

Regulation of Paralegals and the Conflicting Roles of Advocates and Expert Witnesses

BY J. BRADFORD NIXON

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The only persons currently permitted to act on behalf of taxpayers in municipal assessment and property tax appeals in Ontario are lawyers and paralegals who are accredited and regulated by the Law Society of Upper Canada, subject to limited exemptions for otherwise regulated professionals who are only occasional participants. Private consultants acting as agents who provide legal services and valuation expertise in assessment and property tax proceedings also must now be regulated, licensed, and subject to rules of conduct prescribed by the Law Society.

The purpose of this article is to examine the role of an advocate and the role of an expert witness, to identify the differences between the two roles, and to comment on the evolving duties and obligations of each. Much of this discussion is presented within the context of adversarial proceedings before the Assessment Review Board (ARB) in Ontario.

The discussion references the Rules of Professional Conduct made by the Law Society, particularly the new rules for paralegals who have traditionally

practised as advocates and experts in assessment matters before the ARB. This article further examines jurisprudence which distinguishes the role of the expert and the role of the advocate. Finally, this article evaluates whether the performance of both roles by a paralegal is inimical to fair and just proceedings before the board.

History

The legislature of the Province of Ontario (originally known as Upper Canada) enacted the *Law Society Act* in 1797 to regulate lawyers. The act created a legal profession which was empowered by the governing statute to self-regulate. This general power included the specific powers to control entry to the profession, to define professional standards, to establish educational requirements, and to police the profession's monopoly on practice. These powers remained the sole prerogative of the Law Society of Upper Canada (Ontario) after the creation of the Dominion of Canada that united Upper Canada (Ontario), Lower Canada (Quebec), Nova Scotia, and New Brunswick in 1867.

J. Bradford Nixon, a partner in the law firm of Walker Poole Nixon in Toronto, Ontario, practices exclusively in the field of municipal assessment and property tax on behalf of commercial, industrial, and multi-residential property owners and taxpayers. He was a member of the Ontario parliament from 1987 to 1990 and has worked in senior political staff positions.

In the late 1990s, the Law Society demonstrated an active interest in persons who provided legal services to the public without the supervision of a lawyer. These paralegals were acting as agents in various matters including criminal proceedings, matrimonial proceedings, personal injury proceedings, and transactional work (e.g. real estate) in addition to appearing as advocates before various tribunals, including the Assessment Review Board. This work was all being conducted without the direct or indirect supervision of a lawyer.

In the area of assessment and property tax matters, unregulated consultants had developed a substantial business in Ontario (and indeed much of Canada and the United States) by providing legal advice and agency services to taxpayers seeking reductions in their assessments and property taxes. To advance their client's cause, these consultants acted both as advocates and as experts before the assessment tribunals. The advocacy services provided were substantially similar to those provided by lawyers in the same field, but without the supervision or regulation applied to lawyers. In addition, the same consultants offered opinion evidence to the tribunals based upon their apparent expertise in property tax and assessment valuation matters.

The Court of Appeal in Ontario in 1999 highlighted the need to regulate paralegals generally "who are not required to have any particular training or ability." (*R. v. Romanowicz* 1999) In 2000, the provincial attorney general enlisted the Honourable Peter Cory, a recently retired justice of the Supreme Court of Canada, to make recommendations regarding persons providing legal advice and services to the public who were not educated, insured, or certified as a lawyer (Cory 2000). The provincial government subsequently legislated to extend the responsibility of the Law Society to the licensing and regulation of paralegals within its jurisdiction. Three community colleges now offer two-year diploma courses for paralegals

which are accepted by the Law Society as licensing qualification.

Law Society Regulation of Paralegals

Under amendments to the *Law Society Act* made by the Ontario legislature, the Law Society may now issue licenses which authorize persons other than lawyers (i.e., paralegals) to provide legal services in Ontario. This enabling legislation, known as Bill 14 or the *Access to Justice Act* received royal assent on October 19, 2006. Schedule C contained the amendments to the *Law Society Act*.

Subsection 1(5) of the amended act defines the conduct of providing legal services:

[A] person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.

Subsection 1(6) of the act elaborates on the definition of legal services to include a person who:

1. Gives a person advice with respect to legal interests, rights, or responsibilities of a person or another person.
2. Selects, drafts, completes, or revises, on behalf of a person:
 - i. A document that affects a person's interests in or rights to or in real or personal property; ...
 - vii. A document for use in a proceeding before an adjudicative body.
3. Represents a person in a proceeding before an adjudicative body.
4. Negotiates the legal interests, rights, or responsibilities of a person.

The Assessment Review Board in Ontario is an adjudicative body, governed by its own statute (*Assessment Review Board Act* 1990). It meets the statutory definition of a tribunal established under an act of the legislature of Ontario that is required, after the presentation of evidence or legal argument, to make a decision that affects

a person's legal rights and interests (*Law Society Act* 1990, subsection 1(1)).

The provision of legal services, when representing a person in a proceeding before an adjudicative body, includes determining what documents to serve and file in the proceeding, who to serve, and when, where, or how to serve or file a document; conducting an examination for discovery; or engaging in any other conduct necessary for the conduct of the proceeding (*Law Society Act* 1990, subsection 1(7)). Unregulated agents historically have provided all of these legal services when appearing as well as given opinion evidence as part of their advocacy services.

Law Society Rules of Professional Conduct

The central issue presented in this article is the distinction between advocates and expert witnesses. The Law Society, pursuant to its new jurisdiction to regulate paralegals, has established rules of conduct for paralegals which are very similar in most respects to its rules of conduct for lawyers who also are licensees of the Law Society. The Rules of Professional Conduct (Lawyers) (Law Society of Upper Canada 2000), and the common law jurisprudence, clearly distinguish between the role of a lawyer as an advocate and the role of a lawyer as a witness. Similar distinctions apply between the paralegal who appears before the tribunal as an advocate and the paralegal who appears as an expert witness.

The lawyer is, both by tradition and rule, considered to be a partisan advocate who is required to advance every argument on behalf of his client, resolutely and honourably (Law Society of Upper Canada 2000, rule 4.01(1)). Clients will have similar expectations of paralegals who appear on their behalf.

The paralegal rules of professional conduct prescribed by the Law Society contemplate similar obligations and restrictions on the conduct of a paralegal who appears before an adjudicative

tribunal as an advocate. Rule 4 requires that a paralegal "shall represent the client resolutely" and "raise fearlessly every issue, advance every argument, and ask every question, however distasteful, that the paralegal thinks will help the client's case." (Law Society of Upper Canada 2007, rule 4.01(1), 4.01(4))

The adversarial battleground in which the advocate works necessitates the partisanship of advocates acting on behalf of clients. Nonetheless, there are clear rules of engagement which depend upon the civil conduct of advocates as the basis for effective advocacy:

Litigation, ... whether before a court or tribunal is not a "tea party." Counsel are bound to vigorously advance their client's case fairly and honourably. Accordingly, counsel's role is openly and necessarily partisan and nothing which follows is intended to undermine those principles. But counsel can disagree, even vigorously, without being disagreeable. Whether among counsel or before the courts, antagonistic or acrimonious behaviour is not conducive to effective advocacy. Rather, civility is the hallmark of our best counsel. (The Advocates' Society, n.d., preamble)

The lawyer as advocate is expressly discouraged from advancing personal opinions or beliefs or asserting facts that are properly subject of proof, cross-examination, or challenge before the adjudicative tribunal. In other words, the lawyer who appears as an advocate in a matter is not permitted to provide expert or opinion evidence (Law Society of Upper Canada 2000, rule 4.01(1), 4.02(2)). In fact, if a lawyer has been a witness in proceedings, he or she cannot appear as advocate in any appeal from the decision in those proceedings (Rule 4.02(3)).

The paralegal rules of professional conduct, however, contemplate the paralegal appearing as a witness under strictly controlled conditions. Rule 4.04(3) specifically provides that "a paralegal who is to testify before a tribunal shall entrust

the conduct of the case to another licensee.” (Law Society of Upper Canada 2007) In other words, the paralegal as an expert witness is not permitted to appear as an advocate.

What is an Expert Witness?

The practice of an advocate before an adjudicative tribunal requires unique skills and training: experience in marshalling evidence, the organization of witnesses, the conduct of cross-examination, and the articulation of argument based upon a mixture of facts and law.

One of an advocate’s most powerful tools is opinion evidence provided by witnesses who have expertise in the matters under deliberation by the adjudicative tribunal. Opinion evidence, in the ordinary course, would not be admissible in a hearing before the court or adjudicative tribunal. However, opinion evidence from qualified experts is accepted by the courts and tribunals as an exception to the rule against hearsay which prohibits laypersons from stating in their testimony the inferences or conclusions which they have drawn from the evidence they have observed.

To properly address the distinction between a paralegal advocate and an expert witness, the definition of an expert witness needs to be considered. (See Aalto 2007; Emery and Smith 2007; Horton and Mercer 2007.)

Nearly 100 years ago, the Ontario Court of Appeal described an expert as someone who

... by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by scientific works, or by practical observation; and one who is an old hunter, and has, thus, much experience in the use of firearms, may be as well qualified to testify of the appearance which a gun recently fired would present as a highly educated and skilled guns men. ... (Rice v. Sockett 1912, 85)

More recently, Justice Dickson of the Supreme Court of Canada described the role of the expert as follows:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert’s function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert’s opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If, on the proven facts, the judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary. (R. v. Abbey 1987)

The source of the opinion, for purposes of the law of evidence, was defined by Justice Dickson as “any inference from observed fact.” (*R. v. Abbey* 1982)

The traditional explanation of expert opinion evidence is that it is a permitted exception to the hearsay rule. An alternative approach is to consider opinion evidence as evidence given by a witness in the capacity of an expert (White 1997, 15).

The courts are now somewhat more lenient in determining whether the opinion of a layperson will be heard and admitted as evidence. When considering the admissibility of a layperson’s opinion testimony, the courts have relied on what has been termed the helpfulness doctrine, that is, whether the opinion of the witness could help the court. The status of the witness as a layperson, however, will mitigate the weight and credibility given to the opinion evidence (*R. v. Graat* 1982, 284).

To explain the helpfulness doctrine, Justice Dickson in *R. v. Graat* (1982) drew the line between the opinion evidence of an expert and the opinion evidence of a layperson.

[I]t seems illogical to deny the court the help it could get from a witness’ opinion as to the degree of intoxication, that is to say

whether the person's ability to drive is impaired by alcohol. ... a non-expert witness cannot, of course, give opinion evidence on a legal issue, as, for example, whether or not a person was negligent. ... on the other hand, whether a person's ability to drive is impaired by alcohol is a question of fact, not of law. ... it is akin to an opinion that someone is too drunk to climb a ladder or to go swimming. (para. 58)

The opinion evidence offered by experts differs from any opinion evidence given by a lay witness in that the expert opinion provides something to the court which it could not obtain without the additional knowledge, training, or experience which the expert possesses. The expert witness adds value to a hearing before an adjudicative tribunal by virtue of his or her objectivity and expertise. The primary duty of an expert witness is to assist the court or tribunal in understanding and interpreting factual matters. The ultimate goal of the expert witness is to assist the court by providing an objective opinion on an issue.

To fulfill this function, the expert witness must maintain an air of objectivity and a semblance of independence from the retaining party. The expert cannot play the role of an advocate. Objectivity is obtained when the expert understands that he or she owes a degree of neutrality to the court and, thus, avoids being drawn into the role of, or being characterized as, a "hired gun" for one of the parties (*R. v. Mohan* 1994).

It is important to note that various professional or quasi-professional bodies in the assessment field impose similar obligations of independence and objectivity on their members who appear as expert witnesses. The Institute of Municipal Assessors requires opinions of value to be objective and unbiased (2007). The Appraisal Institute of Canada (AIC) imposes standards of impartiality, objectivity, and independence in the performance of appraisal assignments (Appraisal Institute of Canada 2007, sections 3.1.1, 5.2.1).

"An agency relationship implies that the individual will maximize the position of their client. Appraisal, review, and consulting services are provided on an objective, unbiased, and impartial basis, when the individual is acting as an appraiser." (section 12.10.7)

Admissibility of Expert Witnesses

The Supreme Court of Canada formulated the principles for the consideration given to expert opinion evidence in *R. v. Lavallee* (1990). The court's four-part test for evaluation of an expert's opinion has been followed in subsequent case law.

1. An expert opinion is admissible if relevant, even if it is secondhand evidence.
2. This secondhand 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 [expert] 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.

To be admitted to give expert opinion testimony, the witness must be accepted by the court and qualified as an expert. The Supreme Court of Canada decision in *R. v. Mohan* (1994) set out the principles to be considered in the employment and qualification of expert witnesses. For an expert to be admitted, the advocate is required to satisfy the court or tribunal of the following:

1. The testimony of the expert must be relevant.
2. The testimony of the expert must be necessary to assist the trier of fact.

3. There must be no exclusionary rule prohibiting admission of the expert's evidence.
4. The expert must himself or herself be properly qualified to give the opinion.

The dilemma faced by expert witnesses who rely on hearsay evidence as the basis for their expert opinion was squarely addressed by the Supreme Court in *City of Saint John v. Irving Oil Co. Ltd.* (1966). This case is of particular interest to assessors and real property valuation experts in the assessment field.

Irving Oil sought an order to bar the expert opinion evidence of an appraiser retained by the city in an expropriation proceeding. Irving sought to exclude the appraiser's opinion because "... it [was] based upon information acquired from others who have not been called to testify." (p. 414) The court clearly accepted the appraiser's opinion although it was derived from a review of property sales information which had been gathered secondhand from a variety of informants. Justice Ritchie said:

To characterize the opinion evidence of a qualified appraiser as inadmissible because it is based on something that he has been told is, in my opinion, to treat the matter as if the direct facts of each of the comparable transactions which he has investigated were at issue whereas what is in truth at issue is the value of his opinion. (City of Saint John v. Irving Oil Co. Ltd. 1966, 414)

As the court observed, to hold otherwise would necessitate a parade of supporting witnesses to provide the evidentiary basis for the expert's opinion. The "proceedings to establish the value of land would take on an endless character as each of the appraiser's informants, whose views had contributed to the ultimate formation of his opinion, would have to be included and called." (*City of Saint John v. Irving Oil Co. Ltd.* 1966, 414)

As Justice Sopinka stated in *R. v.*

Lavallee (1990, para. 97), there is a "practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in *City of Saint John*) and evidence that an expert obtains from a party to litigation touching a matter directly in issue." If the source of the information is a party, and the information is accepted from the party without examination, this damages the credibility of the witness.

If a witness is qualified as an expert witness, then the expert will be permitted to offer opinion testimony. If a witness is not qualified as an expert, then the witness will not be permitted to give opinion evidence either by oral testimony or by written report.

This point was illustrated in the recent proceedings before the Assessment Review Board in what is commonly referred to as the Bank Towers litigation (*BCE Place Ltd. v. Municipal Property Assessment Corporation, Region No. 9 and City of Toronto* 2008). The Municipal Property Assessment Corporation (MPAC), the provincial assessing authority, called as a witness the Vice President, Property Values of MPAC.

After introducing, as Exhibit #204, [his] curriculum vitae ... and reviewing the document with him, counsel for MPAC indicated to the Assessment Review Board (Board), in no uncertain terms, that MPAC was not seeking to qualify [him] as an expert witness who would give opinion evidence. ...

MPAC seeks to introduce what counsel characterizes as a witness statement Counsel for the taxpayers [Bank Towers] object to this document being made an exhibit in this hearing. It is the position of the taxpayers that while MPAC is not seeking to qualify [the Vice President, Property Values] as an expert who would be permitted at law to give opinion evidence, the "witness statement" is in fact an expert's report, filled with opinions. (BCE Place Ltd. v. Municipal Property Assessment Corporation, Region No. 9 2007, DM 181)

MPAC sought to characterize the report as a “witness statement.” The City of Toronto sought to characterize [the MPAC employee] as a “special witness,” because he was the “Chief Assessor.”

The Assessment Review Board rejected these efforts by MPAC and the city. The board reiterated:

A witness who has been qualified by the board to give expert evidence on a particular subject may provide admissible opinion evidence on that subject. Witnesses who are not so qualified are not so entitled. (BCE Place Ltd. v. Municipal Property Assessment Corporation, Region No. 92007, DM 181)

The Assessment Review Board found that the 52-page report compiled by MPAC’s employee was not a “witness statement,” but rather “for all intents and purposes, an expert’s report replete with opinion evidence.” (*BCE Place Ltd. v. Municipal Property Assessment Corporation, Region No. 92007, DM 181*)

Given that the witness statement’s author was not qualified as an expert, the Assessment Review Board refused to receive his expert report into evidence.

The board finds that the “tenor and substance” of [the] witness statement are objectionable as [the author] argues facts and law, criticizes opposing witnesses, with no basis in expertise, criticizes a decision of the Ontario Court of Appeal, which was not reviewed by the Supreme Court of Canada, and generally advocates MPAC’s position. Appropriately qualified witnesses for MPAC, for whom complete reports were furnished to counsel for the taxpayers and the board, will be permitted to give opinion evidence for MPAC. Counsel for MPAC will continue to advocate MPAC’s position. [MPAC’s Vice President, Property Values] will be permitted to do neither. (BCE Place Ltd. v. Municipal Property Assessment Corporation, Region No. 92007, DM 181)

Thus, the witness statement was not admitted into evidence because it was,

in fact, an expert report. That is the threshold question which was raised by the taxpayers. If the expert report had been admitted into evidence, the next question would have been the weight to be attached to the report given its apparent advocacy. The law is clear—an expert’s report “cannot be advocacy dressed up as expert opinion.” (*Fraser River Pile & Dredge Ltd. v. Empire Tugboats Ltd.* 1995, 126)

The primary grounds of contesting the admissibility of expert opinion evidence in proceedings before the Assessment Review Board, aside from the relevance test and the absence of exclusionary rules test, are the principles of necessity and proper qualifications.

Necessity to the Trier of Fact

The Supreme Court of Canada in *R. v. Mohan* (1994) replaced the earlier standard of “helpfulness” established by *R. v. Graat* (1982) with the requirement of “necessity.” The Court stated:

The word “helpful” is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information “which is likely to be outside the experience and knowledge of a judge or jury.” ... the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. ... the subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it if unassisted by persons with special knowledge. (R. v. Mohan 1994, 429)

The opinion evidence must be considered necessary for the decision maker to render a correct judgment. The Divisional Court will normally defer to the special expertise of the Assessment Review Board in these matters if the decision of the Assessment Review Board is reasonable. This practice reflects the “pragmatic and functional” approach to

judicial review adopted by the Supreme Court of Canada. Therefore, an applicant must demonstrate that a decision was clearly wrong or unreasonable to succeed on the appeal in a proceeding (*Canada (Director of Investigation & Research) v. Southam Inc.* 1997).

However, to look at the issue another way, if the adjudicative tribunal has sufficient expertise and special knowledge, it is arguable that the opinion evidence of the expert “is superfluous and thus is unnecessary.” (Sopinka, Lederman, and Bryant 1999, 620) This contention raises a seeming contradiction of the “necessity” of an expert witness testifying before a specialized tribunal when that witness is often giving expert evidence on the specific issue upon which the tribunal is expected to possess special knowledge and expertise (e.g., current value). This question arises in determining the level of review of the tribunal using the “pragmatic and functional” approach.

Properly Qualified Expert

The Court in *Mohan* also provided a definition of a “properly qualified” expert as a person who “is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.” (p. 431)

A lack of experience or practical training is not a bar to the admissibility of expert evidence: such a deficiency goes to the weight to be given to the expert’s testimony. Based on the jurisprudence, the threshold for admissibility of an expert appears to be not high. (McLean (Litigation Guardian of) v. Seisel 2004)

The Assessment Review Board in Ontario recently addressed this issue during an interlocutory motion in the Bank Tower appeals (*BCE Place Ltd. v. Municipal Property Assessment Corporation, Region No. 9 2007*). MPAC sought to have the Assessment Review Board qualify a witness as “... an expert in real estate market and financial analysis and commercial

property valuation. ... who is qualified to offer opinion evidence on the fee simple, if unencumbered value ...” of the subject properties. The board said:

[The proposed witness] acknowledged that he had not taken courses offered by the Institute of Municipal Assessors (“IMA”), the International Association of Assessing Officers (“IAAO”), or the Appraisal Institute of Canada (“AIC”). He had no designation from any body in either real property valuation or real property assessment. He was not a chartered financial analyst. He had not taught any courses in commercial property valuation. He had not published any articles in the area of commercial valuation.

In its conclusion, however, the board found:

“... that the fact that [he] lacked specific education or professional designation in the areas of commercial property appraisal or commercial property assessment is irrelevant to [his] qualification ... as an expert or to the admissibility of his evidence. (BCE Place Ltd. v. Municipal Property Assessment Corporation, Region No. 9 2007, DM 184)

The board acknowledged “that the subject matter on which [the witness] intends to testify—that is the property valuation of a bank tower—is a matter outside the knowledge of an average trier of fact.” Put another way, “ordinary people are unlikely to form a correct judgment about it, if unassisted by persons who have special knowledge.” (*R. v. J.-L.J.* 2000)

On the facts, the Ontario Assessment Review Board found that although the witness had not acquired any special or peculiar knowledge through study, he had

“... gained initial experience in commercial property valuation during his tenure at Laventhal & Horwath, Price-Waterhouse, and Arthur Andersen. That experience was obtained between 14 and

20 years ago. While the board finds that such experience does not demonstrate currency with the required subject matter, the valuation of the bank towers, this lack of currency goes to weight, not admissibility.

[His] more recent work demonstrates that he has experience in a wide variety of areas, with a particular focus on market impact studies relevant to the development of new shopping centres and the valuation of airport properties. While the board finds that shopping centres and airports differ in many critical ways from the AAA bank towers, working on the development, privatization, or valuation of such properties has given [him] relevant experience, which would permit him to offer his opinion in this hearing. [He] has experience deriving market rents, and, in utilizing an income approach to valuation, he has worked with capitalization rates. On this evidence, he has specifically valued properties on a fee simple, if unencumbered basis. Therefore, the board qualifies [the witness] as an expert in the real estate market and financial analysis in commercial property valuation, who may offer opinion evidence on the fee simple, if unencumbered value of the subject properties. (BCE Place Ltd. v. Municipal Property Assessment Corporation, Region No. 9 2007, DM 184)

However, having qualified this witness, the board reiterated that consideration would have to be given to the relative strength of the various experts' evidence in terms of professional qualifications and background.

The board will take into account whether an expert witness has a relevant professional designation, in determining the weight, which will be accorded to opinion evidence in this hearing. (BCE Place Ltd. v. Municipal Property Assessment Corporation, Region No. 9 2007, DM 184)

In the end, the board established a low threshold for admissibility apparently based on its conclusion that the witness'

opinion derived from his special knowledge might be helpful.

Challenges to Credibility of Expert Evidence

The expert evidence adduced before an adjudicative tribunal is always subject to its scrutiny. The approach of courts to the independence and utility of experts is evolving. The courts, on many occasions, have expressed strong reservations about the independence and objectivity of expert witnesses. These concerns have resulted in some scepticism and, indeed, cynicism as to the value of the opinion offered. As stated in Horton and Mercer (2004),

Often, an expert is put forward to clothe the inferences, even speculations, a party would like the trier of fact to adopt with a measure of legitimacy and objectivity, such extrapolations from provable facts would otherwise possess. This is a serious issue as to whether such evidence is unhelpful, or even dangerous.

The English Court of Queen's Bench has set seven principles to guide expert witnesses in their duties and responsibilities. These principles were articulated by the court after an 87-day trial wherein most of the court's time was consumed hearing conflicting evidence of experts as to the cause of a fire which broke out in the engine room of a grounded ship—the *Ikarian Reefer* (*National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd.* 1993).

The principles are:

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.
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 in the High Court should never assume the role of advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth, and nothing but the truth without some qualification, that qualification should be stated in the report.
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

Although the commercial court's decision was ultimately reversed on other grounds on appeal, the principles it espoused relating to the duties and responsibilities of expert witnesses was affirmed (*National Justice Compania Na-*

vera S.A. v. Prudential Assurance Co. Ltd. 1995).

Expert witnesses detract from their appearance of objectivity when their testimony exhibits personal animus or bias, a pecuniary interest in the litigation, or partisan advocacy. Each of these conditions will lead the court or tribunal to conclude that the independence and objectivity of the expert witness is compromised and that less weight should be given to the opinion evidence.

Personal Animus or Bias

In investigating a charge of misconduct against a member doctor, the professional discipline committee determined that some weight should be given to the expert's testimony "because of his qualifications, *but less than might have been given* if it were not for the bias he brought to the proceedings." (author's emphasis) (*Huerto v. College of Physicians & Surgeons (Saskatchewan)* 1999) On appeal, the court overturned the disciplinary committee's decision to accept the expert evidence and noted the personal animus of the witness:

This witness, for whatever reason, was far from an objective expert witness, and was simply unwilling to consider any modification in his initial and stated opinion, even when the factual assumptions upon which that opinion was based was successfully challenged. It is my conclusion that no reasonable tribunal could with any confidence have given any weight whatsoever to his opinion evidence. (Huerto v. College of Physicians & Surgeons (Saskatchewan) 1999)

Personal animus to one party may be alternatively viewed as bias in favour of the other party. In the case of *McNamara Construction Co. v. Newfoundland Transshipment Ltd.* (2002), Justice Orsborn of the Newfoundland Supreme Court observed in a decision on a motion regarding expert evidence:

I do believe that when reporting as an expert, the expert and the report, if it is

to be of assistance, do require a demonstration of a measure of objectivity and independence, and that is an objectivity and independence which flows from being true to the particular discipline involved. The expert of the report should not be so identified with the client's case as to change from being an assistant to being an advocate. (McNamara Construction Co. v. Newfoundland Transshipment Ltd. 2000, para. 4)

In the decision at trial, the expert witness retained by the plaintiff was severely criticized and the plaintiff's case was ultimately dismissed. The court held that the expert testimony at trial was partisan advocacy and of limited value. Justice Orsborn remarked:

At the outset, I must observe that [the expert's] demeanour in the witness box did not enhance the weight of her evidence. She was often defensive and argumentative, and did not demonstrate the objectivity the court is entitled to expect of an expert witness. Also, on a number of occasions, she could give no satisfactory explanation for a step in, or aspect of her calculations or methodology; at other times, I found her evidence contradictory and confusing. (McNamara Construction Co. v. Newfoundland Transshipment Ltd. 2002, para. 804)

These comments clearly demonstrate the damage caused to a party's position by a biased witness. The witness who becomes so tied to the correctness of his or her opinion and the correctness of his or her client's cause will appear defensive. This conduct will be inferred by the court to be animosity to the other party's cause (and perhaps to the court itself).

How the conduct and demeanour of expert witnesses impacts the opinion of the trier of fact was clearly illustrated in the recent decision of the Assessment Review Board in the Toronto Hilton appeal (*Hilton Canada Inc. v. MPAC and City of Toronto* 2006). The presiding member

of the board commenced his review of the evidence received from the respective witnesses for the taxpayer and MPAC as follows:

The board found [the hotel's expert] to be an impressive witness, who was clearly an expert in his field, and who answered questions with candour, confidence, and courtesy. ...

The board found [MPAC's expert] to be an opinionated, inflexible, and intolerant witness, who was far from forthright under cross-examination. The board places little weight on his opinions regarding the new concepts and methodologies. (para. 23)

The board preferred the evidence of [the taxpayer's expert] to that of [MPAC's expert].

Pecuniary Interest

The source of the expert witness' retainer raises a difficult issue because the court may infer that the retainer or the promise of future retainers induced the expert to provide a favourable analysis. This inference suggests a conflict with the expert's objectivity and independence and represents a basis for attacking the credibility of the expert witness. Justice Goldie of the British Columbia Court of Appeal, observed:

[W]here ... an expert witness [is] permitted to express opinions, there is room for concern over his/her disinterest in the outcome of the litigation. I am not referring to bias or even apprehension of bias. I am referring to what [Lord Justice] Fletcher Moulton in Lovell & Christmas Ltd. v. Wall (1911, 91) described as the fact that honest people naturally intensify a little in the direction in which their interests point. This is a matter, then, that affects the weight to be given to the evidence of this witness. (Lee v. Swan 1996, 30)

Other courts have been more critical and direct in their rejection of an expert witness when there is a close or continuing financial relationship between the expert and the client. Mr. Justice Farley

of the Ontario Superior Court (Commercial Court) refused to qualify an expert witness in *Bank of Montreal v. Citak* (2001) after the witness admitted that he always took the position as an advocate for his client, that he was paid a good fee, and that part of his fee was contingent upon the outcome of the case before the court. The witness, who the judge described as a “co-venturer” because of the contingency arrangement, had lost his neutrality and objectivity. Mr. Justice Farley said:

Experts must be neutral and objective, to the extent that they are not, they are not qualified to give expert opinions. ...

The terms of engagement are not appropriate for an expert witness who is required to be objective and neutral. ...

While he may not appreciate that result, the fact is that he [i.e., the witness] had lost his neutrality and objectivity. (para. 6–7)

A harsh judgment, perhaps. However, it arose from the judge’s scrutiny of the conduct of the witness who had adopted facts and assumptions without analysis. An expert’s opinion falls short of the required standard of independence and objectivity when he or she has simply regurgitated the client’s opinion and relied solely upon facts the client provided.

The absence of critical analysis and the avoidance of critical issues can have a devastating impact. In *Bank of Montreal v. Citak* (2001), Mr. Justice Farley rejected the expert’s opinion, in part, because of just these circumstances:

As to the quantification elements of [the expert’s] opinion, it is replete with the adoption of facts and assumptions related to him by Mr. Citak and others and from documents [the expert] has obtained from litigation production. These figures are in essence merely “lifted” from their source without analysis. [The witness] has not used any expertise in opining as to quantification. Rather, in essence he has just provided an arithmetic assembly of components given to him by others. (p. 3)

Justice Feldman, in *Interamerican Transport Systems Inc. v. Canadian Pacific Express and Transport Ltd.* (1995), explained the basis for her judicial scrutiny of the conduct of an expert witness:

*I also accept the submission of counsel that in weighing [the expert’s] opinion evidence, the court must consider the fact that the defendant is a client of his from which he would like to receive more work. An expert witness is called to provide assistance to the court in understanding matters which are beyond the expertise of the trier of fact. Such a witness is not to be an advocate for one party, but an independent expert. Expert witnesses are of course paid a fee by the party calling them, which in itself may be considered to affect their independence. **The court will examine the demeanour of an expert in the way the evidence is given, in particular whether the expert takes on the role of an advocate for one side, or remains objective, in weighing the evidence and attributing value to the opinion. If the expert does adopt the attitude of a neutral, then the fact he is being paid, or that the defendant is his client, will cause little or no concern, but that will not be the case if he appears to lose his neutrality. In that case the value of his evidence can diminish significantly.** (author’s emphasis)*

Independence and Objectivity

As previous discussion has illustrated, the jurisprudence is replete with commentary regarding the essential requirement that an expert witness be independent and objective. Otherwise, the witness loses credibility and the court gives little or no weight to the opinion evidence. The admissibility of the testimony from an expert witness may be challenged by legal counsel or the paralegal advocate when the witness is called, or the testimony may be criticized after it has been received.

In a prosecution of a company under the *Ontario Water Resources Act* (1990), the trial court prohibited an expert witness employed by the Ministry of

the Environment from testifying as a witness for the Crown. On a motion for non-suit, the trial judge had rejected the proposed expert on the ground that he lacked independence from the ministry or was partial to its case. As the judge explained,

[The proposed expert witness] is not only employed by the Ministry of the Environment, but is attached to and intimately concerned with the day-to-day operations involving investigations and enforcement by instructions to and education of other members of the branch and including experts. ...

Basically, the bottom line here is that there is not the separation between [the expert witness] and the Crown/Prosecutor that ensures the vital appearance of impartiality. He will not, therefore, be permitted to testify as an expert. (R. v. Inco Ltd. 2006, para. 43)

This decision by the trial judge was overturned on appeal. The appeal court remitted the matter back to the trial judge saying:

[T]he decision on whether to reject this proposed witness as an expert should only be made after a full voir dire on the proposed evidence. ...

[T]he prohibition against expert witnesses assuming the role of advocate is well founded in case law, but has not been extended to a prohibition against qualifying a witness as an expert merely because that witness is employed by a party to the litigation. The mere fact that the proposed expert is employed by the party can be taken into account when the trial judge assesses the weight and value of the evidence. (para. 52)

The requirement that an expert witness be independent from the adversarial battleground is clearly articulated in the case of *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998) in which the proposed expert had previously been an advocate for the

defendant insurer (Kansa) against the plaintiff insured (Fellowes, McNeil). The Plaintiff was alleged to have negligently represented the Defendant in a legal proceeding. The defendant insurer (Kansa) also had a counterclaim against the plaintiff insured (Fellowes, McNeil) for misrepresentation. The advocacy by the proposed expert witness related to his prior retainer by the defendant insurer (Kansa) to investigate the claims of negligent conduct by the plaintiff (Fellowes, McNeil) and he represented the defendant insurer (Kansa) as counsel in those proceedings, regarding the alleged error of the plaintiff law firm. The insurer then sought to have the investigating counsel called as an expert witness to opine as to the negligence of the insured plaintiff.

Judge E. MacDonald said:

Experts must not be permitted to become advocates. To do so would change or tamper with the essence of the role of the expert, which was developed to assist the court in matters which require a special knowledge or expertise beyond the knowledge of the court. In this case, the question is whether the conduct of Fellowes, McNeil fell below the standard for reasonably competent solicitors handling complex insurance matters. If I look to only two of the seven duties and responsibilities of experts testifying in civil cases that are laid out in National Justice Compania Naviera S.A. v. Prudential Assurance Co. (1993, 81), I have to conclude that this would not be a case for [this individual] to assume the role of an expert. These duties are: 1) Expert evidence presented to the court should be, and should seem to be, the independent product of the experts uninfluenced as to the form or content by the exigencies of litigation. 2) 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 the role of advocate. (p. 460)

In the Assessment Review Board setting, the opinion of an appraiser, called by a local municipality to respond to an appeal on the value of contaminated lands, was roundly condemned. The board noted that he “did not develop an opinion of site value, rather he relied on MPAC’s land table for uncontaminated land” and simply adopted structure values from an engineer’s report, and he failed “to take a ‘step back’ and consider the value in exchange of the lands in their totality. ...” Moreover, despite the fact that the witness was an accredited appraiser, the board was not satisfied that the reports met the standards of the AIC.

The Assessment Review Board concluded that the testimony of the appraiser made

... it clear that his report cannot be accepted as within the standards of the Appraisal Institute [of Canada] and that he has simply restated MPAC’s land values and [the engineer’s] valuation of the structures. (Corporation of the City of Elliot Lake v. Denison Mines Limited and MPAC et al. 2004)

Conclusion

The fundamental conflict between the role of an advocate (lawyer or paralegal) and the role of an expert witness will receive much attention at the Assessment Review Board in the next few years. The primary duty of an expert witness is to the board (*Fenwick v. Parklane Nurseries Ltd.* 1996; *Interamerican Transport Systems Inc. v. Canadian Pacific Express and Transport Ltd.* 1995, para. 61). If a witness is to offer opinion evidence on current value and classification in assessment matters, he or she will need to be qualified as an expert and demonstrate his or her independence and objectivity to the board.

Then Justice MacFarland commented in *Fenwick v. Parklane Nurseries Ltd.* (1996) that:

Courts traditionally afford expert witnesses a great deal of respect. This is so

because these persons possess an expertise in a particular area of endeavour where lay persons require assistance. The hallmark of an expert witness is that he or she exercise an independent professional judgment in their assessment of the facts of a given case. Where there is any suggestion that a witness who is proffered as an expert has not that professional independence but has rather simply taken on the cause of the client who pays the bills, a court will be most reluctant to place great weight on the opinions of that expert. (para. 35)

I believe the board will accept that a witness is retained or employed by a party to the proceedings to give opinion evidence. The expert witness can address and mitigate allegations of bias, conflict, and lack of neutrality by his or her scrupulously neutral conduct. I believe the board will understand the natural desire of a witness to receive more work from the party which has retained the witness. I do not expect the board will reject the expert out of hand for these reasons. However, the board will scrutinize the demeanour and conduct of the witness to ensure there is no personal animosity, no pecuniary interest in the outcome, and a sufficient measure of independence and objectivity.

Current practice before the board, whereby tax agents and assessors advocate positions by providing opinions regarding current value and classification without challenge by opposing advocates to their independence and objectivity, will not continue. An example of those current advocacy practices was explored in cross-examination of the assessor in the Bank Tower appeals (*BCE Place Ltd. v. Municipal Property Assessment Corporation, Region No. 9, and City of Toronto* 2008), when the assessor asserted that he would negotiate and, if successful, appear at the hearing tribunal with his judgment and independence intact.

An important question which remains is whether a consultant or assessor who

has prepared pleadings or participated in negotiations related to an appeal can be transformed into an expert witness in the same appeal. The rules of conduct for paralegals clearly suggest not (Law Society of Upper Canada 2007, rule 4.04(3)). Moreover, the jurisprudence indicates not (for example, *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), endnote 45).

Whether an expert witness (either assessor or agent), who routinely appears on behalf of a particular client, or a particular party (MPAC, the municipality, or assessed persons, for instance), can be qualified as an expert without successful challenges to his or her independence and objectivity depends entirely on the witness. The measure of independence is tested by cross-examination. The answers given by the witness will guide the decision of the trier of fact, particularly when the board or court is required to choose between conflicting reports. In *Amertek Inc. v. Canada Commercial Corp.* (2002), Justice O’Driscoll asks what opinion evidence “should carry the day?” After reviewing the case law (referenced at endnotes 43, 45, and 49 in the opinion), he observed:

[The Plaintiff’s expert] prepared his reports and gave his evidence in a very professional manner—“you asked for my expert opinion on the topic, here it is, let the chips fall where they may.” He has no links or ties with any of these litigants In my view, [Defendant’s expert’s] field and depth of learning are not as vast as [the Plaintiff’s expert]. Moreover, it is troubling that [he] has ties to the client who called him as a professional witness. Since 1985, [he] has been U.S. legal counsel to [the Defendant] in at least fourteen (14) U.S. cases and he testified that he saw [the Defendant] as a valuable client and a source for future work referrals. ... Hopefully, it was only because this was his maiden voyage that [Defendant’s expert] strayed from the role and path of the expert witness and took on the role of advocate when, on two

occasions, he commented on the evidence of [a witness] by saying: “That does not ring true with me.” (para. 449)

In the end, Justice O’Driscoll chose the opinion of the Plaintiff’s expert.

The fact that a witness may have been retained or employed by a particular party (such as taxpayers, municipalities, or the assessment corporation) over the years, does not of itself transform a witness into an advocate. The court or tribunal will scrutinize the demeanour of the witness, and his or her opinion, to determine issues of credibility and the weight to be attached to the evidence. The court or tribunal will evaluate the expert’s testimony against other expert testimony and by the test of common sense.

Ultimately, the Assessment Review Board may wish to provide guidelines or rules regarding the conduct of experts and the contents of expert reports. Some adjudicative tribunals have already instituted rules for the conduct of expert witnesses (Environmental Review Tribunal (Ontario) 2007).

The report of the Civil Justice Reform Project in Ontario (chaired by the Honourable Coulter A. Osborne, former Associate Chief Justice of Ontario), suggested possible options for reform including a requirement that experts affirm that their duty is owed to the court, not to a particular party (Osborne 2007). The Federal Court of Australia has issued general guidelines for experts that instruct that the paramount obligation of the expert is to the court. The Explanatory Memoranda section should prove useful to potential expert witnesses (Federal Court of Australia 2008).

In conclusion, the expert witness cannot be an advocate. To avoid characterization as an advocate, the expert witness will need to not only work strenuously to be, but also maintain the appearance of being, independent and objective. Although it may mean that the paralegal who acts as an advocate in assessment appeals will have diminished opportunities

in the future to be qualified as an expert and provide opinion evidence at Assessment Review Board hearings, he or she will have to decide which role to assume and abide by the duties and responsibilities assigned by the Law Society and the courts to that chosen role.

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