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EXPERT EVIDENCE

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TABLE OF CONTENTS

I. INTRODUCTION 3

II. WHAT IS EXPERT EVIDENCE?..... 3

III. SHOULD YOU BE AN EXPERT? 5

IV. BEING RETAINED AS THE EXPERT 5

V. INSTRUCTIONS TO EXPERT 6

VI. PREPARATION FOR DIRECT EXAMINATION 8

VII. CONDUCTING DIRECT EXAMINATION 10

VIII. CROSS-EXAMINATION..... 11

IX. CONCLUSIONS..... 11

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I. Introduction

The rapid advancements made by our society in fields such as science, engineering, medicine and psychology, have created a world in which there is a great deal of specialized knowledge. As a result, it may be difficult to find a business transaction, or for that matter, any form of human interaction for which there will not be some 'expert' who possesses an understanding of the issues beyond that held by the general public. Therefore, when these interactions fall into conflict, and recourse is sought through the legal system, the knowledge possessed by these 'experts' is often essential to the proper resolution of such matters.

However, as the necessity of experts in our legal system has increased, as have concerns regarding their impartiality, and their potential to usurp the proper role of the trier of fact. Therefore, the courts are attempting to develop proper safeguards that ensure experts provide information that assists triers of fact, but does not mislead or confuse them. Before a lawyer seeks the assistance of an expert to help resolve their client's legal issues, an understanding of these safeguards, in addition to a number of other factors, should be considered. This paper will explore the issues that a design profession must begin considering before they ever argue to act as an expert.

II. What is Expert Evidence?

As a general rule, the courts have drawn a distinction between inferences and facts in the provision of evidence. An opinion is an inference drawn from observed facts. Ordinarily, a witness may not express an opinion as this requires conclusions to be drawn from the facts. This is objectionable because it is for the courts to decide what evidence to accept as fact and what conclusions to draw from those facts. However, there are exceptions to this general rule, for example, witnesses are allowed to give their opinion in matters where it is virtually impossible to distinguish between facts and the inferences based on those facts. Common examples of this exception include a witness's opinion of a state of intoxication, the speed of a vehicle, and the distance between two points.

Expert evidence operates as another exception to the rule that witnesses may only testify to facts within their own observation. Where a matter calls for special skill or knowledge, opinion evidence from a witness who is expert in such matters, is admissible to assist the court in drawing conclusions that could not be reasonably drawn by relying on common knowledge or skill. In *R. v.*

*Abbey*¹, Dickson J. described the function of an expert and the proper use of expert evidence 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 the judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary.²

There are also circumstances where the role of experts can go beyond simply providing inferences. For example, in matters of professional responsibility, experts may give evidence regarding the standard of conduct in a particular profession³, and in construction cases, experts may provide evidence of construction techniques and practice.⁴

The principles governing the admissibility of expert opinion evidence have been described by our B.C. Supreme Court as follows⁵:

before an expert opinion could be admitted into evidence I had to be satisfied that the opinion was relevant to the issues raised in this case, that the opinion was necessary to assist me to resolve those issues as the information provided by this opinion was beyond my experience and knowledge, that the opinion was not excluded by any evidentiary rule, and that the proposed witness was properly qualified to give the opinion: *R. v. Mohan*, [1994] 2 S.C.R. 9.

Finally, even where these requirements are met, the evidence may be rejected if its prejudicial effect on the conduct of the trial outweighs its probative value.⁶

¹[1982] 1 S.C.R. 24.

²*Ibid* at 42.

³*Surrey Credit Union v. Wilson* (1990), 45 B.C.L.R. (2d) 310 at 313 (S.C.).

⁴*Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.* (1988), 29 B.C.L.R. (2d) 127.

⁵ *Brito (Guardian ad litem of) v. Woolley*, [2001] B.C.J. No. 1691 (S.C.) at paragraph 3.

⁶*R. v. D.D.*, [2000] 2 S.C.R. 275.

The applicable evidentiary rules that may make expert evidence inadmissible, include any findings of fact and rulings of law by the expert, or evidence argued by the expert as if they were counsel.⁷ Another relevant evidentiary rule, is that the expert opinion should not address the ultimate issue to be decided by the trier of fact. Even where the technical nature of the matters at issue make an expert uniquely qualified to make such a determination, it theoretically remains the prerogative of the judge or jury to decide the outcome. However, this rule has been ignored by many Canadian courts, which often apply it only in situations where the expert's opinion usurps the judge or jury's role in determining the credibility of evidence.⁸

III. Should you be an Expert?

Once you obtain a proper understanding of what constitutes expert evidence, and when it can be used, it becomes much easier to determine whether you can be an expert in a particular case. However, it is not always possible at the outset to determine whether or not there are unresolved issues that require your assistance as a person with specialized knowledge. In this situation, you may be initially retained to help counsel fully understand the technical details, so that counsel can better determine the relevant legal issues. Further, not all experts are retained to convey this information to the trier of fact. Even when counsel realizes that the case does not require your expert opinion evidence, counsel may wish to continue retaining you as a confidential advisor, providing continued assistance to their understanding of the relevant issues.

IV. Being Retained as the Expert

You are initially retained to provide an 'overview' opinion on the relevant issues. Your fees for your services should be reviewed prior to the provision of this 'overview'.

Once the fees are negotiated, you should receive a formal retainer letter that describes your terms of reference. This retainer letter will form part of your final report.

⁷ *Quintette Coal Ltd., supra* at 128.

⁸ *Dawes v. Jajcaj*, [1995] B.C.J. No. 2366 at para. 27 (S.C.).

V. Instructions to Expert

Once you have been chosen, a great deal of thought must be put into determining what information you will need to properly prepare your opinion. It is very important that your expert opinion be based on all of the relevant facts. Otherwise, opposing counsel may be able to dismiss your opinion as one which is either defective or tainted with bias. The facts and assumptions provided to you by your counsel. You must be included as a part or supplement to your expert opinion report.⁹ Expert reports that do not conform with this requirement will be inadmissible unless the court orders otherwise.¹⁰

In preparing a report, your opinion may also be based on your own evidence of fact, but this must be clearly distinguished from assumed facts in the report or testimony.¹¹ In either case, it is essential that the facts you rely upon are accurate and comprehensive. Otherwise, your opinion may not be able to stand up to the inevitable scrutiny from opposing counsel. The assumed facts are not your responsibility, but are the responsibility of counsel to prove.

In creating your expert report, it is perfectly acceptable for counsel to assist you in its preparation, as long as the assistance does not encroach on your objectivity and independence. Therefore, revisions to your report by counsel should be limited to a clarification of issues, and grammatical and stylistic changes, which ensure that your opinion is as cogent and persuasive as possible. Revisions which go to the substance of your opinion are not allowed, and may result in your evidence and report being deemed inadmissible.¹²

All documents and confidential communications primarily created for the purposes of litigation are protected by solicitor's brief privilege. However, once you provide an opinion to the Court based on this privilege information, it may be deemed an implied waiver of this privilege and can be directed to be produced.

⁹ Rule 40A(5) of the Rules of Court.

¹⁰Rule 40A(7) of the Rules of Court.

¹¹ *R. v. Abbey, supra.*

¹² *Vancouver Community College, supra.*

In *Vancouver Community College v. Phillips, Barratt et al*¹³, Finch J. summarized the state of the law in British Columbia regarding waiver of solicitor's brief privilege over documents in an expert's possession or control, in the following manner:

When an expert witness who is not a party is called to testify, or when his report is placed in evidence, he may be required to produce to counsel cross-examining, all documents in his possession which are or may be relevant to matters of substance in his evidence or to his credibility, unless it would be unfair or inconsistent to require such production. Fairness and consistency must be judged in the circumstances of each case. If those requirements are met, the documents are producible because there is an implied intention in the party presenting the witness' evidence, written or oral, to waive the lawyer's brief privilege which previously protected the documents from disclosure.¹⁴

The reason for this change in the law was later described in *Delgamuukw v. British Columbia*, where McEachern, C.J.B.C. stated that:

experience has demonstrated that some experts have been shown to be advocates rather than independent, impartial, objective professionals. For this reason it has been necessary for many judges to comment unfavourably upon the use of expert evidence and for other judges to prescribe relatively new procedures which enhance the likelihood of a successful search for truth.¹⁵

The Court went on in *Delgamuukw* to itemize the documents which must be produced:

First it is settled law that anything in the possession of the witnesses relating to the litigation must be produced for inspection unless a claim to continue privilege is properly made. This would include letters of instruction, fee agreements, written communications from the party or its agents or lawyers relating to the assignment, memos and drafts, suggestions from others and any other written material which has or might have been considered by the witness preparing his report or opinion or evidence.¹⁶

¹³(1987), 27 C.L.R. 11 (BCSC).

¹⁴Ibid at 157.

¹⁵[1988] B.C.J. No. 2076 at QL p. 1 (S.C.).

¹⁶Ibid at QL p. 4.

The decision by Finch J. in *Vancouver Community College, supra* remains good law in British Columbia. However, subsequent cases may have served to limit the most liberal interpretations of what must be disclosed.

In *Delgamuukw*, the Court found that materials relevant to credibility:

must be given a limited or narrow construction because almost anything might relate to credibility and this aspect of the matter must not be an open door to free-roaming cross-examination.¹⁷

In *Laing Property Corp. v. All Seasons Display Inc.*,¹⁸ the Court considered whether an expert offering opinion on the location of a fire was required to disclose materials relating to the cause of the fire. The Court decided that waiver of privilege was only over material relating to his expressed opinion. A general question regarding causation was allowed to be asked in cross-examination, but the court still did not consider any privilege and work product, written opinions or reports regarding causation to be waived.¹⁹ This decision suggests that the Courts will be less likely to waive privilege over materials relevant only to an opinion expressed during cross-examination.

Even if counsel's original intention is to hire you as a confidential advisor, unless counsel can be completely certain that you will not have to testify, their instructions to you should contemplate your potential to provide evidence to the Court.

VI. Preparation for Direct Examination

Preparation for direct examination should begin prior to the initial letter of instruction. Although your opinion will not have been formed at that stage, the legal and scientific issues relevant to the case must be clearly understood by you and counsel to ensure that you provide an opinion on the appropriate question(s).

R. 40A of the *Rules of Court* governs the introduction of expert evidence at trial. Rule 40A(2) provides that written statements of your opinion will be admissible where copies of the statement have been provided to every party of record at least 60 days before the opinion is tendered in

¹⁷Ibid.

¹⁸[2001] B.C.J. No. 1306 (S.C.).

¹⁹Ibid at paras. 36-39.

evidence. R. 40A(3) provides the same requirement for a written description of oral evidence that will be introduced at trial. Generally, these time requirements for delivery will not apply to your opinion provided in response or rebuttal to the opinion given by an expert hired by opposing counsel.²⁰

In addition to these legislated time requirements, there are other reasons in favour of early preparation of your opinion.

You cannot be properly prepared to give evidence in chief unless you know and understand the facts and evidence that will be introduced. It is essential to ensure that the opinion evidence is presented in a clear and convincing manner and this may not be possible if there is inadequate time to review your opinion with counsel prior to its introduction into evidence.

It is also important that you understand the legal issues in dispute. Further, it is important that you understand that the purpose of your evidence is to assist the court. Therefore you must explain your opinion in plain language.

Finally, as part of the preparation of your examination in chief, counsel should cross-examine you extensively to test your opinion. This allows you to find any weaknesses or gaps in the evidence. It also prepares you for cross-examination by opposing counsel.

You should also review with counsel the entirety of your file to determine what documents you wish to claim privilege over. Documents you believe are privileged, and for which you do not believe that privilege has been waived, should be placed in a separate file with the particular basis for the claim of privilege determined for each.

Remember, you can assist counsel and provide two separate functions. They are:

- (1) independent expert advice; and
- (2) advising counsel with respect to the opposing party's expert.

Thus, two separate files should be maintained by you. The independent advice file is generally not privileged and all drafts, etc., must be produced if you are called as a witness. The file containing advice to counsel will generally maintain privilege, and therefore need not be produced.

²⁰ *Kelley v. Kelley*, [1995] B.C.J. No. 3055 (B.C.S.C.).

VII. Conducting Direct Examination

When you are called to testify, the starting point for direct examination is to establish that you are qualified as an expert in the subject area in which you are providing your opinion evidence. These qualifications must be established to the satisfaction of the court for the opinion evidence to be admitted.

Even if your qualifications as an expert are not in dispute, counsel may consider whether reviewing these qualifications for the benefit of the court may serve to further enhance your credibility. The court should be advised as to your specific area of expertise (e.g. geotechnical, structural engineer, etc). The opposing counsel is then entitled to cross examine you on your qualifications, before the court determines whether they are sufficient to allow the report to be entered into evidence.

After the report is entered, it is important that you explain to the court the foundation for your opinions. If counsel fails to properly introduce evidence of the facts upon which your opinion is established, it will have little or no weight with the court.²¹

In explaining the foundation for your opinion, it is permissible for you to rely on learned treatises. The rules governing the use of this material are described in J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada, 2d ed.*:

Peculiar to the examination of experts is the utilization of textbooks. In support of any theory, you are permitted to refer to authoritative treatises and the like, and any portion of such texts upon which you rely is admissible into evidence. Moreover, it appears that, if a written work forms the basis of your opinion, then your counsel is allowed to read extracts to the expert and obtain your judgment on them. The written view of the author thereby becomes your opinion. You did not adopt the writing as being authoritative and in accord with your own opinion, nothing may be read from the text, for that would be tolerating the admissibility of pure hearsay.²²

²¹ *R. v. Abbey, supra.*

²²(Toronto: Butterworths, 1992) at 562 as cited in *Privest Properties Ltd. v. Foundation Co. of Canada*, [1995] B.C.J. No. 2001 at paragraph 295 (S.C.).

VIII. Cross-Examination

Considerations regarding cross-examination need to be made both to prepare for your cross-examination and to assist in the cross-examination of the expert selected by opposing counsel to provide a competing opinion.

Counsel can use you to assist their understanding of your opponent's report or summary of opinion evidence and to prepare a list of questions for use in cross-examination.

Materials such as terms of reference, internal memos, draft reports and communications with opposing counsel may be used in your cross-examination. Production of these documents will be demanded as soon your counsel provides your report to opposing counsel. The information available in these documents may include the amount of input your counsel has had into the preparation of your report.

Opposing counsel will also look to the underlying assumptions or premises upon which your opinion is based. Opposing counsel will determine precisely what instructions were provided to you and by whom. This may reveal a lack of independence in your opinion.

IX. Conclusions

An understanding of the purpose of expert evidence, as well as the applicable case law, leads one to the following propositions:

- (a) Experts are permitted to provide to the Court, opinion evidence relating to scientific or technical matters outside the experience or knowledge of the trier of fact, which does not offend any rule of evidence.
- (b) As early in the litigation process as possible, counsel must obtain a firm understanding of the relevant issues, so that they can determine whether an expert is necessary, and if so, ensure that the expert will set out to formulate an opinion only where their assistance is required.
- (c) Counsel must provide experts with an adequate factual basis to ensure that they provide an opinion that has sufficient foundation to withstand the scrutiny of opposing counsel. However, this need must be balanced with the need to control the documents provided to or generated by the expert. Communications, statements and drafts of opinions, particularly those shown to be inspired by counsel, can seriously undermine the credibility of the expert and of counsel. As a

general rule, no document should be given to the expert if counsel is not prepared to have it produced to the opposing parties.

- (d) When your counsel is conducting your direct examination, the expert must first provide the Court with an explanation of his/her relevant training, as well as the factual basis of his/her opinion. If there are any unproven facts on which the expert's opinion is based, the Court may require him/her to only respond to hypothetical questions.
- (e) Experts can also assist in preparation for the cross-examination of the opposing party's expert. This may require extensive research into the factual basis on which their opinion rests, as well as an examination of their writings, and previous opinions they have provided to Court. Since it is unlikely that cross-examination will lead to a change in the opposing expert's opinion, the focus should be on undermining the factual basis of that opinion, or on demonstrating a particular bias on the part of that expert.

This paper was prepared by Glenn A. Urquhart, Q.C. and Jason McDaniel, of Singleton Urquhart LLP, Vancouver BC, for Continuing Legal Education, May 2005.