
Date: June 8, 2015

Report to: **Council for Decision**

From: Gilbert Larocque, CD, PEng, LLB, FEC
Associate Director, Professional Practice

Subject: Expert Witness Guidelines - Approval

Linkage to Strategic Plan: Improve resources and education as well as awareness and access to resources that help members practice to high professional and ethical standards.

Establish a common level of expectation among stakeholders regarding the practice of the professions in the public's interest.

Background

APEGBC professionals are sometimes called to act as expert witnesses in legal proceedings. The existing guidance material on this practice consists of two bulletins last revised in May 1993:

- Bulletin L: The Engineer as an Expert Witness; and
- Bulletin L-1: The Role of the Expert Witness.

Discussion

A review by the APEGBC Staff in the Fall of 2014 found the Bulletins to be deficient:

- The Bulletins only pertain to the practice of engineering – each Bulletin closes with a note stating “[w]hile this Bulletin is directed to Professional Engineers, the views express would apply equally to Professional Geoscientists”.
- The Bulletins were written in light of the ‘leaky condo’ crisis and the range of their advice is clearly geared towards addressing the concerns arising from the court proceedings at that time.
- The Bulletin contain some advice that do not conform with current practices.
- Recent changes in the Rules of Court are not reflected in the Bulletins.

The Associate Director, Professional Practice researched and drafted new guidelines. Drafts were provided to the Professional Practice Committee, the Building Codes Committee, the Consulting Practice Committee and the Building Enclosure Committee. The comments received from those Committees were integrated in the Guidelines which then proceeded to both an internal legal review by the Director, Legislation, Ethics and Compliance and the Staff Lawyer, Regulatory Affairs, and a legal review by external counsel at Bull Housser Tupper.

In their email meetings of 8 June 2015, the Building Codes Committee, the Building Enclosure Committee and the Consulting Practice Committee had the following motions:

- It is moved, seconded and carried that the Building Codes Committee recommends the APEGBC Council approve the Professional Practice Guidelines – Expert Witness Draft 5 dated 5 June 2015, pending further editorial amendments.

- It is moved, seconded and carried that the Building Enclosure Committee recommends the APEGBC Council approve the Professional Practice Guidelines – Expert Witness Draft 5 dated 5 June 2015, pending further editorial amendments.
- It is moved, seconded and carried that the Consulting Practice Committee recommends the APEGBC Council approve the Professional Practice Guidelines – Expert Witness Draft 5 dated 5 June 2015, pending further editorial amendments.

Recommendation

It is recommended that the APEGBC Council approve the Professional Guidelines – Expert Witness and the consequential cancellation of Bulletins L and L-1.

Motion: To approve the Professional Practice Guidelines – Expert Witness, Draft 5 dated 5 June 2015, pending further editorial amendments; and to approve the cancellation of Bulletin L: The Engineer as an Expert Witness and Bulletin L-1: The Role of the Expert Witness.

Professional Practice Guidelines

Expert Witness

Draft 5.0



Association of Professional Engineers and
Geoscientists of British Columbia

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1.0 Definitions

1.1 The following definitions are specific to these Practice Guidelines. All references in the text to these terms are italicized.

Act

Engineers and Geoscientists Act, [RSBC 1996] c. 116, as amended.

APEGBC

Association of Professional Engineers and Geoscientists of British Columbia.

APEGBC professional(s)

Professional engineers, professional geoscientists, licensees, including limited licensees, licensed to practice by *APEGBC*.

decision-maker

The person or persons who must make a decision in a legal proceeding.

expert

An *APEGBC professional* with special knowledge of a subject beyond that of the average person.

expert report

A report prepared by an *expert* and intended to be submitted as evidence in a *legal proceeding*.

expert witness

An *expert* who provides oral testimony in a *legal proceeding*.

legal proceeding

Small Claims Court; Provincial Courts (all Divisions); Supreme Court of British Columbia; Court of Appeal; Supreme Court of Canada; Federal Court; tribunals; judicial inquests; Royal Commissions; coroner's inquests; arbitration panels; professional disciplinary panels; and mediations.

seal

Any physical or electronic seal applied by an *APEGBC professional* to a document to indicate that he or she is professionally responsible for the work so sealed.

2.0 Purpose and Scope

2.1 The purpose of these Practice Guidelines is to provide guidance to *APEGBC professionals* when they are retained to act as *experts*.

2.2 The *APEGBC* Code of Ethics states, in part:

14 (a) [...] Members and licensees shall act at all times with fairness, courtesy and good faith to their associates, employers, employees and clients, and with fidelity to the public needs. They shall uphold the values of

truth, honesty and trustworthiness and safeguard human life and welfare and the environment. In keeping with these basic tenets, members and licensees shall:

[...]

2) Undertake and accept responsibility for professional assignments only when qualified by training or experience;

3) Provide an opinion on a professional subject only when it is founded upon adequate knowledge and honest conviction;

[...]

7) Conduct themselves with fairness, courtesy and good faith towards clients, colleagues and others, give credit where it is due and accept, as well as give, honest and fair professional comment [...].

2.3 In the course of their work, *APEGBC professionals* routinely provide opinions based on their training, experience, knowledge and honest conviction which could be characterized as “*expert*” because the opinions given are beyond the capabilities of the average person. In legal proceedings, however, the notions of *expert* and *expert witness* refer to an individual with specialized knowledge who helps the *decision-maker* understand the area of specialized knowledge. These Practice Guidelines provide guidance to *APEGBC professionals* who undertake the role of *expert witness*.

3.0 Guidelines for Practice

3.1 Function

3.1.1 The function of an *expert witness* is to assist the *decision-maker* in reaching a proper decision by giving an independent, objective assessment of the engineering or geoscience issues which are the subject of the *expert* opinion. An *expert witness* is not to be an advocate for either party, a prohibition *decision-makers* have repeatedly emphasized. An *expert* can also provide factual evidence, e.g. direct observations at a site.

3.1.2 Different *experts* may express different opinions but this does not necessarily mean one of them is wrong, or that one of them is acting improperly. It is for the *decision-maker* to determine which *expert* opinion it accepts or gives more weight.

3.2 Qualifications

3.2.1 An *expert* must possess strong qualifications in the technical areas and issues which are the subject of the *expert* opinion. These qualifications must be set out in the *expert report*. To demonstrate expertise, an *APEGBC professional* should provide a detailed resume of his or her experience, training, knowledge and relevant publications.

- 3.2.2 While an *APEGBC professional* may provide an opinion on a topic which is outside his or her usual field of practice, this can only be done if the *APEGBC professional* has the requisite specialized knowledge to be an *expert*. Generally speaking, the more qualified the *expert*, the more weight will be given to the *expert's* opinion by the decision-maker.
- 3.2.3 While previous experience as an *expert* is generally viewed favourably, *experts* who present evidence solely for or against a class of parties, or rigidly for or against a point of view risk being branded as biased. *APEGBC professionals* should be aware that the evidence of “niche” *experts* may be rejected, or given less weight, if that *expert's* evidence has previously been discarded in a *legal proceeding* because of bias.
- 3.2.4 The opinion of an *expert* must be the opinion of the *expert*, not the work of others. An *expert* must carefully consider how others contribute to the work underlying the opinion. Where others are involved in preparing parts of an *expert report*, their involvement must be clearly indicated in the *expert report* by specifying their names and qualifications, their scope of work, and their contributions. *Experts* should produce the majority of an *expert report* and the opinions it contains. *Expert reports* produced by others under the direct supervision of an *expert* likely will be given less weight by the *decision-maker*.

3.3 Conflict of Interest

- 3.3.1 *APEGBC professionals* must consider whether they have any personal or business relationships with any of the parties in the *legal proceeding* which may give rise to a conflict of interest. *APEGBC professionals* also should consider whether any of their clients could be disadvantaged by their participation as an *expert* even though the client is not involved in the *legal proceeding*. If there may be a conflict of interest, the *APEGBC professional* should immediately advise both the client and legal counsel so they can make an informed decision with respect to retaining the *APEGBC professional* as an *expert*. If an *APEGBC professional* cannot satisfactorily conclude no conflict of interest exists, he or she should decline to act as *expert*.

3.4 Communication

- 3.4.1 Above all, the provision of *expert* evidence is an exercise in communication. A good *expert* has the ability to communicate persuasively, in a manner that is logical, balanced and reasonable. At all times, the *expert* must remain objective and cannot allow himself or herself to become an advocate for a position or party. The *expert* must impart an opinion that is impartial, unbiased and fair to all concerned.
- 3.4.2 A good *expert* also will possess the ability to support his or her opinion when it is tested, sometimes forcefully, through cross-examination by legal counsel for an opposing party.

- 3.4.3 A good *expert* will remember that the *decision-maker* will best be able to understand the *expert* opinion by the use of clear and concise language that relies, where possible, on non-technical words and simple analogies to explain otherwise technical concepts.

3.5 Confidentiality and Privilege

- 3.5.1 At the outset of a retainer as an *expert*, an *APEGBC professional* may be asked to keep the matter, including the fact of the retainer, confidential. When the retainer involves reviewing the work of another *APEGBC professional*, some *APEGBC professionals* have interpreted Bylaw 14(a)(7) as a requirement to contact the other *APEGBC professional*. Prior to contacting another *APEGBC professional*, the *expert* should discuss the issue with the client and confirm this course of action would be acceptable. It is acceptable not to contact the other *APEGBC professional* if so directed by the client or its legal counsel; however, if the inability to contact the other *APEGBC professional* affects or limits the *expert's* ability to give an opinion, the client and its legal counsel should be so advised, and this limitation should be expressly stated in an *expert report*, if one is prepared.
- 3.5.2 An *APEGBC professional* should confirm, in writing, with the client or the client's legal counsel at the outset of an *expert* retainer whether the *APEGBC professional* has authorization to contact others in relation to the retainer. If authorization is not given, the *expert* should note this in his or her *expert report* if one is prepared. An *APEGBC professional* should not provide an *expert opinion* with insufficient information.
- 3.5.3 When an *expert* is retained by legal counsel, the opinion of the *expert* will be considered part of the legal counsel's preparation work and, therefore, be covered by litigation privilege. To preserve this privilege, legal counsel will probably express much stricter requirements with respect to confidentiality and distribution of information.

3.6 Practice Standards

- 3.6.1 An *expert* generally will be asked to give an opinion as to the applicable practice standards at the relevant time and location. The *expert* may also be asked to give an opinion as to the adequacy or inadequacy of a design, an assembly, construction, or the processes, methods and procedures used in relation to the applicable practice standards. While an *expert* may provide an opinion whether a course of practice met the applicable practice standards, it is inappropriate, however, for an *expert* to determine whether compliance with practice standards was achieved. It is for the *decision-maker* to make a determination on whether the conduct of the party involved in the legal proceeding met the standards of practice.
- 3.6.2 Recent decisions in British Columbia have confirmed the test used by decision-makers to determine whether a professional has properly performed his or her services. The test is whether another reasonably competent and reasonably prudent

professional acting in similar circumstances would have conducted himself or herself in the same manner. It is not necessary that the professional's work be perfect. It need only be up to the standard of the average *APEGBC professional* practising at that time in that discipline in British Columbia.

3.7 Facts

- 3.7.1 It is not necessary for an *expert* to observe the site, the project or the incident that is the subject of the *legal proceedings*. The *expert* can do so, and may give evidence as to his or her observations as this is factual, not opinion, evidence. The *expert* should not, however, make findings of facts based upon such observations. Findings of fact fall solely within the purview of the *decision-maker*.
- 3.7.2 The *expert* opinion must rest upon factual assumptions. It is the responsibility of legal counsel to provide the *expert* with a list of factual assumptions to be made. This process can be iterative as the *expert* will know what assumptions have to be made, and legal counsel will know whether the assumptions can be proven in the legal proceeding. The factual assumptions must be set out in the *expert report* so the *decision-maker* can ascertain whether the opinion was based on factual assumptions which have been accepted as "facts" by the *decision-maker*.
- 3.7.3 It is the responsibility of legal counsel, not the *expert*, to prove the facts on which an *expert's* opinion is based.

3.8 Interpretations

- 3.8.1 It is not appropriate for an *expert* to give an opinion on the meaning of a contract or other document. This is a finding of law reserved to the *decision-maker*. It is acceptable for an *expert* to give opinion evidence on practice or industry-based assumptions underlying the language of contracts or documents.
- 3.8.2 The one exception concerns technical or scientific terms. An *expert* can give an opinion to the *decision-maker* as to their meaning.

3.9 Limits on Expert Testimony

- 3.9.1 At all times, an *expert* must be mindful of his or her role, including the limitations on admissibility of *expert* evidence:
- .1 an *expert* may not make findings of law;
 - .2 an *expert* may not interpret contracts (as that is a finding of law);
 - .3 an *expert* may not make findings of facts;
 - .4 an *expert* may not opine on issues outside his or her area of expertise;
 - .5 an *expert* cannot opine on issues of common knowledge; and
 - .6 an *expert* should not make arguments disguised as opinions

3.10 Documents

- 3.10.1 Since *expert reports* are documents prepared and delivered by an *APEGBC professional* in the *APEGBC professional's* capacity, they must be sealed, signed and dated by the *APEGBC professional* in accordance with the Section 20(9) of the *Act* and the APEGBC Quality Management Guidelines – Use of the APEGBC Seal.
- 3.10.2 All documents prepared by an *expert*, including drafts, are producible to the other parties once the *expert report* is delivered.
- 3.10.3 A *decision-maker* may also order the production of ancillary documents such as timesheets showing the time spent by the *expert* providing expert advice, and agreements to provide *expert* services.

3.11 Fees

- 3.11.1 As with any task, the fees associated with the provision of *expert* services should be determined in advance of undertaking an assignment. *APEGBC* recommends fees be commensurate with the hourly rate of the *APEGBC professional*, with some increase for the inevitable stress and dislocation, and to compensate for the loss of productivity which may ensue for those under the direct supervision of the *APEGBC professional*.
- 3.11.2 Fees should not be based on the result of the action, or whether the *expert* evidence is accepted as both fee arrangements could be viewed as leading to bias and lack of objectivity. While *pro bono* work is not disallowed, there is nothing untoward about accepting fees: a *decision-maker* would likely be surprised if an *expert* did not do so.

4.0 References and Related Documents

4.1 Books

- Continuing Legal Education Society of British Columbia. *Expert Evidence in British Columbia Civil Proceedings*, 3rd ed., 2011, 345 p.
- Dillon, J.R. and Turriff, G. *British Columbia Annual Practice 2014*. Canada Law Book, 2013, 1580 p.

4.2 Case Law

- *Dhaliwal v. Bassi*, 2007 BCSC 547.
- *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.*, (1988) 29 B.C.L.R. 128.
- *Vancouver Community College v. Phillips Barratt*, (1988) 26 B.C.L.R. (2d) 296.
- *Walsh v. Belcourt*, 2004 BCSC 471.

4.3 Guidelines

- APEGBC Quality Management Guidelines – Use of the APEGBC Seal.
- APEGBC Quality Management Guidelines – Retention of Project Documentation.
- Association of Professional Engineers and Geoscientists of Alberta. *Guidelines for Professional Member as a Witness*, v 1.0, October 2003.

4.4 Presentations

- Allard, B. *Presentation: Engineers and Geoscientists as Expert Witnesses*, 22 February 2012.

APPENDIX A

MODEL EXPERT REPORT

A.1 **General**

- A.1.1 *Decision-makers in legal proceedings generally consider it the duty of legal counsel to ensure that expert reports presented in legal proceedings are properly organized and contain the information necessary to assist the decision-maker. Some decision-makers may specify the scope, format and length of expert reports they will accept. Experts must therefore consult with legal counsel, or in the absence of legal counsel with the decision-makers, to ensure the expert reports they submit meet the applicable requirements.*
- A.1.2 The following pages contain a sample model report that could serve as a template for an APEGBC professional to write an expert report.

MEMORANDUM

To: *XXX Law Corporation*

From: *Your name, P.Eng., P.Geo.*

File: file number

Date: mm/dd/yyyy

RE: File Name From Legal Firm

1. GENERAL

Name: *Your name, P.Eng., P.Geo.*

Address:

Area of Expertise:

2. QUALIFICATIONS

Please refer to Attachment 1 Resume of *your name*.
(Below summarize key qualifications)

Employment:

Education:

Associations:

Other:

3. INSTRUCTIONS

I have been retained by *ABC Law Firm* to provide an expert opinion relating to
(identification of subject).

I have been asked by (legal firm contact name) to provide an opinion in respect
of the following question(s):

1. *(Set out the questions on which you have been asked to give an opinion – these questions should be set out in the instruction letter from legal counsel.)*

Instruction letter(s) from (legal firm contact name) to me are included at Attachments 2 to this report.

4. CONFIRMATION OF DUTY

The opinions provided on the above issues are for the use of (lawyer's name) of the firm of XXX, Law Corporation in (describe legal proceeding).

In this capacity:

- I am aware that as an expert witness, I have the duty to assist the Court and I am not an advocate for any party.
- I have made my report in conformity with this duty; and
- I will, if called upon, give oral or written testimony, and give that testimony in conformity with that duty.

5. REFERENCES AND DEFINITIONS

The mm/dd/yyyy letter from (legal firm contact name) provides the following definitions: (examples are:)

- The "Development" means >>>>>
- The "Property" means >>>>.
- "MOTI" means Ministry of Transportation and Infrastructure
- "Ha" means hectares;
- etc..

6. DOCUMENTS REVIEWED

In preparing my opinion, I have considered:

1. (Names or documents reviewed that have bearing on the opinion. There may be many or few and they would normally be supplied by legal counsel.)

In preparing my opinion, I have also considered the following documents:

- i) (Letters, e-mails, drawings and other related documents that may have been used by you during the course of the investigation.)

- ii) (Reference documents such as publications.)

Information developed from research conducted in preparation of the opinion:

- a) Field trip to >>>>
- b) Review of aerial photography >>>>
- c) Etc.

7. ASSUMPTIONS

The opinions expressed in this report are based on the following assumptions:

- 1. (These assumptions will largely be supplied by legal counsel but you may add to these as well. The assumptions from legal counsel and your own assumptions should be separate if there is a long list.)

8. NATURE OF THE OPINION BEING SOUGHT AND EACH ISSUE IN THE PROCEEDING TO WHICH THE OPINION RELATES

[GILBERT: This requirement is fulfilled by setting out the questions on which the expert has been asked to opine. The list of questions can be repeated here, followed by the "Opinion" section in which the opinions in response to each question are set out. Alternatively, they can be "collapsed", i.e. one question is set out, followed by the opinion on that question, and the next question is then set out, followed by the opinion on that question, and so on.]

9. OPINION AND REASONS REGARDING EACH OF THE ISSUES

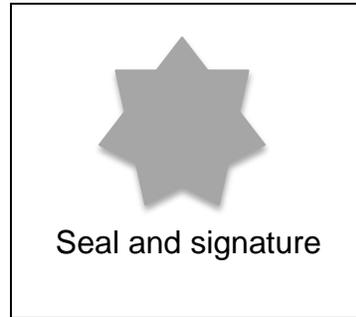
- 1. (REPEAT THE Lawyer's STATEMENT FROM ABOVE Section 3.)

OPINION:

(This is where you discuss how you developed your opinion and may include calculations, references, other supporting information, etc. This section could be quite long and may require explanatory notes. If possible, short discussions and straight forward explanations with examples are preferred.)

(YES or NO or explanation as may be needed.)

Closing remarks regarding the Opinion if appropriate.



Your name, P.Eng., P.Geo.

Attachment 1 : Resume (One page or longer resume as needed)

Attachment 2 - Instruction Letter from Legal Counsel