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Under The Family Law Lens: Expert's Duties and Ethics

Angela Huang, Boulby Weinberg LLP

Overview

The Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, concluded that a properly qualified expert must be independent, unbiased, and impartial and that the expert's opinion must be the result of independent and uninfluenced judgment. These principles have also been applied in family law, which can be seen from the survey of the case law below. The case law demonstrates the standard of ethics required by an expert, including when an expert is allowed to resign from their position where they would be unable to fulfill their duty to be independent, unbiased and impartial.

Case Law: Analysis

Hodgkinson v Hodgkinson, 2011 BCSC 634 highlights the dangers of an expert being personally connected to a party and should serve as a warning that the relationship between an expert and a party should be at an arm's length distance. In this case, the parties each retained an expert to determine the father's income for child support purposes. The plaintiff's counsel argued that the reports of the defendant's expert should be rejected because of a few reasons: (a) there was bias; (b) the reports did not contain the certification required by Rule 13-2 of the *Supreme Court Family Rules*; (c) the plaintiff's counsel advised that she happened to stop at Il Giardino, a restaurant, the previous evening where she saw the expert dining with the defendant and his wife.[1] The judge had warned the defendant's expert not to discuss the case with anyone during the adjournment. The plaintiff's counsel argued that there was bias because the father's expert was in a relationship for many years with Ted Kozub, the father of the defendant's current wife and a business associate of the defendant. The expert technically was the stepmother of the defendant's current wife even though she was already an adult when the father's expert started living with Mr. Kozub. The defendant's expert had no relationship with either Mr. Kozub or the defendant's current wife since 1999 when she and Mr. Kozub ended their relationship.

While Grauer J. determined that there was no bias on part of the defendant's expert, he concluded at paragraph 49 that it was "strongly discouraged" for a party to choose to retain an expert with whom they had a previous connection, regardless of the expert's abilities. Grauer J. also decided to accept the defendant's expert's explanation in terms of having dinner with the defendant and his wife. The defendant's expert explained that she was only catching up with the defendant and his wife socially before she had to return to Kelowna. Grauer J. noted at paragraph 50 that this opportunity to catch up with the defendant and his wife "would have

[1] *Hodgkinson v Hodgkinson*, 2011 BCSC 634, 1 RFL (7th) 82 at para. 47.

been best been passed up." Finally, Grauer J. did not disregard the defendant's expert's report for failing to include the required certification because the rule had only been introduced recently and the litigation had proceeded in an "unsatisfactory manner" with respect to the exchange of expert evidence for both parties.[2] Grauer J., however, held that the court "[would] not be so lenient again in this regard. The certification is not optional."[3]

Sehota v. Sehota, 2012 ONSC 848 sheds light on the duties of a parenting coordinator when a party would like to use them as an expert. The father brought a motion to seek primary residence of the children, to stop the children's relocation, to ask that counselling be ordered for the children, and to reduce the child support related to any order if he has primary residence of the children. The parties had hired a parenting coordinator who wrote a report that was strongly in favour of the father's position.

Rogers J. found that the parenting coordinator was not a qualified expert and that the expert's reporting letter was not admissible as an expert report or as a factual basis that the court could rely upon.[4] To come to this conclusion, Rogers J. determined that the parenting coordinator was not fair, objective, and non-partisan because she had relied on much "hearsay and [the parenting coordinator's] recommendations that go far beyond the mandate of a parenting coordinator [had] caused [the mother] to feel she was not being fairly treated."[5] Rogers J. also concluded that a parenting coordinator had to be unbiased and also "appear to be unbiased."[6] Moreover, the parenting coordinator lacked the required qualifications to make conclusions about someone's mental health, which should have indicated to herself that she was not capable of making such conclusions.[7] The parenting coordinator also sent an undated letter to the court that was received after the motion submissions. Rogers J. determined that the parenting's coordinator's attempt to communicate with a judicial officer about this proceeding was "very concerning" and that "[w]orse still, counsel for the litigants had no knowledge of this unacceptable effort."[8] Rogers J. explain the role of parenting coordinators while referring to the Association of Family and Conciliation Courts' Guidelines and also emphasized that parenting coordinators should not be heavily involved in evidence gathering. Rogers J.'s conclusions with respect to the role of parenting coordinators alludes to the fact that experts have a duty to give expert evidence based on their duties/roles set by their professional bodies.

In *Carmen Alfano Family Trust v. Piersanti*, 2012 ONCA 297, the Ontario Court of Appeal concluded that for an expert to provide its duty to be fair, non-partisan, and objective evidence, the expert must be neutral and independent and cannot become an advocate for the position of the party who retained them. The appellants argued that the trial judge erred in ruling to refuse to admit the evidence of their expert witness, Ronald-Cartwright, as he lacked

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[2] *Ibid* at para. 51.
[3] *Ibid*.
[4] *Sehota v. Sehota*, 2012 ONSC 848 at paras. 34-35.
[5] *Ibid* at para. 8.
[6] *Ibid*.
[7] *Ibid* at para. 10.
[8] *Ibid* at para. 23.

independence and objectivity. The Ontario Court of Appeal concurred with the trial judge's decision to refuse to admit Mr. Anson-Cartwright's evidence due to its lack of independence. In coming to this conclusion, the Ontario Court of Appeal at paragraph 108 re-iterated the principle of experts being independent and impartial: "[E]xpert opinion should always be the result of the expert's independent analysis and conclusion" and "[w]hile the opinion may support the client's position, it should not be influenced as to form or content by the exigencies of the litigation or by pressure from the client." The Ontario Court of Appeal at paragraph 108 also concurred with the trial judge who noted that "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court." The Ontario Court of Appeal examined the emails between Mr. Anson-Cartwright and Mr. Piersanti and determined that these email exchanges were concerning. Some examples of the emails from Mr. Anson-Cartwright that were concerning to the Ontario Court of Appeal are:

- "Further I wanted the plaintiff to admit that there is no executed lease with Ontario Power to bolster your position that the occupation rent should be a fair market rent not the rent paid by a non-arms length party ... so yes, I'm trying to make them look bad"
- "Could you please explain how the Alfanos rationalize that they had an 87 percent interest in Osler and 87 percent interest in Puslinch? Can you tell me succinctly why they are wrong?"
- "I find the critique of Deloitte's[7] cash flow analysis to be not as powerful as it could be. Try to prioritize the "killer" points, otherwise a judge might be overwhelmed by a series of small technical points. What are the three to five points which destroy or invalidate the Deloitte loss of cash flow estimate?"

Serafini v. Serafini, 2013 ONSC 2472 not only suggests that draft expert reports may be accepted by the court if the other party's expert report is not fair, objective, and non-partisan, but also suggests that personal connections between the party and their expert can lead to the court questioning the expert report's impartialness and objectivity. Van Melle J. refused to qualify Mr. Pettinelli as an expert in valuing of businesses as the expert was not able to provide conclusions that were fair, objective and non-partisan as required by Rule 20.1 of the *Family Law Rules*. First, Mr. Pettinelli admitted that he did not follow the Chartered Business Valuator's guidelines for his valuation report. Second, he was the companies' accountant and was also Mr. Pettinelli's cousin. Third, his one-page letter report did not set out the basis upon which he made his calculations. Fourth, he did not explain how he determined the minority interests' values. Fifth, his email to Mr. Grunwald with the updated values of the companies was not entered into evidence.[9] Van Melle J. also decided to accept a draft expert report prepared by Melanie Russell, the expert appointed by Corbett J. to conduct a review of the business valuations conducted by Mr. Pettinelli, because it was "thorough and well annotated" and "there was no evidence to significantly challenge the conclusions reached by Melanie Russell."

[9] *Serafini v. Serafini*, 2013 ONSC 2472, [2013] W.D.F.L. 3838 at para. 46.

In *M. (M.) v M. (R.)*, 2016 ONSC 7003, Minnema J. found that the husband's expert was not allowed to give opinion evidence regarding the husband's income for support purposes because the expert evidence was unnecessary and the wife raised realistic concerns with respect to the expert's duty to be impartial and independent. Minnema J. noted that the husband's expert was the husband's accountant long before he was asked to provide his opinion, which meant that the husband could not ensure that his expert knew about his role and duties as an expert "at the outside of [his expert's] engagement".[10] Minnema J. also held that an expert's neutrality required there to be distance between the party and the party's information and because the husband's expert was the "source of the financial information being relined on, and also the architect of the arrangements relating to the [husband's] income and compensation", "it [would be] impossible to untangle this longstanding work and suggest that his opinion is now somehow impartial."[11]

In *Rosati v Reggimenti*, 2016 ONSC 7013, Sloan J. held that the expert could be "independent, fair, and non-partisan in giving her evidence."[12] The expert was "a fully qualified accountant, business valuator and forensic accountant" and had reviewed several documents with respect to the applicants' business interests and finances and home life real estate.[13] She also reviewed what was relevant to determine whether fraud had been committed by one or both of the respondents and many of these documents she reviewed had been provided by the applicants.[14] Moreover, the expert's work noted the negligence which Mr. Rosati admitted during his testimony with respect to certain financial transactions.[15]

In *Cameron v. Cameron*, 2018 ONSC 2456, Kurz J. noted that the practice of "retaining one's own professional as an expert to provide 'evidence in related to case under the [Family Law Rules], as opposed to a 'participant expert', must be strongly discouraged."[16] In this case, each party had retained their own business valuators and accountants to determine the other party's income for support purposes.[17] Kurz J. emphasized the experts' duty to provide evidence with respect to the issues before the court that is impartial, fair, and non-partisan and within the experts' expertise. Kurz J. also found that this standard is hard to meet "when the expert's firm also provides services to a party or his non-arm's length corporation."[18]

If experts believe that they are unable to fulfill their duties of providing evidence that is impartial, unbiased, independent, then they are allowed to resign on short notice. In *Lakhtakia v. Mehra*, 2022 ONSC 201, the parties disagreed with the respondent's income. The applicant retained a financial expert and the respondent hired Mr. Andrew Cochran from Ernst & Young

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[10] *M. (M.) v M. (R.)*, 2016 ONSC 7003 at para. 16.
[11] *Ibid.*
[12] *Rosati v Reggimenti*, 2016 ONSC 7013, 262 A.C.W.S. (3d) 901 at para. 54 [*Rosati*].
[13] *Ibid* at para. 51.
[14] *Ibid*.
[15] *Rosati* at para. 53.
[16] *Cameron v. Cameron*, 2018 ONSC 2456 at para. 100.
[17] *Ibid* at para. 99.
[18] *Ibid*. at para 101.

("E&Y") as his financial expert to respond to the applicant's expert. However, the respondent's expert, Mr. Cochran, resigned the night of the trial. The respondent advised Shore J. about this and made an adjournment request to Shore J. who dismissed it. The respondent subsequently brought a motion to adjourn the trial to retain a new expert. Pinto J., who heard this motion, dismissed the respondent's adjournment motion and the trial proceeded as scheduled.

Pinto J. found that the respondent's expert, Mr. Cochran, resigned for "good faith and legitimate reasons consistent with his professional and ethical responsibilities under the CBV Institute Code of Ethics" and that "[h]e resigned on the basis that he had not received proper or full disclosure from the respondent."[19] Pinto J. found that Mr. Cochran had resigned because he believed that the respondent had concealed material information from him and gave him many documents that contradicted the respondent's ownership of his corporations, preventing Mr. Cochran to determine the respondent's income.[20] In fact it was not until the applicant's expert provided Mr. Cochran in November 2020 with hundreds of documents that the applicant had obtained through court orders in New York and Tennessee about the respondent's businesses that Mr. Cochran realized that he had been left in the dark.[21] Pinto J. at paragraph 69 also rejected the respondent's claim that Mr. Cochran had "a reputation as a quitter" and found that this was "a complete fabrication offered to distract the court from Mr. Cochran's stated reasons for resignation." Pinto J. at paragraph 69 "found the respondent's claim to be utterly preposterous that someone in E&Y's New York office spoke to him and denigrated the professional reputation of another member of the firm based in a completely different office and country."

The respondent tried to mislead the court by filing an affidavit sworn by the articling student that claimed that Mr. Cochran believed that disclosure requires from the applicant's expert, Ms. Barrett, were disproportionate and that the respondent had already fulfilled the applicant's expert's request for disclosure. The Ontario Court of Appeal determined at paragraph 70 that this affidavit was "a serious misrepresentation of the reasons why Mr. Cochran resigned." Mr. Cochran had explained to the respondent and his counsel why he resigned by the end of January 2021 and had stated that Ms. Barrett's disclosure requests were legitimate.

Lakhtakia v. Mehra, 2022 ONSC 201, also stands for the proposition that a party cannot adjourn a hearing on the basis that their expert resigned if the party can reasonably expect that their expert will resign. Pinto J. at Appendix A found that while the respondent claimed that Mr. Cochran resigned on January 19, 2021, "the respondent knew, or ought reasonably to have known, as early as December 8, 2020 that Mr. Cochran was unlikely to testify at trial." Mr. Cochran had previously told the respondent of his resignation on December 8, 2020 and then confirmed in an email on January 19, 2021 to the respondent and his counsel that he was

[19] *Lakhtakia v. Mehra*, 2022 ONSC 201, 2022 CarswellOnt 181 at para.68 [*Lakhtakia*].
[20] *Ibid.*
[21] *Lakhtakia, supra* note 19 at para. 173.

resigning.[22] Mr. Cochran had only attended a court meeting with Justice Shore on December 9, 2020 as there was an order for another meeting to discuss disclosure.[23]

Conclusion

In the context of family law, an expert is expected to have a certain level of ethics. This involves having a non-arm's length distance with the party retaining the experts. Moreover, an expert should not interfere with the court's process and be an advocate for the party. The expert is expected to follow the guidelines of their professional bodies and if the expert is unable to fulfill their duty of being non-partisan, objective, and independent, then they can resign from their position.

[22] *Ibid* at para. 62.
[23] *Ibid.*