ORIGINAL

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20080506
Docket: L032037
Registry: Vancouver

Between:

The Board of School Trustees of School District No. 63 (Saanich)

Plaintiff

And:

Advanced Architecture Inc. formerly known as Holovsky Mansfield Architects Ltd., Sandbar Construction Limited, Dominion Stucco (1988) Ltd., Pino-Lite Glass Ltd., Top Line Industries Inc., Sandy's Drywall Ltd., Universal Sheet Metal Ltd., Robert D. Tuff & Associates Ltd., Rolco Rollshutters B.C. Inc., Aluminex Extrusions Limited and John Doe 2

Defendants

And:

Advanced Architecture Inc. formerly known as Holovsky Mansfield Architects Ltd., Dominion Stucco (1988) Ltd., Pino-Lite Glass Ltd., Top Line Industries Inc., Sandy's Drywall Ltd., Robert D. Tuff & Associates Ltd., Rolco Rollshutters B.C. Inc., The Corporation of the District of Central Saanich and Her Majesty the Queen in Right of the Province of British Columbia

Third Parties

Before: The Honourable Madam Justice Ross

Ruling on Admissibility of Expert Evidence

May 6, 2008

Counsel for the Plaintiff	David L. Miachika Brian M. Samuels Christopher Schuld
Counsel for the Defendant Sandbar Construction Ltd.	Steven F. Lee
Counsel for the Defendant Pino-Lite Glass Ltd.	William G. Neen David K. Plunkett

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Counsel for the Defendant Dominion Stucco (1988) Ltd.	David M. Twining
Counsel for the Defendant Universal Sheet Metal Ltd.	David J. Bilkey
Counsel for the Defendant Top Line Industries Inc.	Harold K. Rusk
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** These are the Reasons with respect to Ruling 1 on the *voir dire* with respect to the issue of the independence and qualifications of Michael Wilson to issue expert opinion evidence.

[2] The plaintiffs seeks to qualify Michael Wilson to give opinion evidence with respect to the following matters:

> Building envelopes including:
>
> (a) assessments of building envelope, building envelope design and construction;
>
> (c) building envelope remediation or rehabilitation, including estimating and analyzing of the costs associated with said work;
>
> (d) building envelope maintenance
>
> (e) analysis and application of window and door testing;
>
> (f) architectural design and field review practices in British Columbia in early to mid-1990s;
>
> (g) construction practices in British Columbia in the early to mid-1990s;
>
> (h) the standard of care of contractors and/or subcontractors with respect to building envelope construction;
>
> (i) the British Columbia Building Code including interpretation and construction industry standards that were applicable to the design and construction of the addition at Stelly's Secondary School ("Stellys"); and
>
> (j) the cause and effect of water ingress in building envelopes.

[3] The defendants object to Mr. Wilson being qualified at all on the basis of what the defendants submit is a lack of independence or bias. In addition, the defendants submit that Mr. Wilson does not have the necessary expertise to give opinion evidence with respect to the architectural design and field practices in British

Columbia in the early to mid-1990s, construction practices in British Columbia in the early to mid-1990s, the standard of care of contractors and subcontractors regarding construction in British Columbia, and the British Columbia Building Code, including interpretation of the construction industry standards applicable to Stelly's additions, or finally, with respect to issues relating to building envelope maintenance.

[4] The case concerns water ingress at a school building. The plaintiff's opening described the case as follows:

> The building is a high school known as Stelly's Secondary School, located in the Saanich School District outside of Victoria. The original construction of the school was performed in 1976. Construction of a renovation and addition to the school was performed primarily in 1993 and completed in January 1994. It is this addition that is the subject of the lawsuit. Since the completion of the construction of the addition, the plaintiff alleges that water has progressively penetrated the building envelope, including the exterior stucco walls, windows, and adjoining components of the school, and has caused damage to the wall structure behind the stucco, resulting in deterioration of the sheathing and structural framing members, including rot, rust and mould.
>
> In mid-2003, the plaintiff was advised that the building envelope had suffered a systemic and widespread failure, requiring substantial repairs, which were carried out in 2005.

[5] The defendants in the litigation take the position that there was no systemic and widespread failure of the building envelope, that substantial repair was not required, and that in any event, the plaintiff had failed to maintain the building. The defendants assert that problems caused by moisture were the result of the plaintiff's failure to perform adequate maintenance.

[6] The central issues in the litigation include the nature and extent of problems, causation, and the reasonableness of and necessity for repairs.

[7] Mr. Wilson is an engineer who is a member of the firm RDH Building Engineering. RDH has been engaged in several capacities, summarized as follows:

1. RDH was retained to perform an initial assessment of the building enclosure at Stelly's in July 2003.
2. RDH submitted a report with recommendations with respect to the need for remediation.
3. RDH was then retained to assist with and supervise the remediation.
4. Finally, RDH was retained to provide litigation support and an expert report.

Preliminary Objection

[8] The plaintiff raises a preliminary objection that proper notice was not given by the defendants of the objection to Mr. Wilson's qualifications and independence in compliance with Rule 40A(13) of the ***Rules of Court***, B.C. Reg. 221/90. As a consequence, the plaintiff submits, pursuant to Rule 40A(14), the defendants should not be able to raise the objection at trial. Rule 40A(13) and (14) provide:

> A party who receives a written statement under subrule (2) or (3) shall notify the party delivering the statement of any objection to the admissibility of the evidence that the party receiving the statement intends to raise at trial.
>
> No objection under subrule (13) of which reasonable notice could have been given, but was not, shall be permitted at trial unless the court otherwise orders.

[9] It is the case that, with the exception of Mr. Bilkey, the defendants did not provide notice in advance of trial of these objections. Mr. Bilkey's client was a defendant early on, who was then let out of the litigation, only to be joined back in shortly before trial. I find that in all the circumstances, the notice he gave was

timely. In any event, I have concluded that this would be an appropriate case in which to exercise my discretion under Rule 40A(14). The notice was given at the start of what will be a lengthy trial. The plaintiff was prepared to deal with the matter when it came time for submissions, and there was no delay in the trial.

[10] Plaintiff's counsel suggested in submissions that there was prejudice to the plaintiff in that, had the plaintiff known of the objections at the outset, it could have considered retaining an additional expert. However, Rule 40A(13) does not state and no authority was cited for the proposition, that a notice of objection needs to be delivered that far in advance. Indeed, in the normal course when the plaintiff delivers reports at or near the deadline, any notice of objection would necessarily be late by this test. I note that the plaintiff does have another expert, although that report has not yet been put into evidence. I am not satisfied that the plaintiff has been prejudiced, and will permit the defendants to raise the objections to qualification of the expert.

The Role of the Expert

[11] I turn then to the role of the expert. Mr. Justice Dickson described the role of the expert in ***R. v. Abbey***, [1982] 2 S.C.R. 24 as follows at p. 42:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the

> opinion of the expert is unnecessary" (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)

[12] In ***R. v. Mohan***, [1994] 2 S.C.R. 9, the four criteria for the admission of expert evidence were stated as follows: relevance, necessity in assisting the trier of fact, absence of any exclusionary rule, and finally, a properly qualified expert. As Justice Sopinka, speaking for the court, stated in ***Mohan*** at p. 21:

> There is a danger that expert evidence will be misused and will distort the fact-finding process.

[13] Arising out of the importance of the role of an expert witness and the dangers that are associated with the misuse of such evidence, are the requirements that experts who give opinion evidence be independent and impartial. These responsibilities were described in National ***Justice Compania Naviera SA v. Prudential Insurance Co. (sub num. "Ikarian Reefer (The)")***, [1993] 2 Lloyd's Rep. 68 (Eng. Q.B.) at p. 81 as follows:

> B. THE DUTIES AND RESPONSIBILITIES OF EXPERT WITNESSES
>
> The duties and responsibilities of expert witnesses in civil cases include the following:
>
> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v. Jordan*, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce).
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Poliyitte Ltd. v. Commercial Union Assurance Co. Plc.*, [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and *Re J*, [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.

[14] In ***R. v. D.D.***, 2000 SCC 43, [2000] 2 S.C.R. 275, Justice Major for the majority noted, in reference to the "professional expert witness" at paragraph 52:

> Although not biased in a dishonest sense, these witnesses frequently move from the impartiality generally associated with professionals to advocates in the case. In some notable instances, it has been recognized that this lack of independence and impartiality can contribute to miscarriages of justice. (See, e.g., *The Commission on Proceedings Involving Guy Paul Morin* (Kaufman Report) (1998), at p. 172.)

[15] Concerns with respect to the independence and objectivity of an expert witness most frequently are taken into account with respect to assessing the weight to be given to the testimony. See, for example, ***Northwest Mettch Corp. v. Med Con Services Ltd.*** (1997), 45 B.C.L.R. (3d) 366 (S.C.).

[16] In addition, in the consideration of the admissibility of an expert report, one ground for objection is that the expert has assumed the role of the advocate; see ***Yewdale v. Insurance Corp. of British Columbia*** (1995), 3 B.C.L.R. (3d) 247 (C.A.) and cases cited therein. We are, however, at this stage not dealing with the admissibility of the report, but with the issue of qualification.

[17] There have, however, been cases in which the issues of independence and objectivity have gone to the question of admissibility and not merely to weight. See, for example, ***Liverpool Roman Catholic Archdiocese Trustees v. Goldberg (No. 2)***, [2001] 4 All E.R. 950 (Eng. Ch. Div.) in which the test was stated as follows at p. 953:

> However, in my judgment, where it is demonstrated that there exists a relationship between the proposed expert and the party calling him

> which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted however unbiased the conclusions of the expert might probably be. The question is one of fact, namely, the extent and nature of the relationship between the proposed witness and the party.

[18] The issue was discussed in ***Fellows McNeil v. Kansa General International Insurance Co.***, 1998 O.J. No. 4050. In that case, Ontario Supreme Court held a solicitor opinion to be inadmissible given his previous involvement with the client. This case involved a solicitor's negligence claim. The alleged negligence dealt with a lawyer's handling of a disputed insurance claim. The firm, from which the proposed expert was a member, was also retained, initially, to investigate whether there was any merit to bringing a negligence action. Justice MacDonald stated at para. 7:

> "An expert must have a minimum requirement of independence. I agree with Mr. Pitrangeli that the role of Mr. McInnis [the proposed expert] is, in a sense, unprecedented. He is involved in the defence of Uni Royal (on behalf of Kansa) and he is has been proposed as an expert on matters pertaining to the standard to which the solicitors will be ultimately judged on whether or not they performed in a manner consistent with that of a reasonably competent solicitor's handling of complex insurance matters. By reason of the roles assumed by him, I find that Mr. McInnis cannot be such an expert. He has been an advocate for Kansas positions since he became involved in the matter, apparently in late 1994."

Continued at para. 10:

> "It is obvious from the documents and the letters to which I have been referred in detail, that Mr. McInnis is a witness with a lot of factual information relevant to the matters which are before the court; but he cannot be an expert because of his early involvement as an advocate for Kansa on the matter of the investigation and potential claim for negligence against the Fellowes, McNeil firm.

[19] In ***Hutchingame v. Johnstone***, 2006 BCSC 271, Mr. Justice Cole ruled that the opinions of proposed experts were inadmissible because they could not be considered to be independent. He notes at para. 6:

> The plaintiff argues that the opinions of McGregor and Nowosad should be rejected because they are not impartial. McGregor was the defendants' conveying solicitor and will be giving evidence at the trial. Nowosad and McGregor are members of the same firm and it appears that McGregor is either an employee or works on a contractual basis with Nowosad whose firm is called Nowosad & Company. McGregor does not appear on the letterhead. Furthermore, if the court finds that it was the obligation of the defendants to obtain the Crowns consent then that may indicate that McGregor was negligent in the conduct of the conveyance.

And then concludes at para. 8:

> Because of the fact that McGregor acted for the defendants, and may be potentially liable, he cannot be considered to be independent. The same would apply to Nowosad since he is McGregor's employer and also potentially liable. Therefore, their statements should not be admitted into evidence.

[20] The judgment of the Supreme Court of Canada in ***R. v. J.-L.J.***, 2000 SCC 51, [2000] 2 S.C.R. 600 suggests that courts ought to take more seriously the role of gatekeeper at the admissibility stage. Justice Binnie, speaking for the court, states at paragraph 28:

> The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

[21] The factors that have been identified as relevant to this issue of the independence of an expert witness include:

(a) having a financial interest in the outcome of the proceeding;

(b) the relationship between the expert and the party, see for example, ***Metropolitan Toronto v. Loblaw Groceterias Co.***, [1972] S.C.R. 600; and

(c) an expectation of future business and financial dependence, see for example, ***Amertek Inc. v. Canadian Commercial Corp.*** (2003), 229 D.L.R. (4th) 419, 39 B.L.R. (3d) 163 (Ont. S.C.J.) rev'd on other grounds (2005), 200 O.A.C. 38, 76 O.R. (3d) 241.***

[22] In response counsel for the plaintiff cited many cases, some in which the issue was dealt with as an aspect of weight. In my view, it is clear that in an appropriate case, issues of independence and neutrality will form a basis for exclusion. These matters are always to be considered in relation to the issue of weight. Whether the issue will form a basis for exclusion or not is a matter of degree, and in that respect, the cases turn on their facts.

[23] In the case at bar, the defendant's objections after a lengthy *voir dire* can be summarized as follows:

1. Mr. Wilson lacks independence because he is in effect offering opinions about his or his firm's prior opinions.
   (i) His firm – RDH – was hired to investigate and diagnose the existence of potential water ingress failure.
   (ii) Thus, opinions with respect to the issue of building failure are opinions about his firm's prior opinions.
   (iii) After his firm provided recommendations for remediation, he was retained to be project manager to oversee the remediation.

(iv) Thus, opinions with respect to the scope of remediation are in effect opinions about his firm's prior opinions.

2. While RDH does not have a financial interest in the outcome of the litigation, it had a financial interest in the scope of remediation in that it was paid on a percentage basis in the contract for project management.

[24] Stelly's School is but one of many schools that are part of the building envelope programme in British Columbia. RDH is one of a small panel of firms who are called upon to perform initial assessments, and one of the larger panel who are eligible to supervise for remediations.

[25] RDH has earned in excess of $200,000 in fees in association with the project at Stelly's, and as Mr. Wilson stated, hopes to earn more from work in connection with additional schools. RDH has been retained to perform assessments of some 40 schools to date, and in addition it has an association with B.C. Housing, the agency that oversees the school project, having performed some 240 assessments for B.C. Housing in addition to those related to the school project.

[26] Finally, the defendants rely upon Mr. Wilson's testimony in the *voir dire* in relation to the destruction of certain evidence, namely the test results from moisture probes, as evidencing an attitude incompatible with that of an independent and neutral expert.

[27] I have concluded that, considering his admissions and the evidence given in the *voir dire* in this case, the matters raised by the defence are considerations that

should properly be dealt with as issues of weight, and do not form a basis for the exclusion of the evidence.

[28] With respect to the issue of independence, in not dissimilar circumstances, those issues were dealt with as a matter of weight by the court in ***Carleton Condominium Corporation Number 21 v. Minto Construction Ltd.*** (2001), 47 R.P.R. (3d) 32, 15 C.L.R. (3d) 23 (Ont. S.C.J.) and in ***Reed v. Garbut*** (2003), 28 C.L.R. (3d) 1 (Ont. S.C.J.).

[29] Neither Mr. Wilson nor his firm have a financial interest in the outcome of the litigation. With respect to the issue of the financial association between the firm and B.C. Housing, and their expectation of future fees, these are matters of degree, and here I do not find the association to be such as to warrant exclusion.

[30] I was surprised and troubled by the evidence with respect to the destruction of the test data. The significance of the destruction of this evidence is a matter that will likely require consideration in the adjudication of the case on its merits; see ***Endean v. Canadian Red Cross Society*** (1998), 48 B.C.L.R. (3d) 90 (C.A.).

[31] From the perspective of the present issue; however, it is my view that Mr. Wilson's role in the decision to destroy the documents, and his testimony and demeanour in giving evidence relative to this issue, are matters that go to the assessment of his evidence and the weight to be given to it, and not to its admissibility.

Qualifications

[32] The plaintiff notes that in ***R. v. Marquard***, 1993 4 S.C.R. 223, McLachlin J., as she then was, stated for the majority at p. 243, citing ***R. v. Beland***, [1987] 2 S.C.R. 398 at p. 415:

> The only requirement for the admission of expert opinion is that the "expert witness possesses special knowledge and experience going beyond that of the trier of fact".

[33] Counsel for the plaintiff notes that qualification does not depend upon the means by which it is acquired; the qualification could be acquired through a course of study or through practical experience. Counsel submits that once this low threshold is crossed, lack of expertise becomes an issue going to weight and not to admissibility.

[34] There is no doubt, and I do not understand the defendants to contend otherwise, that Mr. Wilson is qualified to give expert opinion evidence with respect to building envelopes including:

- the assessment of building envelope condition
- building envelope design and construction
- building envelope remediation
- estimating and analyzing the costs related to a building envelope remediation
- cause and effect of water ingress in building envelopes

[35] I find that Mr. Wilson is qualified to give opinion evidence with respect to these matters.

[36] The defendants submit that Mr. Wilson does not have the necessary expertise to give opinion evidence with respect to building envelope maintenance. However, Mr. Wilson testified that as part of his work with RDH in both new and rehabilitative construction, he has experience with maintenance, providing maintenance manuals, maintenance inspections, assistance with respect to maintenance, warranty inspection reviews and reserve fund studies. This experience meets the threshold, and I find that he is qualified to give expert evidence with respect to building envelope maintenance.

[37] With respect to the analysis and application of window and door testing, he testified that as part of his work, where specified products are being implemented such as a window, there are quality assurance procedures in place to test these products to make sure they perform in accordance with specifications. He testified that he has experience as part of his work with these procedures, and he described his experience with field review and rehabilitation projects relating to testing mockups and window installations.

[38] He testified in addition that since 1996, on all new construction and building envelope rehabilitation projects, there has been a requirement in his work to test the performance of installed products, such as exterior window systems and doors, through field testing with penetrative air pressure. This work has been part of his scope of service, and in relation to this work he is familiar with the standards for testing, such as American standards testing materials, and the Canadian Standards Association.

[39] I find that Mr. Wilson has the requisite experience and skill to be qualified to give opinion evidence with respect to the analysis and application of window and door testing.

[40] The plaintiff seeks to qualify Mr. Wilson to give opinions with respect to architectural design and field review practices in British Columbia in the early to mid-1990s.

[41] In the early to mid-1990s Mr. Wilson was not working in British Columbia. He was working, rather, in eastern Canada, where stucco clad steel stud wall systems were not used. He has received no training in the architectural design and field review practices in British Columbia in the early to mid-1990s. He concluded no course of study to acquire such knowledge. For example, he did not conduct interviews. Mr. Wilson agreed that before he moved to British Columbia, which was after the period in question, he had no experience or special study in construction practices in British Columbia. He also agreed that after he moved to British Columbia, he did not conduct an investigation or study into these practices to develop a body of data that would allow him to express an opinion on these subjects. He confirmed that prior to 1996, he had never designed a structure with steel stud stucco walls, nor was he associated with any project that had incorporated steel stud stucco walls.

[42] An expert must have the appropriate qualifications to provide opinion evidence to the particular subject for which qualification is sought; see ***Inglis v.***

ICBC, 2005 BCSC 700, 25 C.C.L.I. (4th) 261 and ***Walker Estate v. York-Finch General Hospital*** (1996), 5 C.P.C. (4th) 240 (Ont. Gen. Div.).

[43] The fact that an expert is qualified to give an opinion with respect to one area does not mean that he or she will be permitted to give opinion evidence that exceeds that qualification; see ***R. v. Klassen***, 2003 MBQB 253, 179 Man. R. (2d) 115 and ***Parker v. Saskatchewan Hospital Association*** (2001), 203 D.L.R. (4th) 657 (Sask. C.A.).

[44] I find that Mr. Wilson is not qualified to give expert evidence with respect to architectural design and field review practices in British Columbia in the early to mid-1990s.

[45] For the same reason, that is that he does not have any training or experience and has not undertaken any study that would provide the necessary expertise, I find that Mr. Wilson is not qualified to provide opinions in relation to construction practices in British Columbia in the early to mid-1990s.

[46] The plaintiff seeks to qualify Mr. Wilson to give opinions on the standard of care of a contractor and/or subcontractor with respect to building envelope construction. This topic was not limited to British Columbia in the early to mid-1990s. I find that Mr. Wilson's experience as described in his evidence given on the *voir dire* provides the training and experience necessary for him to provide an expert opinion in this regard. However, while I have found that Mr. Wilson is so qualified by training and experience, I do not wish to be taken to be ruling at this stage that such

opinions are admissible. The defendants have taken objection to Mr. Wilson's reports, and I do not wish to be seen at this stage to be ruling on those objections.

[47] Finally, the plaintiff seeks to qualify Mr. Wilson to express opinions on the British Columbia Building Code, including interpretation and construction industry standards that were applicable to the design and construction of the addition at Stelly's.

[48] Mr. Wilson is familiar with the relevant Building Code; he interprets the codes and advises clients concerning such matters in the course of his work. I am satisfied that he meets the threshold for experience and skill in this area.

[49] At this stage I am satisfied that he has the necessary qualification and is qualified to express opinions on the British Columbia Building Code and construction standards applicable to the construction of the addition at Stelly's.

[50] Again, this ruling is not to be taken to be a ruling with respect to any particular opinions expressed on this subject, since the defendants have indicated an intention to object to the report if Mr. Wilson is found to be qualified to express expert opinion evidence.

[51] I turn then to ruling number 2 on the *voir dire* with respect to the admissibility of the expert report dated March 12th, 2007.

[52] This is a ruling with respect to the admissibility of the expert report of Michael Wilson dated March 12th, 2007. The defendants have submitted that the report is inadmissible because:

1. the opinions fall outside of the expertise of Mr. Wilson;

2. the facts and assumptions on which the opinions are based have not been provided; and

3. the report usurps the functions of the trier of fact and law.

[53] In ruling number 1, with respect to qualifications, I found Mr. Wilson was qualified to express opinions on a number of matters in relation to building envelopes. I found that he was not qualified to express opinion evidence with respect to the subject of architectural design and field review practices in British Columbia in the early to mid-1990s, and construction practices in British Columbia in the early to mid-1990s.

[54] The defendants submit that the report violates the rule against an expert opinion expressing a corporate opinion; see ***Heidebrecht v. Fraser-Burrard Hospital Society*** (1995), 15 B.C.L.R. (3d) 189 (S.C.) and ***Dhaliwal v. Bassi***, 2007 BCSC 548, 73 B.C.L.R. (4th) 170.

[55] Defendants make particular reference to section 1.5 of the report, which states:

> Based on our past experience with similar projects and our knowledge of the construction of the Addition to Stelly's, we have assumed that the organization o the project team generally followed a traditional model, where the School District retained a general contractor who in turn hired trade contractors to implement the construction. We have further outlined our opinions regarding the traditional roles below with respect to the building enclosure.
>
> [emphasis added]

[56] The sections in which the report makes reference to the terms "we" and "are" are in the main sections describing typical roles of construction parties in sections pertaining to the review of documents.

[57] In ***Heidebrecht***, Mr. Justice Henderson stated at para. 11:

> In my view, a document is not a written statement setting out the opinion of an expert unless it appears clearly from the face of that document that the opinions in it are those of the individual expert who prepared and signed the statement. Our rules make no provision for the entry in evidence of joint or corporate opinions. The opinion must be that of an individual expert and it must fall, of course, within the scope of her own expertise. The opinion cannot simply be a reporting of the opinions of others. The statement, to be admissible, must show clearly that this is the case.

[58] In the case at bar, I have qualified Mr. Wilson to give opinion evidence about the standard of care of contractors and subcontractors with respect to building envelopes in general, but not with respect to practices in British Columbia in the early to mid-1990s. His opinions with respect to what he describes as "traditional models" fall within an area in which he has been qualified. Looking at the report as a whole I am satisfied that the opinions expressed are those of Mr. Wilson and that the report does not violate the rule against corporate opinion.

Facts and Assumptions

[59] The defendants submit that the report is not in compliance with Rule 40A(5)(b), which requires the expert report to state the facts and assumptions upon which the opinion is based. In ***Surrey Credit Union v. Willson*** (1990), 45 B.C.L.R. (2d) 310 (S.C.), Mr. Justice McColl stated, at p. 317, the requirements that must be

met for expert evidence to be admitted at trial. Included in those requirements are the following:

> 3. Where he has given an opinion upon facts made known to him he is bound to disclose those facts and how they came to his attention;
>
> 4. Where he has made assumptions he is bound to explain the basis upon which those assumptions have been made;

[60] The plaintiff submits that the report does set out a statement of facts and assumptions, documents reviewed, and the personal observations, and accordingly there has been compliance with the rule.

[61] This principle was also considered in ***Keefer Laundry Ltd. v. Pellerin Milnor Corporation***, 2007 BCSC 899, 72 B.C.L.R. (4th) 187 in which Mr. Justice Smith stated at para. 24:

> It is fundamental that an expert opinion sets out the facts and assumptions on which it is based. The weight that can be given to the opinion depends on the extend to which the party who tenders the opinion is able to prove the truth of those facts and assumptions, but that evidence may come from sources other than the expert. In many cases, however, the opinion will be based in whole or in part on the expert's own observations. Where that is the case, the accuracy and reliability of those observations may be tested on cross-examination in the same way as the evidence of any other witness.

[62] The Court of Appeal in ***Goerzen v. Sjolie*** (1997), 86 B.C.A.C. 44, provides confirmation of the mandatory requirement of Rule 40A(5) at paragraph 16, in which Mr. Justice Goldie, speaking for the court, stated:

> 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. In the case at bar, Mr. Keith admitted the report as delivered failed in this respect.

[63] In that case, the expert's opinion was based upon data contained in his working papers. The data was not set out in the report. The Court concluded the trial judge was correct in considering that the report failed to comply with the rule.

[64] In the case at bar, much of the difficulty is created due to the way the report has been written: many cases, opinions and conclusions are stated without the factual foundation and assumption in proximity. Plaintiff's counsel submits that the facts and assumptions for these opinions and conclusions are found elsewhere in the report, in other sections of the narrative, in the Appendix, and contained in the documents reviewed, including the field notes.

[65] I have reviewed the report in its entirety. In my view the presentation of the report leaves a great deal to be desired in terms of its helpfulness to the court to reach an informed decision concerning the opinions expressed. However, the report does set out facts and assumptions, and in that respect it is in compliance with the rules.

[66] Of course, as Mr. Justice Smith noted in ***Keefer***, the weight to be given to the opinion will depend upon the extent to which the plaintiff is able to establish the truth of these facts and assumptions. In addition, with respect to the opinion, the plaintiff is bound to the facts and assumptions that have been set out in the opinion. If the assumptions are not made out in sufficient facts sustained to support the opinion,

that however is a matter going to weight, if any, to be given to the opinions expressed.

Ultimate Issue

[67] The defendants submit that the report usurps the role of the court as trier of fact in law and defends what was once known as the ultimate issue rule. The defendants submit that the test was discussed by Madam Justice Newbury, as she then was, in ***Yewdale v. ICBC*** at p. 242:

> The expert must not be permitted to displace the role of the trier of fact. Because of this, courts in the past resisted expert testimony going to the "ultimate issue". That clear rule has long since fallen by the wayside, but it still remains essential for the expert to state the facts he or she has assumed in the course of reaching the opinion, and if possible, to avoid making findings of fact on issues in dispute. Thus, if the court does not find such facts or finds different facts, the weight of the expert's opinion can be assessed accordingly,

[68] In ***Surrey Credit Union*** McColl J. stated at paragraph 39:

> He may not make conclusive findings of fact on issues in dispute and may not offer an opinion as to how the law should apply to any of those facts.

[69] And at paragraph 21 he stated:

> ...[H]e cannot make findings of law. That also is within the exclusive jurisdiction of the trial judge.

[70] The defendants submit that in the report Mr. Wilson makes frequent findings of fact, and in so doing, usurps the role of the court as trier of fact. The defendants submit further, in particular in relation to opinions given with respect to the Building

Code, that the report usurps the role of the court as trier of law. With respect to the Building Code Mr. Wilson opines in a number of places that various aspects of the design and as-built condition are in contradiction to the requirements of the Building Code.

[71] The authorities with respect to expert opinion contain frequent statements to the effect that the expert is not to opine on propositions of law; see for example ***Surrey Credit Union and Quintette Coal v. Bow Valley Resource Services*** (1988), 29 B.C.L.R. (2d) 127 (S.C.). These cases are consistent with the rule against receiving expert opinion on questions of domestic law.

[72] Plaintiff's counsel submits that although the Building Code is part of the domestic law by virtue of the provisions of the ***Local Government Act***, R.S.B.C. 1996, c. 323, it is nonetheless a very technical document and one which the court will require expert evidence to understand. Moreover, counsel submits that consultants such as Mr. Wilson interpret the code as a routine part of the services which they provide to their clients.

[73] However, the ***Income Tax Act***, R.S.C. 1985 (5th Supp.), c. 1, is also a complex and technical document and a number of professional advisors, notably accountants, routinely advise their clients concerning its meaning and application. Nevertheless, expert evidence with respect to the construction of that Act is not permitted. See, for example, ***R. v. Century 21 Ramos Realty Inc. & Ramos*** (1987), 58 O.R. (2d) 737, 37 D.L.R. (4th) 649 (C.A.) and ***Eco-Zone Engineering v.***

Grand Falls-Windsor (Town), 2000 NFCA 21, 5 S.L.R. (3d) 55. Accordingly, the fact that the Building Code is technical does not appear to be an answer.

[74] Plaintiff's counsel, however, has also cited a number of cases in which this court has accepted such evidence concerning compliance with the Building Code; see ***M. v. Prince George*** (1999), 3 M.P.L.R. (3d) 106 (B.C.S.C.), ***Dorsey v. Austrian Chalet***, [1992] B.C.J. No. 1766 (S.C.), and the case closest to the circumstances to the present case, ***Strata Plan NW 3341 v. Canlan Ice Sports Corp.***, 2001 BCSC 1214, 93 B.C.L.R. (3d) 136.

[75] On that basis, I have concluded that opinion evidence with respect to the compliance with the Building Code is admissible. The extent to which the opinions expressed amount to a conclusion without supporting evidence or reasoning will be a matter that goes to the weight to be afforded such opinions.

[76] I agree with the submission of plaintiff's counsel that expert evidence is not inadmissible, simply because it addresses the ultimate issues before the court. In that regard; see ***R. v. Fisher***, [1961] S.C.R. 535 and ***Sebastian v. Neufeld*** (1995), 41 C.P.C. (3d) 354 (B.C.S.C.). I also agree with the submission of plaintiff's counsel that there is more room for latitude in circumstances in which the case is being tried by judge alone.

[77] In all of the circumstances and considering the report as a whole, I have concluded that the report will be admitted, and the issues raised by the defendants will be matters going to the weight which can be developed on cross-examination and in final argument.

Ross J.