable and just resolution of claims.”

Fair and Impartial Assistance

Courts have long emphasized the necessity for experts to testify independently and objectively, and have cautioned expert witnesses against acting, or appearing to act, as advocates for the parties that retain them. The correct role of an expert is always to fairly and impartially assist courts and tribunals with matters that fall within their areas of expertise.

In setting out the common law duties of expert witnesses, the Court of Appeal cited National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd., [1993] noting that,

- 1) 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, and

- 2) An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness... should never assume the role of an advocate.

Alleviating the Uncertainty

If it was ever unclear, there should no longer be any uncertainty that expert testimony must be scrupulously unbiased and of service to the court. Further, counsel and expert witnesses wishing to avoid sanction would be prudent to measure both their retainer and subsequent conduct against the standards set out in the Advocates’ Society’s Principles Governing Communications with Testifying Experts.

This is a helpful decision on many levels. First, it removes the chill that had descended upon all discussions between counsel and their experts. Second, the Court has clarified the counsel/expert relationship, and lastly it has reinforced the principles that call upon counsel to act both ethically and professionally in their dealings with experts and their reports. ☺



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