



# EXPERTS IN ENVIRONMENTAL LITIGATION

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# EXPERTS IN ENVIRONMENTAL LITIGATION

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## 1 INTRODUCTION

Environmental litigators find themselves embroiled in a world of disputes where science, engineering and environmental law intersect. These disputes lead to environmental claims. Environmental litigators retain litigation experts. Experts help to decipher, untangle and inform at the intersection of technical and legal issues. Litigators rely on experts because of their specialized expertise.

Environmental litigators depend on experts throughout the litigation process. Experts provide answers to everyday technical questions. They provide opinions. They write expert reports. Sometimes they testify. Environmental litigators know that a good expert can trump in a case while attacking or defending on issues of liability and damages.

Like any other evidence, an expert's evidence must be the subject of diligent scrutiny by the environmental litigator. Careful examination should not be limited to expert evidence submitted by opposing counsel. It must also apply to one's own expert and that expert's evidence. Environmental litigators must wade through the science to introduce into evidence supportable science, not junk science.

This paper sets out an overview of what environmental litigators should consider when counting on environmental experts in litigation. We examine what environmental litigators need to know about finding and retaining experts, the production of expert generated documents, and the requirements under Ontario's *Rules of Civil Procedure*<sup>2</sup> and the Law Society of Upper Canada's *Rules of Professional Conduct*.<sup>3</sup> We examine what opinions Canadian courts offer about the expected relationship between counsel and an expert, and alternative approaches to tendering expert evidence. Finally, we review the law about the admissibility of expert evidence including how to establish and maintain an expert's credibility before and at trial.

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<sup>2</sup> *Rules of Civil Procedure*, RRO 1990, Reg 194 promulgated under Ontario's *Courts of Justice Act* [Rules].

<sup>3</sup> The Law Society of Upper Canada, *Rules of Professional Conduct, Amendments based on the Federation of Law Societies of Canada's Model Code of Professional Conduct*, Toronto: Law Society of Upper Canada, October 2014 [*Professional Conduct*].

## 2 PRE-TRIAL

### 2.1 THE LAW SOCIETY OF UPPER CANADA'S RULES OF PROFESSIONAL CONDUCT

The Law Society of Upper Canada's *Rules of Professional Conduct* requires a lawyer to act with the requisite level of competence.<sup>4</sup> A competent lawyer is judged by his or her relevant knowledge, skills and attributes.<sup>5</sup> A competent lawyer's use of experts is described in the Commentary to Rule 2.01 as follows:

The lawyer may also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, the lawyer should not hesitate to seek the client's instructions to consult experts.<sup>6</sup>

The Law Society of Upper Canada's *Rules of Professional Conduct* were recently amended to incorporate the Federation of Law Societies of Canada's *Model Code of Professional Conduct*<sup>7</sup> and came into force in October 2014. The competent lawyer rule, now Rule 3.1-2 (Commentary 7), relating to experts was modified to mirror the Federation of Law Societies of Canada's *Model Code of Professional Conduct*:

The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts. [emphasis added]<sup>8</sup>

### 2.2 RETAINING EXPERTS

Retaining the right expert is critical for any environmental litigator and often for the outcome of the case itself. The expert should be qualified and have experience in the field of study generally and specifically relating to the issue about which the expert will opine.

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<sup>4</sup> *Ibid*, Rule 2.01.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid*.

<sup>7</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: Federation of Law Societies of Canada, December 2012).

<sup>8</sup> *Professional Conduct*, *supra* note 3.

### 2.2.1 WHO IS AN EXPERT?

Determining who is an expert in the eyes of the Court is critical given the distinction between the role of a lay witness and expert witness at trial. As the authors of *The Law of Evidence in Canada* state:

As a general rule, a witness may not give opinion evidence but may testify only to facts within her or his knowledge, observation and experience. It is the province of the trier of fact to draw inferences from the proven facts. A qualified expert witness, however may provide the trier of fact with a “ready-made inference” which the jury is unable to draw due to the technical nature of the subject matter.<sup>9</sup>

Defining who is an expert for purposes of testifying at trial is not so simple. The definition of an expert witness is not found in Ontario’s *Rules of Civil Procedure*<sup>10</sup> or Ontario’s *Evidence Act*.<sup>11</sup> The common law has broadly defined a properly qualified expert as “a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.”<sup>12</sup>

In addition, the Courts have created a distinction between experts hired prior to litigation and experts hired for the sole purpose of litigation. In *Continental Roofing Ltd. v J.J.’s Hospitality Ltd.*, the Ontario Superior Court held that Rule 53.03 does not apply to experts involved with a matter prior to litigation.<sup>13</sup> In that case, the defendant retained a consultant to provide services to repair a roof. During the repair, the roof started to leak. The consultant conducted an inspection and recommended that the defendant hire another roofer to complete the repair. The Court concluded that the consultant should not be regarded as an expert witness under Rule 53.03 because he was not retained for the sole purpose of providing expert testimony.<sup>14</sup> However, the Court permitted the consultant to provide both factual and opinion evidence at trial.<sup>15</sup>

### 2.2.2 HOW TO FIND AN EXPERT?

When in need of an expert, most environmental litigators refer to their own short list of known experts. These lists develop over years of practicing in the field. However, it is not always that the very expert that is required is on the environmental litigator’s shortlist. So, what happens when a litigator is new to environmental civil litigation, or not so new and requires expertise outside of his or her own shortlist?

One effective way to locate an expert is through referrals from other lawyers. This is common practice for lawyers and especially so from one lawyer to another in the same firm. Through referrals, lawyers learn about experts, including their expertise, work habits and fee structures. A referral might not identify the right expert for the case, but may provide a good lead that gets the

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<sup>9</sup> Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3d ed (Markham: LexisNexis Canada, 2009) at 771.

<sup>10</sup> *Rules*, *supra* note 2.

<sup>11</sup> *Evidence Act*, RSO 1990, c E-23 s 12 [*Evidence Act*].

<sup>12</sup> *R v Mohan*, [1994] 2 SCR 9 at para 31 [*Mohan*].

<sup>13</sup> *Continental Roofing Ltd. v JJ’s Hospitality Ltd.*, 2012 ONSC 1751 at paras 40-43, 2012 [*Continental Roofing*].

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid* at para 42.

litigator to the right expert. Sometimes a lawyer may not know what type of expert he or she seeks until he or she starts the discussion with others in the same or similar field.

On-line directories provide another useful method for locating experts. The reliability of these directories may be questionable and caution is required. Considerable due diligence on the part of the environmental litigator is required to ensure that the right expert is chosen to give the required opinion. Free directories such as ExpertLaw<sup>16</sup> and Expert Pages<sup>17</sup> provide American experts in real estate, engineering and science disciplines. Legal associations also provide expert directories to their members such as the Ontario Trial Lawyers Association. Legal databases by Westlaw Canada or LexisNexis offer expert directories for a fee. The University of Toronto Blue Book<sup>18</sup> lists over 1,500 academic experts in many fields of study. Ryerson University provides a similar directory of its faculty.<sup>19</sup>

Finding the right expert with the right credentials, skills and experience can tip the balance in a case. Many environmental disputes come down to a “battle of the experts”. It is not necessarily the expert that is “right” that helps win a case but rather the expert that sets forth the most plausible explanations and that can best raise uncertainty about the other experts’ theories. Considerable time and effort is required of the environmental litigator to search out, find and retain the right person. That person must be articulate, confident, well-written, well-spoken and available.

### 2.2.3 HOW TO RETAIN AN EXPERT?

Environmental litigators should not overlook the importance of drafting a purposeful retainer letter. The retainer letter defines the relationship between the litigator and the expert. Litigators should be mindful that the contents of the retainer letter must be disclosed by the expert if the expert is to testify at trial.<sup>20</sup> Litigators need to balance between providing the expert with accurate and sufficient information to allow him or her to do his or her work while not providing irrelevant information. At a minimum, the litigator’s retainer letter addressed to the expert should touch on the following topics.

#### Conflict of Interest

The litigator’s retainer letter should confirm that the expert has completed a conflict of interest check. The letter should confirm that the expert is not aware of any conflict of interest in acting for and against parties to the litigation, and that there is no conflict relating to those properties that are the subject of the litigation.

#### Background, Purpose, and Scope of Work

The litigator’s retainer letter should include a recitation of the most salient background facts. The letter should set out the purpose for the expert’s retainer and that the expert is being retained for the sole purpose of providing litigation support. The letter should also state that the expert is being retained by the litigator or law firm, and that the expert will be instructed by counsel. The

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<sup>16</sup> Expert Law <<http://www.expertlaw.com>>.

<sup>17</sup> Expert Pages <<http://www.expertpages.com>>.

<sup>18</sup> University of Toronto, Blue Book <<http://www.bluebook.utoronto.ca>>.

<sup>19</sup> Ryerson University, Faculty Experts <<http://ryerson.ca/news/media/facultyexperts/index.html>>.

<sup>20</sup> *Rules, supra* note 2.

letter should stipulate that the expert's advice and opinions will be utilized by the litigator in providing legal advice to the client. This is especially important if the litigator proposes to cloak the expert's work under privilege.

The expert's scope of work should be set out in the retainer letter in some detail. In some circumstances, the scope of work can be defined somewhat broadly but not beyond the expertise of the expert. Additionally, the retainer letter may need to set scope of work boundaries about what the expert is not to opine about.

### Use and Confidentiality

The litigator's retainer letter should include a confidentiality provision. This is to ensure that all information exchanged and produced by the expert is kept physically separate and labelled "Privileged and Confidential". This applies to both hardcopy and electronic documents referred to and produced by the expert.

The retainer letter should identify when and how the expert is to communicate with the environmental litigator and/or the litigant. The retainer letter should state that the expert is to receive instructions only from instructing counsel. In addition, the letter should state that all findings, opinions and conclusions are to be delivered by the expert exclusively to instructing counsel.

Finally, the retainer letter should identify who is responsible to pay the expert's accounts. Environmental litigators should note the presumption that the litigator is responsible for an expert's reasonable fees where the litigator instructs the expert to prepare material for litigation.<sup>21</sup> A litigator can rebut this presumption if the litigator specifies otherwise in the retainer letter.

### **2.2.4 HOW MANY EXPERTS CAN EACH LITIGANT RETAIN?**

Litigators must be selective about how many and which experts they intend to rely on at trial. In Ontario, parties are limited to calling three experts to testify at trial unless granted leave from the Court.<sup>22</sup> Courts can also appoint additional experts on their own initiative.<sup>23</sup>

Justice Osborne's report for the Civil Justice Reform Project led to the 2010 reform of Ontario's *Rules of Civil Procedure*. In his report, Justice Osborne notes that the rule restricting three experts at trial is loosely enforced by the Courts.<sup>24</sup> His Honour discusses the use of single joint expert systems in other judicial systems around the world.<sup>25</sup> Osborne, J. acknowledges that single joint experts may not be practical in most cases and may not save costs due to the retaining of "shadow" experts.<sup>26</sup> Though Justice Osborne did not recommend a mandatory use of joint experts in Ontario, he did recommend that parties consult early in the litigation process to discuss the prospect of jointly retaining a single expert. We set out below a discussion about alternatives to the traditional use of experts.

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<sup>21</sup> *1401337 Ontario Ltd v MacIvor Harris Roddy LLP*, 2011 ONSC 948 at para 27.

<sup>22</sup> *Evidence Act*, *supra* note 11.

<sup>23</sup> *Rules*, *supra* note 2 at r. 52.03(1).

<sup>24</sup> Hon. Coulter A. Osbourne, "Civil Justice Reform Project – Summary of Findings & Recommendations", (2007) [*Osborne Report*].

<sup>25</sup> *Ibid* at paras 69-73.

<sup>26</sup> *Ibid* at para 72.

Certainly, the use of competing experts will remain the norm unless and until the legislature amends the *Evidence Act*<sup>27</sup> or *Rules of Civil Procedure*<sup>28</sup> to adopt another approach or endorses alternative approaches. In the meanwhile, litigators should be mindful that the rule of three experts at trial is a prescribed limit and is enforceable in Ontario Courts.

## 2.2.5 REQUIREMENTS UNDER ONTARIO'S RULES OF CIVIL PROCEDURE

The Rules govern how and when experts may be used in litigation.

### 2.2.5.1 Expert's duty to the court

All experts have a duty of loyalty to the court. Rule 4.1.01 states:

- (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.
- (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.

### 2.2.5.2 Party-appointed experts

Under Rule 53.03, a party may introduce expert evidence first by written report and then by oral testimony at trial. The party must serve the expert's report on every opposing party within the time designations in the Rules. Under Rule 53.03(2.1), an expert's report shall include:

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

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<sup>27</sup> *Evidence Act*, *supra* note 11.

<sup>28</sup> *Rules*, *supra* note 2.

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, and
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

At trial, an expert may not testify on any issue not addressed in his or her report, except with leave of the court.

### 2.2.5.3 Court-appointed experts

The Rules also allow for the court to appoint an expert for the proceeding. Under Rule 50.06, the presiding pre-trial judge or master will consider the advisability of having the court appoint an expert. If no court-ordered expert is appointed at the pre-trial, the court may appoint an expert at trial under Rule 52.03. This can be done on motion by a party or by the judge's own initiative.

Any court-appointed expert will be given instructions by the court about the scope of their required report. The court may order the expert to inspect property or examine a party's physical or mental state as required. The parties to the action may be required to remunerate the expert as decided by the presiding judge at first instance.

In his summary of findings and recommendations, Osbourne, J. notes that Rule 52.03 is "rarely used" by the court.<sup>29</sup>

Academic Nicholas Bala has advocated for increasing the use of Rule 52.03 to reduce costs and promote settlement between litigants.<sup>30</sup> Bala believes that lawyers are able to avoid obvious biases when hiring and instructing an expert. However, the broader paradigm of paying an expert for his or her opinion leads to subtle biases that may affect objectivity. Bala compares court-appointed experts to the financial sector's move to strengthen the independence of auditors and rating agencies.<sup>31</sup>

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<sup>29</sup> *Ibid.*

<sup>30</sup> Nicholas Bala, "Inside the mind of an expert", *The Lawyers Weekly* (15 February 2013) 10.

<sup>31</sup> *Ibid.*

#### 2.2.5.4 Concurrent evidence from experts

The Rules provide that if an action is not settled at the pre-trial conference, the court may order a joint submission from any experts retained by the opposing parties.

Rule 50.07(1)(c) states:

- (1) If the proceeding is not settled at the pre-trial conference, the presiding judge or case management master may
  - (c) make such order as the judge or case management master considers necessary or advisable with respect to the conduct of the proceeding, including any order under subrule 20.05 (1) or (2).

Under Rule 20.05(2)(k), the court may order:

- (k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,
  - (i) there is a reasonable prospect for agreement on some or all of the issues, or
  - (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court.

As we discuss below, Rules 50.07(1)(c) and 20.05(2)(k) are rarely used by the court.

## 2.3 EXPERT DOCUMENTS

After the retainer is in place and instructions given, environmental experts typically produce lots of documentation including communications to and from various stakeholders. This documentation may include work plans, field notes, correspondence, photographs, diagrams, charts, meeting notes, test results, draft reports and final reports. The yearning question is what of these materials are producible by parties in litigation and to what extent can privilege be exerted over the expert's work product during the litigation.

### 2.3.1 DISCLOSURE OF RELEVANT DOCUMENTS

Environmental litigants have broad disclosure obligations in civil actions. Rule 30.02(1) of the Ontario *Rules of Civil Procedure* states:

Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.<sup>32</sup>

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<sup>32</sup> *Rules, supra* note 2 at r 30.02(1).

In addition, there are specific rules that attach to experts that a litigant intends to call as a witness at trial. Rule 53.03(1) requires parties to produce a report for every expert called to testify at trial.<sup>33</sup> The report must be served not less than 90 days before the pre-trial conference.<sup>34</sup> Production must be made to every other party in the action. Rule 53.03(2.1) specifies the required information that must be included in every expert report including the factual assumptions, research and documents that the expert relies on.<sup>35</sup> The rule also requires that the expert include a statement about the expert's duty to the Court. The expert must append to his or her report the instructions from the retaining party.

Commonly, during the earlier stages of litigation, parties will not produce an expert's report. As a result, Rule 31.06(3) is of particular importance for environmental litigators. The rule allows a party to request disclosure of the findings, opinions and conclusions of experts to be relied on at trial.<sup>36</sup> Often a litigator will rely on this rule to try to obtain a sneak preview of the opposing expert's views. Most often, this is met with resistance.

### 2.3.2 ASSERTION OF PRIVILEGE

Rule 30.02(2) establishes that not every document that is discloseable must be produced if counsel asserts privilege over the document.<sup>37</sup> Typically, environmental litigators seek to cloak and protect an expert's file from production under litigation privilege.

“Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.”<sup>38</sup> This is commonly referred to as a “zone of privacy.” The zone of privacy facilitates environmental litigators' preparation for trial through the use of experts.

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<sup>33</sup> *Ibid* at r 53.03(1).

<sup>34</sup> *Ibid* at r 53.03(1).

<sup>35</sup> *Ibid* at r 53.03(2.1).

<sup>36</sup> *Ibid* at r 31.06(3).

<sup>37</sup> *Rules, supra* note 2 at r 30.02(2).

<sup>38</sup> *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321 at para 23, (Ont CA) [*Chrusz*], citing R.J. Sharpe, “Claiming Privilege in the Discovery Process” in *Law in Transition: Evidence*, LSUC Special Lectures (Toronto: De Boo, 1984) at 163.

In *General Accident Assurance Co. v Chrusz*, the Ontario Court of Appeal stated:

The “zone of privacy” is an attractive description but does not define the outer reaches of protection or legitimate intrusion of discovery to assure a trial on all of the relevant facts. The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. In effect, litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met. There is a tension between them to the extent that when discovery is widened, the reasonable requirements of counsel to conduct litigation must be recognized.

Our modern rules certainly have truncated what would previously have been protected from disclosure.<sup>39</sup>

The Court of Appeal in *Chrusz* adopted the “dominant purpose test”. The test permits the assertion of privilege over documents created for the dominant purpose of litigation, actual or contemplated.<sup>40</sup> Applying the test, the Court concluded that litigation privilege does not protect documents gathered or copied, where the original documents were not privileged.<sup>41</sup> Also at issue were communications and reports between an insurer’s lawyer and the insurer’s third party claims adjuster. The Court limited the extension of privilege to only those communications that occurred while the insurer contemplated litigation against the defendant.

Several years later, the Supreme Court of Canada affirmed the “dominant purpose test” in *Blank v Canada*.<sup>42</sup> The Court stated:

...the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.<sup>43</sup>

The Court ruled that litigation privilege ends upon termination of the litigation that gives rise to the privilege.<sup>44</sup> The Court noted that litigation privilege may extend beyond termination of the litigation where related litigation is pending or may reasonably be apprehended.<sup>45</sup> Related litigation can include separate proceedings that involve the same or related parties, arise from the same or related causes of action, or raise issues common to the initial action and share its essential purpose.<sup>46</sup>

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<sup>39</sup> *Ibid* at paras 25-26.

<sup>40</sup> *Ibid* at para 33.

<sup>41</sup> *Ibid* at para 38.

<sup>42</sup> *Blank v Canada (Department of Justice)*, 2006 SCC 39 at para 60 [*Blank*].

<sup>43</sup> *Ibid* at para 60.

<sup>44</sup> *Ibid* at para 36.

<sup>45</sup> *Ibid* at para 38.

<sup>46</sup> *Ibid* at para 39.

In *Browne (Litigation Guardian Of) v Lavery*, the Ontario Superior Court noted that litigation privilege over a report is waived once it is delivered to the opposing party.<sup>47</sup> Later in *Lecocq Logging Inc. v Hood Logging Equipment Canada Inc.*, the Court held that a waiver over the expert's report served to remove any privilege that would otherwise extend to an expert's notes.<sup>48</sup>

In *Bazinet v Davies Harley Davidson*, the Ontario Superior Court held that waiver of privilege over an expert's report includes a waiver over any other report relied on by the expert in preparing the expert's report.<sup>49</sup> In that case, the plaintiff provided an expert's report to a second expert. The Court held that once the plaintiff relied on the second expert and produced the second expert's report, there was a waiver over the first expert's report.<sup>50</sup> And, the opposing party was entitled to disclosure of the second expert's findings, opinions and conclusions under Rule 31.06(3).

### 2.3.3 DOCUMENT DESTRUCTION POLICIES

Reliance on document destruction policies by experts to justify the deletion or shredding of documents in the expert's file has not been specifically addressed by the Courts in Canada.

The destruction of file documents may give rise to ethical questions. First, destruction of documents often leads to more questions than answers about the motive behind and purpose for destroying documents. Second, it may be seen or inferred to be for some illegitimate or obfuscating purpose. Third, destruction of documents may be questionable where there is no "corporate destruction policy". The lack of a policy may give rise to inconsistency and a *laissez faire* approach to when the expert believes it is appropriate to destroy documents. Fourth, there may be a lack of the application of what may otherwise be a good policy from file-to-file, and among experts even in the same organization. All of these issues can give rise to fodder for cross-examining an expert at trial.

Probably, the best approach is to not destroy any documents, or consistently apply throughout the organization and from file-to-file a well thought out destruction policy. Anything less can lead to attack on the expert's credibility.

Regardless, environmental litigators and their clients cannot necessarily shield from disclosure all information set out in deleted or shredded documents. In *Bookman*, the Court ordered a memorandum outlining counsel's instructions be produced if the instruction letters did not exist.<sup>51</sup> In addition, the Ontario Court of Appeal in *Conceicao Farms Inc v Zeneca Corp* held that Rule 31.06(3) only requires production of information but not the actual document.<sup>52</sup>

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<sup>47</sup> *Browne (Litigation Guardian Of) v Lavery*, (2002), 58 OR (3d) 49 [*Browne*].

<sup>48</sup> *Lecocq Logging Inc. v Hood Logging Equipment Canada Inc.*, 14 CPC (6th) 287 at para 17 (Ont Sup Ct).

<sup>49</sup> *Bazinet v Davies Harley Davidson*, (2007), 158 ACWS (3d) 561 at paras 32-34 (Ont Sup Ct).

<sup>50</sup> *Ibid* at para 26.

<sup>51</sup> *Bookman v Loeb*, [2009] OJ No 2741, 2009 CarswellOnt 3796 at para 37.

<sup>52</sup> *Conceicao Farms Inc. v Zeneca Corp.*, 83 OR (3d) 792 [*Conceicao*].

## 2.4 COMMUNICATION BETWEEN LAWYERS AND EXPERTS

### 2.4.1 CASE LAW DATING BACK TO 1979

Canadian case law on acceptable communication between lawyers and experts is unclear and lacking appellate review. The issue has most often arisen when a party seeks disclosure from an opposing party about communication with an expert or relating to an expert's draft report. The law of acceptable communication with an expert intersects with the law of disclosure and the law of privilege. As seen below, courts have had trouble balancing these interests and this, in turn, has led to mixed results.

In 1979, Justice Hart speaking for the Nova Scotia Supreme Court held in *T Eaton Co v Neil J Buchanan Ltd.*:

It seems to me only logical that if the party wished to rely upon the testimony of its expert and was prepared to waive the privilege that he must also have intended to waive the privilege which extends to his discussions with the expert which form the basis of his report. Surely if a solicitor were called to testify as to an opinion given to his client he would have to reveal the facts related to him upon which the opinion was based. Similarly, in my opinion, an expert employed by the solicitor for the benefit of the party must, as an integral part of his evidence, be subject to cross-examination on the factual basis for his opinions, and this must be known to the party at the time the decision is made to waive the privilege and present the evidence.<sup>53</sup>

The Nova Scotia Supreme Court partially reversed its stance in 1992 with its judgment in *Crocker v MacDonald*.<sup>54</sup> Justice Tidman held in reference to the abovementioned excerpt:

I agree with the logic of the statement, but in my view it does not extend the waiver of solicitor/client privilege to communications between counsel and the expert. While it may be necessary as stated by [Justice Hart] to require the expert to state what he was told of the facts upon which his opinion is based it is quite a different matter to require counsel to produce his correspondence to the retained expert.

The correspondence may contain all kinds of information which counsel properly would not wish disclosed to the opposite party and for which purpose the solicitor/client privilege exists. There are many ways in which counsel can determine the alleged facts upon which the expert's opinion is based without requiring counsel's so-called retention letters.<sup>55</sup>

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<sup>53</sup> *T. Eaton Co. v Neil J Buchanan Ltd.*, 31 NSR (2d) 135.

<sup>54</sup> *Crocker v MacDonald*, 116 NSR (2d) 181.

<sup>55</sup> *Ibid.*

Case law around and immediately after *Crocker v MacDonald* followed Justice Tidman's reasoning and did not require disclosure of correspondence between counsel and an expert. On a motion in *Mahon v Standard Assurance Life Co.*,<sup>56</sup> Master MacLeod in the Ontario Superior Court of Justice summarized the case law, in 2000, as follows:

The most recent decision of this court on point to which I was referred was *Calvaruso v Nantais*<sup>57</sup> referring to *Bell Canada v Olympia & York*.<sup>58</sup> These cases are to the effect that the instructing letter to an expert is privileged. The same conclusion has been reached by the Nova Scotia Supreme Court Trial Division (*Crocker v. MacDonald*) and the B.C. Supreme Court (*Ocean Falls Corp. v. Worthington (Canada) Inc.*).<sup>59</sup>

These issues were again addressed in 2002 by the Ontario Superior Court of Justice in *Browne*.<sup>60</sup> On behalf of the Court, Justice Ferguson held that any communication and possible improper modification of an expert's report should be tested in court by opposing counsel. This information would then speak to the weight the court should attribute to the expert report. The decision stated:

An opinion can obviously be tested in many ways: by comparing the conclusion to the data relied on, by comparing the opinion to data which was available but not relied on, by considering whether the expert's opinion was influenced by the nature of the request of counsel or by information provided by counsel which was not relied on, and by considering whether the opinion was altered at the request of counsel - for instance, by removing damaging content.

It is difficult to understand how a determination could be made as to what was influential. Would counsel decide? Why should this decision not be open to scrutiny? The expert might not realize or acknowledge the extent to which information provided has influenced his or her opinion.<sup>61</sup>

In addition, Justice Ferguson in *Browne* changed the Court's position about the disclosure of information and instructions provided to an expert by counsel:

Any experienced counsel who has dealt with experts would appreciate how important it would be to know what the expert was instructed to do, what the expert was instructed not to do, what information was sent to the expert and the extent to which counsel instructed the expert as to what to say, include or omit in the report ...

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<sup>56</sup> *Mahon v Standard Assurance Life Co.*, [2000] OJ No 2042 (QL) [*Mahon*].

<sup>57</sup> *Calvaruso v Nantais*, (1992) 7 CPC (3d) 254 (Gen Div).

<sup>58</sup> *Bell Canada v Olympia & York*, (1989) 68 OR (2d) 103 (HCJ).

<sup>59</sup> *Ocean Falls Corp. v. Worthington (Canada) Inc.*, (1985), 69 BCLR 124.

<sup>60</sup> *Browne*, *supra* note 47.

<sup>61</sup> *Ibid* at paras 58-59.

In my view, the disclosure of this information would best enable an opposing counsel and the court to assess whether the instructions and information provided affected the objectivity and reliability of the expert's opinion. I also note there is much contrary opinion on this subject: e.g. *Mahon v Standard Life Assurance Co.*<sup>62</sup>

In *Flinn v McFarland*,<sup>63</sup> Justice MacAdam writing for the Nova Scotia Supreme Court in 2002 held that discussions of an expert with counsel of a draft report speaks to the weight of the expert report. This approach is similar to the approach taken in *Browne*. Justice MacAdam stated:

Clearly, the extent to which the final report of the expert may be the result of counsel's comments, is both relevant and entitled to be examined by counsel for the defendants. This, however, does not extend to any earlier drafts the expert may have prepared which he, himself, may have amended, altered or revised in the course of considering the issues and his opinions. It is the fact the expert submitted a draft report to counsel for the plaintiff and then prepared a final report, that may or may not have been revised in accordance with suggestions by counsel for the plaintiff, that the defendants are entitled to pursue in examining the expert as to his opinions and the basis on which he reached his opinions, including to the extent the opinions offered are his or may be the consequence of suggestions by plaintiff's counsel.<sup>64</sup>

Justice MacAdam also agreed with the decision in *Browne* regarding disclosure:

Whatever information and materials were provided to the expert must be disclosed. If this involves discussions with the party, counsel for a party or with a third party, it is, may be, or perhaps should have been, part of the informational basis used by the expert in reaching his conclusion, and must be disclosed.

The only appellate guidance on these issues is the Ontario Court of Appeal's 2006 decision in *Conceicao Farms Inc v Zeneca Corp.*<sup>65</sup> The Court limited the information and instruction given to an expert required to be disclosed to the following:

[The required disclosure] clearly encompasses not only the expert's opinion but the facts on which the opinion is based, the instructions upon which the expert proceeded, and the expert's name and address. How far beyond this the right to obtain foundational information (as our colleague called it) extends, need not be determined here. Suffice it to say that we are of the view that it does not yet extend as far as is tentatively suggested in *Browne (Litigation Guardian of) v. Lavery*. We simply proceed on the basis that the rule entitles the appellant to obtain on discovery the foundational information for [the expert's] final opinion. As will become clear, we need not decide in this case the precise extent of the information that is discoverable.

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<sup>62</sup> *Ibid* at paras 69-70.

<sup>63</sup> *Flinn v McFarland*, 2002 NSSC 272.

<sup>64</sup> *Ibid* at para 9.

<sup>65</sup> *Conceicao*, *supra* note 52.

The most recent decision on these issues, *Moore v Getahun*,<sup>66</sup> is the most far-reaching and crisp. In 2014, on behalf of the Ontario Superior Court of Justice, Justice J. Wilson held:

[T]he purpose of Rule 53.03 is to ensure the expert witness' independence and integrity. The expert's primary duty is to assist the court. In light of this change in the role of the expert witness, I conclude that counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable.

If after submitting the final expert report, counsel believes that there is need for clarification or amplification, any input whatsoever from counsel should be in writing and should be disclosed to opposing counsel.

I do not accept the suggestion in the 2002 Nova Scotia decision, *Flinn v McFarland*, that discussions with counsel of a draft report go to merely weight. The practice of discussing draft reports with counsel is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality.<sup>67</sup>

Under the communication framework proposed in *Moore*, there is to be no communication between counsel and an expert after counsel commissions the report. *Moore* did not address what “foundational information”, as described in *Conceicao Farms*, must be disclosed when hiring and instructing the expert. Perhaps only non-substantive communications between lawyer and expert are permitted according to Justice Wilson.

Based on these cases, the law in Canada and Ontario remains unclear. *Conceicao Farms* provides appellate guidance that foundational information relating to the facts on which the expert opinion is based, instructions on which the expert proceeds and the expert's personal details must be disclosed to opposing parties. *Moore* suggests there should be no discussion whatsoever between counsel and an expert during the drafting phase of the report and that comments can only be made after the report is completed in writing. These would likely be limited to procedure and logistics. The extent and degree to which lawyers follow *Moore* remains to be seen. One significant risk arising from *Moore* is that parties will not be able to secure experts' reports that will aid the Court simply because most initial drafts of expert reports are very poorly written and not nearly as helpful as they can be after counsel asks questions of the expert.

*Moore* is currently under appeal to the Ontario Court of Appeal.

#### 2.4.2 APPLICATION OF MOORE IN ENVIRONMENTAL LITIGATION

The decision in *Moore* is not realistic in environmental litigation. Experts in litigation write technical, scientific reports about land use, soil and groundwater contamination and land remediation options, air, water and waste, and other technical issues. The experts are rarely, if ever, trained in law. Thereby, environmental counsel typically spend time engaging their experts throughout the litigation to ensure that the issues and scope of the expert report are clear and helpful to the decision-maker.

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<sup>66</sup> *Moore v Getahun*, 2014 ONSC 237 [*Moore*].

<sup>67</sup> *Ibid* at paras 50-52.

Competent environmental counsel do not direct the expert to a desired conclusion or finding. Likewise, competent environmental counsel do not persuade the expert against his or her own opinion in the interest of a better result for the client. Environmental claims most often involve objective scientific data which cannot be manipulated by counsel. However, ensuring that the experts' findings, opinions and conclusions are clear, technically supportable and useful to the Court are key objectives of and outcomes for the conversation between environmental counsel and the expert.

In *Moore*, the judge questioned an hour and a half phone call between the defendant's lawyer and expert. During the call, the defendant's lawyer made "suggestions" for and "corrections" to the expert's draft report.<sup>68</sup> Justice Wilson raised concern about the expert's independence and integrity.<sup>69</sup> While the communication in *Moore* was viewed by the Court as inappropriate, it is unfair and unhelpful to extend its application to a broad ban over all communications between counsel and an expert.

*Moore* raises new issues relating to the cost and time, and level of engagement required in environmental litigation. Environmental experts are expensive and often require time to conduct testing and reporting. Without the proper focus, many experts will produce work products that are not useful in the litigation. The report may be missing material information or based on mistaken assumptions. Additional money and time will be spent updating the report, if feasible.

*Moore* also raises potential problems in how counsel may use experts in without prejudice discussions during the course of an action. If counsel cannot communicate with his or her expert during the drafting phase of the expert report, how can attempts at settlement be made through early conversations and meetings? Likewise, does an expert's without prejudice participation in mediation and/or pre-trial bias the expert's ability to present evidence at trial?

*Moore* should not be further extrapolated to preclude without prejudice discussions. The Rules explicitly provide that experts can engage in same.<sup>70</sup> It is undisputed that experts can offer opinions during such discussions. In such circumstances, counsel will need to instruct their experts about the legal issues in question and, depending on the timing, experts' reports may still be in draft form. These instructions and the experts' participation in without prejudice discussions should not be considered a violation of the paradigm envisioned in *Moore*. The broad judicial goal of promoting settlement should not be undermined by a too restrictive application of *Moore*.

A final issue arising from *Moore* is its application to the time-frame during which counsel engages and retains an expert. Often in environmental litigation, experts are hired by plaintiff's counsel prior to litigation to assist counsel to assess if there is a claim and if so, against which defendants. In cases grounded in technical data, it is arguably impossible or unadvisable to commence an action without first hiring an expert. In considering *Moore*, the question arises whether an expert called upon by counsel to assist with early case evaluation will later be precluded from providing litigation support because counsel and the expert have previously discussed the case?

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<sup>68</sup> *Ibid* at para 47.

<sup>69</sup> *Ibid* at para 50.

<sup>70</sup> *Rules, supra* note 2 at r 20.05(2)(k).

Case law decided before *Moore* has only made passing reference to pre-litigation experts and has raised no practice issues.<sup>71</sup> Experts may be necessary pre-litigation and *Moore* should have no effect on lawyer-expert communications and on an expert's ability to testify based on his or her retention date.

Some law firms have published articles about *Moore* summarizing the decision.<sup>72</sup> The articles do not indicate the respective firm's litigation approach in light of *Moore* but rather echo the potential for far reaching implications arising from the decision. Each article concludes that *Moore* is currently under appeal and, thus, its full application remains to be seen.

Non-environmental advocacy groups have published position papers advising that they will not follow the decision in *Moore* until it is heard on appeal. The Holland Group, comprising medical practice lawyers, "unanimously and firmly" supports the practice of reviewing draft expert reports.<sup>73</sup> The Holland Group is chaired by Hon. Coulter Osbourne and advocates that the changes to Rule 53.03 (proposed by Osbourne, J. himself) are not meant to impact the "important" dialogue between counsel and experts.<sup>74</sup> The Advocates' Society, comprising lawyers from several practices areas and other stakeholders, follows the position set forth by the Holland Group.<sup>75</sup>

## 2.5 REPORTING OBLIGATIONS TO THIRD PARTIES

Environmental litigators commonly retain consultants to carry out environmental investigations. The outcome of these investigations can uncover environmental harms including hazards and risks to public safety. Though retained by litigators under litigation privilege, these consultants may have an overriding obligation to report their findings to authorities or regulators.

### 2.5.1 ENGINEERS

Engineers in Ontario are governed by the Association of Professional Engineers Ontario (the "PEO") under the *Professional Engineers Act*.<sup>76</sup> The PEO Code of Ethics imposes an obligation on engineers to act as faithful agents or trustees of their clients/employers including keeping information confidential and avoiding or disclosing conflicts of interest.<sup>77</sup>

<sup>71</sup> See, for example, *Robinson v Ottawa (City)* (2009), 55 MPLR (4th) 283 at para 44.

<sup>72</sup> Christopher Horkin, Cassels Brock & Blackwell LLP, "Communications with Experts No *Moore*?" (3 April 2014), online: <<http://www.casselsbrock.com>>; Catherine MacInnis, Blaney McMurtry LLP, "Ontario Superior Court Tightens Rules: 'Your' Expert Witness May Now Be Anything But" (April, 2014), online: <<http://www.blaney.com>>; Brent J. Arnold, Gowling Lafleur Henderson LLP, "Restrictions on communications with experts: Advocacy groups provide guidance on *Moore v Getahun*" (July, 2014), online: <<http://www.gowlings.com>>; Melissa Tennison, Davis LLP, "Ontario Superior Court of Justice Concludes that the Practice of Discussing Draft Expert Reports with Counsel is Improper" (30 January 2014), online: <<http://www.davis.ca>>.

<sup>73</sup> The Holland Group, *Position Paper of the Holland Group Regarding Issues Arising from a Recent Ontario Superior Court of Justice Decision*, Case Comment on *Moore v Getahun*, 2014 ONSC 237.

<sup>74</sup> *Ibid* at 4.

<sup>75</sup> The Advocates' Society, *Position Paper on Communications with Testifying Experts*, Case Comment on *Moore v Getahun*, 2014 ONSC 237.

<sup>76</sup> *Professional Engineers Act*, RSO 1990, c P-28.

<sup>77</sup> RRO 1990, Reg 941, s 77(3).

The Code of Ethics also creates a duty to the public and states that “a practitioner shall regard the practitioner’s duty to public welfare as paramount.”<sup>78</sup> Engineers can be disciplined by the PEO for professional misconduct, which includes “failure to act to correct or report a situation that the practitioner believes may endanger the safety or the welfare of the public.”<sup>79</sup> This legal obligation is commonly referred to as the engineer’s “duty to report”.

The PEO encourages engineers to resolve conflicts by working with their client/employer to find acceptable solutions before reporting. Nevertheless, the PEO recognizes that conflicts can escalate. Accordingly, the PEO has outlined a reporting process for engineers.<sup>80</sup>

The process involves the PEO assisting the engineer and client/employer to find a resolution. Where the PEO believes a situation may endanger the safety or welfare of the public, the PEO will take action including obtaining independent engineers to review the situation or requesting the client/employer to take all necessary steps. In certain circumstances, the PEO will report the risk to the appropriate government authorities.

Environmental litigators should strive for open avenues of communication with any engineer they retain. Hopefully, through open communication, these litigators can speak directly with an engineer who identifies a public safety issue and work toward finding an appropriate resolution before the engineer must report a dangerous situation. This approach to open communication may in some circumstances relieve the engineer of his or her initial inclination to report and potentially assist the client to mitigate a perilous situation.

## 2.5.2 GEOSCIENTISTS

Geoscientists in Ontario are governed by the Association of Professional Geoscientists of Ontario (“PGEO”) under the *Professional Geoscientists Act*. Similar to engineers, geoscientist have obligations to their clients/employers and the public.

The PGEO Code of Ethics states that their public safety and welfare duty is paramount, just as in the case of the engineers.<sup>81</sup> Geoscientists can be disciplined for professional misconduct which includes “failing to correct or to report a situation that the member or certificate holder believes may endanger the safety or the welfare of the public.”<sup>82</sup>

Again, environmental litigators should strive for good communication with any geoscientists that they retain. This may assist to identify and hopefully mitigate against the geoscientist having to report to a third party authority.

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<sup>78</sup> *Ibid* at s 77(2)(i).

<sup>79</sup> *Ibid* at s 72(2)(c).

<sup>80</sup> Association of Professional Engineers Ontario, *A Professional Engineer’s Duty to Report*, Toronto: PEO, 2010.

<sup>81</sup> *Code of Ethics of Professional Geoscientists*, O Reg 60/01, s 5(2)(a).

<sup>82</sup> *Disciplinary Matters – Complaints and Disciplinary Proceedings Relating to the Practice of Professional Geoscience*, O Reg 258/02, s 16(2)(2).

### 2.5.3 REAL WORLD EXPERIENCE

The authors report that during many years of retaining engineers and geoscientists it has not been necessary for an engineer or geoscientist to report to a government authority about a risk to public safety and public welfare. There have been infrequent circumstances where a conversation about reporting has taken place. Much advice about this issue has been provided to the author's clients but no reporting to a public authority has been made.

That said, the practice of environmental law is transforming with much greater emphasis on risk assessment and human health effects. Certainly, since the passage of the 2011 amendments to the Record of Site Condition Regulation (O. Reg. 153/04 made under Ontario's *Environmental Protection Act*), there has been greater movement afoot to assess risks and particularly those that arise from vapour intrusion.

As we discover more about vapour intrusion and other not so obvious risks, more circumstances may arise where engineers and geoscientists feel compelled to focus on risks to safety and their duty to report. This may be an issue to more frequently broach with the client and engineer or geoscientist prior to and during environmental investigations.

## 2.6 PROCEDURAL ALTERNATIVES IN THE USE OF EXPERTS IN ENVIRONMENTAL LITIGATION

The use of experts is adversarial, expensive and may create bias. There are procedural alternatives that environmental counsel can consider when instructing experts. These alternatives present their own benefits and burdens. In some cases, an alternative approach may be more effective in an action than the traditional model.

### 2.6.1 MANDATORY SINGLE EXPERTS

One alternative to the use of experts in litigation is to appoint a neutral single expert on any issue. This expert is then responsible to the court to provide an expert opinion on which opposing parties may rely. The single expert may be appointed jointly by the opposing parties or by the court. Neither party has the ability to submit additional expert evidence except with leave of the court. This approach is outlined in Ontario under Rule 52.03 and has been instituted as an option in the courts in the United Kingdom, Australia and New Zealand (See Appendix A).

#### 2.6.1.1 Benefits and Drawbacks

One benefit of the single expert model is potential savings in time and costs of litigation. Multiple experts waste monetary resources leading up to trial and also consume valuable time at trial. In theory, single experts can aid the court and litigants and at less cost.

Further, while the Rules state that all experts have a duty to the court, single experts also eliminate any real or perceived bias that may limit party-appointed experts. Competent counsel will not influence a party-appointed expert's conclusions. However, counsel must still instruct the expert and focus the expert.

Unlike party-appointed experts, single experts require agreed upon instructions from opposing parties or the court. The instructions frame the evidence presented at trial and, as such, may be contested between the parties. Time and resources may be wasted at this stage if opposing counsel view the instructions to a single expert as a microcosm of the issues at trial.

Single experts also carry the burden of being the only expert opinion at trial on that issue. Should a single expert lose credibility with the court, there is no alternative opinion to consider. Likewise, there is no possibility for multiple expert opinions to confirm one another or highlight contested issues. It may be hard for the court to determine which issues within a single expert's report are integral to the action and which issues are benign.

### 2.6.1.2 Applicability of the Single Expert Model in General Litigation

The applicability in Ontario of the single-expert model was considered by Hon. Coulter Osbourne in the Civil Justice Reform Project.<sup>83</sup> Osbourne believes that while the idea is good in theory, it will not work in practice in most cases.<sup>84</sup> Opposing parties often have different factual foundations on which an expert's report is based. For this reason, use of a single expert is evaluated on a case-by-case basis and is rarely used.<sup>85</sup> However, Osbourne does not entirely support the current model either. He believes that trial judges should evaluate whether experts are retained unnecessarily when considering costs.

In 2003, the Alberta Law Reform Institute ("ALRI") considered the applicability of the single expert model in Alberta.<sup>86</sup> ALRI concluded that the model:

- ♦ may cause delay during the selection process of the single expert
- ♦ may cause delay during the instruction process of the single expert, and
- ♦ may result in increased court applications from the abovementioned processes.<sup>87</sup>

As a whole, ALRI concluded that switching to the single expert model would likely cause more problems than it would solve.<sup>88</sup> ALRI did not recommend the single expert model in Alberta.

In 2006, the British Columbia Civil Justice Reform Working Group did not recommend the single expert model in British Columbia.<sup>89</sup> The Group recommended a similar approach to Ontario's Rules in which a judge may order a court-appointed single expert where appropriate.<sup>90</sup>

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid* at 71-72.

<sup>85</sup> *Ibid.*

<sup>86</sup> Alberta Law Reform Institute, *Expert Evidence and "independent" Medical Examinations* (Consultation Memorandum No. 12.3) (Edmonton: ALRI, 2003).

<sup>87</sup> *Ibid* at 23.

<sup>88</sup> *Ibid.*

<sup>89</sup> Civil Justice Reform Working Group, British Columbia Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November, 2006) online: BC Justice Review Task Force <[http://www.bcjusticereview.org/working\\_groups/civil\\_justice/cjrwg\\_report\\_11\\_06.pdf](http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf)>.

<sup>90</sup> *Ibid* at 14.

The United Kingdom's preferred single expert approach has had limited success. Since implementation, the model appears to have reduced the 'hired gun' expert and their expert reports.<sup>91</sup> However, it may not reduce time or costs as litigants hire their own "shadow expert" to comment on the appointed expert's report.<sup>92</sup>

### 2.6.1.3 Applicability of the Single Expert Model in Environmental Litigation

In Ontario, Rule 52.03, as described above, permits a judge, on motion by a party or out of his or her initiative, to appoint a single expert. The rule is rarely used.

Osbourne cautions against single experts where the factual foundations on which an expert's report are based are contested.<sup>93</sup> In environmental litigation, expert reports often pertain to contamination, migration and remediation and should, in theory, be objective and non-partisan. The factual foundation on which experts rely (e.g. adjacent land uses, soil and groundwater data) should not be in dispute between the opposing parties and particularly where opposing environmental experts work side-by-side during the investigation, testing and mitigating phases of the project. This is the ideal situation envisioned by Osbourne for a single expert.

It is important to distinguish known facts to ground an expert and legal liability (over which the parties will invariably disagree). A single expert can be instructed by both parties to make the relevant scientific conclusions based on the data available. The expert cannot make legal conclusions relating to intent, negligence or statutory breaches.

A hesitation of the single expert approach in environmental litigation is the unpredictability of having only one report govern the potential outcome of the litigation. For example, in soil and groundwater contamination litigation, objective data may be collected using boreholes and monitoring wells regarding contaminant concentration and groundwater levels. Based on this data, a conclusion about the source of the contamination or the groundwater flow direction is often not possible. At this stage, environmental experts may offer a subjective opinion – the strength of which depends on the objective data and its interpretation. Reasonable experts may arrive at different subjective opinions after looking at the same data.

This concern is not novel to environmental litigation nor is it the only concern. It is representative of the larger debate about whether mandatory single experts are a benefit to the legal system. It depends.

## 2.6.2 CONCURRENT EXPERT EVIDENCE

A second alternative is to have party-appointed experts produce concurrent evidence. In this practice, opposing parties commission and produce their own expert reports on a given issue. Once the reports are disclosed, counsel or the court may instruct the experts to meet independently and without prejudice.

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<sup>91</sup> Robert Musgrove, *Lord Woolf's Reforms of Civil Justice: The Reforms, their Impact, and the future for civil justice reform in England and Wales*, Address to Advocates' Society Policy Forum (Toronto: March 9, 2006).

<sup>92</sup> UK, Department of Constitutional Affairs, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms* (March 2001), <http://www.dca.gov.uk/civil/emerge/emerge.htm>, at paras 4.21 – 4.26.

<sup>93</sup> *Osbourne Report*, *supra* note 24 at 71-72.

As a product of this meeting, the experts identify areas of agreement, areas of disagreement and each expert's reasons for any disagreement. Should the action proceed to trial, the experts may be examined independently or as a group to provide further reasoning in any areas of disagreement. The practice of producing concurrent expert evidence is also known informally as "hot-tubbing".

Ontario's *Rules of Civil Procedure* allow for, but do not mandate, the production of concurrent evidence.<sup>94</sup>

Hot-tubbing is a middle ground between true party-appointed experts and a mandatory single expert. Experts are still each appointed and instructed by one party. However, they are expected to discuss their findings with all other experts on the issue and expressly agree or disagree with one another.

### 2.6.2.1 Benefits and drawbacks

The benefits to producing concurrent evidence are potential savings in time and costs of the litigation as compared to the non-concurrent evidence model. By having the experts discuss their respective reports, the issues may be narrowed and focused. This saves resources in settlement negotiations or at trial and allows the parties and the court to more readily identify the "live" issues that will be determinative of the dispute.

An agreement to provide concurrent evidence allows experts to review the issues outside of the legal framework. Normally, experts are examined at trial by counsel with a specific legal agenda. At trial, experts do not have the floor to discuss their thoughts and opinions regarding how the conclusions of various expert reports interact with one another. When meeting outside of court, the experts may enter a cooperative environment that facilitates peer review and much more open dialogue.

Hot-tubbing also strengthens the most reasonable expert opinions. In the event of any disagreement, experts must either concede their position or defend their report. The justifications of each expert on areas of disagreement provide evidence of the strength of each expert's opinion. Expert opinions that are poorly supported will not fare well against the scrutiny of another expert. Put another way, this model provides a forum for the experts to directly respond to the opposing experts' reports and note any deficiencies and discrepancies.

Despite the benefits, the production of concurrent evidence also has drawbacks. Competent experts thoroughly research and prepare their reports. Such experts should consider all perspectives on an issue and arrive at the conclusion they believe the data best supports. A caucus of the experts may not lead to any changes in position. Each expert is entitled to hold his or her reasonable opinion. In this case, the production of concurrent evidence will not necessarily further the litigation and can be a waste of resources.

The production of concurrent evidence may be more applicable where the expert reports are centred on objective data. In cases where expert reports are based on subjective analyses, a hot-tub may serve only to illustrate that there are a broad range of viewpoints on a given issue. The concurrent evidence may not narrow or focus the issues.

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<sup>94</sup> *Rules, supra* note 2 at r 20.05(2)(k) and r 50.07(1)(c).

Concurrent evidence favours confident, assertive and persuasive experts. Courts and counsel must be careful to attribute weight based on the evidence presented and not the expert presenting the evidence. This concern also applies to non-concurrent expert testimony. However, under such circumstances, counsel have greater control over the expert's testimony.<sup>95</sup>

Concurrent evidence may also not decrease any partisanship or bias among experts as they are still party-appointed. No studies are known by the author to have been undertaken to determine the relationship between hot-tubbing and bias.

### 2.6.2.2 Applicability of Concurrent Evidence in General Litigation

Like mandatory single experts, the production of concurrent expert evidence is considered alternative because the practice is infrequently used in Ontario. Courts in Ontario may apply Rules 50.07(1)(c) and 20.05(2)(k) to order concurrent expert evidence at their discretion.

In *Glass v 618717 Ontario Inc.*,<sup>96</sup> both parties submitted expert evidence regarding business valuation on a motion before Justice D.M. Brown in the Ontario Superior Court of Justice. Justice Brown held:

Counsel for the plaintiffs and the [defendants] welcomed directions from me about further consultations and discussions between the experts.

... When both experts testify at trial I will want to gain a clear understanding of why their views about the fair market value of the shares of those companies are so far apart. To assist me in gaining such an understanding and to focus clearly the business valuation issues for this trial, I direct John Seigel and Robert Martin, the authors of the PWC report, and Chris Nobes, the author of the Campbell Valuation Limited Critique Report, to meet and prepare a joint statement, signed by all of them, which clearly:

- i. identifies their areas of agreement in respect of the valuation of the common shares of the Pronorth Group of companies
- ii. identifies their areas of disagreement, and
  - i. explains in detail the reasons for any disagreements in their opinions.

Under Ontario's *Rules of Civil Procedure*, both sets of experts testify under the obligation to provide "opinion evidence that is fair, objective and non-partisan": Rule 4.1.01(1)(a). I expect their joint statement to provide me with non-partisan expert assistance in understanding why such divergent views appear to exist about the value of the common shares of what strike me as a pretty straight-forward group of commercial companies.<sup>97</sup> [emphasis in original]

<sup>95</sup> Erik Arnold & Errol Soriano, *The Recent Evolution of Expert Evidence in Selected Common Law Jurisdictions Around the World*, January 23, 2013 at 17.

<sup>96</sup> *Glass v 618717 Ontario Inc.*, 2011 ONSC 2926 [*Glass*].

<sup>97</sup> *Ibid* at paras 24-26.

Further into the trial, Justice Brown evaluated the merit of his earlier order:

As noted earlier, in a mid-trial ruling I gave directions to the business valuers to meet and to prepare a joint statement in advance of their testimony. They did so. While the valuers were unable to develop a consensus range of share value, their Joint Statement proved of great assistance in identifying the areas of disagreement and the financial implications of those disagreements. I wish to thank Mr. Seigel and Mr. Nobes for their work in preparing the Joint Statement.<sup>98</sup>

Justice Brown, citing his earlier example of *Glass*, made identical orders for a joint statement from the experts in *Wood v Arius3D Corp*<sup>99</sup> and *Karrys Bros. Ltd. v Ruffa*.<sup>100</sup>

Aside from Justice Brown's abovementioned orders, no concurrent written evidence has been ordered by the Ontario Superior Court of Justice or the Ontario Court of Appeal.

The Federal Court Rules allow for oral concurrent evidence at trial such that the experts are examined as a panel.<sup>101</sup> This approach has been used in the Federal Court in *Apotex Inc. v AstraZeneca Canada Inc*<sup>102</sup> and *Distrimed Inc. v Dispill Inc.*<sup>103</sup>

An order from the court is not required to produce concurrent evidence. Counsel may also direct the experts in an action to produce a joint statement if the parties believe it would be helpful or save resources. In *obiter*, Justice A.M. Gans scolded counsel for not using the hot-tub approach for the expert reports on damages in *Livent Inc. (Special Receiver and Manager of) v Deloitte & Touche*.<sup>104</sup> Justice Gans held:

I digress to observe that the complexity and confusion erupting from the banker's box of damage reports could have been more readily avoided had counsel directed their respective experts to engage in some early "hot tubbing", a concept which has not been met with favour from the Ontario bar though it has on occasion been ordered by this court. The resolution of certain evidentiary problems and factual disputes that disappeared during the course of the trial through the court-assisted conclusion of agreed statements of fact underscores why counsel should insist on more trial management, earlier and more often than a scant few weeks before trial.<sup>105</sup>

There is limited appellate guidance on the topic of expert hot-tubbing. The only comment the Ontario Court of Appeal has offered is in *Suway (Litigation Guardian of) v Women's College Hospital*.<sup>106</sup> At trial in *Suway*, the trial judge criticized the expert witnesses for not discussing their differences with one another prior to trial. The Court of Appeal held:

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<sup>98</sup> *Glass v 618717 Ontario Inc.*, 2012 ONSC 535 at para 250.

<sup>99</sup> *Wood v Arius3D Corp.*, 2012 ONSC 5596.

<sup>100</sup> *Karrys Bros. Ltd. v Ruffa*, 2014 ONSC 713.

<sup>101</sup> *Federal Court Rules*, SOR/98-106 s 282.1.

<sup>102</sup> *Apotex Inc. v AstraZeneca Canada Inc.*, 2012 FC 559 at para 6.

<sup>103</sup> *Distrimed Inc. v Dispill Inc.*, 2013 FC 1043 at para 168.

<sup>104</sup> *Livent Inc. (Special Receiver and Manager of) v Deloitte & Touche*, 2014 ONSC 2176.

<sup>105</sup> *Ibid* at para 276.

<sup>106</sup> *Suway (Litigation Guardian of) v Women's College Hospital*, 2011 ONCA 676 [*Suway*].

We do not agree with the trial judge's criticisms of the expert witnesses in this case because they failed to meet with each other and review the issues prior to the trial. While it would no doubt be open to counsel to agree on such an approach, and while such an approach might well be desirable in some cases, that is a decision for counsel, not for the experts, to make.<sup>107</sup>

The onus rests on counsel to commission voluntary concurrent evidence, not the experts.

### 2.6.2.3 Applicability of Concurrent Evidence in Environmental Litigation

Concurrent expert evidence remains untested (or, at least, unreported) in environmental litigation.

The technical, scientific data used to support expert reports in environmental litigation may be a good candidate for concurrent expert evidence. As discussed when considering mandatory single experts, the factual foundation on which environmental experts rely (e.g. adjacent land uses, soil and groundwater data and the like) should not be in dispute between the opposing experts. This is particularly the case where opposing environmental experts work side-by-side during the investigation, testing and mitigating phases of the project. If there is disagreement, it should pertain to the interpretation and conclusions drawn from the data. A hot-tub of experts to discuss, for example, the source of a contamination or available remedial options may narrow the issues, encourage settlement or expedite the litigation. Without prejudice meetings may facilitate peer review and collaboration among environmental experts.

The concerns of expert bias and an expert's unwillingness to consider another position are undoubtedly unknowns in any case. The effectiveness of concurrent evidence will vary on a case-by-case basis in environmental litigation based on the issues and the particular experts involved. However, these concerns and potential isolated failures should not take away from a potentially useful practice.

## 3 TRIAL

### 3.1 ADMISSIBILITY OF EXPERT EVIDENCE

#### 3.1.1 SUPREME COURT OF CANADA (*R v MOHAN*)

The Supreme Court of Canada's judgment in *R v Mohan*<sup>108</sup> is the current authority on the admissibility of expert evidence. In *Mohan*, the Court held that expert evidence should be admitted if the expert evidence is:

- ♦ relevant
- ♦ necessary in assisting the trier of fact
- ♦ absent of any exclusionary rule, and
- ♦ given by a properly qualified expert.<sup>109</sup>

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<sup>107</sup> *Ibid* at para 114.

<sup>108</sup> *Mohan*, *supra* note 12.

<sup>109</sup> *Ibid* at para 17.

The party tendering the expert bears the burden of meeting the four requirements in *Mohan*.<sup>110</sup> The *Mohan* test applies in both criminal and civil cases.<sup>111</sup>

### 3.1.1.1 Relevance

Relevance of an expert's evidence is a question of law to be decided by the presiding judge.<sup>112</sup> The evidence must not only be related to a fact in issue but also must be valuable to the trial. As described in *McCormick on Evidence*<sup>113</sup> and cited in *Mohan*, the value of the evidence must outweigh its impact on the trial process. In *Mohan*, the Court held:

Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.<sup>114</sup>

The ability for expert evidence to confuse or overwhelm a jury was questioned in *R v Melaragni*<sup>115</sup> and *R v Bourguignon*<sup>116</sup> and accepted in *Mohan* as being a factor in assessing the relevance of that evidence.

### 3.1.1.2 Necessity in Assisting the Trier of Fact

An expert's evidence must be necessary in order to "provide information which is likely to be outside of the experience and knowledge of a judge or jury."<sup>117</sup> This includes instances where the trier of fact is enabled by expert evidence to appreciate technical matters.<sup>118</sup> Likewise, the standard may also be described with a reverse onus – such that an ordinary person is unlikely to correctly judge the facts of the case if unassisted by an expert.<sup>119</sup>

Expert evidence is not necessary solely because it is presented by a well-qualified expert or presented with heavy technical wording. If an issue before the jurors does not require an expert, an expert's evidence may incorrectly influence the trier of fact from their own conclusions.<sup>120</sup>

<sup>110</sup> *R v Terceira* (1998), 38 OR (3d) 175 (CA) aff'd [1999] 3 SCR 866.

<sup>111</sup> *Drumonde v Moniz* (1997), 105 OAC 295 (CA).

<sup>112</sup> *Ibid* at para 18.

<sup>113</sup> Edward Cleary, 3d ed, *McCormick on Evidence*, (St. Paul, USA: West Publishing, 1984) at 544.

<sup>114</sup> *Mohan*, *supra* note 12 at para 18.

<sup>115</sup> *R v Melaragni*, (1992), 73 CCC (3d) 348 at 353 (Gen Div).

<sup>116</sup> *R v Bourguignon*, [1991] OJ No 2670 (Gen Div) (QL).

<sup>117</sup> *Mohan*, *supra* note 12 at para 22.

<sup>118</sup> *R v Abbey*, [1982] 2 SCR 24.

<sup>119</sup> *Kelliher (Village of) v Smith*, [1931] SCR 672 at 684.

<sup>120</sup> *Mohan*, *supra* note 12 at paras 23-25.

### 3.1.1.3 Absence of any Exclusionary Rule

Expert evidence is not automatically admissible if it meets the other three criteria in *Mohan*. The expert evidence must also be admissible under the general law of evidence. If there is any applicable exclusionary rule, the expert evidence will be excluded despite being relevant, necessary and provided by a properly qualified expert.<sup>121</sup>

### 3.1.1.4 Properly Qualified Expert

A properly qualified expert is one who “is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.”<sup>122</sup> Expertise is a relatively modest status that is achieved when the “expert or witness possesses special knowledge and experience going beyond that of the trier of fact.”<sup>123</sup>

## 3.1.2 ONTARIO COURT OF APPEAL (*R V ABBEY*)

In 2009, the Ontario Court of Appeal’s judgment of *R v Abbey*<sup>124</sup> added an additional consideration to the four requirements in *Mohan*. Justice Doherty, on behalf of the Court, adopted a two-step process for determining expert evidence admissibility.<sup>125</sup> First, the party advancing expert evidence must meet the four requirements set out in *Mohan*. Second, if the requirements are met, the trial judge must decide if the evidence is “sufficiently beneficial” to the trial process.<sup>126</sup>

This second portion of the analysis was novel in *Abbey* and Justice Doherty described this function of the trial judge as one of a “gatekeeper.”<sup>127</sup> The inquiry of the *Mohan* requirements will yield “yes” or “no” answers but may not address more difficult or subtle considerations. For that reason, the Court of Appeal described the second portion of the analysis as follows:

The “gatekeeper” inquiry does not involve the application of bright line rules, but instead requires an exercise of judicial discretion. The trial judge must identify and weigh competing considerations to decide whether on balance those considerations favour the admissibility of the evidence. This cost-benefit analysis is case-specific and, unlike the first phase of the admissibility inquiry, often does not admit of a straightforward “yes” or “no” answer. Different trial judges, properly applying the relevant principles in the exercise of their discretion, could in some situations come to different conclusions on admissibility.

<sup>121</sup> *Ibid* at para 26.

<sup>122</sup> *Ibid* at para 27.

<sup>123</sup> *R v Beland*, [1987] 2 SCR 398 at para 16.

<sup>124</sup> *R v Abbey*, 2009 ONCA 624 [*Abbey*].

<sup>125</sup> *Ibid* at para 76.

<sup>126</sup> *Ibid*.

<sup>127</sup> *Ibid* at para 78.

Within this framework, the Supreme Court of Canada's concerns in *Mohan* about the jury being confused or overwhelmed can be considered outside of the four requirements. The trial judge must undertake his or her own discretionary cost-benefit analysis.<sup>128</sup> The costs and inherent risks of the admissibility of expert evidence include the consumption of time, prejudice and confusion.<sup>129</sup> The benefit of the expert evidence is that the trier of fact is properly informed about an issue on which he or she does not have expertise. In addition, the trial judge must also consider the effect of excluding expert evidence on the proper administration of justice.<sup>130</sup>

While not directly addressed in *Abbey*, the gatekeeper does not necessarily have to serve a binary function. The trial judge may be able to admit expert evidence with proper instructions to the jury and may control the presentation of the testimony to minimize the risks.

The Supreme Court of Canada dismissed the application for leave to appeal in *Abbey* without reasons.

### 3.2 JUNK SCIENCE

In recent years, some commentators have suggested that Courts give too much weight and rely too heavily on expert evidence. The Supreme Court of Canada in *R v Mohan* stated:

*Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.*<sup>131</sup>

Justice Sopinka, at page 25 of *Mohan*, also stated:

In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert.

This was a stark warning to litigation counsel and the Courts to judiciously assess their reliance on expert evidence. Courts have a role as “gatekeeper” to ensure junk science or pseudoscience is not entered into evidence at trial.

The approach taken by Courts on junk science has largely been shaped by jurisprudence in the United States, specifically the *Daubert* trilogy. The *Daubert* trilogy comprises three U.S. Supreme Court decisions: *Daubert v Merrel Dow Pharmaceuticals Inc.*<sup>132</sup>, *General Electric Company v Joiner*<sup>133</sup> and *Kumho Tire Company Ltd. v Carmichael*.<sup>134</sup>

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<sup>128</sup> *Ibid* at para 89.

<sup>129</sup> *Ibid*.

<sup>130</sup> *Ibid* at para 93.

<sup>131</sup> *Mohan*, *supra* note 12 at para 23.

<sup>132</sup> *Daubert v Merrel Dow Pharmaceuticals Inc.*, 509 US 579 (1993) [*Daubert*].

<sup>133</sup> *General Electric Company v Joiner*, 522 US 136 (1997) [*Joiner*].

<sup>134</sup> *Kumho Tire Company Ltd. v Carmichael*, 526 US 137 (1999) [*Kumho*].

In *Daubert*, the U.S. Supreme Court considered the applicability of the “general acceptance” test with Federal Court rules when admitting expert scientific testimony. The Court concluded that the “general acceptance test” was not a precondition for the admission of scientific evidence under the Federal Rules of Evidence. Rather the Federal Rules of Evidence required a preliminary assessment about “whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue”. The Court identified a non-exhaustive list of factors for the assessment:

- ◆ whether the theory or technique can be (and has been) tested
- ◆ whether the theory or technique has been subjected to peer review and publication
- ◆ the known or potential rate of error and the existence and maintenance of standards controlling the technique’s operation
- ◆ whether the theory or technique has been generally accepted by a relevant scientific community.

At issue in *Joiner* was the applicable standard of review for evidentiary rulings for expert scientific evidence. The U.S. Supreme Court held that the “abuse of discretion” was the proper standard of review.

In *Kumho*, the U.S. Supreme Court upheld the *Daubert* approach. This included “technical” or “other specialized” knowledge, such as engineering. The Court reaffirmed that the list of factors in *Daubert* was not meant to be exhaustive and may not be applicable in all cases. The Court identified examples where a subject has not been peer reviewed for lack of interest or that general acceptance may not be applicable where a discipline itself lacks reliability.

The Supreme Court of Canada in *R v J.(J.-L.)* adopted the *Daubert* list of factors.<sup>135</sup> The Court cited *Mohan*, where the Supreme Court held that novel scientific theory or technique should be subject to “special scrutiny” and must meet a basic threshold of reliability.<sup>136</sup> Notably, in the criminal law context, the Court in *R v J.(J.-L.)* was determining the admissibility of expert evidence relating to novel sexual assault testing. The Court held that although the testing may be useful in therapy, it was not sufficiently reliable for use in a Court of law.<sup>137</sup>

The Court of Appeal in *Abbey* offered a non-exhaustive broader list of questions that may be relevant and helpful in evaluating whether novel science expert evidence should be accepted:

- ◆ To what extent is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?
- ◆ To what extent is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?
- ◆ What are the particular expert's qualifications within that discipline, profession or area of specialized training?
- ◆ To the extent that the opinion rests on data accumulated through various means such as interviews, is the data accurately recorded, stored and available?

<sup>135</sup> *R. v J.-L.J.*, 2000 SCC 51 at para 33.

<sup>136</sup> *Ibid* at para 35.

<sup>137</sup> *Ibid.*

- ◆ To what extent are the reasoning processes underlying the opinion and the methods used to gather the relevant information clearly explained by the witness and susceptible to critical examination by a jury?
- ◆ To what extent has the expert arrived at his or her opinion using methodologies accepted by those working in the particular field in which the opinion is advanced?
- ◆ To what extent do the accepted methodologies promote and enhance the reliability of the information gathered and relied on by the expert?
- ◆ To what extent has the witness, in advancing the opinion, honoured the boundaries and limits of the discipline from which his or her expertise arises?
- ◆ To what extent is the proffered opinion based on data and other information gathered independently of the specific case or, more broadly, the litigation process?<sup>138</sup>

Environmental litigators should be aware of *R v J.(J.-L.)* and *Abbey*, especially where evolving and novel science is involved. The cases highlight why litigators must prudently examine the methodologies of opposing counsel's experts as well as their own experts. Litigators should determine if the expert is using widely accepted methods. Litigators should review the case law to assess if other Courts have relied on the methods or techniques used by other experts in similar cases. Litigators need to be confident in their experts and the experts' methods and techniques.

### 3.3 CREDIBILITY OF EVIDENCE

With respect, the Court would find it very difficult to accept an explanation with regard to the cause of the landfill off-site odour from a lay person with absolutely no background or experience in waste management, landfill or environmental studies, over that of a well-known, knowledgeable and experienced waste management and landfill expert.<sup>139</sup>

An expert's experience and qualifications must provide a solid foundation and support for his or her credibility at trial. However, an expert's credibility is not infallible. Experts can lose their credibility faster than they earn it. Losing credibility reflects badly on the expert, the litigator who retains the expert and the litigant who retains the litigator.

#### 3.3.1 INDEPENDENCE / BIAS

Experts are paid by the party that retains them. Naturally, experts want to ensure that their client is satisfied in order to continue with the current work and to secure future work. Lawyers are often instrumental in selecting and retaining expert witnesses. Some have been known to "shop around" for opinions they prefer and to apply gentle influence on the expert. Undoubtedly, these practices can impact an expert's credibility with the Court leaving the litigant to bear the brunt of the expert's loss or perceived independence.

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<sup>138</sup> *Ibid* at para 119.

<sup>139</sup> *Ontario (Ministry of the Environment) v Sault Ste Marie (City)*, 2008 ONCJ 583 at para 91.

In the context of a prosecution, the case of *R v Commander Business Furniture Inc.*<sup>140</sup> presents an example of a complete loss of credibility by the defendant's consultant who was tainted by the influence of the defendant (not counsel). The defendant operated a facility that spray painted office furniture. Neighbouring residents made numerous complaints about odours to the then Ontario Ministry of the Environment. The defendant retained a consultant to assess the odour problem and provide potential solutions. The defendant tried to rely on the consultant at trial to establish a due diligence defence. The Ontario Court of Justice found that the defendant instructed the consultant to change its recommendations.<sup>141</sup> The defendant wanted the consultant to recommend less expensive measures, though it was known by the defendant and consultant that the effectiveness of these less costly methods was limited. The Court found that the expert's testimony, premised on the final report, was not a "credible professional opinion" given what the same consultant said in earlier draft reports.<sup>142</sup>

In *WCI Waste Conversion Inc v ADI International Inc*, both defendants' experts lost credibility because of the defendants' influence in the preparation of the experts' reports.<sup>143</sup> The plaintiff and the defendant started a joint venture to construct and operate a composting facility. The plaintiff filed an action when the defendant later terminated the agreement and took over the facility. The defendant retained experts to opine on the design and operation of the facility.

Regarding one of the defendant's experts, the Court found that the evidence contradicted the expert's claim that only he authored his report. The Court concluded that the defendant was "intricately involved in outlining, drafting, revising, and editing" the expert report.<sup>144</sup> The Court stated, "An expert report is only of benefit to the Court if it is independent and unbiased and is not unduly influenced by someone having a pecuniary interest in the contents of that report."<sup>145</sup>

After reviewing the draft reports of the other defendant's expert, the Court found that the final report was altered to eliminate any matters that would reflect negatively on the defendant or positively on the plaintiff.<sup>146</sup> Comparisons of the draft reports indicated that a significant number of paragraphs were deleted or altered after the defendant reviewed the reports. The Court concluded:

...when the party engaging the expert seeks to control or direct or unduly influence the conclusions reached in the expert's report, that party has diminished the credibility and reliability of the report and of itself. When an expert succumbs to such influences, he or she compromises their own integrity and the report rendered is of little or no value.<sup>147</sup>

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<sup>140</sup> *R v Commander Business Furniture Inc.*, (1992), 9 CELR (NS) 185, 1992 CarswellOnt 222, (Ont Ct J) [Commander].

<sup>141</sup> *Ibid* at paras 174-175, 188.

<sup>142</sup> *Ibid* at para 194.

<sup>143</sup> *WCI Waste Conversion Inc v ADI International Inc*, 2008 PESCTD 40 [*WCI Waste*].

<sup>144</sup> *Ibid* at paras 224-227.

<sup>145</sup> *Ibid* at para 228.

<sup>146</sup> *Ibid* at para 234.

<sup>147</sup> *Ibid* at para 244.

The challenge with the use of “hired guns” and “opinions for sale” was discussed in the *Osborne Report*.<sup>148</sup> Specifically, Justice Osborne wrote:

The issue of “hired guns” and “opinions for sale” was repeatedly identified as a problem during consultations. To help curb expert bias, there does not appear to be any sound policy reason why the Rules of Civil Procedure should not expressly impose on experts an overriding duty to the court, rather than to the parties who pay or instruct them. The primary criticism of such an approach is that, without a clear enforcement mechanism, it may have no significant impact on experts unduly swayed by the parties who retain them.<sup>149</sup>

As a result, Ontario’s *Rules of Civil Procedure* were amended based on Justice Osborne’s recommendation to expressly impose a duty on experts.<sup>150</sup> The duty requires the expert to provide fair, objective and non-partisan opinion evidence. The duty of the expert owed to the Court is paramount to any obligation owing by the expert to his or her client/employer. In addition, the *Rules* now require that the expert acknowledge his or her duty to the Court in his or her report.<sup>151</sup>

In *R v Inco*, the Ontario Superior Court of Justice held that the employment relationship or status of an expert vis-a-vis a party did not determine independence or impartiality.<sup>152</sup> In *Inco*, the defendant was charged with discharging untreated mine effluent into a watercourse. The trial judge declined to qualify an expert called by the then Ministry of the Environment for lack of independence with the Crown. On appeal, the Court held that before a witness can be rejected based on lack of independence, the Court should conduct a *voir dire* hearing.<sup>153</sup> At the hearing, a judge can determine if the expert is in a co-venture with the party, or is acting as an advocate for the party.<sup>154</sup> A trial judge can also assess an expert’s opinion based on how it tested under cross-examination, the assumptions used, the disclosure of material facts, and the completeness and level of expertise.<sup>155</sup>

### 3.3.2 EXPERT WITNESS CREDIBILITY AND COSTS

The issue of expert witness credibility and costs resulting from a sophisticated appellant’s pursuit of an ill-founded appeal where its expert professional engineer’s opinions was held to be “fundamentally and irredeemably flawed”<sup>156</sup> was the subject matter of *Seaspan ULC (formerly Seaspan International Ltd.) v Director, Environmental Management Act*. This case was heard before the British Columbia Environmental Appeal Board. Applications for costs were decided on September 15, 2014.

<sup>148</sup> *Osborne Report*, *supra* note 24 at 75.

<sup>149</sup> *Ibid*.

<sup>150</sup> *Rules*, *supra* note 2 at r 4.1.

<sup>151</sup> *Ibid* at r. 53.03(2.1).

<sup>152</sup> *R v Inco* (2006), 80 OR (3d) 594 at paras 42-45 (Ont Sup Ct).

<sup>153</sup> *Ibid* at para 45.

<sup>154</sup> *Ibid* at para 49.

<sup>155</sup> *Ibid* at para 45.

<sup>156</sup> British Columbia Environmental Review Board, Decision Nos. 2010-EMA-005(c), 006(c) dated September 15, 2014 at para 186.

Seaspan ULC (“Seaspan”) appealed a B.C. Director’s Order against Seaspan ULC and Domtar Inc. relating to contaminated land located adjacent to Burrard Inlet in North Vancouver, the location of Seaspan’s Vancouver shipyard. Before the hearing, Seaspan filed its expert’s report in which its expert concluded that the tests did not indicate that the creosote plume was continuous from Parcel A to the Western Front. As the Tribunal cited Seaspan’s expert’s opinion, “In his professional opinion, the creosote contamination found in the Western Front more probably than not originated from the storage of creosote treated boomed timbers on the tidal flats of the Western Front.” This opinion was in support of Seaspan’s position that Seaspan was not responsible to remediate the entirety of this particular plume (although Seaspan did have responsibility to remediate other contamination at the site).

The hearing commenced before the Board. Seaspan called its engineering expert to testify. The expert was qualified to “give opinion evidence as a professional engineer with respect to the cause or causes and delineation of creosote contamination in soil, groundwater and sediments at the subject site.”<sup>157</sup> Seaspan’s expert testified that he was aware of the duty of an expert as required in the B.C. Supreme Court Rules. The expert’s evidence-in-chief and cross-examination concluded at the end of day two of the hearing. It was expected that the expert would be subject to reexamination on day three. However, on day three, the Board was presented with a copy of a letter advising that Seaspan was abandoning its appeals (except those relating to security and registration of a covenant). Following the collapse of the hearing, opposing counsel advised that they would consider applications for an order for costs. Meanwhile, the opposing parties were granted an order compelling the expert to produce his expert file.

The B.C. Environmental Appeal Board posed two key questions: (1) what is the legal test to award costs?, and (2) should applications for costs be granted in the circumstances of this case?

After hearing submissions, the Board posed these questions: “when does a party’s behavior “cross the line” to become a “special circumstance”? At what point does it deserve to be punished? And how does the Board ensure that the threshold is not too low, such that it results in a “chill” on legitimate appeals and litigation strategies?”<sup>158</sup> The Board held that the power to award costs is discretionary, an award of costs will turn on the particular facts of the case, the Board’s stated objective is to encourage responsible conduct throughout the appeal process and to discourage unreasonable and/or abusive conduct.<sup>159</sup> The Board held that, “In other words, costs are punitive in nature: they are not compensatory, as in winner pays the losers’ costs. Rather, they are intended to punish and deter unwanted conduct.”<sup>160</sup> Finally, the Board held that, “When assessing whether or not to award costs, the Board will also weight the importance of ordering costs in the circumstances against the likelihood that an award of costs in those circumstances will have an unwanted “chilling effect”.”<sup>161</sup>

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<sup>157</sup> *Ibid* at para 52.

<sup>158</sup> *Ibid* at para 153.

<sup>159</sup> *Ibid* at paras 162-165.

<sup>160</sup> *Ibid* at paras 162-165.

<sup>161</sup> *Ibid* at para 168.

The Board proceeded to review Seaspan's expert evidence presented during the hearing. The Board held that:

- ◆ the expert's report is deceptive
- ◆ the expert adopted an artificially technical definition of "contamination" in reaching his conclusions in the report by only including analytical results with recorded exceedances
- ◆ once there is discovery of free product the 'discontinuous plume' theory that Seaspan adopted collapses and the expert's conclusion is completely discredited
- ◆ the report was constructed such that a reader could not discern the unusual definition of contamination put forth by the expert
- ◆ the expert's report contradicts the conclusions in previous reports even though the expert was instructed to assume that the previous reports correctly identified the nature and extent of creosote contamination in soil.<sup>162</sup>

As stated by the Board, "Seaspan claims that it did not know, or could not have known, of the flaws in [its expert's] Report. The Panel disagrees. The Panel finds that Seaspan advanced a position that was fundamentally unsound from the outset, presumably, to avoid or lessen the costs of remediating the serious contamination at the Site."<sup>163</sup>

In the end, the Board held that "...this was more than a "doubtful case". Rather it was hopeless, and the theory advanced at the hearing should never have been pursued."<sup>164</sup> The Board concluded that, "Ultimately, the underlying theory of its case – the theory that it chose to pursue to a hearing – was so ill conceived that it crumbled almost immediately under cross-examination. Evidence that free phase DNAPL creosote found in bore holes did not signify "contamination" because of a lack of confirmatory test results was preposterous."<sup>165</sup>

As a deterrent, the Board awarded costs in favour of opposing parties. In addition, the Board directed Seaspan to provide to the Board, and to all other parties, submissions about the payment of the Board's expenses.<sup>166</sup> At the time of writing this paper, the Board had yet to decide about the quantum of costs.

### 3.3.3 FACTUAL ACCURACY AND CONFIRMING ASSUMPTIONS

Unlike some lay witnesses, experts are usually not present during the event that gives rise to the need for expert testimony. Accordingly, expert evidence usually comprises opinions formed on second hand experiences. Experts base their opinions on factual information provided to the expert by a party and others, and on assumptions that the expert draws. In an expert's report, the expert must provide his or her reasons for his or her opinions, including an outline of the factual assumptions upon which he or she bases his or her opinion.<sup>167</sup>

<sup>162</sup> *Ibid* at para. 181.

<sup>163</sup> *Ibid* at para 187.

<sup>164</sup> *Ibid* at para 194.

<sup>165</sup> *Ibid* at para 193.

<sup>166</sup> *Ibid* at paras 216 and 217.

<sup>167</sup> *Rules, supra* note 2 at r 53.03(2.1).

One can appreciate that expert opinions can only be as supportable as the facts upon which the expert bases his or her opinion. Litigators should ensure that their experts have all relevant background facts and other necessary information. This assures that the expert can assess the problem posed to the expert and provide an informed opinion. In *WCI Waste*, the defendant's expert was retained to provide recommendations about an aeration system at the waste facility. The expert relied strictly on information provided by the defendant. The expert failed to read or consider a 60 page manual that detailed the aeration control system.<sup>168</sup> As a result, the Court held that the expert's recommendations for improving the system were already implemented and this substantially devalued the expert's testimony.<sup>169</sup>

In *Simpson v Chapman*, the plaintiff's expert was found by the Court to have used the wrong methodology to assess if the site was contaminated.<sup>170</sup> The expert used a method that was not statutorily approved. The expert based the findings on this non-approved approach. The plaintiff's claim was dismissed because it failed to show that the property was contaminated as defined by provincial regulation.

*Simpson* demonstrates the importance for litigators of verifying with their experts the factual assumptions the experts make in providing the expert's opinion. This is especially relevant for environmental litigators where highly technical regulatory requirements are the law. One example of this is Ontario's Record of Site Condition Regulation (O Reg 153/04 promulgated under the *Environmental Protection Act*). Knowing the nature of the soil type, the land use and other very specific aspects of the property can make a significant difference in the assessment of whether a property meets the Ontario Ministry of the Environment and Climate Change Soil, Ground Water and Sediment Standards. Ensuring in advance that the expert is adopting correct methodologies and relying on correct standards (whether prescribed in law or not) can avoid an expert's fatal loss of credibility.

### 3.4 WEIGHT TO BE AFFORDED THE EVIDENCE

The Ontario Superior Court of Justice (Divisional Court) in *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*<sup>171</sup> recently adopted the dictum of Justice Mohoney in *R. v. Capital Life Insurance Co.*, [1986] 2 F.C. 171 (Fed. C.A.) at p. 177:

In context, the court has said no more than what is trite law: the weight to be given expert evidence is a matter for the trier of fact and an expert's conclusion which is not appropriately explained and supported may properly be given no weight at all.

The Ontario Division Court in *Ostrander Point* held that it was up to the Environmental Review Tribunal to determine if the Tribunal should rely on the expert medical doctor's theory about linking medical symptoms complained of to the operation of the wind turbines. Not surprisingly, the Court held that the Tribunal's decision should be entitled to deference from the Court.

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<sup>168</sup> *WCI Waste*, *supra* note 143 at para 212.

<sup>169</sup> *Ibid* at paras 210-213.

<sup>170</sup> *Simpson v Chapman*, 2009 BCPC 28 [*Simpson*].

<sup>171</sup> *Ostrander Point GP Inc. v Prince Edward County Field Naturalists*, 2014 ONSC 974 (Ont. Div. Ct.).

## APPENDIX A

### Use of Experts in Environmental Litigation in Other Common Law Jurisdictions

#### 1 UNITED KINGDOM

The United Kingdom's Civil Procedure Rules<sup>172</sup> were made on the recommendation of Lord Woolf's 1996 review of the civil justice system.<sup>173</sup> Broadly speaking, the United Kingdom has adopted a stricter approach to the use of experts that is intended to decrease the cost and time of litigation.

Key differences in the United Kingdom include:

- ◆ Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.<sup>174</sup>
- ◆ No party may call an expert or put into evidence an expert's report without the court's permission.<sup>175</sup>
- ◆ Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue be given by a single joint expert.<sup>176</sup> Where the parties cannot agree who should be the single joint expert, the court may select the expert from a list prepared by the parties or in any other manner.<sup>177</sup>
- ◆ Where the court gives a direction for use of a single joint expert, any relevant party may give instructions to the expert and must advise the other parties of the instructions.<sup>178</sup>
- ◆ Unless the court otherwise directs, the relevant parties are jointly and severally liable for payment of the expert's fees and expenses.<sup>179</sup>

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<sup>172</sup> *Civil Procedure Act 1997* (UK), c 12 [*UK Rules*].

<sup>173</sup> Rt. Honourable Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (Department of Constitutional Affairs, UK: July 1996) online: Department of Constitutional Affairs. <<http://www.dca.gov.uk/civil/final/index.htm>>. See recommendations 156- 173 dealing with expert evidence.

<sup>174</sup> *UK Rules*, *supra* note 172 at r 35.1.

<sup>175</sup> *Ibid*, r 35.4(1).

<sup>176</sup> *Ibid*, r 35.7(1).

<sup>177</sup> *Ibid*, r 35.7(2).

<sup>178</sup> *Ibid*, r 35.8(1), (2).

<sup>179</sup> *Ibid*, r 35.8(5).

## 2 AUSTRALIA

Similar to the United Kingdom, the Uniform Civil Procedure Rules of the state of Queensland, Australia restrict the use of experts.<sup>180</sup> The purpose of the rules relating to expert evidence is to:

- ♦ declare the duty of an expert witness in relation to the court and the parties
- ♦ ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court
- ♦ avoid unnecessary costs associated with the parties retaining different experts, and
- ♦ allow, if necessary to ensure a fair trial of a proceeding, for more than one expert to give evidence on an issue in the proceeding.<sup>181</sup>

In Queensland, a doctor or other treatment provider who explains their treatment and the results of same is not considered an “expert”.<sup>182</sup> This rule does not appear to discredit the qualifications of doctors or treatment providers. Instead, it creates an exception to the preferred single expert approach due to the necessity of doctors or treatment providers’ opinions. While Queensland does not create an exception for environmental or scientific expert evidence, this exception-based approach to necessary information may be persuasive in Ontario.

Outside of the state of Queensland, Australia has generally adopted the practice of concurrent evidence.<sup>183</sup> Justice Steven Rares of the Australian Federal Court of Appeal is a proponent of concurrent evidence and explained the primary benefit of concurrent evidence in Australia as follows:

Experts generally take the various courts’ expert codes of conduct very seriously. After all, in general they value their reputations and integrity. But more fundamentally, the ... process often reveals that one party’s case on a critical point will succeed or fail. This is because the experts are able to understand, through professional exchanges, what each has said and on what assumptions.<sup>184</sup>

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<sup>180</sup> *Uniform Civil Procedure Rules 1999* (Qld).

<sup>181</sup> *Ibid* at s 423.

<sup>182</sup> *Ibid* at s 424.

<sup>183</sup> See for example the *Federal Court Rules 2011* (Aus), *Uniform Civil Procedure Rules 2005* (NSW), *Uniform Civil Procedure Rules 1999* (Qld).

<sup>184</sup> *Using the Hot Tub – How Concurrent Expert Evidence Aids Understanding*, The Hon. Justice Steven Rares, New South Wales Bar Association Continuing Professional Development seminar, 2010.

### **3 NEW ZEALAND**

New Zealand's *Judicature Act 1908*<sup>185</sup> governs the rules of civil procedure and the use of experts. In New Zealand, the court may appoint a mandatory single expert to act independently of the parties.<sup>186</sup> The court expert "must, if possible, be a person agreed upon by the parties and, failing agreement, the court must appoint the court expert from persons named by the parties."<sup>187</sup> In addition to the court-appointed expert, the parties may hire their own experts.

Courts in New Zealand have the authority to order concurrent expert evidence if there are multiple experts taking part in an action.<sup>188</sup> The power of the court includes ordering the experts to:

- ◆ confer on specified matters
- ◆ confer in the absence of the legal advisers of the parties
- ◆ try to reach agreement on matters in issue in the proceeding
- ◆ prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement, and
- ◆ prepare the joint witness statement without the assistance of the legal advisers of the parties.<sup>189</sup>

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<sup>185</sup> *Judicature Act 1908* (NZ), 1908/89.

<sup>186</sup> *Ibid* at s 9.36.

<sup>187</sup> *Ibid* at s 9.36(3).

<sup>188</sup> *Ibid* at s 9.44.

<sup>189</sup> *Ibid*.