

## PUBLICATION

### A Recent Court Caution in Use of "Retroactive Capacity" Experts at Trial

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Individuals sometimes attempt to challenge contracts and gifts on the basis that an elderly person lacked capacity to understand actions, or was vulnerable to influence from another party. Such challenges sometimes occur years after the granting of the gift or signing of the contract, and when the elderly person's mental condition has severely declined or they have since passed away. To fill this gap, litigants sometimes use expert witnesses to provide an opinion on the elderly individual's capacity. These reports are referred to as "retroactive capacity assessments" (also known as retrospective capacity assessments). A recent decision by the Honourable Mr. Justice W.A. Tilleman (the "Trial Judge"), now affirmed by our province's highest Court<sup>1</sup>, raises legitimate issues about the reliability of an expert's opinion as to an individual's retroactive capacity when the expert has not medically assessed the subject individual at the relevant time.

The case of *Burby v Ball*<sup>2</sup> centered on the sale of a ranching property by an 86 year-old lifelong rancher, with a wife and no children, to the Defendants. The Defendants were a neighbouring young ranching family and were close family friends with the elderly seller. Over two years after the sale, the elderly seller's younger brother (as his litigation representative and the Plaintiff) commenced the lawsuit. An eight-day trial took place almost seven years after the sale. The Plaintiff argued the elderly seller suffered from dementia at the time of the sale and was thus easily influenced or was at a severe disadvantage in bargaining power.

At trial, both parties introduced expert evidence regarding the elderly seller's capacity at the time of the transaction. Medical documentation for the elderly seller was sparse around the time of the sale. Further, while the Defendants' expert interviewed the elderly seller many years later at a long term care facility, the Plaintiff's expert did not attempt to interview the elderly seller at all. Instead, the Plaintiff's expert relied on interviews of some of the Plaintiff's acquaintances, family members and the seller's lawyer for the subject transaction. Notably, throughout the course of the trial, the Defendants were able to show that several of the accounts relied upon in the Plaintiff's expert report were inaccurate or based on speculation, assumptions and rumour.

At trial, the Plaintiff's expert's report was weakened, but the Plaintiff's expert still concluded the elderly seller did not have capacity at the time of the transaction. Meanwhile, the Defendants' expert concluded the evidence of incapacity was weak and contradictory, concluding he was unable to make a final determination due to the inconsistency in the information available, and the passage of time.

Ultimately, while the Trial Judge found both expert reports helpful, he did not accept one opinion over the other. The Trial Judge determined that the difference in each report could be explained by which information they depended on for their conclusions.

The Trial Judge expressed doubt as to the reliability of retroactive capacity assessments. He further noted he was not convinced of a settled or reliable methodology for determining retroactive capacity. The Trial Judge emphasized considerable caution is required when deciding whether to accept reports which did not assess their subject at the relevant time.

Due to these concerns, the Trial Judge instead based his decision on the elderly seller's capacity from the evidence heard at trial.

The Trial Judge ultimately agreed with the Defendants and found the Plaintiff had "decisional capacity" at the time of this transaction. In assessing the seller's capacity, the Trial Judge emphasized that the seller met with an experienced solicitor to execute the documents, who did not have any concerns regarding the elderly seller's capacity.

This decision is an important reminder that an expert report is only as useful as the evidence upon which it is based. If a party tenders an expert report based on information which is later contradicted or proven false, then the report may essentially become useless for the Court. Further, the decision places doubt on the reliability of the retroactive capacity analysis process in general. Parties seeking to challenge transactions based on capacity must carefully consider the evidentiary basis of their allegations, including the use of contemporaneous medical evidence and the testimony of witnesses who observed the events in question. Accounts of witnesses may be preferred over experts who are strangers to the subject event(s) and make assessments based off of biased or unreliable information.

As our population increasingly ages, similar challenges will be levied as elderly individuals transfer their wealth or sell their properties. This is particularly true of Alberta's rural land owners. Albertans must be well prepared on both fronts. Sellers and buyers must assure their contracts (or gifts) are structured and executed with the help of a lawyer to prevent challenges from disgruntled third parties. If disputes arise, effective litigation counsel are needed to handle these particular challenges in a quickly evolving area.

At McLeod Law LLP, we have experience both in providing tools to parties to protect against future challenges and in effectively resolving disputes when they arise.

If you have questions or would like further information regarding expert evidence at trial, please contact one of the authors.

<sup>1</sup>Burby v Ball, 2018 ABCA 22.

<sup>2</sup>Burby v Ball, 2017 ABQB 300.