

THE EVOLVING OBLIGATIONS OF AN EXPERT WITNESS
Shane Rayman, Rueter Scargall Bennett LLP¹
Ontario Expropriation Association Fall Seminar - October 29, 2009

Introduction

Expert evidence plays a critical role in the resolution of claims for compensation in the expropriation process. Unlike numerous other legal disputes that are dependant upon numerous contested facts, observations and physical evidence (such as who said what to whom, traffic light colours and blood spatter); disputes in expropriation claims are usually focused on opinion evidence provided by experts. This opinion evidence can involve analyses and conclusions about the value of a property, the highest and best use of land, economic projections, capitalization rates and other often intangible questions and issues. As these issues form the substance of most disputes relating to compensation, expert evidence is fundamental to the determination of virtually all compensation issues that arise in expropriation claims.

The use of experts in the expropriation process is not limited to claims for compensation that are advanced to a hearing before the Ontario Municipal Board. The involvement of experts often begins in the initial stages of negotiations between an owner and an expropriating authority, in many cases before the formal expropriation process is commenced. It is often necessary for the initial compensation offers made by an authority acquiring property to be based on the opinion of an independent expert. This

¹ The author extends his gratitude to Mario Thomaidis for his research and editorial assistance and to Paul B. Scargall and Matthew Owen-King for their review and commentary on this paper.

analysis adds transparency to the acquisition / compensation process, and may provide the authority with justification for making the offer and the owner with a basis for its acceptance.

When an authority provides its statutory offer of compensation after an expropriation takes place, this offer must be supported by an appraisal report.² Once the negotiation process between an owner and a public authority begins, experts are ordinarily used by both sides in informal negotiations, in proceedings before the Board of Negotiation,³ and in arbitrations before the Ontario Municipal Board.⁴ Although many expert reports are not ultimately subject to the scrutiny of the Ontario Municipal Board or the court, cautious and responsible conduct suggests that any expert report that is being relied upon at any stage should be defensible as though it will be before the Ontario Municipal Board or the court.

In virtually all disciplines, experts have professional, ethical and moral standards to uphold, in addition to those imposed by the court. The practice standards for an expert are not limited to rules of professional conduct applicable to experts, but also include those imposed by good conscience, common sense and upholding a strong reputation as an independent and credible expert.

² *Expropriations Act*, R.S.O. 1990, c. E.26, as amended, s.25 (the “*Expropriations Act*”).

³ *Ibid* at s. 26(a).

⁴ *Ibid* at s. 26(b).

This paper is intended to explore the duties that an expert has to the court. These duties are similarly applicable to the duties imposed on an expert before the Ontario Municipal Board by the common law and the *Rules of Practice and Procedure* for the Ontario Municipal Board.⁵ These same duties may apply to reports being prepared by an expert who wishes to produce reports that are in compliance with his or her professional standards,⁶ objective analysis and independence. This paper will focus on the existing duties that are applicable to experts as well as the revised *Rules of Civil Procedure*⁷ relating to experts that will be effective as of January 1, 2010.⁸

The examination of the standards and duties applicable to experts is intended to offer guidance for all expert reports, opinions and analyses, whether they are for the purpose of a hearing before the Ontario Municipal Board or to guide negotiations in less formal settings.

Expert Evidence in Expropriation Claims

The importance of expert evidence (notably appraisal evidence) has long been recognized in expropriation proceedings in Ontario. In 1975, Mr. R.B. Robinson, Q.C. writing a

⁵ See commentary on Rule 4 of *Rules of Practice and Procedure* for the Ontario Municipal Board, made under Section 91 of the Ontario *Municipal Board Act*, R.S.O. 1990, c. O.28 and Section 25.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the “*OMB Rules of Practice and Procedure*”) and discussion on page 15, *infra*.

⁶ See e.g. Canadian Institute of Actuaries, *Standards of Practice – Practice Specific Standards for Actuarial Evidence*, Rules 4150.01 to .04 (June 2006); Canadian Institute of Planners, *Statement of Values and Code of Professional Practice*, Rule 2.1 (June 2006); Appraisal Institute of Canada, *Canadian Uniform Standards of Professional Appraisal Practice*, Rule 5.14.6.

⁷ *Rules of Civil Procedure*, R.R.O. 1990, reg 194, as amended (the “*Rules of Civil Procedure*”).

⁸ Ontario Regulation 438/08.

report on the *Expropriations Act* for the Ministry of the Attorney General stated the following (at 29):

The effectiveness of an expropriation statute in the process of determining fair compensation depends on a knowledgeable tribunal and a skilful bar. It depends equally on a highly qualified body of real estate appraisers who are willing to give evidence of value.⁹

The report prepared by Mr. Robinson went on to recommend additional training, qualification and regulation for real estate appraisers in Ontario.¹⁰ Other reports in the area of expropriation have also stated the importance of real property appraisers being qualified, uniformly trained and regulated by a governing body.¹¹ Several statements about the uniform regulation, qualification and education of real property appraisers were made in the 1970s, before initiatives were undertaken to license and train appraisers through various organizations and governing bodies.

The Use of Experts in the Litigation Process

The adversarial system in Canada is based on witnesses providing evidence to a court, tribunal or board and the trier of fact (judge, jury or board member) making assessments of the factual evidence before it. Expert evidence contemplates a witness before the court providing an opinion to influence the decision of the judge, as opposed to mere facts,

⁹ Ontario, Ministry of the Attorney General, *Report on the Expropriations Act* by R.B. Robinson, Q.C., 1975 at 29.

¹⁰ *Ibid.*

¹¹ See *e.g.* Law Reform Commission of Canada, *Report on Expropriation* (Ottawa: Queen's Printer, 1976).

upon which a judge or board member can make an assessment or draw a conclusion.¹²

The basis of admissibility for opinion or expert evidence is that the evidence is necessary to assist the trier of fact. This was succinctly explained by Mr. Justice Dickson, writing for the Supreme Court of Canada in *R. v. Abbey*,¹³ when he described the expert's role before the court as follows (at 42):

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 a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary". [internal citations omitted].

The adversarial system in Canada, which includes hearings before the Ontario Municipal Board under the *Expropriations Act*, generally entails expert evidence being adduced by the respective parties. These experts are called as witnesses by the parties to the proceeding; their evidence is presented in chief before the court; the opposing party has the opportunity to cross-examine the expert on his or her evidence; and it is then at the discretion of the court or the Board to determine the weight of the evidence tendered.¹⁴

¹² John Sopinka *et. al.*, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 616 ("*The Law of Evidence in Canada*").

¹³ *R. v. Abbey*, [1982] 2 S.C.R. 24.

¹⁴ See *Rules of Civil Procedure*, *supra* note 7, r. 53.

This use of experts is in contrast to other systems that encourage the appointment of experts by the court or the use of a single expert, agreed upon by the parties.¹⁵ The Ontario Superior Court of Justice does, however, have the power to appoint an expert to inquire into and report on any relevant issue of fact or opinion, either on a motion by a party or the court's own initiative,¹⁶ although this power is rarely used.¹⁷ As the Ontario Municipal Board has similar powers to that of the Superior Court, this rule may be applicable to the Ontario Municipal Board in appropriate circumstances.¹⁸

The Admissibility of Expert Evidence Before the Court

As a general rule, witnesses are prohibited from testifying about their opinions, as opposed to facts they have observed. Expert witnesses are permitted to give opinion evidence as an exception to this general rule, but only to the extent permitted by a court or the Board.¹⁹ Not only does a judge or Board Member have the ability to weigh the evidence of an expert witness, but they also have the ability to exclude expert evidence when appropriate. This was discussed by Mr. Justice Binnie, writing for the Supreme Court of Canada in *R. v. J.-L.J.*,²⁰ where he wrote (at 613):

¹⁵ See Ontario, Ministry of the Attorney General, *Civil Justice Reform Project: Summary of Findings and Recommendations*, by the Honourable Coulter A. Osborne, Q.C. (Toronto: Queen's Printer, 2007) (the "*Civil Justice Reform Project*") at 71 to 74.

¹⁶ See *Rules of Civil Procedure*, *supra* note 7, r. 52.03.

¹⁷ *Civil Justice Reform Project*, *supra* note 15 at 73.

¹⁸ *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, ss. 34 to 38. The Ontario Municipal Board can also appoint experts with special or technical knowledge to assist the Board pursuant to section 27 of the *Ontario Municipal Board Act*.

¹⁹ Ontario, *Inquiry into Pediatric Forensic Pathology in Ontario*, the Hon. Stephen T. Goudge, Commissioner (Toronto: Queen's Printer, 2008) at 471 ("*Goudge Inquiry*").

²⁰ *R. v. J.-L.J.*, [2000] 2 S.C.R. 600.

The Court has emphasized that the trial judge should take seriously the role of “gate keeper”. The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

Before expert evidence is to be admitted before a court or the Board, the evidence must meet the following admissibility criteria articulated by Mr. Justice Sopinka writing for the Supreme Court of Canada in *R. v. Mohan*:²¹

1. The evidence must be relevant;
2. The evidence must be necessary to assist the trier of fact;
3. There must be no exclusionary rule otherwise prohibiting the receipt of the evidence; and
4. The evidence is given by a properly qualified expert.

The test of whether an expert’s evidence is relevant essentially engages two criteria: (i) whether the proposed expert opinion relates to a fact or issue in the hearing or trial; and (ii) whether the evidence is sufficiently related to the fact or issue so that it goes towards proving the fact or issue.²² The determination of the second criteria, necessity, considers whether the expert’s opinion is required to assist the trier of fact by providing special knowledge that an ordinary person would not have.

²¹ *R. v. Mohan*, [1994] 2 S.C.R. 9 at 20.

²² *Dulong v. Merrill Lynch Canada Inc.* (2006), 80 O.R. (3d) 378 at 380.

The inadmissibility of expert evidence due to other exclusionary rules often relates to expert evidence that is not admissible before the court for other reasons. An example of this exclusion would be expert evidence replacing the function of a judge or Board Member on issues in which the judge or Board Member is qualified to make a decision. This would occur if a party sought to introduce an expert who observes other witnesses and gives an opinion on whether they are telling the truth or lying. This function is reserved for the trier of fact and expert evidence on this issue would not be admissible.²³

A common misconception is that an expert is not allowed to provide evidence on the ultimate issue in a proceeding. Although the court has, at times, excluded expert evidence provided to address an issue reserved for the trial Judge, evidence speaking to the ultimate issue is most often not excluded on that basis alone.²⁴ An example of this is in expropriation proceedings where the ultimate issue relates to the market value of a property. In such a proceeding, the expert appraisal evidence is admissible even if it speaks to the value of the property, which is the ultimate question in issue.

The last criteria for the admission of expert evidence relates to whether an expert is properly qualified. To establish this, evidence must be led on an expert's qualifications that demonstrate that the expert's area of expertise is based on special knowledge. Special knowledge does not always equate to scientific knowledge, but the expert must

²³ See *e.g. R. v. Marquard*, [1993] 4 S.C.R. 223 at 228.

²⁴ *R. v. Mohan*, *supra* note 21 at 20.

demonstrate some form of acquired special or particular knowledge, based upon study, practice or other experience that the ordinary person would not have.²⁵

The *Goudge Inquiry*, which inquired into expert evidence in criminal proceedings in Ontario, recently stressed the requirement for an expert to be properly qualified in the following recommendation (at 475), “When a witness is put forward to give expert scientific evidence, the court should clearly define the subject area of the witness’s expertise and vigorously confine the witness’s testimony to it.”

The *Goudge Inquiry* went on to list criteria for determining the reliability of expert evidence as follows (at 495):

In determining that threshold reliability, the trial judge should focus on factors related to

1. the reliability of the witness, including whether the witness is testifying outside his or her expertise;
2. the reliability of the scientific theory or technique on which the opinion draws, including whether it is generally accepted and whether there are meaningful peer review, professional standards, and quality assurance processes;
3. whether the expert can relate his or her particular opinion in the case to a theory or technique that has been or can be tested, including substitutes for testing that are tailored to the particular discipline;
4. whether there is serious dispute or uncertainty about the science and, if so, whether the trier of fact will be reliably informed about the existence of that dispute or uncertainty;

²⁵ *Rice v. Sockett* (1912), 8 D.L.R. 84 (Ont. C.A.).

5. whether the expert has adequately considered alternative explanations or interpretation of the data and whether the underlying evidence is available for others to challenge the expert's interpretation;
6. whether the language that the expert proposes to use to express his or her conclusions is appropriate, given the degree of controversy or certainty in the underlying science; and
7. whether the expert can express the opinion in a manner such that the trier of fact will be able to reach an independent opinion as to the reliability of the expert's opinion.

The Process of Qualifying an Expert

An expert quite often tenders a professional profile to the court, explains his or her qualifications and attempts to satisfy the court as to why the court should accept his or her opinion. The rationale for this requirement was explained by Madam Justice Charron, writing for the Ontario Court of Appeal in *R. v. A.K. and N.K.*,²⁶ as follows (at 680):

Opinion evidence can only be of assistance to the extent that the witness has acquired special knowledge over the subject-matter that the average trier of fact does not already have. If the witness's "special" or "particular" knowledge on a subject-matter is minimal, he or she should not be qualified as an expert with respect to that subject.

Should the opposing party in a hearing or trial choose to challenge the qualifications of an expert, the party has a right to do so before the witness is qualified.²⁷ This right includes the ability of the opposing party to cross-examine the prospective expert on his

²⁶ *R. v. A.K. and N.K.*, (1999), 45 O.R. (3d) 641 (C.A.).

²⁷ *Goudge Inquiry*, *supra* note 19 at 497.

or her qualifications and to object to the admissibility of the expert's evidence.²⁸ It is then at the discretion of the Board or the court to qualify the expert, to limit the testimony of the expert (based on the area of expertise that is accepted), or to disqualify the expert and prohibit the opinion evidence.²⁹

In the event that an expert is qualified to give expert opinion evidence, the opposing party maintains the right to object to opinion evidence by the expert that is outside of the expert's area of qualification or, alternatively, challenge the weight to be attributed to an expert's testimony.³⁰ This process is intended to ensure that expert evidence is only given by an expert who is properly qualified to give opinion evidence in the expert's respective area of expertise.

Obligations of an expert to the Court or the Board

Expert opinion evidence is intended to assist the court and the common law in Canada requires an expert to provide the court with independent and unbiased testimony. This was discussed in *Frazer & Smith v. Haukioja*,³¹ where Mr. Justice Moore described the function of an expert as follows (at paras. 138 and 139):

Whatever the role an expert may have undertaken during the course of the litigation in assisting counsel to a fuller appreciation of the facts in dispute and the inferences that might be drawn from them, the expert must set aside that role upon entering the witness box at

²⁸ *The Law of Evidence in Canada*, *supra* note 12 at 624.

²⁹ *Goudge Inquiry*, *supra* note 19 at 500.

³⁰ *R. v. Marquard*, *supra* note 23 at 243-244.

³¹ *Frazer & Smith v. Haukioja*, [2008] CanLII 42207 (Ont. S.C.J.).

trial. From the witness box the witness speaks only to assist the court.

At trial the expert must be and appear to be independent of the party or counsel who retained the services of the expert and must demonstrate objectivity and impartiality in the analyses and opinions that she or he is allowed to give. Because the opinions stated by an expert are predicated upon expertise that the court does not possess, the court must be confident in relying upon the expert to provide a thorough, balanced and technically sound analysis. Independence and impartiality; the court expects nothing more and will accept nothing less.

Courts have in many instances censured the evidence of an expert who appears to be acting as a “hired gun” and showing an allegiance to the party by whom he or she has been retained, over and above the paramount duty to assist the court. In a rather critical comment on the use of experts by parties to a proceeding, Mr. Justice Farley stated the following regarding the overuse of experts and the prevailing duty to the court:³²

[...] I make it as a general observation as to the flabbiness with which legal cases have become afflicted by the overreliance on experts (and it appears the willingness of experts to offer themselves up to do “everything”). I paused to note that experts must conduct themselves as objective neutral assistants of the court and, if they fail to fulfill this function, their testimony should be ruled inadmissible and therefore ignored after they have been eviscerated [internal citation omitted].

³² *Toronto Dominion Bank v. E. Goldberg Holdings Ltd.*, [1999] 43 C.P.C. (4th) 275 (Ont. S.C.J.) at 276.

The English decision known as the *Ikarian Reefer*,³³ espoused a number of principles and relevant factors for the receipt of expert evidence by the court. This decision and the analysis therein has been endorsed by numerous courts in Canada.³⁴ The principles set forth in the *Ikarian Reefer* and serve as an effective summary of the duties and responsibilities an expert witness owes to the court or the Board:

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 and unbiased opinion in relation to the matters within his or her expertise and should never assume the role of an advocate.
3. An expert witness should relay the facts or assumption upon which his or her opinion is based and should not omit to consider material facts that could detract from the concluded opinion offered to the court.
4. An expert witness should make it clear when a particular question or fact falls outside of his or her area of expertise.
5. When an opinion is based on what may be insufficient data, the expert should indicate that the opinion is limited.

³³ *National Justice Compania Naviera S. A. v. Prudential Assurance Co. Ltd.*, [1993] 2 Lloyd's Rep. 68 (Q.B.D.), rev'd on other grounds but aff'd on this point [1995] 1 Lloyd's Rep. 455 at 496 (C.A.) ("*Ikarian Reefer*").

³⁴ Applied in Ontario and discussed in *Fellowes, McNeil v. Kansa General International Insurance Company Ltd.* (1998), 40 O.R. (3d) 456 (Ont. Gen. Div.); *Frazer v. Haukioja*, *supra* note 31.

6. In cases where an expert witness is unable to assert that the report contains the truth, the whole truth and nothing but the truth without qualification, that qualification should be stated within the report.
7. If, after the parties exchange reports and expert opinions, the expert witness changes his or her view on a material matter, having reviewed the other side's expert evidence or for any other reason, such change in view or opinion should be communicated through legal representatives to the opposing party without delay and when appropriate to the court.
8. When expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports, or other similar documents, these must be provided to the opposing party at the time or prior to the exchange of expert reports.

Although the principles set-out above may appear to be basic principles of providing truthful, fair and objective evidence, there is a risk that these requirements will fall by the wayside in the heat of a contested hearing or trial, where both sides have a great amount at stake and have a financial interest in succeeding. It is not the role of an expert to win or to lose, but rather to assist a court or the Board by providing truthful and helpful evidence. For an expert to ensure that his or her opinion evidence is accepted by the court and preserve his or her own reputation (both before the court and in the expert's profession), it is essential that the principles above are carefully followed, even if their application detracts from the merits of the claim for which the expert has been retained to support.

The law also requires an expert to be impartial and not connected to the party for whom she or he is has been retained. This is so in order to avoid the perception that the expert is biased or acting as an advocate before the court.³⁵ In the decision of *Fellowes, McNeil v. Kansa General International Insurance Company Ltd.*, Madam Justice MacDonald disqualified an expert on the grounds that that expert was too closely related to the defendant, on whose behalf the expert intended to testify. In this action, the expert had previously acted as counsel for the defendant.³⁶ As will be discussed in further detail below, an expert's duty to the court prevails above all other duties when giving evidence.

The Rules of Civil Procedure and their Application to the Ontario Municipal Board

The *Rules of Civil Procedure* are the rules that govern practice before the Superior Court of Justice (the civil trial court in Ontario). These Rules are promulgated as regulations under the *Courts of Justice Act*,³⁷ and provide what amounts to the ground rules for proceedings before the Court. Although certain rules are expressly incorporated into the *OMB Rules of Practice and Procedure*, the *OMB Rules of Practice and Procedure* state in their commentary that in instances where the Board's own rules do not provide for a matter of procedure, the Board may also follow the *Rules of Civil Procedure* where appropriate.³⁸

³⁵ Geoffrey D.E. Adair, *On Trial: Advocacy Skills Law and Practice*, 2nd ed. (Markham: Butterworths, 2004) at 353.

³⁶ *Fellowes, McNeil*, *supra* note 34 at 459.

³⁷ *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

³⁸ *OMB Rules of Practice and Procedure*, *supra* note 5, commentary on Section 4.

Although not all rules are directly imported into the practice of the Ontario Municipal Board, the *Rules of Civil Procedure* that speak to similar issues of practice would logically have greater application before the Ontario Municipal Board. Moreover, the *Rules of Civil Procedure* that codify common law requirements, such as those that deal with expert evidence would also be applicable to evidence before the Board through the application of the common law. It would appear, therefore, that the amendments to the *Rules of Civil Procedure* applicable to expert evidence are more or less applicable to expert evidence before the Ontario Municipal Board as well, either directly or indirectly.

Whether they are applied directly (by adoption of the *OMB Rules*) or indirectly (by way of the common law), the new *Rules of Civil Procedure* offer guidance to expert evidence that would appear to constitute prudent practice for all witnesses appearing before the Ontario Municipal Board or any other judicial tribunal in Ontario.

Amendments to the *Rules of Civil Procedure*

Through regulation passed in late 2008, the *Rules of Civil Procedure* are being amended.³⁹ These amendments have a substantial impact on several practices before the Court. The amendments were brought forth as part of the Civil Justice Reform Project, which was chaired by the Honourable Coulter A. Osborne. In this capacity, Mr. Justice Osborne wrote a report intended to increase access to justice, add efficiency to the court

³⁹ O. Reg. 438/08.

system and reduce the length and cost of civil proceedings in Ontario.⁴⁰ In addition to imposing new rules on the duty of experts, the amendments to the *Rules of Civil Procedure* modify and attempt to streamline the discovery process in civil proceedings (which is directly applicable to expropriation proceedings in accordance with Rules 33 and 134 of the *OMB Rules of Practice and Procedure*) and provide a broader application of the test for summary judgment (which permits parties to dispose of an action, or issues within an action, without a full trial).

In the *Civil Justice Reform Project*, Mr. Justice Osborne commented on the proliferation and bias of experts as a problem in the litigation system as follows (at 71):

[...] the vast majority of those consulted in the course of this Review identified the proliferation of experts as a significant problem that often leads to a battle of competing experts. Some observed that as soon as one party retains an expert, an opposing party is forced to retain an expert. The expert witness merry-go-round bears with it an advantage to a litigant who has significant financial resources.

There is also the issue of partiality. A common complaint was that too many experts are no more than hired guns who tailor their reports and evidence to suit the clients' needs. I know that this problem exists, but hasten to add that not all experts should be tarred with the same brush.

The *Civil Justice Reform Project* went on to consider various options for dealing with expert evidence that included:

⁴⁰ *Civil Justice Reform Project*, *supra* note 15.

1. Creating a system for a single expert to be relied upon by the court, when appropriate;
2. Increasing the power of the court to appoint an expert;
3. Encouraging a more stringent limit on the number of experts to be relied upon at trial;
4. Requiring experts to meet and confer before an action proceeds to trial;
5. Requiring the disclosure of expert reports prior to the pre-trial of an action;
6. Considering the right of parties to hold pre-trial examinations of experts; and
7. Strictly and expressly imposing the duty on experts to assist the Court.⁴¹

The *Civil Justice Reform Project* recommended the modification of the *Rules of Civil Procedure* to encourage the early exchange of reports before pre-trials or mediations, which could assist in the settlement of an action, along with encouraging experts to confer before a trial.⁴² It also recommended expressly affirming an expert's duty to the court, as discussed below.

The Prevailing Duty of an Expert to the Court

The report of the Civil Justice Reform Project strongly recommended that the *Rules of Civil Procedure* impose a duty to the court on an expert and to require an expert to

⁴¹ *Civil Justice Reform Project*, *supra* note 15 at 72-80.

⁴² *Ibid.* at 83.

explicitly recognize this duty. This was endorsed in the report of the Civil Justice Reform Project as follows (at 75 and 76):

The issue of “hired guns” and “opinions for sale” was repeatedly identified as a problem during consultations. To help curb expert bias, there does not appear to be any sound policy reason why the Rules of Civil Procedure should not expressly impose on experts an overriding duty to the court, rather than to the parties who pay and instruct them. The primary criticism for such an approach is that, without a clear enforcement mechanism, it may have no significant impact on experts unduly swayed by the parties who retain them.

An expressly prescribed overriding duty to provide the court with a true and complete professional opinion will, at a minimum, cause experts to pause and consider the content of their reports and the extent to which their opinions may have been subjected to subtle or overt pressures. Matched with a certification requirement in the expert’s report, it will reinforce the fact that expert evidence is intended to assist the court with its neutral evaluation of issues. At the end of the day, such a reform cannot hurt the process and will hopefully help limit the extent of expert bias.

Following the recommendations of the *Civil Justice Reform Project*, Rule 4.1.01, which will be effective as of January 1, 2010, was added to the *Rules of Civil Procedure*:

DUTY OF EXPERT

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert’s area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

The Rule set-out above reflects the guidance provided by the English Court of Queen's Bench in the *Ikarian Reefer* decision. It mandates the same principles of expert evidence being fair, objective and independent, as well as being within the expert's area of expertise and intended to assist the court. Rule 4.1.01(2) sets forth, in no uncertain terms, that an expert's duty to a court prevails over the expert's duty to his or her own client. For that reason, if an expert is found to be in conflict with the best interests of a client, the expert is still bound to his or her overriding duty to the court.

It is essential for these obligations and duties of an expert to be understood not only by counsel who appear before the court, but also by experts who must clearly understand their duty. It also is sensible for both experts and legal counsel to advise clients of this prevailing duty, as it should be understood by a client in advance that an expert may have to assist the court in a manner that may not ultimately be helpful to the client.

Although this obligation on experts may be unappealing to certain clients, it is in the interests of the administration of justice to ensure that issues before the Board and the court be determined in a fair and sound manner. This objective is furthered by imposing

an express duty on an expert to assist the court, which correspondingly deters experts from providing partisan evidence to the court. The early disclosure of this duty may avoid situations where an expert would not meet the expectations of a client at trial. Such an instance may occur where an expert would provide an opinion that would not assist the client, but rather the court (and at times the opposing party) in a proceeding.

Timing for the Exchange of Expert Reports

Section 29 of the *Expropriations Act* requires all expert reports to be exchanged no less than 15 days before the commencement of a hearing. This statutory provision has its origins in the *Expropriations Act* developed in the late 1960s.⁴³ Over the past 40 years, the sophistication and proliferation of expert evidence, along with the level of detail within expert reports, has substantially increased. As a consequence, the applicable *OMB Rules of Practice and Procedure* generally dictate that appraisal reports are to be exchanged in accordance with the *Rules of Civil Procedure*, which provide for a longer period for the exchange of expert reports prior to the commencement of the hearing of a matter.

Providing a longer period of notice for the exchange of expert reports is sensible in order to allow all of the parties to properly prepare for a hearing, develop evidence in reply and better understand the issues in a proceeding. This early exchange of expert reports can often facilitate the narrowing of issues in a proceeding, improve the effectiveness of

⁴³ See John W. Morden, “Introduction to the Expropriations Act, 1968-9 (Ontario)”, a paper delivered to the American Right of Way Association, Ontario Chapter, February 17, 1969 (Toronto: Canada Law Book, 1969) at 24-25.

mediation and pre-hearing conferences and at times lead to a settlement before a hearing is required.⁴⁴ One drawback to providing a lengthy period for the exchange of expert reports before a hearing is that it increases the length of time before a matter can proceed to a hearing.

The amendments to the *Rules of Civil Procedure* require expert reports to be served on the opposing party 90 days before the pre-trial conference.⁴⁵ Reports prepared in response to initial expert reports are to be exchanged 60 days prior to the pre-trial conference.⁴⁶ Any other expert reports prepared in reply to these materials are to be exchanged 30 days before the pre-trial conference.⁴⁷ Prior to the amendments, these exchange periods were the same in duration, but before the trial, as opposed to the pre-trial conference. The new amendments to the *Rules of Civil Procedure* also require the parties to an action to consult each other on the exchange period for expert reports prior to trial.⁴⁸

The *OMB Rules of Practice and Procedure* state that if the *Rules of Civil Procedure* specify a greater notice period for appraisal or other expert reports than under sub-section 28(1) of the *Expropriations Act*, the greater notice period applies.⁴⁹ As a result of this provision, the exchange period for expert reports in expropriation matters is, at a

⁴⁴ See *Civil Justice Reform Project*, *supra* note 15 at 77-78.

⁴⁵ *Rules of Civil Procedure*, *supra* note 7, r. 53.03(a).

⁴⁶ *Ibid.*, r. 53.03(2).

⁴⁷ *Ibid.*, r. 53.03(3).

⁴⁸ *Ibid.* r. 50.06.

⁴⁹ *OMB Rules of Practice and Procedure* *supra* note 5, s. 140.

minimum, that required under Rule 53 of the *Rules of Civil Procedure*. The amendments to the Rules of Civil Procedure may complicate the application of Rule 53 to proceedings before the Ontario Municipal Board, as the procedural requirement for a pre-hearing conference is not applied in the same manner as that of a pre-trial conference.

A useful mechanism for hearing management that is frequently used in expropriation matters is a Procedural Order.⁵⁰ Under normal circumstances, the parties agree upon a timeline for the advancement of the proceeding and this is then incorporated into a Procedural Order that is issued on consent by the Ontario Municipal Board. Even when parties do not agree, the Ontario Municipal Board can issue a Procedural Order, after hearing submissions and argument of counsel. In most cases, Procedural Orders set forth the exchange date for expert reports and reply reports, along with dates for the discovery process, mediations and the hearing.

A Procedural Order provides the parties with a degree of flexibility to set the exchange date for appraisal reports, based on the circumstances pertaining to the matter. This is a practice that is only now being adopted by the *Rules of Civil Procedure*. For instance, in some cases the parties may wish to expedite the advancement of a proceeding to a hearing. To accomplish this, the time frame for the exchange of expert reports can be compressed. Alternatively, in instances where expert reports are very complex and, at times, reply reports are critical to the formulation of a party's case, the duration between the exchange of expert reports and a hearing could be lengthened.

⁵⁰ See "Sample Procedural Order" in attachments to *OMB Rules of Practice and Procedure*, *supra* note 5.

It is often productive to have certain expert reports and reply reports exchanged before a mediation takes place. Quite often, the resolution of a matter is dependant upon the exchange of expert reports and the assessments parties can make about the merits of their case after digesting the expert evidence that will be put forward by the opposing party. It is sensible, therefore, for the exchange of expert reports to take place before a mediation, when possible. This was expressed by the *Civil Justice Reform Project* in its discussion for the time for delivery of expert reports. The report did not, however, go so far as to recommend that expert reports be exchanged before mediation, but recommended that whenever possible, the timing for exchange dates should be left to counsel, acting reasonably.⁵¹

Statutory Requirements for Expert Reports

Under the new amendments to the *Rules of Civil Procedure* that will be effective as of January 1, 2010, all expert reports in a proceeding will have to comply with the new Rule 53.03(2.1), which provides specific requirements for expert reports. Rule 53.03(2.1) reads as follows:

RULE 53.03 (2.1)

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

⁵¹ *Civil Justice Reform Project*, *supra* note 15 at 78-79.

3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
 - iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

The requirements under Rule 53.03(2.1) resulted from the recommendations of the *Civil Justice Reform Project*. These requirements, like those of Rule 4.1.01, bare a resemblance to the criteria for expert reports set forth in the *Ikarian Reefer* case, discussed above. These rules are intended to provide further transparency to expert reports and ensure that they fulfill the goal of providing independent and objective assistance to the court.

Sub-rules 53.03(2.1)(1) and (2) are intended to clarify an expert's area of expertise and ensure that the area of expertise of the witness is expressed within the report. With this information, a reader of the report (the court or the opposing party) is given both a clear understanding as to the expert's true area in which he or she is entitled to render opinion

evidence. This information enables one relying on the report to question or challenge whether the opinions within the report are actually within the expert's qualified area of expertise. It also addresses the concern of the "roaming expert" whose area of expertise tends to roam with the issues that arise in a proceeding. Our legal system has been very critical of this practice.⁵² In the event that the opinions fall outside of the expert's area of expertise, challenges can be raised with respect to the admissibility or weight given to such evidence.

Sub-rules 53.03(2.1)(3) and (4) provide for the instructions given to an expert, the nature of the opinion being sought from the expert and how the opinion relates to each issue in the proceeding. This information provides clarity as to the actual opinion of the expert and how it relates to the matters at issue in a proceeding. This information benefits the reader by providing a clear understanding as to how the information and opinion being given by the expert is applicable to the issues and how it fits into the overall case. Moreover, understanding the expert's instructions provides greater insight into the opinion and any potential influence on the expert's mandate. This may provide a basis for a challenge to the expert's evidence or the application of the evidence.

Sub-rules 53.03(2.1)(5) and (6) seek the opinion and analysis given by an expert. Although this is done in the majority of expert reports, these rules set forth a standard by which the opinion is to be presented in a report. The rules are intended to provide clarity to the opinion.

⁵² *Gouge Inquiry*, *supra* note 19 at 472.

The amended rules also require the expert to disclose factual assumptions relating to the opinion, the research relating to the opinion and the documents or information relied upon to formulate the opinion. This disclosure is intended to provide an objective and transparent basis for the findings in the report, as opposed to an opinion that is based on subjective judgment or unexplained experience of the expert. By providing transparency to the facts, assumptions, research and information an expert is provided and on which the expert's opinion is based, it not only provides a court or Board with greater information to satisfy itself that the opinion is accurate, but it also provides an opposing party with a rational foundation for testing or challenging the expert opinion. This challenge can take place by reply reports prepared by other experts or during the cross-examination of the expert.

Courts have long supported transparency in expert reports. This includes the right of the opposing party to access all of the documents in the expert's file upon which the opinion is based.⁵³ Courts maintain that an expert enjoys a zone of privacy if she or he is providing consultation to a party or assisting in without-prejudice negotiations. This zone of privacy is protected by legal privilege.⁵⁴ When, however, an expert report is tendered for use by a court, this zone of privacy falls by the way-side and the entire file of the expert, including the information contemplated in Rule 53.03(2.1)(6), is open to the opposing side upon request. Although this requirement of production by an expert

⁵³ *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 82 O.R. (3d) 229 (Ont. C.A.); *Aviaco International Leasing Inc. v. Boeing Canada Inc.*, [2002] O.J. No. 3799 (S.C.J.).

⁵⁴ *Hosh (Litigation Guardian of) v. Black*, [2003] CarswellOnt. 2283 at para. 18 (Master).

may seem somewhat invasive, the courts have found that it is a fair balance to ensure that an expert opinion truly assists a court and is based on fair and objective evidence.⁵⁵

The requirement of Sub-rule 53.03(2.1)(7) for an expert to acknowledge his or her duty to a court may seem somewhat redundant, as the Rules are applicable to the expert with or without the acknowledgement. This acknowledgement, however, serves as a reminder to the expert and to the party for whom the expert is working of this duty. The acknowledgement may also be important in having expert reports support and facilitate settlement discussions. In such settlement discussions experts are well served to acknowledge that under Rule 53.03(2.1)(7) the duty to the court has been expressly affirmed in advance of a hearing. Having this duty expressly affirmed by the expert may lend credibility to the report in settlement discussions and potentially provide additional support for an expert opinion before the hearing.

Consideration of Other Practices for Expert Evidence

The *Civil Justice Reform Project* discussed other potential changes to the use of experts in proceedings before the court. Although some of these changes were not adopted into the *Rules of Civil Procedure*, they may have a specific application to various matters in the context of civil litigation or expropriation claims. Some of the items discussed were:

1. **The retainer of single expert by opposing parties** - This is intended to reduce costs and provide one opinion to assist the court. Often, in cases where

⁵⁵ *Conceicao Farms Inc. v. Zeneca Corp.*, *supra* note 55.

an expert's opinion is somewhat arithmetic and/or unlikely to be contested (such as actuarial analyses or real property surveys), a joint expert can save costs, eliminate contested issues and reduce the duration of a hearing.

2. **Summary trials on issues involving experts** - At times, a somewhat discrete point disputed between experts could form the foundation for a disagreement between the parties that would lead to a contested hearing. In certain instances, it may be appropriate to have that one issue that is contested between experts adjudicated in advance of a trial or a hearing, in order to potentially shorten or settle the upcoming hearing. This procedure is similar to the determination of an issue before trial, which is provided for under the *Rules of Civil Procedure*.⁵⁶ The application of this type of rule would be limited, but may be appropriate in certain instances.
3. **Meeting between experts in advance of a hearing or during the mediation process** - This option, although not explicitly required by the *Rules of Civil Procedure*, would seem to be appropriate in virtually all instances. The use of this practice is common in mediations before the Ontario Municipal Board. If experts can arrive at an agreement amongst themselves, it makes very little sense for a matter to be brought before a court and consume both public and private resources in a hearing or trial. Meetings between experts are often appropriate without counsel or clients present. Moreover, experts should not be directed "not to agree" in these meetings. To do so is counter productive to a process intended to allow experts to resolve issues that ought to be resolved prior to a hearing and without the assistance of a court.

⁵⁶ *Rules of Civil Procedure*, *supra* note 7, r. 20.05 (as of Jan. 1, 2009) and r. 21.

4. **Pre-trial interrogatories or out-of-court examinations of experts –**

Although this option was considered by the *Civil Justice Reform Project*, it was dismissed as something that would most likely increase the cost of litigation in Ontario. In many jurisdictions in the United States, the right to depose experts prior to a trial constitutes a fundamental aspect of the discovery process. Such examinations prior to a hearing require a great commitment of time and expense. Although the majority of commentators have found this model to be undesirable in Ontario, there may be specific instances where it would make sense in order to resolve issues before a hearing or shorten the duration of a hearing.

None of the considerations above constitute rules that are binding on parties or experts before the court or the Board. However, instances in the litigation process will at times arise when the application of these options may be appropriate or beneficial to all involved. In such cases, they can be agreed to by the parties or, perhaps, ordered by the court or Board hearing the matter.

In expropriation claims, where expert evidence is crucial to the determination of the majority of contested issues, parties should be encouraged to work together to use experts in the most efficient and effective way possible. This may include certain suggestions set-out above or other means by which the use of expert evidence before a hearing can optimize the efficiency of proceedings.

A number of the suggestions discussed above, along with other unconventional means of using experts before a hearing, could be encapsulated in a Procedural Order issued by the Board. The Board, in most cases, is more than happy to work with the parties to encourage dialogue, discussion or other processes that result in issues being resolved before a contested hearing.

Conclusion

Although the changes to the *Rules of Civil Procedure* have not yet come into force, the majority of these rule changes already have some degree of application to experts before courts, boards and tribunals in Ontario. As such, experts should proceed on the basis that the substance of these rules apply in all instances where an expert is before a court or the Board. Although it is not yet clear how these rules will be interpreted or applied, it would be prudent for all experts to prepare their reports and analyses as though these rules will be applied strictly, so that all reports comply with the *Rules of Civil Procedure* when they become effective on January 1, 2010. The failure to comply with these rules may compromise the weight and/or admissibility of expert evidence that is before the court.

In expropriation matters, the substance of these rules would also appear to be applicable. Experts should, therefore, be made aware of these rules and incorporate them into their analysis, when appropriate. With hope, the application of these new Rules relating to expert evidence will lead to better expert evidence before the court

and the Board and a system that encourages the cost effective and just resolution of contested disputes.

Shane Rayman

Rueter Scargall Bennett LLP
155 University Avenue, Suite 600
Toronto, Ontario M5H 3B7

Tel: (416) 597 5406

Fax: (416) 869 3411

Shane.Rayman@RSLawyers.com