



*You Have Been Retained as an Expert Witness in  
Environmental Litigation – Now What?*



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SMART Remediation  
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# Experts in Environmental Litigation

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SMART Remediation Seminar Series  
Calgary, Alberta  
March 12, 2020



1

## Roadmap

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- **Litigation Privilege**
- **Expert's Duties & Credibility**
- **Admissibility of Expert Evidence**
- **Key Takeaways**



2

# Litigation Privilege

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- **What is Litigation Privilege?**

- *Pinder v Sproule* (2003 ABQB)
  - litigation privilege applies to documents created for the dominant purpose of furthering litigation
  - litigation must be existing or contemplated
  - privilege can only be waived by the client

# Litigation Privilege

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- **What does litigation privilege cover?**

- How far does privilege extend?
- Does privilege reach beyond the expert's final report and into the expert's file?
- Does all of this mean that the expert's field notes, drawings, notes-to-self, notes of conversations with colleagues and instructing counsel, report outlines, and draft written reports are producible in litigation?

# Litigation Privilege

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- ***Chernetz v Eagle Copters Ltd (2005 ABQB)***

- communications between an expert and counsel and working notes created by the expert are privileged as having been created for the dominant purpose of litigation
- when the expert testifies, the privilege is lost as to those documents that the expert reviewed in forming his opinion, whether the expert relied on, rejected or disregarded the information in those documents.
- the privilege is also lost on communications between the expert and instructing counsel to the extent that those communications are relevant to the expert's opinion

# Litigation Privilege

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- **Alberta Rules of Court**

- Rule 5.35(1) – If a party intends to use the evidence of an expert at trial, the expert's report must be served in the sequence described in subrule (2)
- Rule 5.37(1) – The parties may agree, or in exceptional circumstances the Court may direct, that an expert be questioned by any party adverse in interest to the party proposing to call the expert witness at trial

# Litigation Privilege

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- ***Grammer v Langpap* (2014 ABQB)**

- plaintiff produced expert's report to defendant prior to trial
- defendant sought production of expert's underlying documents
- court held that production of report by plaintiff did not amount to an express intention to use the expert evidence at trial
- as such, Rule 5.35 did not apply and plaintiff was not required to produce expert's file

# Litigation Privilege – Documents

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- **Alberta Rules of Court create broad disclosure obligations**

- Rule 5.5(1) – every party must serve an affidavit of records
- Rule 5.6(1) – an affidavit of records must disclose all records that are (i) relevant and material to the issues in the action, and (ii) are or have been under the party's control
- Rule 5.2(1) – “relevant and material”
  - significantly help determine one or more of the issues in the pleadings, or
  - to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues in the pleadings

## Litigation Privilege – Documents

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- **British Columbia’s Supreme Court Civil Rules create disclosure obligations**
  - Rule 11-6(8) – a party who serves expert report must disclose communications and information on which expert opinion is based if asked to do so by opposing party
    - includes data, statements of facts, test results, records of observations

## Litigation Privilege – Communications

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- ***San Filippo v Alberta Health Services (2018 ABQB)***
  - plaintiff argued that communications between the defendant’s counsel and the defendant’s expert were improper
  - court affirmed that communication between counsel and expert witnesses is necessary
  - court found no inappropriate review of “coaching” of the expert

## Litigation Privilege – Communications

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- **Counsel needs to**
  - ensure the expert witness understands the difference between the legal burden of proof and scientific certainty
  - clarify facts and assumptions underlying the expert's opinion
  - confine the report within the expert's area of expertise
  - avoid usurping court's function as arbiter of the issues
- **Counsel explains the legal issues to the expert and delivers complex technical evidence to the Court**

## Litigation Privilege – Communications

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- **“Consultation and collaboration between expert witness and counsel is a necessary component of litigation, particularly in highly technical cases”**
  - *Uponor AB v Heatlink Group Inc* (2016 FC)
- **“Counsel and their experts are permitted to confer in a way that does not interfere with an expert's impartiality and meets the standard of conduct prescribed by both the expert's and counsel's respective professional regulating bodies”**
  - *Moore v Getahun* (2015 ONCA)

# Expert's Duties

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- **What do environmental experts do?**

- decipher
- untangle
- inform
- educate
- clarify
- provide opinions
- support clients and counsel in negotiations
- write expert's reports
- sometimes testify under oath

13



"No, you weren't there. But in your expert opinion as a certified brainiac, do you think he did it?"

14



## Expert's Duties

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- **Experts have a duty**
  - of loyalty
  - to maintain privilege
  - to be truthful and fair
  - to be impartial and unbiased
- **In some jurisdictions, experts must sign-off on their duties**

## Expert's Duties – Alberta

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- **Alberta Rules of Court**
  - Rule 5.34 – Expert report must be in Form 25, and contain
    - expert's name and qualifications
    - information and assumptions on which the expert's opinion is based, and
    - summary of the expert's opinion

## Expert's Duties – BC Supreme Court

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- **BC's Supreme Court Civil Rules**

- Rule 11-2

- (1) in giving an opinion to the court, an expert has a duty to assist the court and is not to be an advocate for any party
- (2) experts must, in any report they prepare, certify that they
  - are aware of this duty
  - have made the report in conformity with the duty, and
  - if called on to testify, will give testimony in conformity with the duty

## Expert's Duties – Ontario Civil Court

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- **Rule 4.1.01 of Ontario's *Rules of Civil Procedure***

- expert must provide
  - (1) opinion evidence that is fair, objective and non-partisan
  - (2) related only to matters that are within the expert's area of expertise, and
  - (3) are required to provide such additional assistance as the court may reasonably require to determine a matter in issue

- **Rule 53.03 of Ontario's *Rules of Civil Procedure***

- A party may introduce expert evidence first by written report and then by oral testimony at trial
- each party must serve the expert's written report within the time designations set out in the *Rules*

## Expert's Duties – Civil Court

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- **Rule 53.03 applies to “litigation experts”, not “participant experts”**
  - A witness with special skill, knowledge, training or experience who has not been engaged by a party to the litigation may give opinion evidence without complying with Rule 53.03 where
    - the opinion to be given is based on the witness's observation of or participation in the events at issue
    - the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training, and experience while observing or participating in such events

## Expert's Duties – Federal Court

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- **Section 52, *Federal Courts Rules***
  - expert witnesses must sign certificate acknowledging that the expert has read the Code of Conduct for Expert Witnesses and agrees to be bound by it
- **Code of Conduct for Expert Witnesses**
  - an expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise
  - this duty overrides any duty to a party to the proceeding, including the person retaining the expert witness

## Expert's Duties – Tribunals (Alberta EAB)

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- **EAB's Rules of Practice**

- Rule 24

- A witness having technical or special knowledge, who is retained by the Board to give evidence, shall provide a written curriculum vitae of his/her qualifications and experience

- Rule 15

- prohibits communication between any counsel and a witness under examination or cross-examination from time the witness has been sworn until witness has been excused

## Expert's Duties – Tribunals (Alberta AER)

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- **AER's Rules of Practice**

- Rule 24

- A witness presenting documentary evidence at a hearing shall confirm on oath or affirmation that the documentary evidence
      - was prepared by the witness or under the witness's direction or control, and
      - is accurate to the best of the witness's knowledge or belief

## Expert's Duties – Alberta

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- **Rule 3, Code of Ethics, Regulation**

- professional engineers and geoscientists shall conduct themselves with integrity, honesty, fairness and objectivity in their professional activities

- **Rule 4.3.3, APEGA's Guideline for Ethical Practice**

- professionals should keep confidential all information that is acquired in the course of their professional duties

## Expert's Duties – British Columbia

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- **Engineers & Geoscientists British Columbia, Code of Ethics**

- Principle 4 – Members shall act as faithful agents of their clients or employers, maintain confidentiality and avoid a conflict of interest
- Principle 7 – Members and licensees shall conduct themselves with fairness, courtesy and good faith towards clients, colleagues and others

## Expert's Duties – Independence

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- **Independence of an expert is an element of the expert's duty of loyalty**
- **Bias and advocacy on the part of an expert may affect the weight given to the evidence**
  - *Wrightman v Director, Ministry of the Environment*
    - Approval Holder of REA for wind farm objected to appellants' expert witness on the grounds that the expert was affiliated with an organization that opposed industrial wind farms
    - ERT held that submissions regarding bias and advocacy will be assessed when weighing the expert's evidence

## Expert's Credibility

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- **Credibility is hard to gain and easy to lose**
- **Credibility is affected by**
  - independence/bias
    - an expert report is only beneficial to the court if it is independent and unbiased
  - factual accuracy and confirming assumptions
    - experts must include in their reports an outline of the factual assumptions upon which their opinion is based
- **Cases are often won or lost based on credibility**

## Expert's Credibility

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- **Cost consequences of a lack of credibility**
  - *Seaspan ULC v British Columbia (Director, Environmental Management Act)* (2014 BC Environmental Appeal Board)
    - defendant ordered to pay costs for advancing an implausible argument based on an expert report that lacked credibility
      - report was deceptive
      - adopted artificially technical definition of contamination
      - contradiction of conclusions of previous reports

## Admissibility of Expert Evidence

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- **Expert evidence will be admitted if**
  1. The evidence is
    - a) relevant
    - b) necessary in assisting the trier of fact
    - c) absent of any exclusionary rule
    - d) given by a properly qualified expert
  2. The court finds the evidence to be “sufficiently beneficial” to the trial process, and
  3. The court is satisfied of the expert's independence and impartiality

# Admissibility of Expert Evidence

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- **In evaluating whether novel science should be admitted, courts consider**
  - the extent to which the field is a recognized discipline or profession
  - the extent to which the work is subject to quality assurance measures and independent review by others in the field
  - the particular expert's qualifications
  - the extent to which the expert's methodologies are accepted by those in the field

# Expert's Duty, Credibility, Admissibility

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## Key Takeaways

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- **Experts must understand the extent and application of litigation privilege**
- **Experts owe a duty of loyalty to provide fair and objective opinions to the Court**
- **Expert's independence and impartiality affect the admissibility of and weight given to evidence**
- **Credibility is critical and impacts the outcome of litigation**

## Willms & Shier Environmental Lawyers

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- **Established over 40 years ago**
- **19 lawyers**
  - seven are certified by the Law Society of Ontario as Environmental Law Specialists
  - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, and Nunavut
  - offices in Calgary, Ottawa, Toronto and Yellowknife

## Contact Information

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