Ont. C.A. Opines on Rules for Expert Evidence
A Commentary on *Moore v. Getahun*

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*** Note – Leave to appeal the Ontario Court of Appeal decision in Moore v Getahun was denied by the Supreme Court of Canada on Sept. 17, 2015 ***

In her 2014 trial decision in *Moore v. Getahun*, 2014 ONSC 237 (CanLII), Madam Justice Janet M. Wilson of the Superior Court of Justice surprised and startled the profession by ruling that it was improper for counsel to assist an expert witness in the preparation of the expert's report. This matter was appealed to the Ontario Court of Appeal, which, in a four day hearing, heard not only from counsel for the parties, but also from counsel from the following intervenors:

Criminal Lawyers' Association
Ontario Trial Lawyers Association
The Holland Group
Canadian Defence Lawyers Association
Canadian Institute of Chartered Business Valuators
The Advocates' Society

In the course of its reasons, the Court opined on the following issues:

1. Is it improper for counsel to assist an expert witness in the preparation of the expert's report?
2. Did the 2010 changes to Rules 4 and 53 of the Rules of Civil Procedure make substantive changes to the rules of admissibility of expert evidence or merely codify the existing common law?
3. Are draft reports and consultations between expert witnesses and counsel protected by litigation privilege?
4. May a trial judge take into account statements made by an expert in the expert's report when the report was not in evidence, but was provided to the trial judge as an aide memoire?

The appeal decision was delivered on Jan. 29, 2015 and is cited as *Moore v. Getahun*, 2015 ONCA 55, 2015 ONCA 55 (CanLII)

1. Is it improper for counsel to assist an expert witness in the preparation of the expert's report?

After hearing from all parties and intervenors, the court remarked:

> [49] It is apparent from the submissions of the parties and the interveners representing both sides of the bar that, if accepted, the trial judge's ruling would represent a major change in practice. It is widely accepted that consultation between counsel and expert witnesses in the preparation of Rule 53.03 reports, within certain limits, is necessary to ensure the efficient and orderly presentation of expert evidence and the timely, affordable and just resolution of claims.

The court held:

> [62] I agree with the submissions of the appellant and the interveners that it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.
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> [63] Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties reflected by rule 4.1.01 and contained in the Form 53 acknowledgment of expert's duty. Reviewing a draft report enables counsel to ensure that the report (i) complies with the Rules of Civil Procedure and the rules of evidence, (ii) addresses and is restricted to the relevant issues and (iii) is written in a manner and style that is accessible and comprehensible. Counsel need to ensure that the expert witness understands matters such as the difference between the legal burden of proof and scientific certainty, the need to clarify the facts and assumptions underlying the expert's opinion, the need to confine the report to matters within the expert witness's area of expertise and the need to avoid usurping the court's function as the ultimate arbiter of the issues.
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> [64] Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared.
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> [65] Leaving the expert witness entirely to his or her own devices, or requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner. Such a rule would encourage the hiring of "shadow experts" to advise counsel. There would be an incentive to jettison rather than edit and improve badly drafted reports, causing added cost and delay. Precluding consultation would also encourage the use of those expert

witnesses who make a career of testifying in court and who are often perceived to be hired guns likely to offer partisan opinions, as these expert witnesses may require less guidance and preparation. In my respectful view, the changes suggested by the trial judge would not be in the interests of justice and would frustrate the timely and cost-effective adjudication of civil disputes.

[66] **For these reasons, I reject the trial judge's proclamation that the practice of consultation between counsel and expert witnesses to review draft reports must end.** [emphasis added}

2. Did the 2010 changes to Rules 4 and 53 of the Rules of Civil Procedure make substantive changes to the rules of admissibility of expert evidence or merely codify the existing common law?

The trial judge had based her ruling that it was improper for counsel to assist an expert witness in the preparation of the expert's report on the premise that the 2010 changes to the Rules of Civil Procedure had changed the duty of expert witnesses and counsel. The Court addressed this issue as follows:

[51] I now turn to the law. I disagree with the trial judge's statement that the 2010 amendments to rule 53.03 introduced a "change in the role of expert witnesses".

[52] As I read the amendments and the Osborne Report recommendations, the changes were intended to clarify and emphasize the existing duties of expert witnesses. I agree with Lederman J.'s statement in Henderson v. Risi, 2012 ONSC 3459 (CanLII), 111 O.R. (3d) 554 (S.C.), at para. 19, that these changes represent a restatement of the basic common law principle that it is the duty of an expert witness "to provide opinion evidence that is fair, objective and non-partisan." Those common law duties were summarized in an often cited passage from National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd. ("The Ikarian Reefer"), [1993] 2 Lloyd's Rep. 68, at p. 81 (Eng. Q.B. Comm.), rev'd on other grounds but endorsed on this point, [1995] 1 Lloyd's Rep 455 (Eng. C.A. Civ.), at p. 496:

> 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 [citation omitted].
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> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise [citation omitted]. An expert witness… should never assume the role of an advocate.

> **The 2010 amendments to rule 53.03 did not create new duties but rather codified and reinforced these basic common law principles.** [emphasis added]
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> [53] The changes suggested by the trial judge find no support in the various reviews and studies on civil justice reform to which we have been referred. The Honourable Coulter Osborne certainly shared the trial judge's aspiration for a regime that fosters unbiased expert evidence, yet there is no suggestion in his report that the solution could be found by altering the long-standing practice of counsel reviewing draft reports.

3. Are draft reports and consultations between expert witnesses and counsel protected by litigation privilege?

In this regard, the court held that draft reports are protected by privilege, regardless of whether or not the expert is called at trial:

> [70] Pursuant to rule 31.06(3), the draft reports of experts the party does not intend to call are privileged and need not be disclosed. Under the protection of litigation privilege, the same holds for the draft reports, notes and records of any consultations between experts and counsel, even where the party intends to call the expert as a witness.
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> [71] Making preparatory discussions and drafts subject to automatic disclosure would, in my view, be contrary to existing doctrine and would inhibit careful preparation. Such a rule would discourage the participants from reducing preliminary or tentative views to writing, a necessary step in the development of a sound and thorough opinion. Compelling production of all drafts, good and bad, would discourage parties from engaging experts to provide careful and dispassionate opinions and would instead encourage partisan and unbalanced reports. Allowing an open-ended inquiry into the differences between a final report and an earlier draft would unduly interfere with the orderly preparation of a party's case and would run the risk of needlessly prolonging proceedings.

However, the privilege related to draft reports of expert who testifies at trial is limited:

> [74] The most obvious qualification is that the Rules of Civil Procedure require disclosure of the opinion of an expert witness before trial. If a party intends to call the expert as a witness at trial, rule 31.06(3) entitles the opposite party on oral discovery to "obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined".
> [75] As well, the party who intends to call the expert witness is required to disclose the expert's report and the other information mandated by rule 53.03(2.1). The result is that what has been called "the foundational information" for the opinion must be disclosed: Conceicao Farms, at para. 14. Bryant, Lederman and Fuerst refer to this as an "implied waiver" of privilege over the

facts underlying an expert's opinion that results from calling the expert as a witness: Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 4th ed. (Markham: LexisNexis Canada, 2014), at para. 14.220. These authors favour restricting the implied waiver "to material relating to formulation of the expressed opinion" (at para. 14.224). They state that caution should be exercised before requiring "wide-ranging disclosure of all solicitor-expert communications and drafts of reports", as such a practice could encourage "a general practice among solicitors of destroying drafts after they are no longer needed just to avoid the problem" (at para. 14.226).

[76] The second qualification is that, as stated in Blank, at para. 37, "litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration." Litigation privilege yields where required to meet the ends of justice, and "[i]t is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day": Blank, at para. 44.

[77] In my view, the ends of justice do not permit litigation privilege to be used to shield improper conduct. As I have already mentioned, it is common ground on this appeal that it is wrong for counsel to interfere with an expert's duties of independence and objectivity. Where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witness's duties of independence and objectivity, the court can order disclosure of such discussions. See, for example, Ebrahim v. Continental Precious Minerals Inc., 2012 ONSC 1123 (CanLII), 2012 ONSC 1123 (S.C.), at paras. 63-75, where the court ordered disclosure of draft reports and affidavits after an expert witness testified that he did not draft the report or affidavit containing his expert opinion and admitted that his firm had an ongoing commercial relationship with the party calling him.

[78] Absent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert, a party should not be allowed to demand production of draft reports or notes of interactions between counsel and an expert witness. Evidence of an hour and a half conference call plainly does not meet the threshold of constituting a factual foundation for an allegation of improper influence. In my view, the trial judge erred in law by stating that all changes in the reports of expert witnesses should be routinely documented and disclosed. She should not have ordered the production of Dr. Taylor's drafts and notes.

4. May a trial judge take into account statements made by an expert in the expert's report when the report is not in evidence, but is provided to the trial judge as an aide memoire?

In the case at bar, the trial judge rejected parts of the expert's viva voce testimony that she held departed from what he wrote in his report. The report had not been placed in evidence, but was provided to the trial judge at her request as an aide memoire.

The court held:

> [85] In my view, the trial judge's use of the expert reports of Drs. Taylor and Athwal to contradict their viva voce evidence reveals an error of law.
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> [86] If an expert's report has not been entered into evidence as an exhibit, it has no evidentiary value, even if provided to the trial judge as an aide memoire. Inconsistencies between the viva voce evidence of an expert witness and his or her written report are the proper subject of cross-examination. However, if the expert witness was not cross-examined as to an inconsistency between his or her viva voce evidence and the contents of their report, it is not open to a trial judge to place any weight in assessing the expert's credibility on this perceived inconsistency. This is not a mere technicality but rather a matter of trial fairness. The expert witness is entitled to be openly confronted with what may appear to be contradictions so that he or she has the opportunity to explain or clarify the apparent inconsistencies.

From the Court's reasons we can take the following:

1. It is not improper for counsel to assist an expert in preparing his report, provided they do not lead him to provide an opinion that he does not believe in.
2. The 2010 changes to the Rules of Civil Procedure make procedural changes to the manner in which expert evidence is adduced, but do not substantively change the duties of counsel or experts.
3. Draft reports are subject to litigation privilege unless the party can establish a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert,
4. If an expert's report has not been entered into evidence as an exhibit, it has no evidentiary value, even if provided to the trial judge as an aide memoire.

In the end the Court dismissed the appeal on the grounds that the trial judge's errors did not affect the outcome, and as a result, the Court's reasons are technically obiter dicta, but it would take a brave trial judge to ignore them.

*** Update, March 28, 2015 – See our more recent commentary on Westerhof v Gee Estate (Commentary 31 on our web page) ***