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Phone: (905) 415-5889 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

Environment

Overeager experts get wake-up call as they battle it out in environmental litigation

By **Marc McAree and Victoria Chai**

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(October 11, 2017, 2:40 PM EDT) -- Disputes that lead to environmental claims almost always deal at the intersection of science, engineering and law. Environmental experts are integral to the environmental lawyer's ability to comprehend and advocate about the science and engineering that underpins many environmental disputes.

Environmental litigators in Ontario are, like all other litigators, bound by the Rules of Civil Procedure in the civil litigation context. There is recent new law about (i) experts' duty of loyalty to decision-makers and (ii) non-disclosure of experts' files and reports, with the former incorporated into the rules. This new law is being adopted by administrative tribunals, including Ontario's Environmental Review Tribunal.

Further, as environmental litigators frequently confront the "battle of the experts," they need their experts to persuasively express complex technical ideas grounded in the facts and in plain language. Otherwise, the opponent's expert's evidence may be preferred by courts and tribunals.

Disclosure of experts' files and reports

It was not so long ago that the Ontario Court of Appeal ruled in *Moore v. Getahun* 2015 ONCA 55. The case involved allegations of medical malpractice that gave rise to whether a litigation lawyer is permitted to communicate and, if so, when and to what extent, with experts retained to provide evidence at trial.

The lower court ruled in *Moore v. Getahun* 2014 ONSC 237 that lawyer-expert communications were improper. This was in part because Rule 53.03 of the Rules of Civil Procedure aims to ensure the integrity of expert witnesses. The lower court concluded that counsel's prior practice of reviewing draft reports should stop. In essence, it put an end to communications between counsel and experts from when counsel retains experts for trial.

There was much fallout in the legal community from the lower court decision, including an appeal of that ruling to the Court of Appeal. The Appeal Court in *Moore* recognized that the lower court judge had concerns about the "hired gun" problem, resulting in its decision to strictly limit discussions between expert witnesses and counsel, including requiring all discussions to be documented and subject to production.

In expressing a diametrically opposed view, Justice Robert Sharpe, writing for the Court of Appeal, cited three ways in which expert witnesses' objectivity is fostered in our judicial system and through the adversarial process, including:

- ethical and professional standards of the legal profession that forbid counsel from engaging in practices that may interfere with the independence and objectivity of expert witnesses.
- ethical standards of other professional bodies that impose obligations on their members to be independent and impartial when dealing with expert evidence.
- the adversarial process, including cross-examination.

In the end, the Court of Appeal held that consultation and collaboration between counsel and expert witnesses is essential to ensure that experts understand their duties in the Rules (4.1.01 and 53). The court noted that counsel plays a crucial mediating role by explaining the legal issues to the expert witness and then by coherently presenting complex expert evidence to the court. It also found that lawyers and experts can communicate.

In addition, subject to any suggestion of improper influence on an expert witness, that expert's file remains the subject of privilege and is not disclosable in the litigation.

Let's fast forward to 2016, before Ontario's Environmental Review Tribunal in *Hirsch v. Ontario (Ministry of the Environment and Climate Change)* [2016] O.E.R.T.D. No. 54. This was an appeal of a renewable energy approval for a wind facility comprising 27 wind turbines and associated infrastructure.

The tribunal was faced with a motion to disclose the files of the experts to be called at the hearing. It adopted and applied the dictum of the Appeal Court in *Moore* into the environmental law and administrative law contexts. The tribunal found there was no evidence that would give rise to a reasonable suspicion that counsel improperly influenced the witnesses. It also held that litigation privilege applied to all correspondence, draft affidavits, draft witness statements, notes and records of consultations between counsel and their witnesses and expert reports. The moving party's motion for disclosure was dismissed by the tribunal.

The tribunal's application of *Moore* sends a clear message to environmental counsel that communication between experts and counsel is permitted. Courts and tribunals expect that such communications will not be improper or coercive, and that experts will abide by their duty of loyalty to judicial decision-makers. To do otherwise risks the credibility of the experts and counsel. Loss of credibility will almost certainly result in prejudice and harm to the client's case.

Only one environmental expert wins in the end

In most litigation disputes, environmental litigators and their experts partake in the "battle of the experts." Arising from trial in *Weenen v. Biadi* 2015 ONSC 6832, the Ontario Superior Court of Justice had to decide if Biadi caused flooding at Weenen's property, resulting in damage that was compensable. The court reviewed the evidence from the parties' respective experts and spent considerable time examining each expert's theory of causation.

The court preferred and accepted the evidence of the plaintiff's expert because that expert:

- had an opinion based on accurate, easily discernible facts.
- did not guess at anything.
- was responsive.
- provided reasonable explanations (and those explanations were based on facts).

- understood his duty as an expert to provide unbiased, scientific evidence in accordance with the acknowledgement of the expert's duty.

It is incumbent on environmental litigators to ensure that their experts have clear and logically articulated opinions that are well supported in fact. In the environmental context, experts must be able to clearly communicate complex scientific and engineering concepts in plain language. They also must honestly and reasonably be able to speak to the strengths of their opinions, and address weaknesses in their reports and during oral testimony when challenged.

Pursuant to Rule 4.1.01, all experts, including environmental experts, owe a duty of loyalty to the court, not to the client who retains them. We see increasingly that administrative tribunals, such as Ontario's Environmental Review Tribunal, are requiring experts to acknowledge their duty of loyalty to the tribunal by executing an "Acknowledgement of Expert's Duty" form.

The duty of loyalty of the expert is law, and experts must comply. Otherwise, their non-compliance will almost undoubtedly lead to reputation ruin — and prejudice their clients in litigation.

Marc McAree, a partner at Willms & Shier Environmental Lawyers LLP *in Toronto, is certified as a specialist in environmental law by the Law Society of Upper Canada. Victoria Chai is an associate lawyer and former student-at-law at the firm.*

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