

GLOBAL COMPETITION REVIEW

The Guide to Energy Market Manipulation

Editor
Gordon Kaiser, JAMS

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Editor

Gordon Kaiser

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The Use of Expert Evidence

M Philip Tunley¹

Introduction

The recent decision in *Re Market Surveillance Administrator allegations against TransAlta Corporation et al* (the *TransAlta* decision) is Canada's first energy market manipulation case.² One striking feature of this decision is the significance of expert evidence in making the determinations that led to the finding that TransAlta violated the law. At the same time, the decision demonstrates a willingness on the part of energy regulators, despite hesitance among the courts in Canada, to take a bold and practical approach to the admissibility and assessment of this kind of evidence.

Much of the work done by and in front of energy tribunals involves experts. Expert evidence can affect the assessment of a wide variety of issues involved in energy regulation, including accounting and financial matters, monopoly and market economics, environmental impacts of energy products and infrastructure, and a myriad of technological and scientific issues affecting the energy industry. Such evidence can be critical both in the adjudication of disputes between stakeholders, and in the forward-looking development of energy policy. At its best, such evidence has the potential to be compelling, or even decisive, on many issues.

This is well exemplified in the *TransAlta* decision, which makes extensive use of expert opinion evidence. However, this stands in stark contrast to the recent approach of many courts, whose recent decisions continue to express a cautious and restrictive approach to the admission and use of expert opinion evidence. It is important for energy lawyers and regulators to understand both the principled reasons for the courts' approach, and the reasons behind that taken in the *TransAlta* decision.

¹ M Philip Tunley is a founding partner at St. Lawrence Barristers LLP.

² *Re Market Surveillance Administrator allegations against TransAlta Corporation et al*, Decision 3110-D01-2015, the AUC (27 July 2015) (*TransAlta* decision).

This chapter therefore begins with an overview of the *TransAlta* decision of the Alberta Utilities Commission (AUC), highlighting key areas in which the evidence of experts affected the outcome.

It then provides a review of recent court cases, both as an essential primer on the law relating to expert evidence, and to highlight the underlying principles and purposes behind the courts' more restrictive approach. At the outset, it is important to understand the reasons behind this approach, and behind the procedural and substantive limitations that the courts impose upon the admission of expert evidence, in order to appreciate the significance of the *TransAlta* decision in its more expansive reliance upon this kind of evidence.

The chapter concludes with a more detailed review of those portions of the AUC's *TransAlta* decision that involve the use of expert evidence to make detailed findings and determinations in the case. The chapter argues that there is really no conflict in principle between the policies that underlie the courts' decisions, and the AUC's approach.

Overview: use of expert evidence in the TransAlta decision

The proceedings which led to the *TransAlta* decision were commenced by Alberta's Market Surveillance Administrator (MSA).

The MSA alleged that on four occasions between November 2010 and February 2011, TransAlta intentionally took certain of its electricity-generating facilities offline for repairs during periods of high electricity demand, rather than deferring those repairs to lower-demand periods, in order to drive up electricity prices, and thereby benefit TransAlta's energy-trading portfolio. It alleged (among other things) that TransAlta possessed material, non-public information that it improperly used to trade in Alberta's electricity trading market. It alleged that TransAlta's conduct breached its obligation under Section 6 of the Electric Utilities Act (the Act), and that the breach resulted in part from its failure to have appropriate preventive and protective measures in place to ensure compliance with this obligation.

TransAlta denied all material allegations, and also specifically relied upon defences of due diligence, officially induced error, and abuse of process arising from certain communications and dealings with MSA officials prior to the trading events in issue.

At an early stage, in accordance with the AUC's Rules, both parties filed reports containing expert opinion evidence in support of various aspects of their respective positions. Although no challenge to admissibility of such evidence had been made by either side in written submissions on the pre-qualification of experts, after the conclusion of the evidentiary hearing, the Supreme Court of Canada released an important decision on the admissibility of expert evidence in *White Burgess Langille Inman v. Abbott and Haliburton Company Limited*.³ As a result, parties asked the AUC to address a series of challenges to the expert evidence led by both sides. Although questions addressing the specific tests for admissibility set out in the *White Burgess* decision had not been asked, the AUC was ultimately able to apply the Supreme Court's analysis retrospectively, and to conclude that all the experts who testified met the threshold for admissibility.⁴

³ *White Burgess Langille Inman v. Abbott and Haliburton*, 2015 SCC 23, 383 D.L.R. (4th) 429 (*White Burgess*).

⁴ *TransAlta* decision, supra note 1 at Paragraphs 85, 100, 105-106.

It is notable that the AUC was able, without using expert evidence, to determine that TransAlta's timing of the four outages was intentionally based upon resulting price effects in the forward market for electricity. This was so because TransAlta had a well-documented portfolio bidding strategy, which was admittedly designed to take advantage of such effects.⁵ Similarly, the AUC was able to dismiss TransAlta's defences of due diligence, officially induced error, and abuse of process without significantly relying on expert evidence. These defences were based upon facts related to specific interactions and communications in which TransAlta claimed it had sought and received advice from the MSA about the timing of the four outages.⁶

The Commission noted that the expert evidence filed in the proceeding fell generally into three categories. Two of those involved expert economic evidence, first regarding the restriction or prevention of competition and second regarding price impacts associated with the timing of outages. The third piece of evidence was about the technology and practices in the electricity generation industry in Alberta and in North America regarding the discretionary nature of the outages.⁷

Before examining the nature and effect of this evidence, it is useful to review the general common law relating to expert evidence, which provides the background to both *White Burgess* and the *TransAlta* decision on this issue.

The principles and policies underlying expert evidence at common law

The limited admissibility of opinion evidence: fact versus opinion

The general rule of our common law is that witnesses may not give opinion evidence, but are limited to testimony about facts within their personal knowledge.⁸ It is often said that this rule is simple to state, but difficult to apply. In practice, the line between fact and opinion is seldom clear. The most common explanation of the distinction is that 'opinions' represent an inference or conclusion drawn by the witness or trier from underlying facts.

This distinction highlights two specific reasons for the general rule against allowing opinion evidence.

- First, it is usually the role of the court or tribunal, not the witnesses, to draw inferences or conclusions from the facts.
- Second, there is a desire to avoid collateral inquiries. The admission of each witness's opinions based on the facts would very likely lead to an assessment of a myriad of factors affecting the basis for the witness's opinion, and its validity.

The first of these rationales is based on the integrity of the decision-making process. This rationale is particularly important where the inference or conclusion to be drawn involves a

5 *TransAlta* decision, supra note 1 at Paragraphs 35–37, 275 and 304–309.

6 *TransAlta* decision, supra note 1 at Paragraphs 595–648.

7 *TransAlta* decision, supra note 1 at Paragraph 107.

8 For a good discussion of this rule, and the principles underlying it, see Alan W Bryant, Sidney Lederman & Michelle K Fuerest, Sopinka, Lederman and Bryant: *The Law of Evidence in Canada*, 4th ed (Sopinka) (Markham: LexisNexis, 2014) at chapter 12, Introduction. There are several other excellent evidence texts, which often provide slightly different insights and analysis. It is worth consulting more than one whenever an important issue arises.

legal or normative component, such as a conclusion about whether conduct is negligent or meets some other recognised standard.

The second rationale highlights the inherent unreliability of this kind of evidence. Ordinary people's opinions can vary, and even conflict, based on a wide range of factors, including purely emotional, unprincipled and even biased tendencies. As such, in most circumstances, it is neither relevant nor helpful, and may even be distracting, to hear a lay witness's opinions about the matters in issue.

However, the general rule against admitting opinion evidence it is subject to at least two recognised exceptions. One involves lay witnesses with no special knowledge, and applies in circumstances where the distinction between fact and opinion is virtually impossible to maintain: for example, testimony as to whether someone is drunk, or how fast a vehicle is travelling. The other important exception involves expert opinion evidence.

In this context, an expert is someone with special knowledge or expertise, who can provide the trier of fact with a 'ready-made inference' based on facts they observe or are asked to assume, which the trier itself would be unable to draw unassisted.⁹ This concept of an expert provides a number of ways in which the concerns about lay persons giving opinion evidence can be mitigated or overcome, which in turn highlights important considerations in the presentation and assessment of expert opinion evidence, as follows:

- Foundation: does the testimony differentiate appropriately between opinions and the underlying facts on which they are based, and are the necessary facts established to support the opinions offered?
- Relevance: are the opinions offered relevant to an issue raised before the tribunal?
- Qualifications: does the witness have special knowledge, which the tribunal or trier of fact does not have, based on qualifications or experience, to provide a proper basis for the opinions offered?
- Necessity: are the opinions necessary to the tribunal's decision-making process, or do they usurp the proper role or functions of the tribunal?

These background principles also highlight why expert evidence, although common, is exceptional, and should properly be subject to special requirements, and assessed with caution.

Conditions for the admission of expert opinion evidence

The last three considerations outlined above have been identified by the Supreme Court of Canada in *R v. Mohan*¹⁰ as pre-conditions that must be met before expert evidence is admitted in the courts. In total, five such substantive conditions have now been suggested. They are reviewed in turn below, together with the procedural requirements developed by the courts (and adopted by many tribunals) to ensure compliance with each of the conditions.

Relevance and the requirement for an expert report

The condition of relevance is basic and necessary for any evidence to be admitted, but its application in cases of expert evidence has several dimensions.

⁹ Ibid at 769.

¹⁰ *R v. Mohan* [1994] 2 SCR 9, 114 DLR (4th) 419 (Mohan) at pp. 20–25.

First the opinion that is offered must arise from or relate to the facts that are relevant to the dispute: an opinion on facts other than those in issue is not relevant, and is of no assistance. However, this does not mean that the expert is limited to facts disclosed or put in issue by the parties: it is quite common for further investigations or tests to be undertaken by or at the request of an expert witness, and for additional facts to be put forward. These additional facts are also subject to the relevancy requirement.

Second, the opinion itself must be one that is relevant to an issue which the court or tribunal is to decide: for example, the value of property in issue, or the negligence of a party.

Finally, the criterion of relevance also has a legal component, which engages counsel for the parties directly. A vital part of counsel's role is to advise on the issues that require expert evidence and the selection of appropriate experts to address them, and to instruct the experts appropriately. It is common practice for counsel, in discussion with the expert, to prepare a retainer letter that sets out any facts provided or to be assumed, and the specific issues on which an opinion is sought.

This analysis illustrates how expert evidence tends to complicate a dispute, by adding to the facts that need to be decided, as well as the evidence to be considered on certain issues. To address this, most courts and tribunals have rules of practice requiring the preparation of an expert report setting out (among other things) the facts that the expert has considered, and the opinions she or he is offering to the trier of fact. Typically, these rules require parties to exchange expert reports a certain time in advance of the hearing, and limit the testimony of the experts at the hearing to the matters set out therein.¹¹

One of the functions of such requirements is to allow parties to raise any objections regarding relevance of the proposed testimony before it is called. Another key purpose is to ensure fairness, by giving the responding party an opportunity to answer the issues defined by the expert, to the extent that they necessarily expand the issues to be determined in the proceeding.

Qualifications and 'tendering' the expert

Court rules and practices also typically address the requirement for a qualified expert.

Selection of an appropriate expert must be based on their qualifications to provide the opinions requested, but counsel also consider their other qualities as a witness. Discussion of the draft retainer letter with the selected expert ensures that the issues defined by counsel are fully within her or his qualifications. In some cases, this may identify a need to sub-divide the issues between differently qualified experts, and to request two or more separate reports that together meet the needs of the particular case.

The rules of practice requiring expert reports typically require that these also include confirmation of the witness's qualifications to provide the opinion requested. Qualifications may consist of formal training, certifications, research, publications or other experience. Reports typically attach a current CV, and may include other material addressing the witness's qualification to address the specific issues raised in the case.

¹¹ See for example, Rule 53.03(1) of the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg 194 as am; Rule 52.2(1) of the Federal Court Rules, SOR/98-106 as am. is to the same effect but requires an affidavit; and see s 657.3(1) of the Criminal Code, RSC 1985, c C-46 as am.

In addition, most courts have adopted a screening process, referred to as ‘tendering’ the expert, which counsel must go through at the beginning of their expert’s testimony. This process typically involves leading the expert through their relevant qualifications, and then asking the court to recognise the witness as an expert in a defined area covering the issues in their report. Opposing counsel is then given an opportunity to cross-examine the expert on their qualifications in the defined area, followed by any re-examination. The court may then require argument, if there is still any challenge to the witness giving evidence. Ultimately, the court rules both on whether the witness is qualified to give expert opinion evidence, and if so in what area or areas.

In many cases, this process may be abridged in whole or in part by opposing counsel conceding the issue of qualification. Counsel may nevertheless elect to cross-examine on qualifications at the outset, either as a matter going to weight rather than admissibility, or simply to restrict the scope of the witness’s expertise. In some cases, the relative scope of the witnesses’ expertise and the areas in which they are recognised by the court to be qualified to give expert opinions may be the real battleground, as counsel seek to exploit any areas where their own expert is qualified while the opposing expert is not.

Some tribunals abridge or dispense with this tendering process altogether, as a matter of routine. If it will serve no real purpose in terms of the quality of the expert testimony, this may be appropriate. It is common, for example, to dispense with the process where the witness has testified previously and has been recognised as having the relevant expertise by the decision maker. In other cases, however, it can serve an important ‘gate-keeping’ function, as well as ensuring fairness to all parties. There may therefore be a strong case for following it through, particularly where the expert evidence is contested, and the outcome of the case is likely to depend on how that evidence is assessed.

Necessity and opinions on the ‘very issue’ before the court

It is trite to say that an expert must not usurp the function of the trier of fact, by giving evidence on the very issue that the trier is to decide. However, in practice this can be a very difficult line to draw. Two common examples serve to illustrate the problem.

- An accountant asked to give evidence about certain property whose value is in issue may testify about the accuracy of financial data about the property (expert findings), calculations she or he performed on that data and their results (expert conclusions), the fairness of the presentation of information in financial statements related to the property (expert opinion) – and they may offer an opinion as to the value of the property, which may in some cases be the ultimate issue the court is to decide.
- A medical doctor may be asked to give evidence about symptoms observed in a patient or the results of tests performed (findings), the factors likely to be contributing to the patient’s condition (conclusions), their diagnosis (opinion) – and they may offer an opinion as to the current standard of care recognised in their profession for treatment of the condition, or the causation of the condition, which again approach the ultimate issue to be decided.

The requirement of ‘necessity’ in court decisions about the admissibility of expert evidence is one of the ways this line is drawn on a case-by-case basis: the question asked is whether the trier of fact (judge or jury) could or could not draw the inference required without expert

assistance? If the answer is ‘no’ – because special knowledge or judgement is required to draw the inference reliably – then expert evidence is admissible to assist.

Where opinion evidence is admitted on or very close to the ultimate issue, the integrity of the decision-making process can still be protected in a number of ways. For example:

- the court normally has at least two competing opinions to select from;
- the court is still required to test the opinions given, based upon foundation in the facts, expert literature or research, common sense or logic, and even the credibility of the witnesses; and
- in many areas, experts deliberately express opinions in a form that respects the ultimate decision-making authority of the court; for example, a valuation opinion is often in terms of a range of reasonable values rather than a single result.

These and other factors – including the fact that accountants regularly advise buyers or sellers, and physicians regularly treat ill patients in the real world – all help to ensure the reliability of the ultimate decision made by the court or tribunal in these circumstances.

Another dimension of the analysis concerning the rule against evidence on the ultimate issue arises where the inference to which the testimony relates has a legal component; for example, a finding of negligence. Expert evidence about what standards of care or conduct are currently practised in a profession or facility is certainly proper. Evidence that shows those prevailing standards do or do not require certain actions or precautions, or do or do not mitigate certain risks, is also usually proper. However, going on to provide opinions on what the standard ought to be, in a prescriptive sense, usually crosses the line and trenches upon the functions of the court or tribunal.

At the other end of the spectrum, opinion evidence is not necessary if the court is able to draw the inference itself, without assistance, in which case the evidence should not be allowed.

Other exclusionary rules continue to apply

In *Mohan*, the court added a fourth condition: that the proposed testimony must not fall afoul of any other exclusionary rule of evidence, separate and apart from the opinion rule.¹² In other words, even if evidence is given by an appropriately qualified expert, is relevant and meets the necessity criterion, it is not admissible if other exclusionary rules apply.

It is not the purpose of this chapter to explore these issues in detail, since available evidence texts generally provide a thorough review. However, both counsel and the tribunal should ensure that other applicable exclusionary rules are not overlooked when expert evidence is developed and presented, including in particular the special problems that can arise with the hearsay rule.¹³

¹² *Mohan*, supra note 10 at pp. 25, 37–39. The Court in that case upheld the exclusion of evidence sought to be called by the defence from a psychiatrist as to disposition to commit the crime charged.

¹³ See *Sopinka*, supra note 8 at Paragraphs 12.169–12.215.

Impartiality, independence and bias

Very recently, in *White Burgess* the Supreme Court suggested a fifth condition to the admissibility of expert evidence, in stating that:

At a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence.

This statement builds on a long line of authorities articulating the expert's duty to provide independent, impartial and unbiased evidence to the courts, which first developed at common law. Based on a review of the case law, the often-cited UK case of *National Justice Compania Naviera v. Prudential*,¹⁴ set out several principles or elements of this expert duty. These may be summarised as follows:

- the evidence should be the independent product of the expert, uninfluenced by the exigencies of the litigation;
- that evidence should be objective, unbiased and within the witness' expertise;
- the expert should state the facts or assumptions on which the evidence is based, and not omit to consider relevant facts;
- all qualifications on the opinion should be stated expressly;
- all documents relied on must be produced to the parties; and
- the expert should never assume the role of an advocate.

The duty of the expert to remain impartial and independent has also been codified in the rules of several courts. Recently, in Ontario, the articulation of this duty has been significantly strengthened following a recent civil justice review¹⁵ and subsequent public inquiry¹⁶ that identified renewed concerns about the potential for misuse and overreliance on expert opinion evidence. Rule 4.1.01(1) now provides that it is the duty of every expert engaged by or on behalf of a party to provide opinion evidence that is (1) 'fair, objective and non-partisan', and (2) 'related only to matters that are within the expert's area of expertise'. In addition, the expert has a duty to 'provide such additional assistance as the court may reasonably require to determine a matter in issue'. Subrule 2 provides that this duty 'prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged'. The expert is required to sign and include in his or her report a written acknowledgement of this duty.¹⁷ The Ontario Energy Board has now adopted similar principles in Rule 13A of its own Rules of Practice and Procedure.

14 *National Justice Compania Naviera SA v. Prudential Assurance Co*, [1993] FSR 563, [1993] Lloyd's Rep 68.

15 The Report of the Civil Justice Reform Project headed by Coulter Osborne, 2007, made recommendations resulting in these revisions to the Rules of Civil Procedure in Ontario. See The Honourable Coulter A Osborne, Civil Justice Reform Project: Summary of Findings and Recommendations at chapter 9, online: Ministry of the Attorney General of Ontario http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/cjrp-report_en.pdf.

16 The 2008 report by Commissioner Stephen Goudge in the Inquiry into Pediatric Forensic Pathology in Ontario arose out of concerns about the evidence given by pathologist Dr Charles Smith.

17 Rules of Civil Procedure, RRO 1990, Reg. 194, Rule 4.1 and Form 53.

Despite these developments and the Supreme Court's decision in *White Burgess*, however, it remains uncertain whether tribunals will be able (as with the other four conditions) to enforce this principle pre-emptively, before the evidence is heard. The Court in *White Burgess* notes that the threshold to avoid pre-emptive exclusion is 'not particularly onerous' and that this 'should only occur in very clear cases'.¹⁸

The Court has so far provided little guidance on what 'certain point' must be reached before considerations of independence, impartiality and bias should result in a finding of inadmissibility, rather than going to weight. In terms of a test, the Court cited another recent decision of its own, in *Mouvement laïque québécois v. Saguenay (City)*,¹⁹ which seems to make this determination depend very much on the facts: 'whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case'. While the Court then cited several cases in which evidence was ruled inadmissible because the expert was a party litigant, or a lawyer for a party, or had some interest in the litigation, or in one case simply had an inappropriate retainer agreement, *White Burgess* does not clarify whether these were categorical rulings or turned on their particular facts. In the absence of further guidance, it is difficult to anticipate how it could be determined whether the test proposed is met or not, without first hearing the evidence.

This case law suggests that if it can be shown that any of these five conditions are not met by proposed expert evidence, then a preliminary objection can be taken to prevent the evidence being heard by a court at all. Interestingly, objections based upon a failure to differentiate fact from opinion, or the sufficiency of the facts to support an opinion, are not currently identified as preconditions for admissibility in the same way. As a practical matter, however, many issues related to relevance, necessity and bias may also become apparent only as the substantive evidence is led, and a pre-emptive objection may not always be possible. At that stage, the question whether these objections should be taken into account in ruling on the admissibility of the evidence, or as going to the weight to be given to the opinions and whether they should be accepted at the conclusion of the hearing, may well depend upon the specific facts of the case.

Types of experts

Participant and non-party experts

In another very recent decision, the Ontario Court of Appeal has held that these conditions and procedural requirements (particularly the expert's duty respecting independence, impartiality and bias) only apply to 'litigation experts' who are specifically retained and called by the parties to provide opinions on matters arising in the litigation.

In *Westerhof v. Gee Estate*,²⁰ in the context of medical evidence relating to a personal injury dispute, the Court of Appeal usefully distinguishes two other types of experts who are not subject to these requirements.

Under this analysis, participating experts are ones who form expert opinions or make expert findings based upon their participation in the underlying events (e.g., a treating

¹⁸ *White Burgess*, supra note 3, at Paragraph 49.

¹⁹ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at Paragraph 106.

²⁰ *Westerhof v. Gee Estate*, 2015 ONCA 206, at Paragraphs 6-8, 65-86.

physician who renders emergency service at a hospital). There has never been any doubt that such witnesses may give evidence about their actions and observations, including evidence about the expert judgements (opinions) they applied, for example, in terms of the treatments they provided.

Similarly, third-party experts are identified as experts retained by someone other than the parties to form an opinion based on the underlying facts, such as a medical practitioner retained to provide opinions for insurance purposes unrelated to the litigation.

What is important about the Court's reasoning about these different types of experts in *Westerhof* is that it is expressly not based upon drawing a simplistic distinction between fact evidence and opinion evidence, as earlier authorities arguably were.²¹ Rather, it expressly accepts that the evidence to be given by any of the three types of expert will be expert opinion evidence, and that, in the case of participant and third-party experts, it will be given without complying with the rules applicable to litigation experts.²² This is important because it may avoid the need to limit the evidence of participant and third-party experts based on untenable distinctions between fact evidence and opinions.

The rationale for admissibility of this type of opinion evidence is based upon the presence of other factors that provide assurance as to its reliability. Specifically, participant and third-party experts form and typically record their findings, opinions and conclusions in a professional context prior to, or at least separate from, the particular litigation. The Court's reasoning also takes account of the artificiality and impracticality of trying to force compliance with the litigation expert regime by such experts.²³ Inevitably, in cross-examination or even during examination in chief, counsel may wish to confront these 'experts' with the opinions or analysis of litigation experts, to either reinforce or challenge whatever judgments they made at the time they formed their opinion. There is no principled basis to restrict this kind of expert exchange.

The approach taken in the *Westerhof* case should be welcomed by energy lawyers and regulators, to whom the concept of participating and non-party experts should be very familiar. For example, legislation in the energy field sometimes allows regulators in an adjudicative proceeding to receive reports from other specialist agencies, such as an electricity system operator, without specifying the evidentiary nature or status of such reports.²⁴ Under the *Westerhof* analysis, such reports can now be recognised simply as a form of non-party expert report. When an issue is joined on some aspect of such a report before the regulator, responding litigation expert reports could be filed. Procedures could be invoked to require the attendance of an expert representative of the agency for cross-examination on their report. Ultimately, the tribunal would have the benefit of a full expert evidentiary record to decide the issue in the public interest. Similarly, regulated parties often commission consulting reports when developing a facility, system or policy, long before any issue arises about it

²¹ See especially *ibid* at Paragraphs 66–70.

²² *Ibid* at Paragraph 14.

²³ *Ibid* at Paragraphs 82–83, 85–86.

²⁴ See for example, the Ontario Energy Board's Decision and Order in EB-2011-0140, *East-West Tie Line – Phase II* (7 August 2013), at p. 4 ff, in which the Board requested technical reports from the Ontario Power Authority and Independent Electricity Operator relating to the technical feasibility and requirements and the need for an electricity transmission project.

in proceedings before a regulator. When such issue does arise, these consulting reports are typically filed. They can now be presented, challenged and evaluated for what they are, that is, a form of participating expert report.

The expert employee

Courts have, generally, not gone the next logical step, to recognise that the expert accounting, financial or technical employees and other representatives of a party could also be recognised and qualified to give opinion evidence as participating experts.

The closest the courts have come is, perhaps, the Supreme Court's decision in *White Burgess*, in which an expert who was a partner in a firm directly involved in the dispute was nevertheless qualified to give such evidence. The Supreme Court in that case made or adopted conflicting statements about the ability of persons regularly engaged by a party to provide the kind of independent, impartial and unbiased opinion evidence that the courts are looking for. The Court stated that in most cases 'a mere employment relationship with the party calling the evidence will be insufficient' to disqualify the witness. However, the Supreme Court also quoted with approval from long-standing authority to the effect that 'there is a natural bias to do something serviceable for those who employ you and adequately remunerate you'.²⁵ Applying the fact-specific test which it articulated, the Court did not disqualify the witness in that case.

However, in *White Burgess*, the witness was qualified as a litigation expert, and as such was required to comply with all the requirements of filing an expert report and signing an acknowledgement of expert duty. As outlined below, the analysis in the *TransAlta* decision confirms that approach, recognising that the evidence of specialised or technical staff of a regulator or of a utility can be admitted, challenged, weighed and evaluated in the same way as other expert opinion evidence, at least where the tribunal's rules regarding expert evidence have been complied with.

Nevertheless, when the ultimate disposition of the proceeding is likely to turn on a battle of expert evidence, the parties will not often be prepared to rely solely on their in-house experts, but rather will be well advised to retain litigation experts to make the case.

The role of counsel in drafting expert reports

Another recent decision of the Ontario Court of Appeal in *Moore v. Getahun*²⁶ revisits the long-standing debate about counsel's role in the preparation and review of expert reports, and appears to resolve it convincingly. The trial judge, following one line of prior decisions, had expressed strong concern about counsel's involvement in the process of drafting expert reports, and required disclosure of all drafts. Her decision caused a renewed debate among lawyers, particularly at the Advocates Society, who prepared 'Principles Governing Communications with Testifying Experts', and intervened in the appeal. The Court of Appeal, adopting the Advocates Society's 'Principles' gave lengthy reasons allowing the appeal. The Court refused to interfere with 'the well-established practice of counsel meeting

²⁵ *TransAlta* decision, supra note 2 at Paragraphs 86–88, 121; and see *White Burgess*, supra note 3 at Paragraphs 11, 49.

²⁶ *Moore v. Getahun*, 2015 ONCA 55.

with expert witnesses to review draft reports’ on the basis that ‘expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive’. It also held that production of draft reports is not required and should not be ordered ‘[a]bsent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert’.²⁷

This decision provides a strong reaffirmation of the legitimacy of counsel’s involvement, based upon the importance of ensuring that expert evidence is relevant to the matters in issue, and that it is of assistance to the court.

The expert evidence in the *TransAlta* decision

The AUC’s status as an expert tribunal

As a general proposition that underpinned all the issues of expert evidence which it considers in the *TransAlta* decision, the AUC notes its own status as a specialised and expert tribunal. It states:

*At the outset of this discussion, the Commission considers it important to note that the Commission itself is an expert tribunal whose expertise includes the very issues identified and addressed in the expert economic evidence filed in this proceeding; i.e., questions of economic policy in competition issues and to the quantification of price impacts through counterfactual analysis.*²⁸

Indeed, the AUC states further:

*In this instance, the Commission is very knowledgeable about the issues raised in the expert economic evidence and with the methods and language used by the economics experts in providing their various opinions. While this expertise does not eliminate concerns specific to expert independence, it does allow the Commission to make an informed judgement about the economic evidence filed in the proceeding. In the Commission’s view, its familiarity with the subject matter ameliorates one of the potential dangers associated with expert evidence that can arise due to a lack of independence.*²⁹

This point is one of general application, which obviously distinguishes the position of a senior industry regulator such as the AUC from that of the courts, which are quite deliberately designed to be and to act as non-expert, lay decision makers. Arguably, if and to the extent the determinations relating to expert evidence in the *TransAlta* decision go beyond what a court might be expected to decide faced with similar evidence, that is justified by the expert nature of the tribunal itself.

The admissibility of expert evidence of employees

The *TransAlta* decision is an important acknowledgment and application by an energy regulator of the *White Burgess* framework in considering challenges to the admissibility of expert

²⁷ Ibid at Paragraphs 62–65, 78.

²⁸ *TransAlta* decision, supra note 1 at Paragraph 109.

²⁹ *TransAlta* decision, supra note 1 at Paragraph 111.

evidence. The AUC accepts and applies that framework and the principles set out in that decision to the evidence called by both parties.

Specifically on the question of whether the expert accounting, financial or technical staff of a regulator or regulated party – who invariably testify in energy proceedings – can be recognised as experts, the *TransAlta* decision is a major step forward.

One of the MSA's expert witnesses was its own employee, Ayres, who had acted as the lead investigator, and prepared the notice of allegations that framed the prosecution before the AUC. TransAlta argued that these circumstances gave the witness a 'vested interest in the outcome of this proceeding', which should result in his evidence being inadmissible. In rejecting that argument, the AUC relied in part on the Supreme Court's acknowledgment in *White Burgess* that in most cases 'a mere employment relationship with the party calling the evidence will be insufficient' to disqualify the witness: notably, it did not give weight to the contrary statements also quoted by the Court.³⁰

Indeed, the AUC acknowledged that:

*Ayres was involved in the OBEG consultation, was the MSA's lead investigator into TransAlta's conduct, and provided expert evidence in support of the MSA's notice and application filed with the Commission. Given his various roles, Ayres provided both factual and opinion evidence at the proceeding. His factual evidence related to the events that led to the MSA filing its notice with the Commission. His opinion evidence related to the price impacts associated with the four outages that form the basis of the MSA's case against TransAlta.*³¹

The Commission accepted that in these circumstances 'the expert and the party are effectively one and the same', and that 'ordinarily that could be cause for considerable concern leading to the evidence in question being accorded little or no weight'. In finding that result should not follow in the instant case, however, the AUC recognised several important mitigating factors, specifically:

- the assumptions and calculations made by the expert were transparent;
- the AUC had available a critique of the expert's testimony from TransAlta's own experts, and was not reliant upon the challenged expert alone;
- the AUC also relied upon its own expertise, which 'does allow it to make an informed judgment' about the challenged evidence;
- the witness was 'well qualified' because of his 'experience and knowledge of the Alberta electricity market'; and
- the AUC also accepted both the MSA's argument that it had a mandate as an expert statutory body, which should not be unduly prevented from developing and employing its own in-house expertise, and the witness's testimony that he understood that mandate.³²

³⁰ *TransAlta* decision, supra note 2 at Paragraphs 86–88, 121; and see *White Burgess*, supra note 3 at Paragraphs 11, 49.

³¹ *TransAlta* decision, supra note 2 at Paragraph 120.

³² *TransAlta* decision, supra note 2 at Paragraphs 97, 109–111, 122–128.

The Commission went on to refer to other ‘corporate witnesses’ whose evidence included some element of specialised technical and opinion evidence, and applied the three-part test it had developed in previous decisions, as follows:

In the Commission’s view, the policy and explanatory evidence provided by a corporate witness is akin to ordinary evidence provided by a lay witness. It is essentially an explanation or recitation of facts. Technical evidence, on the other hand, is essentially expert evidence provided by a corporate witness. The Commission evaluates the evidence provided by the applicants’ corporate witnesses in the same way it evaluates the evidence provided by the other lay and expert witnesses who participated in the hearing. The Commission will first consider the nature of the evidence provided i.e., does it deal with facts or opinion? If the evidence addresses a specialized or technical subject matter the Commission will then consider whether the corporate witness has demonstrated that he or she has the necessary skill, knowledge and experience to provide an opinion on the subject matter. Finally, the Commission will consider whether or to what degree the policy evidence, factual evidence or technical evidence was influenced by the witness’ position as an employee of the applicant. The Commission will assess all of these factors when considering the weight to give to the evidence provided by a corporate witness.³³

The fact is that the testimony of such witnesses, the financial and other documents they prepare, and the witness statements prepared for them by counsel, often reflect both implicit and explicit expert opinion evidence. The Commission’s three-part test provides an appropriate screen to determine whether they should be denied expert status, or their evidence restricted, on a substantive basis, and not simply because they are employees of one of the litigant parties.

The expert evidence as to the discretionary nature of the outages

In Section 4.3 of the *TransAlta* decision, which extends over Paragraphs 303-441, the AUC deals at length with the issue of whether the timing of the four outage events was discretionary.

This section of the analysis deals with a mix of factual and opinion evidence from TransAlta staff responsible for the operation of the generation facilities, and the evidence of litigation experts called on the issue by the parties. The Commission’s review focuses on the circumstances that make each of the outage events discretionary or non-discretionary, as well as on the general practices of market participants in Alberta and elsewhere in North America regarding the timing of outages.

A key finding, which appears to have tipped the balance in weighing the competing views of the parties and their experts, is the AUC’s clear preference for one of the MSA’s experts, Heath, over the report of TransAlta’s experts, ‘where there is a conflict in their respective views’.³⁴ In making this finding, the AUC states:

³³ *TransAlta* decision, supra note 2 at Paragraphs 132-133, citing from Decision 2011-436, AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc., Heartland Transmission Project, 1 November 2011, page 18, Paragraph 93.

³⁴ *TransAlta* decision, supra note 2 at Paragraphs 342-344.

The evidence of Heath was based on his own experience in operating power plants in Alberta and on a review of the Tube Failure and Repair reports, emails related to the specific outage (including emails between TransAlta plant staff, and emails between TransAlta plant staff and TransAlta's marketing group), log book entries both from the unit operators (Control Room Operator logs) and the Shift Supervisors, Lock out Tag Out (or 'LOTO') forms and Transaction Management System (TMS) entries and transcripts arising from interviews conducted by the MSA.

Heath has first-hand, practical knowledge regarding the day-to-day operation of coal-fired generating units in Alberta, including TransAlta's Wabamum and Sundance generating units. Additionally, ... Heath is also the former Vice President of Alberta's Balancing Pool and, as such, has a comprehensive understanding of the structure and operation of Alberta's electricity industry.

The evidence related to this issue is very detailed and technical, and it may be difficult for some readers – even with the benefit of the AUC's detailed reasons – to determine exactly what factors led to the AUC's expressed preference for Heath's evidence. However, one obviously important factor, to which the AUC refers repeatedly, was the numerous relevant entries made (or not made) in the operations log books kept by staff of TransAlta at the facility during the time of events giving rise to the outages. Among all the other detailed factual evidence as to the circumstances of the four outage events, and the imminence or lack of imminence of the associated risks at the time of the shutdown decision, the AUC's review is replete with reference to these log entries, and to commentary by the MSA's expert on what he would expect the logs to record, if the outage events were truly urgent and non-discretionary. The Commission found that Heath 'gave convincing evidence about the importance of the various log books required at a power plant and the significance of information that was included or omitted from them'. It found that his testimony on these matters 'was candid and straight forward' and 'consistent and convincing under cross examination'.³⁵

This provides an excellent example of the interplay between the analysis of highly technical and specialised factual evidence about relevant energy market events, and the assessment and weighing of expert opinion evidence. It clearly demonstrates why an overly formalistic distinction between evidence of facts and expert opinion evidence would not be maintainable in this context. The pragmatic approach taken by the AUC in this case is not only necessary given the subject matter of its adjudication, it is also quite consistent with the stated principles and policies that underlie the courts' approach to these issues.

The expert financial evidence

It is notable that the expert economic evidence regarding the issue of restriction or prevention of competition was provided by different experts (Church, Shehadeh and Falk) from those who provided the evidence regarding the issue of price impacts associated with the timing of outages (Ayres and Freyer).³⁶ This well illustrates how, even within the general field of economics, different experts with appropriate sub-specialities may be required to address specific issues raised by a complex technical dispute such as this.

³⁵ *TransAlta* decision, supra note 2, for example at Paragraphs 322, 343, 345, 359, 373–4, 376, 379–385, 399 and 432–5.

³⁶ *TransAlta* decision, supra note 2 at Paragraph 107.

The Commission reviewed in detail the expert evidence of Ayres, who was the chief economist for the MSA, and found it to be generally reliable.³⁷

A key issue in contention with respect to price impacts of the timing of the outages was a ‘counterfactual price impact analysis’ prepared by Ayres. The MSA submitted that this was constructed in good faith based on Ayres’ expertise and knowledge of the behaviour of market participants and the Alberta market. The MSA submitted that, as an expert body, it should not be prevented from utilising that expertise in performing its statutory mandate.³⁸ The Commission explained that this analysis involved alternative outage timings and a method for estimating the corresponding pool prices for the counterfactual timings had two alternative scenarios occurred: first, had the outages occurred during the different hours; and second, had the outages not occurred during the hours of actual outage timing. The Commission noted that:

*For the second element, Ayres used a straightforward procedure, which was consistent with TransAlta’s own records that outlined how the effectiveness of the strategy was to be measured.*³⁹

Ayres used a set of assumptions regarding responses from price responsive buyers, participating generators, and others. In dismissing TransAlta’s complaint that these assumptions had an element of subjectivity, the AUC noted that Ayres’ were nevertheless transparent.⁴⁰ Specifically, the AUC found that the expert for TransAlta used a similar methodology (Paragraph 453) and confirmed price impacts resulting from the four outages, albeit in lower amounts than suggested by the MSA’s expert.⁴¹

Perhaps the most interesting feature of the *TransAlta* decision arises in the course of the AUC’s consideration of whether the timing of the outages affected competition.

Again, the analysis begins with an extensive review of expert evidence on this issue.⁴² The Commission first finds that limitations on energy consumers’ ability to switch to substitute products or suppliers allow for a greater ability to exercise market power.⁴³ It then examines structural factors in the Alberta electricity market, which it finds also influence the ability to exercise market power.⁴⁴ The Commission then in effect uses these findings to provide an interpretation of the disputed provisions in Section 6 of the Act and related regulatory provisions.⁴⁵

The Commission then finds the timing of outages is part of the generator’s competitive supply capability, and that TransAlta was therefore a competitor of other market participants at all material times, including during the outages.⁴⁶ Together with the evidence of direct evidence of harm to other market participants, the AUC relies on these findings to

³⁷ *TransAlta* decision, supra note 2 at Paragraphs 443–451.

³⁸ *TransAlta* decision, supra note 2 at Paragraph 97.

³⁹ *TransAlta* decision, supra note 2 at Paragraph 123.

⁴⁰ *TransAlta* decision, supra note 2 at Paragraph 124.

⁴¹ *TransAlta* decision, supra note 2 at Paragraphs 453, 454, 458 and Table 2.

⁴² *TransAlta* decision, supra note 2 at Paragraphs 480–518.

⁴³ *TransAlta* decision, supra note 2 at Paragraph 519.

⁴⁴ *TransAlta* decision, supra note 2 at Paragraphs 520–521.

⁴⁵ *TransAlta* decision, supra note 2 at Paragraph 522.

⁴⁶ *TransAlta* decision, supra note 2 at Paragraph 524.

hold that TransAlta's deliberate use of the timing of outages to affect prices was contrary to the legislation.⁴⁷

Concluding observations

The *TransAlta* decision shows how the proper preparation, presentation and evaluation of expert evidence can be critical to effective energy regulation. Whether we act as counsel presenting and cross-examining witnesses on matters involving special expertise, or as tribunal members evaluating their testimony, the issues involved are complex and serious, and arise in one form or another on an almost daily basis. These issues are both more prevalent and more important because of the increasing technological and financial complexity of our world, particularly in the field of energy regulation. Recent court decisions in this area are useful to energy lawyers and regulators, in that they remind us that this kind of evidence is admissible only as an exception to the general rules, and highlight the reasons for the exercise of caution in receiving and relying upon it at all. They reveal principles and procedures developed by the courts over time to govern its admissibility, and ensure its reliability, which are generally still relevant and applicable in energy regulation today.

This provides a foundation for energy regulators to build upon, by adapting and adding to the courts experience in ways that can better serve the interests of stakeholders and the public interests involved.

This is not to say that court decisions should be applied slavishly, either by regulators or on judicial review. The *TransAlta* decision shows how an expert regulator can overcome some of the limitations reflected in the approach of the courts as non-expert, lay decision makers. This same measure of expertise is involved in the presentation and assessment of many of the adjudicative facts that arise in energy proceedings, including implicit or explicit 'opinions' of technical witnesses, whether or not they are formally identified as 'experts'.

The *TransAlta* decision also shows how expert evidence can assist the policy-making role of 'expert' tribunals, such as energy regulators. It shows how such tribunals can apply their own expertise to properly control and assess the evidence in proceedings over which they preside. It shows that this can be consistent with the goals of fairness to parties, and of optimal decision-making in the public interest that underlie administrative proceedings. In all these respects, the case has useful and important lessons for energy lawyers and regulators.

Ultimately, specialised tribunals like those in the energy field are simply more reliant on expert evidence to function effectively, than are the courts in most cases. It is necessary for such tribunals to receive and assess expert evidence more often and for more purposes, than it is for the courts. It is normal and a matter of routine. Such tribunals must therefore be prepared to process such evidence more efficiently, and sometimes perhaps more flexibly, than the courts, but that is not a reason to do it any less carefully and deliberately. The *TransAlta* decision is a very good example of how this balance can be struck without sacrificing the important principles and policies relating to the common law of expert evidence that underlie recent court decisions.

⁴⁷ *TransAlta* decision, supra note 2 at Paragraphs 525–528.

Appendix 4

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Phil Tunley has more than 30 years' experience as counsel in complex litigation matters. He represents clients at all levels of courts in Ontario, and in the Federal Courts and Supreme Court of Canada. He appears frequently before a variety of administrative appeals tribunals. He is also an experienced trial counsel in both civil disputes and provincial offence matters, and in a wide range of regulatory and administrative hearings.

Phil's civil litigation practice includes corporate and commercial disputes, energy law, high technology matters, and professional and business regulation. His experience centres on complex matters, often involving high volumes of documentary productions, or conflicts of law issues engaging two or more legal systems. He practises litigation as a specialty, and is always keen to work as co-counsel with specialist lawyers in a particular subject area or from other jurisdictions. He has special expertise in expert evidence, electronic evidence and automated litigation support in complex trials.

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The Guide to Energy Market Manipulation is a survey of the law on market manipulation in the energy sector across nations that reflects the collective wisdom and real-life experiences of 30 distinguished practitioners from 18 different organisations.

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