COMMUNICATION BETWEEN LAWYERS AND EXPERTS

Marc McAree,* Robert Woon** & Anand Srivastava***

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*Marc McAree is a partner at Willms & Shier Environmental Lawyers LLP in Toronto and is certified as a Specialist in Environmental Law by the Law Society of Upper Canada.

**Robert Woon is an associate at Willms & Shier Environmental Lawyers LLP. Robert was previously a summer student and an articling student with the firm.

***Anand Srivastava was a 2014 summer student at Willms & Shier Environmental Lawyers LLP. Anand will return to the firm in 2015/2016 to complete his articles.

INTRODUCTION

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.

CASE LAW DATING BACK TO 1979

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.[1]

The Nova Scotia Supreme Court partially reversed its stance in 1992 with its judgment in *Crocker v. MacDonald*.[2] 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.[3]

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.*,[4] Master MacLeod in the Ontario Superior Court of Justice summarized the case law, in 2000, as follows:

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[1] *T Eaton Co v Neil J Buchanan Ltd*, 31 NSR (2d) 135.
[2] *Crocker v MacDonald*, 116 NSR (2d) 181.
[3] *Ibid*.
[4] *Mahon v Standard Assurance Life Co*, [2000] OJ No 2042 (QL) [*Mahon*].

> A recent decision of this court on point to which I was referred was *Calvaruso v. Nantais*[5] referring to *Bell Canada v. Olympia & York*.[6] 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.*).[7]

These issues were again addressed in 2002 by the Ontario Superior Court of Justice in *Browne*.[8] 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.[9]

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 …
>
> 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*.[10]

In *Flinn v. McFarland*,[11] 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:

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[5] *Calvaruso v Nantais* (1992), 7 CPC (3d) 254 (Gen Div).
[6] *Bell Canada v Olympia & York* (1989), 68 OR (2d) 103 (HCJ).
[7] *Ocean Falls Corp v Worthington (Canada) Inc* (1985), 69 BCLR 124.
[8] *Brown (Litigation Guardian of) v Lavery* (2002), 58 OR (3d) 49 [*Browne*].
[9] *Ibid* at paras 58-59.
[10] *Ibid* at paras 69-70.
[11] *Flinn v McFarland*, 2002 NSSC 272.

> 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.[12]

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*.[13] 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.

The most recent decision on these issues, *Moore v. Getahun*,[14] 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.

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[12] *Ibid* at para 9.

[13] *Conceicao Farms Inc v Zeneca Corp*, 83 OR (3d) 792 [*Conceicao*].

[14] *Moore v Getahun*, 2014 ONSC 237 [*Moore*].

> 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.[15]

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.

APPLICATION OF MOORE IN ENVIRONMENTAL LITIGATION

The Ontario Superior Court of Justice 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.

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.

[15] *Ibid* at paras 50-52.

In the Superior Court decision, 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.[16] Justice Wilson raised concern about the expert's independence and integrity.[17] 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.

The Superior Court decision 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.

The Superior Court 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?

The Superior Court should not be further extrapolated to preclude without prejudice discussions. The Rules explicitly provide that experts can engage in same.[18] 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 the Superior Court decision 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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[16] *Ibid* at para 47.

[17] *Ibid* at para 50.

[18] *Rules of Civil Procedure*, RRO 1990, Reg 194 promulgated under Ontario's *Courts of Justice Act* [*Rules*] at Rule 20.05(2)(k).

Case law decided before *Moore* has only made passing reference to pre-litigation experts and has raised no practice issues.[19] 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.

MOORE v. GETAHUN – ON APPEAL

On January 29, 2015, the Ontario Court of Appeal released its decision [2015 ONCA 55] on appeal of Justice Wilson's Reasons for Decision dated January 14, 2014 in *Moore v. Getahun* [2014 ONSC 237].

Background

Mr. Moore, then 21, was performing tricks on his motorcycle when he broke his arm. He visited a hospital seeking medical attention for his injury. The emergency room doctor attempted to realign Mr. Moore arm and applied a full circumferential cast to Mr. Moore's arm. The next day, in pain, Mr. Moore attended at a second hospital where the attending doctor diagnosed that Mr. Moore had compartment syndrome. Surgery averted further damage to Mr. Moore's arm. Mr. Moore brought a medical malpractice suit against Dr. Getahun, the initial emergency room attending doctor.

The Decision at Trial

The matter went to trial. In her trial decision, Justice Wilson noted that one of the medical experts and counsel conferred about the experts' report. In fact, there was a telephone call that lasted about 90 minutes during which the expert doctor and counsel discussed the doctor's draft report. Justice Wilson declared that it was inappropriate for counsel to review draft expert reports. She wrote:

> 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 report are no longer acceptable. [para. 50-52].

The Decision of the Ontario Court of Appeal

The Ontario Court of Appeal summarized its view of Justice Wilson's finding:

> 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. [para. 45]

[19] See, for example, *Robinson v Ottawa (City)* (2009), 55 MPLR (4th) 283 at para 44.

In disagreeing with the trial judge, Justice Sharpe, writing for the Court of Appeal, cited three ways in which expert witness objectivity is fostered in the law and in practice:

> First, the ethical and professional standards of the legal profession forbid counsel from engaging in practices likely to interfere with the independence and objectivity of expert witness. [para. 59]
>
> Second, the ethical standards of other professional bodies place an obligation upon their members to be independent and impartial when giving expert evidence. [para. 60]
>
> Third, the adversarial process, particularly through cross-examination, provides an effective tool to deal with cases where there is an air of reality to the suggestion that counsel improperly influenced an expert witness. [para. 61]

In commenting on Justice Wilson's dictum about communications between expert witnesses and counsel, Justice Sharpe disagreed with the trial judge:

> 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 the Form 53 acknowledgement of expert's duty. Reviewing a draft report enables counsel to ensure that the report (i) complies with the *Rules of Civil Procedure* and the rules of evidence, (ii) addresses and is restricted to the relevant issues and (iii) is written in a manner and style that is accessible and comprehensible. Counsel need to ensure that the expert witness understands matters such as the difference between the legal burden of proof and scientific certainty, the need to clarify the facts and assumptions underlying the expert's opinion, the need to confine the report to matters within the expert witness's area of expertise and the need to avoid usurping the court's function as the ultimate arbiter of the issues. [para. 63]
>
> 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. [para. 64]
>
> 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. [para. 65]

The Court of Appeal proceeded to assess: (1) if there is an obligation to make production of communications between counsel and expert witnesses, or (2) if such communications have the protection of litigation privilege.

The Court stated the basic principle from *Blank v. Canada (Ministry of Justice)*, 2006 S.C.C. 39, that "[l]itigation privilege protects communications with a third party where the dominant purpose of the communication is to prepare for litigation" [para. 68]. The court in *Blank* refers to this principle as the "zone of privacy".

Justice Sharpe wrote:

> In my view, the ends of justice do not permit litigation privilege to be used to shield improper conduct. As I have already mentioned, it is common ground on this appeal that it is wrong for counsel to interfere with an expert's duties of independence and objectivity. Where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witnesses's duties of independence and objectivity, the court can order disclosure of such discussions. [para. 77]
>
> 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. [para. 78]

The Court of Appeal affirmed that the expert's report to be relied on at trial and other information mandated by Rule 53.03(2.1) must be disclosed in the litigation. This other information has been called "the foundation information" for the expert's opinion as referred to in *Conceicao Farms Inc. v. Zeneca Corp.* (2006), 83 O.R. (3d) 792 (C.A.).

Ontario's Rule 53.03(2.1) states:

> (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:
>
> 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.
>
> 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.
>
> 7. An acknowledgement of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48.

CONCLUSION

On January 29, 2015, the Ontario Court of Appeal held that counsel and their experts are permitted to confer in a way that does not interfere with an expert's impartiality and meets the standards of conduct prescribed by both the expert's and counsel's respective professional regulating bodies. These communications do not need to be committed to writing to avoid increased delay and cost.

Counsel is to ensure that the expert: (1) understands its legal duty to the court; (2) complies with applicable rules of procedure and evidence; (3) produces an opinion that is relevant to the issues in dispute; and (4) prepares a report that is comprehensible for and useful to the court.

Communications between counsel and the expert will have the protection of litigation privilege unless there are reasonable grounds to suspect that counsel communicated with the expert in a way that is likely to interfere with the expert's duties of independence and objectively. Only "the foundational information" that supports and unpins the opinion must be disclosed along with the expert's report to be relied on at trial.