Toronto Local Appeal Body

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ORDER ON QUALIFICATION OF EXPERT

Decision Issue Date Thursday, August 12, 2021

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), and Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): VENITA INDEWEY, CITY OF TORONTO

Applicant: VICTOR HIPOLITO

Property Address/Description: 90 ASH CRES

Committee of Adjustment Case File: 17 184062 WET 06 CO (B0063/17EYK), 17 184076 WET 06 MV (A0585/17EYK), 17 184077 WET 06 MV (A0586/17EYK)

TLAB Case File Number: 19 162059 S53 03 TLAB, 19 162061 S45 03 TLAB, 19 162062 S45 03 TLAB

Hearing dates: Oct 2 and 3, 2019, Sept 18 and 25, 2020, Dec 4,18, 2020, Jan 18, Feb 24, Apr 1, Apr 28, May 27, 2021

REGISTERED PARTIES AND PARTICIPANTS

Party/ Owner	Elizabeth Porritt	Russell Cheeseman
Expert Witness	Bruce Bostock	
Expert Witness	T.J. Cieciura	
Appellant	City of Toronto	Derin Abimbola
Expert Witness	Svetlana Verbitsky	
Appellant	Venita Indewey	
Party	Ron Jamieson	
Party	Long Branch Neighbourhood Association	Judy Gibson

Participant	Ron Jamieson
Participant	Sandy Donald
Participant	Steven Vella
Participant	Christine Mercado
Participant	Gerry Quackenbush
Expert Witness	David Godley

ORDER DELIVERED BY T. YAO

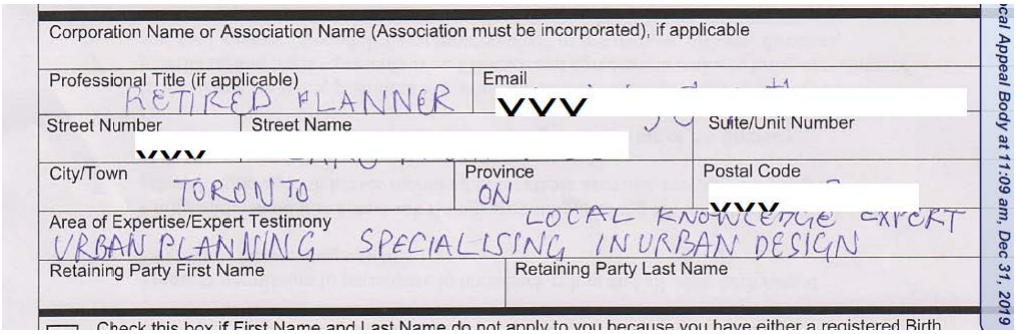
Mr. Godley requested that he be qualified to give opinion evidence in "urban planning specializing in urban design" and as a "local knowledge expert". Mr. Cheeseman, lawyer for the owner, brought a motion for an order that Mr. Godley was not qualified. I denied the motion; then I qualified Mr. Godley. These are written reasons supporting that oral decision. The underlying main case's result (whether or not to grant a severance and variances) is in a separate decision.

This decision covers the following topics:

1. Who is Mr. Godley and should he be qualified?
2. The general principle that qualification is a "modest status". This term is from the Ontario's Superior Court of Justice case of *Ministry of Housing v OMB.*
3. There exists a "general rule" which supposes that there is a hard boundary between fact and opinion. This is criticized as a "blunder" by an influential American jurist, and restated correctly by Canadian Justice Sopinka, who calls the hard boundary "unworkable".
4. The TLAB Practice Direction on experts, in the light of the above.

In qualifying Mr. Godley, I relied on the *Ministry of Housing* v OMB, which is appended to this decision. I also attach two other excepts from two other court cases: *Black v Toronto,* 2020, and *Deo v Sheasby*, 2021.

Mr. Godley's Form 6



Corporation Name or Association Name (Association must be incorporated), if applicable

Professional Title (if applicable): RETIRED PLANNER | Email: VVV

Street Number: VVV | Street Name | Suite/Unit Number

City/Town: TORONTO | Province: ON | Postal Code: VVV

Area of Expertise/Expert Testimony: URBAN PLANNING SPECIALISING IN URBAN DESIGN LOCAL KNOWLEDGE EXPERT

Retaining Party First Name | Retaining Party Last Name

Check this box if First Name and Last Name do not apply to you because you have either a registered Birth

...cal Appeal Body at 11:09 am, Dec 31, 2019

Above is Mr. Godley's Acknowledgement of Expert's Duty Form 6[1] indicating a wish to be qualified as:

> Urban planning specializing in urban design [and] local knowledge expert

Mr. Godley has also signed where he acknowledges an obligation to provide nonpartisan opinion evidence.

How other planners were qualified in this hearing

I qualified Mr. Cieciura (Ms. Porritt's planner) on the first day of this hearing, October 2, 2019. He was cross examined by Ms. Gibson (representative of Long Branch Neighbourhood Association). Mr. Cieciura testified he obtained a Master's degree in Rural Planning and Development from the University of Guelph in 1999. Ms. Gibson elucidated the following information in her cross examination:

- Mr. Cieciura had undertaken 20-30 cases in Long Branch within the last five years of which 60-80% have involved severances;
- In all of these cases, he has worked for the person seeking the severance;
- He has said "no" to some persons wishing to retain him, because on examination of their file, he felt he could not support the application;
- At the Committee of Adjustment, he used the word "NIMBY" but quickly corrected himself.

Mr. Cieciura said:

> I was approached by the designer for the owners to review this file and determine whether I could professionally support the application. . . .So I did do a review of information supplied by the owner's architect, and I reviewed general policy. . ., looked at the location of the subject property, provincial plans, City's Official Plan, zoning by-law. I

[1]I have blanked out certain fields for privacy reasons.

did conduct a site visit, had discussions with the owner's solicitor, and determined that I could support he application for consent to sever the subject property.

Based on all of the above, I qualified Mr. Cieciura.

Ms. Smith (City of Toronto Planning Department planner summonsed by Long Branch Neighbourhood Association) was also a planning witness. She said that she had been a City community planner assigned to Etobicoke for 13 months commencing September 2018. Then for a short period of time, she had a more senior role in the same office. Since January 2020 she has worked as a policy planner in the City Planning Department. Although Ms. Gibson did not ask that Ms. Smith be qualified, I accept that she has the qualifications to be an expert planning witness. Ms. Smith did testify as to her planning opinion on the severance being sought by Mr. Cheeseman's client. Mr. Cheeseman, Ms. Abimbola, the lawyer for the City, and other persons did not raise any objection to her lack of qualification when she spoke of her planning "opinion" .

The motion not to qualify Mr. Godley

Mr. Cheeseman's objection is that the Ontario Municipal Board has refused to qualify Mr. Godley, so I should too. In *82 Twenty Seventh Street*[2], (Member M. Carter-Whitney), and *6 Shamrock Ave*[3] *(*Member B. Taylor) both considered Mr. Godley **not** deserving of qualification because he lived in the area, and therefore had a personal interest in the outcome of the matter. Secondly, Mr. Godley had appeared in other similar hearings and he may have been an "activist" or advocate. These allegations were made to the OMB by Mr. Ketcheson, the owners' lawyer in both cases. The allegations were unsupported by sworn evidence.

In his motion, Mr. Cheeseman also did not supply documentary evidence other than the two OMB rulings just mentioned. Nor did he cross examine Mr. Godley on his experience, training or his attendances at other hearings. He moved to argument, submitting the two OMB decisions, which as I noted, rest on Mr. Ketcheson's allegations made seven years ago and made without benefit of the *Black v Toronto* or *Deo v Sheasby.*

In support of Mr. Godley's qualifications, Ms. Gibson offered three TLAB cases where he was found to be a local knowledge expert[4]. Those cases are set out in the chronology for local knowledge experts on page 8. I now turn to a 2020 court pronouncement on whether witnesses who have taken a public position should be disqualified.

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[2] PL 140319, (Dec 17, 2014). Ms. Carter-Whitney denied the severance.
[3] PL 140328 (Oct 31, 2014). Mr. Taylor granted the severance.
[4] *11 Stanley Ave, 15 Stanley Ave* and *77 Thirty Fifth*, discussed on page 8.

Black v Toronto

In *Black*, Justice Schabas was asked by a group of homeless persons to prohibit the City from closing encampments in public parks during the pandemic. Their evidence included affidavits from "committed medical experts", who had written publicly on the issue to oppose such evictions, and who swore similar affidavits for a nearly identical City of Hamilton application.[5]

Part of Justice Schabas's reasoning was:

> Often, because of their commitment to their field and the conclusions they have reached, experts become involved in advocacy. However, **this does not disqualify experts**; if it did it would risk denying courts important perspectives on many issues. Courts are not naïve and can, where necessary, discount or ignore testimony of experts if and when it becomes advocacy as opposed to evidence. (my bold)

A similar sentiment to "Courts are not naïve" and can assess whether evidence is advocacy[6] was expressed by Justice Wright in the *Ministry of Housing* case to be discussed in greater detail in the next section:

Here, the TLAB is the trier of fact and is not naive. Mr. Godley will not be the only Long Branch Neighbourhood Association witness. Severance disputes are not novel. The TLAB has to perform the same type of cost/benefit analysis; and consider the time spent hearing evidence versus the danger that such evidence may be "advocacy". In both OMB cases referenced by Mr. Cheeseman , the presiding members heard the allegedly controverted evidence anyway, so no time was saved. In my view, given the words "modest status" describing an expert witness, and discussed below, the qualification process is not the place to decide what weight is to be given to Mr. Godley's evidence.

"A modest status"

In *Minister of House v OMB*, the Minister asked the Court to review the OMB's refusal to accept Mr. H as an expert witness. Mr. H had no formal degree in

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[5] The two physicians clearly have expertise on these issues. . . . Dr. O'Shea's expertise regarding the impact and control of COVID-19 as it relates to the homeless population is also recognized by his participation on a subcommittee that advises [the City of] Hamilton's Emergency Operations Committee on those issues.

[6] [Justice Wright speaking about the OMB] 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.

hydrogeology but did have had some 30 years' practical experience. The Court directed the OMB to accept him as an expert.

Turning to this case, Mr. Godley has two planning degrees, has practiced as an urban planner for various governments and has an additional qualification that neither Mr. Cieciura nor Ms. Smith have, namely five years' experience sitting as a member of the Toronto Committee of Adjustment. Thus, by Justice Wright's standards, I find Mr. Godley has adequate training and experience to meet the test of being qualified. Justice Wright also commented on the difference between weight and admissibility:

> 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.

The purpose of qualification is to allow an expert but not an ordinary person to testify as to their "planning opinion". I now turn to how courts demarcate "opinion" as opposed to factual testimony.

Fact v. opinion

Justice Wright was of the view that the "general rule" formation of the demarcation between fact and opinion evidence was inadequate. However, he framed it in a "literary" way, by quoting Wigmore:

> [Justice Wright speaking) 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".

Wigmore on Evidence is the source for the law of evidence for lawyers. So, both Justice Wright and Wigmore are saying that fact merges into opinion and vice versa, in a way that defies a hard boundary. Justice Sopinka, former member of the Supreme Court of Canada, expands further:[7]

> 1. Rationale of Exclusion
>
> §12.4 The development of the rule excluding opinion evidence was characterized by Wigmore as "an historical blunder". Reduced to its essentials, it limited a witness to describing precisely and exactly his or her observations and no more. Any inference or conclusion taken from those observations was a matter for the court and the opinion of the witness was not wanted. The exclusion of such opinion evidence was primarily based upon the fear that it would otherwise result in a usurpation of the function of the

[7] Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 5th ed. Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst

> trier of fact and that such opinion was irrelevant. . . . These justifications appear to be **mere afterthought to support a rule which is neither sensible nor workable** if strictly applied to exclude inferences which are rationally based on the witness' perceptions and without which the witness could not accurately, adequately and with reasonable facility describe the underlying facts upon which her or his testimony is based. (citations omitted, my bold)

So, if the formulation that only experts can give opinion evidence is neither "sensible or workable", then what should be the general rule? The Ontario *Evidence Act* is silent about this issue; it merely says that only three opinion witnesses are permitted, unless the presiding judicial officer gives special permission[8]. The Ontario *Evidence Act* uses the helpful phrase according to "law or **practice**".

To ascertain what is common practice under a Wigmore-type evidence system, I resorted to the US Federal Rules of Evidence, a codification of the ten volume set of *Wigmore on Evidence*. This represents to me a formulation of what an Ontario judge would expect to be "practice". The 2020 US Federal Rules state:

> Rule 701 – Opinion Testimony by Lay Witnesses
> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
>
> Rule 702 – Testimony by Expert Witnesses
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

It is interesting that these rules start by the converse of what is usually stated; a lay witness **can give opinion evidence** unless it is scientific, and an expert witness is

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[8] Expert evidence
12. Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding. R.S.O. 1990, c. E.23, s. 12.

allowed to give opinion evidence **or otherwise**. The dividing line is whether the testimony is "scientific, technical or other specialized knowledge"[9].

Since we don't know at the outset whether the proposed witness will talk about non-technical or technical things, I think that a refusal to consider him as an expert as requested by Mr. Cheeseman would be premature, based on the *Ministry of Housing case.* Furthermore, according to Justice Wright, the OMB:

> 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. (*Ministry*, par 8)

Local Knowledge Experts

Mr. Godley also asks to be qualified as a "local knowledge expert" as described in the TLAB Practice Direction 6 on Expert Witnesses. The history is of this term is as follows:

May 11, 2018 — The Federation of North Toronto Residents (FoNTRA) submits a written brief recommending that the TLAB allow local knowledge experts to give opinion as well as factual evidence[10].

Sept 14, 2018 — In 15 Stanley Ave, former TLAB Chair Lord recognized Mr. Godley as "a person knowledgeable in local matters" and permitted him "to give opinion evidence as a lay citizen"[11]. Mr. Godley in that case

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[9] The Toronto Official Plan contains much language that is **not** technical or specialized. For example, it begins:
1. MAKING CHOICES Toronto is a great city! It has evolved into a special place that people care about deeply. It is a wonderful city in which to live, offering a diversity and richness of urban life that nurtures creativity, entrepreneurial spirit and a concern for each other and for future generations. Together, these characteristics have shaped a city that attracts people from every corner of the world.

[10] [FoNTRA recommends] 1.4 Recognize the Local Knowledge Expert Several recent TLAB cases have demonstrated the valuable role of Local Knowledge Experts in the hearing process. FoNTRA believes that Local Knowledge Experts should be able to provide opinion evidence along with factual evidence in all cases. The TLAB members should weigh the evidence of Local Knowledge Experts as they do with other experts.

[11] [Former TLAB Chair Lord speaking] The participation of David Godley, Participant, who had filed no Participants' Statement as required by the TLAB Rules but had supplied a Witness Statement in the nature of expert testimony from a professional planner. Mr. Cheeseman objected to Mr. Godley's qualifications; the filing as being improper; and Mr. Godley's ability to participate having no connection to the subject appeal as he was a resident of Long Branch, over one kilometre away.
On receiving assurance from Mr. Godley that he did not intend to be qualified by Ms. Sheasby-Coleman as an expert witness with professional planning credentials, the TLAB recognized Mr.

assured Chair Lord that he did not desire to be qualified as an expert.

Jan 23, 2019 — In *11 Stanley Ave,* I recognized Mr. Godley as a "local knowledge expert" at his request. As I recall, there was no formal qualification process. That decision and TLAB Chair Lombardi's review decision were approved by Justice Favreau in *Deo v. Sheasby*. The same process occurred before TLAB Member Talukder in *77 Thirty Fifth (*July 31, 2020).

May 26, 2020 — TLAB Practice Direction 6 on Expert Witnesses is issued. The Direction reads in part:

> Generally, opinions are not proper evidence in a court or tribunal and thus an expert's testimony is an exception to this general rule. . . .
>
> Before the TLAB certain persons have, from time to time, been recognized as "local knowledge experts". This is not a traditional field of expertise like planning, or hydrogeology, for example. Persons with significant experience in a particular local area of the City of Toronto can, in appropriate circumstances, be qualified as an expert. For instance, a person may have significant knowledge of an area's history, its people, or other facets of the community that are relevant to an issue before the TLAB.
>
> Provided these persons can provide expert, non-partisan, dispassionate, helpful and relevant facts to the TLAB Member, they may be qualified as an expert.

Mr. Godley has sworn to give evidence that is "fair, objective and non-partisan", as has Mr. Cieciura. In my view, he qualifies to be a "local knowledge expert" as well as an urban planner.

Conclusion

Mr. Cheeseman's motion is denied. From his training, experience and acknowledgement of Expert's Duty, I find that Mr. Godley may give opinion evidence in urban planner specializing in urban design and as a local knowledge expert.

Godley as a person knowledgeable in local matters. He was permitted to give opinion evidence as a lay citizen with such evidence to be a matter of weight to be determined by the tribunal. (This is the case of *Deo v. Sheasby*)

X

Ted Yao
Panel Chair, Toronto Local Appeal Body

Endnote: Three court cases on expert witnesses

2001 CarswellOnt 1089 (formatting changed from original)

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 Developments 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

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
Opinion
Experts
Qualification of expert
XIII.2.c.i Training or experience Municipal law
Planning appeal boards and tribunals
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 "approximately30 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 hydrogeology 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 hydrogeology 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.

Endnote 2

Portion of *Black et al. v. City of Toronto*, 2020 ONSC 6398 (CanLII) dealing with admissibility of expert witness:

Motion to exclude the applicants' expert evidence

[25] As a preliminary issue, the City objects to the admissibility of the expert evidence from Dr. Tim O'Shea and Dr. Gillian Wiwcharuk. The City argues that that these two physicians are advocates for the homeless population who lack the necessary independence to provide impartial expert evidence.

[26] In support of its argument, the City notes that Dr Wiwcharuk is a named applicant, and affiant, in what appears to be a nearly identical application brought against the City of Hamilton: *Bailey, et al. v. City of Hamilton*, Court File number CV-20-73435. Dr. O'Shea is a co-founder and current Medical Director of another applicant in that proceeding, the Hamilton Social Medicine Response Team ("HAMSMaRT"), which provides health services to homeless people and advocates for various issues, including opposing decisions by the City of Hamilton to clear tent encampments. Both physicians have published articles in print and on social media opposing the break-up of encampments during the COVID-19 pandemic, and both agreed in cross-examination that they support this application and hope it will be successful.

[27] The City also argues that the evidence should be excluded due to its reliance on hearsay and for making factual assertions not supported by evidence, and because the physicians have no direct knowledge of the situation in Toronto.

[28] I do not agree with the City's submissions. The expert evidence of Drs. O'Shea and Wiwcharuk meets the test for admissibility set out in *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9 at pp. 20-25. It is relevant and necessary evidence to assist the Court in understanding the risks of COVID-19 and its impact on the homeless population, the particular risks and vulnerabilities of homeless people generally, the role of encampments, the medical risks of shelters, including the risk of contracting COVID-19 in shelters, and concerns about the loss of shelter and the medical and social effects of breaking up encampments, particularly during a pandemic. As aptly summarized by the applicants, "the evidence of Drs. O'Shea and Wiwcharuk speaks to three general subjects:

> 1) The socio-medical profile of homeless people in Canadian cities and specifically that of people living in homeless encampments;
>
> 2) The medical risks of clearing homeless people from their encampments; and
>
> 3) The risks posed by COVID-19, including its means of transmission and risks of transmission within homeless shelters."

[29] The two physicians clearly have expertise on these issues. Both work closely with homeless patients and the homeless population. Dr. O'Shea is an internist and infectious diseases specialist and has a Master's degree in public health. Dr. O'Shea's expertise regarding the impact and control of COVID-19 as it relates to the homeless population is also recognized by his participation on a subcommittee that advises Hamilton's Emergency Operations Committee on those issues. Dr. Wiwcharuk practices "inner city family medicine" including providing primary care to the homeless population at shelters and on the street. She also works as an addiction medicine consultant with in-patients in hospitals and at clinics in shelters, and as an emergency room physician she has treated patients with COVID-19.

[30] Drs. O'Shea and Wiwcharuk were asked to provide expert evidence within their scope of expertise. They have signed the required Acknowledgement of Expert's Duty recognizing the nature of their duty to provide opinion evidence to the Court that "is fair, objective and

non-partisan" and that is "related only to matters that are within [their] area[s] of expertise", and "to provide such additional assistance as the court may reasonably require." They have also acknowledged that this duty "prevails over any obligation which [they] may owe to any party."

[31] In public interest litigation of this kind, it would be surprising not to have experts who have expressed points of view and advocated for particular outcomes. **Often, because of their commitment to their field and the conclusions they have reached, experts become involved in advocacy. However, this does not disqualify experts; if it did it would risk denying courts important perspectives on many issues. Courts are not naïve and can, where necessary, discount or ignore testimony of experts if and when it becomes advocacy as opposed to evidence.** (my bold)

[32] In this case, the applicants have presented evidence from committed medical experts in the field of treating the homeless population. The experts are not mere activists, as was the case in *Galganov v. Russell (Township)*, 2010 ONSC 4566 at paras. 27-38, but have undisputed and extensive professional expertise. Their evidence provides the court with helpful, indeed necessary, evidence of the factual context and circumstances in which the applicants are asserting their rights. The evidence from them is largely objective, backed up by reports from government bodies and other institutions such as the World Health Organization ("WHO") and the U.S.-based Centers for Disease Control and Prevention ("CDC"), and cannot be described as simply an argument fed to the expert, as arose in *Alfano v. Piersanti*, 2012 ONCA 297 at para. 100. This also addresses the hearsay concern raised by the City which, in any event, is really a question of weight.

[33] There is no evidence that Drs. O'Shea and Wiwcharuk have a financial or personal interest in the outcome of this case, or that they have been involved in the legal strategy or been privy to confidential information which would raise concerns about their independence. There is also no evidence, nor is it suggested, that they have tailored their evidence or displayed any bias in their presentation of their evidence, much of which is not opinion evidence at all but, as noted, provides the Court with important contextual evidence. The actual opinion evidence from Drs. O'Shea and Wiwcharuk is limited and based on objective sources as well as their own expertise and experience.

[34] The evidence the experts have provided in this case is, to use the words of the Supreme Court in *White Burgess Langille Inman v. Abbott and Haliburton Company*, 2015 SCC 23, [2015] 2 S.C.R. 182 at para. 2, "fair, objective and non-partisan." As the applicants correctly point out, the onus rests on the party opposing admission to show a "realistic concern" that the expert is "unable and/or unwilling to comply with that duty" (at para. 48). The bar for exclusion is high:

> I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence. [White Burgess at para. 49]

[35] As Cromwell J. also noted at para. 49 of *White Burgess*, "... it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection."

[36] In exercising its gatekeeper function, the court must engage in a cost-benefit analysis and weigh the probative value of the evidence against the risks associated with its admission. As the Supreme Court stated in *White Burgess* at para. 54: "At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence." In my view, the balance here clearly weighs in favour of admitting the evidence which provides critical information and context to the matter before the court.

[37] I am aware of the perspectives of the experts, and that may have some impact on the probative value and weight to be given to their evidence, but it does not make it inadmissible: *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 at para. 106. These physicians are experts who have acknowledged their duty to the court to provide independent and impartial evidence, and the City has not provided any compelling basis on which the court could have a "realistic concern" that they will not, or have not, complied with that obligation. Even if there was a concern, absent a showing that the expert cannot comply with his or her duty the evidence is still admissible and the concern about bias can go to what weight I choose to give it: *R. v. Natsis*, 2018 ONCA 425, 140 O.R. (3d) 721 at para. 11.

[38] Accordingly, I deny the City's motion to exclude the evidence of Drs. Wiwcharuk and O'Shea.

Deo v. Sheasby-Coleman, 2021 ONSC 4150, May 26, 2021

[32] With respect to the issue of non-experts being allowed to give opinion evidence, Ms. Deo takes issue with two witnesses who testified at the hearing. Mr. Goodman is an architect who resides in the neighbourhood and he was allowed to give opinion evidence on architectural issues. Ms. Deo also argues that another witness, Mr. Godley, was allowed to give expert planning evidence without being qualified as an expert. The issue of whether a witness should be qualified as an expert or allowed to give opinion evidence is not a question of law; rather, it is a question of mixed fact and law. In any event, both Member Yao and Member Lombardi provide comprehensive reasons for the admission of these witnesses' evidence. This issue does not raise a question of law nor does it a raise a question of general importance.