

DISHING THE DIRT ON DISCLOSURE AND CONFIDENTIALITY

British Columbia Expropriation Association
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- As a general rule a witness may only testify to facts within their knowledge, observation and experience
- Normally sentences starting with “*I think ...*” are opinions not facts

→ There are two types of opinions that are in certain circumstances admissible

→ **Lay Opinion**

→ If the subject is within the personal knowledge of the witness he or she can say things like:

“I think that person is older than 65 ...”

→ This is simply a short way of relating all the detailed, complicated, and subtle facts that support a factual observation

Lay Opinion (cont'd)

- Typically Lay Opinion is admissible about things like:
 - Handwriting
 - Emotional state of person
 - Estimate of speed or distance
 - Whether an object is worn and decrepit or new and in good shape

Expert Opinion

- The opinion of an expert is admissible to prove a fact or facts when the subject matter of the evidence is beyond the common understanding of a judge or jury
- Expert Opinion evidence is permitted to assist the trier of fact draw the appropriate inferences from proven facts

Admissibility of Expert Opinion (Substantive Issues)

- The opinion must be relevant to the issues in the case
- Must be necessary i.e. the fact cannot be satisfactorily proven in another way
- Must not offend other exclusionary rules of evidence
- Must be given by a person who by reason of
 - Special skill
 - Knowledge
 - Training or experienceis qualified to give the opinion

R. v. Mahon [1994] 2 SCR 9

Admissibility of Expert Opinion (Procedural issues)

- Proceedings to which the *B.C. Evidence Act* applies:
 - Statement in writing setting out the opinion of the expert must be given 30 days in advance to opposing parties [s. 10(3)]
 - An assertion of qualifications in a written statement is proof
- *B.C. Evidence Act* does not apply to
 - Court proceedings, Provincial Court, Supreme Court and Court of Appeal
 - To other bodies that can make their own rules as to introduction of expert reports and testimony of experts

Admissibility of Expert Opinion (Procedural issues)

B.C. Supreme Court Rules – Part 11

- Rule 11-6(1) an expert report must set out:
 - Expert's name, address and area of expertise
 - Expert's qualifications
 - The instructions provided
 - Nature of the opinion and the issues to which it relates
 - The opinion
 - Reasons for the opinion including:
 - Factual assumptions on which it is based
 - Description of research that led to the opinion
 - List of every document relied on by the expert

Admissibility of Expert Opinion (Procedural issues)

B.C. Supreme Court Rules – Part 11

- Rule 11-6(3) must serve the report 84 days before trial
- Rule 11-6(8) disclosure obligation: if requested the party serving the report must produce:
 - Any written statement of fact on which the opinion is based
 - A record of independent observations made by the expert
 - Any data compiled by the expert in relation to the report
 - The results of any tests conducted
 - Must make available for review and copying the contents of the expert's file

Source and Content of Disclosure Obligation

- Supreme Court Rules Part 11 is relatively new and only applies to court proceedings
- Proceedings before other bodies will be governed by their own rules, the *B.C. Evidence Act*, and/or the common law
- Supreme Court Rules Part 11 for the most part is a description of common law disclosure obligations

“[an expert] testifies in an objective way to assist the court in understanding scientific, technical or complex matters within the scope of his professional expertise. He is presented to the court as truthful, reliable, knowledgeable and qualified. It is as though the party calling him says: ‘Here is Mr. X, an expert in an area where the court needs assistance. You can rely on his opinion. It is sound. He is prepared to stand by it. My friend can cross-examine him as he will. He won’t get anywhere. The witness has nothing to hide.’”

Vancouver Community College v. Phillips Barratt, 1988
20 B.C.L.R. (2d) 289 at 296

Confidential Advisor

- As long as the expert remains in this role there are sound reasons for maintaining privilege over the expert's work product and communications with counsel and the party

Vancouver Community College v. Phillips Barratt, 1988
20 B.C.L.R. (2d) 289 at 296

- Once the expert becomes a witness the role is substantially different
- The opinion is being offered to assist the court in its search for truth
- The expert is no longer a partisan advisor but a witness whose duty is to assist the court or tribunal

Vancouver Community College v. Phillips Barratt,
1988 20 B.C.L.R. (2d) 289 at 296

Rule 11-2

- Duty to assist the court and not to be an advocate for any party
- Must certify that
 - (a) Aware of that duty
 - (b) Report made in conformity with that duty
 - (c) Will give evidence in conformity with that duty

“It is fair that expert witnesses should be thoroughly cross-examined on all matters touching the weight of the evidence they offer. In our system, that is the accepted method of getting at the truth. It would not, however, be fair to require the witness to deliver up papers that are wholly irrelevant, either to the substance of his opinion or to his credibility. For example, papers concerning his personal affairs remain his own and are no one else’s business. Similarly, the expert may be doing work for persons not party to the litigation. He should not be required to disclose their secrets.”

Vancouver Community College v. Phillips Barratt, 1988
20 B.C.L.R. (2d) 289 at 297

- If the opinion is based on information that is confidential to persons other than the person retaining the expert the court or tribunal may nonetheless order disclosure of the confidential information
- This can occur even though it causes the expert to breach his or her duty of confidentiality to the other person

- An accountant is retained to provide an opinion of the economic loss sustained by the client
- In the opinion the expert set out the expected annual growth rates the client would have achieved had the wrongful act not occurred
- Although not using the financial information from another client directly in coming to that opinion the expert did use that information as a “measure of sustaining the reasonableness of the selected growth rate”

A Place You Do Not Want To Be (cont'd)

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- The other party applied for an order that the expert produce the financial statements of the other client
- The expert and her firm opposed the production on the grounds that it was confidential to a non-party
- Court ruled

“[23] Even if the information had not been relied on by [the expert], in determining industry growth rate estimates, it was at least considered and used to some extent as a check on their reasonableness.

A Place You Do Not Want To Be (cont'd)

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...An opinion can obviously be tested in many ways: by comparing the conclusion to the data relied on, by comparing the opinion to data which was available but not relied on, by considering whether the expert's opinion was influenced by the nature of the request of counsel or by information provided by counsel which was not relied on, and by considering whether the opinion was altered at the request of counsel – for instance, by removing damaging content.”

A Place You Do Not Want To Be (cont'd)

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[26] While I can accept that the information contained in the financial statements of KPMG's private client was intended to be held in confidence and only disclosed as required by law or as permitted by the client, its use has a direct bearing on the [issues in this case]."

South West Shore Development Authority v. Ocean Produce International Ltd., (2008) NSSC 240

“Reports prepared by expert witnesses that serve as the basis of their testimony may become public documents available to other parties involved in the case and to the general public. As a result, professional engineers who are asked to keep the source or the nature of proprietary information, or trade secrets, fully confidential and protected cannot extend such assurance if the information is included in the report. On the other hand, an expert witness has a duty to provide a complete report and cannot exclude relevant information simply because the client wishes to keep it confidential.” (Page 9)

“The fact that documents are prepared in the context of a confidential relationship between professional engineer and client, or marked confidential, will not preclude disclosure in court.” (Page 9-10)

“Thus, professional engineers may be called upon to reveal the source or nature of their information, even though they have given promises of confidentiality. It will be up to the court or the tribunal to gauge the hardship that might ensue, should engineers be forced to violate such promises of confidentiality, and to decide if an engineer will be required to reveal confidential information. Obviously it is better to avoid such situations in the first place.”

The Professional Engineer as an Expert Witness
(Professional Engineers of Ontario, Sept. 2011)

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