

The Independence of Expert Witnesses – Part II

February 20, 2019

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This article continues the discussion in [“The Independence of Expert Witnesses”](#), which was published on April 2, 2018.

Now that we have some case law applying *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 (“**White Burgess**”), it may be helpful to revisit what that case held on the issue of the independence of expert witnesses, and how it has been applied.

1. Key Holdings in *White Burgess*

(1) At the threshold stage, in the absence of a challenge, a simple attestation on the part of the expert recognizing the duty to be fair, objective and non-partisan will generally be sufficient. [para. 47]

(2) If the admissibility of expert evidence is challenged on the basis of an expert’s lack of independence and impartiality, the challenger must show that there is a realistic concern that the expert is unable and/or unwilling to comply with the duty to be fair, objective and non-partisan. If this is demonstrated, “the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence”. [para. 48]

(3) This threshold requirement is not particularly onerous and it will likely be quite rare that an attack at this stage will succeed: only in very clear cases. Anything less than clear unwillingness or inability to provide the court with fair, objective and non-partisan evidence should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence. [para. 49]

(4) The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. It is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection. The existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. “In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court.” [para. 49]

(5) “As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest 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 or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert’s interest or relationship with a party, the question is not whether a reasonable*

observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.” [Emphasis Added] [para. 50]

(6) Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan*, the judge must still take concerns about the expert’s independence and impartiality into account in weighing the evidence at the gatekeeping stage. “At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.” [para. 54]

2. Comment

The case law that has followed *White Burgess* focuses almost completely on the issue of independence. This case law deals with attacks on the admissibility of expert evidence which are framed as the expert showing a lack of independence.

While the Supreme Court said in *White Burgess* that the threshold test is easily met, my view is that if a lawyer intends to attack the opposing party’s expert for lack of independence, then that lawyer should start the attack at the outset (always assuming that it is a *bona fide* attack), and not wait until later. Even if the attack fails at the threshold stage, nothing will be lost if and when the attack is resumed when the witness is called, and little will be lost if the court decides that it goes to weight only and not admissibility. More importantly, the court will be put on notice that it must continue to be diligent in continuing its gatekeeper role. The Court of Appeal in *Bruff-Murphy v Gunawardena*, 2017 ONCA 502 has emphasised the trial court’s continuing obligation.

Finally, when applying the above test, it should be remembered that the Supreme Court found nothing improper with the expert called in *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16. In this case, the expert was a co-founder and member of the appellant and, at the time of the hearing, was its Vice-President. Clearly, the apprehension of bias no longer exists as a reason for disqualification of an expert.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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