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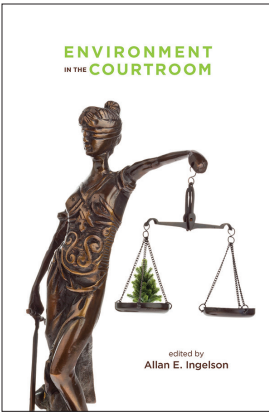
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## ENVIRONMENT IN THE COURTROOM

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## Experts Only

JIM BUNTING, TERRI-LEE OLENIUK, AND SARAH POWELL

### Introduction

When you follow a guide off *piste* you are letting your guide take your life in their hands. Before doing so you will no doubt vet the qualifications of your guide to ensure that they have the necessary experience and skill to lead you safely down the mountain. The experience of the authors is, unfortunately, that many of our environmental and energy administrative tribunals do not apply the same rigour before admitting “expert” testimony into evidence before them. These administrative tribunals often follow what the Ontario Court of Appeal dubbed the “let it all in approach” when receiving expert testimony.<sup>1</sup> This approach has become so common that the authors noted during discussions with other counsel that some lawyers simply chose not to bother challenging the qualifications of an expert in administrative hearings.

This approach presents challenges for all parties. While the outcome is not as dramatic as falling into a chasm or being buried in an avalanche, the let it all in approach is of little to no value to administrative hearings, generally increases the complexity and cost of these hearings, and in some cases could have the effect of misleading the public.

This chapter reviews a few examples in which administrative tribunals have admitted expert evidence in circumstances where, in the respectful view of the authors, the evidence should have been refused or at the very least given no weight. In addition, the chapter briefly reviews other expert evidence issues that are unique to administrative tribunals. It then concludes with some recommendations for counsel and adjudicators to address the admissibility of proffered expert opinion evidence in a fair, efficient, and reasonable fashion.

It should be noted that it is not the intention of the authors to criticize prior decisions. The let it all in approach has likely evolved in an effort to be fair, efficient, and appeal-proof, in tribunal hearings where the strict rules of

evidence do not apply and where public interest considerations are paramount. However, the authors suggest that this practice has downsides and the manner in which it is applied should be revisited

## Gatekeeper Function

Numerous papers address the law as it pertains to the admissibility of expert evidence. See, for example, “Admissibility of Expert Evidence and Costs,”<sup>2</sup> which discusses the critically important gatekeeper function that an adjudicator must exercise when expert evidence is tendered. This chapter does not cover that same ground; however, it is useful to briefly review the accepted legal principles regarding qualifying experts.

The role of the expert witness is to provide independent assistance by way of an objective, unbiased opinion in relation to matters within the expert’s expertise. An expert witness should never assume the role of advocate and is less a “witness for a party” than a “witness for the court.”<sup>3</sup> Where the expert assumes the role of an advocate, he or she can no longer be viewed as an expert in the legally correct sense.<sup>4</sup> It is up to the tribunal to consider whether the expert has the necessary expertise to express an opinion on a particular issue in the field (an expert witness may be properly qualified to provide an opinion on one issue but not another in the same field).

The importance of properly vetting proffered expert testimony cannot be overstated. Perhaps the most poignant illustration of the harm improper expert testimony can cause is found in the *Inquiry into Pediatric Forensic Pathology*.<sup>5</sup> This inquiry was commissioned in Ontario by the Honourable Stephen Goudge of the Ontario Court of Appeal in response to a number of wrongful convictions. The inquiry revealed that these wrongful convictions were due, in part, to the expert testimony of Dr. Smith, whom Justice Goudge described as follows:

In the cases that led to the creation of this Inquiry, Dr. Charles Smith was allowed to give expert evidence in pediatric forensic pathology, often without challenge or with only limited review of his credentials. *He was an apparently well-accredited expert from a world-renowned institution. He was a commanding presence who often testified in a dogmatic style. The evidence at this inquiry demonstrated that the legal system is vulnerable to unreliable expert evidence, especially when it is presented by someone with Dr. Smith’s demeanor and reputation.* An expert like this can too easily overwhelm what should be the gatekeeper’s vigilance and healthy skepticism, as we have seen. In fact, as

we now know, Dr. Smith had none of the requisite training in forensic pathology and no reliable scientific basis for many of his opinions.<sup>6</sup> [Emphasis added.]

The inquiry lists a number of the ways in which Dr. Smith's expert testimony was faulty, including that Dr. Smith:

- a) Failed to understand that his role as an expert was not to assist his client in advancing their case, but to assist the court.
- b) Failed to acknowledge the limits of his expertise. Justice Goudge commented that “[e]xpert witnesses are called to the court to speak to the issues that involve their expertise. They are not given free rein to discuss other matters on which they happen to have an opinion.”
- c) Provided inappropriate unscientific evidence by referring to his own personal experiences or impressions.
- d) Provided opinions that were speculative, unsubstantiated and not based on scientific findings.
- e) Used loose and unscientific language that carried a risk of misinterpretation.
- f) Failed to testify at all times with the candour required of an expert.<sup>7</sup>

The case of Dr. Smith provides warning flags for a trier of fact to watch for, but it also establishes the crucial importance of properly assessing expert testimony in order to avoid the risk of the expert advocate unwittingly influencing the trier of fact without a proper foundation.

## **Rules of Different Tribunals Regarding Expert Testimony**

### **ALBERTA UTILITIES COMMISSION**

The Alberta Utilities Commission (AUC) is not bound by the rules of evidence applicable to judicial proceedings.<sup>8</sup> However, while it has some flexibility to determine the admissibility and weight of evidence, it “cannot ignore the principles that underlie the formal rules of evidence.”<sup>9</sup> The AUC has discretion to refuse evidence that it considers inherently flawed.<sup>10</sup> That said, administrative tribunals may admit any material as evidence that is “logically probative.”<sup>11</sup> The AUC has described its approach to evidence as follows:

The Commission may hear any evidence introduced that may be relevant, decide what evidence is relevant and what is not, decide what

part of the evidence is to be accepted and what part rejected, weigh the evidence that it accepts and where there are conflicts in the evidence decide which evidence is more likely to be true, and come to reasonable conclusions based on such evidence. Its overriding duty is to observe the principles of procedural fairness. This requires listening to and acting fairly regarding all parties, and giving each party a fair opportunity to respond to and contradict adverse testimony or information presented at hearing.<sup>12</sup>

Unlike in a court proceeding, the AUC has acknowledged that its proceedings are not matters between two or more competing parties to determine who wins and loses.<sup>13</sup> With respect to expert evidence, the AUC has proceeded as follows:

- a) Consider whether the evidence is relevant.
- b) If so, consider whether the evidence is opinion evidence related to a specialized or technical field and whether the person giving the opinion is qualified to do so because of expertise.
- c) If so, consider the weight to be given to the evidence based on, *inter alia*: (i) the independence and objectivity of the expert witness; and (ii) the extent the witness was acting as an advocate for a client.<sup>14</sup>

The AUC requires expert witnesses to restrict their opinion evidence to issues or matters “within their area of expertise.” Where experts testify on matters beyond the limits of their expertise, the AUC: (i) gives the evidence the weight of lay witness opinion; and (ii) prefers the evidence of any other expert witnesses qualified to give evidence in that area. Questions about the scope of a witness’ evidence vis-à-vis the area in which the expert was qualified and the weight of that witness’ opinion are considered by the AUC during the proceeding.

In a recent proceeding, the AUC advised all parties that it *would not* be necessary for counsel to request that their respective witnesses be qualified as “expert” witnesses with regard to their pre-filed written evidence or testimony in the proceeding. It stated:

[T]he Commission has generally allowed witnesses, whether qualified as experts or not, to provide opinion evidence where relevant to the scope of a proceeding. The value ascribed to such evidence is a question of weight, which is a function of the professional qualifications,

specialized knowledge, experience, relevant publications, industry recognition and independence of the witness.

Given the above, the Commission is currently considering whether its current practice of qualifying expert witnesses is necessary or efficient. The elimination of the need to qualify witnesses as experts may streamline proceedings and avoid possible disputes over the “expert” designation, while continuing to allow parties to focus on the issue of the weight that should be accorded by the Commission to a party’s evidence in the circumstances.

The Commission is interested in using this proceeding as an opportunity to assess an alternative to the usual procedures for qualifying expert witnesses. To that end, the Commission has directed the writer to advise all parties that it will not be necessary for counsel to request that their respective witnesses be qualified as “expert” witnesses with regard to their pre-filed written evidence or testimony in this proceeding.<sup>15</sup>

Essentially, the AUC’s recent approach is not to act as a gatekeeper of any sort but to focus instead solely on the weight it gives expert evidence. Further discussion of the AUC’s approach to expert evidence is provided later in the case study portion of this chapter.

## **ONTARIO ENVIRONMENTAL REVIEW TRIBUNAL**

The Ontario Environmental Review Tribunal (ERT) *Rules of Practice and Practice Directions* contain “Practice Directions for Technical and Opinion Evidence.” This Practice Direction explains the role and procedure to be followed by both “expert or opinion witnesses” and “technical witnesses.” The rules pertaining to expert or opinion witnesses are substantively the same as the common law rules for an expert witness. A “technical witness” under the Practice Direction is described as follows:

Many witnesses, particularly government employees, appear before the Tribunal to give evidence of scientific and technical observations, tests, measurements, and estimates. While these witnesses are often not considered experts who interpret scientific and technical evidence and provide opinions, they collect, compile, and to some extent interpret, information that is essential to the Tribunal’s understanding of the issues and often forms the basis for expert opinion evidence. In this Practice Direction, these witnesses are referred to as “technical

witnesses” and the scientific and technical information they convey is referred to as “technical evidence”.<sup>16</sup>

The Practice Directions set out the purpose and role of both the expert and technical witness, including describing the requirements to be followed in preparing any expert report. That Practice Direction provides as follows in circumstances where requirements under the Practice Direction are not adhered to:

If this Practice Direction is not complied with, the Tribunal may:

- (a) decline to accept the opinions or evidence of an otherwise qualified witness;
- (b) admit the evidence, but accord it little weight;
- (c) adjourn the date of the Hearing until such time as this Practice Direction is complied with;
- (d) note the conduct of the witness and subject the witness to adverse comment in its decision;
- (e) report a breach of professional standards of conduct, an attempt to mislead, incompetence or negligence, extensive violation of this Practice Direction, or serious interference with the Tribunal’s process to the professional association or licensing body responsible for compliance with standards of conduct; and/or
- (f) order that costs be paid forthwith by the Party who retained or employed the witness.<sup>17</sup>

## NATIONAL ENERGY BOARD

Interestingly, the National Energy Board (NEB) allows for a person to participate in a hearing as an expert intervenor *not* affiliated with any potentially affected party.

The *Jobs, Growth and Long-term Prosperity Act* came into force in July 2012 and amended the *National Energy Board Act (NEB Act)*.<sup>18</sup> One of the amendments was the addition of section 55.2, which establishes what discretion the NEB has with respect to granting participation rights or “standing” for certain NEB proceedings. Section 55.2 provides:

55.2 On an application for a certificate, the Board shall consider the representations of any person who, in the Board’s opinion, is directly affected by the granting or refusing of the application, *and it may consider the representations of any person who, in its opinion, has relevant*



*information or expertise.* A decision of the Board as to whether it will consider the representations of any person is conclusive.<sup>19</sup> [Emphasis added.]

The NEB has indicated that these changes assist it with collecting information that the NEB considers to be relevant to its mandate and the application before it.<sup>20</sup>

In determining whether an applicant has relevant information or expertise, the NEB considers whether the applicant has met the onus of showing possession of relevant information or expertise. In terms of its role as a gatekeeper, the NEB uses an Application to Participate process to determine who should be granted standing in a hearing. The application is generally a four-page form that the person fills out, and there is no other qualification process.

In its section 55.2 Guidance, the NEB included the following considerations to explain how it determines whether a person has relevant information:

- a) The source of the person's knowledge (for example, local, regional or Aboriginal);
- b) The extent to which the information is within the project scope and related to the list of issues; and
- c) How much value the information will add to the Board's decision or recommendation.

The same section 55.2 Guidance states that the NEB may consider the following factors when deciding if a person has relevant expertise:

- a) The person's qualifications (for example, the person has specialist knowledge and experience);
- b) The extent to which the person's expertise is within the project scope and related to the list of issues; and
- c) How much value the information will add to the Board's decision or recommendation.<sup>21</sup>

In a recent ruling the NEB had the following comments regarding its assessment of applicants who claim to have "relevant information or expertise":

The Board also considers whether the relevant information or expertise being offered will add value to the Board's assessment. The

Board is an expert tribunal with decades of experience in assessing applications for projects under its jurisdiction in the Canadian public interest, and the Board employs this expertise when assessing completed ATP forms.<sup>22</sup>

The NEB's ruling on participation determines whether a person meets the test for having relevant information or expertise and, if so, whether the person can participate as an intervenor or a commentor. It is important to note that if a person is granted standing as an intervenor they have full participatory rights and can bring motions, file evidence, make information requests of the proponent and other intervenors, and make argument.

This approach is challenging, as the NEB's recent rulings on participation have not provided any guidance regarding the area of expertise that the expert is qualified to opine on, the rationale applied by the NEB to determine whether such expertise is helpful, or the value that the NEB places on such evidence. In addition, it is not apparent why the NEB, an expert tribunal with decades of experience in assessing applications for projects under its jurisdiction in the Canadian public interest, would determine that such expertise is necessary.

In addition to granting persons with relevant expertise standing as intervenors, the NEB's Participant Funding Program provides intervenors with the opportunity to apply for financial assistance to intervene in proceedings. The maximum amount of funding is \$12,000 for individual intervenors.<sup>23</sup> The NEB's Participant Funding Program Guide details how to apply for funding to hire experts.<sup>24</sup> Recently, the NEB granted \$1,790 in participant funding for travel to a hearing for an intervenor who was granted standing based on "relevant expertise."<sup>25</sup>

## Case Discussion

Refusing to admit expert testimony when a witness clearly lacks expertise is generally not a difficult task. The battle lines with regard to expert testimony are usually drawn around the scope of expertise and whether the expert in question is independent or impartial. The following case examples illustrate some of the issues faced by administrative tribunals.

### THE ARMOW WIND DECISION<sup>26</sup>

A recent hearing before the ERT in connection with an appeal from the approval of the Armow Wind renewable energy project serves as a good discussion point. In this case, the appellant tendered Rick James as an expert witness

in the area of acoustics. Mr. James had testified before the ERT in at least three prior proceedings before the Armow Wind appeal. His independence had been challenged in the K2 Wind appeal, which was heard a few months before the Armow Wind proceeding, but the ERT in that case did not provide any reasons analyzing the challenge to Mr. James' qualifications and independence. In contrast, the ERT in Armow Wind addressed the challenge to Mr. James' qualifications and independence.

By way of context, in the Armow Wind proceeding, as a matter of efficiency, Mr. James' qualifications and independence were challenged as part of his cross-examination on the substance of his opinion, and there was not a separate *voir dire* to consider the admissibility of his evidence. This obviously impacts the manner in which a tribunal discharges its gatekeeper function, as the tribunal will hear the evidence before ruling on its admissibility.

The evidence established the following in respect of Mr. James' independence:

- (a) Since 2005, Mr. James, has represented clients in about 30 different matters and not one client he has represented has supported the development of wind turbines.
- (b) Mr. James was a founding member and current member of the board of directors of the Society for Wind Vigilance, which had publicly called for "a moratorium on further industrial wind development."
- (c) Mr. James agreed that through his work with the Society for Wind Vigilance he is "*advocating*" against the development of wind projects close to homes.
- (d) While Mr. James testified that he is not against all wind projects, just projects that are too close to homes, he testified that he has never seen a project in Ontario that he would consider safe and he does not know what a safe setback distance would be for a wind turbine.

In addition to the facts above that have had an impact on Mr. James' independence, cross-examination revealed a number of other instances where Mr. James, in the view of the authors, failed to comply with the requirements necessary for proper and admissible expert testimony. Of particular note, Mr. James provided (or at least attempted to provide) an opinion outside his area of expertise (acoustics), including testimony about the physiological response of the human body to certain types of noise and about the merits of an epidemiological study. Mr. James offered an opinion in these areas despite

confirming that he is not qualified to provide a medical opinion as a doctor would and that he is not an expert in statistics or epidemiology.

Mr. James also used unscientific and alarmist statements during the course of his testimony. For example, he acknowledged that he had previously testified in a proceeding in Michigan where he described the noise from a small non-industrial wind turbine as “like being on the battleship in World War II with a Kamikaze pilot coming towards you.” Similarly, in his testimony before the ERT:

- a) Mr. James testified that low frequency sound and infrasound from wind turbines occurs in the one hertz range and that sources of noise in the natural environment that generate frequencies in that same range are things like earthquakes, tsunamis and tornadoes. He conceded, however, that waves crashing on a beach generate noise close to that same range.
- b) Mr. James described bursts of elevated infrasound as being “like a gunshot”. He conceded, however, that he could instead have testified that these sound bursts were very short like “a snap of the fingers” or “a tap of the foot”.<sup>27</sup>

The ERT considered all of Mr. James’ evidence and found that he met the requisite qualifications to provide opinion evidence on matters related to acoustics and noise control engineering and wind turbines. The ERT held, however, that his evidence “on other matters, including health effects of wind turbines and epidemiology, would be excluded from consideration.”<sup>28</sup> This was, in the view of the authors, correct. Mr. James had sufficient experience to be qualified in the area of acoustics, but he was not qualified to testify in the other areas.

The major contention with Mr. James’ evidence, however, was whether he was sufficiently independent to be permitted to give expert testimony. On the issue of Mr. James’ objectivity and impartiality, the ERT found as follows:

The evidence about Mr. James’ independence is equivocal. Some aspects of his evidence were selective and he was not entirely forthcoming about the actual state of the science with respect to wind turbine noise. His failure to modify his witness statement after it was shown to be inaccurate through cross-examination in a previous Tribunal hearing shows carelessness, at a minimum. His use of alarmist language may indicate that he is acting more as an advocate than as an objective

and independent expert. While all of these factors could influence the weight to be given to his evidence, the Tribunal does not consider that his evidence is so tainted that it should be excluded entirely.<sup>29</sup>

In the view of the authors, the ERT correctly noted that there were issues with Mr. James' independence. However, having made the findings it did about Mr. James' independence, the ERT could have gone further and found that even if his evidence was admitted it would be afforded little to no weight. In the view of the authors, in the absence of independence, the evidence of an expert cannot be trusted and there is a risk—as illustrated by the case of Dr. Smith—that the opinion evidence is not fair or balanced and could be misleading.

Put simply, whether an expert is independent and impartial is not something that should be “equivocal.” If there are serious issues and concerns about an expert's independence that evidence either should not be admitted at all or it should be given little to no weight.

#### **THE PLATINUM PRODUCE DECISION<sup>30</sup>**

In another appeal from a renewable energy approval, the ERT permitted the appellant, Platinum Produce, the right to deliver an expert report of Dr. Robert McMurtry in reply to certain evidence led by the approval holder. Dr. McMurtry had previously testified in a number of renewable energy approval appeals and expressed an opinion about the alleged harms to human health caused by wind turbines.

Although Dr. McMurtry's opinion in this appeal ultimately ended up being of no consequence, because it was premised on incorrect assumptions, it is concerning to the authors that Dr. McMurtry's opinion was considered at all in the circumstances of this case. In this regard, numerous facts raised questions about the independence of Dr. McMurtry, including his involvement as the founding chair of the Society for Wind Vigilance and his involvement as an incorporating director of the Alliance to Protect Prince Edward County (APPEC), an organization whose mission statement suggests there is “no location in the County that is appropriate for a wind turbine development.” These concerns about independence were exacerbated by the manner in which Dr. McMurtry prepared his expert report for this appeal. In particular, the ERT made the following evidentiary findings:

[97] On cross-examination Dr. McMurtry acknowledged that he did not draft his reply witness statement and that the witness statement should be corrected to state his opinion that it is “more probable than

not” the Project will cause serious harm to human health of the workers. He also failed to provide a signed “Acknowledgement of Expert’s Duty” form prior to giving his evidence.

Stated plainly, Dr. McMurtry did not draft his expert report, he did not appear to have read the report before it was served and filed, the report was wrong in that it overstated the opinion Dr. McMurtry held, and Dr. McMurtry did not at any time sign an acknowledgement of expert’s duty in connection with his testimony as required under the applicable Practice Direction.

In the circumstances of this case, it is the respectful view of the authors that Dr. McMurtry lacked the necessary level of independence and impartiality for his evidence to be given any weight at all by the ERT.

### **TRANSALTA ENFORCEMENT PROCEEDINGS**

In December 2014, the AUC commenced the hearing for Proceeding No. 3110.<sup>31</sup> The proceeding involved an investigation by the Market Surveillance Administrator (MSA) of timed outages and related trading at certain coal-fired generating units operated by TransAlta Corporation (TransAlta). In its application, the MSA relied on a report by Dr. Matt Ayres, Deputy Administrator and Chief Economist of the MSA. The MSA also proffered Dr. Ayres as an expert witness in the hearing before the AUC.

Dr. Ayres played a leading role in the MSA’s two-year investigation of TransAlta, which ultimately led to the hearing. Over the course of the investigation, Dr. Ayres: (i) authored/signed the initial notice of investigation; (ii) interviewed TransAlta staff; (iii) was the contact person at the MSA for correspondence with TransAlta; (iv) was in contact with and guided MSA staff; and (v) authored a report the MSA relied on in the application.

In a *curriculum vitae* filed with the AUC, Dr. Ayres described his role with the MSA as including: (i) leading a team of economists and other staff in providing expert analysis of market rules, market monitoring activity, and investigations; and (ii) providing expert evidence in AUC proceedings on MSA matters.

TransAlta did not challenge the qualification of Dr. Ayres as an expert prior to the hearing. In its written submissions, however, TransAlta argued that the AUC should reject Dr. Ayres’ evidence or give it little weight. In support of this position, TransAlta relied on the fact that Dr. Ayres was the lead investigator into the allegedly impugned conduct and that he had a vested interest in the outcome of this proceeding. According to TransAlta, Dr. Ayres was not independent and, as a result, his evidence was unreliable.

The MSA filed its reply argument on February 19, 2015<sup>32</sup> and submitted that Dr. Ayres is an expert. According to the MSA, his full-time job is to monitor the Alberta market, and the assumptions he employed were derived both from his extensive experience in the Alberta market and his education in economics. The MSA argued that Dr. Ayres is: (i) independent of any market participant; and (ii) serves only the legislative mandate of the MSA and the development of a fair, efficient, and openly competitive market in Alberta.<sup>33</sup> It went on to suggest that preventing an expert body with a statutory mandate and requirement to bring matters before the AUC from utilizing that expertise in performing its statutory mandate due to “bias” is without foundation.<sup>34</sup>

### **BLUEARTH RENEWABLES BULL CREEK WIND PROJECT<sup>35</sup>**

In June 2012, 1646658 Alberta Ltd. (“BluEarth”), a wholly owned subsidiary of BluEarth Renewables Inc., filed an application with the AUC to construct and operate the Bull Creek Wind Project, which included 46 wind turbines with 2.5-megawatt capacity. The AUC received objections to the project, including a number from members of the Killarney Lake Group (KLG), which was made up of nearby landowners.

A key issue in the proceeding was whether operation of the project may cause adverse health effects for nearby residents, including those with pre-existing medical conditions. Eight expert witnesses filed reports and testified on this topic in the proceeding. The record before the AUC on this topic was considerable. In addition to the expert reports, numerous medical, epidemiologic, and acoustic studies and reports were referenced or filed in the proceeding.<sup>36</sup>

On January 15, 2013, the KLG filed a request for advanced funding that included funding for nine expert witnesses. In Decision 2013-0261, the AUC awarded advanced costs of \$142,109.50 to the KLG with respect to legal and consulting fees.<sup>37</sup>

The AUC ruled on the qualifications of expert witnesses three days prior to the oral hearing.<sup>38</sup> In doing so, it noted the following legal principles regarding expert witnesses:

- *Independent and unbiased expertise* – An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. Expert witnesses are held to a high standard and must fully disclose the kind of relationships and history that might lead to concerns about bias.

Such a finding would generally lead to an adverse inference on the impartiality and character of that expert witness

- *Scope of expertise* – Aspects of experts’ evidence that extend beyond the limits of their expertise should be given the weight of a lay witness rather than the weight of a properly qualified expert in these areas.
- *Expert not advocate* – An expert witness should never assume the role of advocate.

The AUC indicated that the fact that an expert is permitted to give evidence on a particular point is not a determination by the AUC of the credibility or weight to be accorded to that evidence.<sup>39</sup> Below is a summary of issues that were raised regarding some of the individuals tendered as experts.

### **Expert as Advocate**

KLG experts Dr. Carl Phillips, Dr. Christopher Hanning, and Mr. James were all affiliated with the Society for Wind Vigilance (“Society”), in the capacity of either a board member or scientific advisor. During the hearing, Dr. Phillips, Dr. Hanning, and Mr. James did not dispute that the Society’s own press release indicates that it supports “a moratorium on further industrial wind development.”<sup>40</sup> In addition, the majority of the reports and studies cited in support of the KLG expert’s positions regarding the effects of wind turbine noise on health were either authored by or peer reviewed by Society members and advisors – Phillips, Hanning, James, Nissenbaum, Krogh, Horner, Aramini, Salt, Shepherd, and Thorne.

Dr. Hanning testified with respect to his involvement with the Society.<sup>41</sup> The only paper that Dr. Hanning authored regarding the effects of wind turbines was co-authored by Drs. Aramini and Nissenbaum. Dr. Hanning testified that Dr. Aramini is a scientific advisor for the Society, while Dr. Nissenbaum sits on the Society’s board of directors.<sup>42</sup> Mr. James is one of the founders and is a board member of the Society. He noted that the Society was formed by a group of professionals, as a forum to review and provide white papers on wind turbine noise and health effects, and, curiously, to provide personal protection for its members against lawsuits.<sup>43</sup>

### **Expert Is Unlicensed Physician**

The KLG also sought to rely on the expert evidence of Dr. Sarah Laurie. Dr. Laurie practised as a rural general physician for a short time but had not



practised medicine for over 11 years and was, at that time, not a licensed physician. In her expert report, Dr. Laurie discussed her role as Chief Executive Officer of the Waubra Foundation, an Australian organization whose goal is to facilitate properly conducted, independent multidisciplinary research into the health problems identified by residents living near wind turbines. Dr. Laurie has previously testified on behalf of opponents of wind farm projects in other jurisdictions.<sup>44</sup>

### **Expert Opining Outside Area of Expertise**

Noise levels were crucial to the hearing. Dr. Adrian Upton, qualified as a neurologist, described AUC Rule 012 (which governs noise from facilities, measured cumulatively with noise from other facilities) as an “arbitrary assessment of what range of noise is acceptable.”<sup>45</sup> In addition, Dr. Upton was unable to provide any detail regarding how the references he provided in his opening statement supported his opinion regarding the effects of wind turbine noise on sleep and health.

### **AUC Findings**

The AUC was not prepared to disregard the evidence provided by the KLG experts solely because they are members of the Society or a similar organization, nor was it prepared to disregard the evidence provided by the applicant’s witnesses because they have previously testified on behalf of other wind developers. It indicated that while such affiliations are a factor that the AUC may take into account when assessing each expert’s objectivity, it must consider a number of other factors when determining the overall weight to give each expert’s evidence. In the AUC’s view, the best place for this analysis is within the decision where the expert’s evidence is discussed.<sup>46</sup>

The AUC concluded that Dr. Laurie lacked the necessary skills, experience, and training to comment on the interpretation of epidemiologic studies or the interpretation of acoustical studies and reports. The AUC gave little weight to this aspect of Dr. Laurie’s evidence.<sup>47</sup>

In the AUC’s view, Dr. Upton did not appear to have specialized knowledge or experience specifically with respect to wind turbines and their health effects. The AUC also held that Dr. Upton appeared to be unfamiliar with the qualifications of some of the authors of the reports he relied upon in forming his opinion on the health impacts of wind turbines or whether the reports he referenced were published or peer reviewed. The AUC took this apparent unfamiliarity with the subject into account when it weighed Dr. Upton’s

evidence regarding the general health impacts of wind turbines on nearby residents.<sup>48</sup>

The AUC found that Dr. Phillips provided evidence that was consistent with his expertise, and that Dr. Phillips attempted to provide his evidence in an objective manner. The AUC observed that Dr. Phillips was far less definitive in his oral testimony than he was in his written evidence with respect to many of his conclusions. This suggested to the AUC that Dr. Phillips retained some flexibility in his views regarding the health effects associated with wind turbines. Despite these findings, the AUC gave little weight to Dr. Phillips' specific conclusions regarding the project's health effects on nearby residents. First, Dr. Phillips provided little rationale for his predictions regarding the number of people who would experience health effects from the project. Second, Dr. Phillips confirmed that his conclusions were not based upon any particular adverse event reports, and, in fact, he had not reviewed any adverse event reports in the preparation of his written evidence. Third, Dr. Phillips confirmed that the data he looked at was not organized in a systematic way and that he did not break down the data to determine a dose-response relationship between wind turbine operation and the symptoms he described. Fourth, Dr. Phillips conceded that he had not specifically defined the population upon which his conclusions were based.<sup>49</sup>

Despite these findings, costs were nonetheless awarded for the participation of these experts in excess of \$20,000.

## **Conclusion/Recommendations**

There is no one size fits all approach that can be applied to expert evidence submitted before administrative tribunals. In some instances, the breadth and volume of the evidence submitted will be such that it is most appropriate to consider and rule on qualifications and independence before hearing testimony on the opinion in issue. There will also be circumstances where the evidence, if admitted, could be sufficiently prejudicial or complex that the administrative tribunal should decide in advance whether it is prepared to hear that evidence before ruling on qualifications and independence. Finally, there will be cases where a form of the "let it all in" approach is most efficient. This will be in circumstances where receiving the evidence will not substantially lengthen the hearing and the administrative tribunal is situated to hear the evidence without being misled by it.

It is up to counsel and the administrative tribunal to carefully consider each situation and decide which approach to follow. What is clear, however,

is that many administrative tribunals must do more than just “let it all in.” Where opinion evidence is offered by an individual who does not have the requisite qualifications, independence, or impartiality, the administrative tribunal should make that finding and refuse to accept the evidence on that basis or afford the evidence little to no weight. In addition, in certain administrative tribunals where cost awards are granted or participant funding is awarded, properly excluding experts at the outset (instead of taking a let it all in approach and then giving little to no weight to their evidence) would promote efficiency and cost effectiveness for all parties.

In conclusion, when it comes to discharging its gatekeeper function, it matters less how a particular administrative tribunal does it and more that it is done.

#### NOTES

- 1 *Johnson v Milton (Town)*, 2008 ONCA 440, 91 OR (3d) 190 at para 46.
- 2 Chapter 38 in this volume.
- 3 *1159465 Alberta Ltd v Adwood Manufacturing*, 2010 ABQB 133 at para 2.11.
- 4 *Perricone v Baldassarra* (1995), 7 MVR (3d) 91 at 99 (Ont Gen Div).
- 5 *Inquiry into Pediatric Forensic Pathology in Ontario Report* (Toronto: Ministry of the Attorney General, 2008) (Commissioner: the Honourable Stephen T Goudge) vol 3 [The Goudge Inquiry] (accessed 5 February 2018), online: <[http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v3\\_en\\_pdf/Vol\\_3\\_Eng.pdf](http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v3_en_pdf/Vol_3_Eng.pdf)>.
- 6 The Goudge Inquiry, *ibid* at 470.
- 7 The Goudge Inquiry, *ibid* at 17–19.
- 8 *Alberta Utilities Commission Act*, SA 2007, c A37.2, s 20. This reflects the common law position that administrative tribunals are not bound to apply strict rules of evidence, unless expressly prescribed. Tribunals are entitled to act on any evidence that is logically probative: *Alberta (Workers' Compensation Board) v Appeals Commission*, 2005 ABCA 276 at paras 63–64 [WCB].
- 9 AUC Decision 2011-436: AltaLink Management Ltd and EPCOR Distribution & Transmission Inc – Heartland Transmission Project, Application No 1606609, Proceeding ID No 457, 1 November 2011 at para 82 [Heartland Transmission Project], *aff'd* on other grounds 2012 ABCA 378. See also AUC Decision 2012-303: ATCO Electric Ltd – Eastern Alberta Transmission Line Project, Applications No 1607153 and No 1607736, Proceeding ID No 1069, 15 November 2012 at para 96 [ATCO Electric Ltd], where the AUC qualified this statement by adding the underlined: “While this allows the Commission some flexibility to determine what evidence to admit and what weight to give the evidence it admits, it cannot ignore the principles of procedural fairness that underlie the formal rules of evidence.”
- 10 *Lavallee v Alberta (Securities Commission)*, 2010 ABCA 48 at paras 16–17 [Lavallee] (interpreting a similar section of the Securities Act, RSA 2000, c S-4). Leave to appeal to SCC was dismissed in *Lavallee v Alberta (Securities Commission)*, [2010] SCCA No 119.

- 11 *WCB, supra* note 8 at para 63, citing *TA Miller Ltd v Minister of Housing and Local Government*, [1968] 1 WLR 992 at 995 (CA); *Trenchard v Secretary of State for the Environment*, [1997] EWJ No 1118 at para 28 (CA); and *Bortolotti v Ontario (Ministry of Housing)* (1977), 15 OR (2d) 617 (CA).
- 12 AUC Decision 2012-104: Milner Power Inc – Complaint by Milner Power Inc Regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology, Application No 1606494, Proceeding ID No 790, 16 April 2012 at para 200 [Milner Power Inc]. The commission cited the following authorities: *Kane v University of British Columbia*, [1980] 1 SCR 1105 at 1112–13; *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75; and *Lavallee, supra* note 10.
- 13 ATCO Electric Ltd, *supra* note 9 at para 87; Heartland Transmission Project, *supra* note 9 at para 73; AUC Decision 2012-327: AltaLink Management Ltd – Western Alberta Transmission Line Project, Application No 1607067, Proceeding ID No 1045, 6 December 2012 at para 140.
- 14 Heartland Transmission Project, *supra* note 9 at para 96.
- 15 Proceeding 2739, Application No 1609784, correspondence dated 18 June 2014.
- 16 Ontario Environmental Review Tribunal, *Rules of Practice and Practice Directions* (12 September 2016), online: <<http://elto.gov.on.ca/tribunals/ert/guides-rules/>> at 46.
- 17 Ontario Environmental Review Tribunal, *ibid* at 50.
- 18 *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, Division 2.
- 19 *National Energy Board Act*, RSC 1985, c N-7, s 55.2.
- 20 NEB, Trans Mountain Pipeline ULC (Trans Mountain) – Application for the Trans Mountain Expansion Project (Application), 16 December 2013, and Ruling on Participation (Ruling), 2 April 2014.
- 21 NEB, “Section 55.2 Guidance – Participation in a Facilities Hearing” (22 March 2013).
- 22 NEB, “Ruling on Participation and Updated Timetable of Events in the Application for the Line 9B Reversal and Line 9 Capacity Expansion Project” at 3.
- 23 NEB, “Participant Funding Program,” online: <<http://www.neb-one.gc.ca/prtcptn/hrng/pfp/prtcptntfndngprgrm-eng.html>>.
- 24 NEB, *Participant Funding Program Guide* (13 July 2017, accessed 5 February 2018), online: <<https://www.neb-one.gc.ca/prtcptn/hrng/pfp/prgrmgd-eng.html>>.
- 25 NEB, “Allocation of Funds for Participation in the Public Hearing for Trans Mountain Expansion” (17 February 2015, accessed 5 February 2018), online: <<http://www.neb-one.gc.ca/prtcptn/hrng/pfp/llctnfnd/trnsmntnxpnsn-eng.html>>.
- 26 *Kroepin v Director, Ministry of the Environment*, [2014] OERTD No 24, 88 CELR (3d) 1 [*Kroepin*].
- 27 Mr. James’ Evidence, 9 January 2014, Transcript, 364–366, Compendium, vol 1, tab E.
- 28 *Kroepin, supra* note 26 at 86.
- 29 *Kroepin, ibid* at 86.
- 30 *Platinum Produce Company v Director, Ministry of the Environment*, Case No 13-096 [*Platinum*].
- 31 The AUC has not rendered its decision in respect of Proceeding No 3110.
- 32 Reply Argument of the Market Surveillance Administrator, Application No 1610350, Proceeding No 3110 [Reply Argument].
- 33 Reply Argument, *ibid* at para 132.
- 34 Reply Argument, *ibid* at para 136; see AUC Decision 3110-D02-2015 Market Surveillance Administrator allegations against TransAlta Corporation et al., 18 September 2015.
- 35 AUC Decision 2014-040: 1646658 Alberta Ltd., Bull Creek Wind Project (20 February 2014) [Decision].
- 36 Decision, *ibid* at para 365.

- 37 AUC Decision 2013-026: 1646658 Alberta Ltd – Bull Creek Wind Project – Advance Funding, Application No 1608556, Proceeding ID No 1955, 31 January 2013.
- 38 Ruling on the Qualification of Expert Witnesses in Proceeding ID No 1955.
- 39 Ruling on the Qualification of Expert Witnesses in Proceeding ID No 1955; AUC Advance Costs Decision 2013-026 at 6.
- 40 The Society for Wind Vigilance, News Release, “The Society for Wind Vigilance Announces First International Symposium” (17 July 2010, accessed 5 February 2018) online: <<http://www.windvigilance.com/news/the-society-for-wind-vigilance-announces-first-international-symposium>>.
- 41 Transcript, vol 6, 1426.
- 42 Transcript, vol 6, 1447.
- 43 Transcript, vol 8, 1738.
- 44 Decision, *supra* note 35 at para 309.
- 45 Transcript, vol 8, 1833.
- 46 Decision, *supra* note 35 at para 52.
- 47 Decision, *ibid* at para 375.
- 48 Decision, *ibid* at para 373.
- 49 Decision, *ibid* at paras 369 and 383–386.