

## BC Court Takes Laissez-faire Approach to Counsel's Involvement with Expert Reports Compared to Ontario

The opinions of expert witnesses play an important role in the litigation process. A well drafted expert report can make the difference in the outcome of the litigation, so litigants and their counsel must take care to ensure that the opinion of the expert is in a form properly before the court.

The role of the expert is to provide non-partisan evidence for the benefit of the court. An expert should not be viewed as an advocate for one litigant or another, and thus litigants and their counsel must take care to ensure the expert's objectivity is not compromised in the creation of the expert report.

In the recent Ontario Supreme Court decision of *Moore v. Getahun*<sup>1</sup>, the Ontario court disapproved of counsel's prior practice of reviewing draft expert reports. The court reasoned that reviewing draft versions of an expert report is improper and undermines both the purpose of Rule 53.03 of the *Ontario Civil Rules of Procedure*<sup>2</sup> as well as the expert's credibility.

The court in *Moore* held that the practice of reviewing draft reports is no longer acceptable and should stop, and "if after submitting the final expert report, counsel believes that there is need for clarification or amplification, any input whatsoever from counsel should be in writing and should be disclosed to opposing counsel."

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<sup>1</sup> *Moore v. Getahun*, 2014 ONSC 237 [*Moore*].

<sup>2</sup> *Rules of Civil Procedure*, RRO 1990, Reg 194, s 53.03.

Ontario's Rule 53.03, "*Expert Witnesses*," outlines the rules governing the use of expert reports in that jurisdiction. Concerns about bias in expert reports were addressed through changes to Rule 53.03. The rule now requires expert reports to be served 90, 60 or 30 days before trial, rather than the previous 10 days, and specifies certain information that must be contained in an expert report.

Part 11, "*Experts*," in the British Columbia *Supreme Court Civil Rules*<sup>3</sup> sets out the rules governing experts and expert reports in that jurisdiction. Similar to Ontario, Rule 11-6 of the *SCCR* outlines timelines for service of expert reports and also specifies certain information that must be contained in expert reports.

### **British Columbia's Treatment of Counsel's Practice of Reviewing Draft Expert Reports**

To date, the courts in British Columbia have made no specific reference to the decision in *Moore*. However, earlier this year, the British Columbia Supreme Court discussed the involvement of counsel in the preparation of expert reports.

In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*<sup>4</sup>, Russell J. ruled on the admissibility of an expert report tendered on behalf of the plaintiff. The court's decision included a lengthy discussion on the impartiality and independence of expert witnesses, but made no mention of the recent *Moore* decision. The defendants objected to the admissibility of the report, arguing that counsel's involvement in the preparation of the report gave rise to concerns about the expert's impartiality.

The defendants in *Conseil* suggested that if counsel is involved in the preparation of an expert report, he or she must avoid doing anything that may compromise the appearance of an expert's independence and impartiality, and should maintain contemporaneous records of his or her involvement in order to avoid allegations of impropriety.

The plaintiff took the position that counsel's involvement in the preparation of an expert report should not impute bias to the expert, and, indeed, counsel plays a vital role in assisting witnesses to present their evidence in a manner that is clear and helpful to the court. In deciding the issue, Russell J. provided the

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<sup>3</sup> *Supreme Court Civil Rules*, BC Reg 168/2009, s11 [*SCCR*].

<sup>4</sup> *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2014 BCSC 851 [*Conseil*].

following comments with respect to counsel's involvement in the preparation of expert reports in British Columbia:

- it is "quite proper" for counsel to provide some feedback on the form of an expert report to ensure that the evidence is useful to the court;
- requiring counsel to retain records of their involvement could create an undue financial burden for litigants;
- the law does not require counsel or experts to maintain records of their involvement in the event they may be called upon to dispel allegations of bias at some point in the future, nor should any suspicion of improper involvement arise if counsel do not retain such records; and
- counsel should not be required to file and serve affidavits with respect to their involvement in the preparation of an expert report to dispel any allegations of wrongdoing, and similarly, a decision not to file an affidavit should not give rise to a suspicion of impropriety by counsel.

Ultimately, Russell J. was not persuaded that the evidence before her demonstrated that the plaintiff's expert lacked impartiality to the extent that it affected the probative value of the report.

### **Take away**

Despite the Ontario court's disapproval of counsel's prior practice of reviewing draft expert reports in *Moore*, the decision does not seem to have impacted the treatment of expert reports prepared for use by the courts in British Columbia. On the contrary, the recent *Conseil* decision signals the British Columbia Supreme Court's approval of counsel's practice of providing some feedback on the form of an expert report to ensure that the evidence is of assistance to the court.

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[a cautionary note](#)

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