is also entitled to reasonable disbursements and GST. Any disagreement about specific items can be put before an assessment officer.

6 The issues were highly technical, and expert evidence was necessary for both sides. Given the nature of the issues, it was inevitable that there would be some duplication of the expert evidence, and that some experts would extrapolate on the opinions of other experts. The appellant's success on appeal, following its failure to prevail at trial, demonstrates that it was prudent to ensure there was a complete record at trial.

7 The reasonableness of a disbursement for an expert witness depends on whether the expenditure was reasonable, measured at the time that it was incurred: *Seidel v. Kerr*, 2004 ABCA 157 (Alta. C.A.) at para. 7, (2004), 27 Alta. L.R. (4th) 227, 348 A.R. 154 (Alta. C.A.). Retaining a rebuttal expert is generally reasonable, even if the other party subsequently elects not to call the witness who was being rebutted.

8 The appellant is accordingly entitled to reasonable expert disbursements for the five experts it retained. If the parties cannot agree on the reasonable quantum of the experts' fees and disbursements, that issue will have to be referred to an assessment officer. Alternative dispute resolution procedures are obviously open to the parties.

9 Currency conversions of US dollar disbursements should be done at the date the invoice was paid, *prima facie* at the rate of conversion actually incurred by the appellant.

*Order accordingly*



# The Role of the Expert Witness

Nabeel Peermohamed*

## 1 – Introduction

In this article, the writer explores the role of the expert witness in litigation. In the pre-trial stage, an expert opinion is generally used to narrow the issues in dispute or reach a settlement between the parties. More importantly, an expert report provides the client with a third party view of the case, which the advocate cannot do. At trial, first principles dictate that an expert opinion is only admissible if it assists the Court. The general objective of obtaining an expert report is to bolster one side's position given the specific facts and circumstances of their case. However, experts who appear overzealous or as advocates should be avoided. These experts are seen as "hired guns" rather than objective. The writer hopes to outline various considerations for the selection and use of an expert.

## 2 – Duties and responsibilities of the expert

Expert evidence should be the sole product of the expert. An expert witness should provide independent assistance to the Court by way of objective, unbiased opinions in relation to matters within his or her expertise. An expert witness should never assume the role of an advocate. Rather, an expert should state the facts or assumptions upon which the expert's opinion is based. The expert should not omit to consider material facts which could detract from his or her concluded opinion.

If an expert's opinion cannot be finalized because the expert considers insufficient data is available, then this must be stated with an indication that the opinion is a provisional one. In cases where an expert witness cannot assert that the report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

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After exchanging reports, if an expert changes their views on a matter having read the other side's expert report or for any other that change of view should be communicated without delay. When expert refers to photographs, plans, calculations, analyses, ments, survey reports or other similar documents, those materials be provided to the opposite party either before or at the same exchange of the reports.

### 3. — When to retain an expert?

Consider what type of assistance is required. An expert may help preparation of the case, particularly where the issue is complex. An expert retained for pre-trial matters can serve to educate about complex and technical matters, help determine the strength weaknesses of the case, and help find other experts.

### 4. — Is the expert evidence admissible?

Consider whether the expert evidence will be admissible at trial. pert's opinion is presumptively inadmissible. A party seeking adduce expert opinion evidence must first satisfy the Court of factors governing the admissibility of expert evidence:[1]

#### *a) — The evidence must be relevant*

Expert evidence must be logically probative of a fact in issue where the evidence is relevant, it may be excluded where the effect of admitting it would outweigh its probative value.

#### *b) — The evidence must be necessary to assist the trier of fact*

Expert evidence will be deemed necessary in those exceptional where the trier of fact is unable to reach their own conclusions absence of assistance from experts with special knowledge.

[1] *R. v. Mohan*, [1994] 2 S.C.R. 9.



#### *c) — No exclusionary factors*

There must be no exclusionary factors which would prevent the expert testimony. Expert evidence can be excluded if it may mislead the trier of fact or is otherwise unreliable.[2]

#### *d) — The expert must be properly qualified*

The expert must demonstrate that they have acquired special or particular knowledge through study or experience in respect of the matters on which they intend to testify. The advocate must examine the expert's CV.

Notwithstanding if the above is established, the Court always has discretion to exclude expert evidence. This is the "discretionary gatekeeping role" where the Court considers whether the potential benefits justify the risks.[3] The Court's discretion to exclude prejudicial evidence continues throughout a trial. It may be invoked after initially admitting the evidence if prejudice manifests later in the trial that was not apparent at the time of admission.[4]

### 5 — Selecting the right expert

Avoid retaining experts that have too little or too much experience in the subject matter at hand. Find the right balance of education, training and experience. Also, find an expert with courtroom experience, but be wary of the "professional witness".

The Courts are inherently suspicious of "hired guns", which can lead to questions surrounding independence, experience and objectivity. Experts may attack credibility in their reports and seek inconsistencies in the evidence are viewed as advocates instead of objective witnesses.[5] Professional witnesses can also appear biased from the outset.

Be aware of the expert's personal relationships with the parties, if any. Consider how the expert will present as a witness in Court. Determine if

[2] *R. v. Conlin*, 2009 ONCA 915 at 59-60.

[3] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

[4] *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 [*Bruff-Murphy*].

[5] *Bruff-Murphy*, *supra*.

they are persuasive and understandable. It is always a good idea for advocate to speak directly with the expert before the expert is retained to make this assessment.

Finding the right expert will require research on the advocate's part. It may require asking the client and other lawyers. Universities and colleges may provide the names of leading scholars. Contact consulting firms that specialize in locating experts to assist in litigation. Counsel consult databases containing lists of available experts.

### 6. — Get the best expert

Retain the best expert for the client's case. This always requires a cost-benefit analysis. However, when faced with a substantially less expensive, clients may require convincing that retaining the best expert, while expensive, will ultimately serve to prove their case.

### 7. — Privilege and disclosure

There are always competing interests when dealing with experts. On the one hand, advocates are to protect their client's right to confidentiality. However, advocates are also obligated to disclose relevant and material information to the opposite parties.

The expert who has been retained for the sole purpose of preparing for trial and will not testify will generally be protected by litigation privilege. The expert who has been retained to assist with negotiations will generally be protected by the rule that communications in furtherance of settlement are protected from disclosure. If the expert testifies, the prevailing view is that all privilege is waived and all information, including client instructions, is available for cross-examination.

Communication between counsel and the expert is privileged unless the expert testifies at trial. In the Ontario Courts' decision in *Moore v. Getahun*, 2014 ONSC 3931, varied in 2015 ONCA 55 ("*Moore*"), the trial judge said that it was unacceptable for counsel to review and discuss draft reports with its expert. The Ontario Court of Appeal disagreed and found the trial judge had erred. The Court of Appeal said draft reports and discussions between counsel and the expert were subject to litigation privilege, and only to be disclosed where there were suspicions of interference with independence and objectivity. The Court of Appeal also said it would be bad policy to disrupt the practice of counsel discussing



draft reports with the expert. The role of the expert is to assist lawyers to create comprehensive reports that respond to the legal issues in a case.

However, as a cautionary note, the Court of Appeal in *Moore* quoted from The Advocate's Society paper titled, "Principles Governing Communications with Testifying Experts" which provided:

> Principle 7
>
> An advocate should inform the expert of the possibility that the expert's file will be disclosed, and should advise the expert witness not to destroy relevant records.
>
> *Commentary*
>
> An advocate should inform an expert witness at the outset of the engagement that the contents of the expert's file may ultimately be disclosed to opposing parties, as well as to the court or tribunal in question.
>
> The expert should be advised not to destroy relevant records, and should also be told that the destruction of records concerning the expert's retainer, the expert's analysis or findings, the expert's communications with the advocate or the advocate's client or the substance of the expert's evidence may be treated with disfavour by the court or tribunal. This could result in, among other things, adverse findings of credibility, the drawing of adverse inferences and the exclusion of otherwise admissible evidence.

Consider *Chapman Management & Consulting Services Ltd. v Kernic Equipment Sales Ltd.*, 2004 ABQB 498, where the Court ordered the production of an expert's entire file (including all instructing letters and memoranda from counsel, draft versions of the expert's reports, and private materials from which the expert's opinions were derived) after testifying on the stand. The Court held that cross-examining the expert on the stand alone was not sufficient. The Court also cited the following quote from *The Law of Evidence in Canada*[6]:

> No doubt the witness should be subject to cross-examination on the factual basis of the opinion. But since an expert usually gives an opinion on the basis of hypothetical facts and is not generally offering the facts as proof thereof, there should seem to be little reason for

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[6] Sopinka, John; Lederman, S.N. & Bryant, A.W., *The Law of Evidence in Canada*, 2d ed. (Toronto, Ont., LexisNexis, 1999)

> compelling disclosure of the source of those facts if that [illegible] otherwise a privileged communication or document. As to the expert's credibility, caution should be exercised before that [illegible] the basis for wide-ranging disclosure of all solicitor-expert communications and drafts of reports. In any event, it might just be general practice among solicitors of destroying drafts after [illegible] no longer needed just to avoid the problem.
>
> (emphasis added)

The writer cautions against an expert destroying draft reports [illegible] availability of same upon Court order will reflect very poorly on the expert's integrity and ultimate credibility.

When disclosing expert reports, the report must be in the required [illegible] and served in accordance with the Rules of Court. This requires the expert's name and qualifications, the information and assumptions which the expert's opinion is based, and a summary of the expert opinion.

The party who bears the primary onus of proof must serve their report first, followed by rebuttal reports from the opposing parties. The initiating party may then serve a surrebuttal report. There are no timelines specified for when an expert's report must be served. However, the trial clerk cannot schedule a trial date unless expert reports have been exchanged or there are deadlines for such exchanges.

## 8. — Raw Data

During an expert's examination, the data they rely upon will vary depending on the expert. In manufacturer's liability suits, the allegedly defective product is at the heart of the case and both parties will require inspection. The plaintiff likely has preserved the alleged defective product, has likely had it examined, and likely already has a report on it. The defence requires the product, as well. Usually, there has been an Application and a Court Order only permitting non-destructive testing of the product. The defence obtains the product and conducts their testing (sometimes under the supervision of the plaintiff's expert). The defence inspection is completed and the product is returned to the plaintiff. Both sides' experts developed their own set of data during their [illegible]



and that data is disclosed during the exchange of finalized expert reports.[7] The data is normally privileged except:

> (a) where the other party would be unable to obtain the facts by other means;
>
> (b) where the object to be examined will be destroyed during testing making it impossible for subsequent tests to be conducted; or
>
> (c) to put the parties on an even footing.[8]

However, consider the situation where the plaintiff has vocational testing done. Can the defendant demand the data from the battery of tests to which the plaintiff was subjected in order to facilitate a rebuttal report?

In *Andre v. Wiebe*, 2000 ABQB 946 ("*Andre*"), the plaintiff applied for an order compelling disclosure of raw data that formed the basis of two medical expert reports from the defendants. The underlying claim arose from alleged personal injuries as a result of a motor vehicle accident. The plaintiff was examined by two doctors at the request of the defendants. The defendants' expert reports were then served. The plaintiff applied to compel the disclosure of the raw data (including the notes, questionnaires, behavioural observations and test score summary sheets) created during the examination for the purposes of obtaining a rebuttal neuropsychologist report. The issue was whether the raw data was producible or privileged.

The Court examined the predecessor to Rule 5.44 of the Alberta Rules of Court stating

> Rule 217(7)(a) provides:
>
> > The party causing the examination to be made
> >
> > (a) shall, upon request, deliver promptly to the party examined or his solicitor a copy of a detailed written report of the examining medical practitioner setting out his findings and conclusions, . . .

The Court held "findings" meant the factual underpinnings, which support an expert's conclusions or opinions, and that the raw data of test results formed the underpinnings that supported the expert's conclusions,

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[7] *Sun Gro Horticulture Canada Ltd. v. Abe's Door Service Ltd.*, 2006 ABQB 34, at para 28

[8] *Teck Cominco Metals Ltd. v. Shanghai Boiler Works Co.*, 2009 BCSC 830.

and therefore should be disclosed. The Court went on to say [illegible] sure of the raw data best satisfied the objects of the Rule[s] which were, amongst others, to avoid trial by ambush. In [illegible] Court ordered the production of the raw data so that the plaintiff could prepare a rebuttal report.

Accordingly, based on *Andre*, raw data for the purposes of [illegible] rebuttal report is producible with the original expert report. However, the Court made it clear that the defendants need not disclose communications between themselves (including their counsel and agents) and their experts.

### 9. — Nominees and videographers

Consider the examination of a plaintiff by a defendant's expert. The Rules of Court provide for the attendance of the plaintiff's [illegible] health care professional and a videographer to be present at the examination. However, several experts do not allow a nominee or videographer. Thus, the choice of experts available to the advocate is limited if the plaintiff insists on a nominee or a videographer present at the examination.

### 10. — Instruction letters to the expert

After an expert is selected, advocates provide them with an instruction letter to request their opinion. Usually a written report is requested however, sometimes a verbal report is initially sufficient.

Advocates should mark instruction letters "privileged and confidential". Some advocates provide a brief summary of the case, ask for the expert's opinion, and then proceed to list a series of questions they want the expert to answer. The advocate should not include assumptions in the questions posed to the expert. Rather, an advocate should keep the questions as neutral and simple as possible.

In addition, it is recommended advocates provide their experts with everything produced in the litigation. Advocates should not be selective when preparing the records to send to their expert. Think about the Court's perception of the expert while on the witness stand being asked if they reviewed some key document, and their answer is "No". Advocates should provide their expert with all producible documents for their review, and leave it to the expert to determine what is relevant or not.



[illegible] it may be worthwhile to caution the expert that draft reports and [illegible] raw data may be requested by the opposite party. Destruction of [illegible] materials should be prohibited.

### [illegible] — Meeting with the expert

Whether meeting with the expert at various times during the litigation process is necessary will depend on the circumstances. In some cases, where the expert has significant experience writing reports, very little communication outside the instruction letter will be required. The expert will simply receive the instruction letter and provide the advocate with their report after the underlying examination of the evidence.

In other circumstances, it may be crucial to meet with the expert before they prepare their report when they have no experience providing such reports in the course of litigation. In these circumstances, the advocate should discuss the case with the expert including the relevant facts and material to review. A further discussion may be necessary to provide the expert with guidance regarding the format of the report. The objective is to have the expert prepare the report in its best shape before it is disclosed. Success at settlement or trial will largely depend on how the expert comes across, including how easy their report is to comprehend.

### [illegible] — Pre-trial use of expert reports

Expert reports can be very helpful in reaching a settlement. Even when exchanged on a without prejudice basis, these reports can be used to narrow the issues in the litigation in the hopes of achieving early resolution. Expert reports are used extensively in mediation. These are usually exchanged on a without prejudice basis and included in written briefs to assist the mediator understand the issues and the evidence. Finally, expert reports will give the client a third party view of their case providing an opinion on areas outside the advocate's expertise.

### [illegible] — Conclusion

The use of experts can provide great value to the case and to the client while trying to resolve disputes. However, it is incumbent upon the advocate to select the right expert and give due consideration to the type of evidence necessary to prove the case. Selection requires research and assessing the expert's suitability through a review of their CV and through

the advice of colleagues. Consider a meeting or telephone discussion to obtain a sense of their background and abilities. The advocate must properly instruct the expert and make maximum use of their report when trying to resolve cases before trial. Finally, the advocate must be aware of their disclosure obligations under the Rules and prevailing law. The writer trusts these considerations will assist advocates in understanding the role of the expert witness in advancing, and possibly resolving, their client's case.



[Indexed as: **R v. Schultz**]

Her Majesty the Queen (Applicant) and Joann Edith Schultz and Garnet E. Schultz (Respondent)

Alberta Provincial Court

Docket: Red Deer 170296438P1

2018 ABPC 134

B.D. Rosborough Prov. J.

Heard: May 2, 2018

Judgment: June 14, 2018

**Criminal law — Charter of Rights and Freedoms — Other Charter issues** — Accused were charged with offences under Animal Protection Act based on observations made by peace officer for Alberta Society for Prevention of Cruelty to Animals who had obtained general warrant — During pre-hearing conferences, accused indicated that they intended to challenge validity of search warrant obtained by officer and Crown indicated that it would apply to have any challenge dismissed — Accused filed Notice of Charter Application to challenge validity of search warrant and to exclude evidence of officer's observations — Crown brought application to dismiss accused's challenge to validity of search warrant without embarking upon voir dire — Application granted in part — Application was granted to extent of dismissing complaints about manner in which officer described his status as peace officer and references to owners in Information to Obtain — General warrant was presumed to be valid — There was support for submission that officer undertook illegal perimeter search that provided him with necessary grounds to apply for general warrant.

**Cases considered by *B.D. Rosborough Prov. J.*:**

*Québec (Procureur général) c. Laroche* (2002), 2002 SCC 72, 2002 CarswellQue 2413, 2002 CarswellQue 2414, (sub nom. *Quebec (Attorney General) v. Laroche*) 169 C.C.C. (3d) 97, 219 D.L.R. (4th) 723, 6 C.R. (6th) 272, 295 N.R. 291, (sub nom. *Quebec (Attorney General) v. Laroche*) 99 C.R.R. (2d) 353, [2002] 3 S.C.R. 708, REJB 2002-35623, [2002] S.C.J. No. 74 (S.C.C.) — referred to

*R. v. McDonald* (2017), 2017 ABQB 778, 2017 CarswellAlta 2723, 399 C.R.R. (2d) 150 (Alta. Q.B.) — referred to

*R. v. Blanchard* (2018), 2018 ABQB 43, 2018 CarswellAlta 75 (Alta. Q.B.) — considered

*R. v. Brodersen* (2012), 2012 ABPC 231, 2012 CarswellAlta 1451, [2012] A.J. No. 902, 65 Alta. L.R. (5th) 290, [2012] 11 W.W.R. 539 (Alta. Prov. Ct.) — referred to