Court of King's Bench of Alberta

Citation: CNOOC Petroleum North America ULC v 801 Seventh Inc, 2023 ABKB 214

Date: 20230423
Docket: 1901 06261
Registry: Calgary

Between:

CNOOC Petroleum North America ULC

Plaintiff/Defendant by Counterclaim
Applicant

- and -

801 Seventh Inc, OPTrust Office Inc., Centurion Holdings Ltd., Quantico Capital Corp., Westhills Development Corporation, Canadian Income Fund Group Inc., and Tokay Capital Corp.

Defendants/Plaintiffs by Counterclaim
Respondents

- and -

CNOOC Limited

Defendant by Counterclaim
Applicant

Mid-Trial Reasons for Decision of the Honourable Justice P.R. Jeffrey

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[1] This mid-trial ruling addresses the objection of the Plaintiff and Defendant by Counterclaim, CNOOC Petroleum North America ULC, ("**CNOOC**" or the "**Tenant**") to certain

portions of the expert evidence of Drs. Lee and Sanchez (the "**Experts**"). The Experts were presented by the Defendants and Plaintiffs by Counterclaim ("**801**" or the "**Landlord**"). The Experts offered a single expert opinion report that they both endorsed and then individually spoke to at trial, each bearing primary responsibility for different parts, in accordance with their own distinct fields of expertise.

[2] CNOOC did not oppose the Landlord's description of the Experts' scope of expertise. After hearing the *voir dire* evidence about their experience and credentials, both in direct examination and under cross examination, I found each was qualified to offer opinions to the Court within the following areas:

> Forensic laboratory analysis and microscopy for characterizing asbestos in raw materials and building products, including with respect to air, bulk, dust, and environmental samples, and the potential for fibre release.

[3] CNOOC says that 7 portions of the Experts' evidence either exceeded the boundaries of those qualifications or duplicated the expert evidence of other Landlord experts or both. The first type of challenge alleges impermissible overreach by the Experts and the second challenge alleges impermissible overlap. I say "overlap" not "duplication" because CNOOC is not challenging all the evidence of an 801 expert as duplicative or as covering the very same subject area as another of its experts, but challenges portions only as overlapping portions of prior 801 experts. CNOOC asks that I exclude those identified portions from the trial record as part of my "gatekeeper" function.

[4] CNOOC put 801 on notice of these concerns on October 3, 2022, the first day of the trial. This was roughly 4 months earlier than when CNOOC advanced the application formally during trial. On October 3, 2022, CNOOC included the overreach and overlap objections in combination with a series of other particulars of the Experts approach, that CNNOC said: distorted the fact-finding process by obscuring material facts amongst pages of needless and/or irrelevant detail, increased rather than reduced confusion, selected methodologies or only portions thereof while ignoring others or misconstruing their provenance without explanation, and obfuscated by conflating amphibole and amphibole asbestos fibres.

Applicable Law on Overreach

[5] The law requires courts to "be vigilant in monitoring and enforcing the proper scope of expert evidence" and says a court "must do [its] best to ensure that, throughout the expert's testimony, the testimony remains within the proper boundaries" the trial judge sets in identifying the scope of the opinion evidence they may offer to the court: *R v Sekhon*, 2014 SCC15, at para 46. The Court must guard against experts overreaching that scope, plus ensure the content of their actual evidence is properly the subject of expert evidence: *Sekhon*, at 47.

[6] Not everything that an expert offers in oral evidence that is not specifically stated in their Form 25 expert reports, or that is not expressly stated in the Court's ruling on the permitted scope of their opinion evidence, is necessarily outside the permitted scope of their testimony. The Alberta Court of Appeal said, in para 4 of *R v McPhail*, 2019 ABCA 427:

> Expert witnesses must be qualified, and testimony outside their area of expertise should be prevented: *R. v Sekhon*, ... Experts, however, must have some latitude in the evidence they give. An expert who is permitted to give his opinion is also

> permitted to give the circumstances upon which that opinion is based, and experts necessarily bring past experiences to bear on their opinions: see *R. v Awer*, 2016 ABCA 128 at para. 51, ...; *R. v Prosser*, 2015 NBCA 7 at paras. 40,.... An expert is also entitled to give factual evidence of personal observations, outside the rules regarding the admissibility of expert evidence: *Kon Construction Ltd v Terranova Developments Ltd*, 2015 ABCA 249 at para. 35-7, 40, ... Having been qualified in general terms, the Crown expert was entitled to give evidence on subsidiary issues such as the interpretation of the size of the DNA samples.

[7] This is not phrased as an exhaustive list of categories of testimony that fall within the permitted scope. In differentiating between the permissible and impermissible testimony from an expert, courts remain guided by the over-arching objective of their gatekeeper function, being careful to not allow onto the evidentiary record evidence whose probative value is outweighed by its prejudicial effect.

Applicable Law on Overlap

[8] Regarding expert evidence that duplicates the evidence of another expert from the same party, the Court's prior leave is required. Rule 8.16(1) of the *Alberta Rules of Court* says:

> Unless the Court otherwise permits, no more than one expert is permitted to give opinion evidence on any one subject on behalf of a party.

[9] The accepted purpose of the Rule is "to prevent abuse, expense, and delay caused by the excessive use of expert evidence where unnecessary to assist the court in arriving at a just result": Reid & Poelman, *Civil Procedure & Practice in Alberta*, 2022 Edition (LexisNexis Canada Inc, May 2022), at p 315. Under the old *Rules of Court*, if the court did allow a duplicate expert, then after they had testified the court also had to determine if any unnecessary costs were incurred as a result. If so, they had to be ordered against the presenting party on a solicitor client basis: rule 218.5, *Alberta Rules of Court*, Alta. Reg. 338/33; 277/95; 243/96. This requirement was not carried over into the new *Rules of Court* in 2010 but it confirms one of the legislators' purposes was to single out the practice for added deterrence.

[10] This accepted purpose for the limitation, of preventing abuse, expense, and delay, informs the sorts of things a court should consider on a request like the one before me, on whether to permit any overlap or duplication of expert evidence for the same party to remain on the trial record.

[11] In *Smith v Obuck*, 2018 ABQB 849, a party asked the Court for leave to call more than one physiatrist in a personal injury trial. The issue was what the phrase "any one subject" in the Rule meant. Did it preclude a second expert with the same area of expertise being called by the same party?

[12] In *Smith* the court identified seven distinct factors the court "must consider", stating within para 21:

1. Is the testimony of Dr. Naidu relevant to the subject matter in issue?
2. Can calling both experts be considered "piling on" or duplicative?
3. Does the evidence of Dr. Naidu add anything to the evidence of Dr. Irvine?

4. Is the evidence of Dr. Naidu required to allow the Plaintiff to fairly present its case?
5. Will the evidence of Dr. Naidu assist the trial judge?
6. Is allowing Dr. Naidu to testify prejudicial to the Defendant?
7. Can any abuse, expense or delay that is determined to have been caused by the calling of Dr. Naidu be addressed by an award of costs at trial?

[13] This statement in *Smith* that these factors "must" be considered did not mean they are mandatory considerations in every case, but rather that the judge considered them mandatory for *that* case. That is evident from the full sentence in which the Court declared them to be mandatory. This conclusion is compelled also by the fact that in cases like the one before me, in which we are already passed the first stage inquiry into threshold admissibility based on the *Mohan* factors, consideration number 1 (relevance) has already been considered, as has to a limited degree consideration number 5 (will it assist the court). They go to threshold admissibility of expert evidence, not duplication of expert evidence. If the allegedly duplicative evidence of two experts is either not relevant or of no assistance to the court, then neither expert should be testifying. They both will be excluded under the *Mohan* factors at the first stage.

[14] In my view whether an expert's evidence will be relevant or of assistance does not tip the scales either in favour or against permitting them to testify in the same subject area as a previous expert witness for the same party. Therefore, when dealing with a rule 8.16(1) application for permission to call more than one expert in the same subject area, in my view and with respect, the court should just assume both experts will satisfy the test for threshold admissibility and turn its mind solely to considerations measuring the potential for abuse of process, delay, and undue expense. The four *Mohan* factors going to threshold admissibility are best addressed within the trial in the normal way.

[15] In *Smith*, though, after considering all seven of its mandatory factors leave was granted. In doing so the Court observed that there was not complete duplication but rather only the potential for some overlap. Each physiatrist "saw the Plaintiff at different periods of time following the collision" and the Court concluded therefore "there will be aspects of their evidence that are different." It appears therefore, that some likelihood of overlap of evidence from experts sharing the same professional designation will not alone preclude calling both. In other words, as the wording of the rule suggests, duplication of subject area evidence is not prohibited.

[16] The factors listed by the court in *Burgess v Wu et al.*, [2005] OTC 159 (SC), are informative for this application. At issue in that case was a different rule of court than Alberta rule 8.16(1). The Ontario rule requires leave before a party may call more than 3 experts in total in a trial. As a result, considerations "d" and "f" in the *Burgess* list repeated below do not apply here, but the rest are useful in guiding the application of rule 8.16(1):

> A decision on motions like this will necessarily be fact driven and consequently it is not possible to identify a fixed list of relevant factors. However, I conclude the following are relevant factors in this case taking into account the caselaw and the circumstances of this case:
>
> a. Whether the opposing party objects to leave being granted. While I can imagine situations where both parties are "overkilling" the

> evidence, I think that if both parties have agreed on certain numbers of experts or on filing reports from some experts in addition to calling others then this is a significant factor. While there is certainly public expense involved, in civil cases the parties bear a very substantial portion of the costs of trial which is the crux of the rule. I believe contested motions on the issue of granting leave are rare. I think that where there is no opposition then leave is usually granted.
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> b. The number of expert subjects in issue.
>
> c. The number of experts each side proposes to have opine on each subject.
>
> d. How many experts are customarily called in cases with similar issues?
>
> e. Will the opposing party be disadvantaged if leave is granted because the applying party will then have more experts than the opposing party?
>
> f. Is it necessary to call more than three experts in order to adduce evidence on the issues in dispute?
>
> g. How much duplication is there in the proposed opinions of different experts?
>
> h. Is the time and cost involved in calling the additional experts disproportionate to the amount at stake in the trial?

Conclusions on the Challenged Portions of the Experts' Evidence Regarding Overlap

[17] I do not exclude any of the challenged portions on the grounds of duplication or overlap.

[18] First, on a macro level, there are overlaps of varying degrees in the content of many sets of experts on both sides of the issues, as 801 observes. Some experts called by the same party, on both sides of the issues, may reach similar conclusions about the same subject matter but can do so for reasons arising from their differing disciplines of study. That is the case here. I frankly think it would be almost impossible to avoid in a case of this magnitude and complexity, in which close to 20 experts have been called by the parties to assist the Court. For the most part, in the portions of expert evidence challenged on the grounds of duplication each expert speaking on the common subject matter has opined on the common matter from the perspective of their own distinct training, experience, and resulting expertise. I do not find their overlap to be offside the purpose for the restrictions in rule 8.16(1).

[19] Second, this is not a case where multiple experts who have identical or virtually identical subject matter expertise are presented by the same party.

[20] Third, assessing the challenges under the *Burgess* factors also militates against the court's interference with each party's prerogative in how they wish to present their client's case to the court. The number of experts each side proposes to have opine on each subject is not disproportionate to the other. The challenged duplication of evidence is not a significant portion

of the evidence of those experts. The parties' experts do not conveniently align on a one for one basis against an expert opposite. That is, in some subject areas, one party has called more than one expert to address the evidence of one expert opposite. I am not persuaded there is any disadvantage to CNOOC by the isolated instances of overlap it identified, in all the circumstances of this case. The time and cost involved in the experts speaking to matters of overlap is nominal, if not *de minimis*, relative to the amounts at stake in the litigation – very roughly in the range of $750,000,000. Those costs also appear to have been exceeded by the time and cost expended on the challenge based on the overlap.

[21] Fourth, there is no 'piling on' by reason of the 801 experts' overlap in evidence. In any event, the Court does not determine issues involving the assistance of experts by a show of hands. Presenting a greater number of the experts on a point does not help a party succeed on that point. The court needs only hear it once; more than that adds nothing. Nor does the highest priced or most experienced expert help a party succeed on that point, *ceteris paribus*. Rather, things like the consistency of an expert's opinion with schools of thought widely held within a field of study, that are supported by replicated studies that have been critically peer reviewed and reported in reputable objective publications, more often militate in favour of their opinions gaining traction with the trier of fact. So do cogence, principles of logical reasoning, clarity of communication not obfuscation, responsiveness to questioning regardless of the source of the question, and unbiased assistance to the court demonstrated by, for example, being able to concede points when appropriate. A determination to never say "yes" to any proposition from "the other side", merely because of its source and no matter how innocuous, most always adversely affects the weight ascribed to that expert's views.

[22] Fifth, even if CNOOC's challenges on the grounds of overlap were persuasive, the opportunity to prevent needless time in trial to hear a second time the same thing, whether from experts of the same field of study or from experts from differing fields of study, has passed. There is no opportunity to get back that trial and avoid the unnecessary expense to the other parties.

[23] I recognize that one purpose of rule 8.16(1) is also to prevent abuse, and that there is still opportunity to avoid abuse and trial unfairness after the fact by excluding from the record duplicate opinions from experts addressing the same subject area. But I find nothing falling in the category of abuse here.

[24] And as for the time and expense already incurred, it is still open to either party to argue, if and when the Court is called on to award costs, that regardless of outcome they were put to needless expense by reason of the other's duplication of expert evidence.

Conclusions on the Challenged Portions of the Experts' Evidence Regarding Overreach

[25] First, I decline 801's suggestion that I "treat [all CNOOC's] concerns as issues going to a matter of weight." Inadmissible evidence cannot receive any weight. All expert opinions offered within the boundaries of the expert's permitted scope are subject to whatever weight the trier of fact ascribes. Any opinions outside those boundaries are not admissible at all. While the Court appreciates the confidence 801 expressed that the Court would know where the line has been crossed when deliberating, and the Court will be doing that in respect of many of the expert witnesses regardless of no formal challenge levelled as with the evidence of Drs Lee and Sanchez. The Court's responsibility is to address each challenge raised by the parties.

[26] Next, proceeding through each of the 7 challenged portions individually, I do not exclude the first challenged portion. In this first portion the Experts assert that WR Grace & Company removed asbestos from their vermiculite.

[27] CNOOC says the Experts' offer no citation to support their comments about removal of asbestos by WR Grace and it implies those comments fall outside the scope of their expertise. CNOOC says they should be excluded from the trial record.

[28] 801 says it is a statement of fact not opinion. If that is right and it is not an opinion of one of the two Experts, it risks being offside the second guideline in para 47 of *Sekhon*, that is, it may not be "properly the subject matter of expert evidence."

[29] 801 elaborates, saying that the challenged assertion "is common knowledge within the field of expertise" of the Experts, and that therefore "no citation is needed for this type of evidence."

[30] I do not consider the presence or absence of a citation helpful in determining whether the proposition supported by it falls within an expert's permitted scope of opinion evidence. It begs the question. If an expert provides a citation as authority for, or as the source of, a proposition, they are representing that the citation should be accepted by the Court as reliable in respect of the proposition. That is itself an opinion, and also only admissible if *it* falls within the scope of the expert's permitted range of opinion evidence. A citation for a proposition may enhance the weight the trier ultimately ascribes to the proposition (for example by showing the proposition to be widely accepted or common knowledge within the field), but only if the proposition and the citation fall within the expert's expertise. It is not probative on the question of *whether* the proposition (or the citation) falls within their expertise.

[31] In any event, the Experts offered no citation, and it is not the Experts who say the proposition needs none because it reflects common knowledge within their fields of study. Counsel says so. As likeable and tremendously capable as Mr McKinnon is, I cannot take *his* opinion that it is common knowledge within the Experts' field as proof of that point. 801 had ample opportunity to adduce that further evidence, from its own witnesses or from a CNOOC witness in cross-examination.

[32] The question of whether these first challenged assertions are overreach or are within the permitted scope of the Experts' opinion evidence is answered by the responses of Dr. Lee to questions from CNOOC's counsel on his qualifications. I find that these first challenged assertions fall within both the "characterizing asbestos in raw materials and building products" and the "characterizing …the potential for fibre release" aspects of the Experts' permitted scope for opinions. Further, they are part of Dr. Lee's personal experience in the work he has done previously within his field of study, specifically the work performed directly for WR Grace & Company (at para 4 of *McPhail*, again, the Court of Appeal spoke of "experts necessarily bring past experiences to bear on their opinions … [and are] entitled to give evidence on subsidiary issues").

[33] I exclude the second challenged portions, for the reasons argued by CNOOC. In these portions the Experts opine that the building at issue in the action (the "**Building**") is "safe". The Experts have been qualified to opine on characterizing asbestos in raw materials and building products and on characterizing the potential for asbestos fibre release. Offering their views on whether the Building is safe falls outside those areas. I am not persuaded by 801's attempt to

bootstrap Dr. Lee's explanation of the Experts' use of the word "clean" to apply also to their use of the word "safe" or that expertise on fibre-release entails its implications for building safety. I consider those to be two different things.

[34] I do not exclude the third challenged portion. In this portion the Experts opine that the Building is "clean". I accept from the evidence of the Experts that they do not use the word "clean" in its common sense, but as a short form of saying "the fireproofing is not shedding asbestos." The latter is within their scope of expertise. If they meant clean as commonly used, it would fall outside their permitted scope. By the word "clean" the Experts are speaking only of concentrations of asbestos originating from the fireproofing. The Court will take care when deliberating to limit these Experts' third challenged comments to the very limited sense they have intended.

[35] I exclude the fourth challenged portion. In this portion the Experts opine that they observed the fireproofing in the Building to be in good condition. It is not phrased, as 801 suggests, as a factual assumption attributed to the observations of WHS. The Experts can opine on the asbestos condition of the fireproofing, even its friability, but not on anything else that may factor into an assessment of its condition. Therefore opining on an overall assessment of its condition is outside their permitted scope.

[36] I exclude the fifth challenged portion. In this portion the Experts opine that there is minimal debris on the surface of the ceiling tiles. This objection is much ado about nothing, just an observation anyone might make, but in this case made by two people who have experience studying asbestos in a great many buildings. Yet the objection is technically correct and therefore succeeds. Technically, debris may comprise more than just asbestos. The Experts were qualified to opine about asbestos within the Building, not whatever else debris may comprise or release in fibrous form. Speaking about the volume of debris falls outside this expertise. Further, the topic of this fifth challenged portion is not an area where the court needs assistance. Without more, I would be unlikely to qualify anyone to assist me just in gauging the amount of observable debris in a series of photographs. When these Experts make such comments as the one here challenged, they can leave the impression of straying into advocacy not being independent.

[37] Regarding the sixth challenged portion, I exclude the word "non-respirable" from each instance identified by CNOOC in its table. The rest of the statements in which that word is found remain. The rest of the statements fall within the Experts' permitted scope of expertise. I agree with CNOOC that the Experts are outside their permitted expertise when describing bundles and fragments and large particles also as "non-respirable". 801 may be correct that while testifying the Experts' explained some effects of particle size on respirability and explained tissue burden analysis and recounted some of their experiences related to respirability, but that did not form part of the description of their scope of permitted opinions. The "non-respirability" opinion falls outside the approved scope for their opinions.

[38] I exclude from the seventh challenged portion the reference to the size of a particle at which it is "potentially respirable", for reasons just given above. As for the remainder of the challenged portion, I do not understand the Experts to be opining that the large asbestos particles in the fireproofing do not remain airborne, as objected to by CNOOC. Even if they did speak to that, I consider it to be a matter sufficiently within the Experts' scope, particularly as that expertise pertains to the potential for fibre release. In studying fibre release they will unavoidably also learn more about the fibres once released.

[39] Upon resumption of trial, this Decision shall also be added to the trial record, so no formal order need be prepared by counsel as to its conclusions.

Heard on the 1st, 21st and 27th days of February, 2023.
Dated at the City of Calgary, Alberta this 13th day of April, 2023.

P.R. Jeffrey
J.C.K.B.A.

Appearances:

J.E. Sharpe
J. Lisztwan
M. Kuhl
D. Thiedemann
M. Bova
for CNOOC, the Plaintiff/Defendant by Counterclaim

B. Yorke-Slader, KC
M. Mysak
D. McKinnon
T. McDonough
D. Wahl
A. Yowart
V. Rudolf
A. Marshall
for 801, the Defendants/Plaintiffs by Counterclaim

J. Patterson
D. Dickey
J. Deyholos
for CNOOC Limited, the Defendant by Counterclaim