# CASE COMMENT

## *Yorkville North Development Ltd.* v. *Toronto (City)*: A Property Value Witness Without Property in the Witness

Expropriation proceedings often become battles of experts. In such battles, the opinions and evidence of the right expert can be determinative. Before finding Mr. or Ms. Right, a party may consult several experts, some of whom may later be consulted by the opposing party. Can one party's Mr. Right be disqualified because he was previously consulted by the opposing party, who felt he was Mr. Wrong?

In the recent case *Yorkville North Development Ltd.* v. *Toronto (City)*(2007), the City thought that Mr. Robert Robson was Mr. Right. In 1999, however, Mr. Robson attended a meeting with an officer of the claimant. Allegedly, the strengths and weaknesses of the claimant's case were discussed. Subsequent to the meeting, Mr. Robson refused to accept the retainer, as documented by a letter from the claimant's solicitor. Mr. Robson had no recollection of that meeting. There was no file that could be found that indicated that Mr. Robson had obtained documents relating to the matter at all, let alone privileged and confidential material. The claimant brought a motion to prohibit Mr. Robson from appearing as an expert witness for the City, arguing that Mr. Robson had previously met and obtained confidential information about the claimant's case and that his attendance before the Ontario Municipal Board on behalf of the City would therefore be illegal, unethical, and prejudicial. The Board concluded that there was no indication that confidential information had been imparted or that the information would be of any value in formulating an opinion that is material. The Board dismissed the motion, thereby permitting Mr. Robson to continue his retainer with the City to provide advice on property value and to appear before the Municipal Board.

The touchstone in such cases is the principle that there is no property in a witness, as set out by the English Court of Appeal in *Harmony Shipping Co. S.A.* v. *Saudi Europe Line Ltd* (1980). Setting aside expert witnesses and starting with witnesses of fact, the Board has a right to every person's evidence in furtherance of the Board's primary duty to ascertain the truth. One side cannot prohibit the other side from meeting a witness of fact, getting the facts, and calling the person to give evidence. It is a fundamental maxim that the public has a right to every person's relevant evidence: *R.* v. *McGowan,* (Ont. S.C.J., 2005). Turning to expert witnesses, many of the communications between a lawyer and an expert witness will be privileged and protected from disclosure. These communications cannot be given in evidence to the Board. Subject to this qualification, an expert witness is in the same position as a witness of fact; *Cousineau* v. *St. Joseph's Health Centre*, (Ont. H.C., 1990). Despite more cynical views that clothe experts as advocates, it must be remembered that an expert is not called for or against a party, but is called to provide an opinion to help the Board: *Loblaw Properties Ltd.* v. *Brampton (City)* (O.M.B., 2001). In pursuit of the search for truth, the Board is entitled to have the facts observed by the expert adduced before it and to have the expert's independent opinion on those facts: *Harmony Shipping.* Irrespective of which party has retained the expert witness, if that expert has material and relevant evidence to give, the expert is a compellable witness and the Board is entitled to have the expert's independent opinion, exclusive of privileged communications: *R.* v. *McGowan*. Further, the administration of justice would be undermined if a rich client could consult all the acknowledged experts in the field and then say to each of them "you cannot give evidence against me": *Harmony Shipping*.

The Board in *Yorkville North Development Ltd.* relied on the decision of the Ontario Divisional Court in *Cairns* v. *Mississauga (City)* (Ont. Div. Ct., 2006). In the *Cairns* case, the lawyers for one party communicated with and provided information, including a written summary of their intended case, to a potential expert witness. All of this information had been turned over voluntarily and gratuitously to the expert. The expert declined to act for that party, but subsequently agreed to act for the opposing party. Consistent with the principles set out above, the Board refused to disqualify the expert witness, and leave to appeal this decision was refused by the court. The court commented that one party cannot baldly assert disclosure of confidential information to a potential expert who declines a retainer, and expect the expert will be automatically disqualified on the basis of loss of public confidence in the judicial system. Indeed, finding the underlying information to be confidential in a public matter like an expropriation is apt to be a difficult hurdle. In *Yorkville North Development Ltd.*, there was no indication that confidential information had been communicated to Mr. Robson, and after applying *Cairns*, the Board refused to disqualify him as a witness.

It must be emphasized that to ensure a fair hearing when the expert has been consulted in the course of litigation by the opposing party, the Board must be alert to stop expert testimony that reveals privileged communications passing between the lawyer and the expert. In this regard, the bundle of confidential knowledge held by the expert in his or her notes, file, and memory is determinative. The *Cairns* case rested near one end of this knowledge spectrum. The expert in *Cairns* possessed information that may have been privileged. The risk of disclosure of confidential communications existed but because the parameters of the confidential and privileged communications were known, the knowledge of the privileged communications could be isolated and quarantined, thereby permitting both a vigorous search for truth and a fair trial. When one slides down the knowledge spectrum, however, the expert is more at risk of disqualification. An expert who has spotty notes and records, some recollection of the confidential information, and is unable to parse in his or her mind the privileged communications from other facts and discussions is subject to disqualification. In this situation, the goal of a fair trial process must trump the search for truth. The Board cannot ensure that the privileged communications will not unwittingly be revealed in the expert's evidence. Likewise, even further down the knowledge spectrum, it would be an impossible task to enforce a rule which permitted a person who had received confidential and privileged communications to act for an opposing party if the expert did not remember the communications and information. The Board cannot verify the expert's lack of memory or ensure that the expert's memories are not triggered at some point in the trial process. There is also a risk that the forgotten information could nonetheless influence the expert in the formation of his or her opinion, or be inadvertently disclosed. Fairness dictates disqualification: *Burgess et al.* v. *Wu* (Ont. S.C.J., 2003).

It is notable that the Board avoided this difficulty in *Yorkville North Development Ltd.* by its finding that no confidential information had been communicated to Mr. Robson. Had the Board found otherwise and the communication otherwise fell within the scope of litigation privilege then Mr. Robson should have been disqualified. The Board further held that there was no indication that any of the information that was imparted to Mr. Robson would "be of any value to formulate an opinion that is material". By itself, this latter reason should be insufficient to save Mr. Robson. First of all, it is wholly speculative. Secondly, it is irrelevant to the analysis as set out above. Since Mr. Robson had no recollection of the meeting, had he received confidential communications, he would have been disqualified irrespective of whether the particular communication would at some future date become relevant in determining an opinion of value. The critical factor is the receipt of the privileged and confidential communication, not whether the communication was material or would become material to the formation of an opinion.

These cases and principles also paint practical lessons for lawyers, experts, and clients. For lawyers, particularly in light of the public nature of proceedings before the Board, a bald assertion that confidential information had been disclosed to a potential expert will be insufficient to secure the expert's disqualification. For experts, it is critical to keep accurate records of all meetings with potential clients, and not simply wait until the retainer is secured and the file opened. Clients, insofar as they are able to do so, should require the experts they retain to have in place a system that identifies potential conflicts of interest so that these potential conflicts can be identified and considered at an early stage in proceedings.

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