Citation: 2014 TCC 35
Date: 20140131
Docket: 2011-3519(IT)G

BETWEEN:

ACHIM BEKESINSKI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

RULING ON APPELLANT'S PRELIMINARY OBJECTION TO EXPERT WITNESS REPORT TENDERED BY THE RESPONDENT

Campbell J.

Introduction:

[1] At the end of the third day of the hearing of this appeal, Appellant Counsel raised an objection and sought this Court's ruling on whether the Expert Report ("the Report"), being tendered by the Respondent, should be excluded.

[2] The sole issue in this appeal is whether the Appellant is liable, as the director of D.M. Edward Cartage Ltd. ("the Company"), for unremitted amounts of taxes, Employment Insurance premiums and Canada Pension Plan contributions owed by the Company.

[3] The answer to this issue is dependant upon whether the Appellant actually signed a notice of resignation on July 20, 2006, or whether, as the Respondent contends, he signed it on a later date and, consequently, the notice of resignation has been back-dated. To support its position, the Respondent sought to have its witness, Annie Vallière, qualified as an expert in ink dating.

[4] Following a *voire dire*, I rendered my reasons orally and qualified Ms. Vallière, a Canada Border Services forensic document chemist, as an expert in this capacity. Immediately following this qualification, Appellant Counsel raised his

preliminary objection respecting the tendering of Ms. Vallière's Report. The Appellant submitted that the Report should be excluded because it does not meet the requirements of Rule 145 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") and, in addition, was without evidentiary foundation. I requested that the parties provide written submissions respecting the scope, purpose and application of Rule 145 and, more specifically, subrule 145(2)(*b*) and whether the Report meets the requirements of the *Rules*.

Position of the Parties:

[5] Appellant Counsel's argument focussed not only on Rule 145 but also on what he termed the "no foundation" evidentiary objection. According to the Appellant's Written Submissions, Rule 145 "sets out the procedural baselines in which an expert report may be adduced: i.e. procedural guidelines." (Appellant's Written Submissions, para 7). The Appellant also argued that there is no evidentiary foundation established for the expert opinion evidence (Appellant's Written Submissions, para 23) because the Report contains only a bare conclusion together with a brief explanation of the process employed. More specifically, the Appellant argued that the Report lacks evidentiary foundation because it is missing the following items upon which Ms. Vallière's opinion is based: the data collected, the quantitative analysis derived from the data and the ratios based on the quantitative analysis.

[6] The Respondent submits that "[o]n a clear and plain wording of subrule 145(2)(b), Ms. Vallière's report meets the requirements" (Respondent's Written Submissions, para 16) and, therefore, the *Rules* do not require that the "scientific data relied on to reach her conclusion" be included in the Report (Respondent's Written Submissions, para 7).

[7] According to the Respondent's argument, the Report satisfies subrule 145(2)(*b*) in the following manner:

> 10. While her report may be succinct, it holds all of the information required by subrule 145(2)(b): what she was asked to do (she was asked whether the document at issue was signed at the time it was purported to have been signed, the methodology employed to arrive at her opinion and Ms. Vallière's opinion on the issue).
>
> (Respondent's Written Submissions, para 10).

[8] The Respondent noted, at paragraph 11 of its Written Submissions, that although "[t]he scope and purpose of Rule 145 have not been judicially considered," the principles underlying the rules on expert evidence can be gleaned from similar legislation in other jurisdictions. Specifically, the Respondent noted that the Tax Court *Rules*, respecting expert evidence, do not have the same explicit requirements set out in Rule 53.03 of the Ontario *Rules of Civil Procedure*. The current version, Rule 53.03, mandates that an expert statement include the assumptions and the basis for the expert's opinion, along with the research and the documents relied upon in formulating the opinion (Respondent's Written Submissions, paras 12 and 13). However, Rule 145 is less onerous as it does not contain the same requirements and merely "mandates that the expert provide an (*sic*) 'full statement of the proposed evidence in chief'." (Respondent's Written Submissions, para 15).

Analysis:

[9] Rule 145 states that, unless this Court otherwise orders, an expert will not be permitted to testify at a hearing unless "a full statement of the proposed evidence in chief of the expert" has been set out in the expert's report. This limits the expert's evidence in chief to the content of the report. The main question is, therefore, whether Rule 145 requires that the data, quantitative analysis and ratios, referenced by the Appellant as formulating the foundation of Ms. Vallière's expert opinion, be specifically included in the Report.

[10] Rule 145 of the *Rules* states:

> **145.** (1) In this section, "affidavit" includes,
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> (*a*) a solemn declaration made under section 41 of the *Canada Evidence Act*,
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> (*b*) a statement in writing signed by the proposed witness and accompanied by a certificate of counsel that counsel is satisfied that it represents evidence that the proposed witness is prepared to give in the matter, or
>
> (*c*) a statement in writing in any other form authorized by direction of the Court in a particular case and for special reasons.
>
> (2) Unless otherwise directed by the Court, no evidence in chief of an expert witness shall be received at the hearing in respect of an issue unless,
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> (*a*) the issue has been defined by the pleadings or by written agreement of the parties stating the issues,
>
> (*b*) a full statement of the proposed evidence in chief of the witness has been set out in an affidavit, the original of which has been filed and a copy of which has been served on all other parties, not less than thirty days before the commencement of the hearing; and
>
> (*c*) the witness is available at the hearing for cross-examination.

> (3) Unless otherwise directed by the Court, no evidence of an expert witness shall be led in rebuttal of any evidence tendered in writing under paragraph (2)(*b*) unless the rebuttal evidence has been reduced to writing in accordance with this section and the original filed and a copy served on all the other parties not less that fifteen days before the commencement of the hearing.
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> (4) Subject to compliance with subsection (2), evidence in chief of an expert witness may be given at the hearing by,
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> (*a*) reading the whole or part of the affidavit into evidence by the witness, unless the Court, with the consent of the parties, permits it to be taken as read, and
>
> (*b*) if the party calling the witness so elects, the verbal testimony of the witness,
>
> (i) explaining or demonstrating what is in the affidavit or the part that has been given in evidence, and
>
> (ii) in respect of other matters by special leave of the Court, upon such terms as may be just.
>
> (5) A witness shall not be cross-examined before the hearing on an affidavit filed under subsection (2) without leave of the Court, and if such leave is granted, the witness shall not be cross-examined at the hearing without leave of the Court but the witness may, with leave of the Court, be produced for re-examination and shall be produced for examination by the Court, if the Court so requires.
>
> (6) An affidavit filed under subsection (2) shall not become part of the evidence at the hearing unless given in evidence under subsection (4).

[11] There are proposed amendments pending to Rule 145, which will govern expert witnesses and the admissibility of their evidence in this Court. The proposed new Rule, in contrast to the present Rule, enumerates specific requirements in respect to expert report content. The proposed new Rule accomplishes this by adding, as a Schedule, a "Code of Conduct for Expert Witnesses", which will enumerate the specific content required to be included in an expert report. That content shall include the reasons for each opinion, the facts and assumptions upon which the opinion is based, literature or other materials which support the expert opinion and a summary of the methodology, including tests and investigations relied upon.

[12] The proposed amendments to Rule 145 mirror the current *Federal Courts Rules* 52.1 to 52.6 and 279 to 280. The Federal Court's previous Rules, on admissibility and tendering of expert evidence, were similar to the present Tax Court Rule 145. Under those prior Rules, the Federal Court of Appeal in *Leithiser v Pengo Hydro-Pull of Canada Ltd.*, [1974] 2 FC 954 (FCA), at para 15, explained that the purpose of expert evidence rules was to reduce the length and expense of trials

involving experts and to encourage settlement in the pre-trial process. The Court further noted that this purpose is undermined when counsel withhold information in the expert affidavit and attempt to introduce it at trial. The Court held that, while such practice may comply with the letter of the law, it will not be consistent with the purpose of the Rule. Since the Federal Court's prior Rules governing experts were similar to the present Tax Court *Rules*, these remarks apply to the purpose behind the present Rule 145.

[13] The underlying purpose of Rule 145 is one of procedural fairness designated to avoid 'trial by ambush'. This point was canvassed in *Mathew et al v The Queen*, 2001 DTC 742, where Justice Dussault stated, at para 35:

> … Secondly, notice was given pursuant to section 145 of the *Tax Court of Canada Rules (General Procedure)* that the evidence Mr. Taylor was going to give was that contained in his report. Based on his evaluation of the type of evidence contained in the report, counsel for the Appellants proceeded to trial on the assumption that the report could not be admitted in evidence and that a rebuttal opinion was not necessary in the circumstances. After nine days of trial we are at a point where counsel for the Respondent is asking the Court to at least accept Mr. Taylor's testimony on limited matters within his area of expertise. In my opinion, procedural fairness embodied in section 145 of the Rules requires that the report filed and served represent the evidence that the expert is prepared to give in the matter. The 30 days' notice ensures that the other party can prepare his case accordingly. (Emphasis added)

[14] The Court in *Mathew* excluded the expert report because, among other reasons, it failed to include the assumptions upon which the expert had formulated the opinion. The Court concluded that the potential prejudice that might arise as a result of such failure outweighed the necessity of admitting the report into evidence.

[15] In *Witt v The Queen*, 2008 DTC 4322, Justice Bowie rejected the expert opinion evidence as it did not meet the requirement of necessity set out by the Supreme Court of Canada in *The Queen v Mohan*, [1994] 2 SCR 9, at pages 21 to 25. Justice Bowie went on to conclude, at paragraph 9, that, even if he were to admit the expert opinion, he would not have found it useful because:

> … His Rule 145 affidavit is 6½ pages long. The first 6 pages are no more than a recitation of facts that are found in the Agreed Facts. The last seven lines express his opinion on the very question that I have to decide, consisting simply of a bald conclusion, devoid of any significant analysis or reasoning. The opinion evidence, which was marked as Exhibit A-2 at the trial, is ruled inadmissible. …

[16] With the exception of the two Tax Court cases cited, there is little caselaw that is useful in disposing of the preliminary objection. However, a comparison of this Court's Rule 145 to the comparable provisions under the Ontario and British Columbia Civil Procedure Rules is useful. The existing Ontario Rules are the product of considerable changes stemming from recommendations contained in the *Civil Justice Reform Project: Summary of Findings and Recommendations*, Hon. Coulter A. Osborne, Q.C. (November 2007) at pages 80 to 84, which suggested greater regulation of the content of expert reports. Consequently, the current Rule 53.03(2.1) of the Ontario *Rules of Civil Procedure* ("the New Ontario Rules") requires that an expert report include specifics such as the reasons for the expert opinion, description of assumptions underlying the opinion, research conducted and documents relied upon. The provision governing expert evidence prior to the amendments (the "Old Ontario Rules") which preceded the current Rule 53.03(2.1) required an expert to set out his/her name, address and qualifications, the opinion and the "substance of his or her proposed testimony." The wording contained in the Old Ontario Rules is comparable to this Court's current Rule 145, which references "a full statement of the proposed evidence in chief."

[17] In *Transmetro Properties Ltd. v Lockyer Bros. Ltd.*, [1985] OJ No. 1671, the Ontario Supreme Court - High Court of Justice, at paragraph 19, held that the "substance" of the proposed testimony included supporting documents, calculations and other engineering background materials relied upon by the expert in formulating the opinion. Consequently, the Court held that the word "substance", under the Old Ontario Rules, required that more than a mere conclusion be included in a report. At paragraph 19 of these reasons, the Court considered the requirements under Rule 31.06(3) and stated:

> I also observed that r. 31.06(3) uses the words:
>
> "… disclosure of the findings, opinions and conclusions …"
>
> It is my view that those words can only bear the interpretation that before one concludes, one must find; before one opinionates, one must find and therefore it is essential that the defendant is aware of the findings which I interpret should be the documents, the calculations and the engineering data upon which the opinion and the conclusions were drawn. (Emphasis added)

[18] The Court in *Marchand (Litigation Guardian of) v Public General Hospital Society of Chatham*, [2000] OJ No. 4428 (ONCA), upheld the Trial Judge's finding and refused to allow an expert to testify on an issue that had not been included in the

expert report. After reviewing the jurisprudence, the Court, at paragraph 38, made the following comments respecting the purpose of the Rule:

> … these cases indicate that the "substance" requirement of rule 53.03(1) must be determined in light of the purpose of the rule, which is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial. Accordingly, an expert report cannot merely state a conclusion. The report must set out the expert's opinion, and the basis for that opinion. Further, while testifying, an expert may explain and amplify what is in his or her report but only on matters that are "latent in" or "touched on" by the report. An expert may not testify about matters that open up a new field not mentioned in the report. The trial judge must be afforded a certain amount of discretion in applying rule 53.03 with a view to ensuring that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report.

[19] Rule 11-6 of the British Columbia *Supreme Court Rules* (the "New BC Rules") requires that an expert report set out the reasons underlying the opinion, a description of the factual assumptions, research conducted and documents relied upon. This provision contains essentially the same requirements as the present Rule 53.03 of the New Ontario Rules. The British Columbia *Supreme Court Rules* were amended on July 1, 2010. Under the former Rules (the "Old BC Rules"), expert evidence was governed by Rule 40A, which stated that "a written statement setting out the opinion of an expert is admissible" provided that the statement sets out or is accompanied by a supplementary statement that includes the name and qualifications of the expert and the "facts and assumptions on which the opinion is based."

[20] British Columbia courts have held that the Rules respecting expert evidence are "not simply a matter of form" and if an expert report does not provide the required information, it may be contrary to the object of the Rules, namely, a just, speedy and inexpensive determination of the proceedings on its merits (*Haughian v Jiwa*, 2011 BCSC 1632 at para 33). Although the Court's comments address the New BC Rules, I believe that they are equally applicable to the objection before me and the purpose underlying Rule 145. Although the Court in *Haughian* was encouraged to exercise its discretion and admit the report despite its non-compliance with Rule 11-6, it refused to do so on the basis that the opposing party is entitled to a report that complies with the Rules in order to properly prepare cross-examination of the expert and to decide whether to obtain a rebuttal report.

[21] The decision in *Mazur v Lucas*, [2010] BCJ No 2087 (BCCA), involved a question of the admissibility of hearsay evidence contained in an expert report.

Although not directly on point, the Court's comments on the purpose of expert evidence rules, under both Rule 40A of the Old BC Rules and Rule 11-6 of the New BC Rules, are pertinent. At paragraph 42, the Court compares these two Rules but states that the general purpose behind both Rules remains the same:

> New Rule 11-6 expands on what an expert was required to state under old Rule 40A, but does not alter the general principle that it is essential for the trier of fact to know the basis of an expert opinion so that the opinion can be evaluated. The Rule has a dual purpose. The second purpose is to allow the opposing party to know the basis of the expert's opinion so that they or their counsel can properly prepare for, and conduct, cross-examination of the expert, and if appropriate, secure a responsive expert opinion. Thus, the result of these reasons would be the same if this case had arisen under the new Rules. There is nothing in these Rules touching directly on the question of the admissibility of hearsay evidence in expert reports

[22] In *Goerzen v Sjolie*, [1997] BCJ No. 44 (BCCA), also decided under Rule 40A of the Old BC Rules, the Court dealt with two grounds of appeal from the Trial Judge's decision which excluded material portions of the expert report that were unsupported by facts and assumptions. It was argued that the expert report, together with the expert's working files, which were produced at trial, satisfied Rule 40A. The Appellant took the further position that the usual practice was that working papers do not accompany reports but are made available for inspection and copying following delivery of the report and prior to trial. The Court rejected this reasoning at paragraphs 15 and 16:

> I am unable to agree that the precision of clause (b) of subrule (5) should be modified by a subjective definition and wholly dependent on the author's views of what the other party should know. …
>
> It is incontestable that working papers are often voluminous, repetitive and sometimes unintelligible to other than a trained eye. But this does not relieve a party whose expert witness delivers a report purporting to conform in purpose and content to subrule (5) from ensuring that all the facts and assumptions on which the opinion is based are included. …

[23] During the *voire dire*, Ms. Vallière admitted on cross-examination that the opinion presented in her Report was based upon data she collected, quantitative analysis conducted on the data collected and then drawing consequent ratios. She agreed with Appellant Counsel that her report did not contain any of the methodology and testing that supported her stated opinion. She pointed out that these facts, mathematical testing and underlying assumptions were contained in her work

notes but that it had not been her decision to withhold this information and analysis from the Report. At page 181 of the transcript, she stated the following in response to Appellant Counsel's questions:

> A. It is not my decision to release it. Counsel knew about it. If she didn't release it, it's not my decision.

Except for these references during the *voire dire*, the support for her stated opinion is not otherwise before this Court, either in the evidence as a schedule attached to the Report or as separately submitted by Respondent Counsel prior to, during or subsequent to the hearing.

[24] Rule 145(2)(*b*) establishes the boundaries respecting evidence in chief of an expert and it limits that evidence to "a full statement of the proposed evidence in chief of the witness" as set out in an affidavit and filed and served on all parties at least 30 days before the date scheduled for the hearing. This is a mandatory requirement unless otherwise directed by the Court. Appellant Counsel argued that the Report does not comply with Rule 145 because it simply recites an opinion without the data, quantitative analysis and ratios which, by Ms. Vallière's own admission, are absent from the Report. Respondent Counsel argued that, on a "clear and plain wording" of Rule 145, the Report, although succinct, contains all the necessary information, including the task Ms. Vallière was required to complete, a description of the general methodology and her opinion.

[25] With the exception of the *Mathew* and *Witt* decisions, I have been unable to locate any other jurisprudence where the scope and purpose of Rule 145 has been considered by this Court. The caselaw from the Ontario and British Columbia jurisdictions, on their respective expert report provisions, assists with the principles underlying the Tax Court *Rules* on expert evidence. Both Ontario and British Columbia have amended provisions which list specific information to be included in an expert report. The Tax Court is in the process of amending its Rule in a similar fashion. However, the wording under the Old Ontario Rules and the Old BC Rules is similar to the present Rule 145 of this Court.

[26] So what does the phrase, contained in our current Rule 145, "a full statement of the proposed evidence in chief," mean as it applies to expert reports? According to the *Oxford English Dictionary*, 2nd ed., the word "statement", which is used as a noun in Rule 145, means:

> 3. a. A written or oral communication setting forth facts, arguments, demands, or the like.

Black's Law Dictionary, 9th ed., defines "statement" as:

> 2. A formal and exact presentation of facts.

Rule 145 further employs the adjective "full" to describe the noun "statement". *Collins English Dictionary*, http://www.collinsdictionary.com, defines "full", when used as an adjective, as:

> 5. *(premonimal)* with no part lacking; complete – *a full dozen*

Merriam-Webster Dictionary, http://www.merriam-webster.com, defines "full" as:

> **d:** not lacking in any essential: PERFECT <in *full* control of your senses>

[27] By definition, "full statement" implies that exact facts and arguments, complete in extent and every particular, respecting the expert's proposed evidence in chief shall be set out in the affidavit. This means that Ms. Vallière's Report, which, by her own admission in the *voire dire*, does not contain the underlying data collected, quantitative analysis employed and the ratios calculated to support her stated opinion, is deficient as it does not contain a full statement of her proposed evidence in chief as mandated by Rule 145. As noted in the jurisprudence from other jurisdictions, such a deficiency compromises the Appellant's ability to prepare for cross-examination and to properly instruct its own expert witnesses. This leaves the Appellant at a distinct disadvantage and, as caselaw from other jurisdictions has noted, is not consistent with the spirit and purpose of similarly worded expert evidence rules. These rules exist to facilitate trial preparation and to decrease time and expense in matters involving experts. This is the common theme of the expert evidence rules across jurisdictions. Adequate notice of the evidence prevents 'trial by ambush' and the potential prejudice that may result to the opposing party.

[28] According to the *voire dire* evidence, Ms. Vallière's Report provided the general methodology she adopted together with her opinion. Although the present Rule 145 does not specifically require that a report disclose data, analysis and ratios, which Ms. Vallière admitted underlies her opinion, by the plain and obvious meaning of "full statement" and in light of the object and purpose of Rule 145, procedural fairness demands that an expert report include such underlying facts and assumptions. This Court, in the case of *Mathew*, held that an expert has an obligation

to communicate those facts and assumptions which are relied upon in formulating an opinion contained in a report. British Columbia courts have held that fairness requires notice to an opposing party of not only the expert opinion but, again, its underlying facts and assumptions to facilitate a just, speedy and inexpensive determination of every proceeding on its merits. Similarly, the Ontario Court of Appeal in *Marchand*, at paragraph 38, held that the purpose of expert evidence rules is to "facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial."

[29] In respect to specific content of expert reports, caselaw has consistently held that data, analysis and calculations relied upon to formulate an opinion must also be included. Providing this information by disclosing an expert's working files at trial has been held not to satisfy the requirements of the British Columbia Rules (*Goerzen*). The Ontario Supreme Court - High Court of Justice in *Transmetro* also concluded that the phrase "substance of the proposed testimony," referenced in the Old Ontario Rules respecting expert evidence, included supporting documents, calculations and other engineering background materials relied upon by an expert in formulating his opinion. Similarly, the Federal Court of Appeal in *Karam v National Capital Commission*, [1978] 1 FC 403 (FCA), held that, where an expert affidavit does not adequately explain an expert's reasoning, such expert should not be allowed to supplement the affidavit with verbal testimony until a supplementary affidavit has been filed and the opposing party has time to consider it.

[30] An expert opinion must be supported by underlying facts, calculations, research, documents, hypotheses or whatever it is the expert is relying upon to formulate his or her opinion. Such information must be stated and included in the report, otherwise the opinion is simply that: an unsupported opinion. Ms. Vallière's Report fails to comply with the form that Rule 145 dictates a report shall take. Further, as noted in *Haughian*, at paragraph 33:

> … it is not simply a matter of form. It is not for plaintiff's counsel, or for that matter the court, to piece together various documents and attempt to determine what the report actually consists of. …

[31] Respondent Counsel's argument that the Report satisfies the practices and procedures of the Canada Border Services Agency with respect to the preparation of ink dating reports, of course, has no relevance in my determination of whether it satisfies the requirements of Rule 145. In preparing this Report for the hearing, Respondent Counsel made a decision to limit Ms. Vallière's statement and to omit

any reference to the working files which Ms. Vallière testified supported her opinion in the Report. This was a judgment call that Counsel made in preparing the conduct of her case that would come before this Court. Whatever her reasons, in my view she decided that nominal compliance with Rule 145 would suffice. That was a risk that Counsel chose to take. Counsel also made a choice not to offer these working files to Appellant Counsel or to this Court at any point, even after they became an issue.

[32] While I may have the discretion to order the Respondent to release the expert's working files to the Appellant and to adjourn the hearing to further dates down the road to allow the Appellant additional time to review those files, to prepare a cross-examination and to decide on potential rebuttal evidence, in my opinion procedural fairness, which Rule 145 aims to accomplish not only in its wording but in its underlying object and purpose, dictates that, in the circumstances of this appeal, Ms. Vallière's Report be excluded. In addition, I have no duty to correct Counsel's decision to approach a case in a particular way, particularly as it relates to compliance with the *Rules*. Counsel must make decisions like this all the time but, unfortunately in these circumstances, I do not see my role as being an active participant in correcting the approach adopted by Respondent Counsel. To allow further adjournments in this matter would go against the very purpose underlying these expert evidence Rules, thereby promoting additional time, delays and expenses. This course of action would only undermine the very spirit and object of the Rules. In addition, I believe that Respondent Counsel's suggestion, that the required information contained in the working papers and, in her words, "any deficiencies perceived by the Appellant" (Respondent's Written Submissions, para 2) could be remedied through cross-examination of the expert or by requesting this Court to assign little or no weight to the Report, would not comply with a proper interpretation of Rule 145, nor would it be consistent with the spirit and purpose of the *Rules*.

[33] My decision to exclude Ms. Vallière's Report, in accordance with these reasons, disposes of the preliminary objection. However, I wish to briefly address Appellant Counsel's "no evidentiary foundation" argument. As I understand his position, he argued that, since the Report lacks the data, quantitative analysis and ratios upon which Ms. Vallière formulated her opinion and since this information is not otherwise in evidence before this Court, there is "no evidentiary foundation being laid for expert opinion evidence." (Appellant's Written Submissions, para 23). The Appellant relied on the Supreme Court of Canada decisions in *The Queen v Lavallee*, [1990] 1 SCR 852 and *The Queen v Abbey*, [1982] 2 SCR 24, (see *Mazur*) for the proposition that "an expert opinion cannot be used to adduce evidence that is not otherwise adducible." (Appellant's Written Submissions, para 24). These cases relate to the evidentiary value of expert opinions that are based on hearsay evidence. The

Supreme Court of Canada has held that expert opinion that relies on hearsay evidence is admissible, not for the truth of its content or facts but for the limited purpose of evaluating the expert opinion. The weight to be accorded to an expert opinion is a function of the extent to which its underlying facts are found to exist. Where the opinion relies only on inadmissible hearsay evidence, it will be accorded little weight. Therefore, the "no foundation" evidentiary rule involves the weight, rather than the admissibility, of expert evidence that relies on hearsay.

[34] Appellant Counsel's argument is that, where there is no evidentiary foundation, in that the opinion is based only on inadmissible evidence, then the expert's evidence may be excluded or accorded little weight. However, the Appellant did not identify any hearsay evidence or other such inadmissible evidence that Ms. Vallière relied upon in formulating her opinion. The Appellant has not argued that those items that are missing from her Report are hearsay evidence but, instead, takes issue with the Report because of the omission of those very items. These were comprised of the lab tests and calculations which are not hearsay but, rather, the expert's firsthand knowledge, observations and so forth. In fact, quite the opposite position has been argued by the Appellant – that these missing items are imperative to the Report and should have been included. Consequently, the Appellant takes issue, not with the fact that Ms. Vallière has relied on inadmissible evidence in formulating her opinion but, rather, that the scientific data, tests, calculations and process employed by her in formulating her opinion has been omitted from the Report. It is unclear to me how Appellant Counsel's argument respecting "no foundation" as it relates to the Supreme Court of Canada decisions, has any application to the objection that was before me.

[35] For these reasons, since the Report does not comply with Rule 145, it will be excluded.

Signed at Ottawa, Canada, this 31st day of January 2014.

"Diane Campbell"

Campbell J.

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