

EXPERT WITNESSES: ASSESSMENT OF CREDIBILITY

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“IT COMES DOWN TO A MATTER OF CREDIBILITY; IS A WITNESS’S ORAL TESTIMONY AND WORK PRODUCT BELIEVABLE.”

Previous columns in this publication canvassed the requirements now imposed upon appraisers appearing as expert witnesses before courts and other tribunals. It is now routine for Rules of Court to expressly state the duty of an expert witness to assist the court and to not be an advocate for any party.¹ This express imposition of a duty furthers the objective that expert witnesses provide reliable, trustworthy, untainted evidence to assist a tribunal to reach an appropriate decision.

However, the duty to assist a decision-making body and to avoid advocating on behalf of a party is only the threshold requirement. Experts retained as witnesses may fully understand their duty to the tribunal and may assiduously avoid partisanship. However, in the face of competing opinions advanced by experts, the tribunal must determine who to rely upon and whether that reliance will be in whole or in part. It comes down to a matter of credibility; is a witness’s oral testimony and work product believable.

Among the ways that credibility is assessed are 1) reputation within the expert’s field of endeavour, 2) the extent to which previous tribunals have accepted or rejected opinions of the expert, 3) the quality of work product, and 4) demeanour while testifying.

Before an expert testifies, credibility is already being gained or lost.

One’s history and the written work product prepared in advance of testifying are foundational pieces. Inexperienced expert witnesses should be made aware of what seasoned experts already know. Once the identity of an expert witness is relayed to an opposing side, that side will undertake an investigation to determine if and when the expert has testified and how tribunals receive the expert. If available, transcripts of evidence from past hearings will be reviewed for prior inconsistent statements. The expert’s reputation among his or her peers and the expert’s writings and publications will be researched. All of this activity is for the purpose of producing reasons to suggest to a tribunal that the expert’s opinion is unreliable. When retained as an expert, you should alert the party engaging your services to negative past events, writings and any other circumstances that, if discovered, could be used to undermine your credibility. Negative circumstances can often be addressed in ways to diffuse the harm that might otherwise result. On the other hand, do not be shy about positive experiences or previous writings; these can be used to bolster credibility.

An expert’s work product is an introduction to the expert. The clarity of presentation, the presence or absence of errors, whether there is irrelevant boilerplate material in a report, the relevance of supporting material in the report and in the addenda, whether

what is stated in one part of a report is consistent with other portions of the report, whether conclusions are the logical outflow of the analysis and whether the work is an advocacy piece to advance a client's case or an unbiased presentation of information to assist the tribunal all work to establish or lessen an expert's credibility. There has been much written over the recent past about the role of legal counsel in the preparation of expert reports, but at least one thing is undisputable. There is nothing wrong with having counsel review a draft of your work to ensure that the opinions you are expressing are being conveyed in a clear and logical fashion so that the tribunal can understand what you are conveying and that you are squarely addressing the matter upon which your opinion is sought.

If you are required to appear at a hearing, how will the tribunal assess your credibility? The British Columbia Supreme Court recently reminded practitioners, parties and experts how judges go about testing credibility. In *Pete Walry Construction Ltd. v. Canadian Adventure Company Holdings Ltd.*,² construction of facilities in a remote mountain location for a backcountry ski resort proceeded without a formal written contract. The court perforce resorted to weighing conflicting oral testimony and faced the challenging task of determining who among the witnesses provided the most reliable account of the events leading to the dispute.

Although this column is about a tribunal's process to assess credibility, a short diversion might be of interest. A surprising number of people are under the misapprehension that an oral contract is not enforceable. On the contrary, such an agreement is enforceable provided a party can adduce sufficient evidence to persuade a decision-maker that one's assertions are true, or at least the most probable among competing presentations of evidence.

In *Pete Walry*, the court quoted from a previous decision in which the court stated:³

[63] Oral contracts must be construed without the key interpretive tool used to understand written contracts, namely, the words of the agreement. However, the goal is the same whether the contract is oral or written: to determine, objectively, what the parties intended. Where the contract is oral, the court can consider evidence from a variety of sources: what the parties communicated to one another, any documents exchanged and the parties' conduct. In that context, credibility and the reliability of witnesses are important features of this case.

As for assessing credibility, the court in *Pete Walry* relied upon a variety of cases from various courts, including the Supreme Court of Canada. The following passage describes a process of general application whether the case centers around oral evidence or around competing expert opinion:⁴

[27] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides ... The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally ... Ultimately, the validity of the evidence depends on whether the evidence is consistent with the

probabilities affecting the case as a whole and shown to be in existence at the time ...

[28] In assessing credibility in the face of conflicting evidence, the Nova Scotia Supreme Court ... noted ...:

- [36] There are many tools for assessing credibility:
- a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.
 - b) The ability to review independent evidence that confirms or contradicts the witness' testimony.
 - c) The ability to assess whether the witness' testimony is plausible or ... it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions," but, in doing so, I am required not to rely on false or frail assumptions about human behaviour.
 - d) It is possible to rely upon the demeanour of the witness, including his or her sincerity and use of language, but it should be done with caution ...
 - e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence ...

Just so that it is clear, the courts' references to statement includes all forms of statement whether written or oral. Appraisal reports are reviewed closely by tribunals to assess whether the conclusions reached are reliable and whether the author's view of an appraisal assignment is "in harmony with the preponderance of probabilities."



A witness's testimony may be accepted in whole or in part or not at all. "There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence ..."⁵ Many appraisers know this firsthand from their experiences before tribunals.

One might think after this brief dissertation on credibility that there is little reason to agree to a retainer as an expert witness, but, in this

writer's humble opinion, expert witness engagements make for a better appraiser and adherence to the duty to assist the tribunal and to not advocate a cause will enhance an expert's credibility and reputation in the instant proceeding and in the long term.

This article is provided for the purposes of generating discussion and to make practitioners aware of certain challenges presented in the law. It is not to be taken as legal advice. Any questions relating to the matters discussed herein should be put to qualified legal and appraisal practitioners.

End notes

- ¹ See for example B.C. Supreme Court Civil Rule 11-2(1).
- ² 2017 BCSC 67.
- ³ C.J. Smith Contracting Ltd. v. Kazem-Pour, 2014 BCSC 689, at para. 63.
- ⁴ Gill Tech Framing Ltd. v. Gill, 2012 BCSC 1913, paras. 27 and 28 quoting from Bradshaw v. Stenner, 2010 BCSC 1398 at para. 186 and Re Novac Estate, 2008 NSSC 283, paras. 36 and 37, all quoted in Pete Walry at para. 28.
- ⁵ Re Novac Estate, para. 37. 