Citation: 2017 TCC 55
Date: 20170602
Docket: 2012-754(IT)G

BETWEEN:

WILLIAM KAUL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

2013-1882(IT)G

AND BETWEEN:

IAN ROHER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on January 31, 2017, at Toronto, Ontario

By: The Honourable Eugene P. Rossiter, Chief Justice

Appearances:

Counsel for the Appellant:	Irving Marks, Matthew Sokosky, Ellad Gersh and Adam Brunswick
Counsel for the Respondent:	Jenna L. Clark, Erin Strashin and Amit Ummat

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AMENDED JUDGMENT AND REASONS FOR JUDGMENT

Rossiter C.J.

I. INTRODUCTION

[1] Dr. William Kaul and Mr. Ian Roher (the "Appellants") are the only two remaining lead litigants in a group of related appeals before the Court. The sole issue in the appeals is the fair market value of the art that was purchased and subsequently donated by the participants in an art donation program that was in operation from 1998 to 2003 (the "Program" or the "Artistic Program"). The Program was promoted and operated by a number of entities over the years, including Artistic Ideas Inc., Artistic Expressions Inc. and Artistic Ideals Inc. (hereinafter collectively referred to as "Artistic").

[2] The trial started in October 2016 with a larger group of lead litigants, which include the Appellants. Over the course of the hearing, the Respondent challenged the admissibility of the expert reports (the "Court Reports") prepared by two of the appraisers, Ms. Edith Yeomans and Mr. Charles Rosoff, who were retained by Artistic to provide appraisals for the Program during the relevant years (the "Appraisers"). For various reasons, detailed herein, both Court Reports were excluded. The parties then argued a confidential motion before D'Arcy J. of this Court, the content of which I am not privy to. Following D'Arcy J.'s ruling on that motion, most of the lead litigants, save and except for the Appellants, have settled their appeals with the Canada Revenue Agency (the "CRA").

[3] Before proceeding with their case, counsel for the Appellants brought forth a motion seeking in advance a ruling as to whether the Appraisers can testify as "participant experts" to their original appraisals for the truth of the contents (the "Appraisal Reports").

[4] For the reasons which are detailed below, I would allow, or otherwise direct pursuant to a discretion granted under section 145 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688, as amended ("*Tax Court Rules*") that Ms. Yeomans may testify as a participant expert with respect to the content of the Appraisal Reports that she had already compiled during her involvement in the Artistic Program. As for Mr. Rosoff, the Court does not have sufficient evidence before it, at this time, to make a similar direction although it appears that he prepared similar appraisals as Ms. Yeomans.

II. FACTS

A. Edith Yeomans' Appraisal Reports

[5] Ms. Yeomans and Mr. Rosoff are two of the appraisers engaged by Artistic to value the lithographic prints that were transacted in the Artistic Program.

[6] Ms. Yeomans was based in Toronto and was the primary appraiser who had set the Program in motion. From 1998 to 2003, she conducted appraisals of every single title purchased and donated by participants in the Artistic Program.

[7] Ms. Yeomans was a licenced appraiser accredited by the American Society of Appraisers. Her qualifications as an appraiser in fine arts were not in dispute during a *voir dire* held in November 2016 for the purpose of qualifying her as an expert witness before this Court.

[8] During the *voir dire*, Ms. Yeomans testified that prior to her involvement with Artistic, she had been approached several times by other art donation programs. She turned them down because they required her to certify or "rubber stamp" certain values to their art that were not determined by her independent judgment and expertise, but were instead dictated by them.

[9] She testified that she took the job with Artistic because it did not impose on her this requirement as a condition of her retainer. She knew that the Program was basically a buy-low-donate-high concept. She also knew that the threshold required of her appraisals was approximately $1,000 CAD per piece. Nevertheless, she was the person responsible for determining, in her capacity as the appraiser, the fair market value of a particular title in USD and consequently, whether that title met the threshold. Those that she determined met or exceeded the threshold were included in the Program for selection by the participants; and those that she determined were below the threshold were discarded. She was retained by Artistic at an hourly rate, irrespective of the valuation opinions that she would reach in any particular case.

[10] Her appraisal process normally involved the direct inspection of art at the offices of Artistic and conducting research on the art, including the artist, the type of art, and etc. She then came to an initial value conclusion based on a market-comparison approach whereby she would compare the sales data of, for example, the same or similar art from the same artist in the U.S. market. She accessed this information through direct communication with art dealers, commercial galleries and etc. She inspected samples of every single title that was purchased and donated by participants in the Program, but not every single reproduction of every title. She

would communicate her preliminary value conclusions to Artistic either verbally or by fax.

[11] There was no evidence of any communications between Ms. Yeomans and the Appellants or any of the participant donors.

[12] Following her initial value conclusions, she would provide two Appraisal Reports to Artistic: (i) a long-form report that included the appraisals of all titles that she had appraised for the Program; and (ii) a short-form report that only included titles that were chosen for the Program, i.e., those that met the threshold. The purpose of the Appraisal Reports was, largely, to put into writing the preliminary verbal value conclusions that had already been reached by Ms. Yeomans. Other than the length as a result of the number of titles that were included, the content of the two Appraisal Reports were otherwise no different. Only the short-form reports were later provided to the participant donors and to the charities.

[13] The Appraisal Reports have been disclosed to the Respondent since the very beginning. However, the Appellants refused to produce Ms. Yeomans' working papers and any supporting documents on the basis that litigation privilege attached to those documents.

B. Charles Rosoff's Appraisal Reports

[14] Mr. Rosoff was an appraiser based in New York City. He was not involved in the Program initially. He came onboard later in 1999 as a replacement for Lesley Fink, one of the original appraisers for the Artistic Program.

[15] Ms. Yeomans would share information with Mr. Rosoff about the artists and the market, but not her valuation conclusions. Mr. Rosoff then conducted his own independent appraisals and rendered the necessary Appraisal Reports.

[16] There has not been evidence from Mr. Rosoff himself, to date, including but not limited to his expertise or how he had performed his appraisals.

C. Court Reports

[17] In 2016, the Appraisers each produced a Court Report in connection with the current appeals pursuant to section 145 of the *Tax Court Rules*. Ms. Yeomans' Court Report largely restates her value conclusions that were reached in the short-

form Appraisal Reports. The Court Report also include other content such as opinions on the appropriate market for the determination of the fair market value, and additional follow-up research on values of similar artwork closer to the time of this trial. It is unclear what was included in Mr. Rosoff's Court Report.

[18] Prior to the start of the trial proper, the Respondent brought a motion to exclude both Court Reports on the ground that they failed to comply with the notice and disclosure requirements set out under section 145 of the *Tax Court Rules*. Specifically, the Court Reports that were filed with the Court failed to include "any literature or other materials specifically relied on in support of the opinions" as set out by subsection 3(h) of the Code of Conduct for Expert Witnesses in Schedule III of the *Tax Court Rules* ("Code of Conduct").

[19] The Court found that Mr. Rosoff's Court Report was substantially, if not wholly deficient in that regard and therefore excluded his Court Report on that basis. As such, Mr. Rosoff has not yet been called as an expert witness before this Court.

[20] With regard to Ms. Yeomans' Court Report, the Respondent conceded that it had complied with the substantive requirements that were set out by section 145 of the *Tax Court Rules* and the companion Code of Conduct. However, as the hearing continued and as Ms. Yeomans was later called as an expert witness, the Respondent raised a further challenge to the admissibility of her Court Report, which formed the backbone of her proposed expert opinion evidence, on the basis that her extensive involvement in the Artistic Program precluded her from testifying as an expert before this Court because of her lack of impartiality.

[21] Following the above-mentioned *voir dire* held to determine if Ms. Yeomans' may be qualified as an expert witness before this Court (many of the factual findings are set forth above), the Court found that Ms. Yeomans clearly lacked the necessary impartiality and objectivity for her to testify to the content of the Court Report as an independent and impartial expert witness before this Court. Her Court Report was therefore not admitted into evidence.

[22] Following this ruling, the proceeding was adjourned *sine die* as the parties pondered their next steps. In December 2016, the parties argued a confidential motion before D'Arcy J., who rendered a decision following which, most of the lead litigants in the appeals have since settled their appeals with the CRA, save and except for the Appellants.

D. Purpose of this Motion

[23] The Appellants now seek to tender the Appraisal Reports of Ms. Yeomans and Mr. Rosoff for the truth of their contents, including most importantly the value conclusions that were reached therein, on the basis that the Appraisers are "participant experts" based on the Ontario Court of Appeal's decision in *Westerhof v Gee Estate*, 2015 ONCA 206, 124 OR (3d) 721, leave to appeal to SCC refused, 2015 CanLII 69447 ("*Westerhof*").

[24] The Respondent argues that *Westerhof*, which dealt specifically with the amended expert evidence rules under the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194 ("*Ontario Rules*"), should not apply to the present case because the language in the relevant provisions of the *Ontario Rules* are different than their counterpart in the *Tax Court Rules*. Alternatively, if the Court finds that *Westerhof* applies, Ms. Yeomans and Mr. Rosoff nevertheless do not meet the *Westerhof* test for participant experts. Lastly, the Respondent takes the view that the Court should not make a blanket ruling vis-à-vis the admissibility of the Appraisal Reports at this point.

[25] At the outset, since evidence regarding Mr. Rosoff's appraisals are lacking at this point, I do not propose to make a ruling regarding the admissibility of his Appraisal Reports at this time. However, I believe that my following analysis should equally inform of the approach that will be taken in respect to the admissibility of his original appraisals.

III. FOUR DIFFERENT TYPES OF WITNESSES WITH EXPERTISE

[26] The Ontario Court of Appeal first coined the term "participant experts" in *Westerhof*. Subsequently, it has been widely applied in the Ontario courts: see *XPG v Royal Bank of Canada*, 2016 ONSC 3508, 87 CPC (7th) 57 ("*XPG*"), *Hervieux v Huronia Optical*, 2016 ONCA 294, 399 DLR (4th) 63 ("*Hervieux*"). It has also been referenced in other jurisdictions across Canada: *Laing v Sekundiak*, 2015 MBCA 72, 319 Man R (2d) 268 ("*Laing*") and *Kon Construction Ltd v Terranova Developments Ltd*, 2015 ABCA 249, 20 Alta LR (6th) 85 ("*Kon Construction*").

[27] According to these authorities, there are four different types of witnesses with expertise: (i) an independent expert; (ii) a participant expert; (iii) a non-party expert, and (iv) a litigant with expertise, or a litigant expert.

Independent Expert:

[28] An independent expert (also known as a litigation expert) is an expert who is retained by a party for the purpose of, or in contemplation of litigation. In *Westerhof,* these are the experts contemplated by rule 4.1.01 and Form 53 of the *Ontario Rules* as experts "engaged by or on behalf of a party to provide evidence in relation to a proceeding." In *Kon Construction* at paragraph 35, the Alberta Court of Appeal described these experts as individuals "who are retained to provide opinions about issues in the litigation, but were not otherwise involved in the underlying events." The Court further stated that this is the category of experts who is contemplated by the common law framework and rules set out in *R v Mohan*, [1994] 2 SCR 9 ("*Mohan*") and *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 SCR 182 ("*White Burgess*") and that the "rules of evidence and civil procedure relating to expert witnesses are primarily designed to deal with [these experts]." These experts must be willing and able to provide independent, impartial and unbiased litigation opinions to the court and must not act as advocates for any of the parties: *White Burgess*.

Participant Expert:

[29] A participant expert may be described as a witness with expertise who was involved in the underlying events that gave rise to the litigation, but in contrast to a litigation expert, was not involved for the purpose of, or in contemplation of any litigation. These experts may express opinions that were formed based on their observation of or participation in the underlying events as part of the ordinary exercise of their skill, knowledge, training and experience: *Westerhof*, at para. 60. These experts are a unique hybrid in that they can attest to both "facts", which they observed or examined while participating in the underlying events, and "opinions", which they formed during their participation based on their expertise: *Westerhof*, at paras. 61, 67 to 70. While it is recommended that these witnesses be properly qualified as experts, there is no rule mandating such: *Kon Construction*, at para. 37.

[30] The most salient example of this category are treating physicians. They are allowed to provide their treatment opinions in court without complying with the court's procedural rules dealing with expert evidence: *Westerhof*. Such evidence is usually unchallenged because these witnesses are essentially "witnesses of fact" to the extent that they can testify to "facts" of their involvement, as well as the "opinions that went to the exercise of [their] judgment": *Marchand v The Public General Hospital of Chatham* (2000), 51 OR (3d) 97, [2000] OJ No 4428 at para. 120 ("*Marchand*"); also see *Westerhof* at paras. 67-70.

Non-Party Expert:

[31] Non-party experts are similar to participant experts in that their opinions are also formed for a purpose other than litigation: *Westerhof*, at para. 62. They are retained by a non-party to the litigation. The Court in *Westerhof* referred to, for example in an accident, medical practitioners who were engaged by statutory accident benefits insurers. In *Westerhof*, a physiotherapist and a kinesiologist were allowed to testify to their opinions initially prepared for Mr. Westerhof's insurer without complying with the expert evidence rules in the *Ontario Rules*: at paras. 112-114.

Litigant Expert:

[32] The fourth category is a litigant or a party with expertise, and includes employees of a corporate litigant who have expertise in the jobs they were hired to perform. This category appears to have been first formally recognized by the Alberta Court of Appeal in *Kon Construction*. The Court differentiated such witnesses on two grounds. First, it is not necessary for the party tendering such a witness to show that he or she is impartial, independent, or unbiased according to *White Burgess*. The obvious self-interest of the litigant does not automatically disqualify the opinion evidence. Second, there is no need to engage in a *Mohan*-type of analysis to qualify these witnesses. In this Court, these witnesses have also been allowed to give their opinion evidence to explain why they did what they did: see *Diotte v Canada*, 2008 TCC 244, 2008 DTC 4558 (the taxpayer was allowed to provide his valuation opinions).

[33] The common thread that ties the latter three types of witnesses of expertise together, and which makes them distinct from the first category of experts is that their opinions are based on their personal observations of or participation and involvement in the subject matter at issue in a litigation for a purpose other than litigation. A participant expert and a litigant with expertise formed the opinions at the time of the events taking place. A non-party expert may or may not have observed the events at the time, but nonetheless formed his or her opinions for a purpose other than litigation. Because of the nature of these witnesses, the scope of their opinion testimony is necessarily limited to their respective roles and involvement.

IV. WHETHER WESTERHOF APPLIES?

A. Parties' Positions

[34] The first issue that arises is whether *Westerhof*, an Ontario decision dealing with the *Ontario Rules*, applies to a proceeding arising in the Tax Court of Canada.

[35] The Respondent argues that *Westerhof* does not apply because the concept of a "participant expert" arose out of the wording of the relevant provisions in the *Ontario Rules*, which is different than their counterpart under the *Tax Court Rules*, which govern the current proceeding.

[36] Specifically, in *Westerhof*, the issue that was before the Ontario Court of Appeal was whether rule 53.03 of the *Ontario Rules* (see Appendix A), i.e. the rule setting out the procedural requirements regarding expert opinion evidence, applied only to *litigation experts* described by the language of rule 4.1.01 and Form 53 of the *Ontario Rules* – which specifically refer to experts who are "engaged by or on behalf of a party to provide evidence in relation to a proceeding" – or much more broadly as to encompass all witnesses with expertise, including participant experts and non-party experts, who propose to give opinion evidence. The Court found that rule 53.03 of the *Ontario Rules* applied only to litigation experts, and that other witnesses with expertise who are not "engaged by or on behalf of a party", such as the treating physicians in *Westerhof*, need not follow rule 53.03 prior to providing opinion evidence regarding their observations of or participation in the underlying events at issue.

[37] The Respondent asserts that, in contrast, the Tax Court equivalent, namely section 145 of the *Tax Court Rules* and the Code of Conduct, do not define or add any qualification to the term "expert witness." Consequently, the expert evidence rules in the Tax Court ought to apply to all witnesses with expertise who propose to provide opinion evidence. Lastly, the Respondent acknowledges that the Court ultimately retains the discretion to admit such evidence at trial pursuant to subsections 145(7) and (15) of the *Tax Court Rules*.

[38] The Appellant argues that *Westerhof* applies to a proceeding arising in this Court as there is no material distinction between an expert who is "engaged by or on behalf of a party" as contemplated under the *Ontario Rules* and an "expert witness" under the *Tax Court Rules*. As with the former, the latter should also be interpreted narrowly so as to include only a litigation expert, particularly in light of the wording on Form 145(2)—the Certificate Concerning Code of Conduct for Expert Witnesses—that every proposed expert witness must sign as a companion

document to an expert report that is in compliance with the *Tax Court Rules*. Specifically, Form 145(2) expressly states as follows:

> (*name*), having been named as an expert witness by the (*party*), certify that I have read the Code of Conduct for Expert Witnesses set out in Schedule III to the *Tax Court of Canada Rules (General Procedure)* and agree to be bound by it. [emphasis added]

B. Analysis

[39] I agree with the Appellant's position that *Westerhof* applies to a proceeding in this Court and that section 145 of the *Tax Court Rules* contemplates only independent or litigation experts retained for the purpose of litigation, but *not* participant experts, or other witnesses with expertise. I based my conclusion on the following reasons.

(i) A participant expert is quintessentially a fact witness

[40] First and foremost, the Respondent mainly rests her case on the differences in the statutory language between the relevant expert evidence rules under the *Ontario Rules* that were discussed in *Westerhof* and the *Tax Court Rules*. On my reading of *Westerhof*, I find that there is much more than what meets the eye as the idiosyncratic statutory language in the *Ontario Rules* was but one of six reasons (number 4 out of 6, to be precise in terms of the ordering) which the Ontario Court of Appeal relied on in finding that rule 53.03 under the *Ontario Rules* did not apply to participant experts or non-party experts: *Westerhof*, at para. 80. Instead, I find that the primary reason behind the Court's "creation" of a participant expert - who was allowed to provide opinion evidence relating to his or her participation or observation of the underlying events at issue – was because of the fact that he or she was, in essence, a *fact* witness to those events.

[41] Two passages in *Westerhof* were particularly revealing of the Court of Appeal's true intentions. First, immediately following the formulation of the test for a participant expert at paragraph 60, the Court stated the reasons as to why it preferred to call such witnesses "participant experts", notwithstanding that they have also been referred to as fact witnesses in the past:

> 61 Such witnesses have sometimes been referred to as "fact witnesses" because their evidence is derived from their observations of or involvement in the underlying facts. Yet, describing such witnesses as "fact witness" risks confusion because the term "fact witness" does not make clear whether the witness's

> evidence must relate solely to their *observations* of the underlying facts or whether they may give *opinion* evidence admissible for its truth. I have therefore referred to such witnesses as "participant experts".

[42] Second, the Court further explained in *Westerhof* that the concept of "participant experts" had its roots in common law that predate the relevant 2010 amendment to the *Ontario Rules* that gave rise to the new rules: at paras. 66 to 73. I find it important to quote in full the Court's discussion of the leading case, *Marchand, supra* in *Westerhof*, at paras. 67 to 70, as it clearly illustrates the common law origin of a "participant expert" in Ontario, or as the Court of Appeal called it in *Marchand*, a "witness of fact":

> 67 The leading pre-2010 case concerning the scope and application of rule 53.03 is this court's decision in *Marchand v. The Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97. In *Marchand*, this court confirmed that treating physicians could testify about treatment opinions without complying with the former rule 53.03.
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> 68 At para. 120 of *Marchand*, this court held that a treating physician is called as a "witness of fact, not as an expert witness", and therefore the former rule 53.03 was not engaged:
>
> > Dr. Tithecott was not a "rule 53.03 witness". Dr. Tithecott was called as a witness of fact, not as an expert witness. Thus, insofar as Dr. Tithecott was testifying about the facts of his own involvement, *or the opinions that went to the exercise of his judgment*, rule 53.03 was not engaged. [Emphasis added.]
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> 69 In describing Dr. Tithecott as "a witness of fact, not as an expert witness", this court was not making a simple distinction between factual evidence and opinion evidence. This court said specifically that, "insofar as Dr. Tithecott was testifying about the facts of his own involvement, *or the opinions that went to the exercise of his judgment*" (emphasis added), the former rule 53.03 "was not engaged."
>
> 70 Put another way, Dr. Tithecott, a treating physician, was permitted to testify about opinions that arose directly from his treatment of his patient, the plaintiff in the case. He was not required to comply with rule 53.03, and his opinion evidence was admitted for the truth of its contents. This was because he formed his opinions relevant to the matters at issue while participating in the events and as part of the ordinary exercise of his expertise. Accordingly, rather than being a stranger to the underlying events who gave an opinion based on a review of documents or statements from others concerning what had taken place, Dr. Tithecott formed his opinion based on direct knowledge of the underlying facts. He was therefore a "fact witness", or, as I have referred to such witnesses in these reasons, a "participant expert". [emphasis added].

[43] Precisely because these witnesses are fact witnesses, it makes logical sense that the expert evidence rules in the Ontario courts or in this Court should not target them. However, because of their expertise and their involvement in the underlying events at issue, they are allowed to testify essentially to the facts of their own involvement, or the opinions that went to the exercise of their judgment.

(ii) Westerhof has been followed in other Canadian jurisdictions

[44] Other Canadian jurisdictions that do not have the same statutory regime as Ontario nonetheless found that *Westerhof* was applicable or instructive.

[45] In *Laing*, the Manitoba Court of Appeal followed *Westerhof* and found that the application judge erred in disregarding the opinion evidence of a treating physician, an orthopaedic surgeon who performed a remedial hip replacement surgery on the litigant, in an action for damages based on, among other things, negligence for a lack of informed consent. In particular, at paragraph 103, the Court stated that:

> The Ontario Court of Appeal recently addressed the varying categories of expert evidence in *Westerhof v. Gee Estate*, 2015 ONCA 206, 331 O.A.C. 129. The case concerns Rule 53.03 in the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, which was amended in 2010. This rule sets out the requirements for introducing the evidence of expert witnesses at trial. While this rule is distinct to Ontario, *Westerhof* is instructive about how the evidence of an expert witness, such as Dr. Hedden, may be used. [emphasis added]

[46] In *Kon Construction*, the Alberta Court of Appeal took it one step further and allowed "expert" employees of an engineering firm, one of the parties to the litigation, that was sued over performance of a contract to give opinion evidence about how and why they performed their jobs as they did, the very subject matter of the contractual dispute. In doing so, the Court noted that the Alberta *Rules of Court*, AR 124/2010 ("*Alberta Rules*") specifically defined an "expert" much more widely as "a person who is proposed to give expert opinion evidence" as opposed to the much narrower qualification added in the *Ontario Rules*. Nevertheless, the Court commented as follows at paragraphs 32 and 34:

> 32 On their face, the Alberta *Rules* apply to any witness who proposes to give expert opinion evidence.
>
> 33 …

> 34 Notwithstanding their wide wording, the *Rules* and the common law on expert witnesses largely contemplate the "external" expert witness who is retained to provide an opinion to assist the court. For example, in *White Burgess* at para. 32 the Court wrote:
>
> > Underlying the various formulations of the duty [of the expert witness to the court] are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another.
>
> This formulation of the duty of expert witnesses assumes that the expert has no interest or involvement in the case other than to provide his or her expert opinion on the issues. [emphasis added]

[47] While none of these cases, including *Westerhof* are binding on this Court, they are highly persuasive. The Respondent has not brought to my attention any case law in the federal courts on this particular issue of a "participant expert".

(iii) Language in Tax Court Rules contemplate only independent experts, not "participant experts"

[48] On a reading of the *Tax Court Rules* as a harmonious whole, I find that it also only targets independent experts hired for the purpose of litigation, and not "participant experts" who are essentially fact witnesses, as discussed above.

[49] First of all, as the Appellant correctly submitted, while the *Tax Court Rules* do not use the same exact phrase "engaged by or on behalf of a party" in section 145, I find no material distinction between that phrase and the phrase "named … by the (*party*)" used in the Form 145(2) Certificate that must be signed by a proposed expert witness. The two phrases can be used interchangeably in this context.

[50] This conclusion is buttressed by similarly suggestive language found throughout the relevant provisions in the *Tax Court Rules* that, when viewed as a whole, strongly imply that the *Tax Court Rules* likely only contemplated independent experts who are retained for the purpose of the adversarial process, but not the broader group of witnesses with expertise, including participant experts.

[51] For example, the formulation of an expert's duties under rule 4.1.01 of the *Ontario Rules* exhibit an uncanny resemblance to that which was set out in the Expert's Code of Conduct in the *Tax Court Rules*. The relevant portions are reproduced as follows for comparison:

Ontario Rules, Rule 4.1.01 "**Duty of Expert**"	*Tax Court Rules*, Code of Conduct, "**General Duty to the Court**"
4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules, (a) to provide opinion evidence that is fair, objective and non-partisan; (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise … **Duty Prevails** (2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.	1 An expert witness has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise. 2 This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert witness must be independent and objective and must not be an advocate for a party.

[52] Subsection 3(i) of the Code of Conduct also provides that a properly done expert report referred to under subsections 145(1) and (2) of the *Tax Court Rules* must include "a summary of the methodology used … including … whether a representative of any other party was present." This language suggests that at the time that an expert is conducting its research and investigation for the purpose of drafting the expert report, litigation is either being contemplated or has already commenced. Otherwise, this requirement would serve no purpose.

[53] In addition, the following policy statements made in the Regulatory Impact Analysis Statement[1] released in connection with the 2014 amendments to the expert evidence rules lend further credence to the above interpretation:

> Subsection 145(2) provides that the expert's report must set out the proposed evidence of the expert, the expert's qualifications and be accompanied by a certificate signed by the expert acknowledging that the expert agrees to be bound by the Code of Conduct for Expert Witnesses that is added as a schedule to the Rules to ensure that expert witnesses understand their independent advisory role to the Court. [emphasis added]

[54] Lastly, I would add that the phrase "engaged by or on behalf of a party" did appear, for what it's worth, in a different context under subsection 99(1) of the *Tax Court Rules* wherein the Court has a discretion to grant leave to examine for discovery a non-party other than "an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation." The Respondent drew the conclusion that the absence of the said phrase in section 145 indicates that section 145 applied to all expert witnesses. I prefer not to draw such a quick conclusion based on the non-existence of certain language. If anything, in light of what I found above regarding the nature of a participant expert, the case law following *Westerhof*, the statutory context and further reasons below, I find the converse to be true, that is, the only experts that are contemplated under the *Tax Court Rules* are independent experts.

(iv) Tax Court Rules should be interpreted liberally to accommodate participant experts and other witnesses with expertise

[55] Rule 4(1) of the *Tax Court Rules* provides the overarching principle that the rules, including the expert evidence rules, shall be given a liberal and expansive reading so as to "secure the just, most expeditious and least expensive determination of every proceeding on its merits." Consistent with that principle, participant experts should be allowed to testify to their observation of or participation in the events that later gave rise to litigation, subject to inherent limitations in the scope of their evidence.

[56] First and foremost, the opinion evidence of participant experts constitute in many cases the best evidence available. A participant expert derives his or her

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[1] Rules Amending Certain Rules Made Under the Tax Court of Canada Act, Vol 148, No 5, February 26, 2014. Available on http://www.gazette.gc.ca/rp-pr/p2/2014/2014-02-26/html/sor-dors26-eng.php.

opinion contemporaneously based on his or her expertise and participation in the underlying events at issue. The opinions are not influenced by the exigencies of litigation and may be trusted by the courts because these witnesses, as often the case, are professionals whose professional integrity, absent evidence to the contrary, can usually be relied upon by the courts. In this regard, I find the rationale provided by the Alberta Court of Appeal in *Kon Construction*, at para. 40, which allowed litigants or parties with expertise to give opinion evidence relating to the underlying events, to be equally valid and forceful:

> As parties to the litigation they are entitled to testify, and generally they will have the most direct and relevant evidence about the issues. The truth finding function of a trial requires that their evidence be received. Since they were often only involved in the underlying events because of their expertise, it makes no sense to hold that they cannot explain why they acted as they did, if they stray into their expertise. Their opinions explain why they acted as they did. [emphasis added]

[57] Such evidence is particularly helpful where the Court is forced to deal with matters that are "antiquated". The present case is a perfect example. At issue before me is a dispute about the value of artwork that was donated anywhere from 14 to 19 years ago. To disallow, categorically, contemporaneous opinion evidence from the Appraisers who were retained to provide appraisals at the time because of their expertise is to deprive the Court of potentially probative evidence that may very likely bear on the merits of the case.

[58] The Respondent's strict interpretation of section 145 will not promote "the most expeditious and least expensive determination of every proceeding on its merits" but rather exacerbate the existing problems of delays and cost in litigation. Pursuant to the Respondent's interpretation, all witnesses with expertise must comply with section 145 in order to tender any expert opinion evidence. Yet, participant experts because of their involvement in the underlying events that gave rise to litigation will in most if not all cases fail to meet the threshold of impartiality required of an expert witness: *White Burgess*. The Court Report of Ms. Yeomans was excluded on this exact basis. This cannot be the correct outcome. Participant experts are, after all, just another way of saying "fact witnesses with expertise". Because of their hybrid nature, *Marchand* and *Westerhof* provide the case law foundation for them to testify not only to the "facts" of their participation in the underlying events at issue, but also opinions that were formed in the ordinary exercise of their expertise.

(v) There are many precedents in this Court that allow opinion evidence from witnesses with expertise

[59] I note that this Court has long had a rather lenient approach to admitting contemporaneous opinion evidence tendered by witnesses with expertise who had participated in the underlying events at issue. These witnesses were never given the name "participant experts" as their limited opinion evidence were presumably admitted based on the premise that they are essentially witnesses of fact, to the extent that their opinions related to their direct involvement in the underlying events. As all trials before this Court are judge-only, this Court has long preferred to determine cases based on their real merits, which include admitting potentially probative opinion evidence from witnesses with expertise who had formulated their opinions for a purpose other than litigation.

[60] I will give just two examples. In *Klotz v R*, 2004 TCC 147 aff'd by 2005 FCA 158, another art donation case in which expert appraisal evidence was involved, former Associate Chief Justice Bowman (as he then was) allowed the appraiser, Ms. Laverty, to testify as an expert notwithstanding that she had in fact participated in the donation program at issue,. Her original appraisal report was admitted in full and her expert report prepared in connection with the litigation was also allowed into evidence, notwithstanding the challenge raised by the Respondent's counsel. Bowman ACJ. stated at paragraphs 35 and 37 in *Klotz*:

> 35 Counsel for the respondent suggests that her evidence should be rejected because she is not objective and has an interest in the outcome…
>
> …
>
> 37 I am not prepared to reject Ms. Laverty's report simply because of her rather minor participation in the AFE program. My concerns with the appraisal go beyond that. Counsel attacked her objectivity, independence and credibility. I prefer to examine the report objectively. It is, after all, the appraisal not the appraiser that is on trial here. [emphasis added]

[61] While I understand that the decision in *Klotz* predates the 2014 amendments to section 145 of the *Tax Court Rules* and I have personally taken a different approach in the current appeals vis-à-vis Ms. Yeomans' Court Report, I have no quarrel with his admitting of the original appraisal reports as evidence of the values and other opinions that a qualified appraiser had reached in her direct participation in the donation program.

[62] In *Attia v R*, 2014 TCC 46, [2014] GSTC 150, the Court allowed the taxpayer's treating physicians to testify to their diagnoses and treatment of the taxpayer's depression during the relevant years. On the face of the decision, there

appeared to be no challenge at trial from the counsel for the Respondent in that case regarding the admissibility of such evidence. The opinion evidence was given substantial weight by the judge in finding that the taxpayer had exercised a reasonable degree of due diligence in the circumstances so as to be relieved from a director's liability assessment under subsection 323(1) of the *Excise Tax Act*, RSC 1985, c E-15.

(vi) Disclosure issues are less of a concern regarding participant experts

[63] Lastly, I note that the purpose of section 145 of the *Tax Court Rules*, similar to that of rule 53.03 of the *Ontario Rules*, is to "maintain procedural fairness and avoid 'trial by ambush'": *Grimes v R*, 2016 TCC 280 at para 160. This principle is not thwarted by the introduction of participant experts because their very nature necessarily limits the scope of the evidence that they are permitted to give. The Court of Appeal's reasoning in *Westerhof* at para. 85 is particular persuasive:

> I am not persuaded that disclosure problems exist in relation to the opinions of participant experts and non-party experts requiring that they comply with rule 53.03. In many instances, these experts will have prepared documents summarizing their opinions about the matter contemporaneously with their involvement. These summaries can be obtained as part of the discovery process. Further, even if these experts have not prepared such summaries, it is open to a party, as part of the discovery process, to seek disclosure of any opinions, notes or records of participant experts and non-party experts the opposing party intends to rely on at trial. If the notes produced are illegible, the party producing them must provide a readable version.

[64] In the particular circumstances of this case, the opinion testimony of the Appraiser would be limited to the content of the Appraisal Reports, which had long been disclosed to the Respondent. To that extent, the Respondent's concerns about disclosure regarding the original opinions are certainly more theoretical than real. On the other hand, to the extent that the Appellants have failed to produce the relevant supporting documents, such as invoices, literature, upon which the Appraiser relied in compiling her Appraisal Reports in the list of documents and the Respondent has not had a chance to ask any questions about them on discovery, procedural fairness dictates that these documents cannot be now admitted just because the Appraisal Reports are allowed.

[65] In conclusion, I find that *Westerhof*, with certain clarifications as discussed in the next section, should apply with equal force to proceedings arising in the Tax Court. More specifically, the expert evidence rules in the *Tax Court Rules*, while

broadly worded, only capture independent or litigation experts who are named or retained by a party to the litigation to provide independent and impartial expert opinions. Participant experts and other types of witnesses with expertise do not have to comply with these rules provided that they meet the test.

V. IS THE WESTERHOF TEST MET?

A. Overview

[66] Finding that *Westerhof* applies in the context of proceedings arising in the Tax Court, the next question becomes whether Ms. Yeomans met the test for participant experts as set out under paragraph 60, which states that:

> … a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:
>
> - the opinion to be given is based on the witness's observation of or participation in the events at issue; and
>
> - the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events. [emphasis added]

[67] The Respondent argues that even if *Westerhof* applies in the Tax Court, Ms. Yeomans does not meet the test for participant experts because of the following:

> (i) Ms. Yeomans has been "engaged by or on behalf of party to the litigation" to provide the Court Report for the purpose of the litigation, which had been excluded on *voir dire*. Alternatively, the Respondent contends that her Appraisal Reports were procured by Artistic on behalf of the Appellants and other donors, in support of the donation credits; and
>
> (ii) Ms. Yeomans formed her opinions based on a review of third-party data and records and did not form her opinions based on her direct observation of or participation in the events at issue, in contrast to, for example, a treating physician.

[68] The Respondent also argues that the Court retains the gatekeeper function in respect to any opinion evidence and that no blanket ruling vis-à-vis the admissibility of the Appraisal Reports should be rendered on this motion.

[69] The Appellant argues that the *Westerhof* test for participant experts was met in the circumstances of the case. Ms. Yeomans directly participated in valuing the artworks whose value are at issue in this appeal. She rendered the appraisal opinions contemporaneously. She was wearing two "hats", one as the original appraiser, i.e. a participant expert, and another as an independent or litigation expert. While Ms. Yeomans was disqualified from wearing the second "hat", she should nonetheless be permitted to wear the first "hat".

[70] In order to determine if Ms. Yeomans met the *Westerhof* test, there are a number of issues that need to be addressed:

> (i) What is the meaning of the phrase "a witness … who has not been engaged by or on behalf of a party to the litigation" within the *Westerhof* test?
>
> (ii) Was Ms. Yeomans **"**engaged by or on behalf of**"** the Appellants to form her appraisal opinions?
>
> (iii) Did Ms. Yeomans form her appraisal opinions based on her observation of or participation in the underlying events at issue as part of the ordinary exercise of her expertise?
>
> (iv) How does a participant expert fit into the *Mohan* and *White Burgess* framework for expert witnesses?

B. Meaning of "engaged by or on behalf of a party to the litigation"?

[71] The primary hurdle to allowing Ms. Yeomans to testify as a participant expert in the present case arises from a particular phrase used in the *Westerhof* test, which states that "a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence…" Ms. Yeomans was engaged, literally, by or on behalf of the Appellants to give opinion evidence in the form of the Court Reports. Alternatively, the Respondent argues that the Appraisal Reports were procured by Artistic on behalf of the Appellants. As a result, she does not meet the test for a participant expert and is precluded from providing her appraisal opinions in the

form of the Appraisal Reports written during her direct participation in the Artistic Program.

[72] I disagree with the Respondent's interpretation of the *Westerhof* test for participant experts. I am of the view that the phrase "engaged by or on behalf of a party to the litigation" cannot be read in isolation from the rest of the test and the Court's reasoning in *Westerhof*. In particular, I find that the phrase may be superfluous in the context of determining whether a witness may testify as a participant expert.

[73] The real legal test, it seems to me, should be that a witness with expertise who has not been engaged by or on behalf of a party to the litigation to form the original opinion **for the purpose of litigation** may give the said opinion evidence without complying with the expert evidence rules – *e.g*. rule 53.03 in the *Ontario Rules*, rule 145 in the *Tax Court Rules* – provided that the "core" of the *Westerhof* test is met, that is, "the opinion to be given is based on the witness's observation of or participation in the events at issue; and the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events": *Westerhof*, at para. 60.

[74] This interpretation is supported by the Court of Appeal's reasoning in *Westerhof*. For example, in explaining why the language of rule 4.1.01 of the *Ontario Rules* and Form 53.03 supported a distinction between litigation experts and participant experts, the Court of Appeal stated the following with regard to the particular phrase "engaged by or behalf of a party to the litigation":

> 82 Witnesses, albeit ones with expertise, testifying to opinions formed during their involvement in a matter, do not come within this description. They are not engaged by a party to form their opinions, and they do not form their opinions for the purpose of the litigation. As such, they are not "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding." A party does not "engage" an expert "to provide [opinion] evidence in relation to a proceeding" simply by calling the expert to testify about an opinion the expert has already formed.
>
> 83 Similarly, the requirement in rule 53.03(2.1)3 that an expert's report set out "the instructions provided to the expert in relation to the proceeding" makes it abundantly clear that rule 53.03 only applies to litigation experts. A party does not provide instructions to a litigation* expert or a non-party expert in relation to the proceeding - that it is because these experts have already formed their opinions. **[emphasis added – *I believe that this is most likely an error as the Court most likely meant to say a "participant expert".]**

[75] I note here that the phrase "engaged by or behalf of a party to the litigation" is not a judicial innovation, but was rather a phrase borrowed directly from rule 4.1.01 of the *Ontario Rules*.

[76] In addition, I also find that the Court's following statements at paragraph 86 of *Westerhof* to be directly on point, notwithstanding it was made in a different context:

> Sixth, I agree with the submissions of the parties and interveners who say that the Divisional Court's ruling will actually exacerbate the problems of expense and delay that it purports to alleviate. Unlike an expert witness engaged by or on behalf of a party to provide opinion evidence in relation to the proceeding, participant experts and non-party experts do not testify because they are being paid an expert's fee to write the report contemplated by rule 53.03. Rather, they testify because they were involved in underlying events and, generally, have already documented their opinions in notes or summaries that do not comply with rule 53.03. Rule 53.03(2.1) contains strict requirements. Requiring participant witnesses and non-party experts to comply with rule 53.03 can only add to the cost of the litigation, create the possibility of delay because of potential difficulties in obtaining rule 53.03 compliant reports, and add unnecessarily to the workload of persons not expecting to have to write rule 53.03-compliant reports (e.g. emergency room physicians, surgeons and family doctors). [emphasis added]

[77] As the Court of Appeal stated, the fundamental difference between a participant expert and a litigation expert, to which the procedural rules are meant to capture, is that the former is only testifying to opinions formed during his or her involvement in the matter at issue and that the opinions were already formed for a purpose other than litigation, whereas the latter is seeking to testify to an opinion formed solely for the purpose of litigation.

[78] Here, I would reiterate the Court's words that "a party does not 'engage' an expert 'to provide [opinion] evidence in relation to a proceeding' simply by calling the expert to testify about an opinion the expert has already formed": *Westerhof*, at para. 82. The Appellants do not "engage" Ms. Yeomans to provide the appraisal opinions in relation to these appeals simply by now attempting to call her to testify about the said appraisals which she had already made more than a decade ago.

[79] The fact that she was engaged by the Appellants to provide the now excluded Court Report should have no bearing on this motion, which is concerned with the admissibility of the original appraisal opinions, and not the Court Report.

[80] Put another way, she is wearing a different “hat” as a participant expert, which is, in my opinion, the only “hat” that she should have put on in the very beginning of these appeals. I say this because a litigation expert’s role is to provide independent, impartial and objective opinions to assist the court. Ms. Yeomans, on the other hand, because of her extensive involvement in the Artistic Program, could not possibly have fulfilled that role – the basis upon which her Court Report was excluded in the first place.

[81] Now in her role as an participant-appraiser for Artistic, Ms. Yeomans is acting in her capacity as a fact witness to the extent that she will be testifying to her original appraisals which she made for the purpose of the Program. Having taken off her ill-fitted "hat" as an independent expert, she should be permitted to wear the right “hat” in testifying to her original appraisals already formed prior to her engagement with the litigation process.

[82] The two roles can be properly segregated because the opinions can be segregated. In fact, that is precisely what the Court of Appeal had intended in describing, at paragraph 72 in *Westerhof*, the *obiter* comments made by the trial judge in *Burgess (Litigation Guardian of) v Wu* (2003), 68 OR (3d) 710 (SC) as follows:

> … the trial judge differentiated between physicians' opinions formed at the time of treatment - which involve making a diagnosis, formulating a treatment plan and making a prognosis ("treatment opinions") - and opinions formed for the purpose of assisting the court at trial and based on consideration of information from a variety of sources ("litigation opinions"). Although the question of to whom rule 53.03 applies was not before the court, the clear distinction made between treatment opinions and litigation opinions supports the view that not all opinion evidence falls within the ambit of rule 53.03.

[83] In this particular case, the separation of the opinions is made even easier since they have been put down on paper. Any opinions that were not stated in the Appraisal Reports themselves will not be admitted. To that extent, the Appraisers are not litigation experts in disguise.

[84] Second, my interpretation is consistent with how the Ontario Courts themselves have phrased the test for participant experts subsequent to *Westerhof*.

[85] In *Hervieux, supra*, the Ontario Court of Appeal revisiting the issue in the context of the small claims proceedings stated the test in *Westerhof* as follows:

> **15** In *Westerhof v. Gee Estate*, 2015 ONCA 206, 124 O.R. (3d) 721, at para. 60, leave to appeal refused 2015 CarswellOnt 16501 (S.C.C.), this court recently held that a treating physician could provide expert opinion evidence for the truth of its contents without complying with the formal requirements of r. 53.03 of the *Rules of Civil Procedure*, O. Reg. 17014, in the following circumstances:
>
> > The opinion to be given is based on the witness's observation of or participation in the events at issue; and
> >
> > The witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

[86] There was no mention of the requirement that the physician must not be "engaged by or on behalf of a party". In the case, while the plaintiff did not provide a formal expert report at trial, which led to a dismissal of his action in the Small Claims Court, he had nonetheless "repeatedly indicated his intention to call his treating physicians as experts at trial and had included their names on his witness list that he filed with the court" and had also "requested opinions of his treating physicians": *Hervieux*, at paragraph 17. However, none of that mattered to the Court of Appeal, which clearly would have allowed the plaintiff's treating physicians to testify as participant experts.

[87] In *Hoang (Litigation guardian of) v Vicentini*, 2016 ONCA 723 ("*Hoang*"), the Ontario Court of Appeal explained the *Westerhof* test as follows at paragraph 28:

> As a general rule, a participant expert with special skill, knowledge, training, or experience may give opinion evidence without complying with r. 53.03 where (i) the opinion to be given is based on the witness's observation of or participation in the events at issue and (ii) the witness formed the opinion as part of the ordinary exercise of his or her skill, knowledge, training, and experience while observing or participating in such events: at para. 60. However, if a participant expert proffers opinion evidence extending beyond those limits, he or she must comply with r. 53.03 with respect to the portion of the opinion extending beyond those limits: at para. 60.

[88] The glaring absence in this formulation of the *Westerhof* test of the phrase "engaged by or on behalf of a party", again, by the same court strongly suggest that it is more likely that the Ontario Court of Appeal did not intend to use the phrase as an integral part of the test.

[89] Third, my interpretation is also consistent with how *Westerhof* has subsequently been interpreted by courts in other Canadian jurisdictions.

[90] In *Laing*, *supra*, the Manitoba Court of Appeal found that the application judge made a palpable and overriding error in disregarding the opinion evidence of an orthopaedic surgeon in respect to the issue of the risks that underlie the use of an unlicensed ceramic hip replacement system. The Court found that according to *Westerhof* and *Marchand*, the surgeon, while not a litigation expert, would fit within the parameters of a participant or participating expert who could testify not only to his observations of the underlying facts, but also opinions that he formed during his direct involvement in his treatment of the patient.

[91] In coming to this conclusion, the Manitoba Court of Appeal did not find the need to discuss at all the alleged requirement that a participant expert must not have been engaged by or on behalf of a party to the litigation. While it may be that it was simply not necessary since the said surgeon was introduced and examined at the application stage as a "person, other than an expert" pursuant to rule 39.03(1) of the Manitoba *Court of Queen's Bench Rules*, Man Reg 553/88 ("*Manitoba Rules*"), I would also note that the Court cited parts of two medical reports that were provided by the said surgeon to Ms. Laing's counsel in May and July 2004, respectively, the latter one in response to questions arising from the former, at a time when litigation had already commenced or was certainly in contemplation. In fact, the notice of application was filed by Ms. Laing in June 2004, in between the two medical reports.

[92] In *Kon Construction*, *supra*, the Alberta Court of Appeal created another category of witnesses with expertise who can give opinion evidence about their participation in the underlying events at issue, i.e. litigants or parties with expertise. The Court's underlying rationale for this class of "experts" is the same as that of participant experts, that is, they were involved in the events underlying the litigation: *Kon Construction*, at para. 35. In allowing a supervising engineer and a surveyor of an engineering firm who was a party to the litigation to give opinion testimony, the Court further stated at paragraph 43:

> To the extent that professional judgments had to be made about which surveys to select, and which computer programs to use, Marinus Scheffer and Klaver [**litigant experts**] could also be cross-examined to test the evidence. They may have justified some of their choices because of their expert opinions about the proper procedures to use, but that does not render their evidence inadmissible as "expert evidence". The litigation alleged that they had not properly exercised their expertise, and they were entitled to defend themselves by explaining why they did what they did. Terranova retained Scheffer Andrew as an expert engineering firm to supervise the project, and to certify the invoices. When Scheffer Andrew was sued, it was entitled to explain how and why it did its work; the firm was hired because of its expertise, and it is

> inconsistent to now argue that it cannot demonstrate that it had any expertise. It cannot fairly be denied the opportunity to justify its work product on the basis that its officers and employees, who were hired (and later sued) because of their expertise, are now expressing "opinions". The independent experts retained by the parties could then express external expert opinions against this background about whether the standard of care had been met. [annotation added]

[93] In *Kon Construction*, the Court of Appeal also cited as support a previous case in this Court, *Diotte*, *supra*, in which the Court while dismissing the taxpayer's attempt to have himself qualified as an expert witness in the valuation of shares due to obvious bias and self-interest, nonetheless allowed him to give evidence as to how and why he had reached the valuation which became a subject matter of the litigation. The Court of Appeal reasoned at paragraph 41 that:

> His interest in the outcome of the case was not a barrier to his testimony. This evidence was, presumably, given by him as a lay witness, even though it clearly engaged his opinions about the value of the shares. Diotte was a witness with expertise, who was involved in the underlying events, and so was permitted to give evidence arising from his expertise even though he was not qualified as an "expert" under the Mohan test.

[94] If litigants with expertise, who have obvious self-interest in the outcome of a case, can testify to the opinions formed during their underlying involvement because of their expertise, I find it difficult to reconcile this with a strict interpretation of the phrase "engaged by or on behalf of a party" that is advocated by the Respondent in respect to the test for participant experts.

[95] In conclusion, I find that the phrase "engaged by or on behalf of a party" is superfluous for the purpose of determining whether one is a participant expert. A much more logical interpretation that is consistent with *Westerhof* is that the witness must not have been engaged by or on behalf of a party to form the original opinions **for the purpose of litigation** which he or she now seeks to tender as a participant expert in court. This is the real concern or mischief with the unfettered use of opinion evidence from participating witnesses with expertise.

C. Was Ms. Yeomans "engaged by or on behalf of" the Appellant donors to form the original appraisals?

[96] Now I have to determine the question as to whether Ms. Yeomans was **"**engaged by or on behalf of**"** the Appellants to form the original appraisal opinions which admissibility are now at issue. The Respondent asserted in the alternative

that the Appraisal Reports were in fact procured by Artistic on behalf of the Appellants.

[97] Notwithstanding the Respondent's assertion, I find that the evidence was clear that Artistic, not the Appellants, was the entity that engaged Ms. Yeomans to provide the appraisal opinions. Artistic was in direct contact with Ms. Yeomans. She was retained by Artistic at an hourly rate. She inspected the art at the offices of Artistic. On the other hand, there was no evidence of any direct contact between Ms. Yeomans and the Appellants. **Further, given my above interpretation of the phrase "engaged by or on behalf of a party", even if Ms. Yeomans' appraisals were procured by or on behalf of the Appellants, that would not necessarily disqualify her original appraisals, so long that they were not formed for the purpose of litigation. There was no evidence that was the case.**

D. Did Ms. Yeomans form her appraisal opinions based on her observation of or participation in the underlying events at issue as part of the ordinary exercise of her expertise?

[98] Further, the Respondent argues that there is a distinction between the roles of a treating physician and that of an appraiser such as Ms. Yeomans. Whereas the typical treating physician renders diagnostic or prognostic opinions based on the direct observation of patients, Ms. Yeomans formed her appraisal opinions, embodied by the Appraisal Reports, based on a review of third party data and literature.

[99] In other words, her opinions were not formed based on her direct participation or observation in the underlying sales activities from which her research data was derived. In support of the position, counsel for the Respondent cited the case *AG(Ontario) v 18,500.00 in Canadian Currency et al*., 2016 ONSC 2237, 131 OR (3d) 162 ("*Canadian Currency*") in which the Court found that a Detective Constable who was called by the Crown to give opinion evidence in a civil forfeiture proceeding could not be a participant expert. The Respondent asserted that the basis for the Court's refusal to recognize this officer, who had expertise in forfeiture of crime-related property, was that the opinions he formed were not based on his own observations, but rather that of others. Similarly, Ms. Yeomans did not render her opinions based on her personal observations. The Respondent suggested that an example of a participant expert in the context of this case may be one of the art dealers who supplied the art at issue to Artistic, but not an appraiser whose opinions were based largely on inadmissible hearsay evidence.

[100] I disagree with the Respondent's interpretation for a number of reasons.

[101] First, I am of the view that the distinction drawn by the Respondent between Ms. Yeomans and a treating physician is immaterial. A physician, whether generalist or specialist, normally examines the patient in person in the physician's office. Ms. Yeomans examined the art in person in Artistic's office. The physician takes down the history of the patient and conducts some medical tests. Ms. Yeomans inspected the art, noted down the artist, the dimensions of the art, its quality, and other technical details necessary to make an appraisal. The physician, unsure about how to interpret the test results, digs into his library and looks for information and precedents from medical books and journals. Still uncertain, the physician may consult with another expert. Similarly, Ms. Yeomans, unsure about what value conclusion to draw regarding a particular piece of painting, conducted her research by inquiring about the market and sales information of the same or similar painting by the same artist, or similar artists. She accessed such information from various sources including commercial art galleries and art dealers. The physician analyzes the information and subsequently forms an opinion, whether it be a diagnosis or a prognosis, and offers treatment options to the patient. Ms. Yeomans also analyzed the information she obtained and formed an opinion as to the value of that particular painting.

[102] I do not see any material distinctions between the two roles. Both physically examined the subject or object at issue. Both became involved because of their particular area of expertise. Both engaged in a process of research and inquiry in accordance with their training in order to arrive at their opinions. Instead of books and journals, Ms. Yeomans' information came primarily from art dealers and commercial art galleries. To the extent that the Respondent takes issue with the fact that she relied heavily on inadmissible hearsay information, or a combination of direct observation and hearsay, the Supreme Court of Canada in *R v Lavallee*, [1990] 1 SCR 852, 76 CR (3d) 329, has made it abundantly clear that such deficiencies impact the weight to be given to the expert opinion, but not to its admissibility. Wilson J. speaking on behalf of the majority stated as follows at p. 897 in the context of a jury trial:

> Where the factual basis of an expert's opinion is a mélange of admissible and inadmissible evidence the duty of the trial judge is to caution the jury that the weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which it relies.

[103] In *City of St. John v Irving Oil Co. Ltd*, [1966] SCR 581, 58 DLR (2d) 404 ("*St. John*"), a case predating *Lavallee*, a unanimous Supreme Court found that valuation opinions that were based on hearsay information were properly admissible. Ritchie J. stated at p. 592 as follows:

> Counsel on behalf of the City of Saint John pointed out that if the opinion of a qualified appraiser is to be excluded because it is based upon information acquired from others who have not been called to testify in the course of his investigation, then proceedings to establish the value of land would take on an endless character as each of the appraiser's informants whose views had contributed to the ultimate formation of his opinion would have to be individually called. To characterize the opinion evidence of a qualified appraiser as inadmissible because it is based on something that he has been told is, in my opinion, to treat the matter as if the direct facts of each of the comparable transactions which he has investigated were at issue whereas what is in truth at issue is the value of his opinion.
>
> The nature of the source upon which such an opinion is based cannot, in my view, have any effect on the admissibility of the opinion itself. Any frailties which may be alleged concerning the information upon which the opinion was founded are in my view only relevant in assessing the weight to be attached to that opinion, and in the present case this was entirely a question for the arbitrators and not one upon which the Appeal Division could properly rest its decision. [emphasis added]

[104] I find that any distinction that the Respondent attempts to draw between a treating physician and Ms. Yeomans in this case appears more fictional than real.

[105] Lastly, the case tendered by the Respondent, *Canadian Currency*, *supra*, deserves some comments. In my opinion, the role of the Detective Constable who was not permitted to testify as a participant expert cannot be more different than that of Ms. Yeomans. That officer did not directly participate in the investigation or arrest of the individual who was later charged and convicted of a drug offence. He was involved in building a civil forfeiture case as he was the one who submitted a request to the Attorney General of Ontario to consider commencing such a proceeding. Therefore, his opinions were not based on his observations of or participation in the underlying events at issue, i.e. the investigations and the arrest. He formed his opinions as part of the civil forfeiture case, and was, in essence, a "litigation expert in disguise".

[106] In contrast, Ms. Yeomans directly participated in the Artistic Program through her role as an appraiser for the art that were purchased and donated. Her valuation opinions were based on the ordinary exercise of her skill, knowledge, training and experience as a professional appraiser while directly participating in

the valuation process. She inspected every single title that was used or discarded in the Program, in the course of which she rendered the short-form and the long-form appraisal reports. Her valuation opinions were relied upon by Artistic to determine which art should be made available for selection by the donors. Her opinions were also relied upon by the charities which issued the donation receipts for the art, whose valuations are at issue in this appeal. She is the epitome of a participant expert.

[107] The Respondent's argument might have been more persuasive if Ms. Yeomans had never examined the artwork at issue herself but merely relied on second-hand data and literature. But even then, as I stated above, her appraisal opinions were still formed as part of her role as one of the original appraisers for the Artistic Program.

[108] Based on the above, I find Ms. Yeomans had formed her opinions, as embodied in the Appraisal Reports, based on her direct observation of or participation in the Artistic Program and that the opinions were formed as an ordinary exercise of her expertise as a professional appraiser.

E. How does a participant expert fit into the Mohan and White Burgess Framework?

[109] The Respondent insists that in the present case, there lies a fundamental distinction between a witness with expertise who is subpoenaed to give fact evidence, interspersed with opinion evidence as a result of that witness's participation and observation in the underlying events, and one who was retained to provide independent expert testimony in court, which were subsequently disqualified on the ground of impartiality. To use the Respondent counsel's words, while Ms. Yeomans can wear two "hats", she only has "one head". A participant expert must still meet the *Mohan* framework for the admissibility of expert evidence, which include the *White Burgess* test for impartiality at the qualification stage. Ms. Yeomans' impartiality remains a concern, even as a participant expert.

[110] The Respondent's position is supported by an oral decision of the Ontario Superior Court of Justice in *XPG, supra*. In *XPG*, at paras. 24 to 33 and 37 to 47, the Court stated that in order for opinion evidence of participant experts to be admissible, it must meet "the criteria applicable to all expert evidence", including the *Mohan* framework and the test of independence and impartiality in *White Burgess*.

[111] I would like to make two clarifications in respect to this requirement.

[112] First, I agree that parties should generally attempt to formally qualify these witnesses as "experts". However, instead of imposing this as a strict requirement for the parties as set out in *XPG*, I would take a more liberal approach as suggested by the Alberta Court of Appeal in *Kon Construction*, at para. 37, which stated that:

> Where witnesses with expertise (who are not litigants) are to testify about events within the scope of their expertise, it is generally prudent to have them formally qualified as expert witnesses, particularly when they propose to express opinions on collateral issues like the employment prospects of the patient. [emphasis added]

[113] This approach is more in line with the nature of participant experts, who are, in essence, witnesses of fact. Ultimately, it is in the parties' best interest to qualify such witnesses in order for the Court to properly appreciate the weight to be attributed to their testimony.

[114] Second, in respect to the test of independence and impartiality as set out in *White Burgess*, an analysis that should be conducted at the qualified expert stage in *Mohan*, I emphasize that independence and impartiality must be viewed in relation to the opinion testimony that the witness proposes to give. For a witness proposed to be called as a participant expert, the witness should be independent and impartial at the time he or she formed the original opinion during the exercise of his or her expertise in the ordinary course. For a witness proposed to be called as a litigation or independent expert for the purpose of litigation, the witness should be independent and impartial in respect to the litigation opinions that he or she formed in connection with a litigation that is either taking place, or is being contemplated. In this respect, I note that my comments echo what I had stated above in respect to the meaning of the phrase "engaged by or on behalf of a party to the litigation".

[115] In the case at bar, I find that Ms. Yeomans was independent and impartial vis-à-vis her original appraisals. Her compensation did not depend on her valuation. She was paid on an hourly basis to provide art appraisals for the Artistic Program from 1998 to 2003. While she knew the general threshold of approximately $1,000 CAD that was needed to make the Program work from a financial standpoint, neither Artistic nor the Appellants had dictated to her the value that she had to assign to any particular piece of painting. She had no direct communication with the Appellants or any of the participants in the Program. Ultimately, she was the one who determined which pieces should or should not be

used in the Program. The participants then selected those from an inventory of titles which had been approved by her.

[116] As such, any remaining concerns about her impartiality should go to the weight to be properly attributed to her Appraisal Reports, particularly in the context of a non-jury trial. The Court retains the gatekeeper function in respect to all opinion evidence. I would also add that since the valuation opinions in the Appraisal Reports to which Ms. Yeomans is attempting to testify are the ultimate issue for this litigation, I am keenly aware that there is an added level of scrutiny the closer an expert opinion is to the ultimate issue.

VI. Conclusion

[117] Based on the above, I find, or otherwise direct pursuant to my general discretion under section 145 of the *Tax Court Rules*, that the Appraisal Reports of Ms. Yeomans should be admitted for the truth of their contents on the basis that she is a participant expert in the Artistic Program. Ms. Yeomans is allowed to testify to the contents of the Appraisal Reports, limited to the opinions that she had formed while participating as the appraisers for the Artistic Program.

[118] I note that this Court retains the gatekeeper function to exclude any opinion testimony from Ms. Yeomans that fall outside the scope of her Appraisal Reports.

[119] Costs shall follow the cause.

This Amended Judgment and Reasons for Judgment are issued in substitution for the Judgment and Reasons for Judgment dated April 20, 2017.

Signed at **Ottawa, Canada**, this **2nd** day of **June**, 2017.

"E.P. Rossiter"

Rossiter C.J.

Appendix A – *Ontario Rules*

RULES OF CIVIL PROCEDURE
R.R.O. 1990, Reg. 194

Duty of Expert

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

…

Experts' Reports

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
   i. a description of the factual assumptions on which the opinion is based,
   ii. a description of any research conducted by the expert that led him or her to form the opinion, and
   iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

Schedule for Service of Reports

(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1) and (2), unless the court orders otherwise.

Sanction for Failure to Address Issue in Report or Supplementary Report

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

(a) a report served under this rule; or

(b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial.

Extension or Abridgment of Time

(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,

(a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or

(b) by the court, on motion.

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COURT FILE NO.:	2012-754(IT)G and 2013-1882(IT)G
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DATE OF HEARING:	January 31, 2017
AMENDED REASONS FOR JUDGMENT BY:	The Honourable Eugene P. Rossiter, Chief Justice
DATE OF **AMENDED** JUDGMENT:	**June 2, 2017**

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