



*Your Credibility Is On The Line: Examining Your Role As An Expert Witness*



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Virtual SMART Remediation Seminar Series 2021  
February 25, 2021

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# Your Credibility Is On The Line: Examining Your Role As An Expert Witness

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## Roadmap

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- **Role of an Expert**
- **Expert's Duties & Credibility**
- **Admissibility of Expert Evidence**
- **Key Takeaways**



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# WHAT IS THE ROLE OF AN EXPERT?

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## The Many Roles of an Expert

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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

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## Types of Experts

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### Two types of litigation experts

- In *Westerhof v Gee Estate*, the Ontario Court of Appeal upheld the distinction between experts hired prior to litigation and experts hired for the sole purpose of litigation
- **“Participant” or “Fact” experts**
  - Persons with “special skill, knowledge, training or experience” who provide an opinion developed through observations of or participation in the events in dispute
  - May be retained under legal privilege
- **“Litigation” experts**
  - Experts engaged by or on behalf of a party to provide opinion evidence in relation to a legal proceeding
  - retained under legal privilege

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## Communications with Experts

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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**

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## Communications with Experts

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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

## 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**

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## Expert's Duties

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- **“The expert’s opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert’s independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party’s position over another. **The acid test is whether the expert’s opinion would not change regardless of which party retained him or her [emphasis added].”****
- *White Burgess Langille Inman v Abbott and Haliburton Co* (2015 SCC)

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## Expert's Duties – Examples

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- **Alberta Rules of Court**
  - Rule 5.34 – Expert report must be in Form 25
- **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*
- **Section 52 of the 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

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## Expert's 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 expert's evidence**

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## 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**

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## ADMISSIBILITY OF EXPERT EVIDENCE

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## Admissibility of Expert Evidence

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### Expert evidence will be admitted if

- **The evidence is**
  - relevant
  - necessary in assisting the trier of fact
  - absent of any exclusionary rule
  - given by a properly qualified expert
- **The court finds the evidence to be “sufficiently beneficial” to the trial process**
- **The court is satisfied of the expert’s independence and impartiality**

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## 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

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# KEY TAKEAWAYS

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## Key Takeaways

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- **Experts must understand what it means to be retained under legal privilege**
- **Experts owe a duty of loyalty to provide fair and objective opinions to the Court / Tribunal**
- **Expert's independence and impartiality affect the admissibility of and weight given to evidence**
- **Credibility is critical and impacts the outcome of litigation**

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## Willms & Shier Environmental Lawyers

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



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## Contact Information

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