EXPERTS IN ENVIRONMENTAL CIVIL ACTIONS

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The Anatomy of an Environmental Civil Action: Navigating to and Through Trial

September 20, 2012

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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 civil claims. Environmental litigators retain litigation experts. Experts help to decipher and untangle technical and legal intersections. Litigators rely on experts because of their specialized expertise in a field.

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 good science, not junk science, into evidence.

This paper sets out an overview of what environmental litigators should consider when counting on environmental experts in civil litigation. The paper examines what environmental litigators need to know about finding and retaining experts, the production of expert generated documents and professional reporting obligations. It reviews the law on the admissibility of expert evidence. It discusses how to establish and maintain an expert's credibility before and at trial. Case examples are set out later in the paper that describe where environmental experts have gone wrong before the Courts.

2 PRE-TRIAL

2.1 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 on which the expert will opine.

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2.1.1 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.*[2]

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* or Ontario's *Evidence Act*. 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."[3]

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.[4] 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.[5] However, the Court permitted the consultant to provide both factual and opinion evidence at trial.[6]

2.1.2 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?

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2 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.

3 *R. v. Mohan*, [1994] 2 SCR 9 at para. 31, 114 DLR (4th) 419.

4 *Continental Roofing Ltd. v. JJ's Hospitality Ltd*, 2012 ONSC 1751 at paras. 40-43, 2012 CarswellOnt 2960 (WL Can), [*Continental Roofing*].

5 *Ibid*.

6 *Ibid* at para. 42.

Often, an 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 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[7] and Expert Pages[8] can provide a list of 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[9] provides a directory of over 1,500 academic experts in many fields of study. Ryerson University provides a similar directory of their faculty.[10]

It may be trite to say but worth reiterating that 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.

2.1.3 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.[11] 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.

<u>Conflict of Interest</u>

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 certain parties to the litigation, and that there is no conflict relating to those properties that are the subject of the litigation.

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7 http://www.expertlaw.com
8 http://www.expertpages.com
9 http://www.bluebook.utoronto.ca
10 http://ryerson.ca/news/media/facultyexperts/index.html.html
11 Ontario, *Rules of Civil Procedure*, r. 53.03(2.1).

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 letter should stipulate that the expert's advice and opinions will be utilized by the litigator to render legal advice to the litigator's 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. Importantly, the retainer letter may need to set scope of work boundaries about what the expert is not to opine on.

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 the retaining counsel. In addition, the letter should provide that all findings, opinions, and conclusions should be delivered by the expert exclusively to the retaining 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.[12] A litigator can rebut this presumption if the litigator specifies otherwise in the retainer.

[12] *1401337 Ontario Ltd v MacIvor Harris Roddy LLP*, 2011 ONSC 948 at para. 27, 332 DLR (4th) 175.

2.1.4 HOW MANY EXPERTS CAN BE RETAINED?

Litigators must be selective about how many and which experts they intend to rely on at trial. In Ontario, parties are limited to calling only three experts to testify at trial unless granted leave from the Court.[13] Courts can also appoint additional experts on their own initiative.[14]

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.[15] His Honour discusses the use of single joint expert systems in other judicial systems around the world.[16] Osborne, J. acknowledges that single experts may not be practical in most cases and may not save costs due to the retaining of "shadow" experts.[17] 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.

Certainly, the use of competing experts will remain the norm unless and until the legislature amends the *Evidence Act* or *Rules of Civil Procedure* to adopt another approach. 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 EXPERT DOCUMENTS

Once the retainer is in place and instructions given, environmental experts produce lots of documentation including communications to and from various stakeholders throughout the course of the expert's work. This documentation may include field notes, correspondence, photographs, work plans, 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.

2.2.1 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.*[18]

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13 *Evidence Act*, R.S.O. 1990, c E-23 s 12.
14 Ontario, *Rules of Civil Procedure*, r. 52.03(1).
15 Honourable Coulter A. Osborne, Q.C., "Civil Justice Reform Project – Summary of Findings & Recommendations" (November 2007), online: Ministry of the Attorney General http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf, [*Osborne Report*].
16 *Ibid* at paras. 69-73.
17 *Ibid* at para. 72.
18 Ontario, *Rules of Civil Procedure*, 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.[19] The report must be served not less than 90 days before the pre-trial conference.[20] 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.[21] 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 that will be relied on at trial.[22] Often a litigator will rely on this rule to try to obtain a sneak preview of the expert's views. Most often, this is met with resistance.

What information constitutes "findings, opinions and conclusions of an expert" is the source of contested case law. In *Browne (Litigation Guardian of) v. Lavery*, the Ontario Superior Court found that the meaning of "findings" was given both broad and narrow interpretations.[23]

Where Courts have given "findings" a broad interpretation, this requires the disclosure of:

- technical calculations prepared by the party and sent to the expert
- raw data and test scores used
- field notes, raw data, records made and used by the expert to prepare his or her report
- research, documents, calculations and factual data relied on by the expert.[24]

Where the meaning of "findings" was given a narrow interpretation, the Courts have not required the disclosure of:

- notes of interviews conducted by the expert
- notes and records on which the report is based
- preliminary drafts of the expert's report
- an instructing letter from counsel to an expert witness
- documents to which only "passing reference" is made.[25]

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19 Ontario, *Rules of Civil Procedure*, r. 53.03(1).
20 Ontario, *Rules of Civil Procedure*, r. 53.03(1).
21 Ontario, *Rules of Civil Procedure*, r. 53.03(2.1).
22 Ontario, *Rules of Civil Procedure*, r. 31.06(3).
23 (2002), 58 OR (3d) 49 at paras. 45-46, 37 CCLI (3d) 86, (Ont Sup Ct) [*Browne*].
24 *Ibid* at para. 45.
25 *Ibid* at para. 46.

The Court in *Browne* supported a broad interpretation of "findings". The defendants were ordered to produce an expert's report that was given to a subsequent expert because the initial report constituted a "finding."[26] The defendant's argument that findings should be restricted to what the subsequent expert actually relied on was rejected. The Court stated, "The fundamental difficulty with that principle is that there is no practical and fair way to determine what documents (either in whole or in part) have been influential or relied upon."[27] In *obiter*, the Court held:

> *It is my tentative view that our system of civil litigation would function more fairly and effectively if parties were required to produce all communications which take place between counsel and an expert before the completion of a report of an expert whose opinion is going to be used at trial...*
>
> *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. This area of the case law cries out for appellate review.*[28]

More recently in *Conceicao Farms Inc. v. Zeneca Corp*, the Ontario Court of Appeal held that the scope of Rule 31.06(3) was not as broad as suggested in *Browne*.[29] The Court held that Rule 31.06(3) was limited to discovery of the foundational information for the findings, opinions and conclusions of an expert.[30] The rule did not go so far as to require production of the document but only the information in the document.[31] Privilege over the document still can survive even if information in the document must be disclosed at discovery.[32] The Court noted that the rule is only applicable during discovery before a trial.[33]

Environmental litigators should be aware of this rule and its implications. The rule does not apply where the expert's opinions are prepared for the sole purpose of contemplated or pending litigation and the expert will not be called to testify at trial.[34]

The rule still allows litigators to consult with experts without having to disclosure findings, opinions and conclusions that are negative to their case. This is permitted as long as the litigator does not call the expert at trial.

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26 *Ibid* at para. 52.
27 *Ibid* at para. 54.
28 *Browne*, *supra* note 23 at paras. 66, 70, 71.
29 (2006), 83 OR (3d) 792 at para. 14, 272 DLR (4th) 545, (Ont CA) [*Conceicao*].
30 *Ibid* at para. 19.
31 *Ibid* at paras. 11, 21.
32 *Ibid.*
33 *Ibid* at paras. 18-19.
34 Ontario, *Rules of Civil Procedure*, r. 31.06(3).

Environmental litigators should note the implications of the rule where consultants are hired directly by their clients. Consider where a party discovers potential contamination and retains a consultant to conduct an investigation. An opposing party could request disclosure of potentially negative information where it was prepared for a purpose other than litigation or contemplation of litigation. Environmental litigators should be proactive to ensure their clients are aware of potential litigation and when there is an opportunity to cloak the expert's retainer with privilege.

2.2.2 ASSERTION OF PRIVILEGE

Conceicao highlighted a key distinction between what must be disclosed and what must be produced under Rule 31.06(3). The Court of Appeal was aware that practically speaking it might be easier to produce the document if required to disclose information in a document.[35] However environmental litigators may not be so inclined to do so. Rule 30.02(2) establishes that not every document that is discloseable must be produced if counsel asserts privilege over the document.[36] 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."[37] This is commonly referred to as a "zone of privacy." The zone of privacy is what allows environmental litigators to prepare for trial through the use of experts.

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 intrusive 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.*[38]

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35 *Conceicao, supra* note 29 at para. 12.
36 Ontario, *Rules of Civil Procedure*, r. 30.02(2).
37 *General Accident Assurance Co v. Chrusz* (1999), 45 OR (3d) 321 at para. 23, 180 DLR (4th) 241, (Ont CA) [*Chrusz*], citing R.J. Sharpe, "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence,* L.S.U.C. Special Lectures (Toronto: De Boo, 1984) at 163.
38 *Ibid* at paras. 25-26.

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.[39] Applying the test, the Court concluded that litigation privilege does not protect documents gathered or copied, where the original documents were not privileged.[40] 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*.[41] 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.*[42]

The Court ruled that litigation privilege ends upon termination of the litigation that gives rise to the privilege.[43] The Court noted that litigation privilege may extend beyond termination of the litigation where related litigation is pending or may reasonably be apprehended.[44] 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.[45]

Environmental litigators must be conscious of the evolution occurring in the law of disclosure and privilege. Recent case law is signaling a trend towards full disclosure and limiting the scope of litigation privilege. The scope of privilege over documents in an expert's file remains unclear as the case law continues to unfold. What is becoming clear is that litigators are increasingly being ordered to produce more documents that were once thought protected by privilege. However, Courts have not yet gone as far as requiring production of the expert's entire file.

In *Browne*, the Ontario Superior Court noted that litigation privilege over a report is waived once it is delivered to the opposing party.[46] 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.[47]

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39 *Ibid* at para. 33.
40 *Ibid* at para. 38.
41 *Blank v. Canada (Department of Justice)*, 2006 SCC 39 at para. 60, [2006] 2 SCR 319, [*Blank*].
42 *Blank*, *supra* note 41 at para. 60.
43 *Ibid* at para. 36.
44 *Ibid* at para. 38.
45 *Ibid* at para. 39.
46 *Browne*, *supra* note 23 at para. 17.
47 14 CPC (6th) 287 at para. 17, 2005 CarswellOnt 2303 (WL Can), (Ont Sup Ct).

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.[48] 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.[49] And, the opposing party was entitled to disclosure of the second expert's findings, opinions and conclusions under Rule 31.06(3).

In *Setten v. Johnson*[50], the defendants requested production of an expert's entire file. The Ontario Superior Court ordered the production of two documents that were drafts of the expert's report.[51] The Court protected the remainder of the expert's file under litigation privilege.[52]

In *Bookman v. Loeb*, the Ontario Superior Court relied on *Conceicao* and stated:

> *I infer that the scope of what must be produced lies somewhere between the foundational information for the expert's opinion, and everything that has passed between the expert and the instructing solicitor, including the expert's entire file.*[53]

The Court in *Bookman* ordered production of the expert's draft reports, meeting notes taken by the expert, letters of instructions from current or prior counsel, and the expert's accounts.[54] The Court held that privilege still protected the meeting notes made by the solicitor, correspondence between the solicitor and expert, and the expert's files.[55]

2.2.3 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, the destruction of documents may be seen or inferred to be for some illegitimate or obfuscating purpose. Third, the 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-examination of an expert at trial.

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48 (2007), 158 ACWS (3d) 561 at paras. 32-34, 2007 CarswellOnt 3979 (WL Can), (Ont Sup Ct).
49 *Ibid* at para. 26.
50 2011 ONSC 5786, 209 ACWS (3d) 795, (Ont Sup Ct).
51 *Ibid* at para. 11.
52 *Ibid* at para. 17.
53 72 RFL (6th) 388 at para. 29, 2009 CarswellOnt 3796 (WL Can), (Ont Sup Ct) [*Bookman*].
54 *Ibid* at paras. 35-39.
55 *Ibid.*

Probably, the best approach is to either not destroy any documents or to consistently apply throughout the organization and from file-to-file a well thought out destruction policy. Anything less can lead to an 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.[56] In addition, the Ontario Court of Appeal in *Conceicao* held that Rule 31.06(3) only requires production of information but not the actual document.[57]

2.3 REPORTING OBLIGATIONS TO THIRD PARTIES

Environmental litigators commonly retain consultants to carry out 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.

2.3.1 ENGINEERS

Engineers in Ontario are governed by the Association of Professional Engineers Ontario (the "PEO") under the *Professional Engineers Act.*[58] The PEO Code of Ethics imposes an obligation on engineers to act as faithful agents or trustees of their clients/employers including keeping confidential information and avoiding or disclosing conflicts of interest.[59]

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."[60] 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."[61] 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.[62]

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.

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56 *Bookman, supra* note 53 at para. 37.
57 *Conceicao, supra* note 29 at 21.
58 R.S.O. 1990, c P-28.
59 R.R.O. 1990, Reg. 941, s 77(3).
60 *Ibid* at s 77(2)(i).
61 R.R.O. 1990. Reg. 941, s 72(2)(c).
62 Association of Professional Engineers Ontario, *A Professional Engineer's Duty to Report,* Toronto: PEO, 2010.

Environmental litigators should try to ensure that they have 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 feels compelled to report a dangerous situation. This approach to open communication may relieve the engineer of this onerous obligation and potentially assist the client to mitigate a perilous situation.

2.3.2 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.[63] 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."[64]

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.

2.3.3 REAL WORLD EXPERIENCE

The authors of this paper report that in their 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 authors' clients but no reporting to a public authority has been made, in the authors' experience.

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, more circumstances may arise where engineers and geoscientists feel compelled to focus on safety risks 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.

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[63] O. Reg. 60/01, s 5(2)(a).
[64] O. Reg. 258/02, s 16(2)(2).

3 TRIAL

3.1 ADMISSIBILITY OF EXPERT EVIDENCE

Expert opinion evidence is not automatically admitted into Court. The leading case on the admissibility of expert evidence is *R. v. Mohan.*[65] In *R v. Mohan,* the Supreme Court of Canada outlined four factors for Courts to consider when assessing the admissibility of expert evidence:

- relevance
- necessity in assisting the trier of fact
- the absence of any exclusionary rule
- properly qualified expert.[66]

3.1.1 RELEVANCE

The Supreme Court of Canada in *R. v. Mohan* held that expert evidence must first be relevant to a fact in issue, known as logical relevance. The Court added that the probative value must be weighed against its prejudicial effect. Logically relevant evidence can be excluded if its value is not proportionate to the amount of time to be incurred to adduce that evidence or its reliability is something less than credible.

The *Mohan* proposition is analogous to recent amendments to the Ontario *Rules of Civil Procedure* where the principle of proportionality is now law.[67] Rule 1.04(1.1) of the *Rules of Civil Procedure* provides that:

> *In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.*

For there to be the admission of evidence, the evidence must be logically relevant to the case at bar and have real value before the Court will allow it.

3.1.2 NECESSITY

In *R. v. Mohan,* the Court relied on *R. v. Abbey*[68] and held that the evidence of the expert is necessary where it "is likely to be outside the experience and knowledge of a judge or jury."[69] The Court emphasized that the evidence will only be necessary where the trier of fact is unlikely to form his or her own conclusions without the help of the specialized knowledge of an expert.

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65 *R.v. Mohan, supra* note 3.
66 *R.v. Mohan, supra* note 3 at paras. 17-21.
67 Ontario, *Rules of Civil Procedure*, r. 1.04(1.1).
68 [1982] 2 SCR 24, 138 DLR (3d) 202.
69 *R.v. Mohan, supra* note 3 at paras. 17-21.

The issue of necessity is especially relevant in the context of environmental civil litigation where disputes often involve a "battle of the experts". The Court in *R. v. Mohan* stated:

> *There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's* (sic) *becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept*[70].

Furthermore, the Court in *R. v. Mohan* held:

> *These concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. Although the rule is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue.*[71]

Due to the technical nature of environmental cases, experts are commonly retained to provide environmental litigators with advice and opinions. The "battle of the experts" gets perpetuated once an expert is retained by an opposing party to review the opposing expert's evidence and to conduct its own review. Nonetheless the "battle" must meet the test of necessity.

In *Smith v. Inco Ltd.* the Ontario Superior Court held that an expert's evidence was inadmissible for lack of necessity.[72] One of the issues at trial was what the general public knew about nickel contamination in soil at certain time periods. The expert in question had expertise in mass communication and organized thousands of relevant documents including newspapers articles, public notices, reports, internet postings, and television broadcasts. The expert proposed to give opinion evidence about what the public knew based on content, nature and readability of the documents. The Court held that the evidence was helpful but not necessary.[73] It was not outside the capabilities of a judge to read and analyze the documents. Notwithstanding, the Court acknowledged the particular expert's experience at many trials in the United States.[74] This shows that it is not enough for the expert to possess the requisite qualifications. The necessity of that expert's evidence must be and will be assessed by the Court on an expert-by-expert basis.

Environmental experts are frequently asked to opine about sources of contamination, contaminant pathways, contaminant mobility, and impacts to the environment and human health. These efforts relate to the plaintiff's efforts to prove liability and the defendant's attempts to refute same. It also speaks to the issue of damages as technical input is essential to an assessment of damages. There can be a grey line (as opposed to a bright line) between an

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70 *R.v. Mohan*, *supra* note 3 at para. 28.
71 *R.v. Mohan*, *supra* note 3 at paras. 28-29.
72 (2009), 84 CPC (6th) 111 at para. 43, 2009 CarswellOnt 7095, (Ont Sup Ct).
73 *Ibid* at para. 27.
74 *Ibid* at paras. 22-23.

environmental expert's opinion evidence and that expert's opinions about the ultimate issues at trial. Only the former should be permitted into evidence. In *Dulong v. Merrill Lynch Canada Inc,* the Ontario Superior Court explained:

> *While an expert can provide the trier of fact with a ready-made inference, it is neither appropriate nor helpful for an expert to make factual findings...Where the expert purports to opine on the ultimate issue before the Court and threatens to usurp the role of the trial judge, the requirement of necessity should be strictly enforced* [citations omitted].[75]

Environmental litigators must ensure that their own experts do not step outside their role as an aid to the Court and into the role of judge and/or jury. Slipping into the role of judge and/or jury can be fairly easily done. Expert witnesses can be nervous and may say more than they ought to. And, it is human nature to want to be helpful and to get to conclusions. However, this is the task of the trier of fact, not the expert witness.

It is the role of the litigator to remind the expert that he or she must be impartial and is there to assist the Court only about an issue within the expert's expertise. Litigation counsel should prepare their experts to understand the distinction between testifying about technical issues and not to draw conclusions that go to the heart of liability. At the time of retaining experts, litigation counsel should advise about the expert's duty to the Court as only recently set out in Rule 4.1.01 of Ontario's *Rules of Civil Procedure:*

> *4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,*
>
> *(a) to provide opinion evidence that is fair, objective and non-partisan;*
>
> *(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and*
>
> *(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.*
>
> *(2) Duty Prevails – 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. O. Reg. 438/08, s. 8.*

[75] (2006), 80 OR (3d) 378 at para. 14, 23 CPC (6th) 172, (Ont Sup Ct).

3.1.3 ABSENCE OF EXCLUSIONARY RULE

Expert evidence is subject to any applicable exclusionary rules of evidence. The Court in *R. v. Mohan* held that compliance with the three other factors will not ensure admissibility of expert evidence if the evidence is otherwise excluded by the rules of evidence.[76]

3.1.4 PROPERLY QUALIFIED EXPERT

Expert evidence will only be admitted if the expert is properly qualified. A properly qualified expert is one who has special or peculiar knowledge through study or experience on a matter.[77] At trial, the proper practice is for litigators to qualify expert witnesses in the areas in which they will testify.[78]

The qualifications required to properly qualify an expert are broad. Rule 53.03(2.1) of Ontario's *Rules of Civil Procedure* prescribes that an expert set out his or her qualifications, employment and education in the expert's report.[79] The specific qualifications must be in the area of expertise on which the expert will give evidence.

In *Bryson v. Canada*[80], the Court did not admit evidence from one of the plaintiff's experts for lack of qualifications. The expert in question had a Ph.D. in chemical engineering. The expert provided affidavit evidence about potential links between the chemicals at issue and the medical conditions of the plaintiffs. The Court in *Bryson* noted that the proposed expert had significant experience and conducted medical research in conjunction with or under the direction of medical professionals.[81] However, the Court ruled that the expert was not qualified in the field of epidemiology, toxicology, immunology or endocrinology and therefore could not be qualified to testify. The Court found that the expert: (1) had no academic qualifications in those fields, (2) did not have a degree in medicine, (3) did not work or study in those fields during her undergraduate or graduate studies, (4) had not taken any academic courses in those fields, and (5) did not publish any peer reviewed academic journal articles in those fields.[82]

One issue at trial in *WCI Waste Conversion Inc. v. ADI International Inc.*[83], was the cause of operational problems at a composting plant. The defendant retained an expert to identify the problems and to make recommendations. The expert had a Ph.D. and was the director of a composting school at the University of Maine. The Prince Edward Island Supreme Court qualified the expert in the field of composting process only. The Court found that the expert had no experience designing facilities with the scale or type of facility in question. The defendant admitted that the process used at the composting plant was more complicated than the process the expert was familiar with. This became evident at trial as the expert was unaware of common terms and basic specifications.

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76 *R.v. Mohan, supra* note 3 at para. 30.
77 *Ibid* at para. 31.
78 *R. v. Marquard*, [1993] 4 SCR 223 at para. 36, 108 DLR (4th) 47, [*Marquard*].
79 Ontario, *Rules of Civil Procedure*, r. 53.03(2.1).
80 2009 NBQB 204, 353 NBR (2d) 1 [*Bryson*].
81 *Ibid* at para. 17.
82 *Ibid* at para. 16.
83 2008 PESCTD 40, 283 Nfld & PEIR 254 [*WCI Waste*].

Environmental litigators should not assume that an expert will be qualified based solely on his or her academic credentials, professional designations and experience. Litigators must assess the expertise of an expert in the context of the very specific matter that that expert is being asked to opine on and testify about. The litigator should develop a checklist of topic related questions to put to the expert prior to retaining the expert. The lawyer should ask about the expert's experience in testifying before administrative bodies and in the Courts. Litigators should research cases involving the expert and particularly those where the expert gave evidence to see what the judicial decision-makers wrote about that expert's testimony.

In *R. v. Marquard,* the Supreme Court of Canada made it clear that the onus is on opposing counsel to object to an opposing litigant's expert's qualifications or if it becomes apparent that the expert is testifying outside his or her area of expertise.[84] The Court held, absent an objection, that expert evidence may still be admissible if the evidence falls outside the area to which the expert should be limited.[85] However, where an expert is shown not to have expertise in the area in which he or she provides testimony, the evidence must be disregarded.[86]

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.*[87]

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.* [88], *General Electric Company v. Joiner*[89] and *Kumho Tire Company Ltd. v. Carmichael.*[90]

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84 *Marquard, supra* note 79 at para. 37.
85 *Ibid.*
86 *Ibid.*
87 *R. v. Mohan, supra* note 3 at para. 23.
88 509 U.S. 579 (1993), [*Daubert*].
89 522 U.S. 136 (1997), [*Joiner*].

In *Daubert*, the U.S. Supreme Court had to consider 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.[91] 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.[92] 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.[93]

Environmental litigators should be aware of *R. v. J.(J.-L.)* and the *Daubert* factors, 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.

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90 526 U.S. 137 (1999), [*Kumho*].
91 2000 SCC 51 at para. 33, [2000] 2 SCR 600.
92 *Ibid* at para. 35.
93 *Ibid.*

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.*[94]

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 of independence.

In the context of a prosecution, the case of *R. v. Commander Business Furniture Inc.*[95] 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 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.[96] 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.[97]

In *WCI Waste,* both defendants' experts lost credibility because of the defendants' influence in the preparation of the experts' reports. 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.

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94 *Ontario (Ministry of the Environment) v. Sault Ste Marie (City)*, 2008 ONCJ 583 at para. 91; 39 CELR (3d) 222.
95 (1992), 9 CELR (NS) 185, 1992 CarswellOnt 222, (Ont Ct J) [*Commander*].
96 *Ibid* at paras. 174-175, 188.
97 *Ibid* at para. 194.

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.[98] 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".[99]

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.[100] 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.*[101]

The challenge with the use of "hired guns" and "opinions for sale" was discussed in the *Osborne Report*.[102] 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.*[103]

As a result, Ontario's *Rules of Civil Procedure* was amended based on Justice Osborne's recommendation to expressly impose a duty on experts.[104] 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.[105]

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98 *WCI Waste, supra* note 84 at para. 224-227.
99 *Ibid* at para. 228.
100 *Ibid* at para. 234.
101 *Ibid* at para. 244.
102 *Osborne Report, supra* note 15 at 75.
103 *Ibid.*
104 Ontario, *Rules of Civil Procedure*, r. 4.1.
105 Ontario, *Rules of Civil Procedure*, r. 53.03(2.1.).

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.[106] 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 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.[107] 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.[108] 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.[109]

3.3.2 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.[110]

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.[111] 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.[112]

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.[113] 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.

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106 *R. v. Inco* (2006), 80 OR (3d) 594 at paras. 42-45, 21 CELR (3d) 240, (Ont Sup Ct).
107 *Ibid* at para. 45.
108 *Ibid* at para. 49.
109 *Ibid* at para. 45.
110 Ontario, *Rules of Civil Procedure*, r. 53.03(2.1).
111 *WCI Waste*, *supra* note 84 at para. 212.
112 *Ibid* at paras. 210-213.
113 2009 BCPC 28, 42 CELR (3d) 265 [*Simpson*].

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 Soil, Ground Water and Sediment Standards. Ensuring in advance that the experts are using the right methodologies and standards (whether prescribed in law or not), can avoid an expert's fatal loss of credibility in the litigation process.

Document #: 530280