CASE SUMMARY

Keith A. Bannon
Glaholt LLP

Derrick Dodgson
Glaholt LLP

PROJECT CONSULTANTS: EXPERTS ON SITE AND NOW IN THE COURTROOM

Westerhof v. Gee Estate

The Ontario Court of Appeal recently brought further clarity to the introduction of expert evidence at trial. In its decision in *Westerhof v. Gee Estate*, the court found that rule 53.03 of the Ontario *Rules of Civil Procedure* does not apply to all witnesses with expertise who are called upon to give opinion evidence at trial.

This decision follows the heralded decision of the Ontario Court of Appeal in *Moore v. Getahun* in which the court ruled that it was not improper for counsel to communicate with an expert witness regarding the contents of their report. The court's more recent decision may have even greater impact on the trial of construction disputes when it comes to introducing the evidence of fact witnesses such as project architects and engineers, whose evidence will naturally contain some opinion evidence.

Rule 53.03(1) requires a party intending to call an *expert witness* at trial to serve an expert report not less than 90 days before the pre-trial conference, or not less than 60 days under subrule (2) if done in response to the expert witness of another party. The terms *expert* and *expert witness* are not defined in the *Rules*.

A comprehensive review of the *Rules* in 2010 resulted in many amendments to rule 53.03, which, prior to the amendments, was primarily procedural, requiring a party wishing to have evidence given by an expert to provide a signed report setting out the expert's "name, address and qualifications and the substance of his or her proposed testimony". In 2010, rule 4.1.01(1) was added, establishing duties concerning the provision of opinion evidence by "every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding". This language is mirrored in Form 53, which the expert must complete and sign as part of their expert report to acknowledge their duty.

The Court of Appeal in *Westerhof* concluded that rule 53.03 does not apply to some experts who may give opinion evidence based on their participation in the subject matter of the proceeding.

While the witnesses in *Westerhof* were physicians and other medical experts involved in the treatment of a plaintiff's injuries, applicability beyond the medical context is certainly intended. The Court of Appeal drew support for its decision from many older cases, including some specifically concerning expert witnesses in construction projects.

Knowing how and when experts on a construction project can give evidence is critical when planning your strategy for litigation. The law in this area represents the difference between a key expert, such as an architect or engineer, being able to give evidence or not.

In September 2014, the Court of Appeal heard two appeals together. In the first case, Jeremy Westerhof had attempted to call evidence from nine medical witnesses in support of his claim for damages resulting from an automobile accident. The trial judge held that medical witnesses who treated or assessed Mr. Westerhof would not be allowed to give opinion evidence concerning their diagnosis or prognosis, because they did not deliver expert reports and, therefore, did not comply with rule 53.03.

The second appeal concerned injuries to Daniel McCallum, which, he alleged, were suffered in an automobile accident caused by James Baker. In this case, a different trial judge came to the opposite conclusion and allowed several medical practitioners who had treated Mr. McCallum to give opinion evidence without complying with rule 53.03.

The Court of Appeal used the same reasoning to address both appeals. Writing for the Court, Justice Simmons identified an important difference between experts engaged to provide opinion evidence in relation to a proceeding (*litigation experts*) and experts who form opinions based on their participation in the underlying events (*participant experts*). Justice Simmons observed that pre-2010 jurisprudence (including the construction case of *Continental v. JJ's Hospitality*, discussed below) was consistent in holding that rule 53.03 does not apply to opinion evidence given by participant experts. Additionally, she determined that the 2010 changes to the *Rules* did not alter the application of rule 53.03 to include participant witnesses:

> [81] I conclude that rule 4.1.01, rule 53.03 and Form 53 are a comprehensive framework addressing a specific class of expert witnesses and expert reports. Although the words "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding" do not appear in rule 53.03, they appear in both rule 4.1.01 and Form 53. Rule 4.1.01 defines the expert's duty referred to in rule 53.03(2.1)7, and rule 53.03(2.1)7 requires that Form 53 be signed. Taking account of these factors, I see no basis for concluding that rule 53.03 was intended to apply to persons other than expert witnesses "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding".
>
> [82] Witnesses, albeit ones with expertise, testifying to opinions formed during their involvement in a matter, do not come within this description. They are not engaged by a party to form their opinions, and they do not form their opinions for the purpose of the litigation. As such, they are not "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding." A party does not "engage" an expert "to provide [opinion] evidence in relation to a proceeding" simply by calling the expert to testify about an opinion the expert has already formed.

Justice Simmons also observed that the required contents of an expert report as amended in 2010 support the conclusion that rule 53.03 does not apply to participant experts:

> [83] Similarly, the requirement in rule 53.03(2.1)3 that an expert's report set out "the instructions provided to the expert in relation to the proceeding" makes it abundantly clear that rule 53.03 only applies to litigation experts. A party does not provide instructions to a litigation expert or a non-party expert in relation to the proceeding – that it is because these experts have already formed their opinions.

As will be apparent from the case below, this is not an entirely new distinction; however, *Westerhof* does clearly establish that *participant experts* are not required to submit an expert report under rule 53.03.

Application to Construction Litigation: *Continental v. J.J.'s Hospitality*

In reaching her decision in *Westerhof*, Justice Simmons followed a number of prior cases, including *Continental v. J.J.'s Hospitality*. In that 2012 case, the hotel J.J.'s Hospitality sought to have its roof replaced on the basis of a recommendation from Bruce Caughill, an architect and engineer who was retained by J.J.'s Hospitality to provide consulting services with respect to the roof. Mr. Caughill solicited and approved the proposal made by the roofing company Continental. During the work, leaking was reported, and Mr. Caughill advised J.J.'s Hospitality to engage a different company for installation of a different kind of roof. Continental issued a claim against J.J.'s Hospitality for the contract price, and J.J.'s Hospitality counterclaimed for damages to the building.

In response to Continental's argument against allowing Mr. Caughill to give evidence, Justice Koke considered whether Mr. Caughill was an expert witness under rule 53.03:

> [40] In my view, Mr. Caughill is not to be regarded as an expert witness under Rule 53.03. He has not been retained by the defendant for the sole purpose of providing expert testimony of trial. He is not what we commonly refer to as a litigation expert. He has been directly involved in the events of this case. It is alleged that he approved the original design and method to be used to carry out the roof repairs and he was instrumental in arranging to have the work completed, using a different method and a different roofing company. Clearly, he is not a disinterested party.

Like in *Westerhof*, it was observed that "recent cases have held that rule 53.03 is limited in its application to witnesses who are hired as 'litigation experts' and have not had any involvement with the subject matter of the litigation or either of the parties". Justice Koke found that the 2010 amendments to this section of the *Rules* were based on concerns of expert bias and the cost of using experts in litigation:

> [42] I am of the view that Mr. Caughill should be permitted to provide evidence with respect to his involvement in the subject matter of this action, and that his evidence can include both factual evidence and opinions which he formed concerning the methods employed by the plaintiff in carrying out the work and the cause of the water leakage into the building.
>
> [43] My reasons for coming to this conclusion include consideration of the reasons why it was deemed desirable to amend Rule 53.03. The amendments to the rule were intended to eliminate the use of "hired guns" or "opinions for sale" in civil litigation, which resulted in potentially biased evidence being given at trial. In the case of Mr. Caughill and looking at the mischief that Rule 53.03 was intended to address, I do not find him to be a typical "hired gun" or just a "litigation expert" in the circumstances of this case.

Ultimately, in both *Westerhof* and *Continental,* the Court's finding on the intention and purpose of the amendments to Rule 53.03, along with the nature of the evidence being given by true participant experts, was fundamental to its decision. The Court identified that the Rule was "intended to eliminate the use of 'hired guns' or 'opinions for sale' in civil litigation" and not to exclude the evidence of true participant experts.

Conclusion

In Ontario, experts involved with the subject matter of a dispute—whether treating physicians or project engineers—do not need to comply with the requirements of rule 53.03 in order to give opinion evidence at trial. However, when not personally involved in the subject matter of the dispute, experts engaged in relation to a proceeding will be required to complete an expert report including Form 53, and that report must be served on all other parties within the timing requirements of rule 53.03. Parties involved in construction projects must be aware of this distinction regarding the necessity of expert reports. Thorough consideration of the Court of Appeal's decision in *Westerhof* can help reduce the risk of a surprising and potentially crippling evidentiary ruling at trial.

Ontario Court of Appeal
March 26, 2015
Laskin, Sharpe, Simmons, JJ.A.