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PUBLICATION

Much Ado About Not Much: The Ontario Court of Appeal Sets the Record Straight on Expert Evidence in Ontario

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Last spring we published an article on the impact of a decision of Justice Janet N. Wilson in *Moore v. Getahun* ("***Moore***"), which appeared to drastically change the law on expert evidence in Ontario. That decision was met with much controversy and appealed on several grounds.

On January 29, 2015, the Ontario Court of Appeal released its decision in *Moore*, clarifying the law on the use of expert evidence, with a focus on access to justice and the "*…timely, affordable and just resolution of claims.*"

Background

The realities of modern litigation require the use of expert reports. Parties involved in commercial litigation often hire experts to ascertain the value of a business or property. Because of the central role that experts play in the determination of issues in litigation, they owe a duty to the court to be independent, and provide objective and unbiased opinions in relation to the matters on which they give evidence.

In preparing their opinions, experts have always worked closely with lawyers to ensure they understand the facts and specific issues on which they are being asked to provide an opinion. Those communications are generally protected from disclosure to the other side on the basis of litigation privilege. In some instances, expert witnesses were seen as having gone too far - advocating along with their instructing lawyer on behalf of the party retaining them rather than providing an unbiased professional opinion. It was in the context of such concerns that Justice Wilson rendered her trial decision in *Moore*. Specifically she stated:

"*I conclude that counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable.*"

In Justice Wilson's view, counsel could no longer rely on litigation privilege to protect their communications with their clients' experts and should expect to disclose all communications with experts. The Ontario Court of Appeal flatly rejected Justice Wilson views in this regard, and took the opportunity to re-state the law on expert evidence in the Province.

The Outrage and the Appeal

It is hard to think of a decision in recent memory that has inspired more debate in the legal community than the trial decision in *Moore*. With a virtual moratorium imposed by that decision on communications between lawyers and their clients' experts, many believed that the practical result of the trial decision in *Moore* would be to decrease the effectiveness of expert witnesses and increase the overall cost for parties in litigation.

A wide range of legal organizations in the Province responded with their concerns and sought to be heard by the Ontario Court of Appeal. They were welcomed by the Court. At the outset of the decision, written by Justice Robert J. Sharpe, the Court noted that opposing counsel on the appeal agreed that Justice Wilson's statements on communications with expert witnesses were erroneous.

The Court of Appeal went on to state: "*…banning undocumented discussions between counsel and expert witnesses or mandating disclosure of all written communications is unsupported by and contrary to existing authority…*"

The Court found that experts require a high level of instruction from lawyers in order to be in a position to prepare reports that will satisfy the rules of evidence. While this process could have a tendency to potentially affect the impartiality of expert opinions, the Court found that there are sufficient checks and balances in place to prevent courts from being misled as a result. Specifically, the ethical and professional standards of lawyers and their experts forbid them from permitting partisan expert reports to be tendered in evidence. Further, the adversarial process, which permits the cross-examination of expert witnesses, is designed to weed out tainted evidence.

In coming to his conclusion that Justice Wilson erred in finding that the consultation process between lawyers and experts must end, Justice Sharpe noted:

"*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 result of this decision by the Court of Appeal is to shore-up the existing common law principles and to reject the new direction proposed by Justice Wilson in her decision in *Moore*. As was the case before the trial decision in *Moore*, the law requires experts to produce independent and unbiased opinions, while allowing lawyers to consult with the experts to increase efficiencies and ultimately minimize costs to the parties. In our view, this is good news for lawyers and their clients and for the judicial system as a whole.