The Independence of Expert Witnesses

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By

Although the proposition that an expert should be independent has always been accepted wisdom, the requirement that an expert be independent has only recently been mandated by the Court as part of the threshold test for admissibility.

The test as recently articulated by Laskin J.A. in *Abbey #2*[1] gathers in the preceding jurisprudence, and incorporates the Supreme Court of Canada's pronouncements in *White Burgess*.[2] Laskin J.A. stated: [3]

The test may be summarized as follows:

Expert evidence is admissible when:

(1) It meets the threshold requirements of admissibility, which are:

1. The evidence must be logically relevant;
2. The evidence must be necessary to assist the trier of fact;
3. The evidence must not be subject to any other exclusionary rule;
4. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfill the expert's duty to the court to provide evidence that is:
5. Impartial,
6. Independent, and

iii. Unbiased.

For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,

and

(2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

1. Legal relevance,
2. Necessity,
3. Reliability, and
4. Absence of bias.

With respect to the "threshold requirement of admissibility", the Supreme Court in *White Burgess* noted that: [4]

This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it.

What does this mean for counsel in the selection and preparation of an expert witness? While the law may still be at the relatively early stages in applying this test, prudence would suggest that nothing has changed, and that an expert witness must be chosen from those who are independent of the litigation. This, in fact, has been the law and practice for some time, with some recognized exceptions (e.g. police officers).

As a result, it may be safe to say, and the current and recent case law supports, that where a real lack of independence can be shown – something more than *de minimis* – the Court will intervene at the threshold stage. What constitutes "*de minimis*" will be left to be determined, one way or the other, during the course of the trial.

One matter, however, is now crystal clear and is a change. The mere appearance of bias is not enough to rule an expert out. In the Supreme Court's decision in *Saguenay*,[5] Gascon J., writing for the majority, held that "more than a simple appearance of bias is necessary" for expert testimony to be inadmissible, and that inadmissibility does not contemplate "whether a reasonable person would consider that the expert is not independent".[6]

Instead, the assessment must be fact-driven and will consider whether the "expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstance of the case".[7] In *Saguenay*, the expert was a co-founder and member of the moving party in the litigation and, at the time of trial, was the moving party's vice-president, but none of this precluded the Court from finding him independent and able to give opinion evidence.

The Supreme Court in *White Burgess* explained that: [8]

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. For example, 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 no 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.

Despite what appears to be a "watering down" of the principle of independence of an expert at the admissibility stage, it is important to remember that even though the evidence of an expert is ruled to be admissible, the issue of the independence of the expert witness is relevant and can be considered at later stages in the evidentiary process. If expert evidence meets the threshold requirements for admissibility, the trial judge maintains a gatekeeper function regarding the admission of the evidence. As explained by the Supreme Court in *White Burgess*:[9]

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.

If expert evidence is ultimately admitted, an expert's lack of independence and impartiality can also be considered in relation to the weight to be given to the evidence.

[1] *R v Abbey*, 2017 ONCA 640 [***Abbey #2***].

[2] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [***White Burgess***].

[3] *Abbey # 2*, *supra* note 1, at para. 48.

[4] *White Burgess, supra* note 2 at para. 49.

[5] *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 [***Saguenay***].

[6] *Saguenay*, *ibid* at para. 106.

[7] *Saguenay*, *ibid*.

[8] *White Burgess*, *supra* note 2, at para. 49.

[9] *White Burgess. ibid*. at para. 54. See also *Abbey # 2, supra* note 1, at para. 49.

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