

Expert Evidence and Reports in Tax Cases

Expert Evidence and Reports in Tax Cases

Bekesinski v The Queen, [2014 TCC 35](#)

That must be included in an expert report in order for the expert evidence to be admissible under Rule 145 of the [Tax Court of Canada Rules \(General Procedure\)](#)?

FACTS

The MNR wished to make use of an expert report prepared by an ink dating expert to challenge the taxpayer's claim that a document was executed on a certain date. The taxpayer objected to the introduction of the experts report and therefore evidence on the basis that the requirements of Rule 145 were not met.

The expert report did not contain the data, calculations, and methodology leading to and supporting the conclusions made. The report was very brief, but the MNR claimed that the general methodology explained, and the conclusions drawn were sufficient to meet Rule 145's requirements. Counsel in this case chose not to release the working notes of the expert, though the expert stated that this was not her decision. The court said this was a strategic decision that once made had to be lived with by counsel.

ANALYSIS

Rule 145 states that, unless the Court orders otherwise, an expert will not be permitted to testify at a hearing unless "a full statement of the proposed evidence in chief of the expert" has been set out in the expert's report. There are amendments proposed to Rule 145 that enumerate specific requirements for what must be included in expert reports (reasons for each opinion, facts and assumptions relied on, literature and other materials that support the expert opinion, and summary of methodology including tests and investigations relied on).

The court noted that there were only two cases dealing with Rule 145, being *Mathew et al v The Queen*, 2001 DTC 742, and *Witt v The Queen*, 2008 DTC 4322. However, the court referred to the purpose of the rule and the similarity of this purpose to rules in other courts, and used cases referring to other rules for guidance: *Transmetro Properties Ltd. v Lockyer Bros. Ltd.*, [1985] OJ No. 1671; *Marchand (Litigation Guardian of) v Public General Hospital Society of Chatham*, [2000] OJ No. 4428 (ONCA); *Haughian v Jiwa*, 2011 BCSC 1632; *Mazur v Lucas*, [2010] BCJ No 2087 (BCCA); *Goerzen v Sjolie*, [1997] BCJ No. 44 (BCCA).

The TCC turned to the definition of (1) "statement" in the *Oxford English Dictionary*, 2nd ed - 3. a. A written or oral communication setting forth facts, arguments, demands, or the like - and *Black's Law Dictionary*, 9th ed - 2. A formal and exact presentation of facts; ad (2) "full" as an adjective in *Collins English Dictionary*, <http://www.collinsdictionary.com> -5. (*premonimal*) with no part lacking; complete – a full dozen - and *Merriam-Webster Dictionary*,

<http://www.merriam-webster.com> - **d**: not lacking in any essential: PERFECT .

Therefore, the definition of the phrase "full statement" was, in paragraph 27:

[27] By definition, "full statement" implies that exact facts and arguments, complete in extent and every particular, respecting the expert's proposed evidence in chief shall be set out in the affidavit. [...] This is the common theme of the expert evidence rules across jurisdictions. Adequate notice of the evidence prevents 'trial by ambush' and the potential prejudice that may result to the opposing party.

[...]

29] In respect to specific content of expert reports, caselaw has consistently held that data, analysis and calculations relied upon to formulate an opinion must also be included. [...]

[30] An expert opinion must be supported by underlying facts, calculations, research, documents, hypotheses or whatever it is the expert is relying upon to formulate his or her opinion. Such information must be stated and included in the report, otherwise the opinion is simply that: an unsupported opinion. [...]

The TCC also dealt with whether to correct the shortcoming by ordering disclosure, and determine that this was not appropriate:

[32] While I may have the discretion to order the Respondent to release the expert's working files to the Appellant and to adjourn the hearing to further dates down the road to allow the Appellant additional time to review those files, to prepare a cross-examination and to decide on potential rebuttal evidence, in my opinion procedural fairness, which Rule 145 aims to accomplish not only in its wording but in its underlying object and purpose, dictates that, in the circumstances of this appeal, Ms. Vallière's Report be excluded. In addition, I have no duty to correct Counsel's decision to approach a case in a particular way, particularly as it relates to compliance with the *Rules*. Counsel must make decisions like this all the time but, unfortunately in these circumstances, I do not see my role as being an active participant in correcting the approach adopted by Respondent Counsel. To allow further adjournments in this matter would go against the very purpose underlying these expert evidence Rules, thereby promoting additional time, delays and expenses. This course of action would only undermine the very spirit and object of the Rules. [...]

If you like this website, please share with others and consider [supporting us with a donation](#):

[Back To Top](#)