

[Indexed as: **Fontana et al. v. Oxford County**]
IN THE MATTER OF THE EXPROPRIATIONS ACT, RSO
1990, c. E-26
IN THE MATTER OF AN ARBITRATION
LUIGI FONTANA, MIRTO RUI, ANTONIO CALVANO AND
GIUSEPPE MARIGNANI IN TRUST (Claimants) and THE
CORPORATION OF THE COUNTY OF OXFORD
(Respondent)
BLANDFORD SQUARE DEVELOPMENTS LIMITED,
VINCORP FINANCIAL LTD., and JOSEPH CHETTI, IN
TRUST (Claimants) and THE CORPORATION OF THE
COUNTY OF OXFORD (Respondent)
IRWIN MINTZ, IN TRUST (Claimant) and THE
CORPORATION OF THE COUNTY OF OXFORD
(Respondent)
Local Planning Appeal Tribunal
Docket: LC160003, LC160029, LC160043
Lanthier Member
Heard: October 22, 2019
Judgment: October 22, 2019

Real property — Expropriation — Valuation — Evidence of value — Appraisal reports — Parties in expropriation matter arrived at resolution to settle motion brought by county to strike review report prepared by real estate and planning advisors (“report”) — Parties requested tribunal provide ruling on request by county regarding attendance of two authors of report — County was requesting that each of two co-authors, professional land economist and registered professional planner, respectively, be excluded from hearing as other provided his or her testimony — Manner in which tribunal and court receives expert testimony is different from that of factual evidence — Distinctions are nature of qualified expert evidence and special ground rules that apply — Process of presenting evidence by experts in cases such as this commonly involved situation where one expert may be relying upon opinion of other — In expropriation case, it is accepted that issue of highest and best use opinion evidence may be domain of planner which in turn can serve as basis for appraiser’s opinion evidence as to market value as defined in Expropriations Act — It was reasonable that one of experts should be present to hear evidence of other — Entire process of pre-hearing disclosure lent itself to sharing and collaboration of ex-

perts' testimony well in advance of hearing and throughout process — County was not denied opportunity to challenge co-authors fairly and to test veracity of their opinions and strengths of facts, assumptions and opinions upon which they were based — There would be no prejudice to any party if order was not made — Ruling issued that co-authors would not be excluded — Expropriations Act, R.S.O. 1990, c. E-26.

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally

R. 52.06

RULING on request regarding attendance of co-authors of report by real estate and planning advisors at hearing.

Robert Ackerman, for Fontana Group

Stephen Waqué, Andrew Baker, Julie Lesage, for County of Oxford

Lanthier Member (orally):

- 1 MR. LANTHIER: Yes. I had sufficient time to prepare reasons so I will provide the decision with the reasons this morning, which is as follows:
- 2 The parties have arrived at a resolution to settle the motion brought by the County to strike the review report prepared by GSI Real Estate and Planning Advisors Inc., referred to as “the GSI Report.” That motion arose as a result of the nature of the GSI Report served in reply which went beyond the parameters of a reply to add additional valuation opinions.
- 3 As a means to resolve the non-compliance with the procedural order and the motion, as between counsel they have agreed to a consensual arrangement which will avoid any adjournment of the hearing and resolve the matter expeditiously. The parties have consented as to the service of supplementary reply reports, or surreply reports, which have already been provided in the introduction of the reply evidence in Fontana’s case in chief with the resultant opportunity of the County to respond in the presentation of the oral evidence.
- 4 As well, the parties have agreed to terms whereby each will voluntarily have their own like experts withdraw from the hearing room as each party’s other appraisal expert is testifying. That is, for example, on the Fontana Group side Ben Lansink will not be present when Ian Tilley and

Catherine Spears are testifying. And similarly for the county's witnesses, David Atlin will not be present when Yvonne Whyte is testifying and vice versa.

- 5 The agreed upon resolution of the motion is also predicated upon the ruling of the Tribunal on one additional matter that has now been raised and about which they cannot agree. The parties have agreed to accept this additional ruling by the Tribunal as determinative of the motion with the other above-mentioned terms.
- 6 The parties have requested the Tribunal provide a ruling on a request by the County regarding the attendance of the two authors of the GSI Report. In addition to the indicated arrangement for the voluntarily exclusion of the other like experts on each side, the County requests that in the circumstances of the GSI Report that each of the two coauthors, Ian Tilley, professional land economist, and Catherine Spears, registered professional planner, also be excluded from the hearing as the other provides his or her testimony; that is Mr. Tilley will be required to be absent from the hearing room when Ms. Spears is testifying and Ms. Spears will be excluded when Mr. Tilley is providing his evidence.
- 7 Fontana Group opposes this exclusion of these expert witnesses as being excessive, unnecessary and contrary to the process whereby the evidence of one expert may be based upon the opinion evidence of another expert. Mr. Ackerman argues that the process of excluding witnesses as a matter of procedure is directed towards lay witnesses and not qualified expert witnesses and that there is no prejudice to the County if the expert witnesses are present and hear the other expert's oral evidence.
- 8 To the contrary, Fontana Group argues that it would be unfair to the presentation of the case by the witnesses called by it if such an order is made. Neither party has provided any judicial authority or prior decision of the Tribunal with respect to this type of requested exclusion of expert witnesses initiated by the County. That request, if granted, would result in the exclusion of two co-authors of a report during the evidence of the other.
- 9 By extension, and specifically in expropriation hearings, if this type of order was granted this might also signal the Tribunal's support of a precedential exclusion of an expert planning witness from any hearing when the related expert appraisal witness called by the same party is testifying where it is common that the appraiser is relying upon the opinions of the planner.

- 10 As well, such an order might further endorse a practice of exclusion in a hearing when one qualified expert may be excluded from the hearing room when another expert connected by the subject matter and whose opinion informs the other expert's opinion is testifying on behalf of a common party.
- 11 There is a provision in rule 52.06 of the Rules of Civil Procedure whereby a trial judge may at the request of a party order that a witness be excluded from the courtroom until called to give evidence. It cannot apply to party or to witness instructing a lawyer. Although sometimes there is a blanket order made to exclude all witnesses, the rule notably refers to "a witness" and not "all witnesses" which thus grants the presiding judge the full discretion as to which witnesses should be excluded.
- 12 Dealing first with the material to which the Panel has been referred by the County to support this request, Mr. Waqué has referred the Panel to excerpts from the Canadian Uniform Standards of Professional Appraisal Practice, Exhibit 5. It is the Panel's view that the provisions identified in the submissions and the fact that Mr. Tilley may be deemed to be responsible for Ms. Spears' testimony is not particularly helpful under the circumstances in deciding this issue.
- 13 The County has also referred the Tribunal to an extract from Sopinka and Lederman on evidence and the basis upon which such an order to exclude a witness is made. The premise of this exclusion is to preserve the integrity of the evidence and avoid a witness from tailoring evidence based on evidence already presented in the hearing.
- 14 Mr. Waqué also argues that the exclusion of the two coauthors will allow for his effective cross-examination of each expert in testimony sterile circumstances where each expert witness is unable to know what the other has said.
- 15 The County further submits that under the approach governing the exclusion of witnesses the County is not required to establish overwhelming prejudice and that if the parties make the request it is to be granted.
- 16 Notwithstanding the submission that the party requesting the exclusion is not required to show prejudice, Mr. Waqué has presented argument as to how the County may be prejudiced if the two co-authors of the GSI Report are permitted to hear each other's evidence.
- 17 That perceived prejudice is that Mr. Tilley may tailor his evidence if he has heard Ms. Spears' evidence and that the County should be permit-

ted to cross-examine Ms. Spears without informing Mr. Tilley in real time about the matters Mr. Waqué might raise so that Mr. Tilley may not then anticipate what will be raised in his cross-examination.

18 The Tribunal has considered the submissions and cannot agree that it is appropriate to impose such a restriction under the circumstances for the following reasons: First, it is the Tribunal's view that Rule 52.06 and the practical application of the rule by the Court or by the Tribunal is fully discretionary. No party is entitled to the order for the exclusion of a witness merely by making the request.

19 As to the underlying reason for the order, generally the basis for the exclusion of a witness is twofold. First, there is the concern that if opposing parties hear the evidence of the other parties they may tailor or alter their own testimony to their benefit on whatever matters may be contentious and, particularly, in matters of credible.

20 The second concern is that if witnesses of one party who are aligned together in the litigation are able to hear the witnesses who first testify in the hearing they may then later be inclined to alter and tailor their own testimony do be consistent with or enhance what has already been heard.

21 The Tribunal would not wish to be seen as making a sweeping determination that there would never be exceptional circumstances which might warrant the exclusion of an expert witness from a hearing. In this case, for example, the parties have on consent expressly agreed to an arrangement to exclude specific witnesses on both sides of the hearing in order to resolve a procedure shortcoming and a motion in an expeditious manner.

22 Except in unusual or exceptional circumstances, the Tribunal is inclined to believe that the rule allowing for the exclusion of witnesses at the discretion of the trier of fact is not generally applicable to expert witnesses but rather is directed towards lay persons providing factual evidence and is done to protect the integrity of the litigation and adjudicative process where matters of credibility may be at hand.

23 The Tribunal takes the view that the manner in which it and the Court receives expert testimony is quite different from that of factual evidence. The primary distinction is the nature of qualified expert evidence. And the second distinction is the special ground rules that apply to qualified experts because of the nature of that expert evidence.

24 As to the first distinction, expert opinion evidence is different from non-opinion factual evidence. Opinion evidence may be received by the

Tribunal or Court based upon hearsay and a factual basis provided externally from other sources only from an expert who has been qualified to provide such opinion evidence based on education, certification, expertise acquired through specific and intensive training, and accumulated experience in the specialty field.

- 25 The evidence of an expert as he or she attends a hearing is based upon the retainer and the terms of reference and the information provided through other sources and assessed through the lens of that expertise. The expert's evidence is seldom factually-based evidence that may be subject to matters of credibility.
- 26 To the contrary, the expert's evidence is based upon the factual evidence of others and upon externally-sourced information which is what may often be the basis for impugning the opinion of an expert during cross-examination.
- 27 In the Tribunal's view, the distinct nature of expert opinion evidence as it would be provided by two witnesses such as Ms. Spears and Mr. Tilley does not give rise to a presumption of any type of prejudice or reasonable concern that would call for each of the witnesses to be excluded from hearing the evidence of the other experts called by the same party in a hearing.
- 28 To the contrary, the process of presenting evidence by experts in cases such as this commonly involves a situation where one expert may be relying upon the opinion of the other. The Tribunal would agree with Mr. Ackerman's submission that in an expropriation case it is accepted that the issue of highest and best use opinion evidence may be the domain of the planner which in turn can serve as the basis for the appraiser's opinion evidence as to market value as defined in the Act.
- 29 For that reason, it is reasonable that one of the experts should be present to hear the evidence of the other. It is somewhat fundamental to the process that if any portion of the appraiser's opinion evidence will be based on evidence of other experts, such as planning witnesses, then they should not be barred from hearing and knowing that evidence.
- 30 Conversely, there is in the Tribunal's view no prejudice caused to any party if such an order is not made. Specifically, the Tribunal cannot agree with the County's assertion that failing to assist opposing counsel in crafting the framework of the cross-examination somehow represents prejudice.

- 31 The second important distinction for expert witnesses is the nature of the ground rules. The first aspect of these rules is set by the process of qualifying an expert witness. The qualification process in and of itself allows a witness to give testimony that is much different from that of a lay witness.
- 32 Additionally, both the Courts and this Tribunal have added an important obligation in the rules for any experts who may testify in the hearing which must be firmly adhered to. The acknowledgement of expert's duty under the Tribunal's rules of practice and procedure is mandatory for all experts and represents a fundamental construct for the acceptance of an expert's opinion.
- 33 The expert must acknowledge that he or she will provide evidence that is "fair, objective and non-partisan" and, importantly, assures the Tribunal that the duty to provide evidence that is fair, objective and non-partisan based upon their expertise prevails over any obligation which he or she may owe to any party by whom or on who's behalf he or she is engaged.
- 34 Implicit or perhaps explicit in this acknowledgment of expert's duty is the understanding that the expert cannot and should not tailor their evidence to advance the position of an advocate party, as to do so would be cause the expert's opinion to be partisan in nature. And underlying this mandatory commitment imposed by the Tribunal are the varied rules of professional conduct and professional ethics that govern most every professional association to which an expert may belong.
- 35 The other aspect of the ground rules relates to the various imposed requirements for the exchange and delivery of experts' reports in advance of expert testimony under the legislation and rules, both the Tribunal's and the Rules of Civil Procedure.
- 36 These ground rules support and foster the time-tested principle that the parties must know the case they have to meet. And in the case of expert testimony, the parties are not to be caught by surprise as to the expert evidence to be led in the hearing. There are ramifications if there is a failure to serve experts' reports in advance of a hearing. As with most of the Tribunal's cases, the procedural order in these appeals has provided direction in this regard.
- 37 It is the Tribunal's view that this entire process of pre-hearing disclosure lends itself to the sharing and collaboration of experts' testimony well in advance of the hearing and throughout the process. Sequestering one expert from the other during the hearing process seems to some ex-

tent very much like shutting the stable door after the horse has bolted since they already have had the benefit of learning much of what the other expert will say in their oral testimony.

- 38 In the Tribunal's view, these deliberately-imposed ground rules creates a distinctive category of evidence that is not of a type that may be subject to the same concerns of preserving the integrity of the evidentiary process that arises for non-expert witnesses.
- 39 Put another way, by their very nature experts should be relied upon to provide fair, objective and non-partisan expertise and assistance to the Tribunal as the acknowledgement provides based upon the underlying facts and assumptions they have identified as important. This will often include the opinion evidence of other experts retained by their client or sometimes even those of opposing experts.
- 40 For those reasons, it would serve no purpose and limit the value of experts' opinions if they are compartmentalized and sequestered in their manner of delivery to the Tribunal. To exclude a coauthor of a report or two different experts on the same side from seeing the evidence of another expert aligned with their client's interests or of like position would unduly interfere with the proper preparation of case by litigant and the manner in which experts express opinions that are based upon facts and conclusions of other experts.
- 41 Specifically, in this case the Tribunal would agree with the County that Ms. Spears and Mr. Tilley have already collaborated — agree with the Applicants that Ms. Spears and Mr. Tilley have already collaborated and mirrored their evidence obviously as they have coauthored the report together. The County is not denied the opportunity to challenge them fairly and to test the veracity of their opinions and the strengths of the facts, assumptions and opinions upon which they are based.
- 42 The Tribunal finds that there will be no prejudice or objectionable circumstances if Ms. Spears and Mr. Tilley continue that collaboration as the County puts, if by collaboration this means that they will both be present and accounted for when each of them testifies.
- 43 That is the ruling of the Tribunal. Mr. Tilley and Ms. Spears as the coauthors of the GSI Report will not be excluded from the hearing to hear each other's testimony. — Whereupon the excerpt concluded at 11:39 a.m.

Order accordingly.