The Boundary Point
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Case Commentaries on Property Title and Boundary Law

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

In this issue we revisit a topic that had been addressed in an earlier issue of *The Boundary Point*[1]. The prior treatment involved a trial decision in Ontario and an appellate decision in Nova Scotia. Both decisions were appealed further and we now have the benefit of the Ontario Court of Appeal's statements about the role and conduct of an expert witness. The decision will serve as an important clarification of what had been identified in the trial decision as unacceptable conduct which must stop. The outcome of the further appeal of the appellate decision of the Nova Scotia Court of Appeal to the Supreme Court of Canada is still pending – but greatly anticipated.

The Land Professional as Expert Witness: Clarifying the Role

Key Words: *expert witness, opinion, professionalism, report, impartiality*

The role of an expert has been referred to as "a friend of the court". When appearing in court to testify as a witness, experts are not to be advocates; they are expected to be neutral and impartial. This cardinal rule has evolved over time in order to ensure that expert witnesses are useful to the trier of fact. On questions of technical or scientifically complex matters, judges cannot be expected to know everything; for this reason, common law jurisdictions have welcomed the expert in the courtroom – but with some caution.[2] Recently, it was the degree of caution that exercised by the trier of fact that led to an appeal and has given new insight and clarity about the approach to be used by judges and lawyers in testing the objectivity and neutrality of a proposed expert witness.

All land professionals – whether engineers, architects, lawyers or land surveyors – have a specialized kind of skill and expertise. Knowing how that skill is brought into the courtroom is an important element in being prepared and understanding the criteria which will determine the admissibility of

[1] "The Land Professional as Expert Witness: Changing Roles", July, 2014, *The Boundary Point*, Issue 2(7)

[2] The caution was necessary to ensure that the expert was not just a "hired gun".

what the expert has to say. Such understanding is not for the purpose of making a written report technically "correct". Rather, it is to form a mindset in which a need to be objective and impartial is paramount. For this reason, the appellate decision in *Moore* is highly relevant in giving all land professionals a needed insight to this mindset.

As far as reported cases are concerned, *Moore v. Getahun*[3] was a most **un**remarkable decision for the news media and the public in general when it was released from the Superior Court of Justice in Ontario last year. There were no headlines in newspapers and no TV cameras. However, it did raise eyebrows in the legal community because it represented a strong rejection by the court of a practice that had long been engaged in by lawyers when working with an expert witness. To the legal community, *Moore* represented a significant change in the treatment by a growing number of judges in wanting experts to be not only impartial and neutral – but also free of any unnecessary dialogue and communications with the hiring lawyer. For this reason, its quiet release in 2014 was in sharp contrast to the participation in,[4] and the reception given to the appellate decision by lawyers this year.

The *Moore* case involved a claim for damages arising out of negligence and malpractice on the part of a medical doctor. As a result of a motorcycle accident, Mr. Moore suffered a broken wrist and sought treatment at a local hospital. Dr. Getahun had applied a cast to the fracture but, as a result of it being applied too tightly, there were further complications known as "compartment syndrome". Ultimately, Mr. Moore lost a significant amount of the use of his wrist and forearm; he sued both hospital and doctor for negligence and malpractice.

At trial, lawyers for the defendant doctor received a report from another doctor hired to provide expert evidence. The expert doctor first prepared a draft report and shared it with the defendant's lawyers. The draft was followed by a 1.5 hour telephone conversation in which changes were suggested to the expert by the lawyers. The expert agreed to make the changes and then only the final version, as amended, was shared with other counsel and the court. It was this event – the review and discussion with lawyers - which prompted the trial judge to condemn the practice of counsel in reviewing a draft of the report from an expert. The court identified a change that had been made in the *Rules*, effective January 1, 2010[5] and the trial judge stated,

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[3] *Moore v. Getahun*, 2014 ONSC 237 (CanLII), http://canlii.ca/t/g2lwp

[4] The number of parties who were given standing in the hearing before the Court of Appeal for Ontario was remarkable. The following appeared: Criminal Lawyers' Association, Ontario Trial Lawyers Association, Canadian Defence Lawyers Association, Canadian Institute of Chartered Business Valuators and The Advocates' Society.

[5] Note that some writers have observed that Rule 4.1 did not change anything in terms of substantive law; it only served to strengthen and codify what experts needed to know. See: http://www.thomsonrogers.com/sites/default/files/expert_witnesses_new_duties.pdf and the passage:

> The purpose of Rule 53.03 of the *Rules of Civil Procedure* is to ensure the independence and integrity of the expert witness. The expert's primary duty is to the court. In light of this change in the role of the expert witness under the new rule, I conclude that counsel's practice of reviewing draft reports should stop. There should be full disclosure in writing of any changes to an expert's final report as a result of counsel's corrections, suggestions, or clarifications, to ensure transparency in the process and to ensure that the expert witness is neutral.[6]

Further observations were made by the trial judge about how the expert would be "compromised" by reviewing a draft of his report with the client's lawyer. She stated,

> Dr. Taylor was placed in a very awkward situation with respect to the contents of his second report. When plaintiff's counsel reviewed his file, counsel found various draft reports as well as notes of a one-and-a-half-hour telephone conference call between Dr. Taylor and defence counsel reviewing his draft report.
>
> Dr. Taylor was obviously totally unaware that it may be improper to discuss and change a draft report, as a breach of his duty of impartiality. Counsel were responsible for this situation.[7]

The Court of Appeal for Ontario did not see things the same way. In a unanimous judgment, the court rejected this position, although it did not set aside the trial judge's decision. In its analysis, the court noted that there was a long-established practice of lawyers in reviewing the draft reports of experts. This was a basis for stating:

> For the following reasons, I conclude that the trial judge erred in holding that it was unacceptable for counsel to review and discuss the draft expert reports. She further erred

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> Amendments to the *Rules of Civil Procedure*, effective January 1, 2010, relating to the use of expert reports serve to:
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> - codify the duty of an expert;
> - set out standard mandatory requirements for expert reports; and,
> - alter the deadline for serving expert reports to dates months before pre-trial conferences.
>
> Because these changes are not particularly drastic, it is unclear whether they will have any real impact on the use of experts and expert reports. At most, these new Rules should be considered a direct warning to experts to avoid advocating for parties.
>
> The new 'Duty of Expert' rule (Rule 4.1) is aimed at educating experts about their prevailing duty of objectivity—a duty known and understood by lawyers and judges but not necessarily by experts. Implicit in the need for this Rule is the notion that experts are too often seen by the Court as advocates. Experts will be asked to confirm that they understand their duties by signing an 'Acknowledgment of Expert's Duty' (Form 53) and appending it to their reports.

[6] *Moore v. Getahun*, 2014 ONSC 237 (CanLII), http://canlii.ca/t/g2lwp at para. 520

[7] *Ibid.*, at paras. 287 and 288

> in using the written expert reports that were neither entered into evidence, nor the subject of cross-examination, to contradict and discredit aspects of the *viva voce* evidence of the appellant's expert witnesses. I conclude, however, that these errors did not affect the outcome. As no substantial wrong or miscarriage of justice flowed from the errors, this court would not be justified in ordering a new trial.[8]

It is important to fully appreciate why this conclusion was reached. In a rather candid statement of the questions which this case raises, the court summarized these questions as follows:

> Expert evidence has become more significant with the explosion of scientific knowledge and technical innovation. Many cases have been described as a "battle of experts". Medical negligence cases are a prime example. The trier of fact requires the assistance of expert witnesses to decide issues pertaining to the standard of care, causation and prognosis.
>
> The use of expert evidence poses difficult issues that have been the focus of consideration in civil justice reform. How do we control the added costs associated with the explosion of expert witnesses? How do we ensure that a party has a fair opportunity to challenge an adverse expert witness? How do we ensure that expert witnesses offer an unbiased scientific or technical opinion based upon their training and expertise, rather than act as "hired guns" who present unbalanced opinions unduly favouring the party that retains them?[9]

Perhaps the ultimate finding made by the appellate court (that nothing in the 1.5 hour telephone conversation between the lawyers and the doctor impacted the substance of the opinion contained in the report) is buttressed by the conclusion *that nothing of substance was changed in the expert's opinion*. As noted,

> I begin by considering the changes made to Dr. Taylor's report following discussion with counsel. Nowhere in her reasons does the trial judge explain which changes were significant. My review of the draft reports, the notes, the changes and Dr. Taylor's explanation indicates that the changes could be described as relatively minor editorial and stylistic modifications intended to improve the clarity of the reports. I can see no evidence of any significant change in substance, nor did counsel for the respondent on this appeal point to any such change. In my view, there is nothing in the record to indicate that either counsel or Dr. Taylor did anything improper or that Dr. Taylor's report reflected anything other than his own genuine and unbiased opinion.[10]

This finding is critical and also explains why the appellate court did not reject the practice engaged in between the lawyers and Dr. Taylor. Moreover, there were 3 separate rationales which the

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[8] *Moore v. Getahun*, 2015 ONCA 55 (CanLII), http://canlii.ca/t/gg3lt at para. 7

[9] *Ibid.*, at paras. 34 and 35

[10] *Ibid.*, at para. 50

appellate court identified in discussing how these outcomes would be achieved; the independence and objectivity of expert witnesses is fostered under existing law and practice in a number of ways while still permitting the [cautious] review by counsel of draft reports with experts.

These explanations were stated as follows:

> First, the ethical and professional standards of the legal profession forbid counsel from engaging in practices likely to interfere with the independence and objectivity of expert witnesses. I attach as an Appendix to these reasons The Advocates' Society's *Principles Governing Communications with Testifying Experts*, which provides a thorough and thoughtful statement of the professional standards pertaining to the preparation of expert witnesses. Principle 3 states:
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> > To the same effect, The Holland Group's position paper includes, at p. 4, its opinion "that it is inappropriate for counsel to persuade or attempt to persuade experts to articulate opinions that they do not genuinely hold, and that it is of paramount importance that the expert genuinely believes the opinion that he or she articulates both in the expert report and in the witness box."
>
> In *Medimmune*, at para. 111, the court emphasized that it is "crucial that the lawyers involved should keep the expert's need to remain objective at the forefront of their minds at all times."
>
> Second, the ethical standards of other professional bodies place an obligation upon their members to be independent and impartial when giving expert evidence: see *Guideline: The Professional Engineer as an Expert Witness* (Toronto: Association of Professional Engineers of Ontario, September 2011); the Actuarial Standards Board's Standards of Practice (Ottawa: Canadian Institute of Actuaries, October 2014); the Canadian Institute of Chartered Business Valuators' Code of Ethics (Toronto: Canadian Institute of Chartered Business Valuators, 2012), Standard No. 110: Valuation Reports (Toronto: Canadian Institute of Chartered Business Valuators, 2009) and Standard No. 310: Expert Reports (Toronto: Canadian Institute of Chartered Business Valuators, 2010). Further, pursuant to the *Rules of Civil Procedure*, every expert witness is reminded of the duty imposed by rule 4.1.01 to be objective bolstered 53.03(2.1).
>
> Third, the adversarial process, particularly through cross-examination, provides an effective tool to deal with cases where there is an air of reality to the suggestion that counsel improperly influenced an expert witness. Judges have not shied away from rejecting or limiting the weight to be given to the evidence of an expert witness where there is evidence of a lack of independence or impartiality. In *Medimmune*, at para. 111, the court noted that "partisan expert evidence is almost always exposed as such in cross-examination, which is

> likely to reduce, if not eliminate, the value of the evidence to the client's case"; see also *Alfano v. Piersanti*, 2012 ONCA 297 (CanLII), 291 O.A.C. 62, at paras. 106-120.[11]

These stated safeguards are significant as indicators of what the courts see as the importance of professional ethics for members of regulated professions who can be expected to be called upon to assist a court by way of expert testimony. In some respects one could be rueful about the tacit assignment of responsibility to professional regulators in ensuring that their members are neutral and impartial when assisting a court; it places the ethics of members of professional bodies into sharper focus and scrutiny.

Likewise, there is an implicit assumption that, if judges are to no longer to play an "activist" role in functioning as gatekeepers of expert evidence, this role may now become shared with professional regulators. If this is true, then it would place an elevated burden and priority on regulators in ensuring that the existing competencies in their members' ability and functioning as experts be especially bolstered or strengthened.

This is confirmed when reading further in the appellate court's reasons for ***not*** adopting the trial judge's prohibition against lawyers discussing draft reports with their client's expert.

> 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.
>
> 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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> 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

[11] *Ibid.*, at paras. 57 to 62

> in the interests of justice and would frustrate the timely and cost-effective adjudication of civil disputes.[12]

This may not, however, be the final word. In a pending decision[13] from the Supreme Court of Canada, the impartiality and neutrality of experts is expected to be clarified further. *White Burgess* is an appeal from the Nova Scotia Court of Appeal in which a forensic accountant's report was excluded by the court as a result of the expert's perceived lack of independence.

Editor: Izaak de Rijcke

FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[14] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota, and are expanding in number as more opportunities are added. Only a select few and immediately upcoming CPD opportunities are detailed below.

Second Annual Boundary Law Conference — Online Version

This online version of the conference *Linking Parcel Title and Parcel Boundary: Improving Title Certainty*[15] held November 2014 includes the presentations, papers and slide decks from presenters as well as a forum for discussing ethical issues in the delivery of professional services. The purpose of the conference was to explore new paradigms in bringing certainty and predictability in the location of parcel boundaries on the ground.

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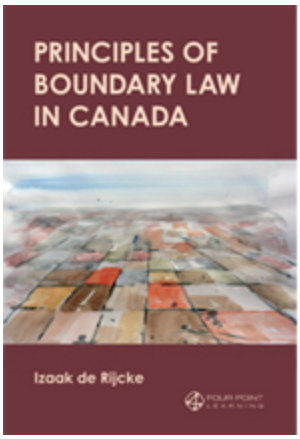
[12] *Ibid.*, at paras. 63 to 65

[13] See: *White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants, et al. v. Abbott and Haliburton Company Limited, et al.*, at: http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35492 Noteworthy is the comment that the Supreme Court has now been sent a copy of the ONCA decision in *Moore v Getahun*. "Correspondence received from, (Letter Form), Mr. Nicholas McHaffie, agent for the appellant, WBLI to provide the Court with a copy of the Judgment rendered 2015-01-29 in *Moore v. Getahun*, 2015 ONCA 55. Distribution 2015-02-20., (Electronic version filed on 2015-02-19)".

[14] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

[15] The conference qualifies for 12 *Formal Activity* AOLS CPD credits.

COMING SOON: *Principles of Boundary Law in Canada*



This comprehensive treatment of the principles of boundary law lies at the intersection of law and land surveying. Although the textbook has its foundation in the law of real property in Canadian common law jurisdictions, it is intended as a resource which bridges two professions. For real estate lawyers, it connects legal principles to the science of surveying and demonstrates how surveyors' understanding of the parcel on the ground has helped shape efficient systems for property demarcation, conveyancing and land registration. For land surveyors, it provides a structure and outlines best practices to follow in the analysis of boundary retracement problems through the application of legal principles. This textbook is not meant to be used as a "how to" guide for the answering of specific questions about boundary problems. Rather, it is intended to serve as a reference tool to support the formation of professional opinions by clarifying the framework for evaluating boundary and survey evidence.

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