Articles

# Expert Evidence for Energy Lawyers and Regulators

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## Introduction

Recent court decisions dealing with the admissibility and assessment of expert evidence are already confronting energy regulators with new challenges, as shown by the decision of the Alberta Utilities Commission in Canada's first electricity market manipulation case.[1]

Much of the work done by and in front of energy tribunals involves experts. Expert evidence can affect the assessment of a wide variety of issues involved in energy regulation, including accounting and financial matters, monopoly and market economics, environmental impacts of energy products and infrastructure, and a myriad of technological and scientific issues affecting the energy industry. Such evidence can be critical both in the adjudication of disputes between stakeholders, and in the forward-looking development of energy policy. At its best, it has the potential to be compelling, or even decisive, on many issues. There may also be a measure of expertise involved in the presentation of many of the adjudicative facts that arise in energy proceedings, including implicit or explicit "opinions" of technical witnesses, whether or not they are formally identified as "experts". The preparation, presentation and assessment of expert evidence are therefore critical topics for both practitioners and tribunal members.

This review of recent cases provides both an essential primer on the law, and some insights into the underlying principles and purposes of this kind of evidence that are relevant to energy lawyers and regulators.

As a starting point, it is useful to examine the law relating to expert evidence, as developed largely in the context of dispute resolution by our courts. Recent court decisions continue to reflect a fundamental tension between, on one hand, the value and importance of expert opinion evidence in an increasingly complex world, and on the other, caution respecting the dangers of misuse and over-reliance on this kind of evidence. In part, this tension reflects an institutional feature of our courts, which are deliberately non-specialist in character. However, it also reflects broader concerns, for example, about the use of experts as professional "hired guns", the potential role of counsel in shaping this kind of evidence to support an adversarial position rather than an accurate or optimal result, and the danger of adjudicators abdicating their role to the experts on highly specialized issues. These concerns can all apply with equal force to regulatory tribunals and proceedings. This review therefore suggests how counsel and tribunal members can both benefit from the application the legal rules and practices developed in our court system, and at the same time avoid the pitfalls identified in court decisions.

The paper also considers how expert evidence can assist the policy-making role of "expert" tribunals, such as energy regulators. It considers some special concerns that can arise when members of such tribunals apply their own expertise to shape the evidence in proceedings over which they preside. The purposes of the rules

of evidence align closely with the goals of fairness to parties, and of optimal decision-making in the public interest that underlie administrative proceedings. These goals are best served when the principles and dangers underlying the law of expert evidence are understood and applied. They should inform counsel's decisions about what expert evidence to call, as well as the procedures to be followed when calling such evidence at a hearing, and the assessment of the evidence by decision-makers. In all these respects, the recent case law has useful and important lessons for energy lawyers and regulators.

# The Limited Admissibility of Opinion Evidence: Fact *versus* Opinion

The general rule of our law is that witnesses may not give opinion evidence, but are limited to testimony about facts within their personal knowledge.[2]

Although the line between fact and opinion is not always clear, in general "opinions" represent an inference or conclusion drawn by the witness from underlying facts. This distinction highlights two specific reasons for the general rule against allowing opinion evidence:

- first, it is usually the role of the court, not the witnesses, to draw inferences or conclusions from the facts; and
- second, there is a concern to avoid collateral inquiries into the myriad factors affecting the basis for the witness's opinion, and its validity.

The first rationale is based on the integrity of the courts' decision-making process, and is particularly important where the inference or conclusion to be drawn involves a legal component: e.g. whether or not someone was negligent. The second highlights the unreliability of this kind of evidence, generally. In most circumstances, it is neither relevant nor helpful to the court, and may even be distracting, to hear the witnesses' opinions about the matters in issue.

The general rule against opinion evidence is, however, subject to recognized exceptions. One involves lay witnesses who do not use special knowledge, and applies in circumstances where the distinction between fact and opinion is virtually impossible to maintain: for example, testimony as to whether someone is drunk, or how fast a vehicle is travelling. The other important exception involves expert opinion evidence. In this context, an "expert" is someone with special knowledge or expertise, who can provide the trier of fact with a "ready-made inference" based on facts they observe or are asked to assume, which the court itself would be unable to draw unassisted.[3]

These background principles highlight why expert evidence, although common, is exceptional in nature, and should properly be subject to special requirements, and assessed with caution.

Some of the most important considerations in the presentation and assessment of expert opinion evidence, which recur throughout the discussion below, can be summarized as follows:

- Relevance: are the opinions offered relevant to an issue raised before the tribunal?
- Qualifications: does the witness have special knowledge, based on qualifications or experience, to provide a proper basis for the opinions offered?
- Necessity: are the opinions necessary to the tribunal's decision-making process, or do they usurp the

proper role or functions of the tribunal?
- Foundation: does the testimony differentiate appropriately between opinions and the underlying facts on which they are based, and are the necessary facts established to support the opinions offered?

# Conditions for the Admission of Expert Opinion Evidence

The first three of these considerations were identified by the Supreme Court of Canada in *R v Mohan*[4] as pre-conditions that must now be met before expert evidence is admitted in the courts. In total five such conditions have now been suggested. They are reviewed in turn below, together with the procedures used by many courts to ensure that the admissibility requirements are met at the outset of a trial.

## (a) Relevance and the Requirement for an Expert Report

The requirement of relevance is basic and necessary for any evidence to be admitted, but its application in cases of expert evidence has several dimensions. First the opinion that is offered must arise from or relate to the facts that are relevant to the dispute: an opinion of facts other than those before the court is not relevant, and is of no assistance to the court. However, this does not mean that the expert is limited to facts disclosed or put in issue by the parties: it is quite common for further investigations or tests to be undertaken by or at the request of an expert witness, and for additional facts to be put forward. These are also subject to the relevancy requirement. Finally, the opinion itself must be one that is relevant to an issue which the court has to decide: for example, the value of property in issue, or the negligence of a party.

Even this relatively simple analysis illustrates how expert evidence tends to complicate a dispute, by adding to the facts that need to be decided, as well as the evidence to be considered on certain issues. To address this, most courts and tribunals have rules of practice requiring the preparation of an expert report setting out (among other things) the facts that the expert has considered, and the opinions she or he is offering to the trier of fact. Typically, these rules require parties to exchange reports a certain time in advance of the hearing, and limit the testimony of the experts at the hearing to the matters set out.[5] One of the functions of such requirements is to allow parties to raise any objections regarding relevance of the proposed testimony before it is called.

The criterion of relevance also has a legal component, which engages counsel for the parties directly. A vital part of counsel's role is to advise on the issues that require expert evidence and the selection of appropriate experts to address them, and to instruct the experts appropriately. It is common practice for counsel, in discussion with the expert, to prepare a retainer letter that sets out any facts provided or to be assumed, and the specific issues on which an opinion is sought. Again, a key purpose is to ensure that the expert report will meet the relevance criterion by responding to issues defined by counsel involved in the proceeding.

## (b) Qualifications and "Tendering" the Expert

Court rules and practices also typically address the requirement for a qualified expert.

Selection of an appropriate expert must be based on their qualifications to provide the opinions requested, but counsel also consider their other qualities as a witness. Discussion of the draft retainer letter with the selected expert ensures that the issues defined by counsel are fully within her or his qualifications. In some cases, this may identify a need to sub-divide the issues between differently qualified experts, and to request two or more

separate reports that together meet the needs of the particular case.

The rules of practice requiring expert reports typically require that these also include confirmation of the witness's qualifications to provide the opinion requested. Qualifications may consist of formal training, certifications, research, publications or other experience. Reports typically attach a current CV, and may include other material addressing the witness's qualification to address the specific issues raised in a given case.

In addition, most courts have adopted a screening process, referred to as "tendering" the expert, which counsel is required to go through at the beginning of their expert witness's testimony. This process typically involves leading the expert through their relevant qualifications, and then asking the court to recognize the witness as an expert in a defined area covering the issues in their report. Opposing counsel is then given an opportunity to cross examine the expert on their qualifications in the defined area, followed by any re-examination. The court may then require argument, if there is still any challenge to the witness giving evidence. Ultimately, the court rules both on whether the witness is qualified to give expert opinion evidence, and if so in what area or areas.

In many cases, this process may be abridged in whole or in part by opposing counsel conceding the issue of qualification. Such counsel may nevertheless elect to cross-examine on qualifications at the outset, either as a matter going to weight rather than admissibility, or simply to restrict the scope of the witness's expertise. In some cases, the relative scope of the witnesses' expertise and the areas in which they are recognized by the court to be qualified to give expert opinions may be the real battleground, as counsel seek to exploit any areas where their own expert is qualified while the opposing expert is not.

Some tribunals abridge or dispense with this tendering process altogether, as a matter of routine. If it will serve no real purpose in terms of the quality of the expert testimony, this may be appropriate. If so, experienced counsel usually agree to dispense with the process. This is common, for example, where the witness has testified previously and has been recognized as having the relevant expertise by the decision-maker. In other cases, however, it can serve an important "gate-keeping" function, as well as ensuring fairness to all parties. There may therefore be a strong case for following it through, particularly where the expert evidence is contested, and the outcome of the case is likely to depend on how that evidence is assessed.

## (c) Necessity and Opinions on the "Very Issue" before the Court

It is trite to say that an expert must not usurp the function of the trier of fact, by giving evidence on "the very issue" that the trier is to decide. However, in practice this can be a very difficult line to draw. Two common examples serve to illustrate the problem:

- An accountant asked to give evidence about certain property whose value is in issue may testify about the accuracy of financial data about the property (expert findings), calculations she or he performed on that data and their results (expert conclusions), the fairness of the presentation of information in financial statements related to the property (expert opinion) – and they may offer an opinion as to the value of the property, which may in some cases be the ultimate issue the court is to decide.
- A medical doctor may be asked to give evidence about symptoms observed in a patient or the results of tests performed (findings), the factors likely contributing to the patient's condition (conclusions), their diagnosis (opinion) – and they may offer an opinion as to the current standard of care recognized in

> their profession for treatment of the condition, or the causation of the condition, which again approach the ultimate issue to be decided.

The requirement of "necessity" in court decisions about the admissibility of expert evidence is one of the ways this line is drawn on a case-by-case basis: the question asked is whether the trier of fact (judge or jury) could or could not draw the inference required without expert assistance? If the answer is "no", because special knowledge or judgment is required to draw the inference reliably, then expert evidence is admissible to assist. In that case, the integrity of the decision-making process can still be protected in a number of ways, for example:

- the court normally has at least two competing opinions to select from,
- the court is still required to test the opinions given, based on foundation in the facts, in expert literature or research, in common sense or logic, and even based upon the credibility of the witnesses;
- in many areas, experts deliberately express opinions in a form that respects the ultimate decision-making authority of the court; for example, a valuation opinion is often in terms of a range of "reasonable" values rather than a single result.

These and other factors – including the fact that accountants regularly advise buyers or sellers, and physicians regularly treat ill patients in the real world – also help ensure the reliability of the ultimate decision made by the court based on this kind of evidence.

Another dimension of the analysis of whether this line is crossed arises where the inference to which the testimony relates has a legal component: for example, a finding of negligence. Expert evidence about what standards of care are currently practiced in a given profession may be proper. Evidence that shows those prevailing standards do not require certain treatments, or do not mitigate certain risks, may also be proper. However, going on to provide opinions on what the standard ought to be, in a prescriptive sense, usually crosses the line and trenches upon the functions of the court.

At the other end of the spectrum, opinion evidence is not necessary if the court is able to draw the inference itself, without assistance, in which case the evidence should not be allowed.

## (d) Other Exclusionary Rules Continue to Apply

In *Mohan*, the Court added a fourth condition: that the proposed testimony must not fall afoul of any other exclusionary rule of evidence, separate and apart from the opinion rule.[6] In other words, even if evidence is given by an appropriately qualified expert, is relevant, and meets the necessity criterion, it is not admissible if other exclusionary rules apply.

It is not the purpose of this paper to explore these issues in detail, since available evidence texts generally provide a thorough review. However, both counsel and the tribunal should ensure that other applicable exclusionary rules are not overlooked when expert evidence is developed and presented, including in particular the special problems that can arise with the hearsay rule.[7]

## (e) Impartiality, Independence and Bias

Very recently, in *White Burgess Langille Inman v Abbott and Haliburton Company Limited*,[8] the Supreme Court suggested a fifth condition to the admissibility of expert evidence, in stating that:

> "... at a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence."

This statement builds on a long line of authorities articulating the "expert's duty" to provide independent, impartial, and unbiased evidence to the courts, which first developed at common law. Based on a review of the case law, the often-cited U.K. case of *National Justice Compania Naviera v Prudential*[9] set out a number of principles that comprise the elements of this expert's duty. These may be summarized as follows:

- the evidence should be the independent product of the expert, uninfluenced by the exigencies of the litigation;
- that evidence should be objective, unbiased, and within the witness' expertise;
- the expert should state the facts or assumptions on which the evidence is based, and not omit to consider relevant facts;
- all qualifications on the opinion should be stated expressly;
- all documents relied on must be produced to the parties; and
- the expert should never assume the role of an advocate.

The duty of the expert to remain impartial and independent has also been codified in the rules of several courts. Recently, in Ontario, the articulation of this duty has been significantly strengthened following a recent civil justice review[10] and subsequent public inquiry[11] which identified renewed concerns about the potential for misuse and overreliance on expert opinion evidence. Rule 4.1.01(1) now provides that it is the duty of every expert engaged by or on behalf of a party to provide opinion evidence that is (a) "fair, objective and non-partisan", and (b) "related only to matters that are within the expert's area of expertise". In addition, the expert has a duty to "provide such additional assistance as the court may reasonably require to determine a matter in issue." Subrule (2) provides that this duty "prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged". In addition, the expert is required to sign and include in his or her report a written "Acknowledgement" of this duty.[12] The Ontario Energy Board has now adopted similar principles in Rule 13A of its own Rules of Practice and Procedure.

However, despite these developments and the Supreme Court's decision in *White Burgess*, it remains to be seen whether it will be possible (as with the other four conditions) to enforce this principle pre-emptively, before the evidence is heard. The Court notes that the threshold for pre-emptive exclusion is "not particularly onerous" and that this "should only occur in very clear cases."[13]

The Court has so far provided little guidance on what "certain point" must be reached before considerations of independence, impartiality and bias should result in a finding of inadmissibility, rather than going to weight. In terms of a test, the Court cited another recent decision of its own, in *Mouvement laïque québécois v Saguenay (City)*,[14] which seems to make this determination depend very much on the facts: "whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case." While the Court then cited a number of cases in which evidence was ruled inadmissible because the expert was a party litigant, or a lawyer for a party, or had some interest in the litigation, or in one case simply had an inappropriate retainer agreement, *White Burgess* does not clarify whether these were categorical rulings or turned on their particular facts. In the absence of further guidance, it is difficult to anticipate how it could be determined whether the test proposed is met or not, without first hearing the evidence.

The recent decision of the AUC in *TransAlta* is an important acknowledgment and application of these

principles by an energy regulator. The Commission accepts and applies the *White Burgess* framework in considering challenges to the admissibility of expert evidence called by both parties. Although no challenge to admissibility had been made by either side in written submissions on the pre-qualification of experts, and questions were not asked of the witnesses in testimony related to the tests subsequently adopted in *White Burgess*, the Commission was able to apply the Supreme Court's analysis retrospectively, and to conclude that all of the experts who testified met the threshold for admissibility.[15]

This case law suggests that if it can be shown that any of these five conditions are not met by proposed expert evidence, then a preliminary objection can be taken to prevent the evidence being heard by a court at all. Interestingly, objections based upon a failure to differentiate fact from opinion, or the sufficiency of the facts to support an opinion, are not currently identified as pre-conditions for admissibility in the same way. As a practical matter, however, many issues related to relevance, necessity and bias may also become apparent only as the substantive evidence is led, and a pre-emptive objection may not always be possible. At that stage, the question as to whether these objections are taken into account in ruling the admissibility of the evidence, or as going to the weight to be given to the opinions and whether they should be accepted at the conclusion of the hearing, may well depend upon the specific facts of the case.

# Litigation Experts *versus* Participating or Third Party Experts

In another very recent decision, the Ontario Court of Appeal has held that the these requirements, and particularly the expert's duty respecting independence, impartiality, and bias and requirement to sign an Acknowledgment of that duty, only apply to "litigation experts" who are retained and called by the parties specifically to provide opinions on matters arising in the litigation. In *Westerhof v Gee Estate*,[16] in the context of medical evidence relating to a personal injury dispute, the Court of Appeal usefully distinguishes two other types of experts who are not subject to these requirements.

Under this analysis, "participating experts" are ones who form expert opinions or make expert findings based upon their participation in the underlying events: e.g. a treating physician who renders emergency service at a hospital. There has never been any doubt that such witnesses may give evidence about their actions and observations, including evidence about the expert judgments (opinions) they applied: for example, in terms of the treatments they provided. Similarly, "third party experts" are identified as experts retained by someone other than the litigant parties to form an opinion based on the underlying facts, such as a medical practitioner retained to provide opinions for insurance purposes unrelated to the litigation.

What is important about the Court's reasoning in *Westerhof* is that it is expressly ***not*** based upon drawing a simplistic distinction between fact evidence and opinion evidence, as earlier authorities arguably were.[17] Rather, it expressly accepts that the evidence to be given will be expert opinion evidence, and that it will be given without complying with the rules applicable to litigation experts.[18] Moreover, the rationale for admissibility of this evidence is based upon the presence of other factors that provide assurance as to the reliability of these expert witnesses (specifically that they form and typically record their findings, opinions and conclusions in a professional context prior to, or at least separate from, the particular litigation), as well as the artificiality and impracticality of trying to force compliance with the litigation expert regime.[19] This is important because it may avoid the need to limit their evidence based on untenable distinctions between fact evidence and opinions. Inevitably, in cross-examination or even during examination in chief, counsel may wish to confront these "experts" with the opinions or analysis of litigation experts, to either reinforce or challenge whatever judgments they made at the time they formed their opinion. There is no principled basis

to restrict this kind of expert exchange.

The approach taken in the *Westerhof* case should be welcomed by energy lawyers and regulators, to whom the concept of participating and non-party experts should be very familiar. For example, legislation in the energy field sometime allows regulators in an adjudicative proceeding to receive reports from other specialist agencies, such as an electricity system operator, without specifying the evidentiary nature or status of such reports.[20] Under the *Westerhof* analysis, such reports can now be recognized as simply as a form of non-party expert report. When an issue is joined on some aspect of such a report before the regulator, responding litigation expert reports could be filed. Procedures could be invoked to require the attendance of an expert representative of the agency for cross-examination on their report. Ultimately, the tribunal would have the benefit of a full expert evidentiary record to decide the issue in the public interest. Similarly, regulated parties often commission consulting reports when developing a facility, system or policy, long before any issue arises about it in proceedings before a regulator. When such issue does arise, these consulting reports are typically filed. They can now be presented, challenged, and evaluated for what they are: that is a form of participating expert report.

The next question is whether the expert accounting, financial, or technical staff of a regulated party – who invariably testify in energy proceedings – can now also be recognized as participating experts. The fact is that the financial and other documents they prepare, and the witness statements prepared for them by counsel, regularly reflect both implicit and explicit expert opinion evidence. Should they be denied such status, and their evidence restricted, simply because they are not independent of one of the litigant parties?

This question is one that arose before the AUC in its *TransAlta* decision. In that case, one of the Market Surveillance Administrator's expert witnesses was one of its own employees, who had acted as the lead investigator, and prepared the notice of allegations that framed the prosecution before the Commission. TransAlta argued that these circumstances gave the witness a "vested interest in the outcome of this proceeding", which should result in his evidence being inadmissible. In rejecting that argument, the Commission relied in part upon the statement by the Supreme Court in *White Burgess* that in most cases "a mere employment relationship with the party calling the evidence will be insufficient" to disqualify the witness altogether. The Commission did not note that the Supreme Court also quoted with approval from longstanding authority to the effect that "there is a natural bias to do something serviceable for those who employ you and adequately remunerate you".[21]

The Commission did, however, accept that in these circumstances "the expert and the party are effectively one and the same", and that "ordinarily that could be cause for considerable concern leading to the evidence in question being accorded little or no weight". In finding that the result should not follow in the *TransAlta* case, the Commission recognized a number of important mitigating factors, specifically:

- the assumptions and calculations made by the expert were transparent;
- the Commission had available a critique of the expert's testimony from TransAlta's own experts, and was not reliant upon the challenged expert alone;
- the Commission also relied upon its own expertise, which "does allow it to make an informed judgment" about the challenged evidence;
- the witness was "well qualified" because of his "experience and knowledge of the Alberta electricity market"; and
- the Commission accepted both the MSA's argument that it had a statutory mandate as, itself, an expert body, which should not be unduly prevented from developing and employing its own in-house

> expertise, and the witness's testimony that he understood that mandate.[22]

The Commission also went on to refer to other "corporate witnesses" whose evidence included some element of specialized technical and opinion evidence, and reaffirmed its 3-step process for weighing these "expert" components of their evidence, by considering:

- the nature of their specialized and technical evidence;
- whether the witness has demonstrated the necessary skill, knowledge and experience to provide an opinion; and
- whether or to what degree the evidence was influenced by the witness's position as an employee.[23]

Consistent with *White Burgess*, the *TransAlta* analysis confirms that, as a practical matter, it may be better simply to recognize, challenge and weigh the evidence of specialized or technical corporate witnesses for what it really is, and that is expert opinion evidence. Nevertheless, when an issue in the proceeding is truly going to turn on a battle of expert evidence, the regulated party will likely not rely solely on its in-house experts, but rather will be well advised to retain litigation experts to make its case.

# The Role of Counsel in Drafting Expert Reports

Another recent decision of the Ontario Court of Appeal in *Moore v Getahun*[24] revisits the longstanding debate about counsel's role in the preparation and review of expert reports, and appears to resolve it convincingly. The trial judge, following one line of prior decisions, had expressed strong concern about counsel's involvement in the process of drafting expert reports, and required disclosure of all drafts. Her decision caused a renewed debate among lawyers, particularly at the Advocates Society, who prepared "Principles Governing Communications with Testifying Experts", and intervened in the appeal. The Court of Appeal, adopting the Advocates Society's "Principles" gave lengthy reasons allowing the appeal. The Court refused to interfere with "the well-established practice of counsel meeting with expert witnesses to review draft reports" on the basis that "expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive". It also held that production of draft reports is not required and should not be ordered "[a]bsent a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert."[25]

This decision provides a strong reaffirmation of the legitimacy of counsel's involvement, based upon the importance of ensuring that expert evidence is relevant to the matters in issue, and that it is of assistance to the court.

# Implications for Energy Regulation

How then should energy lawyers and tribunal members respond to these developments in the case law coming from our courts?

In terms of the tightening rules respecting admissibility of expert opinion evidence, one response may be to ignore them, and carry on as usual. Many energy regulators can rely on provisions like subsection 15(1) of Ontario's *Statutory Powers Procedures Act*[26], which provide that they may admit as evidence any relevant testimony "whether or not admissible in a court." The fundamental difference between expert regulators and

non-expert courts in terms of the expert evidence they hear may be invoked to justify departures from the approach represented by these decisions.

Indeed, the AUC in *TransAlta* makes a strong case that its own expertise mitigates the specific risk of deferring inappropriately to expert witnesses to a point where it is "not a significant factor".[27] Nevertheless, as noted, that Commission carefully applies the Supreme Court's analysis in reaching its assessment of particular expert evidence issues before it. This approach is to be commended, for a number of reasons.

First, as has been shown, the main principles and concerns underlying these decisions – complexity of proceedings, the use of experts as professional "hired guns," the potential to shape expert evidence to support adversarial positions, the risk of usurping the proper role of adjudicators – can all apply with equal force in a regulatory context. The decision whether to exclude the evidence on threshold grounds of admissibility, or to admit the evidence but not accept or act upon it, is ultimately not as important as the reasoned analysis of the evidence and the basis for finding it unreliable. These decisions all contribute to that analysis, and to our understanding of what can make expert opinion evidence either unreliable or compelling.

Second, the purposes of the rules of evidence align closely with the goals that that underlie all administrative proceedings. The rules of evidence generally are based on two considerations: fairness and ascertaining the truth through accurate fact-finding. Many regulators would recognize the same principles as fundamental to their goal of optimal decision-making in the public interest. The principles at play in these decisions relate to both the fairness of the process and the accuracy of the findings related to the admission of expert opinion evidence.

Most importantly, specialized tribunals like those in the energy field are simply more reliant on expert evidence to function effectively. It is necessary for them to receive and assess expert evidence more often and for more purposes, than it is for the courts. It is normal, and a matter of routine. Such tribunals must therefore be prepared to process such evidence more efficiently, and sometimes perhaps more flexibly, than the courts, but that is not a reason to do it any less carefully and deliberately.

Some examples will illustrate both the special opportunities and risks that regulators face in their use of expert evidence.

One important opportunity concerns the proactive development and presentation of expert evidence by regulators in policy development proceedings. For example, the Ontario Energy Board has occasionally hired its own expert to lead a process of stakeholder consultations towards the development of a new policy. This technique was used in hearings to develop new options for demand-side management programs for natural gas utilities, and appears to have been particularly effective because of the absence of sharply adversarial interests between stakeholders. Although judicial review of the process was sought, unsuccessfully, by one intervenor, the grounds for review did not challenge evidentiary process followed in the development of the new policy, but rather the substantive policy options that emerged and the legal status and use of the policy in subsequent Board decision-making.[28] In another case, however, the same Board adopted a similar informal consultation process and led expert evidence on the much more contentious issue of rate of return on investment. Although some individual stakeholders led competing evidence to challenge the Board's expert, the ultimate result was a decision and order substantially following the recommendations of the Board's own expert. Although open to subsequent challenge in particular rate hearings, this result left many intervenors unhappy at the appearance of pre-determination, and vowing to raise the issue again at the next opportunity.[29] These examples highlight both the value of this approach to policy development, but also the importance of

fairness considerations in the use and assessment by regulators of their own experts.

Another opportunity, *albeit* with attendant risks, is the engagement in examination of experts by tribunal members who share the same expertise. Properly undertaken, this practice takes advantage of the tribunal's expertise, and can serve the interests of efficiently getting to the heart of the issues troubling the tribunal, while giving notice to the experts, counsel and parties involved of the matters that need to be addressed. The risks are fairly obvious, however, and include the possibility of unfairness if major concerns are being raised only towards the end of a hearing after the evidence is substantially committed, and in extreme cases perhaps even giving an appearance of bias. These risks may be increased if tribunal members at the same time engage in practices (fortunately less common today than in the past), such as performing their own searches of prior reports or testimony of the expert to use in examination, or taking the experts beyond their own reports and testimony to explore other issues reflecting the member's own interests. What is clear from the court decisions reviewed above is that courts are well versed in the issues for fairness related to expert opinion evidence, including the assessment of concerns about bias in this context.

There are, however, many techniques that tribunals can employ to minimize the resulting risks of judicial review. The first is, simply, to raise any issues of concern as soon as expert reports are delivered and filed, so that counsel and the experts can be prepared to address them up front before the hearing begins. Secondly, if tribunal staff have status at the hearing, then cross-examination of the experts (especially questions involving review of material prepared in advance) can appropriately be left to them, as can the preparation of responding expert reports, where appropriate, to address issues of sufficient interest to the tribunal. Just as important, however, tribunals should be prepared to adopt and use the full range of pre-hearing procedures respecting disclosure and resolution of issues, including those developed by the courts specifically to deal with expert opinion evidence.

In terms of such procedural solutions, some tribunals have developed their own approaches that build upon those of the courts. For example, Rule 13A.04(a) of the Ontario Energy Board's *Rules of Practice and Procedure* allows the Board to require two or more opposing litigation experts to confer in advance of the hearing "for the purposes of, among others, narrowing the issues, identifying the points on which their views differ and are in agreement, and preparing a joint written statement to be admissible as evidence at the hearing". Rule 13A.04(b) also allows the Board to require such experts to appear and be questioned together, on a single witness panel. This kind of innovation is designed not only to increase efficiency and reduce the complexity of proceedings, but also to improve the quality and reliability of the evidence heard and the opportunity for tribunal members to evaluate the competing positions.

These and other procedures, including the involvement of tribunal staff in preparing a case for hearing, can all help to avoid the situation of a tribunal being left with an absence of necessary expert evidence on an issue raised before it.[30] No matter how expansive a view one takes of the importance of tribunal expertise or the scope of their ability to take administrative notice of facts, the individual expertise of tribunal members is no substitute for real evidence given by appropriate expert witnesses, tested under cross examination. While tribunal expertise can certainly assist members in understanding and evaluating the expert evidence before them, it cannot by itself provide fair and accurate decision-making in the public interest.

# Conclusions

The proper preparation, presentation and evaluation of expert evidence is critical to effective energy regulation. Whether we act as counsel presenting and cross-examining witnesses on matters involving special

expertise, or as tribunal members evaluating their testimony, the issues involved are complex and serious, and arise in one form or another on an almost daily basis. These issues are both more prevalent and more important because of the increasing technological and financial complexity of our world, particularly in the field of energy regulation. Recent court decisions in this area are useful to energy lawyers and regulators in a number of ways. They remind us that this kind of evidence is admissible only as an exception to the general rules, and highlight the reasons for the exercise of caution in receiving and relying upon it at all. They reveal principles and procedures developed by the courts over time to govern its admissibility, and ensure its reliability, which are generally still relevant and applicable in energy regulation today. They provide a foundation for energy regulators to build upon, by adapting and adding to the courts experience in ways that can better serve the interests of stakeholders and the public interests involved. This is not to say the decisions should be applied slavishly, either by regulators or on judicial review. Rather it is the principles underlying the admissibility of this kind of evidence that should inform counsel's preparation and probing of the witnesses, in order to strengthen the presentation of competing expert positions. Those same principles should also inform the evaluation performed by energy tribunals, to improve the quality of the ultimate decision-making in this area."

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1. *Re Market Surveillance Administrator Allegations Against TransAlta Corporation et al,* Decision 3110-D01-2015, AUC (27 July 2015) [*TransAlta*].
2. For a good discussion of this rule, and the principles underlying it, see Alan W Bryant, Sidney Lederman & Michelle K Fuerest, *Sopinka, Lederman and Bryant: The Law of Evidence in Canada*, 4th ed [*Sopinka*] (Markham: LexisNexis, 2014) at ch 12, Introduction. There are several other excellent evidence texts, which often provide slightly different insights and analysis. It is worth consulting more than one whenever an important issue arises.
3. *Ibid* at 769
4. *R v Mohan,* [1994] 2 SCR 9, 114 DLR (4th) 419 [*Mohan*] at pp 20-25.
5. See for example, rule 53.03(1) of the Ontario *Rules of Civil Procedure*, RRO. 1990, Reg 194 as am; rule 52,2(1) of the *Federal Court Rules*, SOR/98-106 as am. is to the same effect but requires an Affidavit; and see s. 657.3(1) of the *Criminal Code*, RSC 1985, c C-46 as am.
6. *Mohan, supra* note 4 at pp 25, 37-39. The Court in that case upheld the exclusion of evidence sought to be called by the defence from a psychiatrist as to disposition to commit the crime charged.
7. See *Sopinka, supra* note 2 at paras 12.169-12.215.
8. *White Burgess Langille Inman v Abbott and Haliburton*, 2015 SCC 23, 383 DLR (4th) 429 [*White Burgess*].
9. *National Justice Compania Naviera SA v Prudentential Assurance Co,* [1993] FSR 563, [1993] Loyd's Rep 68.
10. The *Report of the Civil Justice Reform Project* headed by Coulter Osborne, 2007, made recommendations resulting in these revisions to the *Rules of Civil Procedure* in Ontario. See The Honourable Coulter A Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* at ch 9, online: Ministry of the Attorney General of Ontario <

    http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/cjrp-report_en.pdf
    >.
11. The 2008 report by Commissioner Stephen Goudge in the *Inquiry into Pediatric Forensic Pathology in Ontario* arose out of concerns about the evidence given by pathologist Dr. Charles Smith.
12. *Rules of Civil Procedure,* RRO 1990, Reg. 194, Rule 4.1 and Form 53.
13. *White Burgess, supra* note 8, at para 49.
14. *Mouvement laï*que québécois v Saguenay (City), 2015 SCC 16 at para 106.
15. *TransAlta, supra* note 1 at paras 85, 100, 105-106.
16. *Westerhof v Gee Estate*, 2015 ONCA 206, at paras 6-8, 65-86.
17. See especially *ibid* at paras 66-70.
18. *Ibid* at para 14.
19. *Ibid* at paras 82-83, 85-86.

20. See for example, the Ontario Energy Board's Decision and Order in EB-2011-0140, *East-West Tie Line – Phase II* (7 August 2013), at p 4 ff, in which the Board requested technical reports from the Ontario Power Authority and Independent Electricity Operator relating to the technical feasibility and requirements and the need for an electricitytransmission project.
21. *TransAlta*, *supra* note 1 at paras 86-88, 121; and see *White Burgess*, *supra* note 8 at paras 11, 49.
22. *TransAlta*, *supra* note 1 at paras 97, 109-111, 122-128.
23. *Ibid* at para 132, applying the tests developed in its Decision 2011-236, *Heartland Transmission Project* (1 November 2011) at para 93.
24. *Moore v Getahun*, 2015 ONCA 55.
25. *Ibid* at paras 62-65, 78.
26. *Statutory powers Procedures Act, RSO 1990, c s22, s 15(1).*
27. *TransAlta*, *supra* note 1 at para 110.
28. EB-2011-0021, *Generic Proceeding on Demand Side Management Activities for Natural Gas Utilities*, Report dated 25 August 2006; see *Pollution Probe v Ontario Energy Board*, 2012 ONSC 3206 (Div Court, 30 May 2012).
29. EB-2006-0087, *Generic Proceeding to Amend the Licenses of Electricity Distributors*, Decision and Order (20 November 2006).
30. An example where this arose can be found in Decision 2005-028 of the Alberta Energy and Utilities Board (now the Alberta Utilities Commission), in *Westridge Utilities Inc. General Rate Application* (19 April 2005).