Balancing Act: Expert and Fact Evidence

Exploring the Boundaries of Opinion Evidence and Related Practice Points

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Agenda

1. The line between expert evidence and fact evidence
2. Real world: when the line blurs
3. Types of objections and how/when to raise
4. When and how to adduce reply evidence
5. Questions?

The Line Between Expert Evidence and Fact Evidence

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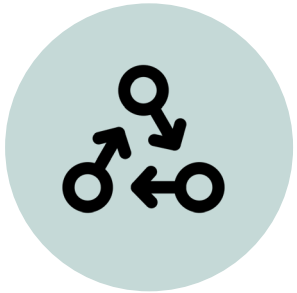
First Principles of Opinion Evidence

- Opinion evidence is presumptively inadmissible.
- The trial judge fulfills a gatekeeping role in admitting expert evidence.
- The SCC has articulated four threshold requirements for admissibility of expert evidence:



Relevance

Necessity in assisting the trier of fact

The absence of any exclusionary rule

A properly qualified expert

See *R v. Mohan, R v. J (J-L)*, *White Burgess*

First Principles of Opinion Evidence

- Expert evidence typically contained in an affidavit/statement/report

- Expert reports must be:
  - Impartial
  - Independent
  - Unbiased

- *The Code of Conduct for Expert Witnesses* sets out an expert's general duty to the Court:
  - An expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise.
  - This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.

Expert Evidence in Patent Cases

Expert evidence often admitted to address key facts, *e.g.*:

- Explain scientific concepts and technology relevant to the subject matter of the patent
- Opine on the interpretation of prior art or the state of common general knowledge in a particular field
- Opine on what is (or is not) taught by the patent disclosure
- Interpret/opine on testing performed by the inventors

Expert Evidence and Patent Construction

- **Experts in patent cases often do opine on the "ultimate question"**

- **Doctrinal reasons for expert testimony**

- **Construction is an exercise for the Court, but:**
  - Experts are there to assist the Court
  - The Court is not bound by expert evidence

- **Question of law, but factually suffused**
  - NOTE: *Munchkin, Inc. v. Angelcare Canada Inc*., 2024 FCA 156 at para. 83: "…an error of claim construction, and hence an error of law"
  - "…expert evidence is often considered in determining how [a person skilled in the art] would have understood certain terms in a claim at the relevant date" *Eli Lilly Canada Inc. v. Apotex Inc.*, 2024 FCA 72 at para. 29

Real World: Where the Line Blurs

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Experts Straying Outside of Expert Report

- **When can an expert stray beyond the four corners of their expert report?**
  - Explanation or clarification?

- **Should you:**

Object?

Seek reply?

Why not both?

- **Can an expert provide reply evidence during their testimony without a reply report?**
  - Questions of fairness and notice
  - Whole new issue versus expanding on an issue already addressed in an expert report
    - ➤ For example, in a dispute about the understanding of prior art document that two experts have addressed:
      - Can Expert 1 reference a new portion of the prior art while testifying in response to Expert 2, without a reply report?
      - What if Expert 1 wants to reference new prior art?
      - What if Expert 2 has yet to testify? Sur-reply?

Lay Witnesses Providing Opinion Evidence

- **A fact witness cannot provide opinion evidence except in limited circumstances**
  - *E.g.*, where the witnesses have the experiential capacity to make the conclusions (2017 FCA 236 at para. 79)

- **Patent inventors are often fact witnesses with expertise**
  - Can their evidence stray into expert territory?
  - Evidence typically technical, but usually reflect historical views of development team at the time and admissible for that purpose; Court can assign appropriate weight (*Merck*, 2022 FC 417 at para. 55)

- **Lay witnesses may provide evidence about "but for" world**
  - Can testify about "but for" world events where witness has relevant knowledge of actual real world events (*Pfizer*, 2016 FCA 161 at paras. 105-108, 112 and 121)
  - Workable non-infringing alternatives (2022 FC 874 at para. 621)

Objections

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Types of Objections

- **Rule 52.5(1) – disqualifying objections as "early as possible" (expert only)**
  - Is expert qualified?
  - Is expert independent?
  - Improper methodology?

- **Other admissibility objections (fact and expert)**
  - Improper opinion
  - Hearsay
  - Rely on inadmissible information (*e.g.*, non-compliance with *Evidence Act,* Rule 248)

- **Weight (fact and expert)**
  - Level of expertise
  - Credibility issues

When/How to Raise?

Before Trial

- FC Timetable Checklist has deadlines for *when* to raise objections and *how* to deal with them
- Admissibility should be raised at as early as possible (Rule 52.5(1)) *FCR*; *White Burgess* at para. 45)
- Would pre-trial *voire dire* benefit gatekeeping role?
  - Need to balance against trial becoming longer and more complex

During Trial

- Stand up or potentially waive the right to later raise an objection (*Rovi*, 2024 FCA 126 at para. 57; *Pfizer*, 2017 FC 526 at paras. 36-41)

During Closing Argument

- On agreement, admissibility objections may be argued as part of closing agreement
- Where no agreement, may be out of time to do so (*Takeda*, 2024 FC 106 at para. 32)

Timing for Objections: Pros and Cons

Before Trial

Pros

- If successful, can make trial more efficient
- Certainty for both parties
- No enough time in trial calendar / unnecessarily lengthens trial

Cons

- Court lacks factual context to properly assess evidence
- Opponent has ability to alter course if evidence ruled inadmissible

During closing argument

Pros

- More efficient (*e.g.*, Court has context, objection may fall away)

Cons

- May have waived ability to object
- Force of objection
- Party seeking to adduce evidence may bear the risk

Reply Evidence

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First Principles of Reply Evidence

- **Rule 274 of the *Federal Courts Rules* expressly contemplates that the plaintiff in an action *may* adduce reply evidence:**

> **Order of presentation**
>
> 274 (1) Subject to subsection (2), at the trial of an action, unless the Court directs otherwise,
>
> (a) the plaintiff shall make an opening address and then adduce evidence;
>
> (b) when the plaintiff's evidence is concluded, the defendant shall make an opening address and then adduce evidence; and
>
> (c) when the defendant's evidence is concluded, the plaintiff may adduce reply evidence.

- **However, Rule 274 does not address what constitutes proper reply evidence.**

First Principles of Reply Evidence

- **Four principles for determining whether reply expert evidence should be permitted:**

  - Evidence which is simply confirmatory of evidence already before the court is not to be allowed.

  - Evidence which is directed to a matter raised for the first time in cross examination and which ought to have been part of the plaintiff's case in chief is not to be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.

  - Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not to be admitted.

  - Evidence which is excluded because it should have been led as part of the plaintiff's case in chief will be examined to determine if it should be admitted in the exercise of trial judge's discretion.

    ➤ *Janssen Inc. v. Teva Canada Limited*, 2019 FC 1309 at para. 16

First Principles of Reply Evidence

- **Additional considerations guiding the admission of reply evidence:**
  - Whether the further evidence serves the interests of justice;
  - Whether the further evidence assists the Court in making its determination on the merits;
  - Whether granting the motion will cause substantial or serious prejudice to the other side; and
  - Whether the reply evidence is responsive and was available and/or could not have been anticipated as being relevant at an earlier date.
    - ➤ *Merck Sharp & Dohme Corp. v. Wyeth LLC*, 2020 FC 1087 at para. 10
- The fourth consideration addresses case-splitting: “unfair surprise, prejudice and confusion” arises when the plaintiff puts forward only some of its evidence at the first instance and adds more evidence to bolster its position after the defendant has made its case.
  - *Angelcare Development Inc. v. Munchkin, Inc.*, 2020 FC 1185 at para. 9

First Principles of Reply Evidence

- **To determine whether the proposed reply was not available and/or could not be anticipated:**

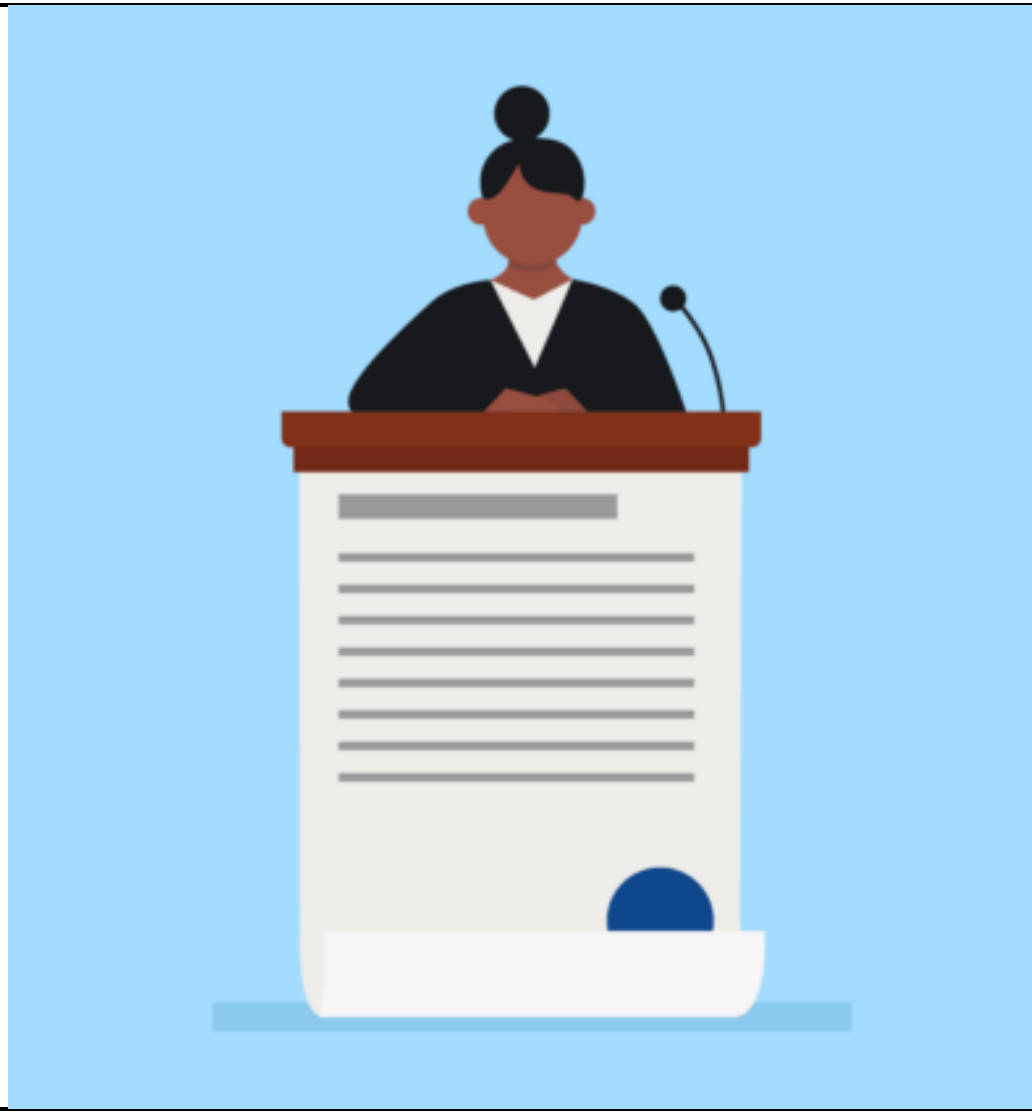
  - Is the proposed evidence properly responsive to the other party's evidence?
    - ➤ It is responsive if it is not a mere statement of counter-opinion but provides evidence that critiques, rebuts, challenges, refutes or disproves the opposite party's evidence.
    - ➤ It is not responsive if it merely repeats or reinforces evidence that the party initially filed.

  - If responsive, could it have been anticipated as being relevant at an earlier date?
    - ➤ If it could have been anticipated earlier, then it is being offered in an attempt to strengthen one's position by introducing new evidence that could and should have been included in the initial affidavit.
    - ➤ Such evidence is not proper reply evidence as the party proposing to file it is splitting his case.

      - *Merck-Frosst v. Canada (Health)*, 2009 FC 914 at paras. 23, 25

Whether to Adduce Reply Evidence – risk vs. reward

- **In deciding whether to bring a motion for reply evidence at all – consider:**
  - Chances of success on motion
    - ➤ Research law for analogous circumstances?
  - Should your reply evidence more properly be addressed through cross-examination?
    - ➤ Is it a dispute between experts where Party/Expert 2 is trying to have the last word?
  - Is it worth the risk?



When and How to Adduce Reply Evidence

- *PMNOC Timetable Checklist includes deadlines for:*
  - 53. Delivery of any proposed reply expert reports
  - 54. Date for raising objections to any proposed reply expert reports
  - 55. Motion for leave to file reply expert evidence
  - 56. Service of any reply expert evidence
- But often the date of the hearing of a reply motion is left to be determined closer to trial

Timing of a motion for reply evidence

When should a motion for reply evidence be heard?

Before trial? **During trial?** **Often in the Court's hands**

Before Trial

Pros

- Certainty before trial as to the evidence
- Focus on preparing for in-chief testimony or cross-exam based on evidence that will be allowed

Cons

- Availability of parties and Court

During Trial

Pros

- Parties and Court better understand importance and context of the proposed evidence
- Potential strategic advantages

Cons

- May take up valuable trial time
- Potential strategic disadvantages

Questions?