

# Workshop on Causation and Future Risk in Environmental Cases

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Comments from the Chair of the above panel

<b>I.</b>	<b>GENERAL BACKGROUND</b> .....	3
<b>II.</b>	<b>RICHARD GATHERCOLE</b> .....	4
<b>A.</b>	<b>Issue #1: To what extent are the traditional roles of the courts and administrative tribunals appropriate for resolving environmental disputes?</b> .....	4
<b>B.</b>	<b>Issue #2: Do the standards of proof and evidentiary rules applied by courts/tribunals put special emphasis on "objective scientific" evidence - to the detriment of the appropriate resolution of the issues?</b> .....	4
<b>C.</b>	<b>Issue # 3: Are courts/tribunals being used by interest groups to resolve basic public policy issues when other institutions are more appropriate?</b> .....	5
<b>D.</b>	<b>Reference Points</b> .....	5
<b>III.</b>	<b>MADAM JUSTICE NICOLE DUVAL HESLER</b> .....	6
<b>A</b>	<b>Issues concerning the role and impact of expert testimony in environmental decision-making</b> .....	6
<b>IV.</b>	<b>MICHAEL JEFFERY, Q.C.</b> .....	8
<b>A.</b>	<b>Issue #1: Why are there fewer obstacles to proving causation and future risk in the environmental administrative context than in the litigation context?</b> .....	8
<b>B.</b>	<b>Issue #2: The need for cross-examination, especially if evidence rules are applied more loosely in the administrative setting.</b> .....	10
<b>C.</b>	<b>Issue #3: How the makeup of the board would affect how the evidence before the board is used. Discussion of the advisability of adopting a "Science Court" model for environmental hearing boards.</b> .....	11
<b>V.</b>	<b>LEGAL REFERENCE POINTS</b> .....	11

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## I. GENERAL BACKGROUND

In environmental decision making, whether in administrative or litigation contexts, proof of causation of a particular harm or proof of a future risk is a persistently difficult aspect.

A good example is the case of *Palmer v. Nova Scotia Forest Industries*,<sup>1</sup> where Justice Nunn struggled with the appropriate test for nuisance, the acceptable level of risk, and the reliability/objectivity of the experts of the respective sides, ultimately finding against the landowner plaintiffs on the ground that they had not proved a sufficient degree of probability of risk to health. Note might also be taken of the decision of the Quebec Superior Court in *Berthiaume v. Val Royal Lasalle Ltée*,<sup>2</sup> in which Justice Hurlbut rejected claims of home owners on the ground that there was insufficient proof of a link between the installation of U.F.F.I. in their homes and claimed health problems. In both *Palmer* and *Berthiaume*, the costs of litigation, in terms of time, money and psychological strain on the parties were enormous. The *Berthiaume* litigation is reported by the *Guinness Book of Records*<sup>3</sup> to be the longest civil court case in the world. Justice Hesler was counsel to the plaintiffs in that litigation.

There are many similar examples, in terms of length of deliberations, complexity of evidence, and ultimate controversy over determinations of "fact" to be found in the administrative domain, such as in the context of environmental assessments. Michael Jeffery and Richard Gathercole have extensive experience in environmental assessment, and litigation.

This panel is well qualified to identify and discuss issues arising in proof of causation and future risk. The planned format is that each panellist will make an initial presentation, leaving a generous amount of time for exchange among panellists and for interventions from other participants. We will strive for a genuine workshop atmosphere.

The panellists have prepared the following notes as background to their presentations.

## **II. RICHARD GATHERCOLE**

### **A. Issue #1: To what extent are the traditional roles of the courts and administrative tribunals appropriate for resolving environmental disputes?**

#### 1. Traditional Roles

- (i) criminal and quasi-criminal - breaches of environmental legislation.
- (ii) civil - litigation regarding impacts of actual or potential environmental degradation (oil spills; electro-magnetic fields).
- (iii) regulatory - review of government decisions (environmental appeals; resource planning/siting decisions) - including judicial review of administrative tribunal decisions.
- (iv) injunctive - to require or preclude actions involving key environmental issues (many examples in B.C. such as Clayoquot Sound).

#### 2. Assumptions underlying these traditional roles and how relevant they are to major environmental issues.

#### 3. Are courts/tribunals accessible to appropriate parties?

### **B. Issue #2: Do the standards of proof and evidentiary rules applied by courts/tribunals put special emphasis on "objective scientific" evidence - to the detriment of the appropriate resolution of the issues?**

#### 1. How "scientific" or "objective" is this evidence?

#### 2. Can courts/tribunals properly assess it?

#### 3. Are courts/tribunals in effect delegating their decision making to "experts"? (for example, Kemano Completion issue - where a court case was settled on the basis of a special behind the scenes meeting of experts chaired by a university president) (EMF issue - how can the courts assess the evidence/lack of evidence on this issue?)

4. How does this affect public access to decision-makers and input into their decisions?

**C. Issue # 3: Are courts/tribunals being used by interest groups to resolve basic public policy issues when other institutions are more appropriate?**

1. The courts' role on Charter cases, together with governments' refusal to address key issues has resulted in an unreasonable reliance on courts to deal with public policy issues.
2. Courts can't deal with some of these issues - they are not win/lose but trade-offs based on public value judgments, to wit,
  - EMF issue
  - Social cost accounting (including all social/environmental costs in resource acquisition decisions and other environmental issues.
3. We need to develop institutional mechanisms for resolving fundamental public policy issues - involving all those affected not just the specific parties to a traditional adversarial process.
4. If these institutions are not developed courts/tribunals will continue to be used by special interest groups to deal with basic public policy issues that they are not established to, or can effectively address - not the inter-party disputes that courts/tribunals are established to, and do, deal with effectively.

**D. Reference Points**

There are, of course, many decisions and writings on the traditional role of the courts and tribunals and on specific issues such as the role of the courts on Charter issues. There are cases on the EMF issue in the United States (and in B.C. before the British Columbia Utilities

Commission). However, I am hoping to focus more on what should happen rather than what has happened.

One article that I would recommend regarding issue #2 is "Statistical Power Analysis and the Precautionary Principle".<sup>4</sup>

### **III. MADAM JUSTICE NICOLE DUVAL HESLER**

#### **A. Issues concerning the role and impact of expert testimony in environmental decision-making**

The use of expert witnesses in Court is fraught with difficulties. Here are some of the topics that will be brought up by the panel:

- How is opinion evidence to be treated? What is the proper weight to give expert evidence?
- Should the expert be allowed to give his/her opinion on the very issue that the Court is called upon to decide?
- Should expert evidence be allowed even when scientific methods have not yet achieved general acceptance?
- The phenomenon of multiple contradictory expert reports - or why courts become disenchanted with expert evidence.
- How "independent" should the expert be?
- What limits, if any, are to be placed on expert evidence?

- The modern conception of expert witnesses - proving causation in environmental cases - will experts be up to the task?
- Novel approaches to proof of causation - should the user have to prove innocuousness of a substance? Should liability be based on contribution to exposure?
- A few practical notes - how should expert evidence be presented?

L'utilisation d'une preuve par expert comporte de nombreux écueils. Les suivants seront analysés:

- Comment traiter la preuve par expert? Quel poids le tribunal doit-il attribuer aux opinions avancées?
- Doit-on permettre à l'expert de se prononcer sur la question même que le tribunal est appelé à trancher?
- Doit-on permettre la preuve par expert dans des domaines où il n'existe pas encore de techniques d'analyse généralement acceptées dans le monde scientifique?
- Le phénomène des expertises multiples contradictoires - cause de désenchantement des tribunaux face à la preuve par expert.
- L'"indépendance" de l'expert - est-ce un pré-requis? Quelle en est la mesure?
- Est-il opportun de soumettre la preuve par expert à certaines restrictions?

- La conception moderne de l'expert et la tâche de prouver causalité en matière d'atteintes dues à l'environnement.
- La preuve de la causalité - les règles traditionnelle demeurent-elles valables? Y a-t-il lieu de renverser le fardeau de la preuve? Devrait-on attribuer une part de responsabilité pour le seul fait d'avoir contribué à une exposition nocive?
- Quelques aspects pratiques sur la présentation de la preuve par expert.

#### IV. MICHAEL JEFFERY, Q.C.

- A. Issue #1: Why are there fewer obstacles to proving causation and future risk in the environmental administrative context than in the litigation context?**
1. Looser application of evidence rules:
    - generally rules of evidence do not apply to environmental administrative tribunals subject to the tribunal's statute specifically providing that certain rules of evidence do apply and subject to the fact that the tribunal is still bound by the rules of natural justice or fairness;
    - applicable section of *Statutory Powers Procedure Acts*<sup>5</sup> allows the tribunal to admit any evidence as long as it is relevant and not repetitious; evidence that would be inadmissible in a court by reason of any privilege under the law of evidence or statute is not admissible at a hearing;
    - example: restrictions upon which the tribunal may take judicial notice not as narrow as such restrictions on a court; examinations of those restrictions and the implication of the wider scope of judicial notice.
  2. Consideration of conditions or safeguards that could be in force if the application is approved:
    - review of scientific difficulties proving causation in environmental court cases such as toxic tort cases and result that courts reluctant to impose liability on individual

or corporation where not clear, at least on the balance of probabilities, that the harm was caused by the activity of the individual or company;

- review of causation problems which exist in environmental board setting because of the difficulty forecasting environmental impacts and their importance;
- examination of why administrative tribunals may be more willing to allow a project to proceed even if not all the evidence meets the balance of probabilities standard, that is, boards may be willing to allow a proposal to proceed even if it is not possible to show that no harm will occur as long as the evidence about the effectiveness of the safeguards meets the test;

3. Goals of the looser application of the evidence rules;

(i) more information before the board for consideration;

(ii) more public participation;

- all parties, no matter what their interest or the extent of the resources they have available to gather evidence for hearing, have the right to be at the hearing and a right to be heard;
- to make this right meaningful, the tribunals must allow the parties to present them with whatever evidence they have; the aim is not to exclude evidence but to admit it with more emphasis placed on the weight to be given to that evidence once it is admitted.

4. Consequence of looser application of evidence rules:

- shift in focus from concern about admission of evidence to concern about the weight to be given to each piece of evidence;
- highlight the difference between administrative tribunals where most evidence is admitted and then focus in on the weight to be given to that evidence as opposed to the court system where the focus is on whether the evidence will be heard in the first place;
- example: how petition evidence is treated by administrative tribunals.

**B. Issue# 2: The need for cross-examination, especially if evidence rules are applied more loosely in the administrative setting.**

- cross-examination crucial to enabling the decision-maker to get at the truth with respect to the actual harm that may or may not be caused by the proposed activity;
- expert opinion evidence which is greatly relied on at environmental assessment hearings must be tested through cross-examination.

**C. Issue #3: How the makeup of the board would affect how the evidence before the board is used. Discussion of the advisability of adopting a "Science Court" model for environmental hearing boards.**

- board made up of generalists such as occurs in the judicial system or the board with members who have special expertise in the area of inquiry of the board (a Science court);
- potential advantage is less need for cross-examination of the evidence;
- however, potential problems include the potential for the issue to be decided on the basis of the expert's own expertise and knowledge, the fact that it is more likely that the evidence would not be presented in a manner that would be understandable to the public, the potential for the decision not to reflect the societal value judgments of the affected community and the threat to procedural consistency and policy continuity.

## **V. LEGAL REFERENCE POINTS**

I. Blue, "Common Evidentiary Issues Before Administrative Tribunals and Suggested Approaches" (1993) 14 Advocates' Q. 385.

R.B. Eisen, "Expert Opinion Evidence at Environmental Board Hearings" (1989) 3 C.E.L.R. (N.S.) 63.

P.S. Elder, "Environmental and Sustainability Assessment" (1992) 2 J.E.L.P. 125.

M. Jeffery, "Science and the Tribunal" (1988) 15 Alternatives 24.

E. Ratushny, Q.C., "Rules of Evidence and Procedural Problems Before Administrative Tribunals" (1989) 2 C.J.A.L.P. 157.

B.E. Smith, "Practice and Procedures Before the Environmental Assessment Board (Ontario)" (1981-82) 3 Advocates' Q. 195.

S.L. Smith, "Science in the Courtroom: The Value of an Adversarial System" (1988) 15 Alternatives 18.

J.Z. Swaigen, "The Role of the Civil Courts in Resolving Risk and Uncertainty in Environmental Law" (1991) 1 J.E.L.P. 199.

H. Turkstra & M. Valiante, "Preparing for and Evaluating the Plaintiff's Environmental Law Suit" (1992) 10 Can. J. Ins. L. 85.

## FOOTNOTES

1. *Palmer v. Nova Scotia Forest Industries* (1983), 60 N.S.R. (2d) 271, 26 C.C.L.T. 2622 (T.D.), 2 D.L.R. (4th) 397.
2. *Berthiaume v. Val Royal Lasalle Ltée*, [1992] R.J.Q. 76 (C.S.).
3. N. McWhirter & S. Greenberg, eds., *Guinness Book of Records* (Enfield: Guinness Superlatives).
4. R.M. Peterman & M. M'Gonicle, "Statistical Power Analysis and the Precautionary Principle" (1992) 24 *Marine Pollution Bulletin* at 231-234.
5. *Statutory Powers Procedure Acts*, R.S.O. 1990, c. S. 22.