

Dueling Environmental Experts: The Court Accepts the More Fact-Based, Reliable and Plausible Explanation

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When a party finds itself in an environmental dispute, what evidence must it submit to support its case? And will that evidence succeed in Court? For example, consider a dispute between neighbours where one neighbour alleges that the other is causing the migration of contamination across their shared property line. Each neighbour hires an expert in contaminant hydrogeology to support his or her theory of the case. How will a Court decide which of the two competing experts' evidence to base its decision on?

The Ontario Superior Court of Justice recently considered this question in *Weenen v Biadi*.¹

Mr. Weenen and Mr. Biadi were neighbours in a rural area. Water covered a significant portion of Mr. Weenen's property. The flooded portions of the property were unusable.²

Mr. Weenen commenced a lawsuit against Mr. Biadi. The main issue before the Court was whether Mr. Biadi caused flooding at Mr. Weenen's property.³

The Court found the following facts to be true:

- ♦ Mr. Weenen owned his property prior to Mr. Biadi purchasing the neighbouring property
- ♦ Before Mr. Biadi's purchase, Mr. Weenen's lands were damp, but not flooded, at times during the year⁴
- ♦ After Mr. Biadi purchased his property, he added thousands of truckloads of earth and fill to his property. This raised the elevation of Mr. Biadi's property,⁵ and
- ♦ Mr. Biadi constructed two shallow drainage ditches to drain surface water from his property. Both ditches were inadequate to prevent the flow of water from Mr. Biadi's property to Mr. Weenen's property.⁶

Mr. Biadi submitted that he did not cause flooding at Mr. Weenen's property.⁷ Mr. Weenen took the opposite position, namely that the placement of additional earth and fill caused surface water to flow from Mr. Biadi's property to his property.⁸ Mr. Biadi and Mr. Weenen each submitted expert evidence in support of their respective theories of causation.

¹ 2015 ONSC 6832.

² Ibid at para 1.

³ Ibid at para 3.

⁴ Ibid at para 17 and 38.

⁵ Ibid at para 18 and 74.

⁶ Ibid at para 20 and 22.

⁷ Ibid at para 87 and 106.

⁸ Ibid at para 122.

The Court reviewed the testimony of the competing experts.

One party's experts:

- ♦ relied on very weak evidence to support opinions without direct knowledge or scientific basis⁹
- ♦ did not all take steps to review all of the evidence in coming to their opinion¹⁰
- ♦ were “incredibly defensive” and “tremendously evasive and non-responsive” in oral testimony¹¹
- ♦ formed their opinion quickly and “appeared to have decided very quickly what the report should say”,¹² and
- ♦ “tried so hard” to give evidence that favoured the party¹³ that one of the experts' evidence was tainted.¹⁴

The other party's expert:

- ♦ had an opinion based on accurate, easily discernible facts¹⁵
- ♦ did not guess at anything¹⁶
- ♦ was responsive¹⁷
- ♦ provided reasonable explanations (and those explanations were based on facts),¹⁸ and
- ♦ understood his duty as an expert to provide unbiased scientific evidence in accordance with the acknowledgment of the expert's duty.¹⁹

The Court's preferred and accepted expert was Mr. Weenen's expert (described second above).

We cannot and do not offer comment about the relationship between the Court's preferred expert and the outcome of the case. But, what we know is that the Court held Mr. Biadi liable because additional earth and fill placed by Mr. Biadi on his property caused surface water to flow from Mr. Biadi's property to Mr. Weenen's property.²⁰ In the end, it is helpful to have an expert that carries out a comprehensive review and analysis, and that is clear and persuasive about what that expert believes is the most persuasive and plausible explanation.

Experts should have clear and logical opinions that are well supported in fact. Experts should be prepared to honestly and reasonably address the weaknesses in their reports in oral testimony. Experts should not favour their client and provide unfounded evidence that results in tainting their testimony. Rule 4.1.01 (Duty of Expert) of Ontario's *Rules of Civil Procedure* imposes a predominant duty of loyalty to the Court on testifying experts.

We have written earlier articles about the role an expert in environmental litigation. For more information please see our article titled “*Experts in Environmental Litigation*” which has been published in the *Canadian Journal of Administrative Law & Practice* 28 C.J.A.L.P 123.

⁹ Ibid at para 94 and 110.

¹⁰ Ibid at para 98 and 111.

¹¹ Ibid at para 95 and 113.

¹² Ibid at para 119.

¹³ Ibid at para 101.

¹⁴ Ibid at para 93.

¹⁵ Ibid at para 124.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid at para 129.

²⁰ Ibid at para 131.

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