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PROCESS FOR CHOOSING AND VETTING AN EXPERT WITNESS IN PATENT CASES*

*Gunars A. Gaikis, Andrew E. Mandlsohn, and Shirley Liang***

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1.0 INTRODUCTION

Expert witnesses are persons who "testify in regard to some professional or technical matter arising in the case, and who are permitted to give their opinions as to such matter on account of their special training, skill, or familiarity with it."[1] An expert witness is typically put forward in litigation involving complex or technical subject matter to provide relevant and necessary information and opinions within the expert's area of expertise to assist the court on such matters.

The court has recognized that opinion evidence given by expert witnesses is admissible because, so far as matters calling for special knowledge or skill are concerned, judges are not necessarily equipped to draw true inferences from facts stated by witnesses. At common law, a two-step test is applied to determine the admissibility of expert evidence. First, four criteria must be met: (1) relevance, (2) necessity, (3) the absence of any exclusionary rule, and (4) a properly qualified expert.[2] These criteria must be satisfied throughout the expert witness's testimony and any evidence given outside these boundaries is inadmissible.[3] Second, the potential helpfulness of the evidence must not be outweighed by dangers that may materialize in association with expert evidence. Specifically, the judge must take concerns

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[1] *Black's Law Dictionary*, 2nd ed, *sub verbo* "experts," online: <http://thelawdictionary.org/letter/e/page/86>.

[2] *R v Mohan*, [1994] 2 SCR 9.

[3] *R v Sekhon*, 2014 SCC 15.

about the expert's independence and impartiality into account in weighing the evidence at this gatekeeping stage.[4]

To assist in maintaining the independence of an expert and to avoid any appearance of impropriety, expert witnesses are typically retained by the law firm, *not* by the client. An expert may also be independently appointed by a judge.[5] Further, the court may order expert witnesses to confer with one another in advance of a hearing in order to narrow the issues and identify the points on which their views differ.[6] This has been referred to as "hot-tubbing" (although applied voluntarily by agreement of the parties and for the first time in the Federal Court by Justice Hughes in *Apotex v AstraZeneca*).[7] The court also has the ability to order expert witnesses to testify as a panel.[8]

The role of an expert witness is to assist the court, *not* to advocate on behalf of a party. The "special duty" that expert witnesses have to the court to provide "fair, objective and non-partisan assistance" was recently reiterated by the Supreme Court in *White Burgess Langille Inman v Abbott and Haliburton Co*. The Supreme Court clarified that underlying this special duty are the concepts of impartiality, independence, and absence of bias. However, while "[t]he acid test is whether the expert's opinion would not change regardless of which party retained him or her," the realities of adversarial litigation cannot be ignored. While experts are "generally retained, instructed and paid by one of the adversaries," the Supreme Court held that "these facts alone do not undermine the expert's independence, impartiality and freedom from bias."[9] This is further made clear in the Federal Courts, for example, by the implementation of the *Code of Conduct for Expert Witnesses*, which states that expert witnesses owe a general duty to the court and requires them to abide by, among other things, the following:[10]

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[4] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at paras 23-24, 54.

[5] See e.g. *Federal Courts Rules*, SOR/98-106, s 52, and *Rules of Civil Procedure*, RRO 1990, Reg 194, s 52.03.

[6] *Federal Courts Rules*, supra note 5, s 52.6.

[7] *Apotex v AstraZeneca*, 2012 FC 559. One of this article's authors was counsel in *Apotex v AstraZeneca* and thus observed first-hand the dynamics of expert witnesses being placed opposite each other in witness boxes on each side of the court, interacting directly with the court and effectively having to comment on each other's answers. It is easy to appreciate that hot-tubbing requires a certain level of confidence and highlights other human traits that not all experts possess. It is also somewhat terrifying for counsel who are, effectively, temporarily removed from the role of guiding the expert and soliciting the desired evidence. The practice of hot-tubbing does not appear to have gained favour in Canada (it originated in Australia) and, at least in the Federal Court, the practice might be limited to the above-mentioned example.

[8] *Federal Courts Rules*, *supra* note 5, s 282.1.

[9] *White Burgess Langille Inman v Abbott and Haliburton Co*, *supra* note 4 at paras 2, 10, 32.

[10] *Federal Courts Rules*, supra note 5, Schedule (Rule 52.2), Code of Conduct for Expert Witnesses, online: Government of Canada <http://laws-lois.justice.gc.ca/eng/regulations/SOR-98-106/>.

1. An expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise.

2. This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is independent and objective. An expert is not an advocate for a party.

Similar rules have been adopted in the Ontario *Rules of Civil Procedure*.[11] The Ontario Court of Appeal recently commented on the application of this rule, and particularly the preparation of expert reports with the assistance of counsel, in *Moore v Getahun*.[12] The Court of Appeal, among other things, rejected the "trial judge's proclamation that the practice of consultation between counsel and expert witnesses to review draft reports must end."[13] The Court of Appeal concluded that "expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case" and that "[c]onsultation and collaboration between counsel and expert witnesses is essential."[14] It is also worth noting that the Court of Appeal, citing a UK case, observed that in some highly technical areas such as patent law, expert witnesses "require a high level of instruction by the lawyers," which may necessitate a "high degree of consultation" involving "an iterative process through a number of drafts."[15] This is consistent with the Supreme Court's decision in *White Burgess Langille Inman v Abbott and Haliburton Co*,[16] where the court rejected the suggestion that an expert could not give fair, objective, and non-partisan evidence "simply because the expert relies on the work of other professionals in reaching his or her own opinion."[17]

Where an expert witness fails to fulfill his or her duty to the court, the court faced with such expert evidence may choose to ignore it entirely.[18] For example, in *Teva Canada Limited v Pfizer Canada Inc*, the court preferred the evidence of the

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[11] RRO 1990, Reg 194, s 53.03, Form 53.

[12] *Moore v Getahun*, 2015 ONCA 55.

[13] *Ibid* at para 66.

[14] *Ibid* at paras 62 and 63.

[15] *Ibid* at para 55.

[16] *Supra* note 4.

[17] *Ibid* at para 61; see also The Advocates' Society, "Principles Governing Communications with Testifying Experts" (June 2014) online: <http://www.advocates.ca/assets/files/pdf/The_Advocates_Society-Principles_Governing_Communications_with_Testifying_Experts_3_sep18.pdf>, referred to by the Court of Appeal in *Moore v Getahun*, *supra* note 12, developed to address the conduct of advocates in their dealings with experts with a view to ensuring that advocates can fulfill their important duties to their clients and to courts and tribunals without compromising the independence or objectivity of testifying experts or impairing the quality of their evidence.

[18] *Federal Courts Rules*, supra note 5, s 52.2(2).

plaintiff's expert witness because the defendant's expert witness "exhibited extreme reluctance to concede any point; even the most obvious."[19] Similarly, in *Varco Canada Limited v Pason Systems Corp*, the court found that an expert witness's failure to disclose a material fact, until forced, significantly impaired his credibility and any weight to be given to his evidence. In contrast, the court found another expert's opinion evidence to be "of considerable help to the Court" because "his testimony was forthright, non-argumentative, and objective."[20] Also, in *Alfano v Piersanti*, the Ontario Court of Appeal stated as follows: "[T]he court retains a residual discretion to exclude the evidence of a proposed expert witness when the court is satisfied that the evidence is so tainted by bias or partiality as to render it of minimal or no assistance."[21] Further, where the expert witness's opinion purports to provide a legal opinion on the very issue before the court, it may be inadmissible.[22]

The Supreme Court has recently confirmed that "a proposed expert's independence and impartiality goes to admissibility and not simply to weight."[23] However, the Federal Court of Appeal clarified in *Saint Honore Cake Shop Limited v Cheung's Bakery Products Ltd* that, "whilst Rule 52.2(2) permits the exclusion of some or all of an expert's affidavit for failing to comply with the Code of Conduct, the same cannot necessarily be said for failing to comply with particular content requirements of an expert affidavit set forth by Rule 52.2(1)."[24] Specifically, the Federal Court of Appeal concluded that the trial judge had erred in finding an expert affidavit to be inadmissible because of the inadvertent absence of the certificate acknowledging that the expert witness had read the *Code of Conduct for Expert Witnesses* when his affidavit was sworn, an oversight that was cured by a later affidavit.[25]

At the very least, there is an increasing awareness and preoccupation among courts with the principle that an expert should be independent. Although an expert's independence and impartiality are never presumed, absent a challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient. However, if a realistic concern that the expert's evidence should not be received because the expert is unable or unwilling to comply with that duty is shown, the burden is on the proponent of the evidence to establish admissibility.[26]

The foregoing considerations make the process of evaluating and selecting an expert more time-consuming and challenging. Not only must experts be independent in fact, they must also *convey* independence in the form and content of their

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[19] *Teva Canada Limited v Pfizer Canada Inc*, 2014 FC 248 at paras 38-41.

[20] *Varco Canada Limited v Pason Systems Corp*, 2013 FC 750 at paras 387-394.

[21] *Alfano v Piersanti*, 2012 ONCA 297 at para 111.

[22] *Meady v Greyhound Canada Transportation Corp*, 2010 ONSC 4519; *R v J-LJ*, 2000 SCC 51.

[23] *White Burgess Langille Inman v Abbott and Haliburton Co*, *supra* note 4 at paras 34-35, 40-45.

[24] *Saint Honore Cake Shop Limited v Cheung's Bakery Products Ltd*, 2015 FCA 12 at para 24.

[25] *Ibid* at paras 26-27.

[26] *White Burgess Langille Inman v Abbott and Haliburton Co*, *supra* note 4 at paras 20, 47-48.

testimony. The Supreme Court recently clarified that the existence of some interest or a relationship with the litigation or a party does not automatically render the evidence of the proposed expert inadmissible: "[T]he question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance."[27]

Expert evidence thus plays a critical role in litigation and the use of expert witnesses has become increasingly prevalent with the rise in high-stakes pharmaceutical patent litigation.[28] Because expert evidence can literally make or break the case, it is important for counsel to spend time and effort in the early stages of litigation to properly identify, select, and prepare the expert witness in order to put the party's best case forward. The sections below provide a brief summary of a process to consider when seeking to choose and vet potential expert witnesses.

2.0 SEARCHING FOR AN EXPERT WITNESS: RESEARCH AND INVESTIGATIONAL TOOLS

The search for an expert witness is often complicated, costly, and time-consuming. The first step is for counsel to identify the particular subject area(s) of expertise in the pending or existing litigation on which evidence is or may be required. It may not always be clear, particularly in the case of contemplated litigation, what areas of expertise will be involved. In addition, litigation can often expand into new issues, and hence new subject areas for expert evidence. Counsel should therefore be alert to the possibility that areas of expertise *related* to those initially identified may also become relevant. Further, it is often not as simple as looking, for example, for a chemist or an accountant. There are numerous subspecialties within chemistry, such as medicinal chemistry, synthetic chemistry, analytical chemistry, physical chemistry, and separation chemistry. In accounting, one will also find a variety of professional designations—for example, CA, CGA, CMA,[29] and CBV—and subspecialties.

The second step is to become thoroughly familiar with the subject area(s). This can generally be accomplished by reviewing relevant literature, including leading textbooks and review articles relating to the subject matter at issue. If counsel are not familiar with the subject matter for which expert evidence is required, it will be extremely difficult, if not impossible, for counsel to critically assess whether the potential expert witness is suitable for the mandate, including whether an expert witness (1) has the appropriate academic or professional credentials, (2) has any

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[27] *Ibid* at paras 49-50, 57.

[28] Pharmaceutical patent litigation (typically in the Federal Courts) may be, based on the total dollars at stake, the most commercially important litigation in Canada by category or type. Such patent litigation involves expert scientific evidence in virtually every case.

[29] In Canada, a unification process is under way to replace these professional designations with CPA.

necessary practical experience in the correct discipline, and (3) is of an appropriate "vintage"—that is, the right expertise and experience as of the relevant date.

The third step is to search for appropriate candidates within each identified relevant area of expertise. There are a variety of resources available for identifying potential expert witnesses. Depending on the resource and budgetary restraints[30] of the case at issue, counsel should consider:

- reviewing editorial boards and authors of relevant journals;
- reviewing past judicial decisions that relate to the same subject matter;
- reviewing the US Pharmacopeia's Council of Experts or like material from similar bodies;[31]
- engaging rating agencies that provide assessments on various experts;[32]
- searching the Internet, including scientific publication sites such as PubMed, using key terms relating to the relevant subject matter; and
- seeking recommendations from other counsel, experts, and the client.

These steps may take several weeks and significant resources. In all cases, it is important to independently test every recommendation and to use your own good judgment. The performance of an expert witness will ultimately be a reflection of counsel's competence and the merits of the client's case.

3.0 CONDUCTING A BACKGROUND CHECK AND ENSURING THAT THERE ARE NO RED FLAGS OR CONFLICTS OF INTEREST

Once potential expert witnesses possessing the appropriate qualifications have been identified, counsel should conduct thorough background checks in order to identify all potentially relevant issues that may affect the expert witnesses' effectiveness and independence (including their ability to act on the case and their credibility). An initial investigation,[33] when reasonably possible, should include counsel:

- speaking to other experts in the field to determine how the potential expert witness is regarded in their field;
- speaking to other counsel who have previously retained and worked with the potential expert witness; and

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[30] There are numerous fee-based service providers who cater to searching for expert witnesses.

[31] See US Pharmacopeial Convention, online: USP <http://www.usp.org>.

[32] For example, Technical Advisory Services for Attorneys is an expert search firm that can identify experts in a variety of fields, online: TASA <http://www.tasanet.com>.

[33] Given concerns of confidentiality, preliminary investigations and discussions with experts and others regarding a potential expert's suitability to act on a matter should be kept at a high level and not delve into the particulars of the case and matters in issue.

- reviewing past judicial decisions that may speak to the credibility and evidence offered by the potential expert witness.[34]

In circumstances where the initial investigation is fruitful—that is, where no red flags are raised—counsel should delve deeper by conducting a more thorough investigation, including the following:

- Obtain and review the potential expert witness's detailed *curriculum vitae*, all past articles authored or co-authored by the potential expert witness (as well as any articles or commentaries by others commenting on the potential expert witness or his or her work), and information relating to past retainers, patents, and "side" businesses, if available. This information will help determine personal positions, if any, of a potential expert that may affect his or her credibility. For example, in pharmaceutical patent litigation, counsel should identify how many times a potential expert witness has been retained by a generic company versus an innovative company. Further, while "professional" expert witnesses—that is, those who appear frequently before the court—are often retained to act (as "safe" witnesses) because of their familiarity with the court's adversarial process, assuming all else is equal, it can be advantageous from the perspective of independence to put forward a novice or "fresh" expert witness. Another approach may be to look for a witness who has in the past been involved on both sides of an issue, which may then make that person appear more open-minded and independent.
- Scour the jurisprudence in multiple jurisdictions to determine whether the potential expert witness has made statements that could be problematic (any contrary evidence, given under oath by the potential expert witness, can be used by opposing counsel to undermine his or her credibility or the weight to be given to the witness's evidence)[35] and to assess whether the expert witness's credibility or evidence was commented on unfavourably by a court.
- Conduct a thorough background check, including for any criminal or potentially embarrassing activity, because a potential expert may not be forthcoming with such information. It is reasonable to assume that opposing counsel will thoroughly investigate any opposing expert witness and uncover any potentially useful information, particularly in high-stakes litigation. While

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[34] For example, in *Varco Canada Limited v Pason Systems Corp*, *supra* note 20 at paras 388-390, the court found previous "qualitative criticism" of an expert by three different courts to be "telling" in his failure to "maintain independence" or "to put forward evidence which could materially assist the Court."

[35] To the extent that the potential expert witness's previous testimony is publicly available, counsel should thoroughly review all affidavits and transcripts of such prior testimony. Where prior evidence is confidential or protected by court order, steps should be taken to determine whether it can be made available for review by counsel. These steps may require seeking the consent of another person or a court, or varying the terms of a confidentiality order, and before any such steps are taken counsel must consider the impact, if any, on litigation strategy.

opposing counsel may refrain from asking embarrassing questions during cross-examination for fear of the strategy backfiring and eliciting sympathy from the court, it is prudent for counsel to conduct such a search to avoid any surprises, since there is typically considerable latitude as to the scope of cross-examination on expertise, independence, and credibility. It can be surprising what information, sometimes not positive, may be uncovered by a simple Internet search. One of this article's authors had a judge in a past case indicate that she googled each expert.

4.0 INTERVIEWING A POTENTIAL EXPERT WITNESS

The initial interview of a potential expert witness may be conducted by telephone.[36] Counsel should endeavour to confirm that the expert witness (1) does not have any conflicts of interest that would prevent or interfere with his or her ability to act, independently or otherwise;[37] (2) possesses the appropriate expertise or experience necessary to fulfill the desired mandate;[38] and (3) will in fact be available to assist during the course of the litigation. Counsel should make every effort to advise the potential expert witness of the expected and potential time commitments and the anticipated litigation schedule. Experts are typically busy and may not appreciate the potential demands on their time, particularly if the litigation takes an unexpected turn—for example, with multiple reply reports. On the other hand, an expert who has ample time due to, for example, retirement may not be sufficiently engaged to be as helpful as an expert who thrives on being busy and performs better in such circumstances.

At this initial stage, it is preferable that counsel not disclose their client's interests on the issues in the case in order to get the expert witness's objective and independent view—that is, to avoid tainting the expert witness.[39] The initial comments and

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[36] Because it is often difficult to find suitable expert witnesses, counsel involved with high-stakes litigation are typically not confined to searching for potential expert witnesses in their own geographic location. Thus, to avoid what may be significant costs in the early stages of litigation, initial interviews with potential expert witnesses are generally conducted by telephone.

[37] The Supreme Court has recently noted that there are a number of cases where an expert's interest in the litigation or relationship to the parties has led to exclusion of the expert evidence: see *White Burgess Langille Inman v Abbott and Haliburton Co*, *supra* note 4 at para 37.

[38] This is extremely important because courts have held expert witnesses' evidence to be inadmissible where such evidence goes beyond the expertise of the expert: see e.g. *Levshtein v National Car Rental*, 2013 ONSC 521; *Ault v Canada (Attorney General)*, 2007 CanLII 55358 (Ont Sup Ct); see also Justice Snider's costs order in *Apotex Inc v Sanofi-Aventis et al* (T-1357-09) (10 August 2012) at para 9, where the court allowed recovery of only 75 percent of an expert witness's fees because of testimony that was "unnecessary, duplicative and beyond his area of expertise."

[39] See e.g. *Teva Canada Innovation v Apotex Inc*, 2014 FC 1070 at paras 88-97, where the court found that "the manner in which the experts were retained and instructed … provides a reason to prefer the evidence of the Apotex experts over that of the Teva experts" because the Teva experts had been made aware of the allegedly infringing substance before they conducted their construction of the claims.

views expressed by the expert witness are of paramount importance because, despite thorough preparation and what are likely to be many more discussions between counsel and the expert witness regarding the evidence, expert witnesses often tend to revert to their initial position (as expressed in the initial discussion) during the pressure of an aggressive or challenging cross-examination. As such, if a potential expert witness's initial reaction appears to be problematic for your client's case, when seeking an expert witness to testify in a case, it is prudent for counsel to proceed with a different expert witness rather than try to convince the potential expert witness of the merits of your client's case.

In addition, from the very first communication with the expert, counsel should be conscious of the possibility that every written communication and the substance of every oral communication may be the subject of a later cross-examination of that expert. Counsel should therefore always ask themselves how the communication may be interpreted or viewed by a judge when assessing the witness's independence and credibility (as well as counsel's own conduct and role in the exchange).

Before any confidential information or your client's position is shared with the potential expert, an appropriate retainer agreement should be executed in order to protect your client's information and interests, and to effectively preclude the expert from acting in an adversarial role.[40] Make sure that the expert understands the effect of the retainer agreement, and that independent counsel's advice is sought if appropriate. While experts should be appropriately compensated for their level of experience, expertise, and qualifications, an outrageously generous compensation rate could come to the attention of the court and leave a negative ("hired gun") impression.

Beyond the initial telephone interview, it is recommended that counsel[41] meet with the expert witness in person to assess his or her personal mannerisms, control, and self-discipline. These characteristics may potentially impact the expert witness's evidence in court, especially during cross-examination. However, in some cases, although an expert may not be suitable to give *viva voce* evidence—that is, live testimony—he or she may nonetheless be of assistance to counsel in paper-based proceedings (where evidence is limited to affidavits and cross-examination outside the court) or by providing expert assistance to counsel behind the scenes as an expert adviser—for example, assisting with the preparation of cross-examinations of the opposing party's expert witnesses and "proofing" the draft affidavit of an expert witness that is expected to be submitted to the court. Where an expert has been retained to provide evidence, and cost is not a material issue, the use of an additional expert as a consultant and adviser behind the scenes can be particularly advantageous to counsel because that individual need not be independent and may assist in identifying weaknesses in the case or the proposed testifying expert's draft report.

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[40] An expert who is not retained or otherwise precluded from acting for the other side could, after one or more interviews with counsel on one side, end up assisting counsel on the other side.

[41] It is preferable to have more than one litigation team member meeting with the expert to allow for different perspectives and assessments of the expert.

5.0 SELECTING AN EXPERT WITNESS

The task of selecting an expert witness is a difficult weighing process, and must necessarily include a consideration and balancing of all the information gathered by counsel during the background/conflicts check and interviews. It is unlikely that you will find the "perfect" expert. Most experts come with at least some negative characteristics or background baggage. Any expert with prior litigation experience has likely been challenged by capable counsel who have been able to extract at least some concessions or admissions that may limit the scope of the expert's future evidence. The selection process requires a careful evaluation of the pros and cons.

Specifically:

- Counsel should consider the degree to which an expert is "experienced"—that is, with plenty of courtroom experience—or "fresh." An "experienced" expert witness understands the process and may not be as easily manipulated by opposing counsel. However, such an expert may have troublesome "baggage" and may be viewed by the court as argumentative or defensive, and hence less independent. On the other end of the spectrum, proceeding with a "fresh" expert, one who has never provided evidence before, dramatically reduces the possibility that prior contrary statements under oath will be put to the expert witness during cross-examination.[42] However, it also presents a risk because it is difficult to predict how an inexperienced expert witness will react to the pressure of cross-examination and whether he or she may be emotional and difficult to control.[43] Generally, it is safer to use an experienced witness,[44] because a novice is more likely to unwittingly make a mistake fatal to your client's case.
- Counsel should also consider the extent to which the expert is invested in the outcome of the case. An expert who becomes too invested in the outcome of the case may take unreasonable positions that will ultimately undermine his or her credibility (recall that an expert witness must not act as an advocate for a party).[45] On the other hand, an expert witness who is not invested at all may

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[42] All experts will be exposed to the possibility of prior inconsistent writings, usually with respect to their many scientific publications, many of which could be co-authored. In the latter case, the potential expert, as a co-author, may not have necessarily agreed with everything contributed by other authors.

[43] Although in the majority of cases, written reasons issued by courts suggest that the judges largely ignore extraneous matters, such as whether an expert witness is experienced or not, such factors can and do sometimes influence the ultimate outcome.

[44] However, an experienced witness will likely be exposed to a longer cross-examination, which in the extreme may have a significant impact on the trial schedule and length. In pharmaceutical patent cases, it is not unheard of for an expert to be cross-examined for a couple of days on potentially inconsistent prior statements by counsel determined to impeach the witness.

[45] The Supreme Court has recently noted several cases where an expert's stance or behaviour as an advocate has justified exclusion of the expert evidence: see *White Burgess Langille Inman v Abbott and Haliburton Co*, *supra* note 4 at para 37.

not be sufficiently engaged or willing to make himself or herself available or to accommodate the exigencies of litigation.

Other important considerations are the relative extent to which the expert

- is regarded by his or her peers or professional organizations, as reflected, for example, in the awards or recognitions that the expert has accumulated;
- has published in the subject area of expertise;
- has practical experience in the subject area;
- has relevant academic credentials and professional designations;
- has an appropriate demeanour and attitude for testimony in open court;
- understands the scientific and related contexts of the litigation; and
- is sufficiently able to participate given the expected demands on the expert's time.

Where feasible and warranted on the basis of the financial stakes in play, the selection process should also include spending enough time with the potential expert to get to know him or her in various settings. This should include a social setting, such as a dinner out, which may allow the expert to relax and be less inhibited. It is also advisable that the potential expert be exposed to several members of the litigation team so that individual perceptions can be shared and discussed. It is critically important that the potential expert be aggressively challenged on views and positions relevant to the issues in the case.

A dry-run performance is one aspect of the expert witness's learning process and may also be useful to counsel as part of the selection process. The purpose of conducting a dry-run performance is to familiarize the expert with the intricacies of the courtroom environment. Thus, it is ideal to conduct the dry-run performance in a courtroom (rather than a boardroom). This will, among other things, help the expert appreciate various sightlines so that he or she knows where to look in order to be attentive to the judge and to avoid seeking approval or signals from the counsels' table. In addition, the dry-run performance should be conducted by both someone familiar to the expert and someone unfamiliar to the expert. As part of the selection process, a dry run may provide comfort to counsel that they have the right expert, or may reveal why the individual might not be suited for the role, quite apart from his or her academic and other professional qualifications.

It may be prudent, depending on the nature of the litigation, to select more than one expert in order to keep your client's options open. An expert may suddenly become unavailable due to illness, for example. It is also conceivable that, with the passage of time, the expert initially preferred by counsel may fall out of favour, in which case having an alternate expert who knows something about the case may later avoid stress and panic among the litigation team.

6.0 CONCLUSION

The considerations identified in this article serve as a potentially useful guide to assist counsel in selecting the most effective expert witnesses. Given the uncertainty of litigation, there is no guarantee that following the process described above will result in a court accepting an expert's testimony and counsel winning the case. However, it is likely to increase the probability of counsel selecting an expert witness who will be able to offer his or her opinions in an independent and objective manner that will assist the trier of fact. This, in turn, can only serve to enhance the case put forward by counsel because the court is likely to be more inclined to accept the evidence proffered by a carefully selected and vetted expert witness.