

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Skinner v. Dalrymple, 2011 NSSC 461

**Date:** (20111212)

**Docket:** SP 188801

**Registry:** Pictou

**Between:**

Peter Skinner, Helico Air Services Limited and  
All-Up Consulting Enterprises Inc.

Plaintiff

v.

Russell Dalrymple and Royal and Sun Alliance Insurance Company

Defendant

**Judge:** The Honourable Justice Arthur J. LeBlanc

**Heard:** November 22, 2011, in Halifax, Nova Scotia

**Counsel:** Bruce MacIntosh, Q.C. and Donn Fraser, for the  
plaintiffs

Murray Ritch, Q.C., Matthew Williams and Lisa  
Richards, for the defendants

**Introduction:**

[1] The plaintiffs seek production of additional file materials of Mark Gain, a forensic accountant to be called as an expert witness by the defendants. The defendants have provided parts of the file up to the date of production of Mr. Gain's report, including working notes, correspondence and the factual material the expert had before him. The plaintiffs now request the following additional documents:

- (1) Time log entries for work on the expert's report.
- (2) File materials (including time log entries) relating to the March 18, 2011, letter modifying his report.
- (3) Materials related to advice given by the expert unrelated to his reports.

**The law governing production of expert's files**

[2] Production of the expert's file is mandated by Rule 55. The content of the expert's report is described at Rule 55.04. Among the stipulations of Rule 55.04(1) are a statement that "the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;" that "the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;" and that "the report includes

everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion.” Rule 55.04(2) and (3) describe the substantive requirements of the report. They provide as follows:

(2) The report must give a concise statement of each of the expert’s opinions and contain all of the following information in support of each opinion:

(a) details of the steps taken by the expert in formulating or confirming the opinion;

(b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;

(c) the degree of certainty with which the expert holds the opinion;

(d) a qualification the expert puts on the opinion because of the need for further investigation, the expert’s deference to the expertise of others, or any other reason.

(3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:

(a) the expert’s relevant qualifications, which may be provided in an attached resumé;

(b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;

(c) reference to all publications of the expert on the subject of the opinion;

(d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;

(e) a statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.

[3] Rule 55.08 requires a party filing an expert's report to disclose "a document or electronic information considered by the expert that is in the control of the party," as well as "any real or demonstrative evidence considered by the expert that is in the control of the party." Further, the expert must provide "a copy of the document or electronic information, or provide disclosure of another thing, that was considered by the expert and is in the control of the expert but not the party."

[4] For purposes of comparison, Rule 31.08(1) of the *Civil Procedure Rules (1972)* required disclosure of "a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed."

## **Arguments**

[5] Plaintiffs' counsel argues that expert witnesses are accountable only to the court, and says any documents pertaining to the opinion given or to the expert's credibility must be disclosed.

[6] **Time logs** - The plaintiffs submit that production of the time logs will permit the court to evaluate "how in depth or how shallow was the analysis," as well as determining who in the expert's office actually did the work. The defendants say the time logs are irrelevant, since they do not speak to the expert's credibility or the reliability of his opinion. The defendants also point out that the plaintiffs did not disclose the time logs of their own expert, who has already testified. It appears, however, that the plaintiffs did offer to provide such records from their own expert upon receipt of those requested from the defendants.

[7] **Materials relating to the March 18, 2011, letter** - According to the defendants, Mr. Gain's letter was a revision to his report, arising from an error he discovered in his methodology, rather than a supplemental report based on new information. The defendants agree to disclose any correspondence between counsel and Mr. Gain relating to this letter. However, they argue that the related time log entries are irrelevant.

[8] **Other materials** - The defendants claim privilege over all other materials created after November 29, 2010. They agree that the general rule is that a party calling an expert witness waives litigation privilege over documents in the expert's possession that are relevant to the substance of his opinion. This will mean, for instance, that early drafts of an expert's report that counsel has commented on will be subject to production, as in *Flinn v. McFarland*, 2002 NSSC 272. In that case, MacAdam J. held that all information provided to the expert in preparing their report must be disclosed (para. 6).

[9] The defendants argue, however, that there is an exception to this general rule that applies where the expert acts as a "confidential advisor" to the party who retained him, specifically by advising on how to cross-examine the opposing expert witness. According to the defendants, Mr. Gain and others in his firm have acted as confidential advisors to counsel and the client since November 29, 2010, assisting in preparation of defence strategy and preparation for cross-examination. Subsequent to providing his report, they submit, Mr. Gain and his associates provided confidential advice for the sole purpose of the litigation. As such, the defendants claim litigation privilege over materials generated since that date, with

the previously-noted exception of Mr. Gain's letter of March 18, 2011, and related materials.

[10] A recent consideration of litigation privilege as it applies to experts' files can be found in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2007 BCSC 909. In that case, the defendant had provided the working files of its experts, except for materials that were alleged to pertain to advice respecting cross-examination of the plaintiffs' experts. Justice Satanove described the exception to litigation privilege for materials used by an expert, then went on to describe an "exception to the exception," for situations where the expert acts as a confidential advisor. After reviewing caselaw considering this exception, Justice Satanove observed that certain cases on this point appear to rest on the "assumption that documents relating to advice on cross-examining the other side's witness do not relate to facts and assumptions on which the opinion is based." She commented that this "may be true when the opinion has been finalized before the cross-examination advice has been given, or if the cross-examination advice does not pertain to the same issues, but what happens when the expert is simultaneously formulating her opinion and providing cross-examination advice on the same issue ... ?"(para. 14). She went on to suggest that such exceptions to the waiver of

litigation privilege are not “blanket exceptions which will apply in all cases regardless of the circumstances”; rather, “the court must balance the competing policies of disclosure versus privilege and determine what is fair in each particular case” (para. 15). Ultimately, Justice Satanove excluded from disclosure materials that dealt with discrete issues without overlapping with the expert’s opinion, and which were “truly in the nature of cross-examination advice only....” (para. 28).

[11] MacAdam J. made a similar distinction in *Flinn*, holding that discussion of “tactics and strategy” which “may be useful to counsel in presenting their case” would “form part of the solicitor’s brief and, as such, are not required to be disclosed to the other side” (para. 29). He went on to say, at para. 33:

[12] The resolution of the question as to whether these otherwise confidential documents are to be disclosed depends on whether in any way, they formed part of the foundation or basis of the expert's opinion and report, or were, at least, considered by or provided to, the expert prior to the preparation of her report. If they did, then they must be disclosed. To the extent any of the materials only relate to the views of the plaintiff's expert on any report or opinion of defendant's expert, these are matters involved in the solicitor's brief and therefore protected from production.



[13] Disclosure, Justice MacAdam noted, applies not only to materials referred to in the expert's report, but to any material that was "part of the information that was available to the expert when preparing her final updated report" (para. 50).

### **Conclusion**

[14] The basis for seeking the disputed materials seems to be the plaintiffs' view that Mr. Gain's expert opinion is insufficiently independent, and the suggestion that he did not understand the distinction between confidential advice and assisting the court. There is no doubt that the purpose of an expert witness is to assist the court. Expert opinion evidence is only admissible for that purpose. At the same time, the expert is retained by a party, at that party's expense. This suggested dichotomy between assisting the court and acting on behalf of a party is addressed by the requirements in Rule 55 for the expert to certify that he is "providing an objective opinion for the assistance of the court," that he is prepared to testify, "comply with directions of the court, and apply independent judgment when assisting the court;" and that "the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion." Further, the expert is subject to cross-

examination and disclosure of all materials that form the foundation of the report, or even documents that the expert had before him while preparing the report.

[15] I do not believe that Rule 55 was intended to force a party to retain two experts, one to provide an opinion, and the other to comment on experts' reports advanced by other parties and to advise on cross-examination. Along with the practical difficulties with retaining multiple experts, for instance, in specialized fields where the required numbers of practitioners do not exist, this would seem contrary to the purpose of the *Civil Procedure Rules*, set out at Rule 1.01 as being "for the just, speedy, and inexpensive determination of every proceeding."

[16] The plaintiffs offer no authority for the proposition that administrative record-keeping documents, such as time sheets, are within the category of documents that form the basis of the expert's report. These are not documents that the expert relies upon in preparing the report, nor is it clear why they would be relevant to the expert's credibility. I cannot see any basis upon which the expert's time records would be relevant. Counsel for the plaintiff submitted that if the expert had "some junior underling" do the work, the time sheets would be relevant. This does not appear to be anything other than speculation. The time sheets are not

in the hands of counsel, are not a communication between counsel and the expert and do not relate to the foundation or substance of the expert's report. As such, I can see no basis upon which to order them produced.

[17] As for materials relating to any advice the expert may have given on "strategy and tactics" (particularly cross-examination), I am satisfied that materials that relate only to such advice, would be protected by litigation privilege. This applies only to documents that relate only to "the views of the plaintiff's expert on any report or opinion of defendant's expert" and not to the foundation of the expert's own opinion.

[18] I wish to emphasize that in this decision I am not ruling on the admissibility of any expert opinion or report.