McWilliams'

Canadian Criminal Evidence

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(Chapters 1 to 16)

General Editors
The Honourable Mr. Justice S. Casey Hill
David M. Tanovich, Associate Professor, Faculty of Law, University of Windsor
Louis P. Strezos, Barrister

Contributing Authors
Benjamin L. Berger, Associate Professor, Faculty of Law, University of Victoria
Nikos Harris, Lecturer, Faculty of Law, University of British Columbia
Scott C. Hutchison, Stockwoods LLP
Ronalda Murphy, Associate Professor, Faculty of Law, Dalhousie University
J. Leigh West, Professor, Faculty of Law, University of Windsor

Canada Law Book
A Division of The Cartwright Group Ltd.
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www.canadalawbook.ca

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> The most interesting effort at using *Mohan* to deal with bias comes from the authors of *McWilliams*. They argue the *Mohan*'s "expert qualification" requirement focuses not only on competence, but also on "fitness to testify as an expert," and they conclude that a fit expert witness is one who is impartial, independent and lacks bias. The suggestion is inviting; from the duty of impartiality and objectivity owed by a witness to the court, it seems to follow that a witness who is partial or biased is not performing the role assigned to him or her as an expert, and should arguably not be admitted as such.[390c]
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> An approach that would be more effective in ferreting out real bias would be to take up the invitation of the authors of *McWilliams* and make bias an overt component of the "expert qualification" inquiry. Once the law resolutely recognizes that expert witnesses are duty-bound to be independent and impartial, the expert evidence of proposed witnesses who cannot fulfill that duty should not be received.[390d]
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> The authors of *McWilliams* proclaim boldly that "[t]he proffered expert is presumptively impartial and bias-free . . ." Michelle and Mandhane make the same assertion. With that presumption in place, there would be no need to address independence and impartiality as conditions for admissibility unless the party opposing the admission of the evidence provided a realistic foundation for bias or partiality. This is how I understand the law to function where a party wishes to challenge the reliability of non-novel scientific theories and techniques, and it parallels the threshold standard used to inquire into the partiality of jurors in challenge for cause cases. This, then, should be the standard for embarking on an inquiry into partiality.[390e]
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> Experts should be presumed to be independent and impartial, and a two-stage standard should be applied, specifically:
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> - The admissibility *voir dire* need not concern questions of independence and partiality unless the party opposing admissibility shows there to be a realistic potential that the witness is biased; and
> - Even where a realistic potential for bias has been demonstrated, the testimony of expert witnesses should be admitted unless it is probable that the expert will be unable to present the expert testimony independently and impartially.[390f]

The importance of impartial expert opinion testimony cannot be overemphasized. The expert's evidence is permitted in the limited circumstances of a necessary exception to an exclusionary rule. Partial or biased evidence amounts to an abuse of the exceptional indulgence or opportunity to provide opinion testimony. This is so having especial regard to the limited effectiveness of cross-examination of an expert witness and, as discussed below, the contours of the hearsay exception relating to an expert's reliance in formulating an opinion on facts, data or material not otherwise proven by admissible evidence at trial.

Historically, the court called an expert witness to give evidence not as a witness for one side or the other and neutrality was assumed.[391] With entrenchment of the adversary system, the professional witness emerged called by one party or the other and "frequently" the courts have seen an unfortunate move away from the impartiality generally associated with professionals to the posture of an advocate.[392]

[390c] *Ibid.*, at pp. 593-4 (footnotes omitted).

[390d] *Ibid.*, at pp. 595-6.

[390e] *Ibid.*, at pp. 597-8 (footnotes omitted).

[390f] *Ibid.*, at pp. 571, 598-9. The party seeking to rebut the assumption of impartiality is obliged to provide "a realistic foundation for the claim that the evidence may be biased" (p. 609).

[391] *R. v. D. (D.)* (2000), 148 C.C.C. (3d) 41 (S.C.C.), at p. 62.

[392] *Supra*, at pp. 60 and 62; Law Reform Commission of Canada, *Report on Evidence* (1975), at p. 73; D.

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> We desire to emphaise the duties of an expert witness in a criminal trial, whether instructed by the prosecution or defence, and those set out in *Harris*. We emphasise that these duties are owed to the court and override any obligation to the person from whom the expert has received instructions or by whom the expert is paid. It is hardly necessary to say that experts should maintain professional objectivity and impartiality at all times.
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> Failure to adhere to these guidelines can cause considerable difficulties and some delay in the conduct of the proceedings.[427h]

The United States too has its share of problems with experts' concealed partiality and those openly testifying as advocates. It has been observed that independence of the expert contributes to objective proof that research comports with dictates of good science.[428] In a 2000 Federal Judicial Centre study, *Expert Testimony in Federal Civil Trials*, the authors report that the most frequent problem cited by judges was experts who "abandon objectivity and become advocates for the side that hired them".[429] This judicial concern as to rampant partisanship in expert witnesses is shared by Australian judges according to a 1999 survey.[430]

Uncovering bias and impartiality is notoriously difficult. Apart from resort to exploration of departures from relevant codes of conduct or professional standards, matters which warrant attention as potentially indicative of expert witness partiality and advocacy include the following:

(1) the nature of the stated expertise or special knowledge;
(2) statements publicly or in publications regarding the prosecution itself or evidencing philosophical hostility toward particular subjects;
(3) a history of retainer exclusively or nearly so by the prosecution or the defence;[430a]
(4) long association with one lawyer or party;
(5) personal involvement or association with a party;
(6) whether a significant percentage of the expert's income is derived from court appearances;
(7) the size of the fee for work performed or a fee contingent on the result in the case;[430b]

427h *R. v. Bowman*, [2006] EWCA Crim 417 (C.C.A.), at paras. 176 and 178.

428 *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 43 F.3d 1311 (9th Cir. 1995), at pp. 1317-19. The Australian Law Reform Commission Report, *Experts* (Adversarial Background Paper 6), January 1999, at p. 30, and footnote 131, notes an extensive American study undertaken in 1994 established the qualities American lawyers most often looked for in potential expert witnesses were their credentials and the adamancy of their support for the lawyer's viewpoint (88% and 84% respectively).

429 M.T. Johnson, C. Krafka, J.S. Cecil, "Expert Testimony in Federal Civil Trials — A Preliminary Analysis" (2000), Federal Judicial Centre, at pp. 5-6.

430 I. Freckelton and J. Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Sydney: Thomson Legal and Regulatory Ltd., 2002), at p. 718.

430a *Frazer v. Haukioja* (2008), 58 C.C.L.T. (3d) 259 (Ont. S.C.J.), at para. 145 (80% of expert's legal work done for the defendants for significant income); *Inquiry into Pediatric Forensic Pathology in Ontario* (Queen's Printer for Ontario: 2008) (The Honourable Stephen T. Goudge, Commissioner), vol. 3, at p. 491 ("Does the expert work invariably for the prosecution (or defence)?"); *Metropolitan Toronto (Municipality) v. Loblaw Groceterias Co.*, [1972] S.C.R. 600, at pp. 608-9 (witness had "a long and close association" with one party and, on a previous occasion, gave expert testimony on its behalf).

(8) lack of a report, a grossly incomplete report, modification or withdrawal of a report without reasonable explanation, a report replete with advocacy and argument;[430c]

(9) performance in other cases indicating lack of objectivity and impartiality including a history of successful attacks on the witness's evidence;[430d]

(10) beyond any retainer fee, whether the expert can be said to hold any economic interest relevant to the subject matter of his or her testimony;[430e]

(11) unexplained differing opinions on near identical subject matter in various court appearances or reports;

(12) departure from, as opposed to adherence to, any governing ethical guidelines, codes or protocols respecting the expert witness's field of expertise;

430b "That an expert is paid for services rendered in a case is not, of itself, a concern . . ." (*Frazer v. Hankioja, supra*, footnote 430a, at para. 146); D.M. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 Queen's L.J. 565, at p. 573 and fn 23:

> When the manner of payment ties the interests of the expert to the outcome of the litigation . . . independence may be called into question. (See *e.g. Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (Sup. Ct. J.) (QL) [*Bank of Monreal]; Northwest Mettech Corp. v. Metcon Services Ltd.* (1997), 74 C.P.R. (3d) 464 (B.C.C.A.) [*Mettech*]; *Lee v. Swan* (1996), 19 B.C.L.R. (3d) 21 (C.A.) [*Lee*]; *Mackie v. Wolfe* (1994), 153 A.R. 81 (Q.B.). But see Michell & Mandhane, *ibid.* at 655, n. 140, which point out that in England the Judicial Committee on the Academy of Experts issued guidelines proclaiming that "any form of contingency fee arrangement for Expert Witnesses is incompatible with the Experts' duty of independence and impartiality." Where the amount of the expert's fee becomes unreasonably high, common sense suggests that an expert would be more apt to mould their testimony to the needs of the party calling them. Given this, the amount paid should be of interest. See also Dr. Theodore Dalrymple, "Expert Witnesses Are Not What They Seem - - And I Should Know" (2003) 27 Advocates' Q. 1.).

430c *Frazer v. Haukioja, supra*, footnote 430a, at paras. 142-3 (expert agreed to provide a formal opinion to counsel only after discussing his views orally; expert held hours of telephone conversations and a meeting with counsel before preparing report); *R. v. Michael David A*, [2006] EWCA Crim 90, at para. 21 (expert failing to make himself available to provide a report for the court); *Whitehouse v. Jordan*, [1980] 1 All E.R. 650 at p. 655 (C.A.), affd [1981] 1 All E.R. 267 (H.L.) (change of opinion by expert after long conferences with counsel and relevant omissions from original report).

430d *Inquiry into Pediatric Forensic Pathology in Ontario, ibid.*, footnote 430a, at p. 491 ("Has the expert made serious mistakes in other investigations or prosecutions? Has the expert been subjected to adverse judicial comment?"); D.M. Paciocco, *ibid.*, footnote 430b, at p. 603 (footnoting *R. v. Ghorvei* (1999), 138 C.C.C. (3d) 340 (Ont. C.A.) and *R. v. Karaibrahimovic* (2002), 164 C.C.C. (3d) 431 (Alta. C.A.)), with the author stating:

> More controversially, demonstrating that the expert has made "serious mistakes in other investigations or prosecutions," or has "been subjected to adverse judicial comment," may help to show that he or she is not suitably open-minded. However, it may be difficult, if not impossible, to use this information; raising the performance of the expert in other cases poses serious admissibility challenges.

I. Freckelton and J. Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Sydney: Thomson Legal and Regulatory Ltd., 2002), at p. 718 (party may prove "successful attacks upon this witness's past evidence"). While the usual rule of avoiding delay, detours into collateral inquiries, and questionable interpretations as to whether a witness' evidence was rejected in another proceeding and the reason(s) therefor, some scope should exist for partiality impeachment in this area given that the expert who testifies to opinions is a special witness providing testimony governed by an exclusionary rule.

430e *Inquiry into Pediatric Forensic Pathology in Ontario, ibid.*, footnote 430a, at p. 492 ("Does the expert have a financial interest in the evidence or technique? This question extends beyond employment to issues of intellectual property, proprietary interests, managerial roles, and shareholding. *Conflicts of interest* should be disclosed so they can be factored into assessments of admissibility and weight." (emphasis of original)).

(13) dogmatism, unreasonable inflexibility, and resistance to legitimate alternative hypotheses and options;[430f]

(14) other circumstances relating to the party's selection of the particular expert;[430g]

(15) inaccessibility prior to trial to the opposing party, follow through on instructions designed to achieve a desired result, shoddy experimental work, persistent failure to recognize other explanations or a range of opinion, lack of disclosure respecting the basis for the opinion or procedures undertaken, operating beyond the field of stated expertise, unstated assumptions, work or searches not performed reasonably related to the issue at hand, unsubstantiated opinions, improperly unqualified statements, unclear or no demarcation between fact and opinion, unauthorized breach of the spirit of a witness exclusion order;[431] and

(16) expressed conclusions or opinions which do not remotely relate to the available factual foundation or prevailing special knowledge.

[430f] *Reference re: Truscott* (2007), 225 C.C.C. (3d) 321 (Ont. C.A.), at para. 313 (expert "was dogmatic and reluctant to admit obvious errors"); *Inquiry into Pediatric Forensic Pathology in Ontario, ibid.*, footnote 430a, at p. 492 ("How confident is the expert? Does the expert express high levels of confidence or quantify certitude in the absence of validation and accuracy studies? Is this quality a feature of the expert's regular practice? Is the expert willing to make concessions?"), at p. 493 ("Purported precision or certainty beyond that permitted by the empirical evidence may be a telltale sign of unreliability"; caution where there exists "failure to consider and provide reasoned rejection of alternative conclusions"); D.M. Paciocco, *ibid.*, footnote 430b, at p. 608 ("dogmatism is an important indicator of bias or partiality"); *Eastern Power Ltd. v. Ontario Electricity Financial Corp.*, [2008] O.J. No. 3722 (QL) (S.C.J.), at para. 306 (expert testifying as an advocate, "far too influenced by the exigencies of litigation", and reluctant to "concede a point on which he was obviously in error").

[430g] Does the expert possess only weak expertise in the field? Has there been "cherry-picking" of expert witnesses by the parties (A. Roberts, "Rejecting General Acceptance, Confounding the Gatekeeper: the Law Commission and Expert Evidence", [2009] Crim. L. R. 51, at p. 58); D.M. Paciocco, *ibid*, footnote 430b, at p. 600 (has expert been chosen from far afield while others were more readily available?).

[431] *Reference Re Truscott, supra*, footnote 430f, at para. 313 (expert "tended to overstate the effect of his opinion"; "critical elements of his opinion were based on nothing more than his purported experience, which could not be verified and was not supported by any empirical work); *Frazer v. Haukioja, supra*, footnote 430a, at para. 143 (non-disclosure by expert of transcripts he had read), at para. 154:

> Cherry picking facts that support a diagnosis that just happens to support the cause of the client that retained the expert and failing to include the facts that hurt the cause, whether those latter facts are capable of explanation and elimination in the course of the development of the expert's analysis and opinion or not smacks of partiality.

and at para. 163 (expert obliged to accurately state professional limitations and "to decline to speak to matters beyond them"); *Inquiry into Pediatric Forensic Pathology in Ontario, ibid.*, footnote 430a (failure to acknowledge a proffered opinion is located in an area of controversy within the science can relate to threshold reliability (p. 493); "full disclosure of the limits and controversies of the science" is important (p. 495); necessity to inform the parties of a change of mind on a material issue (p. 504)); *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales, A New Approach to the Determination of Evidentiary Reliability* (London: The Law Commission, 2009), Consultation Paper No. 190, at para. 6.54 (a "duty to provide details of research findings which undermine the validity of his or her hypothesis or reasoning"); D.M. Paciocco, *ibid.*, footnote 430b, at p. 600 (expert improperly "stretching . . . credentials").