

CASE AND COMMENT

EVIDENCE—EXPERT WITNESSES—NUMBER PERMITTED UNDER FEDERAL AND PROVINCIAL ACTS.

The recent decision of the Manitoba Court of Appeal in *B.C. Pea Growers Ltd. v. City of Portage La Prairie*¹ demonstrates the ambiguity that surrounds section 7 of the Canada Evidence Act,² and the similar provisions in the New Brunswick, Ontario, Manitoba and Saskatchewan Evidence Acts.³ This section restricts the number of expert witnesses who may be called to give testimony during a trial. In this case the issue was the interpretation of section 25 of the Manitoba statute, which reads:

25. Where it is intended by any party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without leave of the court, to be applied for before the examination of any of such witnesses.⁴

The plaintiff, B.C. Pea Growers Ltd., having already presented opinion evidence of three expert witnesses, sought at the trial to introduce a fourth expert. No expert testimony, however, had been introduced as to that branch of the case to which his testimony related; nor had the plaintiff sought the leave of the court in accordance with the provisions of section 25 of the Evidence Act.

Defence counsel objected to the witness being called, but the trial judge admitted the evidence, relying upon *Fagnan v. Ure et al.*⁵ in which the Supreme Court of Canada held that section 10 of the Alberta Evidence Act limited a litigant not to three expert witnesses throughout the trial, but to three experts to testify to each fact in issue. The relevant section of the Alberta statute reads:

10. Where it is intended by a party to examine as witnesses persons entitled according to the law or practice to give opinion evidence not more than three of such witnesses may be called upon either side.⁶

In so deciding the Supreme Court adopted the interpretation which had been given to the section by the Supreme Court of Alberta in

1 (1965), 49 D.L.R. (2d) 91.

2 R.S.C., 1952, c. 307, s. 7.

3 R.S.N.B., 1952, c. 74, s. 22; R.S.O., 1960, c. 125, s. 12; R.S.M., 1954, c. 75, s. 25; R.S.S., 1953, c. 73, s. 44.

4 R.S.M., 154, c. 75, s. 25.

5 (1958), 13 D.L.R. (2d) 273; [1958] S.C.R. 377.

6 R.S.A., 1942, c. 106, s. 10.

Re Scamen,⁷ Cartwright J. holding that the statute must be construed to mean what it was held in the *Scamen* case to mean, as it had since been re-enacted word for word.

The only other relevant decision was an Ontario case, *Buttrum v. Udell*,⁸ in which the Ontario Court of Appeal held that under the Ontario Evidence Act⁹ only three experts could be called throughout the trial without leave of the court. In his decision Ferguson, J.A. said:

I cannot find in the words of the statute any ambiguity or anything that allows us to give the statute the limited or restricted meaning and effect given it by the Alberta court in *Re Scamen v. C.N.R. Co.*, or in this case by the trial Judge.¹⁰

The Ontario statute, unlike the Alberta Act, provides for calling additional expert witnesses with leave of the court, as does the section of the Manitoba Act quoted above.

In the *B.C. Pea Growers* case the Manitoba Court of Appeal followed *Buttrum v. Udell*, holding that in the absence of leave of the court a litigant is restricted to three expert witnesses throughout the trial. The *Fagnan* case was distinguished by Guy J.A. in the following words:

Fagnan v. Ure, (*supra*) is only binding as to the interpretation of the Alberta section as it then was. I find substantial difference between that section and s. 25 of the *Manitoba Evidence Act*. The former had no provision to call more than three expert witnesses ["upon either side"], while the latter makes provision for the calling of more than three experts with leave of the court. One was a very rigid enactment, to prevent the abuse of experts, but left no way out to call more than three when justice required it; while s. 25 of the *Manitoba Evidence Act* is indeed differently worded and provides for the possibility of more than three experts to be called upon leave.¹¹

He then goes on to state that there is no ambiguity in the Manitoba statute, and no reason to give it the wide interpretation which was favoured in *Re Scamen*, and approved in the *Fagnan* case.

The interpretation of the Alberta statute has been settled finally by the Supreme Court of Canada. That court, however, has not yet had to consider a case involving the Canada Evidence Act, or that Ontario, Manitoba or Saskatchewan, all of which provide for calling extra experts with the leave of the court. If the decision in *B.C. Pea Growers* is followed in the interpretation of

7 (1912), 6 D.L.R. 142; 2 W.W.R. 1006.

8 [1925] 3 D.L.R. 45; 57 O.L.R. 97.

9 R.S.O., 1914, c. 76, s. 10.

10 [1925] 3 D.L.R. 45, at p. 49.

11 (1965), 49 D.L.R. (2d) 91, at pp. 97-8.

these statutes then no more than three experts will be allowed to testify for either side in any trial governed by these statutes unless leave has been granted by the court before the first expert had been called.

Of particular interest to the New Brunswick practitioner is the wording of our own statute, section 22 of which reads:

22. Where it is intended by any party to an action to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than three of such witnesses may be called by either side to give opinion evidence on any issue in the action without the leave of the court.¹²

The words "on any issue in the action" clearly have the meaning which was found in the Alberta statute in the *Scamen* and *Fagnan* cases. It is also important to note that leave to introduce more than three experts on any issue may be sought at any time.

Considering the complexity of facts which may be involved in a modern trial the provision of the New Brunswick Evidence Act is a realistic method of limiting the number of experts to prevent abuse, without unduly hampering the proof of facts. In the light of the decision in *B.C. Pea Growers* Parliament, and the Legislatures of Ontario, Manitoba, and Saskatchewan may find it desirable to adopt the wording of the New Brunswick Act, thereby removing the ambiguity.

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12 R.S.N.B., 1952, c. 74, s. 22.

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