



Appraisers' Conundrum Confidentiality v. Litigation Disclosure

VALUING DIVERSITY
REIBC-AIC(BC) JOINT CONFERENCE

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Vancouver, British Columbia

Underlying Premise

Legal Obligation of Disclosure
Trumps
Professional Duty to Maintain Confidentiality

Overview

- Legal Perspective (Lex Pacifica Law Corp.):
 - Legal Requirements of Disclosure

- Appraisal Perspective (Altus Group):
 - Professional Duty of Confidentiality

- Information Gathering Protocol (Altus Group)

Overview – Legal Perspective

- Context: Experts in Litigation
 - Definition of Expert Opinion Evidence
 - Dual Role of Experts
 - Litigation Disclosure Requirements

Expert Evidence Defined

□ General Rule:

- Opinion Evidence Discouraged or Not Allowed

□ Exception:

- Opinion Evidence Must be Relevant
- Necessary for Tribunal to Decide the Matter
- No Other Rule Excluding the Opinion
- Witness is an Expert

■ *R. v. Mohan* [1994] 2 S.C.R. 9

Expert Defined

- Person With Special Knowledge:
 - Through Experience;
 - Through Course of Study; or
 - Combination of Both

Expert Defined cont.

- “The admissibility of such [expert] evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject-matter at issue, the court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.”

- Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), at pp. 536-37

Expert's Dual Role

- Most Often Expert's Retainer is Dual:
 - Expert Advisor for Retaining Party
 - Expert Witness Before Tribunal
- Great Opportunity for Conflict
- Potential Minefields of Disclosure

Expert as Advisor

- Provide Candid Assessment of the Case
- Help Develop and Prepare the Case
- Assist in Cross-Examination Preparation

Expert As Witness

- Provide Tribunal With:
 - Knowledge Base
 - Objective Opinion

Expert Roles Split

- To Avoid Conflict:

- One Expert as Advisor
- One Expert as Witness
- Expensive – Need a Lot at Stake

Tainted View of Experts

- “The **professional witness** is **always partisan**, ready and eager to serve the party calling him. This fact should be ever-present in the mind of the cross-examiner. Encourage the witness to betray his partisanship; encourage him to volunteer statements and opinions, and to give unresponsive answers. Jurors always look with suspicion upon such testimony.”

□ Wellman, Francis, *The Art of Cross-Examination*, page 126

Tribunal Expectations

VCC v. Phillips, Barratt

- Confidential Advisor v. Witness
- As Witness: Opinion/Basis for Opinion Is Not Private Advice
- Professional Opinion to Assist Court in Search for Truth
- No Longer in the Camp of a Partisan
 - *Vancouver Community College v. Phillips, Barratt* (1987), 20 B.C.L.R. (2d) 289 [VCC]

Tribunal Expectations

VCC v. Phillips, Barratt, cont.

- Objective Testimony to Assist the Court in Understanding Scientific, Technical or Complex Matters

- Witness is Presented as Truthful – Reliable – Knowledgeable – Qualified.

- VCC

Tribunal Expectations

VCC v. Phillips, Barratt, cont.

- "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."

- VCC

Tribunal Expectations

VCC v. Phillips, Barratt, cont.

- Witness's Opinion Held Out as Trustworthy
- Party Calling Witness Impliedly Waives Privilege that Previously Protected the Expert's File from Production.
- Representation (At Least at the Outset):
 - Expert Evidence Will Withstand Cross-Examination.
 - VCC

Tribunal Expectations

VCC v. Phillips, Barratt, cont.

- Implied Waiver Over Papers in a Witness's Possession Relevant to:
 - Preparation/Formulation of the Opinion Offered
 - Witness's Consistency, Reliability, Qualifications
 - Other Matters Touching Credibility
 - VCC

Assessing Credibility

- “Moreover, the **assessment** of a witness’s **credibility** must reasonably subject the witness’s story to an examination of its **consistency with the probabilities** of the surrounding conditions or circumstances. The real test of the truth of the story of a witness in such a case must be its **harmony with the preponderance of the probabilities** which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.”

□ *Gichuru v. Smith*, 2013 BCSC 895, para. 129

Expert Witness Credibility

- Assessing Credibility:
 - Ability & Opportunity to Observe Events
 - Firmness of Memory
 - Ability to Resist the Influence of Interest
 - Harmony with Independent Evidence

Expert Witness Objectivity & Credibility

- Objectivity/Credibility Established By:
 - Knowledge of the Subject Matter
 - Preparedness
 - Even-handed Gathering/Analyzing Data
 - Forthright Answering of Questions
 - Supplier of Information – Not an Advocate.

- ***Disclosure Required to Test Foregoing***

Litigation Forums – File Disclosure Requirements

- Courts:
 - Express Requirements

- Administrative Tribunals:
 - Varies with Tribunal
 - Fairness Requirement

- Arbitrations:
 - By Agreement
 - Arbitration Rules
 - Fairness Requirement

- Mediations:
 - Disclosure Not Usual

Litigation Forums

B.C.S.C. Civil Rules

- Rule 11-2(1) – Duty of Expert Witness
 - (1) In giving an opinion to the court, an expert ... has a duty to assist the court and is not to be an advocate for any party.

Litigation Forums

B.C.S.C. Civil Rules

- Rule 11-2(2) – Duty of Expert Witness
 - (2) ... the expert must [in the report] certify that he or she
 - (a) is aware of the duty on 11-2(1)
 - (b) has made a report in conformity with that duty
 - (c) will testify in conformity with that duty

Litigation Forums

B.C.S.C. Civil Rules

□ Rule 11-6(8) – Duty of Expert Witness

After delivery of report, must produce if asked:

- (a) written statements of fact
- (b) records of independent investigations
- (c) data compiled by the expert
- (d) results of any tests or inspections relied upon
- (e) expert's file relating to preparation of the report

Litigation Forums

Other Forums

- Expert Duty and Disclosure Rules:
 - Not As Formal But Same Philosophy
 - Refer to the Tribunal Rules and Practice Directives

Disclosure: Report File

- Is It In Your File?
 - Assume It Must Be Disclosed

- Tribunal Expectation of File Contents:
 - Retainer Letters and Other Instructions
 - Appraisal Theory and Authorities
 - Market Data – Depends on Approach Relied Upon
 - Draft Reports
 - Records/Memos of Conversations/Interviews
 - Expert-Lawyer Communications

- Not in Work File – Why Not?

Disclosure: Advisor File Generally Not

- Litigation Privilege
 - Work Product in Preparation for Case
 - Application of Litigation Privilege Can Be Complex
 - Tribunals Generally Protect this Privilege

Disclosure: Dual Role – Dual Files

- Good File Management
 - What Goes in the Report File
 - What Goes in the Advisor File
- Requires Discussion with Retaining Counsel
 - *Expert Evidence in British Columbia Civil Proceedings*, 3d ed., Vancouver: The Continuing Legal Education Society of British Columbia, 2011, pp. 132-3

Disclosure: Letters of Instruction

- Letter of Instruction:
 - Court Version – Detailed
 - Sets Out Expectations
 - Sets Out Facts & Working Assumptions
 - Forms Part of the Expert Report

- *Expert Evidence in British Columbia Civil Proceedings* pp. 123-135

Disclosure: Draft Reports

- ❑ Drafts of Opinion Report are Producible
- ❑ Drafts of Reports in Counsel's File Producible
- ❑ Conflicting Views:
 - Keep No Drafts
 - Keep Drafts – Be Aware of Production
- ❑ Electronic Files of Drafts – Producible
 - Metadata

Disclosure: Market Research

- ❑ Commercial Database Information
- ❑ Proprietary/Firm Database Information
- ❑ Confidential Information – Client Supplied
- ❑ Confidential Information – Supplied by Others

Disclosure: Appraisal Reports

- ❑ Previous Appraisals of the Same Property
- ❑ Appraisals of Other Properties
- ❑ Extracts: Demands for Entire Appraisal

Disclosure: Data Not Relied Upon

- ❑ Producible to Test Objectivity and Credibility
- ❑ Could Suggest Undue Influence or Uneven Hand

Disclosure: “Past Life”

- ❑ The Expert’s Publications
- ❑ Adverse Decisions in Previous Cases
- ❑ Transcripts in Previous Hearings
- ❑ Previous Appraisal Reports
- ❑ Discipline Hearings

Disclosure: Mediations

- Expert Report Mediation - Dispute Not Resolved
 - Settlement Privilege?
 - Might Only Extend to Report – Not Work File
 - Possible Use Before Tribunal If Remove Mediation References
 - But Implied Waiver of Privilege - Subject to Cross-Examination
 - *Expert Evidence in British Columbia Civil Proceedings* pp. 262 - 269

Disclosure: Negotiations

- “Prepared for Negotiations Purposes”
 - Immediate Question: Would Opinion Change If Not For Negotiation Purposes?
 - Likely Same Treatment as Mediation

Confidentiality Test

- ❑ 4 Part Test:
- ❑ Communication in Confidence of No Disclosure
- ❑ Confidentiality Essential to the Relationship
- ❑ Community Wishes to Foster the Relationship
- ❑ Injury to Relationship by Disclosure is Greater than Benefit of Disclosure

❑ *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *R. v. National Post*, 2010 SCC 16

Confidentiality Test, cont.

- Assume the Tribunal Agrees to Protect Confidentiality
 - Damage Done to the Opinion Report & Expert's Testimony
 - Damages Weight to be Given to Opinion