FTR Now

SCC Clarifies Test for Qualifying as an Expert Witness

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Expert evidence has been a hot topic in Canadian law recently. Following this trend, in White Burgess Langille Inman v. Abbott and Haliburton Co., the Supreme Court of Canada considered the duty owed by an expert witness to the court to be independent, impartial and unbiased. The Court clarified that where an expert is "unable" or "unwilling" to fulfill this duty, that expert is not qualified to give expert evidence: "[t]he acid test is whether the expert's opinion would not change regardless of which party retained him or her […]." In cases where there is only the appearance of a lack of independence and impartiality, these concerns will properly affect the weight given to the evidence but not its admissibility. In this *FTR Now*, we discuss this important decision and its implications.

BACKGROUND

This issue in this case arose out of an action for professional negligence brought by the respondent shareholders against the appellants, who were former auditors for the shareholders' company. The shareholders retained Grant Thornton LLP to perform various accounting tasks, which revealed problems with the appellant auditors' work. The action alleged that the appellant auditors failed to apply generally accepted auditing and accounting standards which resulted in financial loss to the shareholders.

The auditors brought a motion for summary judgment. The shareholders then retained an expert witness, a forensic accounting officer from Grant Thornton, to prepare a report. The accounting officer was not from the same Grant Thornton office that had initially uncovered the alleged negligence. She submitted an affidavit stating her opinion that the auditors failed to comply with their professional obligations to the shareholders.

The auditors sought to strike the affidavit on the grounds that the officer was not an impartial expert witness. They argued that the officer had a personal financial interest in the outcome of the litigation because if the action was unsuccessful the officer's firm (and the officer personally as a partner) could be exposed to liability. The Nova Scotia Supreme Court agreed and found that this was a clear case in which the reliability of the proposed expert did not meet the threshold requirements of admissibility.

This finding was overturned by a split decision of the Nova Scotia Court of Appeal. Specifically, the majority of the Court of Appeal found that the test applied by the trial judge, that an expert "must be, and be seen to be, independent and impartial", was wrong at law.

SUPREME COURT CLARIFIES THE TEST FOR ADMISSIBILITY OF EXPERT EVIDENCE

The Supreme Court established the test for the admissibility of expert evidence in *R. v. Mohan*, which set out the following threshold requirements for expert evidence to be admissible:

i. relevance;
ii. necessity to assist the trier of fact;
iii. absence of an exclusionary rule; and
iv. provided by a properly qualified expert.

Even when these four requirements are satisfied, courts still have discretion to refuse to admit expert evidence where the probative value of the proposed evidence is outweighed by its prejudicial effect. There are two distinct steps in this analysis. Courts must first determine whether these four prerequisites are satisfied and then they must weigh the probative value against the prejudicial effect.

The central questions addressed by the Supreme Court in this decision were:

i. Should a court consider an expert's ability to fulfill his or her duty to the court to be independent, impartial and unbiased when determining whether to admit his or her evidence, and if so, at what stage of the admissibility analysis is this properly considered?
ii. If it should be considered, what is the threshold of independence, impartiality and lack of bias that must be satisfied?

Importantly, the Supreme Court's decision clarified that lack of impartiality and independence of a proposed expert may affect not only the weight to be given to the expert's evidence, but also whether that evidence is admissible.

The Supreme Court found that the issue in this case related to the threshold requirement of whether an expert is "qualified" (*Mohan*) and the need for a court to consider whether the proposed expert is unable or unwilling to fulfill his or her duty to the court. If the expert is either unwilling or unable to do so, the expert is not properly qualified and the evidence should not be admitted.

In addition to considering independence and impartiality at this stage of the *Mohan* analysis, a court may also take these factors into account when weighing the probative value and prejudicial effect of such evidence after the *Mohan* requirements are satisfied.

The Supreme Court cautioned, however, that the bar for establishing that an expert is willing and able to fulfill his or duty is very low. Expert evidence must be fair, objective and non-partisan and fulfilling this duty requires impartiality, independence and the absence of bias. The ultimate question is whether the expert's opinion would not change regardless of which party retained him or her. While the Court clarified that the ability to fulfill this duty will not be presumed, the party opposing the evidence must show a realistic concern that the duty cannot be fulfilled. If a realistic concern is established, the party seeking to call the evidence then bears the onus of satisfying the threshold. The Court stated:

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. [para. 49]

The Court explicitly rejected the test of whether a reasonable person would think that an expert is independent or impartial. The mere appearance of bias is irrelevant. Instead, expert evidence should only be deemed inadmissible on this basis where the actual relationship or interests involved make the expert unable or unwilling to carry out his or her duty to the court.

On the facts of the case before it, the Court determined that the evidence of the Grant Thornton accounting officer was properly admissible.

IMPLICATIONS

The decision in *White Burgess Langille Inman* provides clarity that lack of independence and impartiality affects not only the weight that should be given to expert evidence but in some circumstances can result in the evidence being inadmissible entirely. The mere existence of some relationship, including an employment relationship, or common interest between a proposed expert and a party is not sufficient to preclude the admission of his or her evidence, though it may continue to be properly considered with respect to the weight given to such evidence.

As a result of this decision, however, there will be some circumstances where a proposed expert's evidence may be found inadmissible because the expert is considered unable to discharge his or her duty to the court. Examples put forward by the

Court include:

- direct financial interest in the outcome of the litigation;
- close familial relationship to a party;
- situations in which the proposed expert is likely to incur professional liability if his or her evidence is not accepted by the court; and
- where an expert, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party. [at para. 49]

Such cases are likely to be rare. However, if you find yourself in this situation, you will want to think carefully about your litigation strategy. Also, if you are thinking of retaining an expert, you will want to ensure that your expert does not fall into any of these categories. We would be pleased to help advise you.

Should you have any questions about this decision, please contact Frank Cesario at 416.864.7355 or your regular Hicks Morley lawyer.
