

5 SUPERIOR COURT OF JUSTICE

BETWEEN:

10 JOSEPH QUATTROCCHI & CO. LTD.

PLAINTIFF

15 - and -

20 CHIQUITA (CANADA) INC., CHIQUITA BRANDS
LIMITED, CHIQUITA BRANDS COMPANY NORTH
AMERICA, CHIQUITA BRANDS INTERNATIONAL INC.,
CHIQUITA BRANDS INC., CHIQUITA TROPICAL
PRODUCTS COMPANY, CLARK LEASING LTD.

DEFENDANTS

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REASONS FOR DECISION

35 GIVEN ORALLY BY THE HONOURABLE JUSTICE A. deL. PANET
on December 15, 2006, at OTTAWA, Ontario

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45 APPEARANCES:

Mr. Pasquale Santini

Counsel for the Plaintiff

Mr. Stephen Cavanagh

Counsel for the Defendants

R E A S O N S F O R D E C I S I O N

PANET, J. (Orally)

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This is my decision with respect to the objection by the Plaintiff to the calling of an expert witness by the Defence.

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The Plaintiff states that, in his evidence, the proposed expert witness, Mr. Yereance, would be applying engineering principles in arriving at his views as to the origin and cause of the fire in this case. The Plaintiff submits that in doing so, Mr. Yereance would be carrying on the practice of engineering in Ontario, and he is prohibited from doing so under the *Professional Engineers Act*, R.S.O. 1990, Chapter P.28, as he has no licence in Ontario issued under that Act. The Plaintiff submits that he is therefore not qualified to give evidence as an expert witness.

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With respect, I disagree with the objection by the Plaintiff.

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5 On any issue as to the competence of an individual to give evidence as an expert witness, the focus is and should be on whether the individual has the necessary expertise to give evidence to assist the Court in a particular field or matter. In my view, unless there is a specific provision otherwise, the lack of a professional licence in Ontario should not, as a matter of policy, preclude an expert witness who is otherwise qualified to give evidence in a court in Ontario.

10 In the case of *R. v. Mohan* [1994] 2 S.C.R.9, the Supreme Court of Canada established four criteria for the admissibility of expert evidence:

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- (a) the evidence is relevant to some issue in the case;
 - (b) the evidence is necessary to assist the trier of fact;
 - 20 (c) the evidence does not violate an exclusionary rule; and
 - (d) the witness is a properly qualified expert.

25 In this case, the Plaintiff contends the proposed

witness does not meet the fourth criterion, that he be a properly qualified expert.

5 The focus of the fourth criterion relates to the expertise of the proposed witness in a field in which it is proposed that he give opinion expert. In the text, *The Law of Evidence in Canada*, 2nd edition, Sopinka Letterman Bryant, Toronto, 1999, the authors discuss this issue at p. 623 and I quote:

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15 "The test of expertise so far as the law of evidence is concerned is skill in the field in which the witness' opinion is sought. The admissibility of such evidence does not depend upon the means by which that skill was acquired. As long as a Court is satisfied that the witness is sufficiently experienced in the subject matter at issue, the Court will not be concerned whether his or her skill is derived from specific studies or practical training although that may affect the weight to be given to the evidence."

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As indicated, the focus is on the knowledge and expertise of the individual. In my view, whether or not the individual is licenced in a particular jurisdiction may be a consideration as to the weight to be given to the evidence. However, the lack of a licence should not be a bar to enabling the Court to have the benefit of the expertise of a witness who is otherwise qualified.

This issue was considered by the Court in Illinois, U.S.A. in *Thompson v. Gordon*, Illinois Appellate Court, (2nd District) (2004) 356 Ill. App. 3d 447. The Appellate Court of Illinois, 2nd District, reversed the decision of the trial judge who struck the proposed expert evidence of an engineer on the basis that he lacked a licence in Illinois. The Appellate Court stated that the lack of an Illinois professional engineering licence goes to the weight of the individual's testimony and not to his competency.

The decision of the Appellate Court was upheld by the Supreme Court of the State of Illinois, Docket No. 100600, opinion filed June 2, 2006. In its decision, the Supreme Court stated as

follows and I quote:

5 " Based upon the foregoing, we find that
the Appellate Court was correct in
determining that licensure with the State
of Illinois pursuant to the *Engineering*
Act is not a mandatory prerequisite to
rendering an expert opinion. Relevant
10 considerations in determining whether
Ramisch may testify as an expert include
his knowledge, skill, experience,
training and education. Whether that
skill, knowledge, experience, training
and education afford Ramisch knowledge
15 and experience beyond that of an average
citizen, and whether Ramisch's testimony
will aid the trier of fact in reaching
its conclusions.

20 As the Appellate Court found, the trial
court in this case did not address any of
the preceding considerations, striking
Ramisch's affidavit solely on the basis
that Ramisch did not have an Illinois
25 professional engineering licence. While

licencing may be a factor to consider in determining whether an engineer is qualified to testify as an expert witness, this Court does not require an engineering licence as a prerequisite to testifying."

I agree with the reasoning in the decision in *Thompson v. Gordon* and on that ground alone, I would dismiss the Plaintiff's objection.

Further, in my view, it is open to question whether giving evidence by an individual comes within the definition of the practice of engineering in the *Professional Engineers Act*. In that Act, s.1 defines the practice of professional engineering as:

"Any act of designing, composing, evaluating, advising, reporting, directing or supervising wherein the safeguarding of life, health, property or the public welfare is concerned, and that requires the application of engineering principles but does not include

practicing as a natural scientist."

5 This definition is restrictive in that it does not include within its scope all acts of designing and advising which require the application of engineering principles but only those, "wherein the safeguarding of life, health, property or the public welfare" is concerned. The obvious purpose is to protect the interests of the public in these areas.

10 The present case involves a private dispute between the owner and/or lessee of a tractor trailer and the owner of a warehouse with respect to a fire which occurred in 2002. The proposed evidence relates to the origin and cause of the fire. While the evidence would likely involve the giving of opinions involving the application of engineering principles, it is doubtful whether the proposed evidence would involve the safeguarding of life, health, property or the public welfare. There is no evidence before me that the proposed evidence would come within the definition of the practice of professional engineering, and for this reason also I would

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dismiss the motion by the Plaintiff.

5 The Plaintiff has also referred to a decision by
this Court by Justice Festeryga in *Weslee Mann-
Tattersall v. The Corporation of the City of
Hamilton* released November 25, 2003. In that
case, the Plaintiff sought to qualify a Mr. Serth
as an expert to express opinions in accident
reconstruction with expertise in highway design
10 and maintenance, and also desired Mr. Serth to
give opinions on sightlines.

15 The Defence objected and argued that Mr. Serth
was not qualified to give evidence as he was not
licenced to practice engineering in Ontario and
did not hold a certificate as required under the
Professional Engineers Act.

20 Justice Festeryga concluded that giving evidence
as to sightlines in accident reconstruction would
involve his expertise as an engineer, and he
would therefore be practicing as an engineer in
Ontario.

25 In my view, although not clearly stated in the

5 decision, the learned trial judge may well have concluded that evidence with respect to sightlines in accident reconstruction on the highway did involve considerations with respect to the safeguarding of life or property.

10 The case before me is different as it involves a private dispute as to the cause of a fire which occurred in a warehouse in 2002. It is doubtful whether the giving of evidence in that area involves the safeguarding of life, health, property or the public welfare. In any event, there was no evidence before me on that issue.

15 Further, and perhaps of broader consideration, I reach the conclusion for the reasons stated that the proper issue for consideration of the Court in terms of qualification of the witness to give opinion evidence is the expertise of that individual. The holding of an engineering licence should not be a prerequisite to giving evidence as an expert witness.

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25 The motion by the Plaintiff is therefore dismissed.

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Jan 7/27.
Date

~~The Honourable Mr. Justice A. deL. Panet~~

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