Experts in Environmental Litigation

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Introduction

- **Thesis**
  - “experts” are crucially essential in the litigation of environmental disputes
  - counsel must be permitted, under the cloak of litigation privilege, to communicate with experts from the time of retaining the expert to the time that the expert begins to testify
  - credibility means everything

Introduction

- **What do environmental ‘experts’ do?**
  - decipher
  - untangle
  - inform
  - educate
  - clarify
  - provide opinions
  - support clients and counsel in negotiations
  - write expert’s reports
  - sometimes testify under oath

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Introduction

- **Cases are often won or lost based on the**
  - credibility of the expert
  - ability of the expert to present a more likely and understandable explanation than the expert opposite

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Expert's Duty of Loyalty

- **Environmental 'experts' in litigation have duties**
- **"duty of loyalty to the Court", comply with legal privilege and confidentiality, to be truthful and fair**
- **Experts must sign off on his or her "duty of loyalty"**
- **Environmental administrative tribunals are adopting the civil expert's "duty of loyalty to the court" principle**

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Expert's Duty of Loyalty

- **Rule 4.1.01 of Ontario's *Rules of Civil Procedure***
  - Expert must provide:
    - (1) opinion evidence that is fair, objective and non-partisan
    - (2) related only to matters that are within the expert's area of expertise, and
    - (3) are required to provide such additional assistance as the court may reasonably require to determine a matter in issue
- **Rule 53.03 of Ontario's *Rules of Civil Procedure***
  - a party may introduce expert evidence first by written report and then by oral testimony at trial
  - each party must serve the expert's written report on every opposing party within the time designations set out in the *Rules*

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Expert's Duty of Loyalty

Westerhof v. Gee Estate

- A "participant" or "non-party" expert with "special skill, knowledge, training, or experience" can give opinion evidence without complying with Rule 53.03 where:
  - the opinion to be given is based on the witness's (sic) observation of or participation in the events at issue, and
  - the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events

  Ontario Superior Court of Justice - 2014

- Most obvious example of a "participant" or "non-party" expert" in the context of "environmental litigation" is the consultant that drills boreholes, installs monitoring wells, takes soil and groundwater samples for laboratory testing and writes a report

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Litigation Privilege

- **What is really at stake are the answers to these questions**
  - How far does privilege extend?
  - Does privilege reach beyond the expert's final report and into the expert's file?
  - Does all of this mean that the expert's field notes, drawings, notes-to-self, notes of conversations with colleagues and instructing counsel, report outlines and draft written reports are producible in litigation?

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Litigation Privilege

Moore v. Getahun (Trial)

"…[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 and the role of the expert witness, I concluded 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.

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."

Ontario Superior Court of Justice - 2014

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Litigation Privilege

Moore v. Getahun (Court of Appeal)

"The trial judge was obviously of the view that the then current practice and the ethical rules and standards of the legal profession were inadequate to deal with the "hired gun" problem. Her solution was to strictly control discussions between expert witnesses and counsel and to require that all discussions be documented and subject to disclosure and production."

Ontario Court of Appeal - 2015

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Litigation Privilege

Moore v. Getahun (Court of Appeal)

"Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties reflected by Rule 4.1.01 and contained in Form 53 acknowledgement of the expert's duty.

Counsel plays a crucial mediating role by explaining the legal issues to the expert witness and then by pressing complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared.

Leaving the expert witness entirely to his or her own devices, or requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner."

Ontario Court of Appeal - 2015

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Litigation Privilege

Moore v. Getahun (Court of Appeal)

"Absent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert, a party should not be allowed to demand production of draft reports or notes of interactions between counsel and an expert witness."

Ontario Court of Appeal – 2015

Leave to Appeal to SCC Denied
September 17, 2015

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Experts' Credibility

Seaspan ULC v. British Columbia (Director, Environmental Management Act)

"[I]n 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."

B.C. Environmental Appeal Board – 2014 and 2015

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Litigation Privilege

- **The B.C. Environmental Review Board held:**
  - The expert's report is deceptive
  - The expert adopted an artificially technical definition of "contamination"
  - 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

B.C. Environmental Appeal Board – 2014 and 2015

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Experts' Credibility

Seaspan ULC v. British Columbia (Director, Environmental Management Act)

"Seaspan claims that it did not know, or could not have known, of the flaws in [its expert's] Report. The Panel disagreed. The Panel found 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."

B.C. Environmental Appeal Board – 2014 and 2015

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Experts' Credibility

Seaspan ULC v. British Columbia (Director, Environmental Management Act)

"…this was more than a "doubtful case". Rather it was hopeless, and the theory advanced at the hearing should never have been pursued."

B.C. Environmental Appeal Board – 2014 and 2015

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Experts' Credibility

Seaspan ULC v. British Columbia (Director, Environmental Management Act)

"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 boreholes did not signify "contamination" because of a lack of confirmatory test results was preposterous."

B.C. Environmental Appeal Board – 2014 and 2015

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Expert's Credibility

White Burgess Langille Inman v. Abbott and Haliburton Co. (SCC)

Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her. These concepts, of course, must be applied to the realities of adversary litigation.

Supreme Court of Canada - 2015

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Reference

Marc McAree, Robert Woon & Anand Srivastava, "Experts in Environmental Litigation" (2015) 28 Can J Admin L & Prac 123

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