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RECENT BC DECISIONS AFFECTING EXPERT REPORTS and HEALTH CARE COSTS

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Expert Reports

The courts have long debated how expert testimony should be utilized without confusing or usurping the role of the trier of fact, prejudicing the parties to the litigation, or substantially increasing litigation costs. With its sweeping changes to the Rules of Court in 2010, BC's justice system implemented recommendations regarding expert evidence, with a view of reducing adversarial bias, the complexity of litigation, and litigation costs. Now, after the passage of several years of judicial consideration, we can draw some conclusions concerning tendencies and how insurers should recognize these tendencies in handling claims.

One important result of the 2010 Rule changes on experts is that past expectations of counsel and sophisticated clients, concerning judicial latitude respecting timeliness requirements under the Rules, must be recalibrated to account for stricter application of these requirements.

Rule 11 of the *Supreme Court Civil Rules* (the Rules") contains the requirements for expert reports. There are very specific instructions in Rule 11-6(1) on what each report must include. Rule 11-6(3) provides the deadline for serving an initial expert report on every party of record (84 days) and Rule 11-6(4) establishes a 42 day deadline for serving responding reports. Under Rule 5-3(1)(k), expert opinion evidence must not be tendered at trial unless it is provided for in a Case Plan Order, and joint experts can be ordered at the Case Planning Conference.

We will look at these particular Rule changes to illustrate how counsel must be expected by insurer clients to promptly and carefully select and instruct experts and serve reports. The perils of failing to do so range from cost considerations to exclusion of reports from evidence at trial.

Requirements of Reports, Rule 11-6(1)

A witness is entitled to give expert opinion evidence in an area only if he or she has specialized knowledge in that area. Procedurally, under this Rule, the trial judge must decide on both the area of the witness's expertise and the issues to which the expert's opinion will be directed. That is, the witness must be properly qualified and formally accepted by the court as an expert in a specific area.

The information that must be in an expert's report has been expanded on from the old Rules – although these changes are actually little more than a codification of the common law that developed around our old Rule 40A. The expert must now provide his or her qualifications, work and educational experience in his or her area of expertise; the instructions provided to him or her by counsel; the nature of the opinion being sought and each issue in the matter to which the opinion relates; and the expert's reasons for his or her opinion, including the factual assumptions on which the expert's opinion is based, a description of any research conducted, and a list of every document relied on in forming the opinion.

This Rule is not simply a matter of form. The purpose of the rule is to ensure fairness to both parties by providing the party on whom the report is served with adequate notice to enable them to effectively cross-examine the expert and to properly instruct their own expert if they choose to retain one: *Jones v. Ma*, 2010 BCSC 867 at para. 11; *Mazur v. Lucas*, 2010 BCCA 473 at para. 42. A failure to comply with this Rule has the potential to increase the time and expense of resolving litigation, as such failure leads to uncertainty regarding the expert's qualifications and the purpose of the report tendered, and therefore may be contrary to the overall object of the Rules to determine proceedings in a just, speedy and inexpensive manner: *Haughian v. Jiwa*, 2011 BCSC 1632 at para. 33. Thus, failure to meet any one of these requirements could cause a judge to reject an expert's work.

For example, where it is revealed that the majority of the work in an expert report was conducted by a person or persons other than the report's author, the report may be held inadmissible: see *Jones v. Ma*, *supra*.

Where a medical expert report is tendered in evidence, the author cannot simply refer to "a review of the clinical manifestations of [the medical disorder in question] and diagnosis of [that medical disorder]" and to "a review of the literature" relating to that medical disorder. In those circumstances, the expert contravened Rule 11-6(1)(f)(iii): *Turpin*, *supra*, at paras. 25-28. It is the expert's role to assist the court in understanding what materials the expert reviewed in coming to his or her opinion.

Moreover, counsel cannot rely on Rule 11-6(2) ("The assertion of qualifications of an expert is evidence of them.") to overcome the onus to prove that the author of the report is a qualified expert. Rather, counsel must ensure that there is sufficient information in the report clearly identifying the qualifications of the proposed witness to state an opinion, or opinions, on a precisely defined area of expertise: *Turpin*, *supra*, at paras. 15-16.

Lastly, not only can an expert's report be rejected if it does not meet the requirements under Rule 11-6(1), cost consequences may also flow from those breaches. In *Fan v. Chana*, 2011 BCCA 516 at paras. 57-58, the Court upheld the trial judge's decision to deny disbursements to the successful party. The trial judge held the expert report inadmissible because the expert had provided medical opinions outside of her expertise as a psychologist, in contravention of Rule 11-6(1). While the Court of Appeal stated that it was not unreasonable to obtain an opinion from that particular expert, it should have been obvious to counsel, at the time of obtaining the expert's opinion, that it would not be admissible because the expert did not have the qualifications to provide opinions on the appellant's medical treatment for pain. On that basis, the Court of Appeal held that incurring the expense for the report, at the time it was obtained, was not reasonable.

Counsel must not ignore, or treat as an afterthought, the actual qualifications of the expert and the process of qualifying the expert to give evidence at trial. In that regard, counsel should avoid the following pitfalls: (i) simply attaching an extensive *curriculum vitae* to a report, without highlighting the relevant experience and education; (ii) failing to elicit evidence of relevant experience or education during the process of qualifying the witness; and (iii) failing to ensure

that the expert witness provides an opinion only within the area in which he or she is qualified and regarding the issue he or she has been asked to comment upon.

Overall, the expert and counsel's duty is to satisfy the court that the witness has expertise in the subject area in which he or she is to be qualified in the case at hand. It cannot be understated, therefore, how important it is to highlight those qualifications and that experience most relevant to the opinion or opinions being presented. To avoid negative consequences counsel needs to spend adequate time, during selection and initial retention of an expert, obtaining the necessary information to satisfy himself or herself of the expert's likely qualifications. It is not something easily corrected after service of the report.

Exchange of Reports, Rules 11-6(3) and (4)

Another significant change relates to the deadline for exchanging expert reports. Expert reports must now be exchanged at least 84 days before the scheduled trial date: Rule 11-6(3). The court has recently acknowledged that, on occasion, "there may be circumstances which might justify the ordering of an independent medical examination, otherwise than in support of the preparation of a responsive report": *Jackson v. Yusishen*, 2013 BCSC 1522 at para. 32. However, this is reserved for "exceptional" circumstances where such a report would be required to "level the playing field": *Jackson*, *supra*, at para. 35.

Responding expert reports must be served at least 42 days before the scheduled trial date: Rule 11-6(4). Rule 11-6(4) was enacted to fill a gap in the Rules. The old Rule, Rule 40A, permitted parties to call expert evidence in reply without notice at trial, but in order for such evidence to be admitted, it had to be truly responsive to the expert evidence of a witness called by the opposing party. Rule 11-6(4) provides that notice must be given of responsive expert evidence, although the court retains discretion to admit expert evidence of which sufficient notice has not been given: *Wright v. Brauer*, 2010 BCSC 1282 at para. 16.

The court reviewed the bounds of its discretion in *Wright*, *supra*, a motor vehicle accident case. The defendants brought an application under Rule 7-6(1) to have the plaintiff attend an IME by an orthopaedic surgeon. The deadline for serving a responsive report under Rule 11-6(4) was nearly a month away. The defendants argued that Rule 11-6(4) or Rule 7-6(4), or both, entitled them to require the plaintiff to attend the IME. The court rejected this argument, holding that the defendants were required to establish a basis of necessity for the examination to properly respond to the expert witness's report that was served under Rule 11-6(3) by the other party.

In *Luedecke v. Hillman*, 2010 BCSC 1538 at para. 54, the court clarified that it is not simply a matter of demonstrating a need to respond to the subject matter of the plaintiff's case. It must be "purely responsive" to the medical evidence which the other party has called, although responsive opinions are not limited to "a critical analysis of the methodology of the opposing expert": *Luedecke*, *supra*, at paras. 49, 52. Accordingly, the proposed responding expert must provide sworn evidence setting out the basis for the examination sought. See also *Jackson*, *supra*, at paras. 15-26; *Hamilton v. Demandre*, 2010 BCSC 1914 at paras. 25-40.

That said, it is insufficient for the proposed responding expert to depose merely that he or she cannot give a proper rebuttal opinion report to assist the court without examining the plaintiff.

The proposed responding expert must also state what there is about the other report that would lead him or her to think that he or she needs to examine the opposing litigant: *Becker v. Zetzos* (May 2, 2013), Vancouver Registry M121679 (Master).

In the recent decision of *Jackson*, *supra*, Barrow J. held that other factors, aside from the evidentiary threshold, influence the discretion the court has to order an IME for purposes of preparing a responsive expert report:

(i) the court is more likely to grant the order under Rule 9-7(1) where the responsive report would play a significant role in "levelling the playing field" (para. 27); and

(ii) the court is less likely to grant that order where the court considers that it was likely that the counsel seeking a responsive report anticipated a report of the sort served by the other side, and to which that counsel wished to respond, supported by an IME (para. 28).

As above, these Rules require counsel to prepare for trial earlier than under the former Rules of Court. This is particularly true for defendants in personal injury cases. As Barrow J. states in *Jackson*, *supra*, while it may be common practice for plaintiffs to serve an expert report at or near the deadline, making it "too late" for defendants to prepare a fresh report from their own experts, this is not something courts will take into account when considering whether to grant an order under Rule 9-7(1). Defendants cannot simply assume that the plaintiffs are not serving such reports until the deadline is reached: *Jackson*, *supra*, at para. 33. They must be proactive, particularly where an issue that may require an expert's opinion (e.g. the plaintiff's functional capacity) was raised at the beginning of the litigation.

A recent case illustrates the necessity of adhering to the deadlines set out in the new Rules. If a party seeks to introduce expert evidence after a deadline passes and when there was ample opportunity to do so, the report will likely not be admitted. Accordingly, counsel should take care not to rely too heavily on the court's discretion (in Rule 11-7(6)) to dodge the requirements of Part 11, as the trend in the courts is to require stricter adherence to the Rules.

In *Neyman v. Wouterse*, 2013 BCSC 95 the court was reluctant to waive the requirements under Part 11 – particularly in the face of defence counsel's dilatory conduct throughout the litigation. In that case, involving a motor vehicle accident, the defendant applied for an order permitting him to tender into evidence an expert report that was delivered to plaintiff's counsel some 27 days before the trial started. There was no issue that the report was a responding report under Rule 11-6(4). The issue was whether the court should exercise its discretion under Rule 11-7(6) and admit the report into evidence.

The defendant argued that it would be "severely prejudiced" if the report was not admitted at trial because it was the only medical evidence available to tender into evidence. Further, the defendant stated that the late delivery of the report was the result of inadvertence, namely, the oversight of in-house counsel before conduct of the defence was assigned to its trial counsel.

The plaintiff took the position that she would be egregiously prejudiced by the late admission of the report into evidence. Also, the plaintiff submitted that it was not a case of mere inadvertence on the part of the defendant; rather, as the court put it, "counsel for the plaintiff painted a picture of a defendant who has been dilatory in conducting his defence throughout this proceeding": para. 17.

In reviewing the applicable legal principles, the court noted that it was mindful of the underlying purpose of the Rules regarding expert reports: that they allow "considered review of the expert opinions, the obtaining of important advice, and possible response reports": para. 8, citing *Perry v. Vargas*, 2012 BCSC 1537 at para. 19.

The court reviewed, in depth, the defence's conduct in the face of the plaintiff's medical claims, which claims defence was aware of from the outset and "on an ongoing basis throughout this proceeding": see paras. 18-21. The court concluded that it was satisfied that "the defendant has failed to avail itself of meaningful interlocutory steps to defend itself throughout this proceeding" and that there was "absolutely nothing in the plaintiff's conduct or that of her counsel that could be said to have caused or contributed to the defendant's omissions": para. 22.

Taking into consideration all the facts, the court refused to exercise its discretion to admit the expert report, even though it accepted that the defendant would be prejudiced by exclusion. The court held that there must be some "compelling analysis" why the interests of justice require it to exercise its discretion to allow the "extraordinary step" of abrogating the requirements of the Rules. In the court's view, the defendant had provided no reason whatsoever. Finally, the court held that the circumstances, particularly in light of the defendant's dilatory conduct throughout the proceeding, were not compelling enough to get the court to exercise its discretion to admit the report into evidence.

This case provides a fairly stark example of where dilatory conduct on the part of counsel will lead: the exclusion of highly important, if not key, expert medical evidence. While there will be opportunities for counsel to obtain relief from missing a deadline, caselaw suggests there is no guarantee, and that parties will be held accountable for not availing themselves of opportunities to obtain information during litigation. For insurers, this means that counsel must receive prompt instructions with respect to the retention of experts and the direction to experts to prepare reports. Counsel must keep insurers advised of when these deadlines loom so that informed instructions can be provided.

Joint Appointed Experts – Rules 11-3 and 5-3(1)(k)

Rule 11-3 provides a fairly detailed procedure for appointing a joint expert. While it was thought that such a rule would lead to costs savings, reviews have been mixed in other jurisdictions that implemented the single-expert model. Nevertheless, Rule 11-3 places a greater emphasis on the appointment of joint experts and invites wider application of that process – see *Benedetti v. Breker*, 2011 BCSC 464 at para. 11.

Whether this Rule should be utilized in any particular case will necessarily depend on the specific circumstances. For example, there obviously will be little impetus for the parties to jointly retain an expert where there is no agreement on the factual foundation on which the

expert's report will be based.

Such a decision to retain a joint expert is ultimately out of the parties' control, however, as a case planning judge can appoint a joint expert over the objections of one of the parties. Three cases have considered Rule 11-3 in such circumstances.

In *Benedetti*, *supra*, a personal injury action, the court dismissed the plaintiff's application for an order appointing as a joint psychiatric expert an expert previously chosen by the defendant. Although the application was not brought at a case planning conference, as required by Rule 11-3(1), the court concluded that it would be inappropriate to make the order in any event because it would deprive the defendant of unilateral access to the expert in circumstances where the defendant had previously notified the plaintiff of its choice of expert. In considering the goal of proportionality, the court concluded that it would have doubtful application in that case where the plaintiff already had five medical reports: para. 16.

Benedetti, *supra*, was considered in *Leer and Four L. Industries v. Muskwa Valley Ventures Ltd.*, 2011 BCSC 930, where the defendant company was incorporated by five independent businessmen, including the plaintiff and the personal defendants. At some point, the plaintiff and the personal defendants had a falling out. The plaintiff brought a shareholder oppression claim, seeking an order that the defendant company purchase his shares at fair market value. At a case planning conference, he sought an order that a joint business valuator be appointed. The personal defendants vigorously opposed the idea of a joint expert. They argued that there were substantial controverted facts on the oppression issue; and as a valuation would be necessary only if the plaintiff was successful in his oppression claim, it was premature to require a joint expert. They also asserted that it would be a "shocking proposition" that they would be required to contribute to the cost of an expert required only by the plaintiffs. The court rejected these submissions, on several grounds: (i) it was not premature to require a joint expert on valuation, as all issues in the pleadings are before the court for the purposes of trial; (ii) it would be proportionate to have the defendants pay for a report required by the plaintiffs, as it would avoid duplication of the costs of obtaining an expert report in circumstances where the claim likely was modest (and where, it appears, the court was unconcerned about varying findings); and (iii) a valuation would provide the parties with the information required to settle the longstanding dispute.

Most recently, in *Hans v. Volvo Trucks North America Inc.*, 2012 BCSC 73, the court was asked to exercise its discretion to order that an engineering firm ("SMS") be appointed as a joint expert. In that case, the plaintiffs crashed a truck manufactured by the defendant, Volvo Trucks North America Inc. According to the plaintiffs, the truck's electrical systems failed, including the power steering and brakes. The defendant N. Yanke Transfer Ltd. had the truck towed to Winnipeg, where it had SMS inspect the truck and investigate the cause of the accident. Volvo was invited to attend the inspection, but the plaintiffs were not. SMS concluded that a loose battery terminal nut led to resistance heating, which ultimately led to the failure of several key vehicle systems, including anti-lock brakes, electronic stability control, and power steering. The truck was repaired and the plaintiffs were advised to pick it up. They refused.

At the case planning conference, the plaintiffs applied to have SMS appointed as a joint expert.

The court made that order, on the basis that the plaintiffs would otherwise be prejudiced, as only SMS was in a position to provide expert evidence of the cause of the accident, given that the truck had been repaired:

> [16] In my view, [ordering a joint retainer] is a practical and proportionate way of proceeding in this case where it is impossible for the plaintiffs to obtain their own expert evidence about the cause of the accident. That is because when Yanke retained SMS to inspect the truck, it invited Volvo to attend but not the plaintiffs. The plaintiffs did not therefore have the opportunity to request their own expert to attend the inspection. The plaintiffs only learned of the existence of the SMS report when it was listed on Volvo's list of documents. By that time, the truck had already been repaired. Thus, the only available evidence as to the cause of the accident will be the plaintiff's oral evidence of what occurred … and the SMS report. A joint retainer is necessary to have SMS prepare a report that conforms with the *Rules* with respect to the admissibility of an experts report.
> [Emphasis added.]

Several general propositions can be taken from these cases:

(i) counsel must be prepared by the time of the case planning conference to make any applications regarding expert evidence;

(ii) it is more likely a joint expert will be appointed where there is little reason to have two separate expert reports, such as where there is one correct answer (or it is likely there will be little variance in an expert's findings);

(iii) where a party has already instructed an expert on the issue in question and has provided notice to the other side of its intention to retain that expert, it may be unfair for the opposing party to "hijack" that party's expert by applying to have him or her appointed as a joint expert;

(iv) where it is impossible for one party to obtain its own expert evidence about a particular issue, however, the court will likely order that the opposing party's expert be appointed a joint expert, given the prejudice that would otherwise arise; and

(v) whether a party is applying to have an expert appointed as a joint expert or opposing such an application, the focus of counsel's submissions should be on the proportionality of making such an order (i.e. if making the application, demonstrate why it is proportional in the circumstances, and *vice versa* when opposing).

In our experience it is rare that an appointment of a joint expert becomes the recommended option. In first party disputes there is already the statutory appraisal alternative under the *Insurance Act*. In casualty cases there is often no agreement on the assumptions of fact to be provided to the expert. To confess, part of our reticence in seeking joint experts rests in our

familiarity, and your expert's familiarity, with the adversarial model. Additionally, unless you as our client are willing to accept that the judge's role in determining the ultimate issue may be usurped by the expert, a joint expert should not be appointed.

Commentary

For the purpose of this paper, the message is the BC decisions reveal an increasing tendency by the judiciary to stricter adherence to the Rules. To protect you we must engage in early identification of the purpose of the expert and the qualifications necessary for the expert to assist the court on the issues, and there must be timely instruction to counsel for retention of experts and production of reports.

HCCRA DECISIONS

Since April 1, 2009, the Province of BC has had the legislated right under the *Health Care Costs Recovery Act* (the "Act") to recover its health care costs. In two recent BC decisions the Province successfully expanded its right of recovery. The decisions may affect your indemnity exposure in certain circumstances, on bodily injury files.

1. *Translink v. British Columbia*

In September 2013 the Court rendered its decision in *Translink v. British Columbia*. It was an appeal of a Provincial Court action and the appeal was heard at the same time as the appeal by the Province in *British Columbia v. Opel*. The two cases were decided differently; the *Opel* decision came after *Translink* but the judge decided not to adopt it.

In both cases the underlying action existed before the Act came into force and settled afterward. The Province held that s. 13 of the Act applied and that because the defendant did not seek notice under s. 13(1) as required, under s. 13(5) the Province had a right to recover health care costs. The issues for the Court to decide were:

a) how does the *Gosselin v. Sheppard* decision apply?;

b) does applying s. 13 lead to an absurd result?;

c) does applying s. 13 have a retrospective effect which is not necessary?; and

d) is applying s. 13 an unwarranted violation of the common law rights of private parties to enter freely into contracts of their own choice?

Using basic principles of statutory interpretation, the Court reached the following conclusions:

a) the *Gosselin* decision was distinguishable. It involved a different issue, which was whether the injured party who started an action before the Act came into force had the right to amend her lawsuit after in came into force,

to add a claim for health care costs (on behalf of the Province) under s. 2 of the Act. In *Gosselin* the Court concluded that since the obligation of the injured party to claim health care costs only arose in s. 3 of the Act, and since the Act stated that s. 3 was not applicable to suits started before the Act came into force, it was not clear and unambiguous that s. 2 was intended to apply to actions commenced before the Act came into force. *Gosselin* was silent on s. 13, so it did not address or impact the issues before the Court in *Translink*.

b) S. 13(1) requires that a payor/settlor send notice of a settlement to the Province and obtain written consent to settlement from the Province. If this is not done the Province has the right to recover health care costs under s. 13(5) as a debt due the government. Translink argued that with a suit started before the Act came into force there was nothing the Province could do about the settlement of the underlying action (a Consent Order had been obtained) so it was pointless to require that notice be given. The Court disagreed, interpreting s. 13 as creating a cause of action for debt arising from the failure to give notice. This right of action is independent of any other right granted under the Act, and it is therefore unaffected by any limitations which may affect the remainder of the Act.

c) Translink argued the presumption against retrospectivity applied to s. 13. The Court disagreed, again pointing out that the focus of s. 13 was on the settling of a claim, not on whether there was a lawsuit related to a claim. The failure to provide notice did not have a retroactive effect.

d) Translink argued that the Act alters the common law of freedom of contract. The Ministry agreed, submitting that was the purpose of the Act. The Court accepted the Ministry's position that there had been a "clear choice by the legislature to abrogate the common law right to freely settle claims for personal injury."

The Court confirmed that failure to give notice under s. 13 gave rise to the Province's right to recover its health care costs, whether or not the lawsuit predated the Act.

2. *British Columbia v. Tekavec*

There are two interesting points to take from this decision, rendered December 16, 2013. The first is that the Province had the right to bring its own action to recover health care costs, and the second is that the liability judgment in the original action by the injured party applied to the Province's action.

The plaintiff suffered injuries from a fall from a balcony June 2, 2007, and commenced an action on July 19, 2007. The Act came into force April 1, 2009. On December 9, 2009, the Province received notice of the action. On June 8, 2010, within six months of receiving notice, the Province commenced its own action. On December 24, 2010, the plaintiff won his case in the underlying action, with the defendant being found liable.

In the underlying action the plaintiff submitted a claim for health care costs. Court applied *Gosselin* and refused to award health care costs. Note that by this time the Province had already started its own action for those same care costs.

Although the Province's action was not filed until more than three years after the injury, the Court held that the Province could rely on s. 8(5) of the Act. One of the limitations imposed by this section actions by the Province is "6 months after the date on which the minister first receives notice under s. 12 *[beneficiary's duty to give notice to the minister before settlement]*". The Province filed its claim within 6 months of first receiving notice and was therefore within time.

The next hurdle facing the Province was the Court's decision in the original action that health care costs were not recoverable, on the basis of *Gosselin.* The defendant argued that the Province could have appealed the original judgment on costs but did not do so and was therefore bound by it.

The Court dealt with this by determining that the Province had commenced its action prior to the decision in the original action and there was no indication that the existence of the independent action was raised before the Court. Next, the Court held that *Gosselin* had decided that an independent action under s. 8 did apply to injuries before the Act came into force, and that this action fell within that category of allowable actions. Therefore, there was no impediment to the Ministry maintaining its independent right of action.

Finally, the Court considered whether the original judgment applied to the Province's action. If so, the defendant's Response would be struck and judgment entered, based on the doctrine of issue estoppel. The Court applied the doctrine, concluding that

a) the defences advanced in this action were the same as those raised and decided in the prior judicial decision;

b) the prior judicial decision was final; and

c) the parties to the prior judicial decision are the same as the parties to the current action, or their privies.

The parties were not the same, but the Province successfully argued "…that it was a privy to the plaintiff in the original action, as it was in the same position as the plaintiff for the purposes of the application of the doctrines of issue estoppel or *res judicata*…" The Province had a right to participate in the underlying action but chose not to. If it had participated in that action and the defendant had not been found negligent the Province would have been bound by that judgment in its own action.

The defendant was entitled to proceed in his own third party action against two other defendants because the issues between the defence parties had not been fully canvassed or decided in the original action. Otherwise, the defendant was bound to pay health care costs to the Province in

the amount of $68,061.46.

Commentary

The *Translink* decision underscores the necessity of securing the Province's consent to a settlement. The *Tekavec* decision, while a bit of an anomaly, does confirm the Province's independent right of action even in the face of an existing judgment denying recovery of health care expenses.