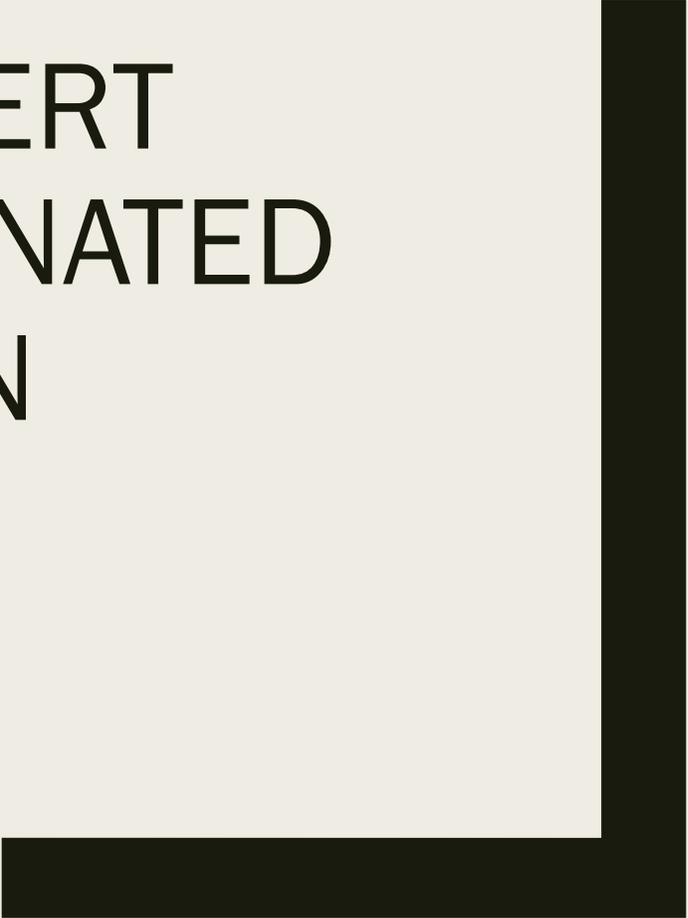




ACTING AS AN EXPERT WITNESS IN CONTAMINATED SITES LITIGATION

Bojm, Funt & Gibbons LLP
Malcolm Funt and Eric Bojm
June 5, 2019



AGENDA

How to act as an expert witness leading up to trial:

- Duty to the Court.
- The Regulatory Approval Process
- Common expert witness pitfalls prior to trial.

How to act as an expert witness at trial:

- Written Expert Reports
- Responding to contradictory expert reports
- Giving Oral testimony at trial
- Common expert witness pitfalls at trial

Duty to the Court

British Columbia *Supreme Court Civil Rules*: Rule 11-2

Duty of expert witness

(1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.

Advice and certification

(2) If an expert is appointed under this Part by one or more parties or by the court, the expert must, in any report he or she prepares under this Part, certify that he or she

(a) is aware of the duty referred to in subrule (1),

(b) has made the report in conformity with that duty, and

(c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

Stay within your expertise

Restrict your opinion to what has been requested and what is within your area of expertise.

Be as succinct as possible while conveying the opinion in an accurate and comprehensive manner.

Where the opinion is based on assumptions or facts other than those presented in the documents reviewed, those assumptions should be specifically identified in the report.

Consider material facts that weaken your opinion. At least acknowledge that there may be views other than your own.

Clearly state the facts and assumptions on which you rely. If a judge rejects some portion of the factual basis on which your opinion is founded, there is a risk that the opinion will be rejected.

The Regulatory Approval Process



Dual Role of Expert in Court and
Technical Engineer dealing with
Regulators



Legal Files



Obtaining Certificates of Compliance



Corresponding with Regulators

Common Pitfalls Leading up to Trial



Draft Reports



Factual uncertainties



Assumptions provided must be realistic – counsel may not know what is realistic in the scientific context.

Acting as an Expert at Trial: Written Report Requirements – Rule 11-6

Requirements for report

(1)An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2 (2) and must set out the following:

(a)the expert's name, address and area of expertise;

(b)the expert's qualifications and employment and educational experience in his or her area of expertise;

(c)the instructions provided to the expert in relation to the proceeding;

(d)the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;

(e)the expert's opinion respecting those issues;

(f)the expert's reasons for his or her opinion, including

(i)a description of the factual assumptions on which the opinion is based,

(ii)a description of any research conducted by the expert that led him or her to form the opinion, and

(iii)a list of every document, if any, relied on by the expert in forming the opinion.

Written Report Tips

- Be careful in preparing and presenting your curriculum vitae. Do not overstate your qualifications.
- Emphasize your specialized knowledge. If you are challenged by opposing counsel on your qualifications or credentials, be firm and confident. A challenge can strengthen, rather than weaken, your qualifications in the eyes of the court.
- The court will consider whether you are qualified to express the specific opinion proffered and whether there is an evidentiary foundation to support your qualifications and scope of the evidence in your report

(*R. v. Giles*, [2016 BCSC 294](#) at para. 54; *R. v. Orr*, [2015 BCCA 88](#) at para. 87).

Preparing for Testimony at Trial

- Review your opinions carefully and those of the opposing experts.
- Reviewing the underlying facts of the opinion is just as important as reviewing the opinion itself.
- Ensure that correct factual assumptions have been made and discuss with counsel to ensure that appropriate steps have been taken to ensure that the factual basis of your report is established during the trial.
- Ensure that you know where your evidence fits into the overall picture. If you don't understand this point or the client's theory of the case, discuss with counsel before trial.

Oral Testimony



Direct Examination: usually limited questioning done by your instructing counsel.



Cross Examination: wide ranging questioning done by opposing counsel.



Use plain language wherever possible. Where technical terms must be used, try to give a non-technical explanation of the terms whenever appropriate. Only answer the questions posed and do not be argumentative.



Give evidence at a pace that enables clear understanding. Use models or diagrams to assist in giving evidence if you think it would help. Use visual aids to hold the judge's attention on complex technical evidence.



The evidence is for the benefit of the court; speak to and look at the judge rather than the counsel conducting the examination or cross-examination.

Being Challenged on Cross Examination

- Ways you may be challenged on cross examination:
 - *If you changed your mind in the course of developing the opinion;*
 - *whether your conclusion would be different if the factual basis were varied;*
 - *whether you ignored evidence which was easily available or was contained in your brief; and*
 - *whether you accepts certain treatises or articles as authoritative.*

Litigation Timeline

Litigation takes years. Stay organized and up to date on what is happening at the site.

Expert Report must be served 84 days before trial. Responding report must be served 42 days before trial.

Preparing the Report: Changing circumstances in contaminated sites litigation (i.e. remediation ongoing may lead to a need for revised conclusions and reports, in particular on cost estimates.

If your report changes in a material way after the report is served, you must (in consultation with counsel), as soon as practicable, prepare a supplementary report, and the party must serve it on all parties. The supplementary report must set out the change in the expert's opinion and the reason for it.

Common Pitfalls at Trial



If you make a mistake, misstated an answer or did not understand a line of questioning, correct it or ask for clarification.



Pay attention to nuanced wording when you are asked a question: Do not accept what opposing counsel puts to you.



Be impartial and realistic. If counsel puts a hypothetical situation that is not to the benefit of your client, but is true, do not fight it but try to distinguish it.

Sources and Questions



Expert Evidence in British
Columbia Civil Proceedings,
Continuing Legal Education
Society of British Columbia.



SUPREME COURT CIVIL RULES