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As Director of Legal Research at Torkin Manes, Marco provides legal opinions and analyses on a range of topics in the civil litigation and corporate/commercial context. He has drafted legal memoranda, facta and materials for all levels of court, with a particular emphasis on appellate cases.

## The Unbiased Expert: Challenging the Admissibility of Expert Evidence in *WBLI v. Abbott and Haliburton*

In yet another important decision this year affecting the preparation and use of expert evidence in litigation, the Supreme Court of Canada has established an analytical framework for determining the admissibility of expert evidence on the basis of the expert's alleged bias and lack of independence. The case of *WBLI v. Abbott and Haliburton*, 2015 SCC 23, per Cromwell J., establishes a two-part analysis for determining whether expert evidence ought to be admissible. The Court's analysis is based on the expert's principal duty to provide an objective and fair opinion.

### The Facts

In *WBLI v. Abbott and Haliburton*, the shareholders of a corporation brought a professional negligence action against the former auditors of their company. The action arose after the shareholders retained a different accounting firm to perform certain accounting tasks (the "Auditing Firm"). In performing its duty, the Auditing Firm discovered problems with the defendant auditors' previous work. The basis for the action was that the defendant auditors failed to adhere to generally accepted accounting practices, which caused financial loss to the plaintiff shareholders.

The defendant auditors ultimately brought a motion for summary judgment to have the professional negligence action against them dismissed. In response, the shareholders retained an expert, a forensic accounting partner at another office of the Auditing Firm (the "Expert"). The Expert swore an affidavit confirming her opinion that the defendant auditors had failed to comply with their professional duties to the shareholders.

On the summary judgment motion, the defendant auditors applied to have the Expert's affidavit struck

on the basis that she was not an impartial expert witness. That is, the defendants argued that because the Expert's firm and the Expert herself could be exposed to professional liability if her expert opinion were not accepted by the Court, the expert had a "personal financial interest" in the outcome of the action which rendered her unable from testifying on the summary judgment motion.

Ultimately, the Supreme Court of Canada held that the Expert was *not* in a conflict of interest that prevented her from giving impartial and objective evidence. In so doing, the Court refined its test for the admissibility of expert evidence in litigation.

### The Principles

Justice Cromwell established the following principles in his decision:

#### 1. An expert's independence and impartiality goes to admissibility and not simply to weight.

The Court held that at Canadian common law, the independence and impartiality of the proposed expert speaks to the very *admissibility* of the evidence, not just to its weight. Canadian law supports the view that expert evidence should be ruled inadmissible due to the expert's lack of impartiality or independence.

#### 2. Expert witnesses must meet a "threshold" of fair, objective and non-partisan opinion evidence.

Expert witnesses have a duty to the Court to give fair, objective and non-partisan opinion evidence. In

the leading decision regarding the admissibility of expert evidence, *R. v. Mohan*, [1994] 2 S.C.R. 9 ("*Mohan*"), the Supreme Court of Canada established the "threshold requirements" that must be established in order for the opinion evidence to be admissible, namely:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) absence of an exclusionary rule; and
- (d) a properly qualified expert.

In *WBLI*, Justice Cromwell affirmed that evidence that did not meet these threshold requirements ought to be excluded. Most important, the Court held that the expert's duty to the Court to provide impartial evidence is to be assessed in part (d) of the *Mohan* analysis above, namely the "properly qualified expert" element of the test. Justice Cromwell states:

A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" [stage of the *Mohan* test] ensures that the courts will focus expressly on the important risks associated with biased experts.

#### 3. The Threshold Test for Admissibility Flows from the Expert's Duty to the Court.

The Court further held that the threshold test for admissibility flows from the duty of the expert

to provide fair, objective and non-partisan evidence to the Court.

Accordingly, once the expert testifies on oath and recognizes his or her duty to the Court, the burden is on the party opposing the 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 unable and / or unwilling to comply with that duty". If the opponent of the evidence does so, the burden to establish on a balance of probabilities that this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence and any part of it that is impartial or lacks independence, ought to be excluded.

In adopting this approach, the Court noted that this threshold requirement was not particularly onerous and it would be "quite rare" that a proposed expert's evidence would be ruled inadmissible on this basis. For example, if the expert had a mere employment relationship with the party calling the evidence, this did not necessarily give rise to admissibility concerns. However, where the expert has a direct financial interest in the outcome of the action, where the expert has a "close familial relationship" with one of the parties, where the expert could incur professional liability if his or her opinion is not accepted by the Court, and where the expert assumes the role of advocate for a party and is clearly unwilling to carry

out her primary duty to the Court, the Court may have concerns about the admissibility of such expert testimony.

**4. The Court must engage in an additional “gatekeeping” role after the threshold inquiry has been met.** The Court further held that a mere finding that the expert evidence meets the basic threshold set out above does not end the inquiry. Once the threshold is met, concerns about an expert witness’ independence or impartiality should be considered as “part of the overall weighing of the costs and benefits of admitting the evidence”. At this stage in the analysis, 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”. The judge must be satisfied that the helpfulness of the expert evidence is not outweighed

by any dangers associated with expert evidence.

#### **Application to the Facts**

Based on the analysis above, the Court in *WBLI* ultimately held that the evidence of the Expert in this case was admissible on the defendant’s motion for summary judgment.

First, the Expert specifically recognized that she was aware of the standard and requirements of the Court that an expert be independent.

Second, the Expert was not in an irreconcilable conflict of interest as the defendant auditors alleged. There was no suggestion in the evidence here that the expert’s firm, i.e. the Auditing Firm, was hired to take a position dictated to it by the plaintiff shareholders; moreover, the possibility of the Auditing Firm being liable to the shareholders if its opinion was not ultimately accepted by the Court was nothing more than a “speculative possibility” in the Court’s view. There was no finding

that the Expert was biased or that she was advocating on behalf of the shareholders.

Third, the Expert did not lack impartiality because she had incorporated into her opinion some of the work done by the Auditing Firm when it was initially retained by the shareholders. There is nothing objectionable about an expert relying on the work of other professionals to reach her opinion.

Accordingly, in this case, Justice Cromwell held that there was nothing to suggest that the Expert was unwilling to provide the Court with fair, objective, non-partisan evidence.

The decision in *WBLI* adds two important aspects to the law of expert evidence. First, an expert’s neutrality affects the admissibility of her evidence, not just the weight the Court should give to it. Second, the circumstances will be rare where an expert is disqualified for an alleged bias or lack of impartiality.

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