

**THE EXPERT WITNESS AND ENVIRONMENTAL LAW**  
**PRACTICAL AND ETHICAL CONSIDERATIONS FOR LAWYERS**

**BRYAN J. BUTTIGIEG<sup>1</sup>**

**Introduction**

The complex nature of environmental issues that come across a lawyer's desk often require highly technical expertise from any (or all) of a number of highly specialized disciplines. Expertise could be needed from fields that include geology; hydrology; hydrogeology, engineering, organic and inorganic chemistry, toxicology, epidemiology and even meteorology. That list is by no means meant to be exhaustive.

Equally varied is the context in which the lawyer might need such expertise. While one most commonly thinks of an environmental expert in their role as expert witness at trial, in reality an environmental expert serves many essential roles in both litigation and transactional legal work. These roles include litigation advisor, assisting with due diligence in a transaction, assisting with identifying risks that might need to be specifically allocated in an agreement, determination of costs for remediation or risk management measures, perhaps in the context of an escrow agreement or a holdback to secure a remediation obligation and as an aid to planning, co-ordinating and scheduling projects. An expert might even be required to generate a final report on which the satisfaction of a contractual obligation might depend.

At the same time, working with the expert must be done in a way that not only furthers the client's interest but complies with the ethical obligations of the lawyer, as well as any professional body to which the expert belongs.

Working effectively with environmental experts is in fact an essential day to day skill of any environmental lawyer. In this paper, I will touch on some of the ethical, scientific and legal issues that arise when lawyers work with environmental experts. I will also address some specific issues that arise in the context of preparing a consultant for a hearing. However, my hope is that it will be seen that preparing an environmental expert for any role that might be needed by a lawyer, is going to require many overlapping considerations regardless of the ultimate role.

**Setting the scene: What are the questions an environmental expert is likely to be asked?**

Typical questions include:

Is the land contaminated?

With what?

To what extent?

What does "contaminated" mean?

To what standard?

Does the contamination restrict my use of the property?

---

<sup>1</sup> *Bryan J. Buttigieg, Certified Specialist, Environmental Law – Miller Thomson LLP*

*Prepared for the Ontario Bar Association Institute, Environmental Law, February 5, 2019*

Is it hazardous?

Where did it come from?

Where is it going?

What can I do about it?

What are my options?

How much will it cost?

How long will it take?

How sure are you of your answers?

## THE ROLE OF THE LAWYER

### When does the lawyer need an environmental expert?

The Law Society's Rules of Conduct provide a useful starting point, in particular Rule 3.1 "Competence":

**3.1-2** A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

Paragraph 7 of the commentary provides further elaboration and specifically points to an ethical obligation to recognize when scientific expertise may be needed:

[7] The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

The scope of this rule applies to far more than just trial preparation of course. It means a real estate lawyer might have a duty to advise a client that an environmental expert may be needed to assess whether there are any environmental risks associated with a proposed real estate transaction. In a legal landscape where courts and legislators hold an owner or previous owner of contaminated land responsible for the impact of contamination regardless of fault (see *Kawartha Lakes (City) v. Ontario (Environment)*, 2013 ONCA 310 (CanLII)); where liability could be unlimited and could extend to officers and directors personally (see *Baker v. Ministry of the Environment*, 2013 ONSC 414) and in the context of ever more rigorous environmental standards and changing scientific information, what lawyer can confidently say they can competently advise a client on the risks of any transaction involving potentially contaminated land, without at least conducting a Phase I and if recommended, a Phase II investigation?

The same considerations of course apply equally to a lawyer advising on the purchase or sale of a business, financing or virtually any transaction involving land. Should a lawyer advise a charity on whether to accept a gift of land without obtaining some expert environmental advice? What about an estates lawyer advising a testator or a beneficiary about the value of a proposed gift of land or the potential liability attached to it?

While it is routine on almost every business transaction to consider the tax implications and obtain expert advice when needed, lawyers must now face the reality that environmental issues and liability concerns permeate virtually every commercial transaction for which legal advice is

needed. The Rules of Conduct are clear. It is the ethical duty of every lawyer to realize when environmental expert advice is needed and to seek the client's instructions to consult such experts.

### **Considerations when hiring a consultant**

How does one pick the right consultant? Previous experience working with the expert or their firm is often a starting point. Other lawyers specializing in the area can often be a good source of referrals. Online tools have made the task much easier than it used to be. Ultimately, there is no substitute for a face to face meeting to assess the suitability of the proposed expert, especially if there is a possibility they may be needed to testify in court at some point. If the expert seems to be acceptable, a formal retainer letter should be prepared. Beyond ensuring the consultant has the requisite expertise, the letter retaining the consultant should address certain basic points such as

Confirm the consultant has checked for and advised of any actual or potential conflicts.

Be as specific as possible as to what questions are being asked.

Will the report be prepared under privilege or is it meant to be disclosed to third parties?

Information provided to or obtained by the consultant should be treated as confidential by the consultant.

Contact with third parties, including Regulators may need to be discussed in advance.

Should drafts be provided first?

Will reliance letters be provided if needed?

The consultant will likely have their own agreement form. It is important to check the consultant's contract for limitations on liability. Liability should not be limited to the value of the retainer. It should match at least the terms of their insurance policy and those limits should be disclosed. If the retainer is based on a fee estimate, do make sure the client knows that the process is often iterative – one set of boreholes may lead to questions requiring more. The initial work proposed may simply not be enough to provide the answers required.

The lawyer should be aware of their own potential for conflict of interest. If the client asks the lawyer to recommend a consultant, what should the lawyer do? Is the consultant a source of referral work for the lawyer? Should that be disclosed to the client? What if the client has a preferred consultant, but they do not happen to be one of the lawyer's top choices for the particular task? Should the lawyer say something or remain silent? Both the lawyer and client could be working with the consultant for a long time. Any report they provide can have long lasting implications. It is essential that these questions be thought through carefully before hiring the consultant.

### **Is the retainer letter producible?**

If an expert is hired for the purpose of providing an opinion to be used in litigation, is the retainer letter producible pursuant to Rule 53 of the *Rules of Civil Procedure*? There is some caselaw to the effect that it is not. In *Maxrelco Immeubles Inc. v. Jim Pattison Industries Ltd.* 2017 ONSC 5836, the court held that there was no obligation to produce the instructing letter unless there was a basis to support a suspicion of improper influence and that Rule 53.03(2.1)<sup>3</sup> was satisfied when the information required by that Rule was set out in the expert report itself:

*[37] I have not been provided with any evidence to support that counsel for Maxrelco acted inappropriately with the expert witness. There is no foundation to support a reasonable suspicion that counsel improperly influenced the reports. Lumipro should not be provided with the interactions between counsel and the expert witness.*

*[38] In addition, the provision in Rule 53.03(2.1)(3) of the Rules has been met by Maxrelco since it provided the required information in the Introduction of the two expert reports. Lastly, based on the facts of this cases and considering the applicable case law, I find that the retention letters remain covered by litigation privilege. Consequently, Maxrelco is not required to produce to Lumipro the instruction letters sent to the expert witness.*

Nevertheless, a properly drafted retainer letter can provide useful evidence of the impartiality of the witness and the fairness of the instructions given to them. Because of the risk the retainer letter may be produced to the other side, even greater care must be exercised to ensure the letter contains no confidential information that is not absolutely necessary for the consultant to render their opinion.

### **The duty of confidentiality**

Section 3.3-1 of the Law Society Rules provides that:

*3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless*

- (a) expressly or impliedly authorized by the client;*
- (b) required by law or by order of a tribunal of competent jurisdiction to do so;*
- (c) required to provide the information to the Law Society; or*
- (d) otherwise permitted by rules 3.3-2 to 3.3-6.*

Practically speaking this means that care must be taken to ensure the consultant is provided with enough information in order to allow them provide a useful opinion while minimizing the disclosure of any confidential information that is not necessary for them to do their job. At the same time, the lawyer must be cautious to not omit any material information that may jeopardize the validity of the expert's findings. If possible the client should be an active participant in this process as the exercise may well trigger recollections of additional facts or previously forgotten documents.

### **How actively should the lawyer participate in the drafting of the final report?**

As mentioned above, the expert's engagement letter should provide for the report to be prepared in draft form. There is nothing improper about this and the Court of Appeal in *Moore v Getahun, 2015 ONCA 55 (CanLII)* has explicitly affirmed the long held view that the assistance of a lawyer in preparing the final expert report is not only permissible, but often desirable as long as it does not interfere with the impartiality of the expert's opinion:

*[62] I agree with the submissions of the appellant and the interveners that it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.*

*[63] Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties reflected by rule 4.1.01 and contained in the Form 53 acknowledgment of expert's duty. Reviewing a draft report enables counsel to ensure that the report (i) complies with the Rules of Civil Procedure and the rules of evidence, (ii) addresses and is restricted to the relevant issues and (iii) is written in a manner and style that is accessible and comprehensible. Counsel need to ensure that the expert witness understands matters such as the difference between the legal burden of proof and scientific certainty, the need to clarify the facts and assumptions underlying the expert's opinion, the need to confine the report to matters within the expert witness's area of expertise and the need to avoid usurping the court's function as the ultimate arbiter of the issues.*

*[64] Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared.*

There are many practical examples of these principles being applied in the context of an environmental report. An opinion of a consultant might be unduly alarmist or overly dismissive in expressing a risk, even if factually correct. A slight change in subjective, value-based wording can have a significant impact on the reader without changing the substance of the information being conveyed. It might even determine the viability of a proposed transaction or the ultimate allocation of risk between parties. Sometimes, consultants might verge into the area of giving legal advice – such as opinions on whether a site meets a legal standard, or whether a record of Site Condition is required. Input from a lawyer as to whether such statements are appropriate or even correct will often be required and in such cases should serve to enhance the accessibility, clarity and value of the eventual opinion.

### **How much technical knowledge is required of the lawyer?**

While the expert is, by definition, the authority on the subject matter under consideration, this should not be taken as an excuse for the lawyer's eyes to glaze over at the mere sight of a long molecular name or reference to the methodology employed in applying a scientific model. In my experience, it is essential that the lawyer exercise as much intellectual curiosity as possible to try to truly understand what the expert is saying and how they arrived at their opinion. Unless the lawyer does so, how are they to competently advise the client on the legal implications of the expert opinion and the proper legal course of action to adopt as a result? How can one properly prepare the witness for a hearing for clear testimony-in-chief and how to give clear and succinct answers to questions posed on cross-examination or by the court? It will not necessarily be an easy exercise. It might even be bruising to some egos to ask basic questions and display apparent abject ignorance in the field of the expert's study. But better to do so in the comfort of one's office than in open court.

This means the lawyer needs to have a basic understanding of the scientific method, different forms of scientific proof and the underlying science behind an expert report. In an indoor air quality test for instance, the lawyer should know the risks and benefits of choosing sub slab testing instead of say, Summa Cannisters. In a groundwater flow report, the lawyer should understand how the data was obtained, the impact of seasonal variations and whether or not it matters that the data was collected at different times. If an opinion is based on a statistical model, the assumptions underlying the use of the model should be understood. Care must be taken to ensure those assumptions are consistent with the known facts. The more specialised the question, the deeper the lawyer will have to go to obtain basic understanding of the science behind the expert opinion.

## **The distinction between Participant and Litigation Experts**

It is not uncommon for an environmental expert to be retained long before any litigation is contemplated. They may not even have been retained by the lawyer but directly by the client. A typical situation would involve a hydrogeologist or geotechnical expert retained to assist in a subsurface excavation, perhaps for underground parking in a high rise development. Partway through the excavation, groundwater contamination is discovered seeping into the excavation at the property boundary. Further investigation leads to litigation being commenced against the neighbour. While an independent expert witness will likely still be retained by the plaintiff, what is the status of the first expert?

The Courts have created a distinction between experts hired prior to litigation (“Participant Experts”) and experts hired for the sole purpose of litigation (“Litigation Experts”). The former can provide opinion evidence but are not subject to the constraints of Rule 53.03. The Ontario Court of Appeal in *Westerhof v Gee*, 2015 ONCA 206 (CanLII) held that :

*[60] Instead, I conclude that a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents 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; and*
- 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.*

*[61] Such witnesses have sometimes been referred to as “fact witnesses” because their evidence is derived from their observations of or involvement in the underlying facts. Yet, describing such witnesses as “fact witness” risks confusion because the term “fact witness” does not make clear whether the witness’s evidence must relate solely to their observations of the underlying facts or whether they may give opinion evidence admissible for its truth. I have therefore referred to such witnesses as “participant experts”.*

*[62] Similarly, I conclude that rule 53.03 does not apply to the opinion evidence of a non-party expert where the non-party expert has formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation.*

*[63] If participant experts or non-party experts also proffer opinion evidence extending beyond the limits I have described, they must comply with rule 53.03 with respect to the portion of their opinions extending beyond those limits.*

Lawyers need to be cautious to ensure the opinions of the Participant Expert do not stray beyond those based on their observation of or participation in the events at issue and that the opinions were formed as part of the ordinary exercise of their expertise while observing or participating in those events. As long as these conditions are met, the participant expert need not be constrained by the strictures of Rule 53.03.

## **Considerations in preparing an expert for a hearing**

The environmental expert can play a number of roles in litigation, of which expert testimony, while often the most visible, is but one. The expert can provide valuable advice as early as the pleading stage, both in the preparation of a claim or defence. They can assist in determining what material facts are needed to establish a claim or defence. They can assist in preparation for examination for discovery by reviewing the technical reports and advising of data gaps,

inconsistencies or even inferences or conclusions supported by the evidence but not made by the other side. They can certainly assist in obtaining the evidence that will ultimately be needed by a party at trial. All this points to the need to consider retaining the right expert as early as possible in litigation and ensuring they are familiar with what the lawyer is trying to prove as much as the lawyer tries to become knowledgeable about the expert's field.

During the hearing itself, the expert can be invaluable in determining whether the other side's expert's qualifications should be challenged. They can point out deficiencies in another expert's CV, questionable assumptions in a report, improper application of a modelling technique or inconsistent statements that might not be apparent to a non-technical reader.

If the expert is to testify, it is important that they are a good communicator. Unfortunately the combination of deep technical expertise and clear communication skills that engage the attention of the court and ultimately prove to be persuasive is one that is often difficult to find. Experts can be as nervous as any other witness. Their performance in the safety of their or your office is not necessarily indicative of how they will fare in a court faced with a stern or uncomprehending judge or an aggressive cross-examiner. An expert with a lot of court experience and numerous favourable judicial references is a rare and valuable one indeed. In an era where so few cases, especially environmental ones, go to trial, such experts can be expected to become even harder to find.

Should you be the one to give the expert their first chance at a trial? It is not an easy decision especially as the whole case may hinge on their testimony. Careful assessment of the capability of the expert and intense preparation will help, but it will be difficult, especially if they are pitted against a veteran of many courtroom appearances.

If the expert does have a lot of experience, has it tended to be one sided? Have they tended to testify mostly for only plaintiffs or only defendants or do they have an even mix? Have they ever been disqualified by a court? On what grounds? Does that matter to the subject of the testimony you need them to provide?

### **Qualifying the expert**

To give an opinion the expert must meet the test set out in *R. v. Mohan* [1994] 2 S.C.R. 9:

- (1) the evidence is relevant to some issue in the case;
- (2) the evidence is necessary to assist the judge (i.e., the information to be provided is likely outside the experience or knowledge of the judge);
- (3) the evidence does not violate the exclusionary rule; and
- (4) the witness is a properly qualified expert.

In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 SCR 182, 2015 SCC 23 (CanLII), the Supreme Court of Canada held that lack of impartiality and independence of a proposed expert may in some cases, go as far as to disqualify them from testifying at all:

*[46] I have already described the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. ...*

*[48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the*

*burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the Mohan framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.*

*[49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.*

*[50] As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.*

### **When does one challenge the expert on the basis of previous adverse decisions?**

It would seem that questions about previous adverse court findings are best raised during the qualification stage and not left to cross examination. In *R. v. Ghorvei*, 1999 CanLII 19941 (ON CA), the court held that a non-expert witness could not be asked about previous testimony in another case which had been rejected by the court which also found the witness to be a “compulsive liar”:

*[27] Third, the appellant seeks leave to introduce fresh evidence relating to Constable Nielsen's credibility. He submits that, if this evidence had been available at trial, it would have been admissible for the purpose of cross-examining Constable Nielsen. He argues further that, because the verdicts in this case are dependent upon Constable Nielsen's credibility, this evidence would likely have affected the result of the trial.*

*[29] If the prior judicial finding that Constable Nielsen lied under oath had formed the basis of a conviction of perjury or of giving contradictory evidence, it is clear that he could have been subjected to cross-examination on that conviction and on its underlying facts: see s. 12 of the Canada Evidence Act, R.S.C. 1985, c. C-5; *R. v. Miller* (1998), 1998 CanLII 5115 (ON CA), 131 C.C.C. (3d) 141, 21 C.R. (5th) 178 (Ont. C.A.). Constable Nielsen, as an ordinary witness and unlike an*



accused person, would also be subject to cross-examination on relevant discreditable conduct even if the conduct has not resulted in a charge being laid or in a conviction: see *R. v. Gonzague* (1983), 1983 CanLII 3541 (ON CA), 4 C.C.C. (3d) 505, 34 C.R. (3d) 169 (Ont. C.A.).

[30] In this case, the judicial finding in *Pappageorge* that Constable Nielsen's testimony was "false" and that he was "a compulsive liar" was not made in the context of proceedings concerning the truth or falsity of the testimony in question. Had the finding been made in the context of a prosecution for perjury or for the giving of contradictory testimony, Constable Nielsen would have been given an opportunity to respond to the accusation that he had lied under oath and the trial judge's finding would have been subject to the criminal standard of proof beyond a reasonable doubt. As the matter stands, the judicial finding in question is nothing more than a rejection of Constable Nielsen's testimony, albeit in very strong terms.

[31] In my view, it is not proper to cross-examine a witness on the fact that his or her testimony has been rejected or disbelieved in a prior case. That fact, in and of itself, does not constitute discreditable conduct. I do not think it would be useful to allow cross-examination of a witness on what is, in essence, no more than an opinion on the credibility of unrelated testimony given by this witness in the context of another case. The triers of fact who would witness this cross-examination would not be able to assess the value of that opinion and the effect, if any, on the witness's credibility without also being provided with the factual foundation for the opinion. This case, in fact, provides a good example of the difficulties that would arise if such cross-examination were permitted because, in my view, once the finding is examined in the context of the whole record in *Pappageorge*, it becomes apparent that it is essentially unfounded and hence can provide no assistance in determining Constable Nielsen's credibility.

Contrast the above statements with those of the court in *Daggitt v. Campbell*, 2016 ONSC 2742 in the context of a motion concerning whether a psychiatrist should be allowed to examine the Plaintiff and provide opinion evidence:

[4] .....Secondly, the plaintiff submits that Dr. Monte Bail, the psychiatrist chosen by the defendants, has demonstrated such clear and definitive defense bias in many previous cases that the court should decline to make any order allowing any independent medical examination by Dr. Monte Bail in particular.

[5] ...Dr. Monte Bail is the psychiatrist of choice selected by Mr. Todd McCarthy, trial counsel for the defendants, in spite of objections raised by the plaintiff as to previous findings that Dr. Bail was not credible and failed to honour his written undertaking to the court in Rule 4.1.01. The defendants ask that the motion be granted.

[26] While it is unnecessary for me to decide the second issue of the relief requested by the plaintiff—namely, whether to not allow Dr. Monte Bail to conduct a defense psychiatric examination due to his failure to adhere to the principles of fairness, objectiveness and impartiality and his defense bias—I make the following observations and comments by way of obiter dicta. I find the plaintiff's argument on this issue compelling. Rule 4.1.01 makes it clear that an expert's duty to the court prevails over any obligation owed by the expert to a party. The Supreme Court of Canada has held that an expert witness who is unable or unwilling to comply is not qualified to give expert opinion evidence and should not be permitted to do so. (See *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), [2015] 2 S.C.R. 182).

[30] The recent changes to the Rules to require experts to undertake to the court to be fair, objective, and non-partisan has done little if anything to curb the use of certain favoured biased "hired guns" by the parties. The consequences of an expert signing the undertaking and failing to honour their obligation in their expert report or evidence is simply the rebuke of the court. This does nothing to prevent

that same expert from being further retained and repeating the process over again in other trials as long as trial counsel are willing to retain them.

[31] Rule 33.02 provides that the court shall name the health practitioner by whom the independent medical examination is to be conducted. It could be argued that the court, in the exercise of its discretion, should therefore consider and determine in appropriate cases whether or not the proposed named health practitioner is biased in favour of a party on the balance of probabilities and therefore fails to qualify as an expert under Rule 4.1.01. The court's discretion would therefore include the discretion not to name a particular health practitioner if that health practitioner fails to meet the criteria set out in Rule 4.1.01 on the basis of bias. While it would be uncommon to find an expert biased and impartial, such an expert so found should not be allowed to have any role in the court process.

[32] Considering the highly intrusive nature of these independent medical assessments, and the serious issue of ensuring a fair trial, the plaintiff's argument to deny the right to have an expert that has been found to be biased conduct the assessment in the first place is worthy of consideration in appropriate circumstances considering the potential for a miscarriage of justice that can be caused by such an expert biased in favour of one party, particularly in front of a jury.

The lesson from *Daggit* (albeit as an *obiter*) and *Ghorvei* appears to be that while a duly qualified witness (expert or not) cannot be cross examined about previous instances where the court did not accept their testimony, it might be possible to challenge their ability to act as a witness prior to the court qualifying them as such. In environmental litigation for instance, might a party refuse to allow the opponent's expert access to a site to perform intrusive testing if they have genuine concerns about the potential bias of that witness? Would a Court on a motion to determine the right to access and investigate the property take the same considerations into account used by the Court in *Daggit* and refuse to allow that witness to conduct the investigation?

### **The future of environmental expert evidence**

As science progresses, new forms of scientific evidence may become available. Canadian courts have tended to adopt a flexible approach to the admissibility of new scientific evidence. The test in *Mohan* referred to above is the starting point. In the context of environmental law in particular, the Supreme Court in *British Columbia v. Canadian Forest Products Ltd.* 2004 S.C.C. 38, 8 C.E.L.R. (3d) 1 (SCC), has signalled a willingness to be open to novel forms of evidence:

"The claim for environmental loss, as in the case of any loss, must be put forward based on a coherent theory of damages, a methodology suitable for their assessment and supporting evidence."

...

"It is neither appropriate nor necessary to pronounce on the specific methodology that could be employed in valuation of environmental losses. This is a matter to be explored by the appropriate experts at trial."

However, any novel approach will be always be subject to scrutiny to protect against “junk science”:

“The dramatic growth and frequency with which [expert witnesses] have been called upon in recent years has led to ongoing debate about suitable controls on their participation, precautions to exclude ‘junk science’, and the need to preserve and protect the role of the trier of fact...” *R v. J* [2000] 2 SCR 600

### **Conclusion**

Environmental Law is one of those areas of law in which it is probably impossible to practice without the regular use of technical expert advice. Knowing how to hire, work with, understand and effectively use the advice of these experts is a crucial part of the competence required of every lawyer asked to advise a client on an environmental issue.