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10th Annual WCCAS Energy, Mining and Resources Arbitration Conference

Expert Testimony & Proving Damages in Arbitration

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Communicating with Expert Witnesses in the Preparation of their Reports

- How it was regarded in previous years
- Ontario Court of Appeal decision in *Moore v. Getahun*, 2015 ONCA, 55
 - Consultation between Counsel and Expert is proper
 - Litigation privilege protects draft reports from production
- Chartered Business Valuator (CBV) views – an intervenor in the ONCA process
- Experts increasing their precautions

Communicating with Expert Witnesses in the Preparation of their Reports (Cont'd)

- Damages experts are somewhat unique: much of what they do is *not* based on facts, but rather on assumptions as to what *should* have happened in the past and, what *would* have happened in the future
- The Court endorsed The Advocates' Society's *Principle Governing Communications with Expert Witnesses* (“a thorough and thoughtful statement of the professional standards”)

Impartiality and Bias

- Impartiality and Bias
- Previous uncertainty
- Supreme Court of Canada decision in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23
- Impact remains to be seen – the ideal v. the practical
- Counsel and the expert *can* safeguard against the possibility of bias creeping into the expert's opinion

Impartiality and Bias (Cont'd)

- Duty to the Court
- Threshold Requirements for Admissibility, *R. v. Hohan*, [1994] 2 S.C.R. 9:
 - Relevance
 - Necessity in assisting the trier of fact
 - Absence of an exclusionary rule
 - A properly qualified expert

Impartiality and Bias (Cont'd)

- Admissibility or only Weight?

Mouvement Laïque Quebecois v. Saguenay (City), 2015 SCC 16 at para. 106:

“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....”

Impartiality and Bias (Cont'd)

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...." [citations omitted].

Impartiality and Bias (Cont'd)

- Examples of Lack of Independence:

Proposed expert was the defendant's lawyer in related matters and had investigated from the outset of his retainer the matter of a potential negligence claim against the plaintiff; expert was the party's lawyer in related U.S. proceedings; expert was the defence counsel's father; expert was also a party to the litigation; expert was effectively a "co-venturer" in the case due in part to the fact that 40% of his remuneration was contingent upon success at trial; expert stood to incur liability depending on the result at trial; and expert's stance or behaviour as an advocate had justified exclusion.

Impartiality and Bias (Cont'd)

Unless the expert is disqualified, lack of independence or a “simple appearance of bias” will go to the weight the court or tribunal is to give to that evidence.

Impartiality and Bias (Cont'd)

- Improperly Offering Expert

Bailey v. Barbour, 2013 ONSC 7397

- Conduct leading to finding of bias:
 - attending in court for 9.5 days of a 10 day trial;
 - having 50-100 email exchanges with counsel for Barbour during the trial;
 - passing handwritten notes to counsel during the trial;
 - sitting at the counsel table throughout the trial;

Impartiality and Bias (Cont'd)

- Suggesting questions to be put by counsel to witnesses, including lay witnesses
- Suggesting exhibits to be relied upon during questioning
- Assisting counsel in locating documents during trial
- Making disparaging comments about another expert witness

Impartiality and Bias (Cont'd)

- Providing “opinion evidence” outside his area of expertise
- Having two experts (one who is a litigation advisor, and one who is an independent expert) can help safeguard around such issues
- Range of practice
- In *Moore v. Getuhan*, the concerned expressed concern over the hiring of “shadow witnesses”

Impartiality and Bias (Cont'd)

- Sanctions imposed on Counsel:

“In these circumstances, this is a case where there is no benefit of any doubt that can be given to the lawyer. The evidence is plain and obvious that Mr. Streisfield breached his obligation to the Court in using Mr. Stewart, and in doing so he acted in bad faith and was directly responsible for wasting costs. A costs order against him personally is warranted.”

Impartiality and Bias (Cont'd)

- Sanctions by Tribunal
- Sanctions by Law Society or Court

The Expert's Scope

- Scope, directed assumptions, instructions letter
- Narrowed scope in settlement phase can backfire in hearing or decision phase
- Experts prefer flexibility (e.g., ability to ask for documents; ability to question opposing expert)
- Loss table or “matrix” a valuable tool for ‘modelling’ the calculations to reflect the relevant range of possibilities