Expert Opinion Evidence

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Evidence that only an expert can give

- Opinion evidence is inadmissible, subject to narrow exceptions.
  - Generally considered unreliable.
  - Also risks usurping the role of the trier of fact.

- Some lay opinion is admitted but only in limited categories:
  - “opinions, estimates and inferences which men in their daily lives reach without ratiocination”.
    - Age, identity, handwriting, speed, weather.
  - Traditional knowledge (spirituality and oral tradition).

- Expert opinion is the other notable exception: allows for findings, conclusions and opinions in a specialized area.
Some preliminaries

- Rules of Evidence are based on “fairness and ascertaining the truth through accurate fact-finding” (Phipson on Evidence).

- The trier of fact must hear all the evidence, and make findings:
  - find primary facts; and
  - draw the appropriate inferences.

- Goals of the rules of evidence in regulatory proceedings
  - Fairness and accessibility to parties and intervenors;
  - Truth, accuracy, best evidence;
  - All relevant evidence for best decision, in the public interest.
Tribunals and expert evidence

- Tribunals not bound by the rules of evidence: *SPPA ss. 15(1)*
  - “may admit as evidence ..., whether or not admissible in a court, any oral testimony relevant to the subject matter of the proceeding”
  - Does not necessarily mean tribunals are free to ignore the rules.
  - Still constrained by relevance, fairness/natural justice, jurisdiction.

- Tribunals are themselves expert:
  - assists with understanding of expert evidence;
  - cannot substitute for real evidence, tested by cross-examination;
  - Limits on administrative notice.

- Role of tribunal staff in leading expert evidence.
Types of expert who appear before tribunals

- *Westerhof v. Gee Estate*, 2015 ONCA 206 usefully distinguishes between different kinds of experts:
  - “Litigation experts” are hired by a party or the tribunal, to review and conduct research to provide an opinion for litigation purposes.
  - “Participant experts” form opinions based on their expert participation in the underlying events: eg. a treating physician.
  - “Non-party experts” form opinions based upon their expert involvement on behalf of a non-party: eg. a medical reviewer engaged by an insurer not at risk in the litigation.

- What about in-house experts, employed to provide opinions or analysis in the ordinary course to one of the parties?
  - Can they be treated by analogy to participant experts?
Admissibility – *R v. Mohan (SCC)*

- General approach of the courts is based on strict safeguards
- Four criteria for admissibility of expert evidence
  - (a) The evidence must consist of expert findings, opinions or conclusions that are *relevant* to one of the issues raised.
  - (b) It must be *necessary* to assist the trier of fact.
    - This involves more than being merely helpful.
    - It must be necessary for the trier of fact to understand the dispute.
  - (c) It must *not offend* any other exclusionary rule.
  - (d) The expert must be *qualified* to provide the evidence.
Necessity, and opinions on “the very issue”

- Trite to say the expert must not usurp the function of the trier of fact, or give opinions on “the very issue” before the court.

- However, some common examples show the difficulty:
  - **Accounting, audit and valuation**: accuracy of financial data (findings), calculations (conclusions), fairness of presentation in statements (opinions), value (the ultimate issue?).
  - **Medical**: symptoms, medical testing (findings), diagnosis (opinions), standard of care, causation of injury (the ultimate issue?).

- In practice this can be a difficult line to draw.
  - Is the finding, conclusion or opinion a matter of expertise?
  - Is it therefore necessary to assist the trier of fact.
The expert’s duty – at common law

  - The evidence should be the independent product of the expert, uninfluenced by the exigencies of the litigation.
  - Objective, unbiased, and within the witness’ expertise.
  - Should state the facts or assumptions on which the evidence is based, and not omit to consider relevant facts.
  - All qualifications on the opinion should be stated expressly.
  - All documents relied on must be produced to the parties.
  - Should never assume the role of an advocate.

- *White Burgess v. Abbott*, 2015 SCC 23 – the Supreme Court has confirmed these principles go to admissibility, not just weight.
The expert’s duty – codification and expansion

- Goudge Commission Report (Dr. Charles Smith) proposed reinforcement of the “expert duty” in courts.
  - http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/

- Ontario Rules 4.1.01 and 53: duty to provide evidence that
  - Is fair, objective and non-partisan (see also OEB, Rule 13A;
  - Relates only to matters within the expert’s area of expertise;
  - Includes such additional assistance as may reasonably be required.
  - Duty prevails over any obligation owed by the expert to any party.
  - Must sign an acknowledgment of this duty and include in report.

- Check the rules of associations or professional bodies to which the expert belongs for other rules for reports and opinions.
Counsel’s Role in Presenting Expert Evidence

- *Moore v. Getahun*, 2014 ONSC 237 (S.C.J.) proposed strict limits on counsel’s communicating with experts in preparing reports, and required disclosure of all draft reports.

- Ontario Court of Appeal reversed – 2015 ONCA 55
  - Adopts the Advocates Society’s recent Paper, “Principles Governing Communications with Testifying Experts”.
    
    “[I]t would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. ... [E]xpert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive ...”

  - Production of draft reports is not required and should not be ordered “[a]bsent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert.”
Selecting, presenting and evaluating the expert – 1 Qualifications

- Are all matters within the expert's field of expertise? Consider:
  - Education, academic experience (teaching and writing).
  - Practical experience in a field of expertise (professions, business people, artisans, historical and traditional knowledge).
  - Whether previously accepted as an expert by a court or tribunal.

- Should counsel take the opportunity to challenge qualifications
  - Rare to disqualify completely on qualifications, alone
  - But can still go to weight, even if both experts testify
  - Provides an opportunity to showcase your own expert’s qualifications, and undermine those of the opposing expert.
Qualifications and experience alone do not necessarily translate into reasonable opinion evidence.

“It is also a mistake to underestimate the influence of incompetence in human affairs. Experts have to have knowledge and experience; they do not have to have common sense.” (Dr. Theodore Dalrymple)

Questions to ask, as counsel or a tribunal member:

- What are the assumptions relied upon? Are they reasonable?
- Are the opinions and conclusions mainstream or novel?
- Do the facts support the findings, and lead to the conclusions?
Selecting, presenting and evaluating the expert – 3 Bias

- Issues to consider in assessing independence and impartiality or their absence”
  - Is the expert independent of the matters in issue: ie. associated with the parties, or involved in related cases, or interested organizations?
  - Previous testimony: is it consistent, and is there a formula?
  - Is the evidence fair and comprehensive?
  - Does it omit reference, and fail to take account, of relevant facts, and especially unhelpful facts?
  - Is it selective in disclosing relevant information?
  - Again, are all matters within the expert's field of expertise?

- Recall *White Burgess* – what degree of partiality makes expert evidence inadmissible, as distinct from affecting weight?
Selecting, presenting and evaluating the expert – 4 Advocacy

- The demeanor of the expert during testimony is critical:
  - Are the answers prompt, clear, straightforward?
  - Do the answers explain or concede unhelpful facts?
- Are the opinions rigid and dogmatic, or do they concede room for honest difference in methodology or judgment?
- Is the evidence contrived to support a predetermined conclusion, or does it reveal an evaluation of alternatives and a search for accuracy, probability, and the best explanation?
- Again, are all matters within the expert's field of expertise?
The expert report

- Should include qualifications, and an acknowledgment of duty.
- Should disclose all material facts, documents reviewed, assumptions made, and anything that could suggest bias.
- Does the report address relevant, specialized issues, within the claimed expertise – ie. is it necessary to allow proper fact-finding and adjudication?
- Does the report assist the trier of fact?
  - Is it clear, well organized, and comprehensive?
  - Does it anticipate and address any problematic facts, consider alternatives, support the choices made?
  - Does it seek or propose an optimum conclusion?
Testing the evidence in the oral proceeding

- Qualifying or “tendering” the expert: defines area of expertise.
  - Not a strict requirement: credentials in the report may suffice.
  - Oral qualification can assist understanding relevance and expertise.
  - Can also be used to bring out any biases, or test for advocacy.
  - Can set markers to prevent the “roaming witness”.

- Whether or not to mark the report as an Exhibit?

- Testing through cross-examination. “There is a crack in everything. That is how light gets in…” (Leonard Cohen).
  - It is often easier to attack credibility than subject matter.
  - The Regulator’s role in making cross-examination effective.
What to look for in cross-examination

- Demeanor: is the witness engaged or on the defensive.
- Responsiveness: cogency in providing direct answers, and care in qualifying them, or equivocation, evasion, and obfuscation.
- Clarity, brevity, and simplicity in explaining complex and technical matters.
- Balance and fairness: eg. acknowledging specific findings or methodologies of opposing experts.
- Willingness to assist, even to go outside the report, within reasonable limits or protections (eg. transcript undertakings).
- Or the opposites of each of these qualities.
The theory and the practice

- In theory, the expert is independent of the client, impartial and free from bias, knowledgeable and experienced, animated by the goal of assisting the tribunal, and does not roam or seek to advocate the client’s position.

- “In theory there is no difference between theory and practice. In practice there is.” (Yogi Berra)

- Be diligent in reviewing expert evidence, and guard against:
  - the dogmatic expert, or one with a scientific prejudice;
  - the expert whose reputation is at stake; or
  - the expert whose opinions are adduced on a regular basis, and may be influenced (even unconsciously) by the prospect of receiving further instructions in the future (Phipson on Evidence)
Regulators’ questions can add to the problem

- Report or transcript “mining” to be put to an expert to validate pre-conceived views.
  - May give undue weight to outdated or inapplicable doctrine.
  - May even create an appearance of pre-judgment.

- Qualifying a non-expert for expediency, to avoid a procedural dance over admissibility, to protect an intervenor cost claim, or to avoid an absence of evidence on a particular issue.

- Taking advantage of the expert’s availability to canvas issues that are either irrelevant or of only tangential relevance (invitation to “roam”).
Policing the experts

- Expert duties and codes of conduct should be enforced.
- Qualify at the outset: be proactive at preventing roaming, by establishing limits based on relevance and expertise.
- Require direct answers to cross-examination questions.
- Develop, publish and consistently apply criteria
  - Expertise, relevance, and necessity to assist (admissibility criteria)
  - Impartiality and advocacy (usually go to weight, but can disqualify)
  - Reliability, based on clarity, comprehensiveness, organization, balance (all contribute to weight).
- Tell them what you want. Then tell them if they delivered.
Various techniques can be used prior to or at the hearing to foster “concurrence” between experts:

- Mandatory meetings of experts pre-hearing, sometimes without the parties or their counsel present, to find areas of agreement, confirm areas of disagreement.
- An agreed statement of facts, or report.
- Opposing expert witnesses appear as a joint panel.
- Allowing the experts to question each other.

All these techniques are intended to foster independence, seek consensus, and reduce witness “advocacy”, and may make it easier to compare the positions of opposing experts.
Alternatives 2 – Legislated Models

- Various alternatives being debated in different jurisdictions.
- In Britain, for criminal trials (based on concerns that juries, in particular, are too easily led), British Law Commission Report 2011 proposed four tests: assistance test (weight); expertise test (admissibility); impartiality test (weight); reliability test (weight).
- In Quebec (civil law), a court-led pilot project in Laval requires the use of a single, court-approved expert, by all parties.
- Limited application in proceedings before expert tribunals?
- The real benefit for regulators is the reminder about key issues.
Background Reading

- The cases cited.
- Decision 2011-436, AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc., Heartland Transmission Project, 1 November 2011, paragraphs 77 to 97. Good review of how expert evidence is assessed.
- The Law Commission, (Law Com No 325) EXPERT EVIDENCE IN CRIMINAL PROCEEDINGS IN ENGLAND AND WALES, 21 March 2011.
- Ontario Energy Board Rules of Practice and Procedure, Rule 13A, expert’s duty to be impartial.
- Federal Court of Canada, Federal Court Rules, Code of Conduct and Rule 52.2(1)(c); Ontario Rules of Civil Procedure, Rules 4.1.01 and 53. Both require the expert to sign a Certificate agreeing to be bound by an ethical code or duty.
Questions?

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