Docket: 2010-3531(IT)G

BETWEEN:

AECON CONSTRUCTION GROUP INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on March 15, 2012, at Vancouver, British Columbia

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant:	Edwin G. Kroft, Q.C. Deborah Taze
Counsel for the Respondent:	Jasmine Sidhu Perry Derksen Geraldine Chen

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ORDER

The respondent's motion is allowed with costs which I set at $1,500, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of June 2012.

"François Angers"

Angers J.

Citation: 2012 TCC 160
Date: 20120608
Docket: 2010-3531(IT)G

BETWEEN:

AECON CONSTRUCTION GROUP INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Angers J.

[1] This is a motion by the respondent for an order that Graham Farquharson of Strathcona Mineral Services Limited is not disqualified, by reason of conflict of interest, from being retained by the respondent as an expert witness in this income tax appeal. The affidavits of Graham Farquharson, Verena Zbyrovski and Ali Lakhani were submitted in support of the respondent's position and the appellant submitted one from Susan Washbun in support of her position.

[2] The substantive issue of the appeal concerns the 1993 fair market value (FMV) of mining properties located in the Keno Hill - Galena Hill near Elsa, Yukon, which translates to the amount deductible as Canadian development expenses pursuant to section 66 of the *Income Tax Act*. The appellant, through its predecessor corporations, contend that the FMV at the time was 32 million dollars while the respondent claims that it amounted to no more than 3 million dollars. Both parties will be calling experts to determine the FMV.

[3] At the time, the appellant relied on the valuation report prepared by one Ross Lawrence of the firm Watts, Griffis and McOuat ("Watts"), dated December 17, 1993. During the course of the audit, Watts prepared an additional analysis dated September 21, 2000, which was submitted to the Canada Revenue Agency (CRA). In

addition, the appellant also retained one Christopher Lattanzi of Micon International Limited as an additional expert. Mr. Lattanzi prepared a report dated June 2009 but the respondent alleges that Mr. Lattanzi might have been contacted as far back as June 2001.

[4] The CRA also had its own valuation analysis made by Mr. Gerry Martin from Business Valuations at the Calgary Tax Services Center. Mr. Martin was assisted by Paul Hawkins & Associates, a mining consulting firm from Calgary and summarized in a memo dated February 9, 2001. Final proposal letters were issued by CRA to the appellant on June 1, 2001 and reassessed in October 2001.

[5] By June 18, 2001, the appellant had contacted two senior mining valuation experts, namely Graham Farquharson (Mr. F) of Strathcona Minerals Services Limited and William Rascoe (Mr. R) of Roscoe Postle and Associates. The appellant did not retain either expert but information was disclosed to both which I will address subsequently in my reasons.

[6] The appellant filed their notice of appeal on November 12, 2010 and an amended notice of appeal on January 5, 2011. The respondent filed their reply on March 4, 2011.

[7] By April 15, 2011, the respondent contacted Mr. F and learned that he had been previously contacted by the appellant. Mr. R was contacted in June 2011 but he withdrew as a potential expert witness for the respondent a month later. Mr. R had invoiced the appellant and withdrew. He communicated the following to respondent's counsel:

> The fact that we received a binder of documents implies there was confidential information in addition to the Watts Firm report. The fact that we invoiced for our work certainly would give the perception of a conflict of our part. Aecon personnel may have notes that reinforce the potential for conflict of interest.

[8] The respondent contacted the appellant on September 21, 2011 to advise that it had contacted both Mr. F and Mr. R. The respondent advised that the appellant's contact with Mr. F would not disqualify him from being retained as an expert. The respondent wanted to resolve this potential issue without undue cost and delay. The appellant disagreed with the respondent's position and took the same position with regards to Mr. R. Hence, the respondent is bringing this motion.

[9] Mr. F's initial recollection in April 2011 about his contact with the appellant was a visit of an officer of the appellant with the appellant's counsel at that time. The meeting was to enable them to inquire about whether Mr. F would participate in a review of a mining investment that was in dispute with the CRA. Mr. F recalls the name Neil Bacon who is vice president and controller of Aecon and the law firm of Wildeboar, Rand, Thomson, Apps and Dellelce LLP is vaguely familiar.

[10] Mr. F's most important recollection was that he had advised the appellant that they were unlikely to agree with the opinion expressed by Watts. This was based on his previous dealings with that firm in another litigation, namely the *Raglan* case.

[11] Subsequently, Mr. F reviewed his diaries and correspondence files. His entries indicated the following:

1. June 18, 2001 – Telephone call – Neil Bacon - Taxation - JEL
2. June 19, 2001 – Keno Hill file review, Aecon vs CCRA
3. June 20, 2001 – Meeting – Neil Bacon – Keno Hill valuation – CCRA
4. June 22, 2001 – Telephone call – Neil Bacon – Thanks for Raglan case
5. July 11, 2001 -

[12] After the June 20, 2001 meeting, Mr. F sent Mr. Bacon a letter on the same day. The letter included a copy of the *Raglan Mines Ltd v. Blok-Anderson*, [1993] O.J. No. 727. In the letter, Mr. F described how he was on opposite sides with Watts. He noted that the trial judge made some interesting observations on share market values relative to the basic underlying value of the mining properties as well as the use of "potential" reserves in the DCF (discounted cash flow) value approach which Watts Griffis had used. It may provide some interesting background for your consideration as to what approach to follow on the matter that we discussed.

[13] The last meeting on July 11, 2001 was again with Mr. F, Mr. Bacon and Mr. Rand who was counsel for the appellant at the time. Subsequent to his review of correspondence, files and diaries, Mr. F wrote to counsel for the respondent on May 2, 2011 to inform him that his notation "Declined to be creative" refers to his response to Mr. Rand's request that they were looking for an expectation to be creative in their response to CCRA. Mr. F believed that the July 11, 2001 meeting resulted in the appellant not having any further interest in discussion with him on this matter.

[14] In Mr. F's letter to respondent's counsel on May 16, 2011 which was in response to queries made by counsel earlier, he wrote that he had never signed a

retainer or any agreement to undertake any assignment on behalf of the appellant; had never received any payment from the appellant, did not recall any specific information from the appellant to review but given the note in his diary, he acknowledges that he must have been given some documentation to review at the initial meeting and says it is possible it may be the Watts valuation report but cannot recall specifically. He adds that we were obviously not enthusiastic about whatever documentation we reviewed, given we took the position to send Mr. Bacon a copy of the *Raglan* case. He also adds that no project file was established on this matter, does not recall any request for confidentiality nor of any specific legal strategy other than their suggestion to take an approach with which we were not comfortable and declined to be creative and finally never expected to hear anything further on the matter.

[15] The issues in this motion are:

(a) Should the decision of whether Mr. F be disqualified, by reason of conflict of interest, be left to the trial judge, or can my decision on this interlocutory motion bind the trial judge?
(b) Is Mr. F disqualified as an expert witness for the respondent by reason of conflict of interest?

[16] It is well-known that before expert testimony can be admitted, the expert must be properly qualified as such. That is for the trial judge to decide. According to the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9, the admission of expert testimony is a two-fold process. First, the witness must be qualified on the basis of the following four criteria, namely: relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule and proper qualifications. Once the evidence is heard on the expert witness' qualifications, the judge is to then rule on the areas he may testify on. In particular, it may be all the relevant areas counsel has moved the Court for the witness to testify to or only some of the areas or none at all.

[17] That being said, it is my opinion that this interlocutory motion is not really about the pre-clearance of an expert but rather about resolving one party's challenge of the retention of a particular expert. The former kind of issue calls for a discussion of the four Mohan criteria, in contradistinction to considerations of conflict of interest or apprehension of bias. It is quite possible to resolve the latter kind of issue by interlocutory motions and eventually to dispose of experts on that basis, and that is a matter quite distinct from the former kind of issue. This view seems to be confirmed by relevant provisions of the recently amended *Federal Courts Rules*, which read as follows:

> 52.5(1) A party to a proceeding shall, as early as possible in the proceeding, raise any objection to an opposing party's proposed expert witness that could disqualify the witness from testifying.
>
> (2) An objection may be raised
>
> (a) by serving and filing a document containing the particulars of an basis for the objection; or
> (b) in accordance with subsection 262(2) or subparagraph 263(c)(i) if, in the case of an action, the objection is known prior to the pre-trial conference.

[18] That Rule allows a party to bring forth reasons why a particular expert should be disqualified as early as possible. The underlying policies of that rule are to save cost, risk of delay at trial and, globally, to streamline the trial process. This Court is moving towards similar rules and although one may think that it may encourage other pre-emptive motions to qualify or disqualify experts, the Rule only contemplates "disqualifying motions". This leaves the process of qualification of expert witnesses in the hands of the trial judge.

[19] Although this Court is not yet governed by such a rule, I believe there is sufficient discretion conferred to a motion judge by Rule 70 in addition to its inherent jurisdiction to dispose of this matter.

[20] The respondent, by this motion, is not asking whether evidence should be admissible or not. It is not a motion for a final determination that Mr. F may or may not give evidence at trial. The trial judge in this case will be concerned with the evidence dealing with the FMV of the mining property. The evidence heard on this motion does not reveal how this motion would bind a trial judge in determining admissibility of evidence regarding FMV and potentially cause problems for the trial judge. The evidence heard does not clarify the effect of confidential information if any on the determination of admissibility of evidence or if it would have an effect on the determination of the FMV. In my opinion, the question in this motion is therefore not an evidentiary matter that is solely for the trial judge to decide.

[21] When the respondent was informed that Mr. F had been previously contacted by the appellant, it so informed the appellant. After discussing the matter with Mr. F, the respondent took the position that the appellant's contact with Mr. F would not disqualify him from being retained. The appellant disagrees with the respondent and the respondent is now seeking a ruling on this issue.

[22] The leading authority on whether or not an expert should be disqualified is *Abbott Laboratories v. Canada (Minister of Health)*, 2006 F.C. 340. In that case, Mr. Justice O'Keefe cited Prothonary Milczynski on a different motion of the same parties. I reproduce paragraphs 19, 20 and 21:

> [19] The proper approach to determine whether or not an expert should be disqualified must consider the facts and surrounding circumstances of each case and:
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> - whether the expert knew he or she was receiving confidential information, with the expectation that the information would be maintained in confidence;
> - the nature of the confidential information;
> - the risk of the confidential information being disclosed
> - the risk of prejudice arising to either the party challenging the expert or to the party seeking to retain the challenged expert; and
> - the interests of justice and public confidence in the judicial process.
>
> [20] Accordingly, the principles require that the Court balance the interests of the party seeking to retain an expert witness and the party seeking to protect its confidential information. In that regard, counsel for *Pharmascience* raises the danger of expert witnesses being contacted simply to deprive an opposing party of their expertise. This danger was eloquently described by Lord Denning in *Harmony Shipping Co SA v. Davis et al*, [1979] 3 All ER 177 (C.A.):
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> > If an expert could have his hands tied by being instructed by one side, it would be very easy for a rich client to consult each of the acknowledged experts in the field. Each expert might give an opinion adverse to the rich man, yet the rich man could say to each, "Your mouth is closed and you cannot give evidence in court against me" ..... Does that mean that the other side is debarred from getting the help of any expert evidence because all the experts have been taken up by the other side? The answer is clearly No .... There is no property in an expert witness as to the fact he has observed and his own independent opinion of them. There being no such property in a witness, it is the duty of a witness to come to court and give his evidence in so far as he is directed by the judge to do so.
>
> [21] In *Labee v. Peters*, [1996] A.J. No. 809 (Alta Q.B.), after reviewing a number of authorities, the Court set out the principles:
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> 1. There is no property in a witness.
> 2. Even though a party has retained an expert and communicated privileged information to the expert, the expert may still be asked for an opinion by an opposing party and may call that expert at trial.

> 3. The expert may not, however, be questioned concerning any privileged material he received from the opposing solicitor nor shall he disclose any opinion he has given to the opposing counsel.

[23] Neither party in this motion, has been able to clarify the nature of the confidential information that may or may not have been communicated. Mr. F's affidavit does not disclose if he has, in fact, received any and the appellant did not cross-examine Mr. F on his affidavit. It is therefore unclear as to the risk associated with disclosing said information or if, it will cause a prejudice to the appellant. No evidence was put forward that allowing the respondent to retain Mr. F. would prejudice the appellant.

[24] In the light of the evidence presented, one cannot conclude that Mr. F and the appellant shared sufficient information for either one to expect that whatever that information may be would be kept in confidence or is privileged. Mr. F was never retained, no retainer agreement or confidentiality agreement was signed and there is no evidence that the appellant would have requested Mr. F not to discuss the matter with others. Mr. F did not open a file, did not invoice the appellant nor received any payment, nor was he asked to perform any services. It appears to me that the discussions Mr F had with the appellant in 2001 were of an informal nature and nothing more than an attempt to see if Mr. F shared their point of view. In his affidavit, Mr. F did not recall discussing specific legal strategy other than the fact that he refused to be "creative" in responding to CRA's position. He cannot recall the documents he reviewed nor did he retain any documents. He also said that early on, he communicated to the appellant that, on the basis of previous experience with Watts, it was unlikely that the appellant would agree with his firm's method of valuation. That is hardly the foundation necessary for the appellant to shield Mr. F from being retained by the opposing party and provide his opinion.

[25] I do not believe that the fact situation of this case jeopardizes the interest of justice and public confidence in the judicial process. This is not a situation where an expert is motivated in selling his opinion to the highest bidder even if it means a breach of a confidential agreement.

[26] It has long been recognized by the courts that there is no property in a witness (see *Abbot*, supra). An expert witness is to testify on his particular expertise objectively and the courts should discourage parties from shopping for experts in order to disqualify them from the other side. Although this latter question was not raised in this fact situation, it is nonetheless a question of preserving the integrity of the judicial system.

[27] Counsel for the appellant has argued that the respondent is not prejudiced as he is in a position to retain a different expert and that the standards he has set are too strict in his choice of experts. That may well be, but it is not this Court's responsibility to rule on what experts should be retained by either party or that one expert would be better than another in a given situation. Counsel are masters of the evidence they wish to present and the trial judge will weigh the evidence presented accordingly.

[28] I therefore conclude that Mr. F is not disqualified as an expert witness for the respondent by reason of conflict of interest. The respondent is entitled to the costs of the motion which I set at $1,500. The parties had to complete the examinations for discovery by March 30, 2012. That date is hereby extended to September 28, 2012 with undertakings to be satisfied by November 16, 2012. The parties shall communicate with the hearings coordinator in writing on or before December 7, 2012 to advise the Court whether the case will be settled, whether a settlement conference would be beneficial or whether a hearing date should be set. In the latter event, the parties shall file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure*) by said date.

Signed at Ottawa, Canada, this 8th day of June 2012.

"François Angers"

Angers J.

CITATION:	2012 TCC 160
COURT FILE NO.:	2010-3531(IT)G
STYLE OF CAUSE:	Aecon Construction Group Inc. and Her Majesty the Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 15, 2012
REASONS FOR ORDER BY:	The Honourable Justice François Angers
DATE OF ORDER:	June 8, 2012

APPEARANCES:

Counsel for the Appellant:	Edwin G. Kroft, Q.C. Deborah Taze
Counsel for the Respondent:	Jasmine Sidhu Perry Derksen Geraldine Chen

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