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Observations on the Fact/Opinion Distinction in Expert Opinion Evidence

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Case Commented On: *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2015 ABQB 401 (CanLII)

This decision of the Court of Queen's Bench concerns the admissibility of evidence given by a "lay witness" at trial and whether that evidence falls within an exception to the general rule that such a witness cannot give opinion evidence.

A central issue at trial was whether Nova failed to run at maximum capacity the ethylene production facility (E3) that it jointly owned with Dow. Nova's defence was that there was a shortage of ethane – "the feedstock for E3" (at para 3) – which in turn meant that it could not run the E3 facility at full capacity.

Nova stated that it would call employees at E3 to offer testimony both about how E3 was operated and about the mechanical and operational constraints that may have limited the ability for E3 to run a full capacity. In other words, Nova wanted the employees to testify about the constraints they faced and why these would have prevented them from failing to run at maximum capacity. The dispute relevant to this comment arises out of the questioning of the first witness, a Mr. Ron Just, who was the optimizing engineer at E3 for much of the period at issue in the trial, and whether his testimony constituted fact evidence or inadmissible opinion evidence.

Madam Justice B.E. Romaine canvasses the law on the admission of opinion evidence tendered by lay witnesses (at paras 7-20), and for brevity I will not provide a review of this case law as it's readily available in any text on evidence law in Canada. Instead, I will focus on the problems that arise from insisting on a blurry distinction between "fact" and "opinion" evidence, particularly when it comes to testimony concerning complex scientific or technical issues.

Justice Romaine begins her analysis with a fairly incontrovertible statement, at least in the law of evidence: an opinion is "an inference from observed facts" (at para 7 citing David Paciocco and Lee Stuesser, *The Law of Evidence*, 7th ed, (Toronto: Irwin Law, 2015) ch 6 [Paciocco and Stuesser]). Lay witnesses, when called to testify, may give the facts but not opinions. As Justice Romaine states, "the trier of fact determines what inferences or conclusions are to be drawn from observed facts" (at para 7), not the lay witness. Expert witnesses, on the other hand, can give opinions provided that they are properly qualified at a *voir dire* applying what is known as the *Mohan* test for admissibility (See *R v Mohan*, [1994] 2 SCR 9).

In Canadian law this is all now clear as mud until put into practice, and then it really gets tricky. But it does not have to be.

Consider the following statement at trial by Mr. Just, Nova's optimizing engineer and first witness:

> "So you'd have to interpolate a little bit there on what the maximum capability for E3 that day would have been. It was midway between four and five furnaces. Four furnaces at 53 Mgs. would be 212 Mgs. per hour of furnace feed and five furnaces would be 265, so you would need to take a midpoint of that and ratio that to our design feed rate of 318 and our 103.4 maximum production to have an estimate of the maximum capability that day" (quoted by Justice Romaine at para 24).

Justice Romaine rules this statement was factual and a description of what actually occurred, but that the problem here is that Mr. Just, "framed the answer on maximum capability in circumstances where such a determination had not been made at the time" (at para 24). For this reason, Justice Romaine finds that Mr. Just was offering impermissible opinion evidence as a lay witness" (at para 24). I argue such rigid characterizations are problematic.

In these sort of evidentiary disputes, it seems Canadian courts are splitting hairs to determine whether meaningful evidence can be admitted and in so doing the courts are focusing on technicalities and distinctions rather than the substance of the testimony. For example, looking at the substance of Mr. Just's testimony in this case – rather than how he framed his answer – it is not so clear to me that what he offered was an opinion in any meaningful sense: Mr. Just does not give a theory on what the precise capacity of E3 would be, he simply states how one would come up with what he admits would be an estimate of the maximum capability on a given day. Seen in this sense – from his perspective – this is merely a statement of fact as he sees it, something that he has come to know to be true by virtue of his training and job experience. But because the Court's focus is, in the first instance, on determining whether the evidence is opinion or factual – on how he went about framing his thoughts – his evidence was excluded.

Having courts engage in this type of binary if/then and fact/opinion reasoning takes us down a rabbit hole where we risk losing sight of what's most important: is the evidence credible, reliable, and probative, and do the benefits of admission outweigh the potential prejudice?

The resultant struggle is compounded by demanding that the court engage not just in a fact versus opinion analysis, but that it does so while simultaneously creating a distinction between lay and expert witnesses. The forced dichotomies create in the case at hand what I would characterize as a small legal absurdity: An expert – properly qualified at a *voir dire* – could have given evidence such as Mr. Just provided and it would (possibly) have been admissible, but a lay witness such as Mr. Just could not. But Mr. Just is only a lay witness because he was not qualified as an expert. All of this is perhaps fair enough except that I think it is also fair to say that Nova never had Mr. Just qualified merely because he was called to give fact evidence, and not because he didn't have the substantive expertise to offer. The result: When an expert in a subject area is called to give factual evidence on that subject area mistakenly frames an otherwise admissible factual answer as opinion, it becomes inadmissible by virtue of the fact that he or she was never qualified to give the opinion he or she did not mean to and was not asked to give. This sounds confusing because, frankly, the logic demands a convoluted explanation.

There is a solution here, and I think it is to demand that witnesses be qualified as experts before being allowed to give testimony beyond the "ken" (or knowledge) of the ordinary judge or jury, regardless of how one might in the future characterize the evidence.

Justice (formerly Professor) Paciocco notes that the concerns inherent in accepting expert opinion evidence are equally present when it comes to the admission of expert fact evidence: "If the evidence requires special training or experience to observe or understand, triers of fact are vulnerable to accepting unreliable testimony" (Paciocco and Stuesser at 206). As a result, Justice Paciocco argues: "Given the difficulty in distinguishing between fact and opinion, and that the established *Mohan* rule [regarding how and when to admit expert evidence and qualify a witness] provides a flexible measure of admissibility that explores credentials, probative value, and prejudice, there are strong reasons why courts should steer away from a rule that turns on the characterization of the proof that experts offer, as opposed to the quality of the evidence" (*ibid* at 207).

In other words, in the case at hand the solution might have been resolved by focusing less on the distinction between fact and opinion evidence, and rather on recognizing that the same concerns are present regardless of whether someone with specialized knowledge provides fact or opinion evidence. The discussion would then turn to how to qualify Mr. Just as an expert – a well-established process – and whether he should be so qualified. In other words, determining whether to accept and rely on the controversial testimony would centre on the credibility, reliability, probity, and the possible prejudicial value of the evidence – exactly where the focus should be. Notably, it does not seem that these topics came up in a meaningful way in this case.

In the result we are left with a decision that properly – based on the law as it stands in Canada – makes an ever-so-subtle distinction between fact and opinion evidence that may or may not be correct upon further examination, and that excludes evidence not because it is prejudicial or lacks credibility, reliability or probative value, but because it was given by an expert who nobody thought to qualify as such.

It is for this reason that I wished to step back from the decision and focus on the broader issues that this judgment raises in the law of evidence. When we escape from the weeds – from dissecting fact versus opinion and expert versus lay witnesses – we are left with the sense that the current approach is not a recipe for the admission of the best facts that will help us make a properly informed decision. This was an opportunity lost to try a better way forward.

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