

EXPERTS IN ENVIRONMENTAL LITIGATION

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INTRODUCTION

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

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

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

This paper provides an overview of what environmental litigators should consider when counting on environmental experts in litigation. We examine what environmental litigators need to know about finding and retaining experts, the production of expert generated documents, and the requirements under Ontario's *Rules of Civil Procedure*¹ and the Law Society of Upper Canada's *Rules of Professional Conduct*.² We examine what opinions Canadian courts offer about the expected relationship between counsel and an expert, and alternative approaches to tendering expert evidence. Finally, we review the law about the admissibility of expert evidence including how to establish and maintain an expert's credibility before and at trial.

PRE-TRIAL

The Law Society of Upper Canada's Rules of Professional Conduct

The Law Society of Upper Canada's *Rules of Professional Conduct* requires a lawyer to act with the requisite level of competence.³ A competent lawyer is judged by his or her relevant knowledge, skills and attributes.⁴ A competent lawyer's use of experts is described in the Commentary to Rule 2.01 as follows:

¹ *Rules of Civil Procedure*, RRO 1990, Reg 194 promulgated under Ontario's *Courts of Justice Act* [Rules].

² The Law Society of Upper Canada, *Rules of Professional Conduct, Amendments based on the Federation of Law Societies of Canada's Model Code of Professional Conduct* (Toronto: Law Society of Upper Canada, October 2014) [Professional Conduct].

³ *Ibid.*, Rule 2.01.

⁴ *Ibid.*

The lawyer may also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, the lawyer should not hesitate to seek the client's instructions to consult experts.⁵

The Law Society of Upper Canada's *Rules of Professional Conduct* were recently amended to incorporate the Federation of Law Societies of Canada's *Model Code of Professional Conduct*⁶ and came into force in October 2014. The competent lawyer rule, now Rule 3.1-2 (Commentary 7), relating to experts was modified to mirror the Federation of Law Societies of Canada's *Model Code of Professional Conduct*:

The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts. [emphasis added]⁷

Retaining Experts

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

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.⁸

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*⁹ or Ontario's *Evidence Act*.¹⁰ The common law has broadly defined a properly qualified

⁵ *Ibid.*

⁶ Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: Federation of Law Societies of Canada, December 2012).

⁷ *Professional Conduct*, *supra* note 2.

⁸ 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.

⁹ *Rules*, *supra* note 1.

¹⁰ *Evidence Act*, RSO 1990, c E-23 s 12.

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.”¹¹

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.¹² 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.¹³ However, the Court permitted the consultant to provide both factual and opinion evidence at trial.¹⁴

How to Find an Expert?

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

One effective way to locate an expert is through referrals from other lawyers. This is common practice for lawyers and especially so from one lawyer to another in the same firm. Through referrals, lawyers learn about experts, including their expertise, work habits and fee structures. A referral might not identify the right expert for the case, but may provide a good lead that gets the 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 ExpertLaw¹⁵ and Expert Pages¹⁶ provide American experts in real estate, engineering and science disciplines. Legal associations also provide expert directories to their members such as

¹¹ *R v Mohan*, [1994] 2 SCR 9 at para 31 [*Mohan*].

¹² *Continental Roofing Ltd v JJ's Hospitality Ltd*, 2012 ONSC 1751 at paras 40-43 [*Continental Roofing*].

¹³ *Ibid.*

¹⁴ *Ibid* at para 42.

¹⁵ Expert Law, online: <<http://www.expertlaw.com>>.

¹⁶ Expert Pages, online: <<http://www.expertpages.com>>.

the Ontario Trial Lawyers Association. Legal databases by Westlaw Canada or LexisNexis offer expert directories for a fee. The University of Toronto Blue Book¹⁷ lists over 1,500 academic experts in many fields of study. Ryerson University provides a similar directory of its faculty.¹⁸

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.

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.¹⁹ Litigators need to balance between providing the expert with accurate and sufficient information to allow him or her to do his or her work while not providing irrelevant information. At a minimum, the litigator’s retainer letter addressed to the expert should touch on the following topics.

Conflict of Interest

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

Background, Purpose, and Scope of Work

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

¹⁷ University of Toronto, “Blue Book”, online: <<http://www.bluebook.utoronto.ca>>.

¹⁸ Ryerson University, “Faculty Experts”, online: <<http://ryerson.ca/news/media/facultyexperts/index.html>>.

¹⁹ *Rules, supra* note 1.

important if the litigator proposes to cloak the expert's work under privilege.

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

Use and Confidentiality

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

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

Finally, the retainer letter should identify who is responsible to pay the expert's accounts. Environmental litigators should note the presumption that the litigator is responsible for an expert's reasonable fees where the litigator instructs the expert to prepare material for litigation.²⁰ A litigator can rebut this presumption if the litigator specifies otherwise in the retainer letter.

How Many Experts can Each Litigant Retain?

Litigators must be selective about how many and which experts they intend to rely on at trial. In Ontario, parties are limited to calling three experts to testify at trial unless granted leave from the Court.²¹ Courts can also appoint additional experts on their own initiative.²²

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.²³ His Honour discusses the use of single joint expert systems in other judicial systems around the world.²⁴

²⁰ *1401337 Ontario Ltd v MacIvor Harris Roddy LLP*, 2011 ONSC 948 at para 27.

²¹ *Evidence Act*, *supra* note 10.

²² *Rules*, *supra* note 1 at Rule 52.03(1).

²³ Hon Coulter A Osbourne, "Civil Justice Reform Project – Summary of Findings & Recommendations" (2007) [Osborne Report].

²⁴ *Ibid* at paras 69-73.

Osborne, J. acknowledges that single joint experts may not be practical in most cases and may not save costs due to the retaining of “shadow” experts.²⁵ Though Justice Osborne did not recommend a mandatory use of joint experts in Ontario, he did recommend that parties consult early in the litigation process to discuss the prospect of jointly retaining a single expert. We set out below a discussion about alternatives to the traditional use of experts.

Certainly, the use of competing experts will remain the norm unless and until the legislature amends the *Evidence Act*²⁶ or *Rules of Civil Procedure*²⁷ to adopt another approach or endorses alternative approaches. In the meanwhile, litigators should be mindful that the rule of three experts at trial is a prescribed limit and is enforceable in Ontario Courts.

Requirements under Ontario’s Rules of Civil Procedure

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

Expert’s Duty to the Court

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

(1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules:

- (a) to provide opinion evidence that is fair, objective and non-partisan
- (b) to provide opinion evidence that is related only to matters that are within the expert’s area of expertise, and
- (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

Party-appointed Experts

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

²⁵ *Ibid* at para 72.

²⁶ *Evidence Act*, *supra* note 10.

²⁷ *Rules*, *supra* note 1.

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

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

Court-appointed Experts

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

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

In his summary of findings and recommendations, Osbourne, J. notes that Rule 52.03 is "rarely used" by the court.²⁸

Academic Nicholas Bala has advocated for increasing the use of Rule 52.03 to reduce

²⁸ *Ibid.*

costs and promote settlement between litigants.²⁹ Bala believes that lawyers are able to avoid obvious biases when hiring and instructing an expert. However, the broader paradigm of paying an expert for his or her opinion leads to subtle biases that may affect objectivity. Bala compares court-appointed experts to the financial sector's move to strengthen the independence of auditors and rating agencies.³⁰

Concurrent Evidence from Experts

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

Rule 50.07(1)(c) states:

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

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

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

- (i) there is a reasonable prospect for agreement on some or all of the issues, or
- (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court.

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

Expert Documents

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

²⁹ Nicholas Bala, "Inside the mind of an expert", *The Lawyers Weekly* (15 February 2013) 10.

³⁰ *Ibid.*

and to what extent can privilege be exerted over the expert's work product during the litigation.

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.³¹

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.³² The report must be served not less than 90 days before the pre-trial conference.³³ 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.³⁴ The rule also requires that the expert include a statement about the expert's duty to the Court. The expert must append to his or her report the instructions from the retaining party.

Commonly, during the earlier stages of litigation, parties will not produce an expert's report. As a result, Rule 31.06(3) is of particular importance for environmental litigators. The rule allows a party to request disclosure of the findings, opinions and conclusions of experts to be relied on at trial.³⁵ Often a litigator will rely on this rule to try to obtain a sneak preview of the opposing expert's views. Most often, this is met with resistance.

Assertion of Privilege

Rule 30.02(2) establishes that not every document that is discloseable must be produced if counsel asserts privilege over the document.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

³¹ *Rules*, supra note 1 at Rule 30.02(1).

³² *Ibid* at Rule 53.03(1).

³³ *Ibid* at Rule 53.03(1).

³⁴ *Ibid* at Rule 53.03(2.1).

³⁵ *Ibid* at Rule 31.06(3).

³⁶ *Ibid* at Rule 30.02(2).

³⁷ *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321 at para 23 (Ont CA) [*Chrusz*], citing RJ Sharpe, "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence*, LSUC Special Lectures (Toronto: De Boo, 1984) at 163.

referred to as a “zone of privacy.” The zone of privacy facilitates environmental litigators’ preparation 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 intrusion of discovery to assure a trial on all of the relevant facts. The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. In effect, litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met. There is a tension between them to the extent that when discovery is widened, the reasonable requirements of counsel to conduct litigation must be recognized.

Our modern rules certainly have truncated what would previously have been protected from disclosure.³⁸

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

³⁸ *Ibid* at paras 25-26.

³⁹ *Ibid* at para 33.

⁴⁰ *Ibid* at para 38.

⁴¹ *Blank v Canada (Department of Justice)*, 2006 SCC 39 at para 60 [*Blank*].

⁴² *Ibid* at para 60.

⁴³ *Ibid* at para 36.

⁴⁴ *Ibid* at para 38.

to the initial action and share its essential purpose.⁴⁵

In *Browne (Litigation Guardian Of) v. Lavery*, the Ontario Superior Court noted that litigation privilege over a report is waived once it is delivered to the opposing party.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

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).

Document Destruction Policies

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

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

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

Regardless, environmental litigators and their clients cannot necessarily shield from

⁴⁵ *Ibid* at para 39.

⁴⁶ *Browne (Litigation Guardian Of) v Lavery* (2002), 58 OR (3d) 49 [*Browne*].

⁴⁷ *Lecocq Logging Inc v Hood Logging Equipment Canada Inc*, 14 CPC (6th) 287 at para 17 (Ont Sup Ct).

⁴⁸ *Bazinet v Davies Harley Davidson* (2007), 158 ACWS (3d) 561 at paras 32-34 (Ont Sup Ct).

⁴⁹ *Ibid* at para 26.

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.⁵⁰ In addition, the Ontario Court of Appeal in *Conceicao Farms Inc. v. Zeneca Corp.* held that Rule 31.06(3) only requires production of information but not the actual document.⁵¹

⁵⁰ *Bookman v Loeb*, [2009] OJ No 2741, 2009 CarswellOnt 3796 at para 37.

⁵¹ *Conceicao Farms Inc v Zeneca Corp*, 83 OR (3d) 792 [*Conceicao*].