EXPERT OPINION EVIDENCE IN CONSTRUCTION CASES

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The production and discovery of draft opinion evidence has been the subject of much debate, varying approaches, and little appellate authority. The Construction Law Section of the Ontario Bar Association (October 4) and separately the Civil Litigation Section (October 11), have each recently presented continuing legal education programs touching on the topic. The lively discussions suggest that a consensus is far from certain.

Courts in Canada still struggle with balancing the assessment of an expert's independence with continuing to preserve litigation privilege. Although production of an expert's draft reports and other materials may provide the trier of fact with significant insight into the expert's independence, production may erode litigation privilege. Counsel retaining the expert plays an important role in maintaining expert independence while ensuring that the expert's evidence will be effective.

On the issue of independence, Canadian cases have applied the English case of *Ikarian Reefer*, [1993] 2 Lloyd's Rep 68 (Eng. Q.B.). There the English Commercial Court outlined an expert witness's duties and responsibilities. Recently, in *Dulong v. Merrill Lynch Canada Inc.* (2006), 80 O.R. (3d) 378 (S.C.J.) an expert's report was criticized for "arguing the facts and generally advocating [the expert's] client's position with respect to them throughout--similar to what one would expect from counsel's closing argument." Such concerns are particularly important for construction cases where liability and damages issues often require expert evidence.

Steps that can be taken to reduce intentional or unintentional bias include:

- Only retaining an expert with actual and perceived objectivity and independence which will not be compromised as the engagement progresses;

- Retaining an expert with the ability to marshal and incorporate evidence from both parties' perspectives;
- Having the draft report reviewed (and peer reviewed if necessary) by another professional in the expert's office (or equivalent), who should review the report from the perspective of the opposing party;
- Having the expert review their assumptions to identify alternative assumptions and consider which are more plausible/reasonable.

Issues relating to the production of and access to draft expert reports have been analyzed in recent case law.

The general trend in Ontario cases has been to preserve litigation privilege. See for example *Bell Canada v. Olympia & York Developments Ltd.* (1989), 68 O.R. (2d) 103 (H.C.J.). However, the more recent trend in Ontario has been to narrow the scope of litigation, see *Potter Station Power Co. v. Inco Ltd.* (1998), 43 C.L.R. (2d) 53 (Ont. Gen. Div.).

For a brief time, the Ontario Court of Appeal accepted some of the reasoning favouring production over broad litigation privilege. In *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 82 O.R. (3d) 229 (C.A.) Gillese J.A. called for a broad approach to disclosure. Gillese J.A. ordered production of a memorandum recording a lengthy lawyer/ expert telephone call that apparently contained foundational information for the expert's final opinion.

However, a full panel of the Ontario Court of Appeal in *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 83 O.R. (3d) 792 (C.A.) reversed Gillese J.A's. The full panel seemed to agree with Gillese J.A's analysis that had the production request been made "pre-trial", a party's right of pre-trial inquiry into foundational information would have led to the production of

the "foundational information" recorded in the lawyer/ expert discussion, but not necessarily the document.

A review of the case law of British Columbia illustrates the different approach taken by the Courts in that jurisdiction, see for example *Vancouver Community College v. Phillips, Barratt* (1987), 20 B.C.L.R. (2d) 289 (S.C.) and *Delgamuukw et. at. v. British Columbia* (1988), 55 D.L.R. (4th) 73 (B.C.S.C.).

Recently in Newfoundland, the Supreme Court Trial Division ordered two draft reports produced in *1278481 Ontario Ltd. v. Her Majesty the Queen* (unreported, August 20, 2007) in a construction dispute. The final report was produced before trial, but not the two prior drafts. The court found the creation of the reports (drafts included) failed the "dominant purpose test". In the result, the two drafts were produced. It would appear that the evolution of the expert's thinking was the subject of some interest on the court's part. Litigation was only a "factor in the revised advice on soil remediation", not the dominant purpose of the report.

In Ontario, rule changes may make a difference. The Discovery Task Force appointed by the Attorney General, in its various incarnations, has recently reported. The September 7, 2007 report from the Honourable Coulter Osborne to the Ontario Attorney General has not yet been released. Potentially on the table are amendments to Ontario Rule 53.03 to provide an expert may be examined before trial. The scope of examination could include the expert's qualifications, area of expertise and the findings and opinions set out in the expert's report. Who will bear this cost will be important- the party wishing to examine the expert should be responsible for paying any reasonable fees.

Other reform options may include consideration of a single joint expert - perhaps useful for technical matters relating to construction where this might be helpful.

This author would welcome and encourage reforms directed towards ensuring the early disclosure of independent expert reports. To some extent a "zone of privacy" will always be necessary for parties and their counsel to candidly and frankly discuss strategy with experts. Such discussions must not influence the proper role of the expert which is not that of an advocate.

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