

Ontario's Expert Evidence Reforms



**One for the price of Two and
other challenges**

**Summary of and commentary on CLE “Expert Evidence Explained”
by Senwung Luk and Matt McPherson**



General Rules of Expert Evidence

R. v Mohan

- Relevance
- Necessity in assisting the trier of fact
- The absence of any exclusionary rule
- A properly qualified expert



General Rules of Expert Evidence

- **Expert evidence must be independent and objective**
- **The facts upon which the opinion is based must be proven**
- **Experts shouldn't give evidence on the ultimate issue**



Rule Reform: Origins

- **Dr Charles Smith and the Goudge Inquiry**
- **The Coulter Osborne Inquiry**

Problems Identified

- **Cost**
- **Delay**
- **Bias / partisanship**
- **“Expert generalists”**



Rule Changes and Proposals

- **Duty of experts to the court**
 - R. 4.1.01
- **Addition to requirements for experts report**
 - Rule 53.03

Other Proposals

- **Single-expert rule**
- **“Hot-tubbing”**



Practical Problems

Discoverability and “Independence”

- Interaction of disclosure and duty of expert Rules
- *Coneicao Farms* (2006 OCA)
 - Disclosure of experts “foundational information”



Practical Problems

Specific Problems

- **Two experts for every party**
- **Expensive**
- **No grandfathering**
- **Small pool in a narrow field**



Conceptual Problems

Objectivity in knowledge

- One right answer?
- One right question?

Bias and knowledge

- recolonizing the law through the rules on expert evidence?
- R. 4.1.01(1)(b) – “only within the expert’s area of expertise”



Attack of the Crowns

- Independence Motions
- Crown experts may not be immune though
 - e.g. Dr. von Gernet, Schmalz
- Other grounds?



Attack of the Crowns

Appendix - Rule Changes

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. O. Reg. 438/08, s. 8.

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. O. Reg. 438/08, s. 8.



Attack of the Crowns

Appendix - Rule Changes

- **Expert Opinions**
- **31.06 (3)** A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,
 - (a) the findings, opinions and conclusions of the expert relevant to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
 - (b) the party being examined undertakes not to call the expert as a witness at the trial. R.R.O. 1990, Reg. 194, r. 31.06 (3); O. Reg. 438/08, s. 30 (2); O. Reg. 453/09, s. 1.
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