

Getting it Wright: The Detour Gold Standard of Expert Independence



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In rejecting a motion by the plaintiffs for production of drafts of an expert report, the Ontario Superior Court of Justice's recent decision in *Wright v. Detour Gold Corp.*² endorses the Court of Appeal's guidance regarding counsel's dealings with expert witnesses as articulated in *Moore v. Getahun*³. Of particular interest to litigation counsel, the decision in *Wright* builds upon the guidance in *Moore* by holding that it is entirely proper for an expert to retain independent legal counsel to assist in the preparation of his or her expert report.

The *Wright* case is a proposed securities class action commenced against Detour Gold Corporation ("Detour") and its former CEO. The plaintiffs allege that Detour's public disclosure during its first year of operations at its flagship gold mine contained misrepresentations regarding the company's production guidance and certain terms of a credit facility. In defending the plaintiffs' motion for leave to proceed with their secondary market claim under the Ontario *Securities Act*, the defendants retained an expert witness (a former

CEO, director and investment banker in the mining industry) to provide an opinion on Detour's public disclosure concerning terms of the credit facility.

The expert chose in turn to retain his own independent legal counsel to assist in the preparation and drafting of his report. This arrangement was used, in part, because it allowed the time-strapped expert to delegate certain tasks, such as locating and assembling publicly available sources that the expert relied upon in forming his opinion. This arrangement had the benefit of reducing involvement and potential influence of defendants' counsel, while ensuring that the content and conclusions of the report were those of the expert alone.

Unsurprisingly perhaps, the plaintiffs took a different view of the arrangement. They brought a motion for production of, among other things, drafts of the expert's report, arguing that the involvement of independent counsel in the preparation of the expert report resulted in an inappropriate interference with the expert's independence, impartiality, and duty to the Court.

In a forcefully written decision, the Court rejected these submissions and held that "what occurred in this case, if anything, is to be encouraged not discouraged"⁴ In particular, the Court found that the assistance of independent counsel served to enhance the expert's independence and impartiality, minimizing any risk of influence on the expert by counsel to the defendants, and allowing the expert to better satisfy his duty to the Court.

In arriving at its decision, the Court considered and reaffirmed the principles regarding counsel's dealings with expert witnesses articulated by the Court of Appeal in *Moore*, finding that it is proper and

normal for an expert to consult with counsel. The Court in *Wright* (quite rightly) reasoned that if it is proper for an expert to consult with counsel for a party to the litigation (whose loyalty is to the litigant), then consultation between the expert and his or her own independent counsel (whose loyalty is to the expert) should also be proper. As the Court of Appeal recognized in *Moore*, such assistance is helpful because it allows the expert to frame the opinion in a comprehensible manner and be responsive to the relevant legal issues. This was exactly what occurred in *Wright*.

The Court's unqualified approval of the retention of independent legal counsel by expert witnesses in *Wright* recognizes the practical reality that the use of independent counsel by an expert serves to reduce the involvement of a litigant's lawyers in the expert's work, and therefore can help prevent any real or perceived influence by a litigant's lawyers. Following the decision in *Wright* (which the plaintiffs have not sought leave to appeal), parties to litigation can, in appropriate circumstances and where costs permit, consider the option of having a testifying expert retain his or her own independent counsel to assist in the preparation of the expert's report. Notwithstanding the Court's decision in *Wright*, it continues to remain of utmost importance that counsel (both for a litigant and for an expert) in all instances observe the established guidance respecting dealings with expert witnesses as articulated by the Court of Appeal in *Moore*. In particular, the opinions of the expert must, without exception, remain the opinions of the expert alone. The retention of independent counsel by an expert should simply be viewed as one additional tool to help counsel achieve this imperative end. ▀

1. Chantelle and Carlos represent the defendants in this case together with their colleague Luis Sarabia (also of Davies).

2. *Wright v. Detour Gold Corp.*, 2016 ONSC 6807 [*Wright*].

3. *Moore v. Getahun*, 2015 ONCA 55 [*Moore*].

4. *Wright*, *supra* note 2 at para 23 [Emphasis added].