

by Steve Revay



Out of sight, out of mind! I would not blame some of our readers feeling that way; after all, more than a year passed since the last issue. I hope, however, that we were not entirely out of sight, at least for most of you.

Although we may not have an excuse for our silence, we have explanations. We have been very busy; in my case not always with revenue-related work. Some of you already know that I have been heavily involved with the Canadian Society for Civil Engineering. In the last issue we featured an article on PMO (Project Management Overview). Since then we have been retained for a number of PMO or quasi-PMO assignments. Elsewhere in this issue we report on the various National Surveys in which we have been and are involved. Our estimators and schedulers were, at times, taxed to their limit preparing budget estimates and scheduling and monitoring projects.

The bulk of our work has been related, however, to dispute resolution with assignments coming, in equal proportions, from contractors and owners. These latter endeavours prompted the topic of the lead article. It is written in self-defense: to remind all our consultants that an expert witness ought not be a cheerleader for his or her side. We have learned through experience that the credibility of an expert and therefore the value of his or her contribution to the case is directly proportionate to the degree of his or her objectivity and independence. It is easy to become a cheerleader particularly when the expert is gently (or at times not so gently) pushed in that direction. I hope this article may serve as a reminder also to those other experts who may feel an urge and/or pressure to argue the case as opposed to offering an objective evaluation.


RAL President

THE EXPERT'S ROLE IN CONSTRUCTION LITIGATION

by Me Marc Prévost — *Stikeman, Elliott*
and Jean Hudon, *eng.* — RAL

All too often in the construction industry, the litigant parties or their legal counsel either do not see the need to resort to an expert, or call on his services too late. The purpose of this article is to give a general outline of the services offered by construction experts and show how these services can benefit the client. In light of the recent judicial decisions rendered with regard to the construction industry, it is also important to understand that experts ought to be given freedom in developing their opinion without undue influence by legal counsel.

Construction disputes have become more frequent and complex due, in part, to the nature of the industry itself: the parties involved in a construction project are numerous — owner, contractors, sub-contractors, architects, consulting engineers, suppliers, etc. — and their respective interests may often conflict. In addition, construction of large projects usually takes several years, and meanwhile the contractor's material, financial and human resources remain fully tied-up.

Considerable sums of money are involved and the technical aspects of these disputes are quite complex and require a thorough study of the countless documents provided by the parties. Assessing the issues and drawing conclusions becomes extremely difficult. Establishing the relationship between the alleged facts and the damages often requires the application of sophisticated techniques such as schedule and productivity analyses; additionally and because of the amounts claimed, the courts are more and more strict with regard to the required proof.

Why solicit advice of an expert?

There are several types of cases where services of experts have long been considered essential: for example, a medical expert in the case of an accident involving bodily injuries, or a structural engineer in the case of structural failure.

Lawyers who have been involved in such cases know from experience that the courts need assistance in coming to conclusions because of the technical aspects surrounding the facts; this assistance is the expert's testimony. In fact, the expert's role is to enlighten the court in their assessment of complex facts which make up the case before them.

Despite the complexity of construction disputes, the importance of an expert apparently is not yet fully recognized, even though, when reading the Canadian jurisprudence, one must conclude that our courts face a growing number of technical issues in construction disputes, such as schedule analyses (delay/acceleration) and the quantification of impact damages. In several cases, it seems that the expert's testimony would have helped to clarify the technical aspects of the case, and enabled the judge to render an award pursuant to a better understanding of the issues at stake. In other instances, the expert's involvement in the early stages of a dispute could have helped both parties to evaluate their respective positions more objectively, and perhaps facilitate a negotiated settlement, thereby avoiding the need for costly legal proceedings. The frequently asked question is: why would I have to retain the services of an expert when I have a lawyer experienced in construction and a number of competent people on my staff? The most compelling reason is the objectivity of the expert, assuming, of course, that the expert takes this responsibility seriously and is prepared to point out also the weaknesses of the case and refrains from exhibiting undue optimism.

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For an expert's opinion to be clear and his contribution meaningful, he should be consulted at the early stages of the dispute. He must have access to all the facts, especially those which are unfavorable to the party's position. In that respect, the Association of Soil and Foundation Engineers (ASFE) recommends to their members that they turn down or terminate their involvement if they do not have access to all essential information. (We shall see later the importance of the expert's objectivity as well as his thorough knowledge of the facts should he be called to testify before the courts.) In addition, the expert must work in close collaboration with the legal counsel, who in turn shall inform him of the pertinent legal aspects of the client's position.

Notwithstanding the course of action chosen to resolve the claim, the expert may be a key player in the preparation and presentation of the claim by emphasizing the strong points and shoring up the weak ones.

As a member of the team, the construction expert's principal role will be to quantify the damages incurred by the claimant. This, of course, will usually involve both a delay analysis and impact cost calculation.

In conclusion: one retains an expert to define the issues in dispute, to form an impartial and independent opinion concerning the validity of the claim, and to determine the damages incurred, subject, of course, to the legal/contractual entitlement to be analyzed by legal counsel.

The choice of an expert and his mandate

A construction expert's role may be restricted to that of a consultant to legal counsel or he may be also called to testify. As a consultant, the expert may be called upon only to evaluate the claim or may take part in the settlement negotiations. If the dispute goes to court, he may be called upon to assist the lawyer in preparing and presenting the claim. As an expert witness, his role is to help the judge or arbitrator in gaining better understanding of the technical issues of the dispute both through his report to the court and oral testimony during the trial.

In selecting an expert, it is important to determine as early as possible whether he will be called to testify. As an expert witness, he must possess qualifications which would not necessarily be required of a consultant. In a consultancy role he must have an in-depth understanding of the technical issues of the claim and be able to form an opinion based on his knowledge of the facts and practical experience. He should be comfortable in bringing to the attention of legal counsel all of the weaknesses of the claim. In addition to the above, however, an expert witness should have excellent communication skills, the ability to express his opinions in layman's terms, be confident, courteous and quick-witted and **never** appear to be arrogant or biased.

The wrong choice in selecting an expert or the improper use of the expert may cause irreparable damage to the final outcome of the case.

The facts

We have stressed above the importance of the expert's thorough knowledge of the facts, especially if he is to testify in court. The credibility of a party and that of its expert witness could be seriously compromised should the opposing party succeed in proving that the expert is not aware of **all** of the relevant facts.

The parties must realize that the facts of the case are of paramount importance. As convincing as the expert's testimony may be, it is the judge or arbitrator who evaluates the merits of the claim based on the factual evidence submitted. In fact, the judge may disregard the expert's testimony (art. 423 C.C.P. and **Shawinigan Engineering Co. v. Naud**, [1929] S.C.R. 341). Similarly, the judge at times may attach more value to the testimony of ordinary (factual) witnesses should the testimony of the expert be contradictory or non-conclusive (**Michaud c. Bergeron**, [1980] C.A. 246).

In the majority of cases, the expert has no independent knowledge of the facts. A party who refuses or neglects to disclose all relevant information to its expert is likely to obtain an opinion which is based on hypotheses only and is not in accordance with the actual facts. In this

event, the court will not take the expert's testimony into account. In this respect, the following excerpts from **Price Bros Co. Ltd. c. Lafontaine**, [1956] B.R. 277 confirm this statement:

"The expert claims that the plaintiff has caused flooding to occur on his property because he had done some work in the river. However, it has been proven that the plaintiff never carried out work to dam up the river [...]" (p. 279) (translation)

"The theories submitted [by the experts] do not apply to the case in point since they are of a general nature and do not take into account the particular aspects which have been proved in this case." (p. 279) (translation)

In order for the expert's testimony to be credible and serve the interests of the claim, it is essential that **all of the facts** on which the expertise is based be proven (**Paillé v. Lorcon inc. et al.**, [1985] C.A. 528). In addition, the expert witness may also give his opinion on facts which he has observed.

Independence of mind of the expert witness

Even though the expert may be called to testify, it is very probable that he will also serve as a consultant in the preparation of the claim. A conflict is possible, at least in theory, between the role of a consultant and of an expert witness. Notwithstanding the fact that he should keep an independent mind, his attitude may become that of an ardent supporter or advocate of the case. When called to testify, however, he must be independent and impartial; complete integrity should show through in his testimony.

To be an advocate one day and totally impartial the next is not always an easy task. The credibility as well as the admissibility of the expert witness's testimony depend on his ability to demonstrate absolute objectivity. More importantly so: the expert's impression should not be that of an advocate, either in his report or in his testimony, as shown in **Emil Anderson Construction Co. et al. v. British Columbia Railway Co.**, (1988) 27 C.L.R. 1 (B.C.S.C.). In that case, the court refused to accept two reports since

they contained arguments in favour of one of the parties rather than an objective technical or scientific opinion:

"[...] their reports are essentially their separate opinion, with arguments in support, on the very questions which the parties have submitted to this Court for decision." (p. 6)

"I have concluded that, not only are the [...] reports themselves inadmissible [...], the authors are not entitled to express opinion evidence along the lines discussed in their respective reports." (p. 7)

It is tempting for some lawyers to try to influence experts to become advocates of their cause; some experts allow themselves to be influenced. **Vancouver Community College v. Phillips Barrat et al.**, (1988) 29 C.L.R. 268 (B.C.S.C.) clearly illustrates the limits which should not be crossed. In that case, numerous and significant changes, beyond what is generally acceptable, had been made to the expert reports by legal counsel. The judge commented that expert A...'s report had been "substantially rewritten by counsel". Since the expert had agreed to such modifications, the court no longer had any confidence in his testimony.

"In the end, I find A...'s evidence both written and oral to be of no value whatever. It is so warped by the process of its creation, so one-sided and partisan, as to be completely devoid of any credibility. I have no confidence in anything A... told me, either in writing or orally." (p. 289)

Financial independence of the expert witness

A recent decision (**Construction Fergon inc. c. S.Q.A.E.**, C.S.M. 500-05-017213-826, January 30, 1989, [J. BÉLANGER]) clearly indicates that the expert must also be financially independent. The expert's fees should in no way be related to the outcome of the claim; again, it is a question that goes to the expert's credibility.

"And so, one may question the [expert's] credibility as well as the personal interest which he may have

in the outcome of this dispute which he seems to have if not provoked, at least greatly encouraged..." (p. 33)

"There was objection to the latter being recognized as an expert due to his personal involvement in the dispute. However, he may not be challenged since he was not appointed by the court [...], in spite of the fact that his remuneration has been set as a percentage of the amount which the court may eventually award to Fergon. These objections affect only the credibility of [the expert's] testimony." (p. 34)

On this subject, some engineering societies recommend to their members to refuse any involvement should their fees depend on the outcome of the dispute.

The witness's experience

We have already mentioned that the expert should have practical experience in the technical issues of the dispute. When choosing an expert witness, it is paramount that the party assure itself that the candidate's experience is relevant to the dispute; the courts attach great importance to this aspect when evaluating the testimony of an expert witness.

"The [expert] acquired experience in large James Bay projects which in no way compare to the particular issue at hand." (Construction Fergon inc., supra, p.34)

"N... is a metallurgical engineer by training. He has virtually no experience in the design or estimating of institutions or educational projects such as VVI, and almost no experience in Vancouver or British Columbia in the time period from 1980-83. N... conceded that he was not an expert in architectural matters, nor in those engineering disciplines relevant to the VVI project. The projects on which he has worked are mostly ones of a value of over \$100 million [...]"

"I do not find N...'s report to be of any assistance in deciding the matters in issue in this case." (Vancouver Community College, supra, pp. 290-291)

Yes, the expert's testimony can be damaging to the claim!

After having read the preceding quotations, one can see how the expert's testimony could be damaging to the claim should certain criteria not be respected. In addition to the various situations described above, there are other circumstances in which the expert's credibility may be affected or discredited altogether. Amongst others, cross-examination by opposing party's legal counsel may bring out surprises:

- The opinion expressed in the expert's report is different from the one which he had previously supported in a publication, at a seminar, or in another dispute;
- The expert admits that the opposing party's expert is better qualified than himself;
- The expert is arrogant, pretentious, inflexible; he refuses to accept an opposing opinion even if it is the most probable given the circumstances;
- The expert obstinately refuses to admit certain weaknesses or unfavourable aspects of the claim.

In fact, a flawless case simply doesn't exist and the expert who directly admits to a particular weakness gains credibility.

In conclusion

In the choice of an expert, it is important to assure that his experience as well as his expertise are suitable to the claim. As a member of the team, the expert should have the full collaboration of the persons with whom he will be working.

A good expert is entirely unbiased and honest; one who overly defends a case is not working in the client's best interest.

It is not the expert who "wins" a case, but rather the parties and their legal counsel. Full knowledge of the facts and a meticulously prepared claim are irreplaceable. The expert's appraisal is an essential element of this preparation and the expert's testimony is its expression. Ultimately, the case will be decided on its merits.

NATIONAL SURVEYS CONDUCTED BY RAL

To date RAL has been commissioned to conduct three studies in its 1990 activities which involve comprehensive personal interview work and data analysis. The first was sponsored by the Canadian Lumber Standards Accreditation Board, Vancouver, and related to a number of proposals concerning association organization governing the lumber grade stamping system. Detailed personal interviews were conducted in 15 centres ranging from Vancouver and Prince George to Grande Prairie (-47° C!) and from Ottawa and Quebec City to Truro and Deer Lake. RAL's report was submitted in May.

The second dealt with a study on The Construction Outlook and Issues, sponsored by Industry, Science and Technology Canada. It considered two facets: firstly, an assessment of the construction industry's performance in the 1980s; and secondly, an outlook for the years 1990-2000. Specific analyses of various sub-sectors were required for the study. In order to obtain the information and opinions for these analyses, members of RAL interviewed approximately 90 senior executives, either owners/clients or industry practitioners (consulting engineers and contractors), in seven leading sub-sectors: office buildings, pulp and paper mills, pipelines, electric power plants, petroleum refineries and petro-

chemical plants, sewage and water treatment plants, and roads and bridges. The 166-page report was submitted in August.

The third study — now in progress — was commissioned by the Treasury Board of Canada and involves a review of the federal government's rules for the specified use of bid depositories on its building construction projects. Interviews are being conducted on a selective basis among federal officials and industry representatives in Vancouver, Winnipeg, Ottawa and Halifax. RAL's report and recommendations are due to be submitted before the end of the year.

A sincere vote of thanks is extended to all of those who so generously contributed their time, knowledge and experienced insights during the extensive interviews.

Important factors in the award of such study contracts to RAL are its many contacts among industry practitioners, owners, associations and government officials at a senior level, and its detailed familiarity with the construction scene.

The above sampling of RAL studies involving personal interviews and analyses was directed from the company's Ottawa Bureau. The study commissioned by ISTC also involved RAL personnel in Vancouver, Calgary, Toronto and Montreal.



Al Morgan has joined RAL on October 1, 1990, as the Manager of the Vancouver Office. Al graduated in 1966 from the University of Alberta with B. Sc. degree in Civil Engineering. After his graduation he has worked with a number of Canada's largest construction companies mostly in B.C., but with a short interval in Eastern Canada on the construction of a 900 Megawatt Nuclear Power Station as Project Engineer.

In B.C. he worked as Design Engineer, Resident Engineer, Project Manager and Manager of the Mechanical Division. The projects he worked on cover a wide variety of civil engineering undertakings, pulp and paper mills, mine installations and power plants. His extensive managerial experience and his knowledge of the industry in general will add greatly to our capability to serve our clients.

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