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Jean-Pierre Dépelteau

EXPERT EVIDENCE

by Jean-Pierre Dépelteau
Fraser Milner Casgrain

When all other methods of conflict resolution fail, the last resort is to seek recourse in a judicial setting, be it in court or arbitration if the contract allows for it.

Much of today's construction litigation involves a great deal of technical evidence which is often challenging for the presiding judge. As such, the retention and reliance upon expert witnesses has been steadily increasing. In the context of construction litigation, this increased reliance can be partly due to an increase in the complexity of claims, delay analysis techniques, productivity analyses and quantum of damages. The purpose of the expert witness is to provide opinion evidence on matters beyond the common knowledge of the judge.

To be effective, the expert must maintain his or her objectivity. Advocacy is the role of legal counsel.

The article by Jean-Pierre Dépelteau delves deeper into the role of an expert and expert testimony.

Jean-Pierre Dépelteau is a senior partner, vice-chairman and a member of the Montreal Board of Directors of Fraser Milner Casgrain LLP. He has developed, over 30 years of practice, a unique expertise in construction law. He advises owners, contractors, specialized sub-contractors and suppliers on the preparation, negotiation and drafting of all types of construction contracts, project management issues, risk analysis, rules related to the awarding of contracts, public-private partnerships, preparation and review of claims, construction bonds, legal hypothecs, insurance matters, contractual liability, mediation, arbitration and judicial litigation. Mr. Dépelteau is a member of several associations, namely in relation to the construction industry. He has been recognized by Lexpert as one of the best 500 lawyers in Canada and he will be listed in the upcoming 2006 The Best Lawyers in Canada. He is invited on a regular basis to lecture at seminars on construction law. Mr. Dépelteau was called to the Barreau du Québec in 1970.

Mr. Dépelteau wishes to thank his colleagues, Claude Morency and Josée Aspinall for their participation in this paper.

1. INTRODUCTION

Society's rapid advancement in new technologies such as engineering, medicine and physics has created a world of specialized knowledge.

The construction industry has not escaped this effervescence. Rather, it is frequently at the origin of significant technological breakthroughs. Consequently, construction law conflicts are subject to a litany of questions, each more scientific and technical than the next. Under these circumstances, it is not surprising that construction law trials are an opportunity to see numerous experts testify on subjects as varied as the specialties found on a construction site, from soil analysis to the building of a site, including structure, mechanics, electricity, environment and even project management.

This marked augmentation over the past decades for the need of experts in the justice system has simultaneously led to growing concerns as to the mission and impartiality of experts. As a result, courts have no choice but to develop rules and directives defining and framing the nature and scope of an expert report, as well as the duties and prerogatives of an expert when their services have been engaged by an attorney in the context of a conflict.

This article summarizes the principal parameters framing an expert's work, from the preparation of his expert report to his testimony before the courts bunaux.

2. THE EXPERT'S ROLE

In principle, it is forbidden to give an opinion-based testimony. In the context of a civil case, the judge is master of the facts and the law, and in this capacity, he is the only one responsible for the appreciation of factual evidence and the drawing of appropriate conclusions. The rule willing that opinion-based testimony is prohibited is based on the principle that this opinion would have the effect of usurping the judge's functions. The courts have nonetheless recognized that there exists an exception to this principle:

> "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 provide 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 the expert is unnecessary (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, *per* Lawton L.J.)."[1] (our underlines) [translated by author]

The expert witness is thus a person who, by virtue of his training and/or experience in a technical or scientific field, is competent to give his opinion on a particular subject in a field of precise expertise.

We have recourse to expert witness testimony to enlighten the court on any technical issues, whether it be medicine, statistics or engineering; specific fields where judges have only vague understanding. As such, with the opinion report and/or data provided by one or more experts, the judge will be in a better position to appreciate the situation:

1 *R. v. Abbey*, [1982] 2 S.C.R. at 42.

> "The role of an expert consists of providing scientific information and a conclusion that, due to its technical nature, is beyond the knowledge or experience of a judge."[2] [translated by author]

The role of an expert witness does not end there. It can be much more vast. More than helping the court in its comprehension and appreciation of certain facts, an expert's task often consists of enlightening the attorney who engaged his services in the management of his file. In the framework of a construction law litigation, the expert, whether he is an engineer, architect, geologist or specialist in any other discipline, will often be summoned to:

- Express his opinion and enlighten the court on the technical or scientific issues of a conflict between two parties;
- Act as a consultant for the attorneys, in order for them to assimilate all the technical information and correctly identify the different intricacies of the case;
- Identify other experts who could serve as witnesses, as the case may be;
- Lay out the principles of a delay analysis, using the facts generated from the work site, in order to allow the judge to establish the causes and as such determine whether a claim is valid;
- Determine the key documents of the case and, as a corollary, identify the missing documents;
- Suggest additional surveys and research which are necessary;
- Express his opinion on the rules of practice in a given field;
- Revise pertinent literature for a given question or subject;
- Provide his opinion on the effects of a delay in an activity sector, with respect to work performed in another activity sector of the project;
- Identify the weaknesses in the adverse parties' expert's arguments and even suggest cross-examination questions.[3]

3. DEVELOPMENT OF TESTIMONY

In principle, the expert witness cannot testify unless he has issued a written report, which would have been introduced into the court file prior to testimony by the party who engaged his services.

Before he renders his expert testimony, it is necessary to qualify the witness. This entails recognizing his expertise in a given field. In effect, an expert who doesn't possess the required technical or scientific competence will not be permitted to testify. Moreover, it is possible that an expert's examination, where he possesses an expertise and/or great experience in a very specialized field, will be restricted exclusively to his field of competence.

As such, the witness will be qualified to testify as an expert witness when his experience (titles, diplomas, work history, etc.), entered into evidence by his curriculum vitae being transmitted to the court by way of a brief examination by the client attorney, challenged by a cross-examination of the attorney of the adverse party, demonstrates his competence.

Once an expert is recognized as such, the client attorney proceeds with his direct examination. The expert is thus called on to restate each of the elements of his report, following the questioning of his attorney. It is important that the expert demonstrate to the court the underpinning of his opinion and, more particularly, the facts and presumptions upon which his report and testimony are founded. When the facts are contested or are not personally known to the expert, which is often the case, hypothetical questions will be asked of the expert witness.[4]

The expert will then be cross-examined. It is, without a doubt, the most difficult part of an expert's testimony. The goal of the attorney who performs the cross-examination is to convince the judge to dismiss the testimony of the expert. For this reason, the attorney will do everything in his power to reduce the credibility of the expertise and/or the expert's testimony by attacking his opinion and his impartiality.

4. ADMISSIBILITY OF TESTIMONY

For an expert witness to testify in court, his report, like his testimony, must first be considered legally admissible. The admission of an expert's evidence essentially depends on its pertinence and utility.[5]

Like all other evidence, pertinence is a sine qua non requirement for admissibility. An expert's report must therefore be pertinent, that is to say, it must be linked to the facts that it tries to establish. But the analysis does not end there. The Supreme Court adds that one must proceed with "a cost benefit analysis, that is "whether its value is worth what it costs." Cost, in this context, is not used in its traditional economic sense but rather in terms of its impact on the trial process."[6] We must ask whether expert evidence will help the judge with the facts or rather whether it is susceptible to create confusion. Furthermore, logically pertinent expert testimony cannot be admitted as evidence where its probative value is greatly inferior to its prejudicial effect.

We must then ask if the expert evidence is useful in the case, if it is really essential in order to enlighten the court on concepts that the court could not itself otherwise assimilate. We would thus refuse expert evidence which risks influencing the decision of a court on subjects that, however technical, could be understood by a judge in light of facts entered into evidence.[7]

Once judged admissible by the court, expert evidence is legally introduced into the court file. However, this doesn't mean that its content will automatically be relied upon. On the contrary, the judge must evaluate its credibility and probative value in order to determine the weight that he wishes to give it, taking into account all the surrounding circumstances.

5. HOW TO RENDER CREDIBLE TESTIMONY

Scientific evidence can be more impressive than a witness testifying on facts. While an expert in principle must enlighten the court on a particular subject that the judge does not have specific knowledge, the judge is never bound by this evidence and is not obligated to retain this testimony. He has the liberty to exclude the testimony in a justified way. The court appreciates the value, quality and credibility of the expert testimony, as it does for all others testimony.[8] In effect, article 2845 of the *Civil Code of Quebec* states that "the probative force of

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2 Pierre Tessier and Monique Dupuis, « Les qualités et les moyens de preuve » in *Preuve et procédure*, volume 2, Collection de droit, Cowansville, Les Éditions Yvon Blais inc., 2005-2006 at 269, cited in *Lainey* v. *Champagne*, REJB 2003-44694 (S.C.).

3 Michael F. Harrington, "The Expert: Partisan Advocate or Aide to the Court", Ottawa, The Leading Edge: CBA'S 2002 National Construction Law Conference, l'Association du Barreau Canadien, 2002 at 4.

4 Ronald E. Dimock and Michael D. Crinson, « Accounting Expert Witness Testimony or Quantified by the Qualified », Alliance for excellence in investigative and forensic accounting, Toronto, Canadian Institute of Chartered Accountants, 2001 at 18 and 19; Glenn A. Urquhart, "Expert Evidence", Ottawa, The Leading Edge: CBA'S 2002 National Construction Law Conference, l'Association du Barreau Canadien, 2002 at 15.

5 *R. v. Mohan*, [1994] 2 S.C.R. 9. In this decision, the Supreme Court makes reference to the applicability of four criteria, (a) pertinence (b) the necessity to help the judge with facts (c) the absence of any rules of exclusion and (d) the sufficient qualification of the expert. For the purposes of this report, only criteria (a) and (b) are considered.

6 *Ibid*. at 21.

7 *R. v. Abbey, supra* note 1. See also *Hôtel Central (Victoriaville)* v. *Compagnie d'assurance Reliance (November 3, 1997), Arthabaska 415-05-000337-963, (S.C.) at 8 to 10.*

8 *Lainey v. Champagne, supra* note 2.

testimony is left to the appraisal of the court," whether it be expert testimony or ordinary testimony.

In order to be retained by a judge, testimony must meet certain elementary rules on objectivity, professionalism and integrity. This is even more true when facing two contradictory testimonies, as the judge must weigh the intrinsic value of each testimony and decide which is more credible.

The true question thus remains to determine how to maximize the probative value of a testimony? How do we insure that expert testimony is not dismissed by a judge? Over the years, jurisprudence developed norms to which experts should explicitly adhere to in order to render their testimonies probative. Essentially, these rules are as follows: (a) remain objective (b) don't select between the presented evidence (c) don't make judicial analysis (d) don't gather the opinions of other experts on a given subject.

5.1 Remain objective

Remember that, the expert witness, even if his services are engaged by a party to the litigation, has, above all, the mission of enlightening the judge. He must thus be impartial, objective and uninfluenced by the attorney who engaged his services, otherwise his credibility will evidently be affected:

> "It clearly appears from M.'s testimony […] that he has a fundamental misunderstanding of his role as an expert. Contrary to what he seems to be believe, the role of an expert is not to defend the thesis of the person who engaged his services, to "work for the victim."
>
> The expert must prove his objectivity and disinterest.
>
> The expert must be impartial. […]"[9] (our underlines) [translated by author]

This case concerned a claim for an insurance indemnity following a fire. The insurance company refused to pay following its engineer's report, an expert in the research of the source of fires, who concluded that the fire was the result of an intentional act given that, particularly, an oil can was present in the basement.

Given the same facts, the expert engaged by the insured came instead to the conclusion that the fire was accidental, having been caused by the overheating of the bi-energy furnace located in the basement of the house.

The court dismissed the report and testimony of the insured's expert in these words:

> "This leads the court to consider the report and testimony of the expert […] in respect to their credibility and conclusions.
>
> The role of an expert, even if paid by one of the parties, is to help the court better understand the technical character of a problem and not defend, at all costs, the thesis of the person who engaged his services. The expert must remain detached and retain his objectivity which will, in the end, render his position defendable, credible and convincing.
>
> Here, the court must certify that M. […] unfortunately did not demonstrate the required detachment or objectivity."[10] (our underlines) [translated by author]

5.2 Avoiding selecting between the presented evidence

From all the presented evidence, the expert must determine the pertinent elements in order to provide an objective scientific opinion and not be uniquely satisfied with the elements that are transmitted by the party who engaged his services:

> "When an expert becomes selective in his choice of evidence, where he endeavors to block a litigious point for kindness to the party who engaged his services, meaning the person who is paying him, while the scientific truth indicates that he must be prudent in the expression of his opinion or when an expert cannot via evidence maintain certain affirmations, he demonstrates partiality and lack of strictness that affects the whole of his testimony. His expertise is thus further weakened and will be set aside."[11] [translated by author]

In the same way, an expert cannot give his opinion without stating the underlying facts of his opinion. Neither can he choose to not take into consideration certain facts that might reduce the credibility of his testimony:

> "While M […] was informed by the firemen and the police of the discovery of an oil can at the place where he himself could note a starting point and intense carbonization, his report makes no mention of it. In fact, even if he knew, before the writing of his report, that a voluntary fire was suspected, M. […] did not even think it important to verify the pertinent information nor took the care to consult the firemen's intervention report, which clearly indicates the presence of an oil can at the source of the fire.
>
> Why did he judge it unnecessary to do so? He explains:
>
> "Well, listen a minute, here. One thing must be understood. In the present case, I was working for the victim who was also, there… […] Who was equally indirectly implicated, there, in terms of a criminal fire. And, the lawyer was equally in the same position."
>
> Later on:
>
> "When I said I didn't want to be… I didn't want to influence, there, my progress. If I begin with the idea that it is an oil fire and I want to prove that it was a voluntary fire, I will only consider the oil can or I will only work in function of the oil can.
>
> If I want to do the contrary, I will only work in function of its removal from there… to not see it."
>
> […]
>
> An expert enlightens the court on his contentions, the plausible hypotheses and the conclusions that we should draw. He cannot pretend to ignore nor silence pertinent facts to the debate, under the pretext that that could "distort his judgment" or lead him to a conclusion that could risk being unfavorable to the party who engaged his services. Basically, the expert must never pledge his allegiance to his client.
>
> In the case at bar, it is clear that the expert […] chose to be a representative of his client rather than an ancillary to justice. In deliberately omitting to speak about what might prove damaging to Mr. Fortin's thesis, the expert […] unfortunately lost all credibility. He almost demonstrated willful blindness."[12] (our underlines) [translated by author]

5.3 Avoiding judicial analysis

It is the exclusive domain of the judge to apply the law to the facts of the case before him. In this sense, the expert can in no way usurp the judge's function as master of law:

> "[…] expert testimony is situated at the border of science and law. However, in no case can an expert usurp the function of

9 *Rénald Fortin* v. *Compagnie d'assurance Wellington & al.*, B.E. 2000B.E.-416 (S.C.) at 9. Motion for leave to appeal dismissed (C.A., 2000-07-13), 500-09-009473-000. Motion for leave to appeal to the Supreme Court dismissed (S.C. Can. 2001-05-03), 28149. Demand for reexamination of the motion for leave to appeal to the Supreme Court dismissed (S.C. Can., 2001-09-27), 28149, restated in the decision: Sarrazin v. Société nationale d'assurance inc., EYB 2006-101535 (S.C.) at 7. See also *McNamara Construction Company* v. *Newfoundland Transshipment Ltd. and al.* (May 17, 2000), Newfoundland, 1998 S.T.J. no 0942, (S.C.) at 2 to 4.

10 *Ibid.* at 8.

11 *Boiler Inspection and Insurance Company of Canada* v. *Manac inc.*, REJB 2003-50734 (S.C.) at par. 198.

12 *Rénald Fortin* v. *Compagnie d'assurance Wellington & al., supra* note 9 at 8 and 9. See also *National Justice Compania Naviera S.A.* v. *Prudential Assurance Co. Ltd.*, [1993] 2 Lloyd's Reports 68, (Queen's Bench Division) at 82; Michael Black, "Disqualifying the Expert: An English Perspective", October 1996, The Construction Lawyer at 57; David I. Bristow, "Expert's Reports – Your duty of disclosure", Ottawa, National Construction Law Conference, Canadian Bar Association, 2004 at 5.

the judge as master of law. This is why he must always hold himself short of this border, while sometimes thin, always remains impassable."

[…]

Is the expert at the border of science and law? He seems to me to have instead all his roots in the realm of fact which is more and more apparent to the jurist. Together they explore, but only the judge crosses to the other side of the border."[13] (our underlines) [translated by author]

Also, it is imperative to appropriately trace the dividing line between the role of the expert and the role of the judge. It is incumbent on the expert to provide to the court scientific criteria necessary to corroborate the accuracy of his conclusions in order to give the court the chance to form its own opinion by the application of these criteria to the facts introduced into evidence by the attorneys. The expert evidence must help the judge in his appreciation of the facts, by giving him particular knowledge that an ordinary person could not provide him. In no case does expert evidence have as a goal the imposing of the expert's opinion on the judge of first instance.[14] It consists of an "enlightened judgment act, and not an act of faith required by the judge of first instance."[15]

5.4 Avoiding gathering the opinions of other experts on a given subject

In order to forge his opinion, an expert can, and even must, take into consideration the opinion of his colleagues by reviewing the pertinent literature on a given subject.[16] However, an expert cannot simply be content with gathering the opinions of other experts, no matter how pertinent. In effect, certain judges have even decided that it consisted of a question of admissibility, and not only a question of probative value[17], and by consequence purely and simply eliminated the expertise of evidence presented by the party:

"The opinion of an expert, as it is recorded in a report, is not the assembly of opinions of other persons, be them, themselves, experts, but it is the expression of an expert's judgment who applied his particular knowledge, taking into account doctrine and jurisprudence, in consideration of the value of the object of the report. Acts of faith are not part of an expert's role in the appreciation he must make of the value."[18] [translated by author]

6. CONCLUSION

In closing, the words of judge Hollinrake of the British Columbian Court of Appeal in the case of *Cogar Estate v. Central Mountains*[19], which reject an expert's report that includes nearly all the aforementioned criticized elements bear repeating:

"The […] report is entitled "Report on Findings, Analysis and Evaluations." The trial judge rejected the report as evidence on the grounds that it:

(1) repeatedly offended the ultimate issue rule;

(2) was replete with findings of fact that usurped the court's function;

(3) many of the findings of fact made by Mr. […] were not of a scientific or technical nature and did not require expert opinion for their proof;

(4) the report was a "thinly disguised argument made by a partisan advocate using slanted facts;" and

(5) it was not possible to sever out the argument from the body of the report.

I have read the report of Mr. […] from cover to cover and I agree with everything the trial judge said about it and the reasons he gave for holding it to be inadmissible.

[…]

I think this report is so badly flawed and so contrary to the position of an expert witness in this jurisdiction that his or her role before the court is to assist the court and not play the role of an advocate, that it was open to the trial judge to view it as not being a statement or notice as required by s. 11 of the Evidence Act.

[…]

Even perusal of Mr. […]'s report makes it obvious that the bulk of the report is a thinly disguised argument made by a partisan advocate using slanted facts.

[…]

Viewed in its totality, the report is more appropriate as argument than it is as evidence. It is argument prepared by engineers under legal direction, rather than by lawyers with the benefit of engineering advice. That does not make it any the less effective as argument. Quite the contrary. However, this is not the stage for hearing argument."

From the above, it is irrefutable that an expert, called to prepare a report and to testify within the framework of a trial, must demonstrate professionalism and prudence in the fulfillment of his mandate. The objectives and scope of the report should be clearly defined from the start in order to avoid a regrettable outcome, as much for the expert as for the attorney who engaged his services.

13 Charles D. Gonthier, « Le témoignage d'experts : à la frontière de la science et du droit », (1993) 53 *R. du B.* 187 at 193 and 196.

14 *National Justice Compania Naviera S.A.* v. *Prudential Assurance Co. Ltd.*, [1993] 2 Lloyd's Reports 68, (Queen's Bench Division) at 81; Jim Delany, "Expert Witnesses and Lawyers: Managing the Relationship", (2005) 22 The International Construction Law Review at 405; Black, *supra note 12 at 57; McNamara Construction Company* v. *Newfoundland Transshipment Ltd. and al.*, Supreme Court of Newfoundland, 1998 S.T.J. n° 0942, May 17, 2000, Juge Orsborn at 3.

15 *Directeur de la protection de la jeunesse* and *T. (O)* and *G (L)* and *T(D)*, EYB 2003-46074 (C.Q.) at 14.

16 Recommended practices for design professionals engaged as experts and the resolution of construction industry disputes, Silver Spring MD, ASFE, 1988 at 3; Urquhart, *supra* note 4 at 15; Harrington, *supra* note 3 at 6.

17 *CUM* v. *Trizec Equities*, EYB 1986-72982 (C.P.).

18 *Domtar* v. *Ville de Windsor*, (August 8, 1984), Saint-François 450-02-001423-816 (P.C.), restated in the decision: *CUM* v. *Trizec Equities, ibid.* at 7.

19 *Cogar Estate* v. *Central Mountains*, 72 B.C.L.R. (2d) at 292.

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