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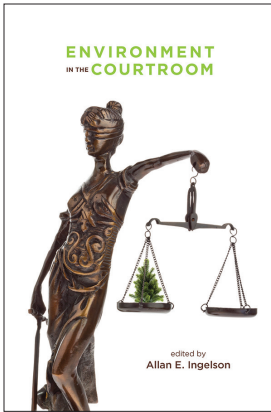
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ENVIRONMENT IN THE COURTROOM

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Reporting Obligations to Third Parties

MARC McAREE, ROBERT WOON, AND ANAND SRIVASTAVA *

Introduction

Environmental litigators commonly retain consultants to carry out environmental investigations. The outcome of these investigations can uncover environmental harms, including hazards and risks to public safety. Though retained by litigators under litigation privilege, these consultants may have an overriding obligation to report their findings to authorities or regulators.

Engineers

In Ontario, engineers in the province are governed by the Association of Professional Engineers Ontario (PEO) under the *Professional Engineers Act*.¹ The PEO Code of Ethics imposes an obligation on engineers to act as faithful agents or trustees of their clients/employers, including keeping information confidential and avoiding or disclosing conflicts of interest.²

The Code of Ethics also creates a duty to the public and states that “a practitioner shall regard the practitioner’s duty to public welfare as paramount.”³ Engineers can be disciplined by the PEO for professional misconduct, which includes “failure to act to correct or report a situation that the practitioner believes may endanger the safety or the welfare of the public.”⁴ This legal obligation is commonly referred to as the engineer’s “duty to report.”

The PEO encourages engineers to resolve conflicts by working with their client/employer to find acceptable solutions before reporting. Nevertheless, the PEO recognizes that conflicts can escalate. Accordingly, the PEO has outlined a reporting process for engineers.⁵

* 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.

The process involves the PEO assisting the engineer and client/employer to find a resolution. Where the PEO believes a situation may endanger the safety or welfare of the public, the PEO will take action, including obtaining independent engineers to review the situation or requesting the client/employer to take all necessary steps. In certain circumstances, the PEO will report the risk to the appropriate government authorities.

Environmental litigators should strive for open avenues of communication with any engineer they retain. Hopefully, through open communication, these litigators can speak directly with an engineer who identifies a public safety issue and work toward finding an appropriate resolution before the engineer must report a dangerous situation. This approach to open communication may in some circumstances relieve the engineer of his or her initial inclination to report and potentially assist the client to mitigate a perilous situation.

Geoscientists

Geoscientists in Ontario are governed by the Association of Professional Geoscientists of Ontario (PGO) under the *Professional Geoscientists Act, 2000*.⁶ Similar to engineers, geoscientists have obligations to their clients/employers and the public.

The PGO Code of Ethics states that their public safety and welfare duty is paramount, just as in the case of engineers.⁷ Geoscientists can be disciplined for professional misconduct, which includes “failing to correct or to report a situation that the member or certificate holder believes may endanger the safety or the welfare of the public.”⁸

Again, environmental litigators should strive for good communication with any geoscientists that they retain. This may help to identify public safety risks and hopefully mitigate against the geoscientist having to report to a third party authority.

Real World Experience

The authors report that during many years of retaining engineers and geoscientists it has not been necessary for an engineer or geoscientist to report to a government authority about a risk to public safety and public welfare. There have been infrequent circumstances where a conversation about reporting has taken place. Much advice about this issue has been provided to the authors’ clients, but no reporting to a public authority has been made.

That said, the practice of environmental law is transforming, with much greater emphasis on risk assessment and human health effects. Certainly, since

the passage of the 2011 amendments to the *Record of Site Condition Regulation*,⁹ there has been greater movement afoot to assess risks, and particularly those that arise from vapour intrusion.

As we discover more about vapour intrusion and other not so obvious risks, more circumstances may arise where engineers and geoscientists feel compelled to focus on risks to safety and their duty to report. This may be an issue to more frequently broach with the client and engineer or geoscientist prior to and during environmental investigations.

Procedural Alternatives in the Use of Experts In Environmental Litigation

The use of experts is adversarial, expensive, and may create bias. There are procedural alternatives that environmental counsel can consider when instructing experts. These alternatives present their own benefits and burdens. In some cases, an alternative approach may be more effective in an action than the traditional model.

MANDATORY SINGLE EXPERTS

One alternative to the use of experts in litigation is to appoint a neutral single expert on any issue. This expert is then responsible to the court to provide an expert opinion on which opposing parties may rely. The single expert may be appointed jointly by the opposing parties or by the court. Neither party has the ability to submit additional expert evidence except with leave of the court. This approach is outlined in Ontario under Rule 52.03¹⁰ and has been instituted as an option in the courts in the United Kingdom, Australia, and New Zealand.

Benefits and Drawbacks

One benefit of the single expert model is potential savings in time and costs of litigation. Multiple experts waste monetary resources leading up to trial and also consume valuable time at trial. In theory, single experts can aid the court and litigants and at less cost.

Further, while the *Rules of Civil Procedure* state that all experts have a duty to the court, single experts also eliminate any real or perceived bias that may limit party-appointed experts. Competent counsel will not influence a party-appointed expert's conclusions. However, counsel must still instruct and focus the expert.

Unlike party-appointed experts, single experts require agreed-upon instructions from opposing parties or the court. The instructions frame the

evidence presented at trial and, as such, may be contested between the parties. Time and resources may be wasted at this stage if opposing counsel view the instructions to a single expert as a microcosm of the issues at trial.

Single experts also carry the burden of being the only expert opinion at trial on that issue. Should a single expert lose credibility with the court, there is no alternative opinion to consider. Likewise, there is no possibility for multiple expert opinions to confirm one another or highlight contested issues. It may be hard for the court to determine which issues within a single expert's report are integral to the action and which issues are benign.

Applicability of the Single Expert Model in General Litigation

The applicability in Ontario of the single expert model was considered by the Honourable Coulter Osborne in the Civil Justice Reform Project.¹¹ Osborne believes that while the idea is good in theory, it will not work in practice in most cases.¹² Opposing parties often have different factual foundations on which an expert's report is based. For this reason, use of a single expert is evaluated on a case-by-case basis and is rarely used.¹³ However, Osborne does not entirely support the current model either. He believes that trial judges should evaluate whether experts are retained unnecessarily when considering costs.¹⁴

In 2003, the Alberta Law Reform Institute (ALRI) considered the applicability of the single expert model in Alberta.¹⁵ ALRI concluded that the model:

- may cause delay during the selection process of the single expert;
- may cause delay during the instruction process of the single expert; and
- may result in increased court applications from the above-mentioned processes.¹⁶

As a whole, ALRI concluded that switching to the single expert model would likely cause more problems than it would solve.¹⁷ ALRI did not recommend the single expert model in Alberta.

In 2006, the British Columbia Civil Justice Reform Working Group did not recommend the single expert model in British Columbia.¹⁸ The group recommended a similar approach to Ontario's Rules in which a judge may order a court-appointed single expert where appropriate.¹⁹

The United Kingdom's preferred single expert approach has had limited success. Since implementation, the model appears to have reduced the "hired gun" expert and their expert reports.²⁰ However, it may not reduce time or

costs as litigants hire their own “shadow expert” to comment on the appointed expert’s report.²¹

Applicability of the Single Expert Model in Environmental Litigation

In Ontario, Rule 52.03,²² as described above, permits a judge, on motion by a party or out of his or her initiative, to appoint a single expert. The rule is rarely used.

Osborne cautions against single experts where the factual foundations on which an expert’s report are based are contested.²³ In environmental litigation, expert reports often pertain to contamination, mitigation, and remediation and should, in theory, be objective and non-partisan. The factual foundation on which experts rely (e.g. adjacent land uses, soil and groundwater data) should not be in dispute between the opposing parties, particularly where opposing environmental experts work side-by-side during the investigating, testing, and mitigating phases of the project. This is the ideal situation envisioned by Osborne for a single expert.

It is important to distinguish between known facts to ground an expert and legal liability (over which the parties will invariably disagree). A single expert can be instructed by both parties to make the relevant scientific conclusions based on the data available. The expert cannot make legal conclusions relating to intent, negligence, or statutory breaches.

A potential drawback of the single expert approach in environmental litigation is the unpredictability of having only one report govern the potential outcome of the litigation. For example, in soil and groundwater contamination litigation, objective data may be collected using boreholes and monitoring wells regarding contaminant concentration and groundwater levels. Based on this data, a conclusion about the source of the contamination or the groundwater flow direction is often not possible. At this stage, environmental experts may offer a subjective opinion—the strength of which depends on the objective data and its interpretation. Reasonable experts may arrive at different subjective opinions after looking at the same data.

This concern is not novel to environmental litigation, nor is it the only concern. It is representative of the larger debate about whether mandatory single experts are a benefit to the legal system.

CONCURRENT EXPERT EVIDENCE

A second alternative is to have party-appointed experts produce concurrent evidence. In this practice, opposing parties commission and produce their own

expert reports on a given issue. Once the reports are disclosed, counsel or the court may instruct the experts to meet independently and without prejudice.

As an outcome of this meeting, the experts identify areas of agreement, areas of disagreement, and each expert's reasons for any disagreement. Should the action proceed to trial, the experts may be examined independently or as a group to provide further reasoning in any areas of disagreement. The practice of producing concurrent expert evidence is also known informally as "hot-tubbing."

Ontario's *Rules of Civil Procedure* allow for, but do not mandate, the production of concurrent evidence.²⁴

Hot-tubbing is a middle ground between true party-appointed experts and a mandatory single expert. Experts are still each appointed and instructed by one party. However, they are expected to discuss their findings with all other experts on the issue and expressly agree or disagree with one another.

Benefits and Drawbacks

The benefits to producing concurrent evidence are potential savings in time and costs of the litigation as compared to the non-concurrent evidence model. By having the experts discuss their respective reports, the issues may be narrowed and focused. This saves resources in settlement negotiations or at trial and allows the parties and the court to more readily identify the "live" issues that will be determinative of the dispute.

An agreement to provide concurrent evidence allows experts to review the issues outside of the legal framework. Normally, experts are examined at trial by counsel with a specific legal agenda. At trial, experts do not have the floor to discuss their thoughts and opinions regarding how the conclusions of various expert reports interact with one another. When meeting outside of court, the experts may enter a cooperative environment that facilitates peer review and much more open dialogue.

Hot-tubbing also strengthens the most reasonable expert opinions. In the event of any disagreement, experts must either concede their position or defend their report. The justifications of each expert on areas of disagreement provide evidence of the strength of each expert's opinion. Expert opinions that are poorly supported will not fare well against the scrutiny of another expert. Put another way, this model provides a forum for the experts to directly respond to the opposing experts' reports and note any deficiencies and discrepancies.

Despite the benefits, the production of concurrent evidence also has drawbacks. Competent experts thoroughly research and prepare their reports. Such experts should consider all perspectives on an issue and arrive at the conclusion they believe the data best supports. A caucus of the experts may not lead to any changes in position. Each expert is entitled to hold his or her reasonable opinion. In this case, the production of concurrent evidence will not necessarily further the litigation and can be a waste of resources.

The production of concurrent evidence may be more applicable where the expert reports are centred on objective data. In cases where expert reports are based on subjective analyses, a hot-tub may serve only to illustrate that there is a broad range of viewpoints on a given issue. The concurrent evidence may not narrow or focus the issues.

Concurrent evidence favours confident, assertive, and persuasive experts. Courts and counsel must be careful to attribute weight based on the evidence presented and not the expert presenting the evidence. This concern also applies to non-concurrent expert testimony. However, under such circumstances, counsel have greater control over the expert's testimony.²⁵

Concurrent evidence may also not decrease any partisanship or bias among experts, as they are still party appointed. No studies are known by the authors to have been undertaken to determine the relationship between hot-tubbing and bias.

Applicability of Concurrent Evidence in General Litigation

As with mandatory single experts, the production of concurrent expert evidence is considered alternative because the practice is infrequently used in Ontario. Courts in Ontario may apply Rules 50.07(1)(c) and 20.05(2)(k) to order concurrent expert evidence at their discretion.

In *Glass v. 618717 Ontario Inc.*,²⁶ both parties submitted expert evidence regarding business valuation on a motion before Justice D.M. Brown of the Ontario Superior Court of Justice. Justice Brown held:

Counsel for the plaintiffs and the [defendants] welcomed directions from me about further consultations and discussions between the experts.

...

... When both experts testify at trial I will want to gain a clear understanding of why their views about the fair market value of the

shares of those companies are so far apart. To assist me in gaining such an understanding and to focus clearly the business valuation issues for this trial, I direct John Seigel and Robert Martin, the authors of the PWC report, and Chris Nobes, the author of the Campbell Valuation Limited Critique Report, to meet and prepare a joint statement, signed by all of them, which clearly:

- i. identifies their areas of agreement in respect of the valuation of the common shares of the Pronorth Group of companies
- ii. identifies their areas of disagreement, and
- iii. explains in detail the reasons for any disagreements in their opinions.

Under Ontario's *Rules of Civil Procedure*, both sets of experts testify under the obligation to provide "opinion evidence that is fair, objective and *non-partisan*": Rule 4.1.01(1)(a). I expect their joint statement to provide me with *non-partisan* expert assistance in understanding why such divergent views appear to exist about the value of the common shares of what strike me as a pretty straight-forward group of commercial companies.²⁷ [Emphasis in original.]

Further into the trial, Justice Brown evaluated the merit of his earlier order:

As noted earlier, in a mid-trial ruling I gave directions to the business valuers to meet and to prepare a joint statement in advance of their testimony. They did so. While the valuers were unable to develop a consensus range of share value, their Joint Statement proved of great assistance in identifying the areas of disagreement and the financial implications of those disagreements. I wish to thank Mr. Seigel and Mr. Nobes for their work in preparing the Joint Statement.²⁸

Justice Brown, citing his earlier example of *Glass*, made identical orders for a joint statement from the experts in *Wood v. Arius3D Corp.*²⁹ and *Karrys Bros. Ltd. v. Ruffa*.³⁰

In *Argo's Foods Inc. v. Economical Mutual Insurance Co. (Argo's Foods)*, Justice C.D. Braid ordered experts engaged by the litigants to meet prior to trial and:

1. Identify the issues on which the experts agree and the issues on which the experts did not agree;
2. Attempt to clarify and resolve any issues that are the subject of disagreement; and
3. Prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for their disagreement.³¹

In *Argo's Foods*, the insured plaintiffs claimed against the defendant insurer for damage caused by windstorms. There was contradictory evidence before the court about whether the windstorms caused damage to the buildings used by the plaintiffs. The defendant insurer's experts concluded that the windstorms only damaged the buildings' roofs, while the insured plaintiffs' experts concluded that the windstorms damaged the entire buildings.³²

The Federal Courts Rules allow for oral concurrent evidence at trial such that the experts are examined as a panel.³³ This approach has been used in the Federal Court in *Apotex Inc. v. AstraZeneca Canada Inc.*³⁴ and *Distrimed Inc. v. Dispill Inc.*³⁵

An order from the court is not required to produce concurrent evidence. Counsel may also direct the experts in an action to produce a joint statement if the parties believe it would be helpful or save resources. In *Livent Inc. (Special Receiver and Manager of) v. Deloitte & Touche*, Justice Gans scolded counsel in *obiter* for not using the hot-tub approach for the expert reports on damages.³⁶ Justice Gans held:

I digress to observe that the complexity and confusion erupting from the banker's box of damage reports could have been more readily avoided had counsel directed their respective experts to engage in some early "hot tubbing," a concept which has not been met with favour from the Ontario bar though it has on occasion been ordered by this court. The resolution of certain evidentiary problems and factual disputes that disappeared during the course of the trial through the court-assisted conclusion of agreed statements of fact underscores why counsel should insist on more trial management, earlier and more often than a scant few weeks before trial.³⁷

There is limited appellate guidance on the topic of expert hot-tubbing. In *Suway (Litigation Guardian of) v. Women's College Hospital*,³⁸ the trial judge

criticized the expert witnesses for not discussing their differences with one another prior to trial. The Court of Appeal held:

We do not agree with the trial judge's criticisms of the expert witnesses in this case because they failed to meet with each other and review the issues prior to the trial. While it would no doubt be open to counsel to agree on such an approach, and while such an approach might well be desirable in some cases, that is a decision for counsel, not for the experts, to make.³⁹

The onus rests on counsel to commission voluntary concurrent evidence, not the experts.

Applicability of Concurrent Evidence in Environmental Litigation

Concurrent expert evidence remains untested (or, at least, unreported) in environmental litigation.

The technical, scientific data used to support expert reports in environmental litigation may be a good candidate for concurrent expert evidence. As discussed when considering mandatory single experts, the factual foundation on which environmental experts rely (e.g. adjacent land uses, soil and groundwater data, and the like) should not be in dispute between the opposing experts. This is particularly the case where opposing environmental experts work side by side during the investigating, testing, and mitigating phases of the project. If there is disagreement, it should pertain to the interpretation and conclusions drawn from the data. A hot-tub of experts to discuss, for example, the source of a contamination or available remedial options may narrow the issues, encourage settlement, or expedite the litigation. Without-prejudice meetings may facilitate peer review and collaboration among environmental experts.

The concerns of expert bias and an expert's unwillingness to consider another position are undoubtedly unknowns in any case. The effectiveness of concurrent evidence will vary on a case-by-case basis in environmental litigation, based on the issues and the particular experts involved. However, these concerns and potential isolated failures should not discourage a potentially useful practice.

NOTES

- 1 RSO 1990, c P-28.
- 2 RRO 1990, Reg 941, s 77(3).
- 3 *Ibid*, s 77(2)(i).
- 4 *Ibid*, s 72(2)(c).
- 5 Association of Professional Engineers Ontario, *A Professional Engineer's Duty to Report* (Toronto: PEO, 2010).
- 6 SO 2000, c 13.
- 7 *Code of Ethics of Professional Geoscientists*, O Reg 60/01, s 5(2)(a).
- 8 *Disciplinary Matters – Complaints and Disciplinary Proceedings Relating to the Practice of Professional Geoscience*, O Reg 258/02, s 16(2)2.
- 9 O Reg 153/04 made under Ontario's *Environmental Protection Act*.
- 10 *Rules of Civil Procedure*, RRO 1990, Reg 194 promulgated under Ontario's *Courts of Justice Act*, Rule 52.03[Rules].
- 11 Hon Coulter A Osborne, "Civil Justice Reform Project – Summary of Findings & Recommendations" (200) [*Osborne Report*], online: <<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>>.
- 12 *Ibid* at 71–72.
- 13 *Ibid*.
- 14 *Ibid* at 72.
- 15 Alberta Law Reform Institute, *Expert Evidence and "Independent" Medical Examinations*, Consultation Memorandum No 12.3 (Edmonton: ALRI, 2003).
- 16 *Ibid* at 23.
- 17 *Ibid*.
- 18 Civil Justice Reform Working Group, British Columbia Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cjrwg_report_11_06.pdf>.
- 19 *Ibid* at 14.
- 20 Robert Musgrove, "Lord Woolf's Reforms of Civil Justice: The Reforms, their Impact, and the Future for Civil Justice Reform in England and Wales" (Address to Advocates' Society Policy Forum, Toronto, 9 March 2006).
- 21 Lord Chancellor's Department, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms: A Report* (London, UK: Lord Chancellor's Department, 2001) at paras 4.21–4.26, online: The National Archives <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/emerge/emerge.htm>>.
- 22 *Rules*, *supra* note 10, Rule 52.03.
- 23 *Osbourne Report*, *supra* note 11 at 71–72.
- 24 *Rules*, *supra* note 10, Rules 20.05(2)(k), 50.07(1)(c).
- 25 Erik Arnold & Errol Soriano, "The Recent Evolution of Expert Evidence in Selected Common Law Jurisdictions Around the World," *The Lawyers Weekly* (23 January 2013) at 15.
- 26 2011 ONSC 2926 (Commercial List) [Glass].
- 27 *Ibid* at paras 24–26.
- 28 *Glass v 618717 Ontario Inc*, 2012 ONSC 535 at para 250.
- 29 2012 ONSC 5596 at para 8.
- 30 2014 ONSC 713 (Commercial List) at paras 19–21.
- 31 2016 ONSC 1169 at para 68.
- 32 *Ibid* at para 64.
- 33 *Federal Courts Rules*, SOR/98-106, s 282.1.
- 34 2012 FC 559 at para 6.
- 35 2013 FC 1043 at para 168.
- 36 2014 ONSC 2176, aff'd 2016 ONCA 11, rev'd on other grounds 2017 SCC 63.
- 37 *Ibid* at para 276.
- 38 2011 ONCA 676 [Suway].
- 39 *Ibid* at para 114.