

THE CHALLENGES OF GATHERING EXPERT EVIDENCE BY PRIVATE INDIVIDUALS

Asha James*

A Symposium on
Environment in the Courtroom:
Evidentiary Issues in Environmental Prosecutions and Hearings
March 6-7, 2015
University of Calgary

This project was undertaken with the financial support of:



Ce projet a été réalisé avec l'appui financier de :



THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.



Canadian Institute of Resources Law
Institut canadien du droit des ressources



UNIVERSITY OF CALGARY
FACULTY OF LAW

*Asha James is the managing associate at Falconers LLP in Toronto Ontario.

The Canadian Institute of Resources Law encourages the availability, dissemination and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following considerations:

- (1) You must acknowledge the source of this work
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of the Institute.

Copyright © 2015

INTRODUCTION

What good is it to members of the public, an ordinary man of ordinary means, to have the right to commence appeals of certain types of environmental projects if the costs of experts make it prohibitive to mount an effective case? This paper addresses the issues faced by ordinary citizens who dare to challenge multi-million dollar energy projects on the basis that the project has the potential to cause harm to the health of the litigant and/or harm to the natural environment.

Specifically, this paper will address the role experts play generally in the litigation process, but more specifically, the role that expert witnesses play in appeals before Environmental Tribunals. As a lawyer practicing in Ontario, I have had the privilege of acting for ordinary citizens, most living in rural environments before the Ontario Environmental Review Tribunal on appeals of renewable energy projects.

Given the nature of these appeals, as explored in detail below, the expert becomes a vital component of the appeal, not only in the giving of evidence, but also in the preparation for the hearing by educating the lawyer about the very complicated technical issues at play.

Currently, the regulatory process in place for these types of appeals in Ontario makes it virtually impossible for citizens of ordinary means to meaningfully participate in the hearing process. Sadly, the appellant is faced with a monumental mountain to climb to be successful on an appeal, a mountain that financially, they just can't afford.

THE ROLE OF AN EXPERT WITNESS

What is the role of an expert? Generally, an expert is defined as a person possessing certain specialized knowledge, training, education, skill and/or experience that goes beyond the knowledge of ordinary members of the general public. In the most simplistic form, in legal proceedings, we rely on experts to explain to the trier of fact that which lies outside of our general realm of understanding.

Well if that is the role of the expert, what is the role of an Environmental Tribunal? An Environmental Tribunal is a body with specialized knowledge about the issues which it decides. Basically, we expect that the Tribunal has a unique understanding about the issues that come before it.

Often I have clients ask, "if the Tribunal has specialized knowledge about environmental issues, why do I need an expert for my case?" The answer, at least in Ontario, is quite simply, that you cannot win without one.

People think of an expert witness as someone who testifies at a trial/hearing to help one side or the other prove its case. An expert witness is typically seen as testifying on behalf of one party or the other to support that party's version of the case. But in actuality, that is

not the job of an expert. An expert is supposed to come to a hearing as an independent third party to provide the trier of fact with an explanation and opinion about complex technical issues that are beyond the general knowledge of most people. An effective expert witness is one that can take technical jargon and explain it in a way that a person of ordinary intelligence can understand.

For decades, courts have provided guidance on the role an expert should play in legal proceedings. In the case of *R. v. Abbey*, Mr. Justice Dickson (as he then was) commented on the role which experts play in the trial process.

With respect to matters for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusion without help, then the opinion of the expert is unnecessary.

An expert witness, like any other witness, may testify as to the veracity of facts of which he has first-hand experience, but this is not the main purpose of his or her testimony. An expert is there to give an opinion. And the opinion more often than not will be based on second-hand evidence.¹

In essence, the evidence of an expert acts as an exemption to the rule against hearsay evidence.

Preparation and the Expert Witness

Use of the Expert Witness in Preparation for Trial

In addition to providing evidence on behalf of a party, experts can be invaluable as an aid in reviewing expert reports received from the opposing party, can assist in the understanding of certain legislation and technical requirements (such as regulatory regulations for renewable energy projects), and preparing for cross-examination of the expert witnesses retained by the opposing side. In appeals before Environmental Tribunals, the lawyers representing the private citizen has to become, in essence an expert as it relates to the issues that are being raised before the Tribunals to be able to present his or her client's case to its best advantage and to conduct creditable cross-examinations. For these reasons, it can be very useful to have an expert witness attend at the hearing, particularly when the opposing party's expert is giving his or her evidence.

The ability to have your expert attend the hearing has the benefit of being an on sight resource for the lawyer during the presentation of the evidence and the cross examination of opposing experts.

¹ *R v Abbey*, [1982] 2 SCR 24 at 42.

THE ONTARIO EXPERIENCE AT TRIBUNAL APPEALS OF RENEWABLE ENERGY PROJECTS

The Timeframe for the Exchange of Documents

The Ontario Environmental Tribunal Rules of Procedure for appeals of renewable energy projects sets out the timeframe for the exchange of documents including the exchange of any expert reports that will be relied upon during the course of the hearing. Pursuant to Tribunal Rules, expert reports are to be filed within 5.5 weeks after the filing of the appeal and within 2.5 weeks after the parties exchange all relevant documents in their possession.²

This expedited timeframe makes it extremely difficult for an appellant to retain an expert to assist at a hearing. In essence, the timeframe makes it so that an individual appellant would actually have to engage an expert prior to a proponent receiving government approval for the project. The expedited timeline for appeals of renewable energy projects in essence, acts as a barrier for individual appellants to be able to engage experts to support in their appeal of a project.

Imagine that one day you receive notice that a high rise building is going to be built on your quiet residential street between your house and the house of your neighbour. Common sense tells you that building something so large in your area will block your access to sunlight in your home, which will, as a consequence, kill all the plants in your garden that you have worked at nurturing meticulously for the last ten years. On top of that, the building produces some level of noise that will keep you awake at night, and everyone knows that prolonged periods of deprived sleep is toxic for your health. So you decide that you don't want this building going up by your home. This is going to affect your health and your natural environment and you decide that you are going to oppose this project. Now, the body that determines approvals for these high rise buildings tells you that if you want to oppose the building you have to file expert reports that relate to how the loss of sunlight will affect your garden and to what degree it will be affected. You will need expert reports about the potential effect of any noise related to the building and how that noise will affect your health. To top it off, you will be required to find an expert, gather this information and provide a report within 6 weeks.

This is a daunting task for the well-resourced, never mind those of us who can barely scrape together enough money to hire a lawyer to assist us in the process. This expedited process forces many appellants into a corner and they have to figure out ways to mount a credible appeal with very limited expert assistance, or even worse, without the assistance of any expert at all.

² Environmental and Land Tribunals Ontario, *Rules of Practice and Practice Directions of The Environmental Review Tribunal* (Toronto: 9 July 2010), Appendix A.

Can you win without an expert?

Recently, there have been a number of cases in Ontario where appellants have challenged the approval of renewable energy wind projects on the basis that the project as approved will cause serious harm to the health of appellant. In attempting to prove their case, many appellants have called the evidence of individuals who have lived in close proximity to wind turbines and claim that after the turbines became operational they began experiencing adverse health effects.

The evidence before various tribunals has been that the wind turbines caused these witnesses to experience sleep disturbances, nausea, dizziness, and cognitive difficulties, feeling vibrations in their body, and increased blood pressure and increased levels of stress.³

Despite evidence that these symptoms were never present prior to operation of the turbines, the Ontario Environmental Tribunal has consistently held that this evidence is not sufficient to prove causation and that expert evidence is required to show a causal link between the claimed symptoms suffered from the wind turbines and the wind turbines themselves.

... in this case, the question is whether the subjective symptoms reported ... are sufficient to establish that night-time noise emissions pose a likelihood of harm, or actual harm, to his health or the health of the members of his family. While the Tribunal gives due weight to Mr. Hornibrook's subjective report of the symptoms he and his family have experienced, as an evidentiary matter, the Tribunal cannot simply assume that he is correct in his assertion that various members of his family suffer from a sleep disorder, aggravation of Crohn's disease, cognitive impairment, or depression. Confirmation of those conditions requires the diagnostic skills of a qualified health professional. Similarly, the Tribunal also cannot simply assume that Mr. Hornibrook is correct in his assertion that sleep disruption resulting from the night-time noise emissions is an operative cause of these conditions, to the extent that they do exist. Accordingly, in weighing the evidence, the Tribunal finds that it can only consider the problems reported by Mr. Hornibrook as subjectively reported symptoms.⁴

However, recently Health Canada released its Study Summary which found a statistical association between wind turbine noise and annoyance. The Study Summary also found a statistical association between annoyance and a number of self-reported and measured endpoints, including but not limited to: blood pressure, migraines, tinnitus, dizziness,

³ See: *Drennan v Director (Ministry of the Environment)*, [2014] OERTD No 10; *Alliance to Protect Prince Edward County v Ontario (Ministry of the Environment)*, [2013] OERTD No 40 [*Ostrander*]; *Dixon v Director, Ministry of the Environment*, [2014] OERTD No 5; *Bovaird v Director (Ministry of the Environment)*, 2013CarswellOnt 12680.

⁴ *Kawartha Dairy Ltd v Director (Ministry of the Environment)* (2008), 41 CELR (3d) 184 at para 21 [*Kawartha Dairy*].

scores on the PSQI, and perceived stress, and measured hair cortisol and systolic and diastolic blood pressure.⁵

Given that the results of the Health Canada study are consistent with the evidence of those living in close proximity to wind turbines in respect of the adverse health effects that they suffered; it will be interesting to see how upcoming Tribunals treat this evidence and the causation issue.

The Ability to Retain an Expert

As outlined above, the Ontario Environmental Tribunal is a very specialized tribunal that addresses matters only pertaining to environmental issues. The Tribunal has specialized knowledge about the issues that come before it. In Ontario, pursuant to the *Environmental Protection Act*, an appellant can appeal the approval of a renewable energy project on only two grounds:

142.1 (1) This section applies to a person resident in Ontario who is not entitled under section 139 to require a hearing by the Tribunal in respect of a decision made by the Director under section 47.5. 2009, c. 12, Sched. G, s. 9.

Same

(2) A person mentioned in subsection (1) may, by written notice served upon the Director and the Tribunal within 15 days after a day prescribed by the regulations, require a hearing by the Tribunal in respect of a decision made by the Director under clause 47.5 (1) (a) or subsection 47.5 (2) or (3). 2009, c. 12, Sched. G, s. 9.

Grounds for hearing

(3) A person may require a hearing under subsection (2) only on the grounds that engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(a) serious harm to human health; or

(b) serious and irreversible harm to plant life, animal life or the natural environment.⁶

Given that the Tribunal requires expert evidence for an appellant to successfully discharge their burden of proof on an appeal, the next question is where one can find such an expert. Due to the specialized nature of the issues before the Tribunal, the pool of experts with the specific knowledge of the issues in play is very limited. Combine with that the fact that many of the experts that have this specific knowledge have already been engaged by renewable energy developers, the pool of possible experts becomes even smaller.

⁵ Health Canada, “Wind Turbine Noise and Health Study: Summary of Results” (6 November 2014), online: <<http://www.hc-sc.gc.ca/ewh-semt/noise-bruit/turbine-eoliennes/summary-resume-eng.php>>.

⁶ *Environmental Protection Act*, RSO 1990, c E.19.

Appellants are faced with the daunting task of finding an expert, educating them on the issues, retaining them and receiving a comprehensive expert opinion all within 5 weeks of the issuing of the renewable energy approval. The time constraints make it virtually impossible. My office has had a number of experts indicate that they would be interested in assisting in the matter but the expedited timelines make it virtually impossible for them to participate. The other response that we have received is that due to the time constraints, the costs of getting a report can triple in cost as opposed to if the expert were to have two to three months to review all the documentation and provide an opinion. Given the opportunity, an appellant would be best suited to call experts in the field of sleep disturbances, epidemiology, public health, psychology, public policy, hydrology, engineering, acoustics, biomechanics, veterinary medicine and an environmentalist.

The only way an appellant could mount the kind of case the Tribunal is looking for to find in their favour, would be to engage experts prior to an approval being granted. There are not very many citizens that can undertake to spend tens of thousands of dollars on experts without being certain that an approval would be granted.

ACCESS TO JUSTICE

The Ontario process for appeals of renewable energy projects acts as a bar to access to justice for an appellant of average financial means. Generally, appellants commence these claims because they believe that the project will cause harm to their health and the environment. These beliefs are not unfounded as evidenced by the Health Canada Study Summary. However, the current appeals process makes it very difficult for appellants to meaningfully participate in the process.

Recently, there has been a shift in the justice community, and recognition that the issues of access to justice require national discussion and a coordinated action strategy. In the recent report entitled *Access to Civil & Family Justice, A Roadmap for Change*, the Honourable Justice Thomas Cromwell of the Supreme Court of Canada calls for a culture shift on the way the courts approach the term access to justice. The report calls for new ways of thinking, imagination and reform, to be aimed at concrete improvement. Justice Cromwell states that “it is time to move away from old patterns and old approaches”.⁷

The report encourages Courts to aim for a justice system that is “timely, efficient, effective, proportional and just.” In doing so, Cromwell J. highlighted that the system was, in fact, created for litigants, and that it is in place to serve the public. Calling for a culture shift on the way courts approach access to justice, Justice Cromwell’s first guiding principle for change was the need to put the public first:

⁷ Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: October 2013).

The focus must be on the people who need to use the system. This focus must include all people, especially members of immigrant, aboriginal and rural populations and other vulnerable groups. Litigants, and particularly self-represented litigants, are not, as they are too often seen, an inconvenience; they are why the system exists.⁸

In other words, according to Justice Cromwell, the principle of access to justice thus requires us to be mindful of those who need the system. The costs of hiring experts and the Tribunal's insistence that they are necessary to have even the smallest glimmer of hope on an appeal make the Tribunal process cost prohibitive for many appellants and leaves many out in the cold without the opportunity to seek justice on issues that affect their life, their health and their environment.

The role of the expert in these Tribunal hearings needs to be seriously reconsidered, because as things currently stand, appellants are not in a position to retain experts to assist in their case because of the high costs associated with it, and therefore, the Tribunal, in essence, becomes a rubber stamp of approval for these projects.

⁸ *Ibid.*