

Energy Bulletin

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Communicating with Expert Witnesses: Implications of *Moore v. Getahun* for Ontario Energy Board Proceedings

The recent decision in *Moore v. Getahun* rendered by Justice Wilson of the Ontario Superior Court of Justice has brought a new perspective to the manner in which counsel and expert witnesses interact in the Province of Ontario.

The facts of the case are fairly straightforward. The plaintiff claimed relief in tort for negligent medical treatment that led to a painful chronic illness. The defendant retained the services of a medical expert for assistance in refuting the plaintiff's claim. The expert sent his draft report to counsel for comments. Justice Wilson found, in the circumstances of this case, that "content helpful to the plaintiff...was deleted or modified," and that the expert's opinion "was certainly shaped by defence counsel's suggestions."

In light of these facts, Justice Wilson made three main determinations:

1. That counsel must stop reviewing draft expert reports;
2. That counsel must no longer communicate with a view to shaping an expert report; and,
3. That counsel must wait until after the submission of the final report to provide input with a view to clarifying or amplifying any part of the report and "any input whatsoever" from counsel should be in writing and should be disclosed to opposing counsel.

Justice Wilson's conclusions are primarily founded on the language in Rule 4.1.01(1)(a) of the *Ontario Rules of Civil Procedure*, which provides that:

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules, (a) to provide opinion evidence that is fair, objective and non-partisan.

In Justice Wilson's estimation, the purpose of the rules is to ensure the independence and integrity of experts and the practice of discussing draft reports undermines that purpose.

Rule 13A.02 of the Ontario Energy Board *Rules of Practice and Procedure* closely parallels the rule considered by Justice Wilson. It reads as follows:

13A.02 An expert shall assist the Board impartially by giving evidence that is fair and objective.

The extent to which Justice Wilson's analysis will be applied by other judges - and accepted by appellate-level courts - remains to be seen. Moving forward, though, parties relying on expert evidence in Ontario Energy Board proceedings should consider their approach to such evidence in view of the comments made by Justice Wilson. For example, if an expert's report falls off track within the context of a specific case, it will be important for the party relying on the evidence of the expert to consider how the report can be refocused without "undermining" the purpose of Rule 13A.02.

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