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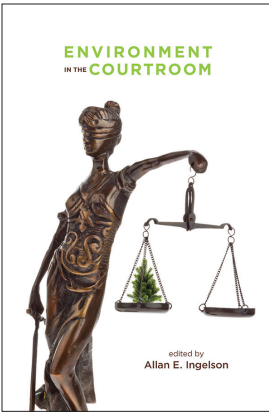
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## ENVIRONMENT IN THE COURTROOM

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## Communication Between Lawyers and Experts

MARC McAREE, ROBERT WOON, AND ANAND SRIVASTAVA\*

### 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. Courts have had trouble balancing these interests and this, in turn, has led to mixed outcomes in the case law.

### 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

\* The authors wish to thank Erin Garbett, an articling student at Willms & Shier Environmental Lawyers LLP, for her assistance in updating this chapter in 2018.

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.<sup>1</sup>

The Nova Scotia Supreme Court partially reversed its stance in 1992 with its judgment in *Crocker v. MacDonald*.<sup>2</sup> Justice Tidman, in reference to the above-mentioned excerpt, held:

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.<sup>3</sup>

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.*, Master MacLeod of the Ontario Superior Court of Justice summarized the case law, in 2000, as follows:<sup>4</sup>

[A] recent decision of this court on point to which I was referred was *Calvaruso v Nantais*<sup>5</sup> referring to *Bell Canada v Olympia & York*.<sup>6</sup> 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*)<sup>7</sup> and the B.C. Supreme Court (*Ocean Falls Corp. v Worthington (Canada) Inc.*).<sup>8</sup>

These issues were again addressed in 2002 by the Ontario Superior Court of Justice in *Browne (Litigation Guardian of) v. Lavery*.<sup>9</sup> 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.<sup>10</sup>

In addition, Justice Ferguson in *Browne* changed the court's position about the disclosure of information and instructions provided to an expert by counsel:<sup>11</sup>

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.*<sup>12</sup>

In *Flinn v. McFarland*,<sup>13</sup> Justice MacAdam, writing for the Nova Scotia Supreme Court in 2002, held that discussions of an expert with counsel about a draft report speak to the weight of the expert report. This approach is similar to the approach taken in *Browne*. Justice MacAdam stated:

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 exam-

ined 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.<sup>14</sup>

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.<sup>15</sup>

The only appellate guidance on these issues is the Ontario Court of Appeal's 2006 decision in *Conceicao Farms Inc. v. Zeneca Corp.*<sup>16</sup> 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*.<sup>17</sup> 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.<sup>18</sup>

To date, the leading decision on these issues, *Moore v. Getahun (Moore)*,<sup>19</sup> is the most far-reaching and clear.

## **Moore v. Getahun**

### **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's arm and applied a full circumferential cast to his 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,<sup>20</sup> 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.<sup>21</sup>

### **ISSUES WITH THE TRIAL DECISION**

The Ontario Superior Court of Justice decision in *Moore* was not realistic in environmental litigation. Experts in litigation write technical, scientific reports. The experts are rarely, if ever, trained in law. Therefore, 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.

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.<sup>22</sup> Justice Wilson raised concern about the expert's independence and integrity.<sup>23</sup> While the communication in *Moore* was viewed by the court as inappropriate, it was unfair and unhelpful to extend its application to a broad ban over all communications between counsel and an expert.

## THE DECISION OF THE ONTARIO COURT OF APPEAL

The Ontario Court of Appeal in *Moore* 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.<sup>24</sup>

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 witnesses.

...

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

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.<sup>25</sup>

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 acknowledgment 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.

Counsel play 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.<sup>26</sup>

The Court of Appeal proceeded to assess: (1) if there is an obligation to produce 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) (Blank)*,<sup>27</sup> that “[l]itigation privilege protects communications with a third party where the dominant purpose of the communication is to prepare for litigation.”<sup>28</sup> The court in *Blank* refers to this principle as the “zone of privacy.”<sup>29</sup>

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 witness's duties of independence and objectivity, the court can order disclosure of such discussions.

...

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.<sup>30</sup>

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) of the Ontario *Rules of Civil Procedure* must be disclosed in the litigation.<sup>31</sup> This other information has been called "the foundational information" for the expert's opinion as referred to in *Conceicao Farms Inc. v. Zeneca Corp.*<sup>32</sup>

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.<sup>33</sup>

On September 17, 2015, the Supreme Court of Canada denied leave to appeal the Ontario Court of Appeal's decision in *Moore*.<sup>34</sup>

## Jurisprudence since *Moore v. Getahun*

In the criminal matter *R. v. Colpitts*, defendants charged with fraud challenged the qualifications of a chartered accountant whom the Crown proffered as an expert on how stock market trading practices are used to artificially influence the price of publicly traded shares.<sup>35</sup> The proposed expert analyzed trading practices involving the shares of the defendant's corporation. The defendants argued that the proposed expert was not impartial, because he only reviewed the trading material provided to him by the Royal Canadian Mounted Police (RCMP), he relied primarily on the information and data that the RCMP provided to him without checking or assessing it for accuracy, and he did not seek additional information from the RCMP when such was warranted.<sup>36</sup> The Nova Scotia Supreme Court rejected the defendants' arguments. Relying on *Moore*, the court held that "[i]t is the role of all proposed experts to seek instructions from a party to the litigation. These types of contact do not equate to evidence of bias sufficient to finding the opinions inadmissible."<sup>37</sup>

In *Maxrelco Immeubles Inc. v. Jim Pattison Industries Ltd.*,<sup>38</sup> the Ontario Superior Court addressed whether a party is required to disclose the letter of instructions sent to its expert. Justice O'Bonsawin concluded that, absent a foundation to support a suspicion that counsel improperly influenced the expert, there was no obligation to produce the instruction letter.<sup>39</sup> Justice O'Bonsawin further held that Rule 53.03(2.1) was satisfied and the instruction letter was not required when the instructions provided to the expert are set out in the expert's report.<sup>40</sup> *Maxrelco* was subsequently followed in *Scaffidi Argentina v. Tega Homes Developments Inc.*<sup>41</sup>

In the family law matter *St. Onge v. St. Onge* (also discussed in chapter 35 of this volume, "Experts in Environmental Litigation"), the plaintiff moved for production of the defendant's experts' communication records.<sup>42</sup> The plaintiff argued that a letter from one of the defendant's experts to the plaintiff's expert disclosed an improper communication between the defendant's counsel and the defendant's expert.<sup>43</sup> The letter stated:

I [defendant's expert] have been requested by Louise Morin, [the defendant's] lawyer, to provide you [plaintiff's expert] with confirmation that [the defendant] has been and is currently being treated by me for depression. . . .

Ms. Morin also asked me to confirm that [the defendant] reported to me, prior to the allegations of sexual abuse of her children on December 30<sup>th</sup>, 2014, that she had been verbally and/or emotionally

abused by [the plaintiff]. In that regard, I am enclosing a copy of a letter which I sent to Ms. Morin on May 13<sup>th</sup>, 2015 ...<sup>44</sup>

The plaintiff argued that the stated communication demonstrated improper influence by the defendant's counsel on the defendant's expert. The Ontario Court of Justice rejected the plaintiff's argument and held that the communication merely assisted the defendant's expert in providing relevant information to the plaintiff's expert.<sup>45</sup> The court declined to order production of the defendant's expert's communication records.

## Conclusion

Based on more recent cases, the law in Canada and Ontario is approaching clarity. *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.

The Ontario Court of Appeal in *Moore* 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 documented to avoid increased delay and cost. Cases since *Moore* have upheld the principles articulated by the Ontario Court of Appeal.

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 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 objectivity. 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.

## NOTES

1 *T Eaton Co v Neil J Buchanan Ltd* (1979), 31 NSR (2d) 135 at para 59 (CA), rev'd on a different point [1980] 2 SCR 228.

2 (1992), 116 NSR (2d) 181 at paras 21–22 (TD).

3 *Ibid.*

- 4 *Mahon v Standard Assurance Life Co*,  
[2000] OJ No 2042 at para 5 (Sup Ct J)  
[*Mahon*].
- 5 *Calvaruso v Nantais* (1992), 7 CPC (3d)  
254 (Ont Gen Div).
- 6 (1989), 68 OR (2d) 103 (H Ct J).
- 7 [1992] NSJ No. 410 (NSTD).
- 8 (1985), 69 BCLR 124 (SC).
- 9 (2002), 58 OR (3d) 49 (Sup Ct J) [*Browne*].
- 10 *Ibid* at paras 58–59.
- 11 *Ibid* at paras 69–70.
- 12 (1999), 42 OR (3d) 641 (Ont CA)
- 13 2002 NSSC 272.
- 14 *Ibid* at para 9.
- 15 *Ibid* at para 17.
- 16 83 OR (3d) 792 (CA) [*Conceicao*].
- 17 *Browne*, *supra* note 9.
- 18 *Conceicao*, *supra* note 16 at para 14.
- 19 *Moore v Getahun*, 2015 ONCA 55 [*Moore*].
- 20 2014 ONSC 237.
- 21 *Ibid* at paras 50–52.
- 22 *Ibid* at para 47.
- 23 *Ibid* at para 50.
- 24 *Moore*, *supra* note 19 at para 45.
- 25 *Ibid* at paras 57, 60–61.
- 26 *Ibid* at paras 63–65.
- 27 2006 SCC 39 [*Blank*].
- 28 *Moore*, *supra* note 19 at para 68.
- 29 *Blank*, *supra* note 27 at para 34.
- 30 *Moore*, *supra* note 19 at paras 77–78.
- 31 *Ibid* at para 75.
- 32 *Supra* note 16 at paras 14, 16–17, 19, and 21.
- 33 *Rules of Civil Procedure*, RRO 1990, Reg  
194 promulgated under Ontario’s *Courts  
of Justice Act*, Rule 53.03(2.1).
- 34 [2015] SCCA No 119 (Ont CA).
- 35 2016 NSSC 219.
- 36 *Ibid* at para 32.
- 37 *Ibid* at para 33.
- 38 2017 ONSC 5836 [*Maxrelco*].
- 39 *Ibid* at para 37.
- 40 *Ibid* at para 38.
- 41 2017 ONSC 6530 [*Scaffidi*].
- 42 *St Onge v St Onge*, 2017 ONCJ 3729.
- 43 *Ibid* at para 53.
- 44 *Ibid* at para 52.
- 45 *Ibid* at para 55.