The Revay Report

Volume 13
Number 3
December 1994

Published by
Revay and Associates
Limited

Construction Economists
and
Management Consultants

By Steve Revay

The role of experts in construction litigation was examined in an earlier issue (October 1990) of The Revay Report. Nevertheless, we believe to be justified in taking another look at experts, but from a different angle. The lead article of this issue has been written by Madam Justice Tamarin Dunnet, Ontario Court of Justice, and is being reproduced from the November 1994 issue of the Construction Law Letter. It ought to serve as a reminder to all experts — practising or aspiring ones — that advocacy should be left to legal counsel. An unsubstantiated expert opinion can totally undermine a case, instead of supporting it.

The second article deals with the responsibility of design consultants vis-à-vis contractors. Much has already been written about the N.D. Lea decision of the Supreme Court of Canada, but because of its significance we have included Paul Sandori's comments in this issue.

Last, but not least, on August 22, 1994 the Stanley Technology Group acquired all outstanding shares of RAL. When this issue reaches you, we will be celebrating our twenty-fifth year, and it was high time to think about ways and means of assuring the continuity and growth of the company. Over the last two or three years, we have examined many different solutions and discussed mergers or outright sale with various organizations. We believe we have chosen the best solution. The make-up and operating philosophy of the Stanley Group offered the best opportunity for continued growth. The services, both in quality and in scope, you have come to expect from us will not change. You will be dealing with the same individuals as in the past. The management of RAL will remain unaltered, the only difference is that we will be serving you from a broader base and with additional capacity.

EXPERT TESTIMONY MUST BE LIMITED TO AREAS OUTSIDE COMMON KNOWLEDGE

By The Honourable Madam Justice Tamarin Dunnet

Admissibility of expert evidence • subject matter must be outside experience and knowledge of judge • expert must not testify as to conclusions with respect to issue in trial • expert must not be allowed to become advocate • duties of expert • solicitor and client privilege • court-appointed independent experts

It is a fundamental principle of law that witnesses can only testify as to what is within their knowledge — that is, what they have personally observed or experienced. In this way the court aspires to consider only the best evidence in its truth seeking process.

There are many matters upon which a judge can form his or her own conclusions. However, on occasion, the significance of the evidence proffered by witnesses can only be properly explained to the court with the assistance of expert testimony.

The question is: are experts being overused? More importantly: have we forgotten their proper and traditional role.

Admissibility. An expert witness may be called to give an opinion on facts perceived by the witness or others when the opinion involves an issue likely to be outside the experience and knowledge of a judge or jury (*R. v. Abbey*). In other words, for expert evidence to be admissible, the subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgement about it if unassisted by persons with special knowledge (*Kelliher v. Smith*).

Traditionally, the expert could testify only as to matters of opinion. A

further limit on expert evidence laid down in early cases was that experts could not testify as to conclusions with respect to the very matter at issue in the trial. The expert was to be confined to technical matters of fact and not to inferences to be drawn from those facts. This is known as the ultimate issue rule.

Over the years, the role of the expert witness has been eroded. Often, they have been permitted to testify on any subject, regardless of whether it is within the understanding and experience of the judge and, where applicable, the jury. They have also been permitted to summarize complicated and ambiguous facts. They have been allowed to base their conclusions on what has been admitted to be hearsay and inadmissible evidence, subject only to the weight to be given to their testimony.

Lawyers and judges must not lose sight of the fact that it is the trier of fact who renders the ultimate decision in the case. The expert does not have this responsibility. Judges and juries are expected to be unbiased and neutral. By contract, experts are hired by one of the parties to provide the court with an opinion which is supportive of the party's case. They are, by nature, partisan.

Duties of Expert. What then is to be done? It is clear that expert evidence can be of tremendous value to our courts and, although they are partisan, experts must not be permitted to become advocates. Counsel must take care in instructing the expert to ensure the subject of his or her report is truly one on which the expert can assist the court. Facts, proven and unproven, must be distinguished from inferences so as not to mislead.

In the recent case of *"The Ikarian Reefer"*, the court referred to the duties of experts testifying in civil matters:

- expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the demands of litigation;
- an expert should provide independent assistance to the court by objective unbiased opinion in relation to matters within his or her expertise and never assume a role of advocate;
- an expert should state the facts or assumptions on which the opinion is based and should not omit to consider material facts which detract from that opinion;
- an expert should make it clear when a particular question or issue falls outside the expert's expertise;
- an expert's opinion is not properly researched because insufficient data is available, this must be stated with an indication that the opinion is no more than a provisional one;
- if, after the exchange of reports, an expert changes his or her view on a material matter, that fact should be communicated without delay to the other side and, when appropriate, to the court;
- where expert evidence refers to photographs, plans, calculations or other similar documents, they must be provided to the opposite party at the same time as the exchange of reports.

Solicitor and Client Privilege. Another recent case of interest is that of *Piché v. Lecours Lumber Co.*. The Ontario Court (General Division) held that a party producing an expert witness in court was not waiving any privilege by the mere fact that the expert was testifying.

In that case, opposing counsel attempted to have the expert's file produced and the defendants objected on the ground of solicitor and client privilege. The judge found that there was no waiver of the privilege for documents in the expert's file merely because the expert became a witness.

Secondly, the privilege could be waived in respect of those facts or premises in the file which had been used to base the expert's opinion and which came to the expert's knowledge from documents supplied to the expert.

Thirdly, if facts given to the expert are not found in other evidence, or if the instructing documents ask the expert to make certain assumptions, the privilege claimed for those facts or assumptions should be considered waived.

Independent Experts. In our increasingly complex and technical world, courts are called upon more and more to decide questions of staggering technical complexity. Experts retained by each side may assist, but the judge may find himself or herself uncertain on particular points and may resort to a rule of procedure that allows the judge to appoint on his or her own initiative one or more independent experts.

The expert then reports on any question of fact or opinion relevant to an issue in the action. The role of the expert, however, is that of a witness, as opposed to one who sits on the bench with the judge and performs an advisory role. Parties may receive the expert's report and may cross-examine.

It is important for counsel to inform their expert that he or she who contests too obviously for one side or the other loses credibility. Experts can maintain their integrity and credibility with the court by remembering not only the duty to tell the truth but also the important duty to assist the judge (and jury, where appropriate) in fulfilling their obligations to their clients.

To the extent that the experts remain aware of these limitations and restrict themselves to areas outside the common knowledge of the trier of fact, expert witnesses are not being overused.

MORE DISCLAIMER CLAUSES?

by Paul Sandori

The decision of the Supreme Court of Canada in the case of *Edgeworth Construction v. N.D. Lea* now opens the door to contractors, subcontractors and even suppliers suing architects and engineers if they have reason to believe the consultant prepared the bid documents negligently and thus caused them loss.

Summarizing briefly, Edgeworth Construction Ltd. had a contract with the B.C. Ministry of Highways for road construction. N.D. Lea & Associates Limited prepared the design. The contractor alleged that it lost money on the project due to errors in the plans and specifications and sued N.D. Lea for negligent misrepresentation.

The trial judge and the B.C. Court of Appeal clearly identified the policy reasons why the engineer **should not** owe a duty of care to the contractor:

N.D. Lea had no direct relationship with Edgeworth — only with the owner, the Ministry of Highways. It had no opportunity to define the risks it was prepared to assume, if any, in relation to Edgeworth. It was not compensated on the basis that it would be assuming such risks, nor could it influence the contract between the Ministry and the contractor.

The contractor, on the other hand, had an opportunity to protect itself in the contract with the Ministry and define the risks it was prepared to bear. It could reflect those risks in the bid price.

The Supreme Court of Canada, with equal clarity, showed why the engineer **should** be liable for negligent misrepresentation:

If N.D. Lea were to win its arguments, then contractors would be obliged to perform their own engineering. In the typically short period allowed for the filing of bids, the contractor would have to do the work that took engineers months or even years. This would be an almost impossible task. Moreover, each bidder would be obliged to repeat a process already undertaken by the owner's consultant.

The court decided that, from an economic point of view, it makes more sense for one engineering firm to do the engineering work and for the contractors to rely on that work — if there is no disclaimer of liability.

The risk of liability to third parties for design errors will be reflected in the cost of the engineers' services to the owner. But that is much better than requiring the owner to pay indirectly for the additional engineering which all bidders would be forced to do.

Both courts make very strong points. The decision of the Supreme Court prevails, but this is almost irrelevant. It matters little whether the contractor can shift the risk to the consultant, or vice versa. Either way, the industry is weakened. The only real answer is that:

- all the parties to a construction project should agree who will carry the risk;
- all the parties to a construction project should compensate whichever party carries the risk;
- they should all work together to minimize that risk.

The engineer in the *Edgeworth* case was, it seems, hampered by the millstone of reduced fees for limited services around its corporate neck. N.D. Lea's job finished at the design stage. It did not have an opportunity to supervise construction and resolve the problems at that stage. It ended up with the risk, without compensation, and there was little it could do about it.

The end result was more cost, construction problems and litigation.

There has already been a profusion of advice from construction law specialists on how architects and engineers should protect themselves. Contractors will, no doubt, have their own expert advice on how to overcome any defences that consultants might put up.

However, it will be unfortunate if the only lessons the construction industry learns from this dispute are legal lessons. The last thing the industry needs is more disclaimer clauses in contracts and more litigation.

Putting up a complex building requires cooperation from a large number of people with special skills. It is a risky business. Who carries the risk and who pays for it is a business question. The industry should not look to the courts to provide the answer.

Another decision of the Supreme Court of Canada, in the case of *Auto Concrete Curb Ltd. v. South Nation River Conservation Authority*, determined that an engineer or architect is not under a duty to advise contractors about problems they may encounter on a project. What method a contractor chooses to do the work is its own responsibility, and so are the consequences.

Logically, the legal advice to project managers and design professionals is that they should not tell the contractor how to perform the work. If they do, they could be assuming responsibilities which the court has determined properly lie with the contractor.

This brings architects and engineers in Canada perilously close to the situation of their colleagues in the United States. They are reluctant to warn a contractor who is about to make a mistake, just as some doctors there will not stop to help a victim of an accident for fear of being sued.

A weaker construction industry, with consultants and contractors at loggerheads and wary of each other, is to nobody's benefit. Instead of each looking for legal fences to protect their own special turfs, members of the construction industry, including owners, should make a determined push towards "partnering".

The idea of partnering is already well known in the construction industry, and boils down to simple common sense. It involves an agreement in principle between owners, contractors and consultants to share the risks involved in completing a construction project, and to establish and promote a non-adversarial environment.

It is not a contractual agreement, nor does it create any legally enforceable rights of duties. The legal relationships are fixed in the construction contract, as on any other project. Partnering is simply a way of doing business.

Until recently, partnering seemed like a good idea. It is fast becoming a necessity.

STANLEY TECHNOLOGY GROUP

Founded in 1954 by Donald Stanley in Edmonton, Alberta, as Stanley Associates Engineering Ltd., The Stanley Technology Group has developed from this initial engineering company that provided high quality service marked by integrity, accountability and responsibility into a world wide diversified group of companies.

December 1993 saw a major restructuring take place with new partners, CIBC Wood Gundy; Imperial Capital Acquisition Inc. and Ontario Teachers Pensions Fund investing in Stanley Technology Group Inc. In March of 1994, Stanley became a public company trading on the Toronto Stock Exchange.

Under the capable guidance of C.E.O. Ron Triffo, the Stanley Group now comprises of some 1,000 staff, operating from over 30 offices throughout the world. Our diversified talent base offers creative minds and the latest technology to our industrial, commercial, government, institutional and international clients. Our services range from professional consulting, preliminary planning, environmental and economic analysis to detailed engineering and construction management.

Many people are unaware of the scope of services offered within the Stanley Group, of course the standard consulting areas of civil, mechanical and electrical engineering are well known. But other areas of our expertise include aquaculture and fisheries and food production through Agrodev Canada Inc. They are one of the largest firms of their kind in the world serving clients in more than 30 countries. SRD Sustainable Resource Development Inc. is another member company that works world wide in the environmental management of natural resources and development of communities. Prince Edward International Ltd's fields of expertise include technical and managerial support services to the potato farming industry among others.

Northwest Computer Services Inc. offers comprehensive computer and business systems consulting. We have a space planning and design firm, Envirocorp Interior Design Group Inc. who have been honoured with awards for their expertise in creating interior environments.

The Olympic Speed Skating Oval in Calgary, Alberta, a winner of the highest consulting engineering award in Canada was done by SLG Stanley Consultants Inc. who have developed a reputation as creative structural engineering specialists.

To the above examples of Stanley's expertise add Light Rail Transit Systems, Airports in the desert, Pulp Mills, Pavement Management Systems, Subdivision Planning, Land Surveying, Turn Key Service on Large Projects — we at Stanley can do it all.

The acquisition of the Revay Group is a valuable addition to the services provided to our clients and we are excited about the future.

Accu-Test Services Ltd. • Agrodev Canada Inc. • Cheriton Engineering Inc. • Coordinate Survey Ltd. • Envirocorp Interior Design Group Inc. • IMC Consulting Group Inc. • Intertecnica Consulting Inc. • ITX Technologies Inc. • Northwest Computer Services Inc. • Pavement Management Systems Limited • Prince Edward International Ltd. • The Revay Group • SENTAR Consultants ltd. • SFC Engineering Company • SLG Stanley Consultants Inc. • SRD Sustainable Resource Development Inc. • Stanley Associates Engineering Ltd. • Stanley Environmental Sciences Inc. • Stanley Industrial Consultants Ltd. (Division RTM Energy et ProForma) • Stanley International Group Inc. • Winkelaar, Howard & Associates Ltd.

The Revay Report is published by Revay and Associates Limited, a national firm of Management Consultants and Construction Economists specializing in the Construction and Government Relations Sectors. Contents may be reproduced, with a credit as to source appreciated. Your comments and suggestions for future articles are most welcome.
Édition française disponible sur demande.

CONTACT INFORMATION

Please visit **www.revay.com** for more details.
To subscribe to the *Revay Report*, **click here**.