

**CITATION:** Chang Xin Construction v. 2049390 Ontario Inc., 2025 ONSC 1503  
**COURT FILE NO.:** CV-21-668503  
**DATE:** 2025 03 07

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF the *Construction Act*, RSO 1990, c. C.30, as amended

**B E T W E E N :** )  
)  
8682470 CANADA INC. o/a CHANG XIN ) D. Stoddard and V. Niharosev, *for the*  
CONSTRUCTION ) *plaintiff / defendant by counterclaim*  
)  
Plaintiff / Defendant by counterclaim )  
)  
**- and -** )  
)  
)  
2049390 ONTARIO INC. and JRJF GROUP ) R. Hosseini and P. Sooresrafil, *for the*  
CORP. ) *defendant/plaintiff by counterclaim,*  
) *2049390 Ontario Inc.*  
Defendants / Plaintiff by counterclaim )  
)  
)  
) **HEARD:** March 6, 2025

2025 ONSC 1503 (CanLII)

**RULING ON OBJECTION TO DEFENDANT’S EXPERT**

**Robinson A.J.**

[1] Trial in this lien action commenced on February 25, 2025. All witnesses have now testified except for the defendant’s proposed expert, Michael Colalillo, a structural engineer. The defendant intends to call Mr. Colalillo as an expert under rule 53.03 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the “*Rules*”) to give opinion evidence on disputed issues with the foundation and footings of the subject building as constructed by the plaintiff. The plaintiff challenges whether Mr. Colalillo is properly called and qualified as an expert. This *voir dire* proceeded to hear submissions and rule on whether Mr. Colalillo may be called as a rule 53.03 expert, as a participant expert, or only as a fact witness.

[2] The plaintiff seeks a ruling that Mr. Colalillo may only testify as a fact witness, striking his trial affidavits, and barring his reports (but not the appended documents) from being admitted

into evidence. The defendant seeks a ruling that Mr. Colalillo be permitted to testify as a rule 53.03 expert or, in the alternative, as a participant expert.

[3] So that the parties could prepare for Mr. Colalillo's examination, I provided my disposition yesterday afternoon with a full ruling to follow, which I now provide.

[4] I find that Michael Colalillo does not meet the requirements for a rule 53.03 expert, so cannot testify in that capacity. However, I am satisfied that he may testify as a participant expert, subject to a qualification *voir dire* on the scope of his expertise.

[5] With respect to Mr. Colalillo's evidence and reports, I am not striking his affidavit sworn January 15, 2025, or the appended letters/reports. I am satisfied that they deal primarily with Mr. Colalillo's own observations made in 2022 and 2023 when he was actively involved in the course of ongoing construction on the project. However, I am striking Mr. Colalillo's affidavit sworn February 11, 2025, and barring admission of his two reports dated December 30, 2024 and February 10, 2025. Both reports do not comply with the requirements of rule 53.03 of the *Rules* and go beyond the limits of a participant expert.

## ANALYSIS

[6] The plaintiff opposes Michael Colalillo testifying as an expert witness based on non-compliance with rule 53.03 of the *Rules* and concerns that Mr. Colalillo has been directly involved in the underlying project and, accordingly, is not a disinterested party. The defendant's position is that any non-compliance with rule 53.03 is only a technicality and that Mr. Colalillo ought to be permitted to testify as an expert on behalf of the defendant.

[7] There are two main components to admissibility of expert evidence. The first component requires the court to consider the well-established threshold requirements for admissibility of the evidence, namely that it is (i) logically relevant, (ii) necessity to assist the trier of fact, (iii) not subject to any other exclusionary rule, and (iv) proffered by a properly qualified expert who is willing and able to provide evidence that is impartial, independent and unbiased. The second component is a discretionary gatekeeping step where the trial judge essentially undertakes a cost-benefit analysis to decide whether the potential benefits of admitting the evidence outweigh its potential risks to the trial process: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 23-24; *Imeson v. Maryvale*, 2018 ONCA 888 at paras. 80-82.

[8] A civil litigation expert is subject to rule 53.03 of the *Rules*, which requires, among other things, an expert report that sets out the expert's opinions, as well as an acknowledgment of the expert's duty: *Imeson, supra* at para. 60. Mandatory requirements for an expert report are set out in subrule 53.03(2.1), which provides that an expert's report shall contain, among other things:

- (a) the expert's name, address and area of expertise;
- (b) the expert's qualifications and employment and educational experiences in his or her area of expertise;

- (c) the instructions provided to the expert in relation to the proceeding; the nature of the opinion being sought and each issue in the proceeding to which the opinion relates;
- (d) 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; and
- (e) 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.

[9] As set out in subrule 53.03(3), an expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of the expert's testimony with respect to that issue is set out in a report served under rule 53.03, a supplementary report served not less than 45 days before trial, or a responding supplementary report served not less than 15 days before trial.

[10] Case law has also established what amounts to an exception to rule 53.03, whereby certain witnesses with special skills, knowledge, training, or experience, who have not been engaged by or on behalf of a party to the litigation, are permitted to give limited opinion evidence without having to comply with rule 53.03. These witnesses are referred to as "participant experts", who are permitted to provide opinion evidence provided that (i) the opinion to be given is based on the witness' observation of or participation in the events at issue; and (ii) the witness formed the opinion to be given as part of the ordinary exercise of their skill, knowledge, training and experience while observing or participating in such events: *Imeson, supra* at paras. 61-62; *Westerhof v. Gee Estate*, 2015 ONCA 206 at paras. 60-61.

[11] The Court of Appeal has clearly stated that rule 53.03 does not apply to the opinion evidence of a non-party participant expert where the non-party expert's relevant opinion has been formed based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation: *Westerhof, supra* at para. 62. Participant expert witnesses nevertheless remain subject to the same two-stage analysis for admissibility of their evidence as rule 53.03 experts: *Imeson, supra* at para. 83.

[12] Michael Colalillo has prepared five reports:

- (a) three reports appended to his affidavit sworn January 15, 2025, namely a report dated February 11, 2022; a revised version of the report dated February 11, 2022, revised on February 23, 2022; and an addendum report dated July 6, 2022;
- (b) a report dated December 30, 2024, which has recently been appended to an affidavit sworn March 4, 2025 (apparently not previously done due to oversight and which the defendant has sought leave to submit); and
- (c) a report dated February 10, 2025, responding to the plaintiff's expert reports of Mark Milner, appended to his affidavit sworn February 11, 2025.

[13] There is no dispute that Mr. Colalillo was directly involved in assessing and advancing the underlying construction project after the plaintiff's contract was terminated by the defendant. In his impugned affidavit, Mr. Colalillo expressly acknowledges that he "became intimately involved in the structural aspects of the project" during the period of January 2022 to June 2023, while employed at Innovatus Engineering Inc. He further states that his "engagement spanned critical review and redesign phases of the project" and that he "authored key reports" and "provided engineering guidance on critical design revisions" for the project. All of his reports from 2022 are consistent with having undertaken a contemporaneous investigation of the constructed foundation and footings of the subject building and making recommendations for required work to advance the construction project. Evidence has also been tendered at this trial that Innovatus Engineering Inc. prepared subsequent structural drawings, stamped by Michael Colalillo, that were submitted to the City of Toronto as part of subsequent revised building permit applications. Those drawings were also relied upon by the defendant in continuing the project.

[14] Nevertheless, despite Mr. Colalillo's evident direct involvement in the project, I agree with the defendant that such involvement does not itself disqualify him from testifying as a rule 53.03 expert. None of the case law cited to me supports that merely because an expert participated in underlying events that are relevant to the opinion formed and the issues to be decided at trial that the expert cannot also provide opinion evidence under rule 53.03 of the *Rules*.

[15] I note that, in both *Imeson* and *Westerhof*, the Court of Appeal contemplated a witness with special skills, knowledge, training, or experience who is directly involved in underlying events still being permitted to give opinion evidence at trial as a rule 53.03 expert. Both decisions note that if a participant expert proffers opinion evidence that extends beyond the limit scope of permitted evidence as a participant expert (*i.e.*, related to an opinion formed as part of the ordinary exercise of their expertise while observing or participating in events at issue), then such evidence must comply with rule 53.03 with respect to any opinions that go beyond those limits: *Imeson v. Maryvale*, *supra* at paras. 63; *Westerhof v. Gee Estate*, *supra* at para. 63. That supports the defendant's position that Mr. Colalillo is not disqualified as a rule 53.03 expert solely by reason of his involvement in the project.

[16] However, none of Mr. Colalillo's reports comply with the requirements of subrule 53.03(2.1) of the *Rules*, which I find problematic. I agree with the defendant that I have discretion to grant leave to permit expert evidence despite technical non-compliance with subrule 53.03(2.1). However, my concerns are such that I will not exercise that discretion in this case, at least not with respect to Mr. Colalillo's litigation reports.

[17] With respect to Mr. Colalillo's 2022 reports, neither his affidavit sworn January 15, 2025, nor the reports clearly identify who retained him. Although James Kan, the defendant's principal, gave evidence that he retained Mr. Colalillo, the three reports from 2022 are all addressed to Abdul Sallah of Dynamic Builders, the successor general contractor on the project after the plaintiff was terminated. In my view, that is significant. Each report states only, "Innovatus Engineering was retained to perform an investigation of the existing foundations for the new building construction at 369 Queen St. W., Toronto." Both purpose for which the investigation was requested and the nature of the opinion sought are not clearly stated. Moreover, the instructions provided to Mr. Colalillo leading to his review are not set out.

[18] In addition, although delivered after this action was commenced and pleadings had closed, the content of the 2022 reports and Mr. Colalillo's affidavit support that those reports were not prepared for the purpose of this litigation. Rather, they were prepared for the purpose of and as part of the ongoing construction project. They are thereby not rule 53.03 reports.

[19] Mr. Colalillo's reports dated December 30, 2024 and February 10, 2025 are clearly reports commissioned by the defendant's lawyers for the purpose of trial. The December 2024 report appears to springboard from Mr. Colalillo's prior reports from 2022. The February 2025 report responds to the reports of the plaintiff's expert, Mark Milner. Neither of Mr. Colalillo's two litigation reports includes any clear information on the instructions he was provided, the nature of opinions sought, or the issue(s) to which the opinions relate.

[20] In the December 2024 report, Mr. Colalillo states that his retainer is "to act as an expert witness for the above referenced case, to offer independent opinions on aspects of the design and construction of the building structure and foundation". That is quite general. I note that the February 2025 report does indicate that Mr. Colalillo was asked to provide comments regarding the deficiencies with the Revision 4 structural drawings, but it is unclear if that is the extent of the request. The report itself provides opinions on deficiencies in the Revision 4 structural drawings squarely at issue in this litigation and on a professional engineer's standard of care. An opinion is expressed that "the engineer and their employer failed in their duty of care" in respect of drawing deficiencies. The referenced "engineer" and "employer" are not identified.

[21] In the February 2025 report, Mr. Colalillo states only that he was "asked to provide our response to the expert report of Mr. Milner." I question the probative value of opinions provided in response to such a generic request. In any event, the report goes beyond that request. It also addresses an oversight from the December 2024 report, provides additional comments on the Revision 4 drawings, and adds a clarification regarding drawings produced by another engineer, X.Y. Liu. It is unclear if the additional comments on the Revision 4 drawings and clarification regarding Mr. Liu were issues on which opinions were requested by the defendant's lawyers and, if so, what specifically was requested or, if not, how they relate to the issues and why Mr. Colalillo felt that including his additional opinions on them was necessary.

[22] In my view, neither of the two reports permits the plaintiff or the court to understand clearly what was asked of the expert, whether the opinions provided are properly within the scope of the request or instructions, the target of certain of the opinions, and to what disputed trial issues the opinions expressed are intended to relate.

[23] These gaps in the report are significant, since the reports were intended to stand as each expert's evidence for trial. This trial was scheduled primarily as a summary trial, with only two witnesses permitted to testify by *viva voce* evidence in chief (neither of which was ultimately called to testify). I provided directions on expert trial affidavits in my trial material directions found at Appendix B to Trial Directions #4. Specifically, I directed that an expert report served under rule 53.03 be appended to an affidavit of the expert in which the expert adopts the report for the purpose of giving it as evidence in the action. My direction uses the same language found in subrule 76.09.1 of the *Rules* for expert affidavits at a summary trial.

[24] The defendant points to Mr. Colalillo's affidavit, at paras. 8-10, which sets out the scope of his investigative steps. The defendant submits that the description of the scope of investigation ought to be read as the instructions that Mr. Colalillo received. I am not prepared to draw that inference. An instruction given or opinion sought may well dovetail with the scope of investigation. However, the necessary scope of investigation may also be something determined solely by the expert as a necessary step in answering the question asked or providing the opinion sought.

[25] For example, there is, in my view, a distinction between Mr. Colalillo being asked to opine on whether the as-built foundation and footings complied with approved permit drawings and being asked to opine on something broader, such as whether the design and construction of the foundation and footings was structurally sound and in compliance with both building requirements and best practices for construction.

[26] For these reasons, I am not satisfied that Mr. Colalillo's litigation reports comply with rule 53.03 of the *Rules*. I am thereby unable to find that his opinions on the Revision 4 drawings and professional standards are logically relevant and necessary to assist me in deciding this case. Having not met the requirements for a rule 53.03 expert, Mr. Colalillo cannot testify in that capacity and his two litigation reports will accordingly not be admitted.

[27] I am not, however, prepared to bar Mr. Colalillo from providing any opinion evidence at this trial. I am satisfied that he appears to meet the requirements for a participant expert. Notably, the content of his affidavit sworn January 15, 2025 and the opinions set out in his 2022 reports all appear to stem from his personal observations and investigations of the foundation and footings. He was a participant in events occurring after the plaintiff was terminated, which are relevant to the defendant's defence and counterclaim positions on the design and construction of the foundation and footings. Mr. Colalillo is a structural engineer who appears to have been exercising his ordinary expertise during his role on the project in 2022 and 2023. To the extent that he has based his opinions on the review of documents, it is not clear to me that doing so would be beyond the ordinary course for a structural engineer.

[28] I also agree with the defendant that it would be unfair to pre-emptively bar Mr. Colalillo from tendering opinion evidence as a participant expert. A qualification *voir dire* will be required, though, to delineate the scope of proper opinion evidence from Mr. Colalillo.

## **DISPOSITION**

[29] For these reasons, I am not permitting Mr. Colalillo to testify as a rule 53.03 expert, but he may still testify as a participant expert on opinions formed from his personal observations and participation in the project, subject to a qualification *voir dire* on the scope of permitted opinion evidence to be given by Mr. Colalillo as a participant expert.

[30] Having found that Mr. Colalillo cannot testify as a rule 53.03 expert, his two litigation reports from December 2024 and February 2025 shall not be admitted. Mr. Colalillo's affidavit sworn February 11, 2025 is hereby struck and leave to submit his affidavit sworn March 4, 2025 is denied. His affidavit sworn January 15, 2025, with exhibits, may be admitted. Following the

qualification *voir dire*, the defendant will be afforded additional *viva voce* examination in chief of Mr. Colalillo to supplement that affidavit prior to cross-examination. Documents appended to the December 2024 and February 2025 reports that are not already in the evidentiary record may be extracted from the reports and put to Mr. Colalillo, but admissibility of such documents will still be subject to any objections by the plaintiff in the ordinary course.

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**ASSOCIATE JUSTICE TODD ROBINSON**

**Released:** March 7, 2025