

Paralegal Advocacy and Expert Witnesses

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J. Bradford Nixon
Walker Poole Nixon LLP
Barristers & Solicitors
5160 Yonge Street, Suite 515
Toronto, ON M2N 6L9
416-225-5160

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Paralegal Advocacy and Expert Witnesses

The purpose of this paper is to discuss the role of an advocate and the role of an expert witness in the context of adversarial proceedings before an adjudicative tribunal such as the Ontario Assessment Review Board, to identify the differences between the two roles, and comment on the evolving duties and obligations of each. Recent legislation in Ontario regulating paralegal representation of property owners is the occasion of this discussion, however, the definition and distinction of the two roles (partisan advocate and objective expert witness), is a long-standing foundation of the common law.

The legislative definition of former lay advocates as paralegals brings this matter to a head. The paper concludes that persons who act as advocates in assessment appeals will have diminished opportunities in the future to be qualified as experts and provide opinion evidence at Ontario Assessment Review Board hearings.

Historic practice before many administrative tribunals, including the Assessment Review Board in Ontario, permitted representatives of taxpayers and assessors to provide both evidence and submissions - in other words, to perform as expert witnesses and advocates. The recent legislation introduced by the Attorney General and enacted by the Ontario Legislature to regulate the paralegal activity of persons representing taxpayers before administrative tribunals has provoked this discussion. Representatives of property owners must either be lawyers or licensed paralegals as a consequence of this legislation. The paralegals, who formerly performed as both advocate and expert witness will be forced to choose their role: they cannot wear two hats.

This discussion begins with reference to the new Rules of Professional Conduct made by The Law Society of Upper Canada ("LSUC"), for paralegals who have practised as both advocates and expert witnesses. These new rules are similar in many respects to the already existing Rules of Professional Conduct for lawyers.

LSUC Regulation of Persons who Provide Legal Services

Recent amendments to the *Law Society Act* in Ontario have extended the jurisdiction of the LSUC to include the responsibility for regulation of paralegals. "An Act to Promote Access to Justice" ("Bill 14") received royal assent on October 19, 2006. Schedule "C" to Bill 14 contained amendments to the *Law Society Act*.¹

Bill 14 granted authority to the LSUC to establish and issue licenses to persons who would be authorized to provide legal services in Ontario (ie. a "paralegal"). 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 provision of legal services, when representing a person in a proceeding before an adjudicative body, includes determining what documents to serve and file in a proceeding, who to serve, 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.²

The Assessment Review Board in Ontario, which is governed by its own statute³, is an adjudicative body. It fits within the definition of an adjudicative body ie. a tribunal established under an act of the Legislature of Ontario⁴ that is required after the presentation of evidence, or legal argument to make a decision that affects a person's legal rights and interests. The scope of this paper addresses paralegal representation of property owners in assessment appeals. The scope of the amendments to the *Law Society Act* addresses all persons who provide legal services to another person.

Rules of Professional Conduct for Paralegals

The LSUC, pursuant to its new jurisdiction to regulate paralegals, has established rules of conduct for paralegals which are very similar in most respects to the rules of conduct previously prescribed for lawyers who are also licensees of the LSUC. At this time, employees of property owners, municipalities and the assessing authority (ie. the Municipal Property Assessment Corporation ("MPAC")), are exempted from the licensing requirements. However, it is a central thesis of this paper that those persons, like the paralegals, are not exempted from the common law obligation to separate the functions of an advocate from an expert witness.

The LSUC Rules of Professional Conduct, 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 to 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.⁵ Clients will have similar expectations of paralegals who appear on their behalf.

The paralegal rules of professional conduct prescribed by the LSUC 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.”⁶

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 civil conduct of the 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.”⁷

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 as advocate is not permitted to provide expert or opinion evidence.⁸

The paralegal rules of professional conduct contemplate the paralegal appearing as a witness, however, 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.”⁹

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

In order to properly address the distinction between a paralegal advocate and an expert witness, the definition of an expert witness needs to be considered.¹⁰

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 if the appearance which a gun recently fired would present as a highly educated and skilled guns men. . . ”¹¹

More recently, Dickson J., 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.”¹²

The source of the opinion, for purposes of the law of evidence, was defined by Dickson J., as “any inference from observed fact.”¹³

The traditional explanation of expert opinion evidence is it is a permitted exception to the hearsay rule. An alternative approach is to consider the opinion evidence as evidence given by a witness in the capacity of an expert.¹⁴

The courts are now somewhat more lenient in determining whether or not the opinion of a layperson will be heard and admitted as evidence. The “helpfulness” doctrine (ie. whether the opinion of the witness could help the court) may allow the opinion statements of a layperson into evidence, however, the status of the witness as a layperson will mitigate the weight and credibility to be given to the opinion evidence.¹⁵

Dickson J., has drawn the line between the opinion evidence of an expert and the opinion evidence of a layperson, in order to explain the helpfulness doctrine:

“ . . . it 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. . .”

The opinion evidence offered by experts differs from any opinion evidence given by a lay witness in that the expert opinion is not something which the Court could reach without the additional knowledge, training or experience which the expert possesses.

The expert witness adds value to the hearing before the adjudicative tribunal by virtue of his/her objectivity and expertise. The primary duty of an expert witness in a hearing is to assist the court or tribunal in understanding and interpreting factual matters. The ultimate goal of the expert witness is to give an objective opinion on an issue to assist the court. The expert cannot play the role of an advocate.

In order to fulfill this function, the expert witness must maintain an air of objectivity and a semblance of independence from the retaining party. Objectivity is obtained if the expert understands that he owes a degree of neutrality to the court and, therefore, avoids being drawn into the role of, or being characterized as, a “hired gun”¹⁶ for one of the parties.

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 appears as expert witnesses. The Institute of Municipal Assessors requires opinions of value to be objective and unbiased.¹⁷ The Appraisal Institute imposes standards of impartiality, objectivity and independence.¹⁸

Contesting Admissibility of Expert Witnesses

In order to be admitted by the court 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 set out principles to be considered in the employment and qualification of an expert witness. In order for the expert to be admitted, the advocate will be 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.
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.”¹⁹

The Supreme Court subsequently interpreted these principles in R. v. Lavallee which provides the test followed in subsequent case law. The four part test is as follows:

- “1. An expert opinion is admissible if relevant, even it is based on 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."²⁰

The dilemma faced by expert witnesses who rely on hearsay evidence as the basis for their expert opinion has been squarely addressed by the Supreme Court in City of Saint John v. Irving Oil.²¹ This case is of particular interest to assessors, real property valuation experts in the assessment field.

Irving Oil sought an order to bar the evidence of an appraiser retained by the City to give expert opinion evidence 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." 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.

Ritchie J. 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."²²

To hold otherwise would require a parade of supporting witnesses to be called 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."²³

As Sopinka J. said in R. v. Lavallee, 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."²⁴ 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 bank tower proceedings before the Assessment Review Board. In that case:

"The Municipal Property Assessment Corporation (MPAC) called as a witness Lawrence Hummel, Vice President, Property

Values, MPAC. After introducing, as Exhibit #204, the curriculum vitae of Mr. Hummel 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 Mr. Hummel as an expert witness who would give opinion evidence.

...

MPAC seeks to introduce what Counsel characterizes as a witness statement of Mr. Hummel. Counsel for the taxpayers 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 Mr. Hummel 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.”²⁵

MPAC sought to characterize the report as a “witness statement”. The City sought to characterize Mr. Hummel 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.”²⁶

The Assessment Review Board found that Mr. Hummel’s 52 page report was not a “witness statement”, but rather “for all intents and purposes, an expert’s report replete with opinion evidence.”²⁷

Given that Mr. Hummel was not qualified as an expert, the Assessment Review Board concluded by refusing to receive into evidence the expert report of Mr. Hummel:

“The Board finds that the ‘tenor and substance’ of Mr. Hummel’s witness statement are objectionable as Mr. Hummel 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. Mr. Hummel will be permitted to do neither.”

Thus, the witness statement was not admitted into evidence because it was, in truth, 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.”²⁸

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 Mohan replaced the earlier standard of “helpfulness” established by R. v. Abbey with the requirement of “necessity” by stating that:

“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 do 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.”²⁹

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”.³⁰

The opinion evidence to be provided by the expert must be necessary for the decision-maker to make a correct judgment. The Divisional Court will normally defer to the special expertise of the Assessment Review Board so long as the decision of the Assessment Review Board is reasonable. This reflects the “pragmatic and functional” approach to judicial review adopted by the Supreme Court of Canada. Thus, for the Applicant to succeed on the appeal in a proceeding, it must show that the decision is clearly wrong or unreasonable.²⁹

One of the issues that has always fascinated me is the “necessity” for an expert witness to testify before a specialized tribunal when the witness is giving expert evidence on the specific issue upon which the tribunal is expected to possess special knowledge and expertise (eg. current value). It arises in determining the level of review of the tribunal using the “pragmatic and functional” approach.

Properly Qualified Expert

The Court in Mohan described 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.”³²

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.³³

The Assessment Review Board recently addressed this issue in an interlocutory motion in the bank tower appeals.³⁴

MPAC sought to have the Assessment Review Board qualify Jeffrey Climans 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:

“Mr. Climans 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 conclusion, the Board found:

“. . . that the fact that Mr. Climans lacked specific education or professional designation in the areas of commercial property appraisal or commercial property assessment is irrelevant to the qualification of Mr. Climans as an expert or to the admissibility of his evidence.”

The Board acknowledged “that the subject matter on which Mr. Climans 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.”³⁵

On the facts, the Assessment Review Board found that Mr. Climans:

“. . . gained initial experience in commercial property valuation during his tenure at Laventhal & Horwath, PriceWaterhouse 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.

Mr. Climans 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 Mr. Climans relevant experience, which would permit him to offer his opinion in this hearing. Mr. Climans 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 quantifies Mr. Climans 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.”

However, having qualified Mr. Climans, the Board reiterated that consideration would have to be given to the relative strength of the various expert’s evidence in terms of professional qualifications and background and said:

“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.”

In the end, despite the Board established a low threshold for admissibility based on an apparent conclusion that the Board believed that Mr. Climans’ opinion based on his special knowledge might be helpful.

Challenges to Credibility of Expert Evidence

The expert evidence adduced before an adjudicative tribunal is always subject of scrutiny by the tribunal. The approach of courts to the independence and utility of experts is evolving. The courts, on many occasions, have expressed strong reservations regarding the independence and objectivity of expert witnesses. The increasing scrutiny applied by the courts to expert witnesses has resulted in much commentary as to the independence and objectivity of the expert witness. These concerns as to the objectivity and independence of the expert witness have resulted in some skepticism and, indeed, cynicism as to the value of the opinion offered.³⁶

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 courts’ 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*.³⁷

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.

Expert witnesses detract or depart from their appearance of objectivity when certain circumstances arise such as personal animus, 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 less weight should be given to the opinion evidence of the expert than otherwise would be the case.

Personal Animus

In Huerto v. College of Physicians & Surgeons (Saskatchewan)³⁸, the professional discipline committee investigating a charge of misconduct against the Plaintiff doctor found 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 the bias he brought to the proceedings." [emphasis added]. On appeal, the Court overturned the disciplinary committee's decision to reject 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."

Personal animus to one party may be alternatively viewed as bias in favour of the other party. In the case of MacNamara Construction Co. v. Newfoundland Transshipment Ltd.³⁹, Justice Orsborn of the Newfoundland Supreme Court observed:

"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."⁴⁰

In this decision, 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. Orsborn J., made the following remarks:

"At the outset, I must observe that [the expert's] demeanor 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.”

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 opinion and the correctness of his or her client’s cause will appear defensive and the conduct will be inferred by the court to be animosity to the other party’s cause (and perhaps the court).

The negative inferences made by a trier of fact from the conduct and demeanour of expert witnesses were clearly illustrated in the recent decision of the Assessment Review Board in the Toronto Hilton appeal. 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 Mr. Rosen 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 Mr. Lesser 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.³⁸

The Board preferred the evidence of Mr. Rose to that of Mr. Lesser.

Pecuniary Interest

The source of the expert witness retainer raises a difficult issue from which the court may infer that the expert has been inclined to provide a favourable analysis as a result of the retainer or in exchange for future retainers. This inference suggests a conflict with the experts objectivity and independence. It represents a basis for attacking the credibility of the expert witness. Goldie J., of the British Columbia Court of Appeal, observed:

“ . . . where. . . 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 Fletcher Moulton L.J. in Lovell & Christmas Ltd. v. Wall (1911), 104 L.T. 85 (C.A.), at 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.”⁴²

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

In 2001, Mr. Justice Farley of the Ontario Superior Court (Commercial Court), refused to qualify an expert witness where 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.⁴³ He described the witness as a “co-venturer” because of the contingency fee and as a result, the witness 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 [ie. the witness] had lost his neutrality and objectivity.”

This is perhaps a harsh judgment, however, it arose out of the judge’s scrutiny of the conduct of the witness who was had adopted facts and assumptions without analysis:

An expert opinion falls short of the required standard of independence and objectivity when he or she simply regurgitates the client’s opinion and relies solely upon facts provided by the client without any real measure of objectivity. The absence of critical analysis and the avoidance of critical issues can have a devastating impact. In *Bank of Montreal v. Citak, Farley, J.*, rejected the expert’s opinion, in part because of just these circumstances:

“As to the quantification elements of Mr. Hill’s opinion, it is replete with the adoption of facts and assumptions related to him by Mr. Citak and others and from documents Mr. Hill has obtained from litigation production. These figures are in essence merely “lifted” from their source without analysis. Mr. Hill 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.”⁴³

Justice Feldman of the Superior Court (now of the Court of Appeal), explained the basis for her judicial scrutiny of the conduct of an expert witness:⁴⁵

“I also accept the submission of counsel that in weighing Mr. Gray’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.” [emphasis added]

Independence and Objectivity

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 criticized after it has been received.

In a prosecution of *Inco*, the Superior Court initially prohibited an expert witness employed by the Ministry of the Environment from testifying as a witness for the Crown in a prosecution under the *Ontario Water Resources Act*.⁴⁶

On a motion for non-suit, the trial judge rejected the proposed expert on the ground that he lacked independence from the Ministry or was partial to its case:

“Mr. Mak [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 Mr. Mak and the Crown/Prosecutor that ensures the vital appearance of impartiality. He will not, therefore, be permitted to testify as an expert.”⁴⁷

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

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

. . .

. . . the 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.”⁴⁸

The principle that experts must not be advocates was made clear in the remarks of Judge E. MacDonald in Fellowes, McNeil v. Kansa General International Insurance Co. (1998), 40 O.R. (3d) 456.

The requirement that an expert witness be independent from the adversarial battleground is clearly articulated in this case where 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.

E. MacDonald J. 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 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 SA v. Prudential Assurance Co., [1993] 2 Lloyd’s Rep. 68 (Eng. Q.B.) At 81, I have to conclude that this would not be a case for Mr. McInnis 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.”⁴⁹

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 because:

1. 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.
2. He failed “to take a step back” and consider the value in exchange of the lands in their totality. . .”.
3. 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 and that he has simply restated MPAC’s land values and Dr. Devenny’s [an engineer] valuation of the structures.”⁵⁰

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.⁵¹ In order to receive opinion evidence as to current value and classification, a witness will have to be qualified as an expert and demonstrate his or her independence and objectivity.

Justice MacFarland, as she then was, commented in Fenwick v. Parklane Nurseries Ltd.⁵¹, 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.”

I believe the Board will accept that witnesses are retained by, or employed by, a party to the proceedings and called by that party 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 demeanor and conduct of the witness before the Board to ensure there is no personal animosity, no pecuniary interest in the outcome, and there is 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 before the Assessment Review Board was explored in cross-examination of the assessor in the bank tower appeals.⁵²

One of the important questions which remains is whether a consultant or assessor who has prepared pleadings, and who was directly led or participated in negotiations to settle the appeals or prosecute the appeals, can be transformed into an expert witness in the same appeal. The Rules of Conduct for paralegals clearly suggest not. Moreover, the jurisprudence indicates not.⁵³

Whether an expert witness (either assessor or agent), who routinely appears on behalf of a particular client, or particular party (OPAC, the municipality, or assessed persons), can be qualified as an expert without successful challenges to his or her independence and objectivity depends on the witness.

The measure of independence is tested by cross-examination and the answers given by the witness in any particular case 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., O’Driscoll J. asks what opinion evidence should carry the day?” He reviews the case law which is referenced at endnotes 43, 45 and 49 above, and observes:

“[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 falls [sic] 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.'"⁵⁴

In the end, O'Driscoll J. 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 OPAC), over the years, does not in and of itself transform the witness into an advocate. The court or tribunal will scrutinize the demeanour of the witness, and his or her opinion, to determine issues of the credibility and the weight to be attached to the evidence. The court or tribunal will weigh the expert's testimony against other expert testimony and against 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 established rules relating to the conduct of expert witnesses.⁵⁵

The Civil Justice Reform Project in Ontario (Chaired by the Honourable Coulter A. Osborne, former Associate Chief Justice of Ontario), has suggested possible options for reform including a requirement that experts affirm their duties are owed to the court, and not to a particular party. The Federal Court of Australia has issued general guidelines for experts including the describing the paramount obligation of the expert to the court. These guidelines contain an Explanatory Memoranda which should be useful for all potential expert witnesses.⁵⁶

In conclusion, the expert witness cannot be an advocate. In order to avoid characterization as an advocate, the expert witness will have to work strenuously to be, and to appear to be, independent and objective. In assessment appeal proceedings, the paralegal will have to decide which role he or she will assume and abide by the duties and responsibilities assigned by the LSUC and the courts to the chosen role.

ENDNOTES

1. *Law Society Act*, R.S.O. 1990, c. L.8.
2. *Law Society Act*, supra, subsection 1(7).
3. *Assessment Review Board Act*, R.S.O. 1990, c. A.32.
4. *Law Society Act*, supra, subsection 1(1), definition of adjudicative body.
5. Law Society of Upper Canada, Rules of Professional Conduct (Lawyers).

4.01(1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary:

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.

In adversary proceedings the lawyer's function as advocate is openly and necessarily partisan.

6. Law Society of Upper Canada Rules of Professional Conduct (Paralegals)

4.01(1) When acting as an advocate, the paralegal shall represent the client resolutely and honourably within the limits of the law while, at the same time, treating the tribunal and other licensees with candour, fairness, courtesy and respect.

4.01(4) Without restricting the generality of subrule (1), the paralegal shall,

- (a) raise fearlessly every issue, advance every argument, and ask every question, however, distasteful, that the paralegal thinks will help the client's case;

(b) endeavour, on the client's behalf, to obtain the benefit of every remedy and defence authorized by law.

7. The Advocates' Society, Principles of Civility for Advocates: available on The Advocates' Society website. The quote is from the preamble to the pamphlet.
8. Law Society Rules of Professional Conduct (Lawyers)

4.02(1) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not submit his or her own affidavit to the tribunal.

Submission of Testimony

4.02(2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not testify before the tribunal unless permitted to do so by the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

Commentary

A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue.

Appeals

4.02(3) A lawyer who is a witness in proceedings shall not appear as advocate in any appeal from the decision in those proceedings.

Lawyers Rules of Professional Conduct

9. Law Society of Upper Canada, Rules of Professional Conduct (Paralegals),

4.04(1) Subject to any contrary provisions of the law or the discretion of the tribunal before which a paralegal is appearing, the paralegal who appears as an advocate shall not submit his or her own affidavit to the tribunal.

(2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a paralegal is appearing, a paralegal who appears as an advocate shall not testify before the tribunal unless permitted to do so by the rules of the court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

(3) A paralegal who is to testify before a tribunal shall entrust the conduct of the case to another licensee.

(4) A paralegal shall not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge.

10. I am indebted to the following articles which have been of assistance, all presented to the Osgoode Professional Development CLE on September 19 & 20, 2007.

“The Independence of Expert Witnesses” by Kevin Aalto.

“Qualification: Establishing Credibility” by Michael G. Emery and Stephen I. Smith

“Admissibility of Expert Evidence” by William G. Horton and Michael Mercer.

11. Rice v. Sockett (1912), 8 D.L.R., 84 at page 85 (C.A.)
12. R v. Abbey (1987), 43 D.L.R. (4th) 641.
13. R. v. Abbey (1982), 138 D.L.R. (3rd) 202 (Supreme Court of Canada)
14. “The Art of Using Expert Evidence”, Robert V. Wright, Q.C., 1997: Canada Law Book Inc., at page 15.
15. R v. Graat, [1982] 144 D.L.R. (3rd) 267, at page 284 (Supreme Court of Canada per Dickson J.)
16. R. v. Mohan (1994), 114 D.L.R. (4th) 419 (Supreme Court of Canada)
17. Institute of Municipal Assessors, Code of Ethics for Assessing Officers.
18. Appraisal Institute of Canada
Canadian Uniform Standards of Professional Appraisal Practice, sections 3, 5 and 12.

3.1.1 These standards. . . [set] out the requirements for integrity, impartiality, objectivity, independent judgment and ethical conduct.

5.2.1. Members must perform assignments ethically, objectively and competently in a meaningful manner in accordance with these Standards.

12.10.7. . . 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.

19. Supra
20. R. v. Lavallee, [1990] 1 S.C.R. 852 per Wilson J.
21. City of Saint John v. Irving Oil Co. Ltd. (1968), 58 D.L.R. (2d) 404.
22. Ibid, page 414.
23. Ibid, page 414.
24. R. v. Lavallee, op. cit, paragraph 97
25. Schedule "A": BCE Place Ltd. v. Municipal Property Assessment Corporation, Region No. 9 Judgment on Interlocutory Motion dated March 22, 2007.
26. Ibid, page 5.
27. Ibid, page 3.
28. Fraser River Pile & Dredge Ltd. v. Empire Tugboats Ltd. (1995), 37 C.P.C. (3d) 119 at 126.
29. R. v. Mohan, supra, at page 429.
30. The Law of Evidence in Canada, page 620, John Sopinka, Sidney Lederman, Alan Bryant, Butterworths: Second Edition.
31. Canada (Director of Investigation & Research) v. Southam Inc. (1997), 144 D.L.R. (4th) 1.
32. R. v. Mohan, supra, at page 431.

33. Per Gillese J.A. in McLean (Litigation Guardian of) v. Seisel (2004), 182 O.A.C. 122 (C.A.)
34. Schedule "B": BCE Place Ltd. V. Municipal Property Assessment Corporation, Region No. 9 Motion Judgment: March 22, 2007; 2007 Carswell Ont. 2056.
35. R. v. J.-L.J., [2000] 2 S.C.R. 600 (S.C.C).
36. "The Use of Expert Witness Evidence in Civil Cases" by William G. Horton and Michael Mercer; The Advocates' Quarterly, Volume 29, 2004, page 153:

"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."
37. National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd., [1993] 2 Lloyd's Law Reports 68, (Queen's Bench (Commercial Court)) reversed on other grounds but affirmed on the principles relating to the duties and responsibilities of expert witnesses [1995] 1 Lloyd's Law Reports 455 (C.A.).
38. Huerto v. College of Physicians & Surgeons (Saskatchewan) (1999), 170 Sask. R. 52 (Sask. Q.B.).
39. MacNamara Construction Co. v. Newfoundland Transshipment Ltd., 2002 Carswell Nfld 124, 20 C.L.R. (3d) 1.
40. Ibid, paragraph 4.
41. Hilton Canada Inc. v. MPAC and City of Toronto, Assessment Review Board Decision released May 26, 2006.
42. Lee v. Swan (1996), 19 B.C.L.R. (3rd) 21 at page 30 (B.C.C.A.).
43. Bank of Montreal v. Citak, [2001] O.J. No. 1096 (S.C.J. Common List)
44. Ibid, page 3.

45. Inter-American Transport Systems Inc. v. Canada Pacific Express and Transport Ltd. (1995), O.J. No. 3644 (Gen. Div.).
46. R. v. Inco Ltd., (2006) 80 O.R. (3d) 594 references the decision of the trial judge, Mahaffy J.
47. Ibid, paragraph 43.
48. Ibid, paragraph 52.
49. Fellowes, McNeil v. Kansa General International Insurance Co. (1998), 40 O.R. (3d) 456 at 460 (Gen. Div.).
50. Corporation of the City of Elliot Lake v. Denison Mines Limited and MPAC et al., Assessment Review Board Decision released November 24, 2004.
51. Fenwick v. Parklane Nurseries Ltd. (1996) 32 C.L.R. (2d) 25 .
Also, Interamerican Transport Systems Inc. v. Canadian Pacific Express and Transport Ltd. (1995), O.J. No. 3644 at paragraph 61 (supra).
52. Schedule "C": Except from the cross-examination of Colin Eldridge dated November 7, 2006.
53. See for instance, Fellowes, McNeil v. Kansa General International Insurance Co., op. cit at endnote 45.
54. Amertek Inc. v. Canada Commercial Corp. (2002), 229 D.L.R. (4th) 419, paragraph 449.
55. Schedule "D": Practice Direction for Technical and Opinion Evidence. Environmental Review Tribunal (Ontario).
56. Schedule "E": Federal Court of Australia Guidelines for Expert Witnesses.