Experts in Environmental Litigation

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SMART Remediation
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Roadmap

- **Thesis**
- **Expert's Duty of Loyalty**
- **Litigation Privilege**
- **Experts' Credibility**
- **Conclusion**

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

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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
  - on the 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", legal privilege, to be truthful and fair**
- **Experts must sign off on their "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 11-2 of British Columbia's *Supreme Court Civil Rules***
  - Expert has a duty to assist the Court and is not to be an advocate for any party
  - The expert must certify in his or her report that he or she is
    - aware of this duty
    - has made the report in conformity with this duty, and
    - will, if called, give testimony in conformity with this duty

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Expert's Duty of Loyalty

- **Rule 11-7 of British Columbia's *Supreme Court Civil Rules***
  - a party may introduce expert evidence first by written report and then by oral testimony at trial
- **Rule 11-6 of British Columbia's *Supreme Court Civil Rules***
  - 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

- **Rule 11-6 of British Columbia’s *Supreme Court Civil Rules***
  - Expert’s report must include
    - the expert's name, address, area of expertise, qualifications and employment and educational experience
    - the instructions provided to the expert in relation to the proceeding
    - the nature of the opinion being sought and the issues in the proceeding to which the opinion relates
    - the expert's opinion respecting those issues

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Expert’s Duty of Loyalty

- **Rule 11-6 of British Columbia’s *Supreme Court Civil Rules***
  - Expert’s report must also include
    - the expert's reasons for his or her opinion, including
      - a description of the factual assumptions on which the opinion is based
      - a description of any research conducted by the expert that led him or her to form the opinion, and
      - a list of every document, if any, relied on by the expert in forming the opinion

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Litigation Privilege

General Accident Assurance Co. v. Chrusz

"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. This is known as the "zone of privacy". The zone of privacy facilitates environmental litigators' preparation for trial through the use of experts."

Ontario Court of Appeal - 1999

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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)

> "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 (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."

Ontario Superior Court of Justice - 2014

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Litigation Privilege

Moore v. Getahun (Trial)

"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."

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)

"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.

Second, the ethical standards of other professional bodies place an obligation upon their members to be independent and impartial when giving expert evidence.

Ontario Court of Appeal - 2015

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Litigation Privilege

Moore v. Getahun (Court of Appeal)

Third, the adversarial process, particularly through cross examination, provides an effective tool to deal with cases where there is an error of reality to the suggestion that counsel improperly influenced an expert witness."

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) citing
Blank v. Canada (Minister of Justice) (SCC)

"[l]itigation privilege protects communications with a third party where the dominant purpose of the communication is to prepare for litigation."

Supreme Court of Canada - 2006

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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

Ontario Ministry of the Environment v. the City of Sault Ste. Marie

"With respect, the Court would find it very difficult to accept an explanation with regard to the cause of the landfill off-site odour from a lay person with absolutely no background or experience in waste management, landfill or environmental studies, over that of a well-known knowledgeable and experienced waste management and landfill expert."

Ontario Court of Justice - 2007

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Experts' Credibility

R. v. Commander Business Furniture Inc.

- **There was a complete loss of credibility by the defendant's consultant in this prosecution brought by the Ontario Ministry of the Environment**
- **The consultant was tainted by the influence of the defendant – its client – not counsel**

Ontario Court of Justice - 1992

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Experts' Credibility

WCI Waste Conversion Inc. v. ADI International Inc.

"[a]n expert report is only a benefit to the Court if it is independent and unbiased and is not unduly influenced by someone having a pecuniary interest in the contents of that report."

PEI Supreme Court – Trial Division - 2008

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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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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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Conclusion

- **Experts are crucially essential in the litigation of environmental disputes and litigants and their counsel depend on experts to not only get their findings, opinions and conclusions correct but to ensure they are supportable under the scrutiny of cross-examination**
- **To do otherwise is a disservice to whichever discipline or profession that expert is associated with, for the litigant and its lawyer who retains that expert, and most importantly, to the adjudicator of the environmental dispute in question, be it a hearing's panel before an administrative tribunal or a judge before a court**
- **Credibility and fairness are everything!**

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Conclusion

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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