

MUNICIPAL, PLANNING & DEVELOPMENT LAW

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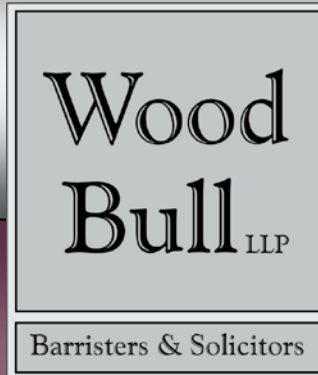
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MUNICIPAL, PLANNING & DEVELOPMENT LAW

Experts Before the OMB

Presented by Dennis H. Wood



MUNICIPAL, PLANNING & DEVELOPMENT LAW

- 1. Who is an Expert**
- 2. Admissibility of the Expert Opinion Evidence Before OMB / Courts**
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WHO IS AN EXPERT

Case Law: *Sydenham Holdings Inc. v. Hempel*

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*Ms Hempel is neither a market analyst nor a qualified land use planner. She has not retained a market analyst, or any other expert, and advised the Board that she does not intend to retain one. The Board has repeatedly stated that it does not attach weight to opinion evidence proffered by witnesses who lack the appropriate expert qualifications. This basic rule of administrative law was set out in plain language in *Abingdon Meat Packers v. West Lincoln (Township)*, [1990] O.M.B.D. No. 1054 (O.M.B.):*

...Everyone can give evidence about something they know or about things they have actually seen, but they can't give "opinion" evidence unless they have some expertise in the field about which they are giving such evidence. In this case there were only two [qualified] planners called, only two people entitled to give opinion evidence about planning matters... [The qualified engineer] can give opinion evidence about engineering, but he can't give opinion evidence about planning or law because he is not qualified [in those fields]...

[Sydenham Holdings Inc v. Hempel]

**ADMISSIBILITY OF THE
EXPERT OPINION EVIDENCE
BEFORE OMB / COURTS**

Criteria for the Admissibility of Opinion Evidence

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The admissibility of expert opinion evidence depends on the application of the following criteria:

1. the evidence is relevant to some issue in the case;
2. the evidence is necessary to assist the trier of fact;
3. the evidence does not violate an exclusionary rule;
and
4. the witness is a properly qualified expert

[Sopinka et al, *The Law of Evidence in Canada*, p. 618; *R. v. Mohan* (1994), 114 D.L.R. (4th) 419, p. 9]

Criteria for the Admissibility of Opinion Evidence: *R. v. Mohan*

- Re. the first criteria, in *R. v. Mohan*, the Supreme Court held that “relevant is a threshold requirement for the admission of expert evidence as with all other evidence” (p. 9)
- Re. the second criteria, in *R. v. Mohan*, the Supreme Court held that “what is required is that the opinion be necessary in the sense that it provide information which is likely to be outside the experience and knowledge of a judge or jury” (p. 11, see also *Sopinka et al* at p. 620)
- Re. the fourth criteria, the expert’s usefulness is circumscribed by the limits of his or her own knowledge - the witness must possess special knowledge and experience going beyond the trier of fact (*Sopinka et al* at p. 623)
- In *R. v. Mohan*, the Supreme Court held that “the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify” (p. 12)

Tools to Identify Appropriate Expert Opinion Evidence



The following tools help to identify appropriate expert opinion evidence:

- set out the defined set of facts with respect to which an opinion is sought;
- set out the technical or difficult question with respect to which an opinion is being sought;
- set out the theory or special principles or knowledge upon which the expert relies; and
- set out the opinion

[Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd [1995] F.C.J. No. 436, p. 7, para 18]

RULES AFFECTING EXPERT EVIDENCE

Rules of Civil Procedure (Court/OMB)



RULE 4.1 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.

(2) Duty Prevails – 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.

Rules of Civil Procedure (Court/OMB)

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RULE 53.03 EXPERT WITNESSES

Experts' Reports

53.03 (2.1) A report ...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.
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.

Rules of Civil Procedure (Court/OMB)



RULE 53.03 EXPERT WITNESSES (cont'd)

Experts' Reports

53.03 (2.1) A report ...shall contain the following information:

...

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.

Ontario Municipal Board Rules of Practice & Procedure

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RULE 21 Prefiling of Witness Statements and Reports

...the Board may require that parties calling expert or professional witnesses serve on the other parties and file with the clerk of the municipality any expert witness statements and reports prepared for the hearing... The expert witness statement must contain:


- a) an executed acknowledgment of expert's duty form (attached to these Rules) and expert's qualifications;
- b) the issues the expert will address, their opinions on these issues, the reasons that support their opinions, their conclusions; and
- c) a list of the reports or documents, whether prepared by the expert or by someone else, that the expert will refer to at the hearing.

The expert's complete report may be filed instead of this statement if it contains the required information. An expert may not be permitted to testify if this statement or report is not served on all parties and filed with the Clerk of the municipality when so directed by the Board. ...

RULES AFFECTING EXPERT EVIDENCE

Ontario Municipal Board Rules of Practice & Procedure

ACKNOWLEDGEMENT OF EXPERT'S DUTY FORM


Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

ACKNOWLEDGMENT OF EXPERT'S DUTY

Case Number	Municipality

1. My name is.....(name)
I live at the(municipality)
in the.....(county or region)
in the(province)

2. I have been engaged by or on behalf of.....(name of party/parties) to provide evidence in relation to the above-noted Board proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

- 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 my area of expertise; and
- c. to provide such additional assistance as the Board may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date..... Signature

Ontario Municipal Board Rules of Practice & Procedure

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RULE 21.01 Duty of the Expert Witness

It is the duty of every expert engaged by or on behalf of a party who is to provide opinion evidence at a proceeding under these Rules to acknowledge, either prior to (by executing the acknowledgment form attached to the Rules) or at the proceeding, that they are to,

- a) provide opinion evidence that is fair, objective and non-partisan;
- b) provide opinion evidence that is related only to the matters that are within the expert's area of expertise; and
- c) to provide such additional assistance as the Board may reasonably require to determine a matter in issue.
- d) These duties prevail over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

EXPERT WITNESS AS ADVOCATE

Case Law: *Bailey v. Barbour*

*[321][17] It is a trite principle of trial procedure that an expert witness should provide independent assistance to the court and should never assume the role of advocate. This is an easy principle to articulate, but the inherent conflict that experts are in as a result of their unique position has historically created tension within the litigation arena. Experts are sought out and paid because they are able to generate evidence and reach conclusions that support the interests of the party who retains them. And yet, as stated by Lord Wilberforce in *The Ikarian Reefer* (1993), 2 Lloyds Reports 68, “It is necessary that 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”.*

Case Law: *Bailey v. Barbour* (cont'd)

[321][18] The most important thing for an expert to retain throughout the litigation process is a position of distance from the interests of the party who engages them, in order that his or her impartiality remains intact. By contrast, the worst thing for an expert to devolve into is advocating for his client's view, or to become a champion for his client's cause. It is only where the expert can reliably be seen by the Court to have reached his opinions through an objective and neutral lens that his evidence can have potential value to the Court. The evidence of an expert who advocates for a client's position, simply because it is his client's position, loses considerable value and will ultimately be a waste of the Court's time if rejected outright due to partisanship.

[Bailey v. Barbour, 2013 ONSC 7397]

Case Law: *Falconwin Holdings Ltd., Re*

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21. *At the outset of the hearing, Mr. Gladstone [ed. - an architect who gave evidence on architectural and urban design matters] identified himself as the agent for Falconwin in this proceeding. It quickly became clear that Mr. Gladstone intended to file with the Board materials that included his professional opinion and intended to have these materials form the entire of the case to be called by Falconwin. Mr. Gladstone acknowledged that Falconwin did not intend to call any [ed. - other] witnesses. Confronted with the circumstance that no Party at that point was represented by counsel, the Board took a substantial amount of time explaining to Mr. Gladstone that Falconwin would have to make an election: either Mr. Gladstone would be the agent calling the case and making submissions and argument as an advocate or he would be the witness providing the Board with his independent expert professional opinion, but he could not be both. Additionally, the Board cautioned Mr. Gladstone that if Falconwin elected to name him as agent then he could not simply file materials he had prepared and that contained his professional analysis and opinion as evidence in support of the Falconwin case.*

Case Law: *Falconwin Holdings Ltd., Re (cont'd)*

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23. ...Mr. Gladstone continued directing the Falconwin case unabated. As such, Mr. Gladstone clearly and unequivocally abandoned any pretence of independent expertise and demonstrated that his appearance in these proceedings continued to be that of advocate. As such, the Board finds that Mr. Gladstone's evidence is unreliable and attaches no weight to the evidence of Mr. Gladstone

[Falconwin Holdings Ltd., Re, 2008 CarswellOnt 4730]

EXPERT WITNESS AS PARTY/PARTICIPANT

Case Law: *Loblaw Properties Ltd. v. Saugeen Shores*

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60. At the time of qualifying Ms Robinson to provide expert opinion evidence, the Board did not appreciate that Ms Robinson had appealed the matters before the Board on behalf of the Concerned Women's Coalition, was a key organizer of the Coalition, that the Coalition was now a committee of FOSS, that Ms Robinson was a director of FOSS, that Ms Robinson had personally contacted nearly all of the FOSS witnesses, had briefed them on the issues as she saw them in persuading them to testify, and served as a key representative of FOSS in directing counsel for FOSS in this proceeding. The Board has no doubt that Ms Robinson has strong views and has expended a great deal of energy in pursuing certain issues. The Board finds, however, that Ms Robinson is not an independent expert. Her role in the Concerned Women's Coalition and FOSS has taken her from independent expert to advocate. As such, the Board further finds that her testimony is so coloured by her advocacy that the Board attaches no weight to her evidence.

[Loblaw Properties Ltd. v. Saugeen Shores (Town), 2008 CarswellOnt 2753]

Case Law: *Citizens Coalition of Greater Fort Erie v. Regional Municipality of Niagara*

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[41] On the question of independence, the key in this case is not whether Ms. Janes believed Dr. Gayler was ever a member. The key in this case is that Dr. Gayler stated explicitly that he was member of PALS, continuously from 1996 to this hearing in 2012, and did so in the c.v. presented by PALS to support the request that Dr. Gayler be qualified to give the Board independent expert opinion evidence. PALS is an appellant and a party in these proceedings.

[42] The Board finds that a witness cannot, at one and the same time, be qualified as an independent expert to give opinion evidence while that same witness is a member of an advocacy group that is an appellant and a party in these proceedings.

*[Citizens Coalition of Greater Fort Erie v. Regional Municipality of Niagara, OMB
November 2, 2012]*

Case Law: *Avery, Re*

52. ...The Board finds that Mr. Breen has engaged in a course of conduct through his self-generated meeting with the Algoma Health Unit and subsequently his self-generated attendance and presentation to City Council that is indicative of one who is an advocate for a certain position.

53. The case law is abundantly clear that a person can be an expert witness or an advocate but not both. It is clear to the Board that Mr. Breen has effectively through his course of conduct crossed the line from "expert witness" to "advocate" and to this Board it is clear he has lost the requisite objectivity that is required of an expert witness.

[*Avery, Re*, 2015 CarswellOnt 2937]

Case Law: *Avery, Re* (cont'd)

67 While Mr. Usher portrays himself as one who has never sought to advocate on behalf of the PPA and sought instead to only act as a representative of the PPA "in the way that planners regularly represent their clients" and to confine his dealings with the Board to procedural matters, the Board does not agree.

...

73 From the Board's perspective it is clear that Mr. Usher has gone beyond the ... "way that planners regularly represent clients" and entered into the fray as an advocate actively seeking out witnesses that Mr. Usher believed would be of assistance to his client's case. Thus the Board will not qualify Mr. Usher as an expert entitled to give opinion evidence in land use matters; rather the Board will assign the appropriate weight to Mr. Usher's evidence, as a fact witness and not as an expert.

[Avery, Re, 2015 CarswellOnt 2937]

LAWYERS COMMUNICATIONS WITH RETAINED EXPERTS

Maintaining Independence and Objectivity of Expert Witnesses: *Moore v. Getahun*



Regarding communications between legal counsel and expert witnesses, in *Moore v. Getahun*, the Ontario Court of Appeal finds that the independence and objectivity of expert witnesses is fostered under existing law and practice in a number of ways:

1. 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 (e.g. Advocates' Society's Principles Governing Communications with Testifying Experts)
2. the ethical standards of other professional bodies place an obligation upon their members to be independent and impartial when giving expert evidence
3. the adversarial process, particularly through cross-examination, provides an effective tool to deal with cases where it is believed that counsel may have 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.

[*Moore v. Getahun*, 2015 ONCA 55]

Reasons for Communications: *Moore v. Getahun*

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[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.

[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.

Reasons for Communications: *Moore v. Getahun*

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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.

[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.

The Advocates' Society:

Principles Governing Communications with Testifying Experts



PRINCIPLE 1

An advocate has a duty to present expert evidence that is: (i) relevant to the matters at issue in the proceeding in question; (ii) reliable; and (iii) clear and comprehensible. An appropriate degree of consultation with testifying experts is essential to fulfilling this duty in many cases. An advocate may therefore consult with experts, including at the stage of preparing expert reports or affidavits, and in preparing experts to testify during trials or hearings. An advocate is not required to abandon the preparation of an expert report or affidavit entirely to an expert witness, and instead can have appropriate input into the format and content of an expert's report or affidavit before it is finalized and delivered.

PRINCIPLE 2

At the outset of any expert engagement, an advocate should ensure that the expert witness is fully informed of the expert's role and of the nature and content of the expert's duties, including the requirements of independence and objectivity.

The Advocates' Society:

Principles Governing Communications with Testifying Experts



PRINCIPLE 3

In fulfilling the advocate's duty to present clear, comprehensible and relevant expert evidence, the advocate should not communicate with an expert witness in any manner likely to interfere with the expert's duties of independence and objectivity.

PRINCIPLE 4

The appropriate degree of consultation between an advocate and a testifying expert, and the appropriate degree of an advocate's involvement in the preparation of an expert's report or affidavit, will depend on the nature and complexity of the case in question, the level of experience of the expert, the nature of the witness's expertise and other relevant circumstances of the case.

The Advocates' Society:

Principles Governing Communications with Testifying Experts



PRINCIPLE 5

An advocate should ensure that an expert has a clear understanding of the issue on which the expert has been asked to opine. An advocate should also ensure that the expert is provided with all documentation and information relevant to the issue they have been asked to opine on, regardless of whether that documentation or information is helpful or harmful to their client's case.

PRINCIPLE 6

An advocate should take reasonable steps to protect a testifying expert witness from unnecessary criticism.

The Advocates' Society:

Principles Governing Communications with Testifying Experts



PRINCIPLE 7

An advocate should inform the expert of the possibility that the expert's file will be disclosed, and should advise the expert witness not to destroy relevant records.

PRINCIPLE 8

At the outset of the expert's engagement, an advocate should inform the expert of the applicable rules governing the confidentiality of documentation and information provided to the expert.

PRINCIPLE 9

In appropriate cases, an advocate should consider an agreement with opposing counsel related to the non-disclosure of draft expert reports and communications with experts.

ABSENCE OF EXPERT EVIDENCE

Case Law: *Ding v. Cruz*

In *Ding v. Cruz*, the Board allows an appeal against a Committee of Adjustment approval of minor variances on the basis that no expert planning evidence was presented to the Board to justify the minor variances:

[11] The Board was thus faced with a situation where no planning evidence would be made available upon which the Board could properly consider the application.

[12] On this basis, the Board advised the parties that even if Mr. Shih were to provide architectural testimony on the appeal, the Board would not have the necessary evidence before it to consider whether the application meets the four-part test under s.45(1) of the Act.

[14] The Applicant could not satisfy this burden in light of the lack of planning evidence. The Applicant has not presented any evidence to the Board upon which the Board could authorize the requested variance or any part of it.

[Ding v. Cruz, OMB May 14, 2015]



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