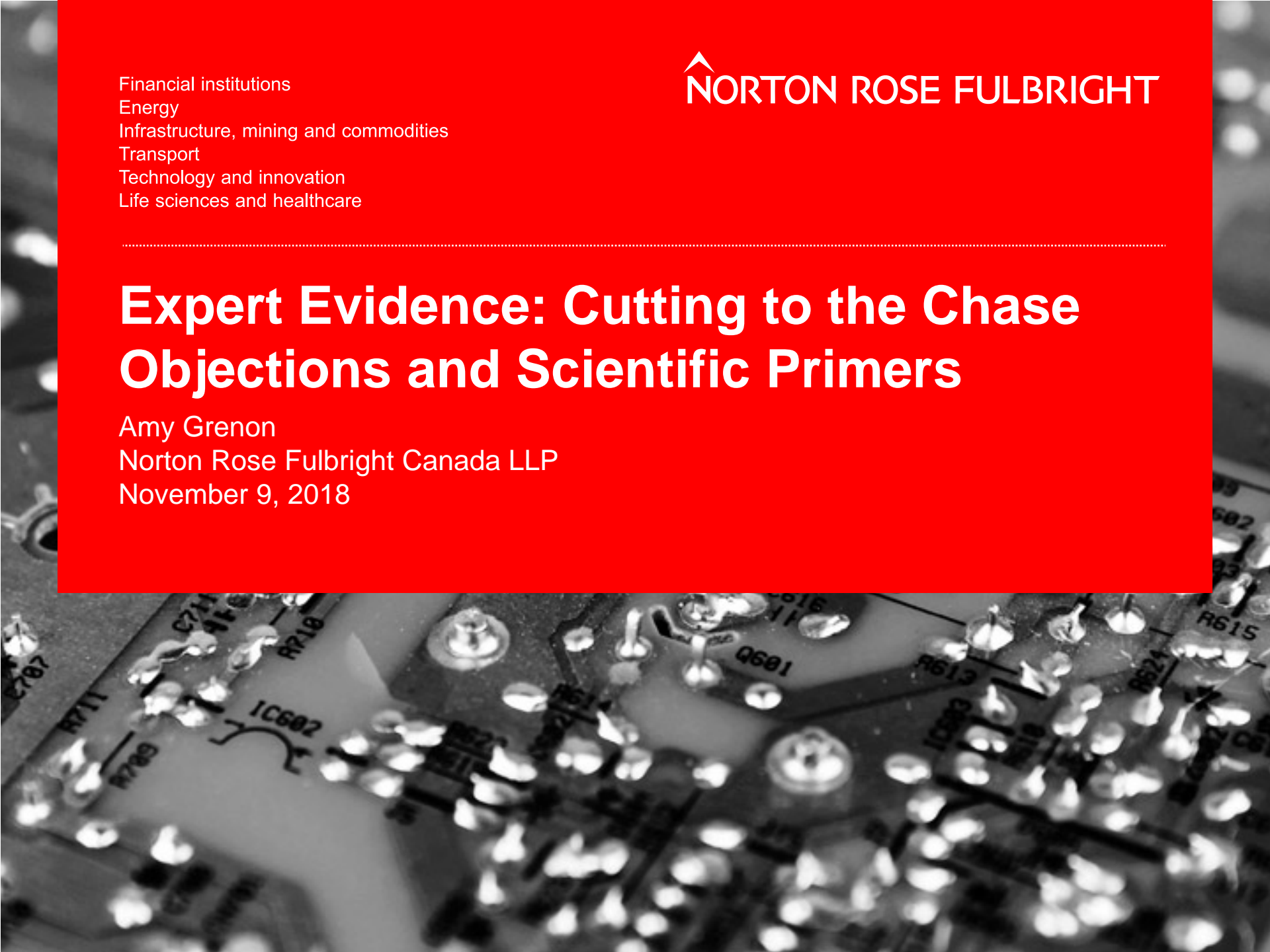


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# Expert Evidence: Cutting to the Chase Objections and Scientific Primers

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November 9, 2018



# Expert Objections – Admissibility

## *White Burgess (SCC 2015):*

### **1. Threshold requirements (*Mohan* factors)**

- Is the evidence logically relevant?
- Is it necessary to assist the trier of fact?
- Is it subject to an exclusionary rule (e.g. domestic law)?
- Is the proposed expert properly qualified?
  - Independent, impartial and absence of bias?

### **2. Gatekeeper function**

- Do the benefits of admitting the evidence outweigh its potential risks?
  - How much is founded on hearsay?

# Expert Objections – Hearsay

- In general, facts underlying an expert's opinion must be proven
- But, widely accepted that an expert's knowledge may be derived from the assertions of others not before the court (e.g., scientific papers, lectures, etc.)
- There is an acceptable component of hearsay in the formulation of an expert's opinion

## Where is the line drawn?

- If it is information that regularly forms the material upon which an expert relies in the course of his or her expertise → **Yes**
- If it goes directly to a matter in issue and comes from a source that is inherently suspect (e.g. a party) → **No**

*R v. Lavallée*, 1990 CanLii 95 (per Sopinka J.)

# Expert Objections – Hearsay

Two examples:

- *Eli Lilly v. Apotex*, 2007 FC 455
  - The Court disregarded portions of expert reports relying upon fact evidence from a retired Lilly employee determined to be hearsay
  - However, it was suggested that portions relying upon a study conducted by an opposing party in foreign litigation may have been admissible (but ultimately were not considered relevant or necessary to the issues)
- *Takeda v. Canada*, 2015 FC 751
  - The Court allowed expert evidence relying upon data disclosed in another patent as it was an “authenticated and facially reliable scientific reference”

# Expert Objections – Expert Code of Conduct

## *Es-Sayyid v. Canada, 2012 FCA 59*

[42] Second, at the hearing, we drew to the attention of counsel that Rule 52.2 of the *Federal Courts Rules*, SOR/ 98-106 had not been followed. That Rule sets out an exacting procedure that must be followed for the admission of expert evidence, a procedure that, among other things, is designed to enhance the independence and objectivity of experts on whom the courts may rely: see Rule 52.2(2) and the Code of Conduct for Expert Witnesses in the Schedule to the Rules.

# Expert Objections – Expert Code of Conduct

R. 55.2 & Schedule requires that expert reports must have:

- (a) a statement of the issues addressed in the report;
- (b) a description of the qualifications of the expert on the issues addressed in the report;
- (c) the expert's current curriculum vitae attached to the report as a schedule;
- (d) the facts and assumptions on which the opinions in the report are based; in that regard, a letter of instructions, if any, may be attached to the report as a schedule;
- (e) a summary of the opinions expressed;
- (f) in the case of a report that is provided in response to another expert's report, an indication of the points of agreement and of disagreement with the other expert's opinions;
- (g) the reasons for each opinion expressed;
- (h) any literature or other materials specifically relied on in support of the opinions;
- (i) a summary of the methodology used, including any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out, and whether a representative of any other party was present;
- (j) any caveats or qualifications necessary to render the report complete and accurate, including those relating to any insufficiency of data or research and an indication of any matters that fall outside the expert's field of expertise; and
- (k) particulars of any aspect of the expert's relationship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court.

- See for example: *Sleep Country v. Sears*, 2017 FC 148

# Expert Objections - Timing

**R. 52.5(1):** Objections that could disqualify a witness from testifying must be made as early as possible.

**R. 262(2):** Objections to expert reports must be made in a pre-trial memorandum.

## Trial Management Guidelines (April 2017):

“Any objections to expert reports or expert qualifications should be made to the case management judge within 30 days of service of the reports and no later than 30 days prior to trial”

**Don't be late – cannot raise objections on appeal**

# Expert Objections - Format

**R. 52.5(2):** Must serve and file document containing the particulars of and basis for the objection.

## Trial Management Guidelines (April 2017):

- Suggests that the Case Management Judge may adjudicate the matter before trial.
- The Trial judge may also agree to hear objections at trial (or presumably beforehand at a separate hearing) - *if raised by the parties prior to the 30 day pre-trial period.*



# Scientific Primers – Part of the Pre-trial Process

## Trial Management Guidelines (April 2017):

- Parties encouraged to “prepare and deliver a joint primer” on the pertinent technology and scientific principles prior to trial.
- Silent on format – could be written or oral

**Rule 52.6:** Allows expert conferences prior to trial

# Scientific Primers – A Starting Point

R. 55.2 & Schedule requires that expert reports must have:

- (a) a statement of the issues addressed in the report;
- (b) a description of the qualifications of the expert on the issues addressed in the report;
- (c) the expert's current curriculum vitae attached to the report as a schedule;
- (d) the facts and assumptions on which the opinions in the report are based; in that regard, a letter of instructions, if any, may be attached to the report as a schedule;
- (e) a summary of the opinions expressed;
- (f) in the case of a report that is provided in response to another expert's report, an indication of the points of agreement and of disagreement with the other expert's opinions;
- (g) the reasons for each opinion expressed;
- (h) any literature or other materials specifically relied on in support of the opinions;
- (i) a summary of the methodology used, including any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out, and whether a representative of any other party was present;
- (j) any caveats or qualifications necessary to render the report complete and accurate, including those relating to any insufficiency of data or research and an indication of any matters that fall outside the expert's field of expertise; and
- (k) particulars of any aspect of the expert's relationship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court.

# Scientific Primers – Plan For It

Consider possibility of a technical primer when preparing reports

- Are there book chapters or videos experts can agree upon?
- Portions of the “background” sections of reports that can be used?
- Scientific summaries submitted in other jurisdictions?

Build oral presentation into pre-trial calendar

- Set dates for completion of materials

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