

Environmental Experts in Litigation

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This presentation provides general information and is not intended to provide legal advice.
Audience members should seek legal advice for specific situations.

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EXPERT REPORTS IN LITIGATION

Expert Role in Regulatory Litigation

- **Client may require:**
 - workplan under Order
 - completion of work items and remediation
 - if order is appealed, expert assistance with Board proceeding
 - prosecution defence and support
 - pre-trial preparation and attendance
 - trial support and attendance

Expert Role in Civil Litigation

- **Client may require:**
 - peer review and gap analysis
 - investigations of site and off-site
 - expert reports, including recommendations for mitigation, remediation
 - mediation
 - pre-trial preparation and attendance
 - trial support and attendance

EXPERTS AS ADVOCATES? OR, NOT?

Evolving Role in Litigation – Advocacy

- **Provincial and federal Courts have rules about**
 - who can be an expert
 - the role of the expert
 - the duties of an expert to the Court
- **Failing to properly understand these rules can lead to decisions against clients, potential claims against the expert and reputational damage**

Evolving Role in Litigation – Advocacy

- **Experts have a duty of loyalty to the Court**
 - to be truthful and fair
 - to be impartial and unbiased
- **Independence of an expert is an element of the expert's duty of loyalty**
- **Bias and advocacy on the part of an expert may affect the weight given to the evidence**
- **In some jurisdictions, experts must sign-off on their duties**

COMMUNICATIONS ABOUT DRAFT EXPERT REPORTS

Litigation Privilege

- **Litigation privilege**
 - applies more narrowly than solicitor-client
 - applies to all communications and documents whose **dominant purpose** is preparation for pending or current litigation
 - litigation privilege is not permanent, but lasts until litigation is done

Litigation Privilege

- **Engage Privilege**
 - counsel should get involved as soon as possible after an environmental incident to establish documents and experts for the dominant purpose of litigation
 - scope the investigation and identifying key persons
 - mark materials “Privileged and Confidential”
 - retaining experts under privilege to prepare reports with the depth of analysis required for litigation

Expert Role in Litigation – Privilege

- ***R v Husky Energy Inc*, 2017 SKQB 383**
 - oil spill into North Saskatchewan River
 - Environment and Climate Change Canada conducted regulatory investigation and obtained search warrant
 - several documents were found to be “litigation privileged” and protected from disclosure
 - documents related to Husky’s internal investigation had been treated confidentially, and created after the spill for the purpose of preparing for a regulatory prosecution or civil litigation
 - expert reports were marked P&C, experts retained by in-house legal, reports were not created for compliance purposes

Lawyer-Expert Communications

- **“Consultation and collaboration between expert witness and counsel is a necessary component of litigation, particularly in highly technical cases”**

Uponor AB v Heatlink Group Inc (2016 FC)

- **“Counsel and their experts are permitted to confer in a way that does not interfere with an expert’s impartiality and meets the standard of conduct prescribed by both the expert’s and counsel’s respective professional regulating bodies”**

Moore v Getahun (2015 ONCA)

EXPERT BLUNDERS

Area of Expertise

- **Environmental consultants have specific expertise, developed over years of experience**
 - Is the expert report being provided within that expertise?
 - Is the expert appropriately qualified to come to the conclusions they arrive at?

Expert Credibility

Expert ignores key findings (BCEAB, 2014)

- Environmental Appeal Board held that the appellant expert's opinion was “fundamentally and irredeemably flawed”
 - report was deceptive
 - adopted artificially technical definition of contamination
 - contradiction of conclusions of previous reports
- Costs awarded against appellant that unexpectedly abandoned appeal after expert witness was completely discredited

Expert Credibility

Expert “reaches” to find fault (ONSC, 2022)

- Dispute regarding contamination arising from a UST and unpaid soil remediation work
- Court critical of expert testimony of the defendant’s expert – “appears to be reaching to find fault” and contradicted by evidence at trial
- Expert’s testimony discredited, claim successful

EXPERT AS SUBJECTS OF LITIGATION, THEMSELVES

Reliance-Based Claims

Reliance on Phase I ESA (NLCA 2018)

- APS required vendor to provide Phase I ESA to purchaser
- Consultant's agreement contained third party disclaimer
- PHC contamination discovered after deal closed
- Purchaser sued vendor and consultant
- Court found if purchaser wanted reliance, should have initiated discussion with consultant
- Consultant had turned mind to third party with disclaimer in agreement

Reliance-Based Claims

Disclaimer Clause for Client Only (ONSC 2022)

- Purchaser entered APS to purchase property
- Vendor's Consultant's proposal contained Disclaimer Clause that stated Consultant Report was prepared for sole benefit of Client and limited third parties' reliance
- Without Consultant's knowledge or consent, Vendor gave a copy of Consultant Report to Purchaser during sale transaction
- Court found Consultant Disclaimer Clause excluded imposition of duty of care by Consultant to Housing Authority
- Disclaimer Clause can extinguish any duty of care and defeat a claim in negligence, even when the plaintiff establishes actual negligence

Limits of Liability

Permitted in Contracts (ABKB 2025)

“...sophisticated parties are capable of drafting clear and comprehensive limitation and exclusion provisions. The court has no discretion to refuse to enforce a valid and applicable limitation or exclusion clause unless the plaintiff can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties ...”

Prosecutions Against Experts

Damage to Habitat of Threatened Species (OCJ 2024)

- Excavation Company awarded maintenance and dredging work of stormwater management pond
- Excavation Company retained Consultant to perform fish and wildlife relocations
- Consultant reported of no aquatic life present in the pond
 - Lilliput mussels found in the pond
 - Lilliput mussels listed as threatened species
- Pond was drained and dredged
- Excavating Company ordered to pay \$10,000 to charity for unlawfully killing, harming, or harassing a species at risk
- Consultants company ordered to pay \$35,000 to charity for damaging and/or destroying the habitat of a species at risk

Professional Discipline

Opining Outside of Area of Expertise (ON PEO, 2022)

- Regulated Member submitted multiple regulatory filings
- Found to have committed professional misconduct on multiple grounds, including deficient submissions and lack of awareness re regulatory requirements
- Discipline Committee noted Member had no special training or expertise in environmental matters
- Penalty
 - Permanent reprimand and findings published
 - License/Certificate of Authorization suspension for 4 months
 - Prohibited from environmental engineering services

KEY TAKEAWAYS

Key Takeaways for Experts

- **Understand client needs**
- **Confirm instructions in writing**
- **Do excellent work**
- **Work with client's counsel, as necessary**
- **Stick to area of expertise**
- **Words, spoken or written, matter**

Willms & Shier Environmental Lawyers

- **Established nearly 50 years ago**
- **Environmental, Indigenous, and Energy law**
- **17 lawyers**
 - six lawyers are certified by the Law Society of Ontario as Environmental Law Specialists
 - lawyers called to the Bars of Alberta, British Columbia, Ontario, the Northwest Territories, Nunavut and the Yukon
 - offices in Calgary, Toronto, Ottawa, and Yellowknife

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