2001 CarswellOnt 1089
Ontario Superior Court of Justice (Divisional Court)

Ontario (Ministry of Municipal Affairs & Housing) v. Ontario (Municipal Board)

2001 CarswellOnt 1089, [2001] O.J. No. 922, 103 A.C.W.S. (3d) 889, 144 O.A.C. 281, 20 M.P.L.R. (3d) 93, 41 O.M.B.R. 257

Her Majesty the Queen in Right of Ontario as Represented by the Ministry of Municipal Affairs and Housing, Applicant and Ontario Municipal Board, 1133373 Ontario Inc., Bond Lake Investors Inc., Zavala Developmentss Inc., Oak Ridges Farm Co-Tenancy, William Thompson, Diane Thompson, Peter Falconi, Joe Falconi, Casa Developments Inc., M. Sedgewick, E.J. Dickson Sifton, The Corporation of the Town of Richmond Hill, The Corporation of the Regional Municipality of York, Toronto and Region Conservation Authority, Duke of Richmond Developments Inc., and Save the Rouge Valley System Inc., Respondents

Wright J.

Heard: February 8-9, 2001
Judgment: February 21, 2001
Docket: 76/01

Counsel: *Leslie M. McIntosh*, *Catherine Conrad*, for Applicant
Michael McQuaid, Q.C., for 1133373 Ontario
J. Davis-Sydor, for Bond Lake Investors Inc.
Thomas Lederer, *C. Barnett*, for Oak Ridges Farm Co-Tenancy
A. Milliken Heisey, Q.C., for Save the Rouge Valley System Inc.

Subject: Property; Public; Evidence; Municipal
Related Abridgment Classifications
Administrative law
III Standard of review
III.1 Correctness
Evidence
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Municipal law
XVIII Planning appeal boards and tribunals
XVIII.3 Judicial review
XVIII.3.c Miscellaneous
Headnote
Evidence --- Opinion evidence — Expert evidence — Admissibility — General
Ontario Municipal Board gave interlocutory ruling declining to receive opinion evidence from province's proposed expert witness at hearing — While witness had 30 years' practical experience in field of evidence, witness did not have formal academic qualifications — Province brought application for judicial review on ground of denial of natural justice — Application granted — According to record, board had accepted that witness had expertise entitling him to give opinion evidence in required field,

and only rejected his evidence on basis of lack of formal qualifications — Board has expertise required to weigh evidence of expert witnesses and to determine which to accept — Board was directed to admit witness's evidence at such weight as it deemed advisable.

Municipal law --- Planning appeal boards and tribunals — Judicial review — General

Ontario Municipal Board gave interlocutory ruling declining to receive opinion evidence from province's proposed expert witness at hearing — While witness had 30 years' practical experience in field of evidence, witness did not have formal academic qualifications — Province brought application for judicial review on ground of denial of natural justice — Application granted — Although hearing before tribunal is ordinarily completed before judicial review occurs, matter was heard by single judge — Board had accepted that witness had expertise entitling him to give opinion evidence in required field and only rejected his evidence on basis of lack of formal qualifications — Board has expertise required to weigh evidence of witness — Standard of review for common law principles of admissibility of evidence is correctness, despite presence of privative clause in legislation — Opinion evidence of witness was rejected contrary to rules of evidence — Province's case relied on witness's evidence — Rejection of witness's evidence resulted in denial of natural justice — Board was directed to accept witness's evidence at such weight as it deemed advisable.

Table of Authorities

Cases considered by *Wright J.*:

Davie v. Edinburgh Magistrates, [1953] S.C. 34 (Scotland Ct. Sess.) — considered

Gage v. Ontario (Attorney General), 90 D.L.R. (4th) 537, 55 O.A.C. 47 (Ont. Div. Ct.) — considered

Gentles v. Ontario (Regional Coroner) (1998), *(*sub nom. *Gentles v. Gentles Inquest (Coroner of))* 165 D.L.R. (4th) 652, *(*sub nom. *Gentles v. Gentles Inquest (Coroner of))* 129 C.C.C. (3d) 277, *(*sub nom. *Gentles v. Béchard (Coroner))* 114 O.A.C. 245, 22 C.R. (5th) 343 (Ont. Div. Ct.) — considered

McIntosh v. College of Physicians & Surgeons (Ontario), 1998 CarswellOnt 4803, [1998] O.J. No. 5222 (Ont. Div. Ct.) — considered

R. v. Mohan, 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 18 O.R. (3d) 160 (note) (S.C.C.) — considered

Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières, 11 Admin. L.R. (2d) 21, *(*sub nom. *Université du Québec à Trois-Rivières v. Larocque)* [1993] 1 S.C.R. 471, *(*sub nom. *Université du Québec à Trois-Rivières v. Larocque)* 93 C.L.L.C. 14,020, *(*sub nom. *Université du Québec à Trois-Rivières v. Larocque)* 101 D.L.R. (4th) 494, *(*sub nom. *Université du Québec à Trois-Rivières v. Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières)* 148 N.R. 209, *(*sub nom. *Université du Québec à Trois-Rivières v. Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières)* 53 Q.A.C. 171 (S.C.C.) — applied

Statutes considered:

Judicial Review Procedure Act, R.S.O. 1990, c. J.1

s. 6(2) — considered

Evidence Act, R.S.O. 1990, c. E.23

s. 23 — considered

Statutory Powers Procedures Act, R.S.O. 1990, c. S.22

s. 15(1) — considered

APPLICATION for judicial review of interlocutory ruling by Ontario Municipal Board, finding evidence of expert inadmissible.

***Wright J.*:**

Summary

1 This matter arises from a ruling made in the course of a hearing before the Ontario Municipal Board. The Board declined to receive opinion evidence on certain topics from the witness "H". The general rule in our law is that witnesses are to give the tribunal facts, not opinions. Wigmore, a great authority in the field of evidence, has called this rule "an historical blunder".

2 There is an exception to this general rule. Persons whom the tribunal considers to have special training or experience in the field may offer opinions. In law such a person is called an "expert". As Professor Paciocco notes in his book on Evidence,

(p. 136) "expertise" in this sense is a modest status achieved when the "expert" possesses special knowledge and experience going beyond that of the trier of fact. Where this threshold level exists, deficiencies in expertise can affect the weight of the "expert" evidence, but do not normally affect its admissibility.

3 In this case the Province and those associated with it ("the applicants") argue that the Board accepted that the witness in question had practical experience in these fields. They argue that having accepted this, the threshold was met and it was not open to the Board to refuse to hear the evidence of the witness on the subjects.

4 The Province and its allies argue that the Board declined to hear the witness' opinions on these subjects because, although he had participated in seminars on the subject over the years, his formal academic training was not in the areas in question. They argue that by stipulating that such witnesses must have formal academic qualifications the Board erred in law, that its error was patently unreasonable and that this error resulted in a denial of natural justice justifying the intervention of the court at this stage of the proceedings. They ask the court to direct the Board that such a witness need not have formal training or accreditation in a field and having accepted that this witness has practical experience in the fields in question they must consider his opinions on the subject, reserving to themselves the right to give those opinions whatever weight they consider appropriate when they come to consider all of the evidence presented to them.

5 Those resisting this application ("the respondents") argue that the Board did not in fact accept that this witness had the sort of practical experience in the fields in question that would meet the threshold level for the admissibility of such evidence. They argue that the Board was aware of the legal rules and the fact that the evidence of this witness was rejected in these three fields shows that they did not accept that he had the appropriate practical experience to meet the legal requirements for giving opinion evidence in these fields. Those resisting this application, go on to argue that even if the Board did err in this regard deference must be accorded to this very senior tribunal and the court should ignore such an error unless the error was patently unreasonable. The respondents argue further that even if an error has been made which is patently unreasonable, the role of the court is to intervene only when there has been a denial of natural justice. They argue that none can be established in this case.

6 The applicants argue that the opinion evidence of this witness is central to their case and the Board's refusal to hear this evidence constitutes a denial of natural justice.

7 The applicants submit that the Board was led into this error by the very commendable desire of the Board to hear only those witnesses it considered to be the most highly qualified by reason of their formal training and practical experience in a situation where the Board conceived that its duty was to yield to experts who were both fully trained and experienced. The applicants argue that the Board erred in considering that it had to yield to experts who are both fully trained and experienced. The applicants say it is the duty of the Board to assess all of the evidence. In doing this they may accept all of a witness' evidence, some of it or none of it. They need to yield to no one.

8 The court concludes that the Board having accepted that the witness "has approximately 30 years practical experience in dealing with hydrogeology related matters" and was "an experienced expert" it should have received the evidence of the witness leaving the weight to be given to that evidence to be assessed when all of the evidence on the hearing was before the Board.

Prematurity and S. 6(2) Judicial Review Procedure Act

9 This is an application for judicial review challenging an interlocutory ruling of the Ontario Municipal Board declining to accept opinion evidence from the witness H. in the field of geology, hydrogeology or hydrogeochemistry.

10 This is an unusual proceeding. There is a right to appeal a final decision of the Board, with leave of the court, on a question of law. The court ordinarily refuses to intervene during the course of proceedings before a tribunal.

> It is preferable to allow administrative proceedings to run their course before the tribunal and then consider all legal issues arising from the proceedings at their conclusion. It is preferable to consider such issues against a backdrop of a full record, including a reasoned decision by the tribunal. *McIntosh .v. College of Physicians & Surgeons (Ontario)*, , [1998] O.J. No. 5222 (Ont. Div. Ct.)(para. 36)

11 On the other hand,

> If there is a prospect of real unfairness through denial of natural justice or otherwise, a superior court may always exercise its inherent supervisory jurisdiction to put an end to the injustice before all the alternative remedies are exhausted. *(Gage v. Ontario (Attorney-General)* (1992), 90 D.L.R. (4th) 537 (Ont. Div. Ct.) at 553

12 Even if the court deals with an issue of judicial review of an interlocutory decision a three-judge panel of the court ordinarily deals with it. (S. 6(2) JRP Act)

13 The Municipal Board has already completed some 77 days of hearings. These hearings are anticipated to continue into June. These hearings have been divided into phases. Each phase deals with a specific aspect of the hearing. In overly simple terms the present phase involves water. The impugned ruling deals with the current phase. When Counsel for 1133373 Ontario Inc. moved to dismiss on the grounds of prematurity the applicants argued strenuously that the length of the hearings, their cost, and the essential nature of the excluded evidence were considerations dictating that the issue be dealt with now. Once I indicated that the issue would not follow the usual course and await the completion of the hearing there was no objection voiced to the request that the matter be dealt with by a single judge immediately. Referral to a panel of the full court would involve a delay until May. So keen were the respondents to have the matter dealt with forthwith that it was only after they had been arguing the application for about an hour that they thought to ask whether I was prepared to hear it. Leave was granted in the circumstances.

Affidavits

14 The applicant tendered three affidavits in support of this motion. The respondents argued vigorously that this issue must be determined upon the record and that the affidavits should be struck.

15 I have refused to strike the affidavits although much of what they contain is irrelevant to the issues before me. While I accept that the matter must be determined primarily upon the record, affidavit evidence is admissible to deal with certain issues, viz.

- Need for haste-should the court grant leave to hear this application at the interlocutory stage, and if so, on a single judge basis-the latter being an issue that, in the event, never arose for the reasons set out above,

- If a reversible error occurred, did it result in a denial of natural justice, i.e., the centrality of the rejected evidence and its effect upon the applicant's case,

The affidavits are not admissible for the purpose of establishing that the witness was qualified to give opinion evidence. That issue is not before the court. The issue is: whether the Board in fact conceded the qualifications for legal acceptance of the witness and if so, what are the legal ramifications of refusing to hear that evidence. Specifically:

Issues

16 Did the Board accept that the witness was an "expert" in the fields of geology, hydrogeology and hydrogeochemistry?

17 If so, did the Board err in rejecting the opinion evidence of the witness?

18 If so, was this error such that the court should intervene? I.e., what is the appropriate standard of review?

19 If so, did the error result in a denial of natural justice?

Did the Board Accept H. as an "Expert" in the Fields in Question?

20 The decision of the Board was as follows:

> The Board therefore makes the following findings, conclusions and decision based on that argument.

> Mr. H... has a Masters Degree in Civil Engineering. Mr. H....has attended approximately a dozen 1-3 day seminars since he formed his firm in 1977 dealing with hydrogeology related matters, and has approximately 30 years practical experience in dealing with hydrogeology related matters. His normal practice is to be the leader of a group of experts. He has never had any formal educational training in geology or hydrogeology or hydrogeochemistry.
>
> Despite Ms. Conrad's attempts, and by his own admission to the Board, Mr. H... is not a geologist, not a hydrogeologist nor is he a hydrogeochemist. He is in his own terminology an Environmental Systems Planner/Engineer — a discipline for which there is no formal description as far as the Board is aware. The Board finds that Mr. H... has expertise in the fields of air photo interpretation and the collection and mining of geographic data for hydrogeological purposes and these fields of expertise were conceded by Messrs. Lederer and McQuaid. Mr. H..., by his own admission has very little actual "in field" experience in geotechnical matters.
>
> Mr. H... intends in his evidence to try and persuade the Board that the proponents' hydrogeology evidence is wrong on matters such as where the water divide really is on the proponents' sites; where the groundwater flows are really going; and where the vertical flow of current recharge on site is ending up just to mention a few of his concerns. Mr. H... does not agree with the geological and hydrogeological experts of the proponents already heard by the Board. In the opinion of the Board after reading his witness statements he will also be contradicting some of the evidence of a fully trained hyrdogeologist, Dr. Hinton, called by his client — the Province — before him at his hearing.
>
> This is not right as in the opinion of the Board, Mr. H... should be have been called before Dr. Hinton and Ms. Conrad (another hydrogeologist called by the Province) to lay the foundation and let them give their opinion evidence of they hydrogeology on the proponents' sites pre and post development based on that foundation.
>
> Earlier in this hearing the Board found that Dr. Sharpe could not give opinion evidence on hydrogeology even though he was a geologist with considerable practical hydrogeology experience. The Board would not only be inconsistent but open to severe criticism if it now allowed Mr. H... to give opinion evidence when he has even less formal training in geology or hydrogeology than Dr. Sharpe.
>
> In a matter as involved and of such scientific importance as the Oak Ridges Moraine, the Board must accept or reject the opinion evidence of fully trained and experienced experts. Mr. H... is the latter and not the former and therefore the Board must yield to those experts who are both.
>
> One cannot help but think of a recent occurrence in Walkerton where the water engineer, who despite having 15 years practical experience on the job, erred in a major way causing a catastrophic event, as he had had no formal training or education as an engineer before taking on the job. You may however be wrong — which, if followed by others in the future, they will look at this Board and say "How could you have accepted his evidence, he wasn't even an hydrogeoloist!"
>
> Ms. Conrad you are welcome to have Mr. H... lay his foundation if you wish but he is not to give geological, hydrogeological or hydrogeochemical opinion evidence at this hearing. Finally, you may wish to have some time to reassess how you wish to continue calling your evidence.

21 Did the Board accept that the witness had the experience that should have entitled him to give opinion evidence in the fields mentioned?

22 The applicants say that they did. The applicants say that the Board accepted the witness as a person who had "approximately 30 years practical experience in dealing with hydrogeology related matters" and was "an experienced expert". The applicants say that the Board rejected his evidence because it wrongly insisted upon formally trained witnesses, that when it came to accepting or rejecting the opinion evidence of fully trained and experienced experts the Board thought it had to yield to those experts who were both, and that the Board was concerned that "others in the future, they will look at this Board and say 'How could you have accepted his evidence, he wasn't even a hydrogeologist'."

23 The applicants say that in rejecting his evidence in those fields the Board erred:

- In insisting upon formal training as a prerequisite to hearing a witness,
- In stating that it was simply following a previous ruling to the effect that Dr. S. could not give opinion evidence on hydrogeology because of his lack of formal training in the field, and
- In taking into consideration the assumption that H. would be called upon to contradict some of the evidence of a fully trained hydrogeologist, Dr. Hinton, called by the Province before him at the hearing.

24 There is no doubt that the Board erred in the recitation of its ruling on the admissibility of the opinion evidence of Dr. S. In fact they did not prevent Dr. S. from giving evidence on hydrogeology although they discouraged him from doing so. On Dec. 7, the Board had ruled:

> Now as to Dr. Sharpe's qualifications, the Board makes the following ruling: There's no question that geology and hyrdogeology go hand-in-hand for one to fully understand the Oak Ridges Moraine. There is no question that Dr. Sharpe is a fully qualified geologist and is a specialist in glacial sedimentation. He is not, however, a fully qualified hydrogeologist which is attested to by his own admission that he and hydrogeologist, Dr. Mark Hinton, "teach each other as we go." The Board will therefore, keeping in mind Dr. Sharpe's practical hydogeology experience, have to decide what weight to give any hydrogeology evidence he gives during the hearing. We would suggest that, wherever possible, he'd leave the hydrogeological opinions and conclusions, his, emanating from his "geological container" be left to Dr. Hinton.

25 The Board also erred when it took into consideration the "fact" that H. would be called upon to contradict the evidence of Dr. Hinton, another witness called by the Province. Whether such contradictory evidence might or might not be given as a matter of fact, (and he testified at tab 3(C) Application Record, pp63-64 it would NOT be given) that consideration did not render H.'s evidence inadmissible as a matter of law. S. 23 of the Evidence Act specifically permits a party to contradict his own witness "by other evidence" so long as that party does not "impeach his or her credit by general evidence of bad character."

26 The respondents concede that the Board referred to H. as an "experienced expert" but they deny that the Board was referring to him as an experienced expert in the fields of geology, hydrogeology and hydrogeochemistry. The respondents submit that the decision of the Board must be looked at in the context of the entire record, specifically the record of the qualification hearing.

27 I agree that in interpreting the decision the wider record is relevant. Having considered the wider record I conclude that the Board accepted that the witness was an experienced expert in the fields in question as the expression "expert" is used in law, and that the only reason the evidence of that witness was rejected was because this "expert" was not "fully trained", or "formally trained". This was a concern the Board had expressed throughout both this witness' qualification hearing, and Dr. S.'s qualification hearing, this was the basis of Counsel's objection to the reception of his evidence in the fields in question (31 Jan., p. 89) and this was the reason the evidence of H. was rejected. While counsel conceded that the witness was an "expert" in the fields of air photo interpretation and the collection and mining of geographic data for hydrogeological purposes, the qualification hearing was oriented towards the witness's background in geology, hydrogeology and hydrogeochemistry. This was the focus of the evidence, the argument and the decision!

28 The Respondents argue that there was a discretion in the Board to reject an otherwise qualified witness where the cost of introducing that evidence would outweigh the benefit. The respondents argue that by admitting what the respondents consider to be dubious evidence that evidence enters the "food chain", is relied upon by others in formulating their opinions and makes the task of the Board more difficult.

29 There is no doubt that after considering the cost/benefit of potential evidence the tribunal might find that the prejudicial value of that evidence outweighed its probative value. That is not the case here. This Board has higher than usual qualifications. The evidence proposed will not involve novel science. The witness will not be the only witness to testify to such matters. And, as *R. v. Mohan* (1994), 114 D.L.R. (4th) 419 (S.C.C.) (p. 430) points out, the hearing is not simply a contest of experts with

the Board acting as a referee in deciding which expert to accept. At the end of the day the Board will have to decide what is in the public interest. In determining this the Board will consider the expert opinions tendered to it but, in the words of *Davie v. Edinburgh Magistrates*, [1953] S.C. 34 (Scotland Ct. Sess.) @ 40, "the parties have invoked the decision of a...tribunal and not an oracular pronouncement by an expert." This may be summarized: "The expert should be on tap, but not on top". I am satisfied the board will be able to handle this evidence appropriately.

Standard of Review

30 The respondents argue that the Board is a senior tribunal protected by a privative clause. As such it has the right to be wrong. The court should intervene only when its ruling is "patently unreasonable".

31 While this approach may be justified when considering whether such a tribunal has properly interpreted the legislation delineating its own jurisdiction, an argument may be made that when it comes to common law principles regarding the admissibility of evidence the appropriate standard of review is "correctness". Even assuming that the standard of review is "patently unreasonable", I accept that this standard is met in this case. Not only was the opinion evidence of this witness rejected contrary to the technical rules of evidence applied by a court, it was rejected contrary to the express legislative directive to such tribunals that they may admit evidence that would not be admissible in a court. (Statutory Powers Procedure Act, s. 15(1))

Denial of Natural Justice

32 Counsel for the applicants concede that not every error results in a denial of natural justice that justifies intervention by the court. The error must have such an impact upon the fairness of the proceeding that one is led to the conclusion that there has been a breach of natural justice. (*Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières*, [1993] 1 S.C.R. 471 (S.C.C.) @ 491;) Counsel for the Province has referred to the evidence of the witness, H., as "the centrepiece" of its case, the "bedrock". Counsel argues that the witness brings a unique ability to explain interdisciplinary co-relations and a unique experience with the area under consideration.

33 Counsel for Save the Rouge Valley System Inc. argues that this witness and his background were well known to the respondents through his involvement in the area over many years, his witness statement was given to them last June and there was no objection to his qualifications. Under the circumstances his client planed its case relying upon the evidence of this witness and is now caught without evidence to offer the Board.

34 On this issue I have not only studied the record but I have considered the affidavits sworn. While it might have been better to have had an affidavit from Ms. Conrad, counsel before the Board, to explain the role of this witness in the presentation of her case, I have concluded that in all of the circumstances the refusal of the Board to receive this evidence resulted in a denial of natural justice. (*Gentles v. Ontario (Regional Coroner)*, [1998] O.J. No. 3927 (Ont. Div. Ct.))

35 An order will go quashing the decision of the Ontario Municipal Board dated the 31 January 2001 refusing to accept the evidence of H. in the fields of geology, hydrogeology and hydrogeochemistry and directing the Board to accept his evidence in these fields, according it such weight as they may deem advisable when considering all of the evidence tendered on this hearing or any phase thereof.

36 I may be spoken to by telephone regarding costs or any other aspect of this decision. Arrangements may be made through the phone number supplied to counsel.

Application granted; evidence admitted.

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