

Marmer Penner Inc. Newsletter

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Draft Reports Are O.K., Again

The expert witness community breathed a collective sigh of relief last week when the Court of Appeal released its decision on *Moore v. Getahun*. As most readers know, expert witnesses and their clients have been in limbo since January 14, 2014, when Justice Wilson released her controversial decision concerning the practice of releasing an expert's draft report and the conduct of experts and counsel in the process of completing draft reports and finalizing same. In the appeal decision, which relied on input from six different "interveners", including the Canadian Institute of Chartered Business Valuators, the major findings of the Lower Court were found to be in error.

In the original decision, Justice Wilson was critical of a discussion that took place between a medical expert and counsel, prior to the release of the expert's final report. Justice Wilson found that this discussion, although it did not change his decision, impacted on the evidence provided. In her decision, Justice Wilson stated that the practice of reviewing draft reports was improper, and was contrary to the purpose of Rule 53.03, which was introduced in 2010 to ensure the expert's neutrality. Since then, experts have been walking on eggshells with their clients, wondering about the appropriateness of releasing draft reports and requesting comments.

The Court of Appeal heard the input from the six interveners, all of whom strongly opposed the Lower Court's decision. In addition, the Court of Appeal also reviewed the original recommendations made by the Honourable Coulter Osbourne, which resulted in the adoption of Rule 53.03. As a result of these considerations, the Court of Appeal disagreed that the long standing practice of counsel reviewing an expert's draft report should be changed. In the Lower Court's findings, there was a presumption that an expert's objectivity and neutrality was diminished by this practice. The Higher Court, however, indicated that this objectivity and neutrality is still fostered in three ways:

- 1) The ethical and professional standards of lawyers forbid them from interfering with the objectivity and neutrality of experts;
- 2) The professional bodies that govern most experts require them to be objective and neutral – in the case of CBV's, this is required by our *Code of Ethics*; and
- 3) Even if there is a problem with an expert's objectivity and neutrality as a result of releasing a draft report, this can be effectively dealt with in the adversarial process, i.e. through cross-examination by opposing counsel.

In the eyes of the Court of Appeal, these reasons were enough to preserve the long standing practice of counsel meeting with experts to review draft reports prior to finalizing. In the words of the Court of Appeal:

“Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case...Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert

witness understands the duties reflected by rule 4.1.01 and contained in the Form 53 acknowledgement of expert's duty. Reviewing a draft report enables counsel to ensure that the report

- i) complies with the *Rules of Civil Procedure* and the rules of evidence;
- ii) addresses and is restricted to the relevant issues; and
- iii) is written in a manner and style that is accessible and comprehensible...Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the Court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared.”

This newsletter is not intended to substitute for proper professional planning. It is intended to highlight areas where professional assistance may be required or enough to discuss at the next hoedown. The professionals at Marmer Penner Inc. will be pleased to assist you with any matters that arise. Please feel free to visit our website at www.marmerpenner.com.