Delivering expert knowledge to global counsel

International Law Office®

Litigation - Canada

SCC rules on expert witness independence and impartiality

Contributed by **Dentons**

June 02 2015

Authors

Barbara L Grossman

Christina Porretta

Introduction

In May 2015 the Supreme Court of Canada released two decisions on the admissibility of expert evidence. The first, *Mouvement Laïque Québécois v Saguenay*, provided guidance on the appropriate considerations in determining whether an expert witness is sufficiently independent and impartial in order for his or her evidence to be admissible.(1) The Supreme Court held that the test for determining whether an expert lacks the requisite independence is "whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case". Accordingly, more than an appearance of bias is required to render expert testimony inadmissible.

Two weeks later, in *White Burgess Langille Inman v Abbott*, the Supreme Court considered whether the standards for admissibility of expert evidence should take into account the proposed expert's (alleged) lack of independence or bias.(2) The decision in *White Burgess* brings much-needed clarity to the issue of whether a trial judge can disqualify an expert based on impartiality and lack of independence at the qualification stage (ie, based on the criteria it set out in *R v Mohan* two decades earlier).(3) Until now, case law on this issue has been contradictory, with most decisions supporting the conclusion that – at a certain point – expert evidence should be ruled inadmissible due to the expert's lack of impartiality or independence.

Saguenay

In *Saguenay* the Supreme Court ordered a municipality and its mayor to cease the recitation of a prayer at city council meetings on the basis that it breached the state's duty of neutrality and was thus a discriminatory interference with an individual's freedom of conscience and religion. At the Quebec Human Rights Tribunal, both parties proffered expert witnesses on the religious significance and nature of prayer. The tribunal preferred the evidence of the appellants' expert, Daniel Baril.

The Quebec Court of Appeal held that the tribunal had erred in its reliance on Baril's opinion. The court questioned Baril's independence and impartiality, noting that he was an advocate for the secularisation of the state and a co-founder and executive member of the *Mouvement Laïque Québécois* (MLQ), a party to the litigation. Because of this relationship with a party and the positions that Baril had taken in the past, the court found that he did "not meet the requirements of objectivity and impartiality that are indispensable to the status of expert". The court criticised the tribunal for having failed to undertake "a review of the grounds for disqualification of the witness Baril", whom it considered ultimately "not qualified to testify"(4) on the basis that "[a] well-informed person, aware of the duty of impartiality that must animate any expert called to appear before a court, would easily agree that the witness Baril lacked the necessary [distance] to act in this case".(5)

Decision

The Supreme Court rejected the Quebec Court of Appeal's conclusion on this point. Although the Supreme Court agreed that the independence and impartiality of an expert are important factors, it concluded that these factors generally affect the weight to be given to the expert's testimony, but do not necessarily disqualify the expert. In explaining its conclusion that it was "not unreasonable" for the tribunal to qualify Baril as an expert and accept the probative value of his opinion, the court commented on the requirements of independence and impartiality for expert witnesses as follows:

> "*It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker … However, these factors generally have an impact on the probative value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily 'disqualify' the expert. …For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would*

> *consider that the expert is not independent. Rather, what must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case.*"(6)

Noting that the tribunal had acknowledged Baril's relationship with the MLQ and his views with respect to secularism, the court added that "a relationship between an expert and a party does not automatically disqualify the expert in every case".(7)

The Supreme Court's comments set a low bar for the admissibility of expert evidence on the criteria of independence and impartiality.

White Burgess

The decision in *White Burgess* focused solely on the issue of whether trial judges can exclude a proposed expert who clearly lacks the requisite independence to qualify as an expert. Until *White Burgess*, the important questions that remained unanswered – and that trial courts struggled with – were the following:

- Should the elements of an expert's duty (ie, independence and impartiality) apply to admissibility of the evidence rather than only to its weight?
- If so, is there a threshold admissibility requirement in relation to independence and impartiality?

The Supreme Court unanimously answered both questions in the affirmative.

In this professional negligence case against a former auditor, the plaintiff's expert's independence and impartiality was challenged by the defendant auditor because she was from a different branch of the accounting firm that had taken over from the defendant auditor and – during the course of performing various accounting tasks – had identified problems with the defendant's previous work. The defendant argued that there was a reasonable chance that the expert would be biased because of the risk that her firm would be vulnerable to litigation if her evidence were rejected or she changed her evidence. The Supreme Court held that the expert met the independence and impartiality threshold, explaining:

> "*The fact that one professional firm discovers what it thinks is or may be professional negligence does not, on its own, disqualify it from offering that opinion as an expert witness. Provided that the initial work is done independently and impartially and the person put forward as an expert understands and is able to comply with the duty to provide fair, objective and non-partisan assistance to the court, the expert meets the threshold qualification in that regard.*"

The court also rejected the suggestion that the expert lacked independence because she incorporated some of the work done by the other branch of the accounting firm.

Expert's duty

The Supreme Court stated that expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence.(8) They must be aware of this duty and willing and able to carry it out. Three concepts underlie the various formulations of the duty of an expert:

- Impartiality – the opinion must be impartial in that it reflects an objective assessment of the questions at hand.
- Independence – it must be independent in that it is the product of the expert's independent judgement, uninfluenced by the identity of the party retaining him or her or the outcome of the litigation.
- Absence of bias – it must be unbiased in the sense that it does not unfairly favour one party's position over another. The expert's opinion should not change regardless of which party retained him or her.(9)

However, the Supreme Court recognised that these concepts must be applied to the realities of adversarial litigation. Experts are generally retained, instructed and paid by one of the adversaries. According to the court, "these facts alone do not undermine the expert's independence, impartiality and freedom of bias".(10)

Framework

The proponent of the expert evidence must establish the threshold requirements of admissibility. These are the four factors of the *Mohan* test:

- relevance of the evidence;
- necessity of the evidence;
- absence of an exclusionary rule; and
- adequate qualifications of the expert.

The court concluded that concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed in relation to the qualifications factor of the *Mohan* test. A proposed expert witness who is unwilling and unable to fulfil his or her duty to the court is not properly qualified to perform the role of an expert. If the expert witness does not meet this threshold

admissibility requirement, his or her evidence should not be admitted. However, once this threshold is met, remaining concerns about an expert witness's compliance with his or her duty should be factored into the overall cost-benefit analysis which the judge conducts his or her gatekeeping function.

Accordingly, the Supreme Court essentially adopted the two-step test set out by the Ontario Court of Appeal in *R v Abbey* and added its own gloss with respect to the qualifications factor of the *Mohan* test for admissibility.(11)

Step 1
The proposed expert must meet the threshold of the *Mohan* test, with the qualification stage of that test addressing concerns related to the expert's duty to the court and willingness and capacity to comply. In addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose must be addressed.(12)

After reviewing Canadian, UK, Australian and US authorities, the court concluded that an expert's lack of independence and impartiality factors into the admissibility of the evidence in addition to the weight to be given to the evidence if admitted. In reaching this conclusion, the court relied on Justice Binnie's oft-cited quote in *R v J-LJ*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility."(13) This is where the test enunciated in *Saguenay* would be applied. For expert evidence to be inadmissible, more than an appearance of bias is necessary. The question to be answered is not whether a reasonable person would not consider the expert to be independent; rather, it is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case.(14)

The court instructed that evidence that does not meet these threshold requirements should be excluded from the outset.

Step 2
Finding that expert evidence meets the basic threshold does not end the inquiry. At the second discretionary gatekeeping step, the trial judge must evaluate the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks (ie, whether otherwise admissible expert evidence should be excluded because its probative value is overborne by its prejudicial effect). This is a residual discretion to exclude evidence based on a cost-benefit analysis. The court adopted Justice Doherty's summary of this balancing exercise in *Abbey*, that:

> "*[The] trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence.*" (15)

Threshold
The Supreme Court also discussed the appropriate threshold for admissibility. If a witness will not or cannot fulfil his or her duty, he or she does not qualify to perform the role of an expert and should be excluded. Therefore, the expert witness must be aware of this primary duty to the court and be willing and able to carry it out. Although the court did not hold that the expert's independence and impartiality should be presumed unless challenged, it did state that, absent such challenge, the expert's attestation or testimony recognising and accepting the duty will generally suffice to establish that this threshold is met.(16)

Once the expert testifies on oath to this effect, the burden is on the party opposing admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unwilling or unable to comply with that duty. If the opponent does so, the burden of establishing this aspect of the admissibility threshold on a balance of probabilities remains with the party proposing to call the evidence. If this is not done, the evidence – or those parts of it that are tainted by a lack of independence or by impartiality – should be excluded.

The court held that this threshold requirement is not particularly onerous and that it will likely be quite rare that a proposed expert's evidence is ruled inadmissible for failing to meet it. The trial judge must determine, with regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is willing and able to carry out his or her primary duty to the court. The nature and extent of the interest or connection with the litigation or a party thereto are significant – not the mere fact of the interest or connection. The court further stated that the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. For example, a mere employment relationship with the party calling the evidence is insufficient.

The court went on to provide some examples of types of interest and relationship that may warrant exclusion of the expert's evidence, including where the proposed expert:

- has a direct financial interest in the outcome of the litigation (described as being of "some concern");
- has a close familial relationship with one of the parties;
- will probably incur professional liability if his or her opinion is not accepted by the court; or
- in his or her proposed evidence or otherwise, assumes the role of an advocate for a party.(17)

The decision as to whether an expert should be permitted to give evidence despite having an interest in or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether an expert witness will be unwilling or unable to fulfil his or her primary duty to the court. When looking at an expert's interest or relationship with a party, the question is whether the relationship or interest results in the expert being unwilling or unable to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

The court emphasised that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unwilling or unable to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or an inability to do so should not lead to exclusion, but be taken into account in the overall weighing of the costs and benefits of receiving the evidence.

Comment

Although the Supreme Court clarified that a proposed expert witness can be excluded from testifying on the basis of a lack of independence or impartiality, it appears that the threshold to meet is quite low. Subject to the trial judge's residual discretion to include the evidence based on a cost-benefit analysis, the 'properly qualified expert' stage of the *Mohan* test will be met so long as the expert witness can show that he or she:

- is aware of the duty to the court to give fair, objective, and non-partisan opinion evidence; and
- is willing and able to carry it out.

Accordingly, where that two-part test is met, any concern that a party may have with respect to the expert's independence (or lack thereof) will be a question of weight to be given to his or her testimony by the trial judge.

Although the court provided some examples of the types of relationship that may warrant exclusion of the expert's evidence, it will be interesting to see how this will be applied in cases going forward. For example, the court noted that a direct financial interest in the outcome of the litigation will be of "some concern". One would think that any financial interest at all in the litigation would be a glaring form of partiality and oust an expert from testifying based on lack of independence. In any event, the categories provided by the court are not closed and experts and parties should pay attention to any circumstances that might appear to taint independence and impartiality.

For further information on this topic please contact Barbara Grossman or Christina Porretta at Dentons by telephone (+1 416 863 4511) or email (barbara.grossman@dentons.com or christina.porretta@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) *Mouvement Laïque Québécois v Saguenay*, 2015 SCC 16.

(2) *White Burgess Langille Inman v Abbott,* 2015 SCC 23.

(3) *R v Mohan*, [1994] 2 SCR 9.

(4) *Saguenay*, *supra* note 1 at paragraph 104.

(5) *Saguenay*, *ibid*.

(6) *Saguenay*, *ibid* at paragraph 106.

(7) *Saguenay*, *ibid* at paragraph 107.

(8) *White Burgess*, *supra* note 2 at paragraphs 26 & 30.

(9) *White Burgess*, *ibid* at paragraph 32.

(10) *White Burgess*, *ibid*.

(11) *R v Abbey*, 2009 ONCA 624.

(12) *R v J-LJ* 2000 SCC 51.

(13) *R v J-LJ, ibid* at paragraph 28.

(14) *Saguenay*, supra note 1 at paragraph 106.

(15) *White Burgess*, *supra* note 2 at paragraph 24.

(16) *White Burgess*, *ibid* at paragraph 47.

(17) *White Burgess*, *ibid* at paragraph 49.

counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners