THE UNCERTAIN DUTY OF THE EXPERT WITNESS

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This article provides a discussion about policy issues currently facing Canadian courts in relying on expert testimony. Changes in the standards of admissibility, the role and responsibilities of the expert witness including the overarching duty to the court, the extent of any duty of impartiality and independence and possible internal and external controls on the use of experts are discussed. A thorough review of authorities from within and outside of Canada is provided.

En fait, cet article est une discussion sur des questions de politiques auxquels les tribunaux du Canada doivent faire face lorsqu'ils se fient à des témoignages d'experts. On y retrouve des sujets aussi variés que les modifications apportées aux normes d'admissibilité, le rôle et les responsabilités du témoin expert y compris le service obligatoire à la cour, l'étendue de toute obligation d'impartialité et d'indépendance, ainsi que des contrôles possibles, tant internes qu'externes, sur le recours à des experts. En outre, vous y trouverez un examen approfondi des ouvrages faisant autorité au Canada et à l'étranger.

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I. INTRODUCTION

The expert witness plays a unique but uncertain role in the civil litigation process. Expert evidence is marked by two key features. First, it is an exception to the general rule that a witness may not offer an opinion. Expert witnesses provide opinions, not facts. They assist the trier of fact in appreciating the significance of facts in evidence and drawing the "appropriate inferences" from them.[1] Second, unlike lay witnesses, expert witnesses are usually paid for their evidence by a party to the litigation. For both reasons, courts have regarded expert evidence with suspicion.[2] This suspicion is reinforced by the courts' recognition of the expertise of expert witnesses. The explosion of scientific knowledge over the past century has made it impossible for judges to outmatch an expert within the expert's field of specialized knowledge.[3] Indeed, by definition, an expert's evidence cannot be admitted unless it "falls outside the likely range of knowledge and experience of the trier of fact."[4] Reluctantly, judges defer to and rely on experts. The effect is "to shift responsibility from the Bench or the jury to the witness-box"[5] because the judge is unable to evaluate expert evidence in the same way as lay evidence.[6] This involuntary reliance on the expertise of expert witnesses contributes to the courts' wariness of their evidence.

Expert evidence is increasingly common and often essential.[7] Yet, faced with expert witnesses who accept payment for testimony on matters beyond the courts' knowledge and experience, the courts have struggled to control expert evidence. In *R. v. Mohan*,[8] the Supreme Court of Canada made the review of expert evidence more vigorous and its admission more difficult. *Mohan* is now routinely applied in both criminal and civil cases.[9]

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1 *R. v. Parrott*, [2001] 1 S.C.R. 178 at para. 55 [*Parrott*].

2 See *e.g. Brownlee v. Hand Firework Co. Ltd.* (1930), 65 O.L.R. 646 at 653 (C.A.) (citing with approval textbook reference to expert testimony as "usually considered to be of slight value" because experts "are proverbially, though perhaps unwittingly biased in favour of the side which calls them").

3 The widespread "scientific illiteracy" of lawyers and judges is also to blame: Janice Tibbetts, "Judges ignorant of science: Binnie" *The Ottawa Citizen* (8 March 2003) A6 (quoting speech by Binnie J. of the Supreme Court of Canada). In some civil cases, the trier of fact will be a jury rather than a judge. However, in Canada, civil jury trials are relatively rare and unlikely in complex cases where expert evidence is most prevalent.

4 *R. v. D.D.*, [2000] 2 S.C.R. 275 at para. 40 [*D.D.*].

5 *Joseph Crosfield and Sons (Limited) v. Techno-Chemical Laboratories (Limited)* (1913), 29 T.L.R. 378 at 379 (Ch. D.). The Courts' preferred approach, as noted in a recent Ontario case, is that "[t]he expert should be on tap, but not on top": *Ontario v. 1133373 Ontario Inc.* (2001), 41 O.M.B.R. 257 at para. 29 (Sup. Ct. J.).

6 *D.D.*, *supra* note 4 at para. 53; *Cantor Fitzgerald International v. Tradition (U.K.) Ltd.*, [2000] R.P.C. 95 at 127-28 (Ch.D.).

7 Indeed, a lawyer's failure to consult an expert and call expert evidence at trial can amount to professional negligence: *Henderson v. Hagblom*, [2003] 7 W.W.R. 590 at para. 86 (Sask. C.A.).

8 [1994] 2 S.C.R. 9 [*Mohan*].

9 Although *Mohan* was a criminal case, the Supreme Court's discussion of the admissibility of expert evidence has been followed in the civil context with only slight variations. See *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 at para. 1 (Sup. Ct. J.) (QL) [*Citak*]; *Toronto Dominion Bank v. E. Goldberger Holdings Ltd.* (1999), 43 C.P.C. (4th) 275 at 277 (Ont. Sup. Ct. J.) [*Toronto Dominion Bank*]; *Fellowes, McNeil v. Kansa General International Insurance Co. Ltd.* (1998), 40 O.R. (3d) 456 (Gen. Div.) [*Fellowes*]; *Drumonde v. Moniz* (1997), 105 O.A.C. 295 at 298 (C.A.); *Homolka v. Harris*, [2002] 6 W.W.R. 432 at paras. 11-12, 14-15, 18 (B.C.C.A.). See David M. Paciocco, "Context, Culture and the Law of Expert Evidence" (2001) 24 Advocates' Q. 42 at 49-52 [Paciocco, "Content, Culture and Law"] (highlighting difference between civil and criminal contexts).

The new approach to expert evidence initiated by *Mohan* has been the subject of extensive commentary.[10] Until recently, however, there has been little discussion in Canada of a related trend: increased scrutiny of the expert's role and duties, quite apart from the evidence he or she proffers.[11] A recent consultation memorandum of the Alberta Law Reform Institute is a welcome exception.[12]

The courts may discount or refuse to admit evidence given by experts who are partial or lack independence, regardless of the necessity and reliability of their testimony. Other sanctions may also be imposed. The trend toward greater scrutiny of the conduct of expert witnesses is consistent with the courts' general wariness of expert testimony. However, the trend is still inchoate. Canadian courts have yet to articulate a clear test to determine when an expert's impartiality or independence has been compromised to such a degree as to attract sanction. As a result, declarations that an expert's evidence is inadmissible, or should be given little weight due to partiality or lack of independence, often seem conclusory rather than analytical.

One way to rationalize the cases on expert impartiality and independence is to understand them as cases about bias. Consideration of how courts have historically approached bias on the part of decision-makers and lay witnesses may illuminate the scope of the duty of expert witnesses to be impartial and independent. Unsurprisingly, the rule against bias for expert witnesses is more rigorous than that for lay witnesses, but less exacting than that imposed on decision-makers. Expert witnesses fall in the middle of the bias spectrum, but their position on the spectrum has been changing. Previously, experts were treated in a similar fashion to

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[10] See Margaret L. Waddell, "Litigation Privilege and the Expert: In the Aftermath of *Chrusz*" (2001) 20:2 Advocates' Soc. J. 10; Ted J. Murphy, "Computer Recreations and the Expert Evidence Admissibility Analysis: A Reconsideration of Current Conceptions of Reliability and Prejudice, and Their Impact on the Role of the Trier of Fact" (2000) 23 Advocates' Q. 392; John A. McLeish & Michael Smitiuch, "Expert Evidence: Setting the Stage for Expert Testimony at Trial" (2000) 22 Advocates' Q. 397; W.N. Ortved, "The Trial Judge as Gatekeeper: A New Level of Scrutiny for the Introduction of Expert Opinion Evidence" in *1998 L.S.U.C. Special Lectures: Personal Injury* (Toronto: The Law Society of Upper Canada, 2000) 1 at 1; David M. Paciocco, "Coping with Expert Evidence About Human Behaviour" (1999) 25 Queen's L.J. 305; P. Brad Limpert, "Beyond the Rule in *Mohan*: A New Model for Assessing the Reliability of Scientific Evidence" (1996) 54 U.T. Fac. L. Rev. 65.

[11] For exceptions, see William G. Horton & Michael Mercer, "The Use of Expert Witness Evidence in Civil Cases" (2004) 29 Advocates Q. 153; G.R. Anderson, "Clear and Partial Danger: Defending Ourselves Against the Threat of Expert Bias" (2004) 83 Can. Bar Rev. 286; Vern Krishna, "Expert witnesses who are partisan lose their value" *The Globe and Mail* (9 February 2004) B11; Michel Proulx, "Le témoin expert: et si l'éthique pouvait contribuer à la manifestation de la vérité" (2004) 8 Can. Crim. L. Rev. 143; Theodore Dalrymple, "Expert Witnesses Are Not What They Seem — And I Should Know" (2003) 27 Advocates' Q. 1; Karim Renno, "Quebec courts demand impartiality from experts" *Lawyers Weekly* (24 January 2003) 17; Thomas S. Woods, "Impartial Expert or 'Hired Gun'? Recent Developments at Home and Abroad" (2002) 60 Advocate (B.C.) 205; John D. MacIssac, "The Role of the Expert in the Court Room: Objective Expert or Team Member?" (2001) 9 C.L.R. (3d) 84; L. Khoury, "L'incertitude scientifique en matière civile et la preuve d'expert" in P. Patenaude, ed., *L'interaction entre le droit et les sciences expérimentales* (Sherbrooke: Les Éditions Revue de Droit de l'Université de Sherbrooke, 2001) 45; David A. Wolfe, "The Right Expert — Qualifications, Training and Education" (1994) 11 Can. Fam. L.Q. 1.

[12] Alberta Law Reform Institute, *Alberta Rules of Court Project, Expert Evidence and "Independent" Medical Examinations: Consultation Memorandum No. 12.3* (Edmonton: Alberta Law Reform Institute, 2003), online: Alberta Law Reform Institute <www.law.ualberta.ca/alri/pdfs/cnslt_memo/cm12-3.pdf> [*ALRI Consultation Memorandum*].

lay witnesses, in the sense that bias affected only the weight given to the expert's testimony. The more recent tendency has been to demand greater impartiality and independence from expert witnesses and impose more severe sanctions when they do not meet those requirements. The increased scrutiny of expert witnesses' impartiality and independence is part of a larger trend toward the judicial regulation of expert evidence.

We argue that increased scrutiny of the partiality or lack of independence of expert witnesses should continue, but frailties in expert evidence due to bias should generally go to weight rather than admissibility. At the same time, courts should actively experiment with other methods of controlling expert bias, although admittedly the cost/benefit analysis of these methods is not yet clear. We discuss some of those methods in greater detail below. In Part II, we highlight the nature and source of the duties of impartiality and independence that the courts (and some legislatures) have imposed on expert witnesses. We begin by comparing the treatment of bias on the part of expert witnesses with that of lay witnesses and decision-makers. We then analyze the Supreme Court of Canada's recent jurisprudence regarding expert testimony and link it to the development of specific duties in relation to impartiality and independence on the part of expert witnesses.

In Part III, we review the costs of expert bias. In Part IV, we consider traditional internal methods of controlling expert evidence: cross-examination and the prohibition against perjury. We also highlight developments in civil liability and immunity of expert witnesses. We then assess a range of external controls that have been advocated in terms of their likely effectiveness in addressing the causes of partiality and a lack of independence. We conclude in Part V with some suggestions for the future.

II. THE DUTY OF IMPARTIALITY AND INDEPENDENCE APPLIED TO EXPERT WITNESSES

A. DISTINGUISHING THE DUTIES

The courts' treatment of expert evidence tainted by partiality or a lack of independence is inconsistent. Courts sometimes suggest that such evidence should be given little weight; on other occasions they exclude the testimony altogether. Possible sanctions are varied and potentially severe, but seem uncoordinated by principle. For this reason, a coherent theory of the expert witness' duty of impartiality and independence is essential. To begin, it is helpful to differentiate between impartiality and independence. Though they exhibit similarities, and courts commonly conflate them,[13] expert independence is distinguishable from expert impartiality. For decision-makers, independence and impartiality are both components of the rule against bias.[14] Impartiality is primarily subjective; it concerns a person's state of mind or attitude in relation to the issues and the parties. Independence is more objective; it concerns a person's status or relationship to others. A useful method of determining whether the impartiality or independence of an expert witness is at issue is to consider whether the concern arises out of the evidence tendered by the expert or,

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[13] See *e.g. R. v. Trench*, [1999] O.J. No. 3798 at paras. 7-8 (Ont. Ct. J.) (QL) (art therapist held not to be an independent and objective professional witness; had acted as child's advocate).

[14] *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at paras. 17-18.

alternatively, relates to the expert personally. The former suggests partiality is the worry, while the latter implies that lack of independence is at issue. Put another way, impartiality concerns how the expert acts, while independence concerns who the expert is.

B. BIAS OF LAY WITNESSES AND DECISION-MAKERS

An analysis of the application of the rule against bias as applied to lay witnesses and decision-makers highlights the historic approach to bias in the trial process and clarifies the levels of scrutiny applied to different actors. Lay evidence is not subject to the same level of scrutiny for bias as expert evidence. As indicated above, unlike expert witnesses, lay witnesses generally may not offer opinions.[15] A lay witness's testimony is usually admissible if it is relevant. Most frailties in lay evidence, such as bias, affect the weight given to the evidence, not its admissibility. Evidence of bias is often used to attack the credibility of a lay witness.[16] In addition, the partiality of a witness who is a party to litigation is presumed.[17] Regrettably, in discussing lay witnesses, courts and commentators rarely distinguish bias arising out of partiality from bias arising out of a lack of independence. Although the failure to draw that distinction may have no practical effect in many cases, it highlights one way in which the evidence of lay witnesses is analyzed differently from that of experts. The courts' recognition of impartiality and independence as separate duties imposed on expert witnesses has not occurred for lay witnesses, perhaps because decision-makers tend not to defer to lay witnesses' evidence.

The effect of bias is very different for decision-makers. Central to the duty of fairness imposed on decision-makers is the requirement that they be free from bias.[18] Courts, administrative tribunals and other decision-makers are subject to a strict rule against bias. Actual bias exists where, though qualified to make the decision, the decision-maker demonstrates prejudice against the party it affects. In practice, the courts have discarded the requirement to show actual bias in favour of a "reasonable apprehension of bias" test, which asks "whether a reasonably informed bystander could reasonably perceive bias on the part of" the decision-maker.[19] The test is applied with varying rigidity depending on the nature of the bias said to be apprehended. Bias can arise from interests, relationships, attitudes or institutional factors.

The treatment of bias on the part of expert witnesses lies between these two poles. Exactly where it lies is an open question, but in recent years the treatment of the bias of expert witnesses has been moving toward the standards that apply to decision-makers. We discuss and evaluate that phenomenon below. In the following section, we consider the Supreme Court of Canada's promulgation of new standards governing the admissibility of expert

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15 For limited exceptions to this rule, see *R. v. Graat*, [1982] 2 S.C.R. 819.

16 The introduction of independent evidence of bias to discredit a witness is predicated on the witness' denials that he or she is partial: *R. v. McDonald*, [1960] S.C.R. 186 at 190-91.

17 Indeed, parties were historically barred from testifying for just this reason. See John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at para. 13.3.

18 See Philip Bryden, "Legal Principles Governing the Disqualification of Judges" (2003) 82 Can. Bar Rev. 555.

19 *Newfoundland Telephone Co. Ltd. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at 636.

evidence. With that background, we then turn to the more specific question of the duties and role of expert witnesses. Many critics of the existing system of expert evidence take the view that expert witnesses should not be considered witnesses in the same sense that lay witnesses are, and should either be treated in a manner similar to decision-makers or else placed in a distinct category. Those broadly content with the existing system argue in response that expert witnesses are witnesses, not decision-makers.

C. THE NEW STANDARDS FOR ADMISSIBILITY: *MOHAN* AND ITS PROGENY

The Supreme Court of Canada's decade-old decision in *Mohan*[20] is the logical starting point for consideration of the Canadian law concerning expert evidence tainted by bias. *Mohan* concerned the admissibility of novel scientific evidence and not the duties of expert witnesses. The Supreme Court, however, set out four criteria for the admission of expert evidence generally: (i) relevance; (ii) necessity in assisting the trier of fact; (iii) the absence of any exclusionary rule; and (iv) a properly qualified expert. The inquiry into relevance is a question of law to be determined by the trial judge. The court must first assess whether the evidence tends to establish a fact in issue. If so, the judge must then weigh the probative value of the evidence against its prejudicial effect.[21] Where novel scientific evidence is an issue, the court must go on to ask whether the jury is likely to be confused by the expert evidence or overwhelmed by its "mystic infallibility."[22]

Mohan also specifies that an expert's opinion must be necessary in the sense of providing information "which is ... outside the experience and knowledge of a judge or jury."[23] Merely establishing that the evidence would be "helpful" to the trier of fact is insufficient.[24] After determining the reliability and necessity of the expert evidence, the trial judge must ensure that the evidence does not run afoul of an exclusionary rule of evidence. Finally, the evidence must come from a properly qualified expert — someone who has acquired special or peculiar knowledge through study or experience. Evidence advancing a novel scientific theory or technique is subject to special scrutiny.

Mohan signaled a greater willingness by Canadian courts to admit expert testimony based on novel scientific or social science theories that might not yet be generally accepted within a given field of knowledge. Yet *Mohan* also appears to have made the admission of expert evidence in any particular field more difficult. Reservations about admitting expert evidence without rigorous review by trial judges pervade *Mohan*. The Supreme Court expressed concern that expert evidence may be "misused" and may "distort the fact-finding process";[25] held that the need for expert evidence should be "assessed in light of its potential to distort the fact-finding process";[26] and warned that "experts [must] not be permitted to usurp the functions of the trier of fact."[27] The Court worried that "[t]oo liberal an approach" to the

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20 *Supra* note 8.
21 *Citak*, *supra* note 9 at para. 1 (suggests this second step may not be required in civil cases).
22 *Mohan*, *supra* note 8 at 22.
23 *Ibid.* at 23, citing *R. v. Abbey*, [1982] 2 S.C.R. 24 at 42.
24 *Ibid.*; see *D.D.*, *supra* note 4 at para. 46; *Parrott*, *supra* note 1 at para. 58.
25 *Mohan*, *ibid.* at 21.
26 *Ibid.* at 24.
27 *Ibid.*

admission of expert evidence would lead trials to degenerate into "nothing more than a contest of experts," and convert the trier of fact into a "referee in deciding which expert to accept."[28]

The Supreme Court of Canada reiterated the increased scrutiny of expert evidence outlined in *Mohan*, in *R. v. J.-L.J.*[29] Adopting language from the U.S. Supreme Court's well-known decision in *Daubert v. Merrell Dow Pharmaceuticals*, Blackmun J. emphasized the role of the trial judge as "gatekeeper" in determining the admissibility of expert evidence.[30] The "gatekeeper" role requires trial judges to scrutinize expert evidence carefully as it is put forward and not to defer the issue by holding that frailties in such evidence go to weight rather than admissibility.[31] Moreover, Binnie J. emphasized that expert testimony that is novel or that approaches the ultimate issue to be tried should be subject to special scrutiny based on the criteria from *Daubert*.[32] Because *Daubert* was a civil case (unlike *Mohan*, *D.D.* or *J.-L.J.*),[33] its criteria may be especially useful in considering the admissibility of expert testimony in civil cases.[34] Taken together, *Mohan* and *J.-L.J.* demonstrate the courts' reluctance to admit expert testimony without a rigorous review by the trial judge of its necessity and reliability. In short, it is now more difficult to have expert testimony admitted in both criminal and civil proceedings.[35]

D. THE DEVELOPMENT OF THE EXPERT'S DUTIES

In tandem with the changes in standards of admissibility for expert evidence, exemplified by *Mohan* and *J.-L.J.*, is greater scrutiny of the roles and responsibilities of expert witnesses and the evolution of an overarching duty on the part of expert witnesses to the court. We discuss these trends in more detail below.

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28 *Ibid.*

29 [2000] 2 S.C.R. 600 [*J.-L.J.*].

30 509 U.S. 579 (1993) [*Daubert*]. *Daubert* is a civil product liability case involving scientific testimony. The *Daubert* approach was extended to expert testimony more generally in *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 at 141 (1999). See also *General Electric v. Joiner*, 522 U.S. 136 (1997) [*Joiner*] (limiting appellate review of trial judge's decision on admissibility of expert evidence to abuse of discretion standard) and *Weisgram v. Marley*, 528 U.S. 440 (2000) (parties must advance best expert evidence at trial).

31 *J.-L.J.*, *supra* note 29 at para. 28; compare *R. v. Marquard*, [1993] 4 S.C.R. 223 at 243 ("[d]eficiencies in the expertise go to weight, not admissibility"); *Shawinigan Engineering v. Naud*, [1929] S.C.R. 341 at 343 (expert evidence should be weighed in the same manner as lay evidence).

32 *J.-L.J.*, *ibid.* at paras. 34-35. *Daubert*, *supra* note 30 at paras. 592-95 indicated that when considering whether to admit novel expert testimony, the court should engage in a two-step inquiry. First, the court should ask whether the reasoning of the proposed scientific testimony is scientifically valid. This analysis may involve consideration of whether the reasoning is testable, whether it has undergone peer review, whether there is a significant rate of error and whether there is general acceptance of the reasoning. Second, the court should consider whether the proposed scientific testimony would help the fact-finder determine a fact at issue. If the evidence meets these criteria, it should be admitted.

33 *Mohan*, *supra* note 8; *D.D.*, *supra* note 4; *J.-L.J.*, *supra* note 29.

34 Paciocco, "Context, Culture and Law," *supra* note 9 at 49-52.

35 See *Toronto Dominion Bank*, *supra* note 9.

1. THE ROLE AND RESPONSIBILITIES OF EXPERT WITNESSES

Although impartiality and independence have likely always been duties imposed on expert witnesses,[36] the courts have become more rigorous in their enforcement of these requirements. The trend is most clearly demonstrated by *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd., ("The Ikarian Reefer")*,[37] a celebrated English decision that has been embraced by Canadian courts[38] and tribunals.[39] Yet a review of the principles set out in that case shows their status to be unclear.

In *The Ikarian Reefer*, the plaintiff's ship ran aground off the coast of Sierra Leone and caught on fire. The defendant insurers claimed that the damage to the ship had been deliberate and thus was not covered by the policy. At trial, Cresswell J. held that the ship had not been deliberately set on fire.[40] In doing so, Cresswell J. suggested that certain expert witnesses' misunderstanding of their duties and responsibilities had drawn out the trial. To this end, Cresswell J. outlined some of the duties of expert witnesses in civil litigation:

> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation....
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise.... An expert witness ... should never assume the role of an advocate.
> 3. An expert witness should state the facts or assumptions upon which his [or her] opinion is based. He [or she] should not omit to consider material facts which could detract from his [or her] concluded opinion....

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36 *R. v. De Tonnancourt* (1956), 18 W.W.R. 337 at 342 (Man. C.A.); but see *Riordan v. R.* (1986), 34 L.C.R. 383 at 384 (F.C.A.).

37 [1993] 2 Lloyd's Rep. 68 at 81-82 (Q.B.D.) [*The Ikarian Reefer*], rev'd on other grounds but aff'd on this point [1995] 1 Lloyd's Rep. 455 at 496 (C.A.) [*The Ikarian Reefer C.A.*].

38 Some or all of the criteria set out in *The Ikarian Reefer* have been relied upon in many Canadian cases, including *Merck & Co. v. Apotex Inc.* (2004), 32 C.P.R. (4th) 203 at para. 16 (F.C.); *Teichgraber v. Gallant*, 2003 ABQB 58 at para. 88 [*Teichgraber*]; *Citak*, *supra* note 9 at paras. 6-7; *Rudberg v. Ishaky*, [2000] O.J. No. 376 at para. 232 (Sup. Ct.J.) (QL); *Jacobson v. Sveen* (2000), 262 A.R. 367 at paras. 6, 32, 33, 35, 36 (Q.B.) [*Jacobson*]; *Dansereau Estate v. Vallee and Lapointe* (1999), 247 A.R. 342 at para. 135 (Q.B.) [*Dansereau Estate*]; *Peter Lombardi Construction Inc. v. Colonnade Investments Inc.*, [1999] O.J. No. 3752 at para. 414 (Master); Fellowes, *supra* note 9; *Kozak v. Funk*, [1996] 1 W.W.R. 107 at para. 16 (Sask. Q.B.), appeal allowed in part [1998] 5 W.W.R. 232 (C.A.) (followed in *Martin v. Inglis*, [2002] 9 W.W.R. 500 at para. 118 (Q.B.)); *Baynton v. Rayner*, [1995] O.J. No. 1617 at para. 124 (Gen. Div.) (QL) [*Baynton*]; *Perricone v. Baldassarra* (1994), 7 M.V.R. (3d) 91 at paras. 21-22 (Ont. Gen. Div.) [*Perricone*]; *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.* (2001), 47 R.P.R. (3d) 32 at para. 24 (Sup. Ct. J.) [*Carleton Condominium Corp.*]. In England, the *Ikarian Reefer* criteria were restated in light of the 1999 English civil procedure reforms in *Anglo Group Plc v. Winther Brown & Co.*, [2000] 72 Con. L. Rev. 118 (Q.B.D.), which were themselves relied upon in *Hamblin v. Ben* (2003), 344 A.R. 282 at para. 35 (Q.B.) [*Hamblin*].

39 John Swaigen & Alan D. Levy, "The Expert's Duty To The Tribunal: A Tool For Reducing Contradictions Between Scientific Process And Legal Process" (1997) 11 Can. J. Admin. L. & Prac. 276 (discussing the Ontario Environmental Appeal Board's *Guidelines for Technical and Opinion Evidence*).

40 Justice Cresswell's decision was overturned by the Court of Appeal, which held that the vessel had been deliberately run aground and set on fire at the behest of the owners. However, the Court of Appeal indicated its agreement with Cresswell J.'s codification of the duties of expert witnesses: *The Ikarian Reefer (C.A.)*, *supra* note 37 at 496.

4. An expert witness should make it clear when a particular question or issue falls outside his [or her] expertise.
5. If an expert's opinion is not properly researched because he [or she] considers [there to be] ... insufficient data ... available, then this must be stated with an indication that the opinion is no more than a provisional one.... In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report....
6. If, after exchange of reports, an expert witness changes his [or her] view on a material matter ..., such change of view should be communicated ... to the other side ... and when appropriate to the court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.[41]

Justice Cresswell did not create these principles out of thin air: he derived them from existing caselaw. Each of them embodies an element of the requirements of independence and impartiality.[42] However, principles (1) and (2) are of particular importance to the present discussion. Principle (1) relates primarily to independence; it is concerned with both the reality and appearance of neutrality on the part of the expert. The focus on the appearance of neutrality (and not just actual neutrality) appears to arise because it would bring the administration of justice into disrepute if the decision-maker deferred to and relied upon an expert who appeared to lack independence. The requirement to appear independent suggests that experts may be considered analogous to decision-makers in certain respects. The appearance of a lack of independence is a ground for disqualification of a decision-maker, so it is a logical extension that a decision-maker should not rely on an expert witness who appears to lack independence. That premise — that expert witnesses should be treated more like decision-makers than witnesses — is controversial.[43]

Principle (2) addresses expert advocacy or partiality. Rather than focusing on the appearance of neutrality, principle (2) requires that the expert actually be objective. This requirement also stems from the decision-maker's reliance on the expert's opinion. Since the evidence offered by an expert is, by definition, outside the trier of fact's knowledge, it must not be influenced by extraneous factors. Justice Cresswell does not appear to have intended that principles (1) and (2) be considered as totally distinct concepts. The two principles are related and reflected in one another, and it is sometimes difficult to differentiate a lack of independence from partiality.

In *The Ikarian Reefer*, Cresswell J. did not indicate whether the duties of expert witnesses he listed are mandatory rules, guidelines or simply suggestions. The Court of Appeal, which endorsed Cresswell J.'s list, did not address this point. While some Canadian courts have referred to the principles as "guidelines" that are "helpful,"[44] others have relied upon the principles outlined in *The Ikarian Reefer* to justify the imposition of "obligations" on expert

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41 *Supra* note 37 at 81-82.

42 For example, an expert witness who passes off her personal opinion as scientific evidence would violate principle (d): see *R. v. Olscamp* (1994), 95 C.C.C. (3d) 466 at 476-80 (Ont. Gen. Div.) [*Olscamp*].

43 *FGT Custodians Pty. Ltd. (formerly Feingold Partners Pty. Ltd.) v. Fagenblat*, [2003] VSCA 33 at paras. 27-28 (Vict. C.A.) [*Fagenblat*].

44 *Perricone*, *supra* note 38 at para. 22; *Baynton*, *supra* note 38 at 124.

witnesses.[45] However, some courts and commentators have expressed doubt that the principles outlined in *The Ikarian Reefer* were intended to be anything other than admonitions to experts and counsel.[46] Whether the principles in *The Ikarian Reefer* were meant to be binding obligations or simply guidelines, by adopting — or at least making favourable reference to — them, Canadian courts and tribunals have indicated a greater willingness to scrutinize the role played by expert witnesses.[47] Still, more than a decade after *The Ikarian Reefer* was decided, Canadian courts and tribunals have yet to adopt a uniform position on how to address the problems of experts acting as advocates for the party retaining them and concerns about the lack of independence.[48] Courts have also failed to articulate a clear position on when deficiencies in impartiality or independence will be sufficient to attract sanction.

The *Ikarian Reefer* principles focus on the role of expert witnesses as distinct from the content of their testimony. By contrast, the Supreme Court of Canada's decisions in *Mohan*, *D.D.* and *J.-L.J.*[49] deal with increased scrutiny of expert testimony in light of its necessity and reliability. The Supreme Court cases do not focus on the role of the expert as such. Yet the duties and responsibilities of expert witnesses outlined in *The Ikarian Reefer* and the four criteria for expert evidence enunciated in *Mohan* are consistent. Some have argued that the criteria outlined in *The Ikarian Reefer* actually relate to the fourth criteria for expert evidence outlined in *Mohan*; that is, the requirement of a properly qualified expert.[50]

While it may be tempting to view the principles in *The Ikarian Reefer* as congruent with the requirements outlined in *Mohan*, a careful reading suggests that the obligation on the expert to remain impartial and independent is separate from, and in addition to, the requirement that expert evidence be proffered by a properly qualified expert.[51] Where an expert is partial or lacks independence, his or her evidence may be given less weight or deemed inadmissible despite satisfaction of the four *Mohan* criteria. Broadly, however, both lines of cases encourage judges to act as "gatekeepers" in civil litigation involving experts: ensuring, first, that the expert understands his or her duty to the court and is not so biased as to be unable to uphold that duty; and second, that the evidence tendered by the expert is scrutinized so as not to mislead the trier of fact.

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45 *Teichgraber*, *supra* note 38 at para. 88; *Jacobson*, *supra* note 38 at para. 32.

46 *Fagenblat*, *supra* note 43 at paras. 15-17.

47 See cases cited *supra* note 38. In *Merck & Co. v. Apotex Inc.*, *supra* note 38 at para. 16, Harrington J. observed that *The Ikarian Reefer*'s treatment of expert evidence was based on authority that "has survived its transatlantic voyage unscathed."

48 Contrast Horton & Mercer, *supra* note 11 at 154 (claiming there are "clear" rules governing the conduct of expert witnesses).

49 *Mohan*, *supra* note 8; *D.D.*, *supra* note 4; *J.-L.J.*, *supra* note 29.

50 Sopinka, Lederman & Bryant, *supra* note 17 at paras. 12.42-12.44 (placing brief discussion of experts' duties to the court under analysis of the "properly qualified expert" element of *Mohan*).

51 S. Casey Hill & Peter McWilliams, *McWilliams' Canadian Criminal Evidence* (Aurora: Canada Law Book, 2003) at 12:30.20.50 is more explicit in tying impartiality and independence to the "properly qualified expert" requirement, but also suggests that they could be considered implied elements of the reliability requirement, or that they are distinct requirements.

2. THE EXPERT WITNESS' DUTY TO THE COURT

The courts now speak of a duty that expert witnesses owe to them.[52] But the source and ambit of that duty is uncertain. The notion of a duty to the court appears to have its roots decades ago in an English case, where it was said that "the expert advisors of the parties, whether legal or scientific, are under a special duty to the Court ... to limit in every possible way the contentious matters of fact to be dealt with at the hearing."[53] Over time, this has developed into a broader notion of a duty to the court, and the language of a more general "duty" to the court is now often repeated. Yet while that language has an air of gravity, it is not particularly helpful as an analytical tool. As a practical matter, it is unclear what the duty adds beyond the existing duty on all witnesses to tell the truth. Moreover, how is the duty to be enforced? And what consequences follow if the duty is not observed?

In *Polivitte Ltd. v. Commercial Union Assurance Co. Plc.*,[54] the Court recognized that expert witnesses have a two-fold role: to advance the case of the retaining party and "to assist the Court ... in determining where the truth lies." The assertion that an expert's sole "duty" is to the court does not acknowledge the tension that arises from these two roles.[55] Superficially, this dilemma is similar to that resulting from the conflicting duties of lawyers to the court and to their clients. The analogy is imperfect, however. Experts are not advocates. Unlike lawyers, they give evidence under oath. They are not permitted to advance arguments they do not themselves believe in the hope that the court will accept them. Expert witnesses, like lay witnesses, must testify as to what they actually believe to be true. Advocates' ultimate duty of loyalty is to their clients, although the existence of a parallel duty to the court places some restrictions upon how far the duty to clients extends. In England, the 1999 *Civil Procedure Rules* specify that experts owe an overriding duty to the court to assist it in matters within their expertise.[56] The fact that the English reforms refer to experts as "experts," rather than "expert witnesses," is telling. It has led some to question whether experts are really witnesses at all under the new system. Amendments in 2002 to the *New Zealand High Court Rules* created a similar duty to the court.[57] This duty has been confirmed by the courts in England[58] and Australia.[59] It seems likely that the Canadian courts will

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52 In *Hamblin*, *supra* note 38 at para. 35, the Court spoke of the "ethical standards" to which expert witnesses are subject.

53 *Graigola Merthyr Co. Ltd. v. Swansea Corporation*, [1928] 1 Ch. 31 at 38. This statement was adopted by the Supreme Court of Canada in *Roman Catholic Episcopal Corp. of London v. Canadian Surety*, [1937] S.C.R. 1 at 6-7, but the point does not appear to have been developed further.

54 [1987] 1 Lloyd's Rep. 379 at 386 (Q.B.D.).

55 ABA Standing Committee on Professional Conduct, "Formal Opinion 97-407 (1997): Lawyer as Expert Witness or Expert Consultant," online: American Bar Association <www.abanet.org/cpr/ethicsearch/97407.html> (duty of expert to court is inconsistent with duty to client).

56 England, *Civil Procedure Rules*, r. 35.3 [*Civil Procedure Rules*]; see Lord Harry Woolf, *Access to Justice Final Report* (London: HMSO, 1996) at 139 [*Woolf Report*].

57 *High Court Amendment Rules 2002* (N.Z.), 2002/132 at Schedule 2.

58 *Stevens v. Gullis*, [2000] 1 All E.R. 527 at 533 (C.A.); *Stanton v. Callaghan*, [2000] 1 Q.B. 75 at 108 (C.A.); *Clark v. Associated Newspapers*, [1998] R.P.C. 261 at 276; *Vernon v. Bosley (No. 2)*, [1997] 1 All E.R. 614 at 647 (C.A.).

59 *Makita (Australia) Pty. Ltd. v. Sprowles* (2001), 52 N.S.W.L.R. 705 at para. 77 (C.A.). In 1998 (as amended in 2003), the Federal Court of Australia issued its own guidelines for expert witnesses, modeled largely on the common law position set out in *The Ikarian Reefer*: Federal Court of Australia, "Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia," online: Federal Court of Australia <www.fedcourt.gov.au/how/prac-direction.html> ["FCA Guidelines"]. See also

impose a similar duty upon experts.[60] The notion of an "overriding" duty to the court places little or no weight on the expert witness's duties to the client.

E. THE CAUSES OF BIAS ON THE PART OF THE EXPERT WITNESS

Experts are vulnerable to allegations of bias for four main reasons. First, experts are paid for their testimony. Courts maintain a long-held suspicion of the impartiality and independence of experts for precisely this reason.[61] Indeed, the only other witnesses who are paid for their testimony are jailhouse informants and "snitches," whose credibility is usually suspect.[62] Whether the fact that expert witnesses are paid makes them any less likely to tell the truth than (unpaid) lay witnesses is unproven. Yet cynicism about the fact that expert witnesses are paid is widespread.[63]

The second problem is "selection bias," which may arise because experts are chosen by the parties rather than the court. Parties (through counsel) may engage in "expert shopping" in an effort to support their positions in litigation. There may be a large pool of potential experts in a given field, but no guarantee that the experts selected by the parties are representative of opinion in that field. Indeed, exactly the opposite may be true. Parties' incentive is to put forward expert evidence that supports their position, whether or not it is representative. This has led to concerns about the impartiality of expert witnesses.[64] Moreover, a party may knowingly select an expert because the expert has a relationship with the party or counsel, either as a friend, relative, employee or the like. This may lead to allegations that the expert lacks independence.

Supreme Court Rules 1970 (N.S.W.), Part 36, Schedule 11(K) (and discussion below) [*New South Wales Supreme Court Rules*]; *Queensland Uniform Civil Procedure Rules, 1999*, r. 426.

60 *D.D., supra* note 4 at para. 41 (McLachlin C.J.C. dissenting) (noting approvingly that an expert witness' testimony did not "verge on advocacy"); *Jacobson, supra* note 38 at para. 35.

61 *The Tracy Peerage* (1843), 8 E.R. 700 at 715 (H.L.) ("hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked"); *Lord Abinger v. Ashton* (1873), 17 L.R. Eq. 358 at 373-374 (C.A.) ("I very much distrust expert evidence" due to the fact that experts are paid for their testimony and are often biased and consider themselves "paid agents" of the party retaining them); *Winans v. New York and Erie Railroad*, 62 U.S. 88 at 101 (1858) ("opposite opinions of persons professing to be experts may be obtained to any amount"); Learned Hand, "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 Harv. L. Rev. 40 at 53 ("hired champion"). Note, however, that in *R. v. More* [1963] S.C.R. 522 at 537-38, the Supreme Court of Canada condemned the trial judge's reliance on criticisms of expert witnesses in textbooks and the *Tracy Peerage Case*, observing that "as generalizations, these statements are bad."

62 George C. Harris, "Testimony for Sale: The Law and Ethics of Snitches and Experts" (2000) 28 Pepp. L. Rev. 1; Peter de C. Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Government of Manitoba, 2001) at 63 ("Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts"); *R. v. Sauvé* (2004), 182 C.C.C. (3d) 321 at 353-56 (Ont. C.A.).

63 This cynicism is exemplified by the comment attributed to the late flamboyant trial lawyer Melvin Belli: "If I got myself an impartial witness, I'd think I was wasting my money" cited in *Wrobleski v. de Lara*, 708 A.2d 1086 at 1092 (Md. Ct. Spec. App. 1998), aff'd 727 A.2d 930 (Md. 1999).

64 *Abbey National Mortgages Plc. v. Key Surveyors Nationwide Ltd.*, [1996] 1 W.L.R. 1534 at 1542 (C.A.); *Thorn v. Worthing Skating Rink Company* (1876), L.R. 6 Ch.D. 415 at 416 (noting case where party consulted 68 experts before retaining one); Lee M. Friedman, "Expert Testimony, Its Abuse and Reformation" (1910) 19 Yale L.J. 247 at 253-54.

Third, once retained, experts are thought to be too susceptible to suasion by counsel. A leading commentator has described the perception that the relationship between counsel and the expert they retain is akin to playing the saxophone: lawyers manipulate the keys and the expert produces the desired sounds.[65] This may be a caricature, but it reflects a widely held view. Much of this suasion occurs through interaction between the expert witness and counsel, particularly the "coaching" of the expert by counsel in preparation for trial.

Fourth, courts and commentators are concerned that experts become psychologically part of the retaining party's litigation team and, as a consequence, lose sight of their proper role.[66] Experts often want to please their clients and assist their "side" in winning a lawsuit.[67] The pressure on experts is not to lie outright — that is too crude a picture; rather, the pressure is to put the best face on the truth. Expert partiality is rarely intentional; it occurs when structures to prevent it are not put in place and obeyed. Similarly, a lack of independence may be found even where the expert appeared impartial if there are reasons to doubt the expert's impartiality.

F. EXPERT IMPARTIALITY

Every lawyer is familiar with derogatory terms for the modern expert: "hired guns"[68] or worse.[69] The notion captured here is that expert evidence is for sale — evidence tailored to order. Recent commentary has warned against the danger of experts acting as advocates for the party paying them.[70] Courts[71] and administrative[72] and arbitral[73] tribunals have confirmed

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65 John H. Langbein, "The German Advantage in Civil Procedure" (1985) 52 U. Chicago L. Rev. 823 at 835; see Lord Taylor of Gosforth, *The Lund Lecture* (1995) 35 Med. Sci. Law 3 at 5 (recalling that when the author was counsel more than one expert had asked him, "[w]hat do you want me to say?").

66 *Olscamp*, *supra* note 41 at 476-80; *In re S. (Infants)*, [1967] 1 W.L.R. 396 at 407 (Ch.D.); C. Montgomery, "Forensic Science in the Trial of Sally Clark" (2004) 44 Med. Sci. Law. 185 at 187; Richard A. Epstein, "A New Regime for Expert Witnesses" (1992) 26 Val. U. L. Rev. 757 at 759.

67 *D.D.*, *supra* note 4 at para. 52 ("Although not biased in a dishonest sense, ... [professional expert witnesses] frequently move from the impartiality generally associated with professionals to advocates in the case.").

68 Francine Dubé, "Judge criticizes 'hired gun' experts" *National Post* (18 November 2002) A1 (citing concerns of Proulx J.A. of the Quebec Court of Appeal); B. McLachlin, "The Role of the Expert Witness" (1990) 14:3 Prov. Judges J. 27 at 30; *O'Connor v. Canada* (1978), 78 D.T.C. 6497 at 6505 (F.C.T.D.) ("experts for hire"); *Children's Aid Society of Toronto v. D.(M.)*, [2001] O.J. No. 4425 at para. 34 (Sup. Ct. J.) (QL) ("An expert is not a 'hired gun' who testifies on behalf of one party or the other, but rather, he or she is a witness who provides an opinion to the court within his or her area of expertise"). See Joel Cooper & Isaac M. Neuhaus, "The 'Hired Gun' Effect: Assessing the Effect of Pay, Frequency of Testifying, and Credentials on the Perception of Expert Testimony" (2000) 24 Law & Hum. Behav. 149.

69 Samuel R. Gross, "Expert Evidence" [1991] Wisc. L. Rev. 1113 at 1115; J. Morgan Kousser, "Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing" (1984) 6 The Public Historian 5; Friedman, *supra* note 64 at 247 ("a kind of intellectual prostitute").

70 Bob Macdonald & Ross Hamilton, "Accounting expert or advocate? Don't cross the line" *Lawyers Weekly* (18 January 2002) 13; Beverley Spencer, "'Semi-advocate' experts cheapen litigation: S.C.C. ludge" *Lawyers Weekly* (17 July 1998) 7. These concerns are not new: see William L. Foster, "Expert Testimony, —Prevalent Complaints and Proposed Remedies" (1898) 11 Harv. L. Rev. 169 at 171.

71 See *e.g. D.D.*, *supra* note 4 at para. 52; *Brough v. Richmond* (2003), 14 B.C.L.R. (4th) 184 at para. 14 (S.C.); *UAP Inc. v. Oak Tree Auto Centre* (2001), 204 Nfld. & P.E.I.R. 189 at paras. 89-90 (P.E.I. S.C.(T.D.)); *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.* (2000), 146 Man. R. (2d) 284 at para. 24 (Q.B.) [*Prairie Well Servicing*]; *Fellowes*, *supra* note 9 at 459-61; *R. v. D.L.M.*, [1996] O.J. No. 3596 at para. 4 (C.A.) (QL) (upholding trial judge's determination that defence expert was more

that expert witnesses must not act as advocates. This is meant in two senses: (i) a person cannot be both an expert witness and counsel; and (ii) a person who is an expert witness must be impartial — which by definition an advocate is not. As the principles set out in *The Ikarian Reefer*[74] suggest, it is precisely because the courts tend to place great weight on the evidence of expert witnesses that they are so insistent that experts act dispassionately.[75] An expert should provide independent assistance to the court through an objective and unbiased opinion.

The best test of whether an expert is impartial occurs when the court is satisfied that his or her opinion would not change regardless of which party retained him or her. In the language of *The Ikarian Reefer*, the expert's opinion should be "uninfluenced as to form or content by the exigencies of litigation."[76] The test is easily stated, but more difficult to apply. Strictly speaking, it cannot mean what it says; in most cases the expert evidence would not have come into existence but for the "exigencies of litigation." Expert partiality is commonly a function of appearance and perception rather than objective factors; thus, an expert may be partial unintentionally.[77] Impartiality tends to be a matter of attitude. Partiality may exist where the expert's opinion is entirely one-sided despite conflicting evidence,[78] where the expert adopts an argumentative attitude[79] or where the expert permits his or her own role in the litigation process to merge with that of counsel.[80] An expert's evidence may be given less weight due to strong personal views about the issues in dispute[81] or personal involvement at a critical time.[82] Courts have found partiality where the expert is an informed champion or an enthusiastic supporter of the retaining party's cause.[83] In each instance, the court's

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of an advocate than an impartial expert); *Fenwick v. Parklane Nurseries Ltd.* (1996), 32 C.L.R. (2d) 25 at paras. 33-34 (Ont. Gen. Div.) [*Fenwick*] (expert acted as "zealous advocate" for client); *Sebastian v. Neufeld* (1995), 41 C.P.C. (3d) 354 at 358-59 (B.C.S.C.) [*Sebastian*]; *Cogar Estate v. Central Mountain Air Services Ltd.* (1992), 72 B.C.L.R. (2d) 292 at paras. 23-29 (C.A.); *Richards v. M.N.R.* (1986), 86 D.T.C. 1475 at 1476 (T.C.C.) (value of testimony "severely decreased" where expert "assumes the mantle of an advocate"); *McKie v. The K.V.P. Co. Ltd.*, [1948] 3 D.L.R. 201 at 204 (Ont. H.C.), aff'd [1949] S.C.R. 698.

72 *Re London (City of) Official Plan Amendment Nos. 162, 163 and 164* (1999), 39 O.M.B.R. 500 at 507; *Re Collingwood (Town of) Official Plan Amendment Nos. 23, 27 & 28* (1997), 36 O.M.B.R. 1 at 11.

73 *Re Pizza Pops, a Division of Pillsbury Canada Ltd. and U.F.C.W., Local 832*, [2001] M.G.A.D. No. 1 at para. 234 (QL).

74 *Supra* note 37.

75 *Autospin (Oil Seals) Ltd. v. Beehive Spinning*, [1995] R.P.C. 683 at 693 (Ch. D.); *Olscamp, supra* note 42 at 476-80.

76 *Supra* note 37 at 81; *930154 Ontario Inc. v. Onofri*, [1994] O.J. No. 2095 at para. 7 (Gen. Div.) (QL).

77 *Peter Lombardi Construction Inc. v. Colonnade Investments Inc.*, [1999] O.J. No. 3752 at para. 420 (Sup. Ct. J.) (QL).

78 *Pearce v. Ove Arup Partnership Ltd. (No. 2)*, [2001] EWHC Ch. 455 (Ch. D.); *R. v. Dowdling & Grollo*, [2000] VSC 222 at para. 19 (Vict. S.C.) [*Dowdling*].

79 *Vancouver Community College v. Phillips Barratt* (1988), 29 C.L.R. 268 at 285-87 (B.C.S.C.) [*Vancouver Community College*]; *Dowdling, ibid.*; *Huerto v. College of Physicians and Surgeons of Saskatchewan* (1999), 178 Sask. R. 52 (Q.B.) [*Huerto*].

80 *Stephen v. Stephen* (1996), 183 Sask. R. 161 at para. 22 (Q.B.) [*Stephen*].

81 *Randwick City Council v. Minister for the Environment*, [1998] FCA 1376 (F.C.A.) [*Randwick City Council*] (witness had acted as consultant to protest groups); *Hart v. Cooper* (1994), 2 E.T.R. (2d) 168 at para. 36 (B.C.S.C.) (physician's evidence "significantly impaired" by bias); *Ontario (A.G.) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 at 389-91, 427-29 (H.C.) [*Bear Island Foundation*].

82 *Samson v. Lockwood* (1995), 49 R.P.R. (2d) 18 at paras. 129-32 (Ont. Gen. Div.).

83 *Halpern v. Canada (A.G.)* (2002), 215 D.L.R. (4th) 223 at paras. 143-44 (Ont. Div. Ct.); *Bear Island Foundation, supra* note 81 at 390 (witness active supporter of native rights).

conclusion was based on its perception of the expert's testimony itself, rather than by reference to objective characteristics of the expert.[84]

In evaluating an expert's impartiality, courts may look beyond the expert's evidence in the case before them and consider the expert's previously expressed views. Many experts will have published in their field of expertise or testified on previous occasions. This makes it difficult for them to diverge from their past views. It is thus common for parties to review the previous writings and testimony of an opposing expert for inconsistencies and contradictions with present evidence, a process facilitated by the internet and on-line case law databases. An English Court found an expert to be unacceptably partial after reviewing an earlier article by the expert concerning the role of an expert witness.[85] The Court quoted disapprovingly from the article, in which the expert had analogized the litigation process to a game of three card monte:

> [T]he man who works the Three Card Trick is not cheating, nor does he incur any moral opprobrium, when he uses his sleight of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on.... If by an analogous "sleight of mind" an expert witness is able to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration.[86]

The Court relied on these statements in finding that the expert had misconceived his role and was not impartial.[87] The situation is unusual, since few experts would be so candid about their perception of their role. It shows, however, that the courts may take a broad view in evaluating an expert's impartiality. Certainly, courts show little reluctance in permitting cross-examination of an expert based on views previously expressed in print or under oath.

Yet, courts should not be too quick to find bias on the part of expert witnesses. In particular, it is critical to distinguish the tendency for experts to be partisan from a mere conflict between expert testimony.[88] The former should be discouraged, but the latter may reflect a genuine divergence of opinion amongst experts, which is essential to the adversarial process.[89] Even where experts proceed from the same set of assumptions, they commonly reach different results. Disagreement is rife in the sciences, let alone the social sciences. This is not objectionable and is not itself evidence of expert partiality. Indeed, at least some of the motivation underlying the development of increased duties on expert witnesses is the assumption that if expert partiality and dependence could be stripped away, then science

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[84] This subjective element of evaluating the impartiality of an expert witness has led in at least one case to the retaining party arguing — albeit unsuccessfully — that the judge who found its expert witness to be partial had himself shown the appearance of bias: *Cairnstores Ltd. v. Aktiebolaget Hassle*, [2002] EWHC 309 (Ch. D.), aff'd [2002] EWCA Civ. 1504 at para. 2 (C.A.).

[85] *Cala Homes (South) Ltd. v. Alfred McAlpine Homes East Ltd.* (1995), 22 F.S.R. 818 (Ch. D.).

[86] *Ibid.* at 841-42.

[87] *Ibid.* at 842-43.

[88] Law Reform Commission of Western Australia, "A Review of the Criminal and Civil Justice System: Consultation Draft" (1997) at 672-73, online: Law Reform Commission of Western Australia <www.lrc.justice.wa.gov.au/>.

[89] Hon. Mr. Justice Glass, "Expert Evidence" (1987) 3 Austl. Bar Rev. 43 at 49; Foster, *supra* note 70 at 179.

would produce the "right answer." That assumption is based on a faulty conception of how science actually operates. In particular, it ignores real scientific disagreement.[90] In their efforts to curtail expert advocacy, the courts must remain tolerant of a legitimate difference of opinion between experts, which is a feature of many fields of expertise. Put another way, "advocacy" should not include an expert's strenuous defence of an opinion within the expert's field of expertise, even if it is a minority view. Experts are charged with forming opinions based on a specified set of factual assumptions. It is not improper for an expert to contest counter-arguments or challenges to his or her opinion, or to defend that opinion forcefully. However, it is improper for the expert to argue as to whether the assumed facts are actually proven[91] or to show an "inappropriate eagerness" to assist the retaining party.[92] The courts' main concern should be to ensure that experts are not tailoring their views to fit the positions of the party retaining them. In principle, the way to test this is to pose the counterfactual identified above: would the expert express the same opinion regardless of which party retained him or her?

A key unresolved issue, in Canada and in other common law countries, is whether expert partiality should affect either the admissibility or weight of expert evidence. One line of cases suggests that where an expert's testimony or "report is overwhelmingly directed to advancing the position" of the party that retained him or her, the judge must take this into consideration in evaluating the expert's credibility.[93] The traditional Canadian approach has been that concerns about the impartiality of an expert witness affect the weight given to his or her testimony, not its admissibility.[94] In a recent Australian case, the judge indicated that, although he would not refuse to admit testimony tainted by impartiality, "[b]eing particularly alive to the issue, [he] proposed to take up the subject with the jury in the usual or stronger terms as appropriate."[95] The question is whether that approach is consistent with the new "gatekeeper" approach to expert evidence advanced by the Supreme Court of Canada in *J.-L.J.*,[96] which implies the exclusion of such evidence.

A competing line of cases refuses to admit the evidence of an expert who is not impartial.[97] In one Australian case, the Court observed that "to the extent that expert evidence was not uninfluenced by the exigencies of litigation that evidence 'is likely to be not only incorrect but self-defeating,'" and excluded the evidence on that basis.[98] Other cases have avoided the issue by eliding the two options.[99]

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90 Tal Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Cambridge: Harvard University Press, 2004) at 3-4.

91 Richard Eggleston, *Evidence, Proof and Probability*, 2d ed. (London: Weidenfeld & Nicolson, 1983) at 154.

92 *Bolton v. Vancouver (City of)* (2002), 29 M.P.L.R. (3d) 249 at para. 10 (B.C.S.C.).

93 *Perricone*, *supra* note 38 at para. 17; *Huerto*, *supra* note 79 at paras. 45-54.

94 *N.M. Paterson and Sons Ltd. v. Mannix Ltd.*, [1966] S.C.R. 180 at 183.

95 *Dowdling*, *supra* note 78 at para. 18.

96 *Supra* note 29.

97 *Citak*, *supra* note 9 at para. 5; *Fellowes*, *supra* note 9 at 459; *Ivan Biuk Construction Ltd. v. Kitchener (City of) Committee of Adjustment*, [2000] O.M.B. Dec. No. 1123.

98 *Randwick City Council*, *supra* note 81.

99 *Stephen*, *supra* note 80 at para. 22 (where counsel interferes with the expert, "[t]he interference may lead to the expert opinion becoming irrelevant, immaterial, or unworthy of weight").

The most recent Australian contribution to the debate — albeit in a case about independence rather than impartiality — has come down strongly against a rule that would exclude expert evidence as a result of bias. In *Fagenblat*,[100] the Victoria Court of Appeal upheld a lower court's refusal to exclude the expert evidence of a chartered accountant who was the brother-in-law of one of the parties. Justice Ormison rejected the suggestion that perceived bias is a basis for disqualification of an expert witness. Such a rule would mean that an expert with an interest in the proceedings was not competent to testify. Justice Ormiston saw no basis for such a rule. The rules precluding witnesses with an interest in proceedings from testifying had been swept away in the nineteenth century. Challenges to expert witnesses should be directed toward their expertise or to the weight to be given to their evidence, not its admissibility.

G. INCREASED SCRUTINY OF COUNSEL IN DEALING WITH EXPERT WITNESSES

As courts become more wary of expert partiality, the interaction of counsel with experts will be subject to greater scrutiny.[101] Indeed, one method of controlling expert witnesses is to do so indirectly, by regulating the lawyers who select and work with them.[102] The requirement of impartiality does not bar experts from working with counsel. The danger, however, is that the expert will permit his or her own role in the litigation process to merge with that of counsel. How, then, can counsel interact with an expert while maintaining the expert's impartiality? Clearly, counsel may give instructions to an expert witness in order to retain him or her.[103] To ensure clarity, it may be desirable to do this in writing.[104] Counsel may also consult with the expert to determine the parameters within which the expert is to exercise his or her expertise.[105] Increased transparency in counsel's dealings with expert witnesses is, however, becoming a court imposed requirement.

Counsel and expert witnesses must maintain their distinct roles, but they may interact. Counsel is not barred from ensuring that the expert's report is focused, relevant, reliant on facts rather than argument or legal opinion and addressed to the key factual matters in issue.[106] Counsel should narrow the issues in dispute and assist the expert in fulfilling his or her own duties. Thus, principle (1) from *The Ikarian Reefer*, which requires that expert evidence be the independent product of the expert,[107] does not prohibit counsel from ensuring that the expert focuses on the matters in issue. Counsel should impose a defined mandate, not an unrestricted one, and may ask the expert to answer specific questions.[108] Counsel may also suggest factors or considerations to the expert, but cannot dictate them; the expert's judgement on those matters must remain unrestricted.[109] In accordance with principle (4)

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100 *Supra* note 43.

101 *Stephen*, *supra* note 80.

102 Tania M. Bubela, "Expert Evidence: The Ethical Responsibility of the Legal Profession" (2004) 41 Alta. L. Rev. 853.

103 *Ibid.* at 868.

104 Moreover, those instructions may not be subject to privilege.

105 Bubela, *supra* note 102 at 870.

106 *Ibid.*

107 *Supra* note 37 at 81.

108 *Sebastian*, *supra* note 71 at para. 15.

109 *Stephen*, *supra* note 80 at para. 26; see also *Boland v. Yates Property Corp. Pty. Limited*, [1999] HCA 64 at para. 279.

from *The Ikarian Reefer*, counsel should ensure that an expert witness does not attempt to address matters outside her field of expertise.[110] In sum, "counsel's participation should ensure that the [expert's] evidence is relevant, material," admissible and useful to the trier of fact.[111] Counsel should not attempt to pressure the expert to adopt a certain opinion.

By contrast, counsel must not bar the expert from exercising the discretion to consider factors the expert views as critical in coming to an opinion.[112] Counsel should not attempt to substitute his or her own views for those of the expert. Counsel should be careful to ensure that any material given to the expert to aid in preparation of the expert's report is admissible. If it is not, the court may refuse to admit the expert report because of the likelihood that the inadmissible evidence influenced the expert's opinion.[113] This is in accordance with principle (3) from *The Ikarian Reefer*: the expert should make clear what material she has relied upon and not ignore material facts that could influence her opinion.[114] Counsel must not draft the expert's report. In a famous case, Lord Denning M.R. excoriated an expert report that had been "settled" by counsel: "it wears the colour of special pleading rather than an impartial report. Whenever counsel 'settle' a document, we know how it goes. 'We had better put this in', 'We had better leave this out', and so forth."[115] Expert reports are likely to be less argumentative if they are written by the experts themselves, not by or under the direction of lawyers.[116]

Counsel should not conduct investigations on behalf of the expert; that task should be left for the expert, except where the expert relies upon a statement of facts likely to be easily proven at trial or not in dispute.[117] Moreover, "[c]ounsel should not encourage experts to undertake a broad review of voluminous material and make a vague statement that the opinion is based on that material."[118] Courts may question an expert's impartiality where a report is rewritten a number of times with the aid of counsel.[119] Overall, it is critical that the expert's evidence remain his or her own product. Some amount of consultation with counsel is inevitable, but the expert must maintain his or her independence.[120]

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110 *Supra* note 37 at 82.

111 *Stephen*, *supra* note 80 at para. 22.

112 *Ibid.*

113 *Sebastian*, *supra* note 71 at paras. 13-17.

114 *Supra* note 37 at 81.

115 *Whitehouse v. Jordan*, [1980] 1 All E.R. 650 at 655 (C.A.), aff'd [1981] 1 W.L.R. 246 (H.L.) [*Whitehouse*]. This view does not appear to be universally shared: *Janssen Pharmaceutica v. Apotex Inc.*, [2002] 1 F.C. 393 at para. 53 (F.C.A.) [*Janssen*] (indicating there was "nothing unusual" — and presumably nothing objectionable — about counsel preparing the first drafts of expert witnesses' affidavits "as long as the evidence is that of the affiant, not the lawyer").

116 *Emil Anderson Construction Co. Ltd. v. British Columbia Railway Company* (1987), 15 B.C.L.R. (2d) 28 at 33 (S.C.).

117 *Sebastian*, *supra* note 71 at para. 15; *Hennessy v. Rothman* (1988), 26 B.C.L.R. (2d) 322 at 324-26 (S.C.), aff'd (1988), 33 B.C.L.R. (2d) xxxi (C.A.).

118 *Sebastian*, *ibid.* at para. 15.

119 *Vancouver Community College*, *supra* note 79 at 285-87.

120 *Whitehouse*, *supra* note 115 at 655. See also *Kelly v. London Transport Executive*, [1982] 1 W.L.R. 1055 at 1064-65 (C.A.).

Courts have warned on several occasions that the expert's duty to be objective and impartial requires experts not to present argument to the court dressed up as evidence.[121] In some cases, this means legal argument posing as evidence.[122] In others, the reference is to the attitude of the expert, whose conception of his or her own role as an advocate for one party affects the expert's evidence or demeanour.[123] Others warn of situations where the roles of expert, advocate and eyewitness are mixed.[124] In short, experts "must express their opinions as opinions and must leave for the court the required conclusions of law."[125] Therefore, counsel should ensure that the expert report and testimony cannot be misconstrued as legal argument.

Counsel must evaluate from the outset the role to be played by the expert. Situations where the expert is hired as a "consulting expert" on a party's litigation team must be distinguished from those where the expert is hired as a witness. A consulting expert's duty is to the client alone; he or she is not bound by duties of impartiality and independence. Consequently, a consulting expert should not be put on the witness stand to give testimony.[126] Indeed, if the consulting expert is used as a witness at trial, it is likely that the expert's dealings with counsel will lose their privilege and the expert's testimony will be attacked as being partial. Counsel should thus consider hiring two different experts if both a consultant and witness are needed and ensure that their roles are not blurred.[127] The distinction between consulting experts, or "expert advisors," and "independent experts," who give evidence, should be formalized.[128] An expert will be deemed to be an advisor where it is likely that he or she will act as an advocate due to his or her assistance in formulating a claim, advising the client,

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121 *B.(W.R.) v. Plint* (1998), 165 D.L.R. (4th) 352 at paras. 14-18 (B.C.S.C.) (historian's report excluded).

122 *Samson Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* (2001), 199 F.T.R. 125 at paras. 22-23 (F.C.T.D.), appeal quashed (2001), 281 N.R. 360 (F.C.A.); *Mathias v. Canada* (1998), 144 F.T.R. 106 at paras. 9-10 (F.C.T.D.); *Yewdale v. ICBC* (1995), 3 B.C.L.R. (3d) 240 at paras. 4-5 (S.C.); *Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd.* (1995), 37 C.P.C. (3d) 119 at paras. 17-18 (F.C.T.D.).

123 See *e.g. Chapman v. Non-Marine Underwriters, Lloyd's London* (1996), 40 C.C.L.I. (2d) 240 at para. 11 (B.C.S.C.) (insurer's expert "attempting to build a case against the insured"); *Mahony v. Jarvis*, [1993] O.J. No. 248 at para. 141 (Gen. Div.) (QL); *Reese v. Alberta (Minister of Forestry, Lands & Wildlife)* (1992), 123 A.R. 241 at paras. 85, 99 (Q.B.).

124 *Degelder Construction v. Dancorp Developments Ltd.* (2000), 78 B.C.L.R. (3d) 256 at para. 120 (S.C.).

125 *Fesser v. Patterson*, [1999] 1 W.W.R. 197 at para. 24 (Sask. Q.B.) [*Fesser*].

126 In *Evans Deakin Pty Ltd. v. Sebel Furniture Ltd.*, [2003] FCA 171 at para. 676, the Federal Court of Australia drew a distinction between expert assistance in a party's preparation of its case, and giving expert evidence. The Court held that there was "no ethical reason" why the same expert could not play both roles, so long as the two tasks were kept separate. A similar view is expressed in Roger V. Clements, "The Changing Role of the Expert Witness" (2003) 71 Med.-Leg. J. 61 at 67.

127 Some argue that hiring two experts would unreasonably increase the financial burden of litigation. There is some truth to this, but it should be remembered that each expert would play a more limited role in the litigation than an expert used both as a consultant and a witness at trial. Thus, the cost to the party retaining two experts may be only slightly greater than the cost of retaining one expert to act as both a consultant and witness. Moreover, any increase in the cost of the litigation resulting from the hiring of two experts must be balanced against the fact that an expert who acts as both a consultant and witness has a greater chance of having his or her testimony given little or no weight at trial.

128 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System: Final Report* (Perth: Law Reform Commission of Western Australia, 1999) at paras. 22.8-22.10, 243-44, online: Law Reform Commission of Western Australia <www.lrc.justice.wa.gov.au> [LRCWA, *Final Report*]. A similar distinction is made in practice under the U.S. *Federal Rules of Civil Procedure 2003*, r. 26(6)(4).

identifying the facts needed in order to express an opinion, preparing a case for trial and providing a critical review of the expert evidence of other parties.

H. EXPERT INDEPENDENCE

In addition to the requirement of impartiality, expert witnesses must remain independent from the parties to litigation. This requirement was identified in *The Ikarian Reefer*: expert evidence "should be, and should be seen to be, the independent product of the expert."[129] It has been applied to exclude evidence that "may appear to be partisan."[130] Likewise, in *D.D.*, the Supreme Court of Canada held that "[i]n some notable instances, it has been recognized that ... lack of independence and impartiality [on the part of an expert witness] can contribute to miscarriages of justice."[131] Whatever the expert's ultimate opinion, and however impartial it may be, the expert may be attacked as lacking sufficient independence due to a prior or existing relationship between the expert and counsel or a party, or based on an overriding interest in the outcome of the litigation.

An expert's independence may be challenged on a range of grounds. The main categories are financial interest and professional or personal relationship. When an expert has a financial interest in the outcome of a proceeding, concerns about his or her independence are inevitable. The impartiality of an expert who has a direct[132] or indirect[133] financial stake in the litigation may be compromised. An expert's receipt of compensation from a party for giving evidence or preparing a report tends to be insufficient in itself to warrant interference by the court.[134] While courts recognize that a paid expert is not completely independent,[135] in most cases the courts will accept a limited degree of lack of independence. Indeed, even an unusually high expert's fee may be acceptable.[136] Something more is generally required for a challenge to an expert's independence to succeed on this basis.[137] From a practical standpoint, if courts required complete financial independence, it is unlikely that experts

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129 *Supra* note 37 at 81.

130 *Randwick City Council*, *supra* note 81.

131 *Supra* note 4 at para. 52, citing Ontario, *The Commission on Proceedings Involving Guy Paul Morin (Kaufman Report)* (Toronto: Ontario Minister of the Attorney General, 1998) at 172. As the reference suggests, this problem is particularly acute in criminal cases involving expert evidence from police forensic experts.

132 *General Refractories Co. of Canada v. Venturedyne Ltd.*, [2002] O.J. No. 54 at para. 127 (Sup. Ct. J.) (QL) [*Venturedyne*]; *Novartis AG v. Apotex* (2000), 6 C.P.R. (4th) 129 at paras. 31, 33 (F.C.T.D.) [*Novartis AG*] (less weight given to evidence of inventor with an "obvious interest" in seeing the patent given a broad interpretation); but see *Jurconi v. Kol-Yad Investments Ltd.*, [1997] B.C.J. No. 468 at para. 135 (S.C.) (QL) (expert witness' friendship with plaintiff and fact that he would only be paid if plaintiff succeeded due to plaintiff's impecuniosity did not affect his testimony).

133 *Mackie v. Wolfe* (1994), 153 A.R. 81 at para. 65 (Q.B.) (expert's evidence discounted where he had a "personal and perhaps financial interest" in confirming existence of medical condition); *Mortimer Co. Ltd. v. Frontenac Breweries Ltd.*, [1930] 1 D.L.R. 182 at 185-86 (S.C.C.) (overruling trial judge's rejection of defendant's expert evidence from business rivals of the plaintiff where the same criticism applied to the plaintiff's expert).

134 *Rudberg (c.o.b. Urban Design & Renovation) v. Ishaky*, [2000] O.J. No. 376 at para. 232 (Sup. Ct. J.) (QL), referring to *Interamerican Transport Systems v. Canadian Pacific Express & Transport Ltd.*, [1995] O.J. No. 3644 at para. 61 (Gen. Div.) (QL) [*Interamerican Transport Systems*]; *R. v. Newman* (1994), 115 Nfld. & P.E.I.R. 197 at para. 219 (Nfld. C.A.).

135 *Interamerican Transport Systems*, *ibid.*

136 *Irving v. Penguin Books Ltd.*, [2001] EWCA Civ. 1197 at para. 107 (C.A.).

137 *Interamerican Transport Systems*, *supra* note 134 at para. 61; *Fenwick*, *supra* note 71 at para. 35.

would agree to testify.[138] Moreover, being paid to testify doesn't necessarily generate a financial interest in the outcome of the proceeding. An expert who is paid to testify may be — and indeed, should be — indifferent as to whether his or her client wins or loses. The "hired gun" epithet thus really refers to the notion that an expert should not offer an opinion for sale; that is, offer to change or "tailor" it for a fee. An expert is not precluded from accepting payment to testify, but there are limits. An expert witness, for instance, who accepts payment to give false or misleading evidence clearly acts improperly. An expert who receives a contingency fee, and thus has a vested interest in the outcome of the litigation, is not independent[139] but rather a "co-venturer in the litigation."[140] However, agreements that expert witnesses be paid a "reasonable" fee to be determined by the court may be acceptable. Indeed, such "nonpercentage contingency fees" may balance concerns about lack of independence with access to justice for those who would otherwise not be able to afford an expert witness.[141]

Several other situations may cast doubt on the independence of an expert. A "long and close" professional relationship between an expert and a party — including cases where the expert has testified for the party on other occasions — may cast doubt on the expert's independence.[142] The expert's expectation of "repeat business" from a party or counsel could in certain circumstances be a source of bias.[143] Courts are particularly suspicious of "professional experts," whose main or sole professional activity is the provision of expert testimony.[144] For similar reasons, although there is no prohibition against a party who is also an expert giving expert evidence, his or her evidence may be accorded less weight because it is that of a party.[145] Courts may give less weight to the expert evidence of a long-time[146] or

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138 In some cases, an unwilling expert may be compelled to testify: *Christensen v. Sinclair* (2002), 210 D.L.R. (4th) 170 (B.C.C.A.). In *Labbee v. Peters* (1996), 10 C.P.C. (5th) 312 (Alta. Q.B.), the Court compelled an expert retained by the plaintiff to give an opinion to the defendant. The Court did so even though the expert was retained by the plaintiff for strategic advice; it was held that he could still provide independent advice to the defence without relying on confidential information.

139 *R. (Factortame Ltd.) v. Transport Secretary (No. 8)*, [2003] Q.B. 381 at para. 73 (C.A.) [*Factortame*]; *Citak*, *supra* note 9 at para. 7; *Tagatz v. Marquette University*, 861 F.2d 1040 at 1042 (7th Cir. 1988).

140 *Citak*, *ibid.* In England, the Judicial Committee of the Academy of Experts issued "Guidelines on Contingency Fees," online: The Academy of Experts <www.academy-experts.org>. These guidelines, issued in 1995 and 1998, expressed the view that "any form of contingency fee arrangement for Expert Witnesses is incompatible with the Experts' duty of independence and impartiality."

141 See Jeffrey J. Parker, "Contingent Expert Witness Fees: Access and Legitimacy" (1991) 64 S. Cal. L. Rev. 1363.

142 *Toronto (Metropolitan) v. Loblaw Groceterias Co. Ltd.*, [1972] S.C.R. 600 at 608-609 [*Loblaw Groceterias*]; *Amertek v. Canadian Commercial Corp.* (2003), 229 D.L.R. (4th) 419 at para. 449 (Ont. Sup. Ct. J.) [*Amertek*] (expert had been counsel to client in at least 14 previous cases); *Novartis AG*, *supra* note 132 at paras. 31-34 (noting "close connection" of witness to party); *Carleton Condominium Corp.*, *supra* note 38 at paras. 29-30 (less weight given to expert evidence due to a close professional collaboration between expert and a party to the litigation; the collaboration concerned the same point upon which the expert was called to give evidence).

143 *Amertek*, *ibid.* (expert saw client as "source for future work referrals").

144 Such witnesses are not necessarily biased, but the fact that they spend a large portion of their time testifying may mean that they are not really experts at all.

145 *Woodruff v. Alloway*, [1999] B.C.J. No. 343 at para. 28 (S.C.) (QL); but see *Fellowes*, *supra* note 9 at 459-60.

146 *Novartis AG*, *supra* note 132 at para. 31; *Prairie Well Servicing*, *supra* note 71 at para. 24 (general manager and senior engineer of defendant not sufficiently independent); but see *R. v. Teske*, [2001] O.J. No. 1896 at paras. 29-31 (Sup. Ct. J.) (QL) [*Teske*] (refusing to give less weight to expert trained "in house" and employed by police force); *Field v. Leeds City Council*, [1999] E.W.J. No. 6741 at para.

senior[147] employee of a party, unless there are structures in place to ensure the expert's independence.[148] Concerns about an employee's independence tend to affect the weight of the evidence, not its admissibility.[149] An expert who plays a multi-faceted role in the proceedings may not be considered sufficiently independent.[150] An expert habitually retained by a particular party or type of party also risks challenges to his or her independence. The excessive involvement of counsel in preparing the witness may also lead to a finding of lack of independence.[151] The courts tend to presume, however, that experts will adhere to their professional obligations of independence unless there is evidence to the contrary. Deviations from those obligations will affect the value of expert evidence.[152]

A personal relationship between an expert witness and a party or counsel may be a source of lack of independence. A controversial English case suggests that the evidence of an expert witness who has a personal relationship with a party — whether as a friend, relative or romantic interest — should be inadmissible. In *LRCA Trustees v. Goldberg (No. 2)*, Evans-Lombe J. suggested that an exclusionary rule should apply "where it is demonstrated that there exists a [personal] relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted however unbiased the conclusions of the expert might probably be."[153] Exactly how this test would operate in practice is not clear, although it was followed in a recent British Columbia case to justify the exclusion of the evidence of an expert witness altogether.[154]

These considerations suggest that in evaluating expert independence, context is critical. In some fields of expertise there may be only a handful of experts, all of whom may know and have personal or professional relationships with each other or with one or more of the parties. A rigid exclusionary rule, or even a mandatory rule requiring that less weight be

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10 (C.A.) [*Field*] (mere fact of employment of expert witness does not lead to disqualification); *Janssen*, *supra* note 115 at para. 28.

147 *Oracle Corp. v. Oracle Service Networks Corp.*, [1999] T.M.O.B. No. 8 at para. 7 (QL) (limited weight accorded to expert evidence of vice president and general counsel of party); *Re British Columbia Forest Products Ltd. and Pulp, Paper and Woodworkers of Canada Local 2* (1978), 20 L.A.C. (2d) 104 at 108-109.

148 *Field*, *supra* note 146 at paras. 10-12; *Brunet v. M.N.R.* (1981), 82 D.T.C. 1308 at para. 4.03.2 (Tax Rev. Bd.); *Fambau Limited v. M.N.R.* (1981), 82 D.T.C. 1027 at 1032-34 (Tax Rev. Bd.).

149 *Hancor v. Systèmes de Drainage Modernes* (1991), 45 F.T.R. 266 at para. 8 (F.C.T.D.); *P.G. du Québec c. Marleau*, [1995] R.D.J. 236 at 240-41 (C.A.); *Municipalité du Mont-Tremblant c. Tellier*, [1994] R.D.J. 44 (C.A.).

150 *Canada (Minister of Transport) v. Norris*, [2000] C.A.T.D. No. 16 at para. 9 (Can. Civ. Aviat. Trib.) (QL) [*Norris*] (case investigator insufficiently independent to be expert witness); *Dansereau Estate*, *supra* note 38 at para. 141 (evidence of lawyers having prior involvement in case not given any weight); compare *Lapointe v. Canada (Minister of Transport)*, [1998] C.A.T.D. No. 26 at paras. 20-21 (Can. Civ. Aviat. Trib.) (QL).

151 *Whiten v. Pilot Insurance*, [2002] 1 S.C.R. 595 at para. 22. See also *Stephen*, *supra* note 80; *Vancouver Community College*, *supra* note 79 at 284-87. See also the discussion above about the role of counsel in relation to expert witnesses in light of concerns regarding partiality.

152 *Fesser*, *supra* note 125 at paras. 24-25.

153 [2001] 4 All E.R. 950 at para. 13 (Ch. D.) [*Goldberg*].

154 *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617 at paras. 34-35 [*Kirby Lowbed Services*].

given to evidence from such experts, is thus inappropriate. In some cases, it could prevent the best, or indeed any, expert evidence from being placed before the court.

Traditionally, concerns about the independence of an expert witness have gone to the weight to be given to that evidence rather than its admissibility.[155] Instead of excluding testimony tainted by a lack of independence, courts tend to allow the expert to be cross-examined to allow the trier of fact to determine the weight to give the testimony.[156] One administrative tribunal stated that while it was in the best interests of the party calling an expert to ensure that the expert is independent, the tribunal could not exclude testimony that was insufficiently independent; such concerns would affect the weight of the evidence alone.[157] This principle is equally applicable when the trier of fact is faced with competing expert opinions.[158] According to this approach, a party is free to call expert evidence that may lack independence or impartiality, but it would be more prudent — and the evidence would be more compelling — if the expert's evidence reflected those qualities.[159]

Although the courts are already aware of the dangers of a lack of independence, the trend established by *The Ikarian Reefer*[160] and the Supreme Court of Canada's decisions in *Mohan*, *D.D.* and *J.-L.J.*[161] suggests that scrutiny of expert independence is likely to increase. Future developments will likely be in the area of challenges based on expert witnesses' personal relationships with one of the parties. In extreme situations, the court will refuse to give expert evidence tainted by a lack of independence any weight at all, effectively excluding the evidence.[162] Some courts even penalize parties who call insufficiently independent experts by refusing to admit that testimony. While recognizing that, *prima facie*, a lack of independence should affect weight, "there can be cases wherein the involvement of the expert is such that his or her evidence may be ruled inadmissible."[163] In *Goldberg*, expert evidence tainted by a lack of independence due to a close personal relationship was held by an English Court to be inadmissible.[164] In *Bank of Montreal v. Citak*,[165] an Ontario Court reached a similar conclusion regarding evidence given by an expert paid a contingency fee. In at least

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155 *Field*, *supra* note 146 at para. 31; *Northwest Mettech Corp. v. Metcon Services Ltd.* (1997), 74 C.P.R. (3d) 464 at paras. 12-13 (B.C.S.C.) [*Northwest Mettech Corp.*]; *Perricone*, *supra* note 38 at para. 17.

156 *Loblaw Groceteria*, *supra* note 142. See also *Teske*, *supra* note 146 at para. 30. See discussion in E.J. Levy, "Examination of Expert Witnesses" in Kenneth M. Matthews *et al.*, *The Expert: A Practitioner's Guide* (Scarborough: Carswell, 1995) at paras. 2-3.

157 *Lapointe v. Canada (Minister of Transport)*, [1998] C.A.T.D. No. 26 at para. 8 (Can. Civ. Aviat. Rib.) (QL).

158 *Erco Industries Ltd. v. British Columbia*, [1981] B.C.J. No. 26 at para. 24 (S.C.) (QL), followed in *London and Midland General Insurance v. Kansa General Insurance*, [1994] I.L.R. 1-3112 at 3073 (Ont. Gen. Div.). See also *Venturedyne*, *supra* note 132 at para. 229.

159 This was the approach adopted in *Fagenblat*, *supra* note 43.

160 *Supra* note 37.

161 *Mohan*, *supra* note 8; *D.D.*, *supra* note 4; *J.-L.J.*, *supra* note 29.

162 See *Remington Rand Corp. v. Philips Electronics N.V.* (1993), 51 C.P.R. (3d) 392 at 396-97 (F.C.T.D.) (witness who had plagiarised expert evidence of another witness in other proceeding lacked degree of independence necessary for expert: evidence accorded no weight), rev'd on other grounds (1995), 64 C.P.R. (3d) 467 (F.C.A.), leave to appeal refused (1996), 67 C.P.R. (3d) vi (S.C.C.); *Vancouver Community College*, *supra* note 79 at 289; *Fellowes*, *supra* note 9.

163 *Northwest Mettech Corp.*, *supra* note 155 at para. 18.

164 *Supra* note 153 at paras. 10-14.

165 *Supra* note 9. Justice Farley also considered other grounds on which to exclude the expert testimony.

one administrative proceeding, a tribunal refused to admit the testimony of an expert who was perceived to be insufficiently independent.[166]

There has been some resistance to these developments. The application of a rigid exclusionary rule to expert evidence because the witness may have an interest in the proceedings is insensitive to context. In *Fagenblat*,[167] the Victoria Court of Appeal rejected the exclusionary approach adopted by the English Court in *Goldberg*.[168] The Court refused to exclude the testimony of an expert accountant who was the brother-in-law of the plaintiff. It held that possible bias of an expert witness should affect the weight of the expert's evidence, but could not lead to the exclusion of his evidence. The Court placed particular emphasis on the fact that a strict exclusionary rule would be impractical. Its application — and particularly, the implication that an expert witness who was related to or employed by a party could never give evidence — would cause unnecessary expense and hardship in many circumstances. Similarly, in *Factortame*, the English Court of Appeal cast doubt on the approach adopted in *Goldberg*, and rejected the suggestion that an expert witness who is employed by a party cannot testify.[169] Indeed, even in *Goldberg* itself, the Court emphasized the need to focus on the extent and nature of the relationship between the proposed witness and the party.[170] According to the *Fagenblat* approach, while it may be desirable that expert witnesses act in an impartial and independent manner, their evidence should not be excluded if they do not do so.[171] Such concerns, however, will affect the weight given to the evidence.[172]

Some courts have suggested that the conflict of interest rules that apply to lawyers should also govern consulting experts.[173] Consulting experts are involved in the preparation of a party's case and may have access to privileged or confidential information. In some cases, consulting experts have been restrained from acting for an opposing party in a separate action;[174] in others they have been disqualified from serving as expert witnesses.[175] However,

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166 *Norris*, *supra* note 150 at para. 9 (expert who was initial investigator, wrote case report and made recommendation for adjudication not sufficiently independent).

167 *Supra* note 43. See also *Collins Thomson v. Clayton*, [2002] NSWSC 366.

168 *Supra* note 153.

169 *Supra* note 139 at paras. 69-70; see also *Admiral Management Services Ltd. v. Para-Protect Europe Ltd.*, [2002] 1 W.L.R. 2722 at 2732 (Ch. D.). In adopting the approach in *LRCA Trustees v. Goldberg (No. 2)*, the B.C. Supreme Court in *Kirby Lowbed Services*, *supra* note 154, did not refer to any of the subsequent English decisions casting doubt on that approach.

170 *Goldberg*, *supra* note 153 at paras. 10-14.

171 *Supra* note 43.

172 *Ibid.* at paras. 24-26.

173 Some cases have applied *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (setting out the conflict of interest rules applying to lawyers) to expert consultants: *Burgess (Litigation Guardian of) v. Wu* (2003), 68 O.R. (3d) 710 at paras. 96-102 (Sup. Ct. J.); *Drabinsky v. KPMG* (1999), 33 C.P.C. (4th) 318 (Ont. Div. Ct.); *Arends v. Lockhart*, [1999] B.C.J. No. 3181 at paras. 5-6 (S.C.) (QL) [*Arends*]; *Breda v. Breda* (1997), 10 C.P.C. (4th) 133 (Ont. Gen. Div.) [*Breda*]; *United States Mineral Products v. Pinchin Harris Holland Associates Ltd.*, [1992] 6 W.W.R. 590 (B.C.S.C.) [*United States Mineral Products*].

174 *United States Mineral Products*, *ibid.* at para. 25.

175 See *Arends*, *supra* note 173; *Breda*, *supra* note 173 at paras. 15-16.

due to the small number of cases applying the conflict of interest rules to experts, the precise consequences of doing so remain unclear.[176]

III. COSTS OF EXPERT BIAS

Bias on the part of expert witnesses generates costs.[177] In considering how to place controls on expert bias, it is critical to evaluate those costs and determine whether proposed control mechanisms are likely to address them. Control mechanisms have their own costs, and they must be compared with the costs of bias to ensure that the proposed cure is not worse than the disease. The required thought experiment is to treat bias on the part of expert witnesses as a species of market failure. This assumes the existence of a market for expert evidence, where the service provided by experts influences judicial and administrative decision-makers.

The costs of expert bias fall on the parties and on society more generally. There are at least four types of costs. First, where courts rely on expert evidence that is biased, it is more likely that the resulting decision will be incorrect, as it will have relied in part on expert evidence skewed by a lack of impartiality or independence. Second, where a legal regime does not require expert witnesses to internalize the full cost of their production of biased evidence, the likely result will be an overproduction of expert evidence. Experts will be paid handsomely while facing few quality requirements. Related to this is a third concern: the problem of a "race to the bottom." Parties faced with biased evidence from an opposing expert may feel that their own expert will be at a disadvantage if she does not also engage in some stretching of the truth. On this hypothesis, each side is engaged in an individually rational but mutually inefficient exercise of retaining biased experts. Fourth, expert bias is likely to give rise to a sort of Gresham's Law of expert evidence; a "distrust externality" may infect all expert witnesses, encouraging unbiased experts to exit the market. This would thereby reduce the quality of expert evidence overall, with adverse consequences for the quality of decision-making that relies on expert evidence.[178]

The goal of regulation should be to make expert evidence as accurate as possible at a minimal cost. We argue that increased scrutiny of the partiality or lack of independence of expert witnesses should continue, but frailties should generally go to the weight to be given to their evidence, rather than its admissibility. At the same time, courts should experiment with other methods of controlling expert bias. The costs and benefits of these other methods, which we discuss in greater detail below, are largely unknown. Indeed, one grave difficulty of regulating the conduct of expert witnesses is that there is relatively little empirical evidence as to what works and what does not. Only by engaging in a process of experimentation with different control mechanisms can the most effective and efficient control mechanisms for expert bias be determined.

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176 See Douglas R. Richmond, "Expert Witness Conflicts and Compensation" (2000) 67 Tenn. L. Rev. 909.

177 Discussed in Jeffrey L. Harrison, "Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses" (2001) 18 Yale J. on Reg. 253.

178 *Ibid.* at 262-72.

Various critical perspectives on the more exacting standards and sanctions on expert witnesses have emerged. One theory envisions a market for experts that is largely self-regulating.[179] It suggests that only minor changes to the existing system are required. A second and related approach also adopts a market analysis to regulating expert behaviour, but is more pessimistic about the operation of existing regulatory mechanisms.[180] A third approach is suspicious of the imposition of ill-defined duties on experts. It tends to view long lists of court imposed duties as platitudinous, logically incoherent and likely to lead to uncertain results, and greater expense, for little gain.[181] Finally, one strain of critique doubts whether experts can ever be objective, and thus doubts whether imposing a duty of impartiality and independence is worthwhile.[182] In our view, lessons may be extracted from each of these four approaches, but none of them provides a complete response to the problem of expert bias.

As noted above, control mechanisms have their own costs. While the increased scrutiny of expert evidence will likely increase the reliability of expert testimony, it is also likely to impose greater costs on the parties and society more generally. Higher standards for expert witnesses will make expert evidence more expensive and require counsel to spend more time and money to ensure that expert witnesses comply with their increased obligations. It will also encourage parties to spend more money and effort to investigate and challenge opposing expert witnesses in the hope that their evidence may be excluded altogether. The social costs are more general. An exclusionary rule may deny the trier of fact access to all the information needed to reach the right decision. Increased proceduralization of expert evidence will make the presentation of expert evidence more expensive and lengthy for the courts as well as the parties.

IV. CONTROL MECHANISMS

Both internal and external control mechanisms are available to minimize expert partiality and lack of independence, and thus to ensure that the expert upholds his or her duty to the court.[183] Internal mechanisms focus on the courtroom and, in particular, the effect given to an expert's evidence. External mechanisms, discussed below, are sanctions against expert conduct that are directed to experts themselves, or the parties retaining them, and not to their evidence. The effectiveness of the various control mechanisms is best evaluated by considering how and to what extent they address the four main causes of expert bias noted above: the financial compensation of experts; the selection of experts by the parties; experts susceptibility to suasion by counsel; and experts' tendency to view themselves as part of the parties' litigation team.

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179 Richard A. Posner, "The Law and Economics of the Economic Expert Witness" (1999) 13:2 J. Econ. Persp. 91.

180 Harrison, *supra* 177.

181 Justice Jacob, "How is the Overriding Duty to the Court Enforceable?" *Expert Witness Institute Newsletter* (Autumn/Winter 2002), online: Expert Witness Institute <www.ewi.org.uk/newsletter3.asp>.

182 Gary Edmond, "After Objectivity: Expert Evidence and Procedural Reform" (2003) 25 Sydney L. Rev. 131.

183 It should be noted, however, that few of the control mechanisms discussed assist in detecting expert bias; they focus on minimizing or preventing it from occurring in the first place. While prevention or minimization of expert bias is essential, such a focus draws attention away from the fact that detecting bias is often difficult.

A. INTERNAL CONTROLS

The traditional control mechanisms exercised over expert witnesses have been the same as those applied to lay witnesses: the requirement that a witness's evidence be given under oath or affirmation and the right of opposing parties to subject the witness to cross-examination. The oath focuses the expert's attention on his or her obligation to tell the truth and the solemnity of the task. It also provides the basis for prosecution for perjury should the expert violate the oath. The prosecution for perjury of expert witnesses who breach their duties was suggested more than two centuries ago by Lord Mansfield in *Folkes v. Chadd*,[184] yet it seems unlikely to prove an effective control mechanism. Perjury — false evidence given under oath that is material to the case and that the witness believes to be untrue — is difficult to prove, particularly in cases where an expert is giving opinion evidence on complex matters.[185] Moreover, it is unlikely that most expert witnesses purposefully lie under oath; rather, they likely believe that they are just putting the best face on the truth. Prosecution for perjury would come into play only in an extreme case of expert misbehaviour. It is too broad an axe to act as an effective deterrent or control mechanism in most cases.[186] Reliance on the rule against perjury does little to address the four concerns of expert bias outlined in Part II.E above.

Cross-examination can be effective in ensuring that an opposing expert witness adheres to the obligations of impartiality and independence. Indeed, it remains among the most important means for doing so. Counsel tends to be given broad latitude in cross-examination on matters going to the independence and impartiality of an opposing expert.[187] It is common for counsel to conduct investigations into the background of an opposing expert in order to reveal sources of possible partiality or lack of independence. Given this, one may ask whether other mechanisms are really necessary to control perceived excesses of expert evidence. But cross-examination is more a means of discovering or revealing problems in expert evidence rather than controlling them. Control mechanisms aim to prevent and punish expert witnesses for misconduct. In any case, the concern with expert witnesses is that they are more "resistant to effective cross-examination" than lay witnesses;[188] judges and juries may find the expert's evidence impenetrable. The possibility exists that an expert could be cross-examined effectively in the sense of exposing the logical errors of the expert's opinion without the judge or jury fully recognizing what has occurred.

As noted above, experts who have a publication record in their field or a previous history of expert testimony, and are thus "repeat players," face powerful incentives not to tailor their evidence to the party retaining them or to otherwise compromise their independence. Experts

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184 (1782), 99 E.R. 589 (K.B.).

185 *Criminal Code*, R.S.C. 1985, c. C-46, s. 131. See *Sears v. Rutishauser*, 466 N.E.2d 210 at 212 (Ill. Sup. Ct. 1984) ("It is virtually impossible to prosecute an expert witness for perjury").

186 Clements, *supra* note 126 at 65.

187 See *e.g. Niewold v. Fry*, 714 N.E.2d 1082 at 1088 (Ill. App. 2 Dist. 1999). However, it should be noted that it is not proper to cross-examine a witness on the fact that his or her testimony has been rejected or disbelieved in a prior case: *R. v. Ghorrei* (1999), 46 O.R. (3d) 63 at paras. 28-33 (C.A.) (witnesses generally); *R. v. Karaibrahimovic* (2002), 303 A.R. 181 at paras. 7-12 (C.A.) (expert witnesses).

188 *D.D.*, *supra* note 4 at para. 54 ("The danger of attornment to the opinion of the expert is further increased by the fact that expert evidence is highly resistant to effective cross-examination by counsel who are not experts in that field").

with a professional reputation to protect will wish to ensure their testimony is consistent with their past writings and testimony. Failure to do so will usually have adverse consequences for the expert's professional reputation, as well as the likelihood that he or she will be retained as an expert witness in the future. To stimulate transparency in this process, the courts might consider obliging experts to produce a list of previous occasions on which they have provided expert testimony.[189] Professional associations could assist in this process by maintaining publicly accessible lists of the previous expert testimony of their members.[190] But that can be only a partial solution. Experts may have no publication record or previous testimony, and there is conflicting evidence as to whether most expert witnesses are repeat players.[191] To the extent that there is a market for experts, those with reputations to protect face incentives to act prudently. Those who are not regular participants in the market, or those without reputations, will be less constrained in the approach they take to expert testimony.

An adverse costs award is a further internal control on expert partiality or lack of independence.[192] Such awards could be made against the party retaining the expert or against the expert personally, depending on the circumstances. Another control mechanism would be to expose expert witnesses to civil liability for negligence or violation of impartiality or independence. At present, expert witnesses, as with witnesses generally, enjoy absolute immunity from civil liability for evidence given in court, subject to certain narrow exceptions.[193] Conversely, there is no immunity for work done by an expert in his or her capacity as a consultant to a party in litigation. It is not clear why expert witnesses should continue to enjoy an immunity for evidence given in court.[194] The rationale for the immunity seems weak.[195] Paid experts should be liable to their clients for the performance of their professional duties. Indeed, it may be argued that a legal regime of civil liability would make expert witnesses more likely to act in accordance with their obligations of independence and impartiality, as it would require experts to internalize the cost of their failure to comply with those obligations.[196]

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189 See U.S., *Federal Rules of Civil Procedure 2003*, r. 26(a)(2)(B) (expert report that parties must provide prior to trial from any expert witness who may be called at trial must contain, among other things, "a list of all publications authored by the witness within the preceding ten years" and "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years").

190 Posner, *supra* note 179 at 98.

191 Contrast Posner, *ibid.*, with David W. Shuman & Stuart A. Greenberg, "The Role of Ethical Norms in the Admissibility of Expert Testimony" (1998) 37:1 Judges' J. 4 at 9 (only 5 percent of experts testify frequently — most testify rarely).

192 *Heppner v. Schmand* (1998), 59 B.C.L.R. (3d) 336 at paras. 11, 18 (C.A.) (special costs award upheld against a party that had called an expert who had "conducted himself as an advocate, not as an independent expert").

193 *Varghese v. Landau*, [2004] O.J. No. 370 at para. 48-51 (Sup. Ct. J.) (QL); *Raiss v. Palmano*, [2001] Lloyds' Rep. (P.N.) 341 (Q.B.D.).

194 *Arthur J.S. Hall & Co. v. Simons Barratt*, [2002] 1 A.C. 615 (H.L.).

195 Peter Cane, *Tort Law and Economic Interests*, 2d ed. (Oxford: Clarendon Press, 1996) at 229-30.

196 Harrison, *supra* note 177 at 284-90. Of course, expert witnesses might seek to contract out of any such liability as a condition of accepting a retainer to testify. It would be implicit, however, that they could do so only at a cost.

Courts and tribunals have displayed an increased willingness to scrutinize expert evidence for impartiality and independence, yet the sanctions lack consistency. It is preferable for judges to tailor sanctions to the particular nature of the partiality or lack of independence found; the exclusion of evidence is only rarely warranted. Excluding evidence where only a slight violation is found impedes the pursuit of justice by preventing the trier of fact from having access to all relevant evidence. It also encourages counsel to launch procedural challenges to the admission of expert testimony because it holds out the possibility that success will result in the complete exclusion of an opposing expert's evidence. This would thereby increase the cost of litigation for arguably little marginal return. Without other mechanisms to control expert evidence, however, courts may be inclined to rely on internal controls alone. As the following section suggests, a range of external mechanisms are available to ensure that expert witnesses' duties of independence and impartiality are observed. A mixture of regulatory instruments permits a more nuanced and calibrated approach rather than the "all or nothing" approach that an exclusionary rule entails.

B. EXTERNAL CONTROLS

In addition to the internal controls discussed above, a variety of external controls have been developed or proposed in an attempt to root out expert partiality and lack of independence. Supporters of these controls assume that experts' failure to observe their duties is a function of the adversarial environment of civil litigation.[197] External controls aim to modify that environment to prevent, or at least minimize, partiality and lack of independence from arising in the first place. Three such controls — court appointed experts, assessors and joint experts — would change how experts are selected and how their evidence is presented. Three other controls — expert panels, professional regulation and court imposed codes of conduct — are less radical efforts to minimize the adversarial aspects of expert testimony.

One common element of the external controls discussed below is that they remain largely untested. In the absence of greater experience and experimentation with external controls, any evaluation of their merits and drawbacks is speculative. It is only through such experience and experimentation that courts and tribunals can gain a sense of whether external control mechanisms are effective and cost efficient means of preventing or controlling expert bias. Greater use of external control mechanisms is also likely to require a cultural change among judges, tribunal members and lawyers, as it will be a departure from the manner in which expert evidence has traditionally been presented. There will be varying degrees of resistance to external controls by those who are content with the existing approach to leading expert evidence, and by those who view external controls as a dilution of the adversarial system and a move to inquisitorial judging.

1. COURT APPOINTED EXPERTS

The analysis of internal controls in the previous section presupposes that they can adequately address the problems of expert partiality and lack of independence. A well-established line of criticism suggests that this is impossible. The critics contend that a system

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[197] Golan, *supra* note 90 at 3-4.

in which parties select and pay expert witnesses for their testimony renders expert partiality and lack of independence endemic.[198] They argue that existing and proposed controls cannot eradicate the problem. This line of criticism may go too far, but concern about expert partiality and lack of independence has certainly led to renewed interest in an increased role for court appointed experts.[199] Reference is often made to the history of the courts' reception of expert evidence, and specifically to the fact that originally expert evidence was called by the court, not the parties. This changed with the development of the adversarial system.[200] For some commentators, the solution to concerns about expert independence and impartiality is to take a page from history and return to court appointment of experts.

Proponents of court appointed experts assume that a main cause of expert partiality and lack of independence is that experts are ordinarily selected by the parties. By having the court select the experts, not the parties, it is hoped that problems of expert bias will be minimized. Rule 52.03 of the Ontario *Rules of Civil Procedure* allows the court to appoint an expert, either on the motion of a party or on the court's own initiative.[201] The rule also allows the expert to examine a party or property if ordered by the court,[202] provides for remuneration of the expert by the parties[203] and permits the parties to cross-examine the expert.[204]

A court appointed expert has a more limited role than that of an expert retained by a party. The court appointed expert explains to the judge "evidence adduced by the parties [that] ... is within his [or her] particular area of competence"; he or she does not lead additional evidence. This enables the court to be better informed in the fields of knowledge necessary to determine the questions of fact presented to it.[205] Rule 52.03 does not, however, authorize the court to conduct its own trial or advance its own theories.[206] Moreover, the court appointed expert should not examine witnesses; any questions that he or she may have should be put through the trial judge.[207] The Supreme Court of Canada has noted that while the court is not bound to accept the testimony of a court appointed witness, such testimony will often be preferred to that of party appointed experts due to the presumed independence of the

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198 See *e.g.* Anthony Kenny, "The Expert in Court" (1983) 99 Law Q. Rev. 197 at 214; Hon. Emory Washburn, "Testimony of Experts" (1866) 1 Am. L. Rev. 45 at 61-64.

199 Tibbitts, *supra* note 3 (citing speech by Binnie J. of the Supreme Court of Canada); McLachlin, *supra* note 68 at 30-31. See Russ Scott, "Court-Appointed Experts: An examination of a proposal of the Litigation Reform Commission of Queensland" (1995) 25 Q. Law Soc. J. 87; John Basten, "The Court Expert in Civil Trials — A Comparative Appraisal" (1977) 40 Mod. L. Rev. 174.

200 *D.D.*, *supra* note 4 at para. 52; Golan, *supra* note 90 at 49-51, 61; Lloyd L. Rosenthal, "The Development of the Use of Expert Testimony" (1935) 2 Law & Contemp. Probs. 403 at 406-11.

201 Ontario, *Rules of Civil Procedure*. Similar provisions exist in other provinces and territories: *Alberta Rules of Court*, r. 218; British Columbia's *Evidence Act*, R.S.B.C. 1996, c. 124, ss. 11, 12; Manitoba, *Queen's Bench Rules*, r. 52.03(1); New Brunswick, *Rules of Court*, r. 54.03; Newfoundland, *Rules of the Supreme Court*, r. 35.01; *Rules of Court, Supreme Court of the North West Territories*, r. 230; Nova Scotia, *Civil Procedure Rules*, r. 23; *Rules of Civil Procedure, Supreme Court of Prince Edward Island*, r. 52.03 [*P.E.I. Rules*]; Quebec, *Code of Civil Procedure*, Arts. 414-24.

202 Ontario, *Rules of Civil Procedure*, r. 52.03(3).

203 *Ibid.*, r. 52.03(11).

204 *Ibid.*, r. 52.03(10).

205 *Phillips v. Ford Motor Co. of Canada Ltd.*, [1971] 2 O.R. 637 at 662 (C.A.) [*Phillips*].

206 *Ibid.* at 661-62.

207 *Ibid.* at 662-63.

expert.[208] (Indeed, r. 52.03 and many of its counterparts refer to "independent experts.") Due to the limited role played by court appointed experts, it is unlikely that they would negate the need to call party appointed experts. Rather, court appointed and party appointed experts would play distinct, and hopefully complementary, roles; thus, court appointed experts supplement rather than replace party appointed witnesses.[209]

Although predecessors to Ontario r. 52.03 go back more than a century, the rule appears to be invoked only occasionally outside the family law context.[210] The Ontario Court of Appeal's rebuke of the conduct of a trial judge and a court appointed expert in *Phillips* appears to have halted further development in the area.[211] Commentators have long advocated greater use of court appointed experts.[212] American courts[213] and commentators[214] argue that in light of the trial judge's new "gatekeeper" function established in *Daubert*, court appointed experts are essential to ensure that the trial judge is in a position to assess the reliability of the party appointed expert.[215] The 1999 English *Civil Procedure Rules* contemplate that court appointed (or, as discussed below, jointly retained) experts will play a greater role in civil litigation.[216] In Queensland, new rules provide that subject to narrow exceptions, expert evidence may be received only from court appointed experts.[217] Proponents of court appointed experts emphasize their impartiality and independence.

Some Canadian courts have begun to support greater use of court appointed experts. In *New Quebec Raglan Mines Ltd. v. Blok-Andersen*,[218] the Court observed that Ontario's r. 52.03 might enable the "high degree of partisanship" frequently shown by experts to be avoided. In another case, the court appointed an independent expert when faced with conflicting views of the experts called by the parties.[219] In a third case, the court appointed an independent expert under r. 52.03 to give an opinion as to the issue of damages.[220] These are isolated decisions, but they may signal the beginning of a shift in thinking about the role played by court appointed experts. In light of the courts' increased reluctance to admit expert

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208 *Citadel Brick Ltd. v. Garneau*, [1937] 3 D.L.R. 169 at 176-77 (S.C.C.); *D.D.*, *supra* note 4 at para. 52; see also *Berube v. Wingrowich*, 1998 ABQB 866 at para. 15; *R. v. Sally Clark*, [2003] EWCA Crim. 1020 at para. 40 (Eng. C.A.) ("the value of an expert free from any influence, however innocently manifesting itself, cannot be discounted").

209 In some civilian jurisdictions, all expert evidence comes from court appointed experts; parties are not permitted to present evidence from experts they have retained.

210 Court appointed family law assessors are relatively common: see Nicholas Bala & Annelise Saunders, "Understanding the Family Context: Why the Law of Expert Evidence is Different in Family Law Cases" (2003) 20 Can. Fam. L.Q. 277.

211 *Supra* note 205 at 661-63.

212 Hand, *supra* note 61 at 56; *In re Saxton*, [1962] 1 W.L.R. 968 at 972 (C.A.), Denning M.R.; E.L. Haines, "The Medical Profession and the Adversary Process" (1973) 11 Osgoode Hall L.J. 41 at 50-51.

213 *Joiner*, *supra* note 30 at 149-50.

214 The focus then tends to be on ensuring that the trial judge is provided with a sufficient scientific background to permit a proper evaluation of the proposed expert evidence against the *Daubert* criteria. Note, "Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence" (1997) 110 Harv. L. Rev. 941.

215 U.S., *Federal Rules of Evidence 2004*, r. 706.

216 *Civil Procedure Rules*, r. 35.7.

217 *Queensland Uniform Civil Procedures Rules, 1999*, rr. 429E-429P.

218 (1993), 9 B.L.R. (2d) 93 at para. 25 (Ont. Gen. Div.).

219 *Smeriglio v. Great Gulf Homes Ltd.*, [1999] O.J. No. 85 at para. 12 (Gen. Div.) (QL).

220 *Ericsson Communications v. Novatel Communications Ltd.* (1996), 45 C.P.C. (3d) 94 at paras. 17-18 (Ont. Gen. Div.).

testimony, more judges may consider appointing third party experts. Still, court appointed experts are themselves subject to scrutiny for lack of impartiality or independence.[221]

Court appointment of experts may generate its own problems. First, costs savings may be illusory if each side engages its own expert in addition to the court appointed expert (the cost of whom the parties must also bear).[222] One way to avoid this is to ensure that court appointed experts are introduced at an early stage to the litigation process. Indeed, under the new Queensland rules, an expert may be appointed by the court even before a proceeding has been commenced.[223] Second, the appointment process itself may be plagued by difficulties. How is a court to determine who is the appropriate expert? Courts don't have the same time, resources or incentives as the parties to enable them to choose appropriately. Courts may lack confidence in their ability to choose an appropriate expert, and the class of experts the courts must choose from may not accurately reflect the field.[224] Some reform proposals suggest that panels of experts be established from which the courts could make appointments. This would mitigate the problem, but the possibility of bias would continue, particularly if the discipline in question is driven by different theoretical approaches or schools. This is particularly true if the discipline in question is riven by different theoretical approaches or schools. Reliance on a single expert could obscure the fact that he or she represents a single viewpoint in the field. Selection bias would thus remain a concern.

Third, while court appointment of experts may reduce expert bias, it would likely lead to even greater deference to the expert by judges and juries because such experts would be cloaked with the mantle of impartiality and objectivity. Counsel are likely to resist reforms designed to transfer control over the selection of expert evidence to the courts.[225] Finally, court appointment of expert witnesses seems to rest uneasily with the adversarial system of civil litigation.[226] Indeed, this may be precisely the point — that reforming the way in which expert evidence is presented to courts and tribunals will necessitate fundamental changes to the adversarial system of litigation. This would move us closer to a civilian model, where the expert is not a witness at all, but rather an "officer of the court."[227]

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221 *Phillips, supra* note 205 at 661 (court appointed expert became a "partisan advocate"); *Children's Aid Society of the County of Perth v. T.*, [1994] O.J. No. 2075 (Prov. Div.) (QL) (challenge to court appointed physician based on previous work for Children's Aid Society). In Quebec, court appointed experts must swear in writing to undertake to perform their duties faithfully and impartially (Art. 418 C.C.P.), and the grounds for recusing a court appointed expert are the same as those for judges (Art. 417 C.C.P.).

222 This suggests that greater use of court appointed experts is likely to be accompanied by greater controls on party appointed experts.

223 *Queensland Uniform Civil Procedure Rules, 1999*, rr. 429Q-429S.

224 See *e.g.* M.N. Howard, "The Neutral Expert: a plausible threat to justice" (1991) Crim. L. Rev. 98 at 103; compare J.R. Spencer, "The Neutral Expert: an implausible bogey" (1991) Crim. L. Rev. 106 at 108.

225 *ALRI Consultation Memorandum, supra* note 12 at paras. 76-77; Roger Ormrod, "Scientific Evidence in Court" (1968) Crim. L. Rev. 240 at 245.

226 *Bilinski v. Wangerin* (1993), 15 Alta. L.R. (3d) 100 at 106 (Q.B.). Some would suggest that the adversarial system should be adjusted: Peter Brett, "The Implications of Science for the Law" (1972) 18 McGill L.J. 170 at 186-87. Certainly, that is the approach taken by the 1999 English Civil Procedure reforms.

227 See *e.g.* J.R. Spencer, "Court Experts and Expert Witnesses: Have we a Lesson to Learn from the French?" (1992) 45 Curr. Legal Probs. 213 at 225.

2. ASSESSORS

A second suggestion is that provision be made for (and where already available, greater use be made of) assessors and other expert advisors to courts.[228] Assessors differ from court appointed experts in that they act as advisors or interpreters to the court in understanding evidence.[229] They are not true witnesses; they do not swear oaths and are not subject to cross-examination.[230] Assessors are occasionally used in admiralty and patent cases, but rarely outside those categories.[231] The theory underlying the appointment of assessors is that they "occupy much the same position as do skilled [expert] witnesses," but "they are not brought forward as the partisans of one side or the other."[232] To that extent, assessors are similar to court appointed experts. Assessors could undoubtedly play a useful role in some civil cases, but they could also generate concern amongst the parties. In particular, parties may be uncomfortable with the degree of influence they anticipate an assessor may have with the court, and with their own inability to determine and test the assessor's views.[233]

Originally, the appointment of an assessor precluded the parties from leading their own expert evidence on matters within the assessor's expertise. An assessor acted in effect as a private adviser to the court rather than a true witness in open court. Because of concern that this could lead to undue reliance on the assessor's opinion by the court, and out of the desire for greater transparency, both of those aspects of an assessor's role have now been cast aside. The Supreme Court of Canada has held that the appointment of an assessor under the predecessor of what is now r. 52 of the *Federal Court Rules, 1998* does not bar the parties from calling their own experts.[234] The Court also held that while an assessor may continue to advise judges, and that while advice need not be disclosed to the parties, the assessor's opinion on factual matters must be disclosed. This has brought the assessor's role into conformity with the principles of natural justice, but rendered it less viable as an alternative to, and less distinct from, a system of party-appointed expert witnesses.

3. JOINT EXPERTS

An alternative to court appointment of expert witnesses is a rule enabling, or in some cases requiring, the parties to retain an expert witness jointly. No rule requiring joint experts currently exists in any Canadian jurisdiction. By contrast, the 1999 English *Civil Procedure Rules* empower the court to require expert evidence to be given only by a single jointly

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228 *ALRI Consultation Memorandum*, *supra* note 12 at para. 83; see *e.g.* British Columbia, *Supreme Court Rules*, r. 39(28); *Federal Court Rules 1998*, r. 52 [*Federal Court Rules*]; *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 31 (assessors in admiralty appeals).

229 *Regional Trust Company v. Canada (Superintendent of Insurance)*, [1987] 2 F.C. 271 at 278 (F.C.A.); Sir Louis Blom-Cooper, "Experts and Assessors: Past, Present and Future" (2002) 21 C.J.Q. 341; Anthony Dickey, "The Province and Function of Assessors in English Courts" (1970) 33 Mod. L. Rev. 494; J.H. Beuscher, "The Use of Experts by the Courts" (1941) 54 Harv. L. Rev. 1105 at 1109-11.

230 *The "Queen Mary"* (1947), 80 Ll. L.R. 609 at 612 (C.A.).

231 *Richardson v. Redpath, Brown & Co. Ltd.*, [1944] A.C. 62 (H.L.); *Owners of S.S. Australia v. Owners of Cargo of S.S. Nautilus*, [1927] A.C. 145 (H.L.) [*Nautilus*].

232 *Nautilus*, *ibid.* at 149, Viscount Dunedin.

233 Assessors may be challenged for bias: *Conteh v. R.*, [1956] A.C. 158 at 164 (P.C.), but this would occur only rarely.

234 *Porto Seguro Companhia De Seguros Gerais v. Belcan S.A.*, [1997] 3 S.C.R. 1278. Rule 52 of the *Federal Court Rules, 1998* was enacted in response to the Supreme Court of Canada's decision

retained expert, although there is recognition that joint experts may not be feasible in complex cases in the Commercial Court.[235] The English *Rules* relating to the appointment of a single jointly retained expert are part of a broader effort to reduce litigation costs and limit the more undesirable aspects of the adversarial system.[236] They do so largely by transferring control over the conduct of civil litigation from the parties and counsel to the courts. Where both parties wish to submit expert evidence on a particular issue, the court may direct that the evidence be submitted by only one expert. In limited circumstances, the parties may be permitted to retain their own experts ("separate experts") in addition to the joint expert, but this is intended to be an exception.[237] The new Queensland rules take a similar approach where the parties agree.[238] One purpose of requiring a joint expert is to "strengthen the impartial role of such witnesses."[239] The English courts are less suspicious of partiality on the part of joint experts than party appointed experts. In one case, a joint expert was said to have "embarked upon his investigation from an entirely neutral base, instructed both by the claimant and the defendant,"[240] and accordingly, "[t]here could be no question of partisan bias, which is not unknown in the world of experts."[241]

Greater use of joint experts might avoid a battle between two experts acting as advocates and increase the likelihood of impartiality, to say nothing of possible costs savings. A system of joint experts leaves more control in the hands of the parties than a system relying on court appointed experts. Use of joint experts is growing in Australia; currently, courts conducting civil pre-trial direction hearings inquire into the need to call more than one expert witness. Further, the Law Reform Commission of Western Australia recommends that courts enforce the shift toward the use of a single expert through the allocation of costs in civil cases.[242] And, as noted above, the new Queensland rules encourage the use of joint experts, while providing for court appointed experts where the parties cannot agree.[243]

Although no Canadian rules of civil procedure specifically provide for joint experts,[244] some Canadian courts and tribunals have encouraged their use. In one case, the Competition

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235 *Civil Procedure Rules*, r. 35.7.

236 *Woolf Report*, *supra* note 56 at 137-52. Indeed, some commentators emphasize that expert witnesses are called "experts" under the new rules, suggesting that this is a deliberate choice to signal that experts are no longer to be considered as witnesses at all.

237 *Daniels v. Walker*, [2000] 1 W.L.R. 1382 at 1387 (C.A.); *Cosgrove v. Pattison*, [2001] 2 CPLR 177 (Ch. D.). Again, the Commercial Court recognizes that joint experts may be inappropriate in some cases.

238 *Queensland Uniform Civil Procedure Rules, 1999*, rr. 429H-429J.

239 *Oxley v. Penwarden*, [2000] E.W.J. No. 4869 at para. 7 (C.A.).

240 *Takenaka (UK) Ltd. v. Frankl* (2000), at 42 (Q.B.), cited in *Takenaka (UK) Ltd. v. Frankl*, [2001] EWCA Civ. 348 No. 1094 at para. 31 (C.A.).

241 *Ibid.*

242 LRCWA, *Final Report*, *supra* note 128 at paras. 22.2-22.3, 238-39.

243 *Queensland Uniform Civil Procedure Rules, 1999*, r. 429H.

244 In most provinces, the provisions governing court-appointed experts suggest that the court appoint an expert agreed to by the parties, but the rules do not require that it do so. See Ontario, *Rules of Civil Procedure*, r. 52.03(2) ("The expert shall be named by the judge and, where possible, shall be an expert agreed on by the parties"). See also *Alberta Rules of Court*, r. 218(2); British Columbia, *Supreme Court Rules*, r. 32(A)(2) (parties may agree on expert witness, but court may select if they can't agree); Manitoba, *Queen's Bench Rules*, r. 52.03(2); New Brunswick, *Rules of Court*, r. 54.03(2); Newfoundland, *Rules of the Supreme Court*, r. 35.01(2) (court shall appoint expert witness "unless the parties agree otherwise"); *P.E.I. Rules*, *supra* note 201, r. 52.03(2).

Tribunal required intervenors in a proceeding to use joint experts on matters common to them.[245] In Ontario, the *Memorandum Re: Commercial List Trial/Hearing Requirements*[246] recommends that the parties consider retaining a joint expert, although the use of joint experts does not appear to have proceeded much further in Ontario.[247] Joint experts seem likely to reduce some of the excesses of witness partiality, while saving costs and leaving control largely in the hands of the parties. Problems of expert partiality and lack of independence could also occur, however, in the case of joint experts.

Requiring a joint expert may cause expense and delay.[248] A system of joint experts requires a default mechanism for the selection of an expert in the event that the parties are unable to agree on one. One option would be for the court to select an expert where the parties cannot agree, analogous to the court's power to appoint an arbitrator where the parties fail to agree on one.[249] This, however, should be kept as a last resort. A better approach is to adopt a mechanism by which the parties are obliged to submit lists of possible experts. If there is overlap in names between the parties' lists, then one of the overlapping names should be randomly selected. If there is no overlap, then one name should be randomly selected from all of the names listed by the parties. This mechanism encourages the parties to agree on an expert. One further proposal would enable each side to designate an expert, but have no further role in dealing with him or her.[250] The expert would receive material for the case directly from the court, not the parties, and thus operate under a "veil of ignorance," in the Rawlsian sense, as to which side had retained him or her. The hope under such a system is that concerns about partiality or lack of independence would be less likely to arise in circumstances where the experts did not know who had retained them. Whether such a system could function in practice is open to some doubt; it certainly seems that the veil might not remain opaque. But it highlights the underlying principle that should govern: ideally, expert witnesses should be indifferent as to who wins or loses.

Commentators whose main concern is the bias-inducing effects of payment to expert witnesses sometimes suggest that expert witnesses, like lay witnesses, should be compelled to testify without being compensated for doing so. The rough analogy would be with jury duty. Though the idea is not without some appeal, it seems impractical. Unlike many lay witnesses, expert witnesses commonly spend considerable time outside the courtroom preparing their opinions and report. If they were not to be paid for such work, what incentive would they have to perform the task adequately? Moreover, the financial burden in terms of opportunity cost for the experts required to give evidence would be considerable. Overall, the proposal seems impractical.

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245 *Canada (Director of Investigation and Research) v. Bank of Montreal* (1996), 66 C.P.R. (3d) 409 at 413 (Comp. Trib.).

246 James M. Farley, Supervising Judge, Commercial List, to the Ontario Bar [n.d.].

247 *Re Cadillac Fairview Inc.*, [1995] O.J. No. 97 at para. 7 (Ont. Gen. Div.) (QL).

248 *ALRI Consultation Memorandum*, *supra* note 12 at paras. 66-67.

249 See *e.g. Arbitration Act, 1991*, S.O. 1991, c. 17, s. 10.

250 Epstein, *supra* note 66 at 760.

4. EXPERT CONFERENCES AND PANELS

Even where parties retain their own expert witnesses, procedural mechanisms may assist in controlling experts' tendency to be partial. Two methods that have met with some success are expert conferences and panels. Expert conferences occur before trial; expert panels at trial. Expert conferences encourage or require the parties' expert witnesses to meet (or "conference") prior to trial in an attempt to narrow and focus the issues in dispute.[251] Following a conference, experts may be encouraged or required to produce a written statement summarizing the areas on which they agree and disagree for use at trial.[252] The premise underlying expert conferences is that expert bias will be minimized if the civil litigation process is made less adversarial.[253] But a move to pretrial expert conferences could cause additional expense and delay, and is likely to be resisted by some lawyers.[254]

Expert panels require expert witnesses on a particular subject to testify in a "panel" format at trial (known in Australia as "hot tubs").[255] The expert witnesses appear at the same time. The parties are permitted to question an expert, and the other experts are asked to comment on those answers or suggest their own responses. Many find that the panel format makes the presentation of expert evidence less adversarial and enables evidence to be given more quickly and effectively. In addition, experts may be more likely to moderate their views in the presence of other experts. In Canada, for example, recent amendments to the *Competition Tribunal Rules* permit the Tribunal to require that expert witnesses testify as a panel.[256] The Tribunal may also direct experts to comment on the views of other experts or the panel and pose questions to them.[257] Similar provisions are contained in the rules of other administrative tribunals.[258] Expert conferences and panels may make the presentation of expert evidence less adversarial. In doing so, they may minimize the effects of expert bias; however, they cannot eliminate it. They merely consist of changes to the way evidence is presented. In addition,

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251 The *New South Wales Supreme Court Rules*, Schedule 11(K), require an expert witness to abide by a Court direction to conference. See also "Practice Note 121: Joint Conferences of Expert Witnesses" (6 July 2001), online: Supreme Court of New South Wales <www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/5ab5d5b26b50089 1ca256755000ac462/cf6c8455ea06e3c1ca256a81000a7e2f?OpenDocument>; *Federal Court Rules (Aust.) 1979* (Cth.), Order 34A. Victoria, *Supreme Court Rules* (Vic.), r. 44.06. *Queensland Uniform Civil Procedure Rules, 1999*, r. 429B. See also Quebec, *Code of Civil Procedure*, Art. 413.1. In Ontario, the Assessment Review Board permits directions to be made for expert witnesses to attend pre-hearing conferences: "Assessment Review Board Rules of Practice and Procedure," online: Assessment Review Board <www.arb.gov.on.ca/en_default.htm>. See also *New Zealand High Court Rules 1985* (N.Z.), 1985/102, r. 330B [*NZHCR*].

252 *English Commercial Court Guide* (London: Stationary Office, 1999), H2.11-H2.17 (experts to meet to discuss, narrow issues; to prepare joint memorandum for court recording that they have met and indicating where they agree and disagree).

253 Edmond, *supra* note 182 at 141.

254 *ALRI Consultation Memorandum*, *supra* note 12 at paras. 95-96.

255 *English Commercial Court Guide*, *supra* note 252, H2.21.

256 *Competition Tribunal Rules*, S.O.R./1994-290, r. 48.1.

257 *Ibid.*, r. 48.2.

258 See "Interim Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal," (1 July 1998), r. 37, online: Financial Services Commission of Ontario <www.fsco.gov.on.ca/FSCO_UW_MainEngine.nsf/00213f50d13c98a2852565360040a254/1698d47cb4466ffd8525663c006e1737?/OpenDocument>(witness panels — not limited to expert witnesses); Ontario Health Services Appeal and Review Board, "Rules of Practice and Procedure," r. 16.03, online: Ontario Health Services Appeal and Review Board <www.hsarb.on.ca/english/rules/default.htm#rule16>.

they may meet with some resistance from counsel unwilling to depart from more traditional methods of leading expert evidence.[259]

5. PROFESSIONAL REGULATION OF EXPERT WITNESSES

One model of expert regulation would take the matter out of the hands of the courts altogether and rely on professional discipline through self-regulating professional associations. Such associations in a range of fields have developed codes of conduct to govern their members when they act as expert witnesses. For example, the Australian Council of Professions adopted a policy statement in 1998 setting out the role and duties of an expert witness.[260] According to this statement, the primary duty of an expert witness is to assist the court; a secondary duty is owed to the "body of knowledge and understanding" from which his or her expertise arises; and a tertiary duty is owed to the party retaining the expert, suggesting that the expert must not act as an advocate for that party. Similar policies have been adopted by various professional organizations in Canada[261] and the U.S.[262]

The promulgation of standards by professional organizations provides another method whereby an expert may be held personally responsible for inappropriate conduct. Proceeding from the premise that the expert's duty is to assist the court,[263] the Court in *Pearce v. Ove Arup Partnership Ltd. (No. 2)* threatened to report an expert who had breached his duty to the court to his professional association.[264] Nevertheless, self-regulation likely represents only a partial solution. First, such codes may be hortatory rather than mandatory. Second, not all professional organizations have established expert witness codes. Third, not all expert

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259 *ALRI Consultation Memorandum, supra* note 12 at para. 101.

260 Australian Council of Professions, "Role and Duties of an Expert Witness in Litigation" (25 May 1998), online: Australian Council of Professions <www.professions.com.au/RDEWL.html>.

261 "Canadian Association of Pathologists Code of Ethics" (9-10 May 1997), Principle E.7, online: Canadian Association of Pathologists <www.cap.medical.org/code_of_ethics.htm> ("Laboratory physicians should recognize that their role as an expert witness in a legal case is not to help one or the other side win, but to provide impartial scientific standards by which the judge or jury, who are triers of fact, can make their own judgement about the facts of the case"); Canadian Society of Chiropractic Evaluators, "Standards and Guidelines Manual" (6 May 2000), s. 11, online: Canadian Association of Chiropractic Evaluators <www.thecsce.ca/standards.html>.

262 See American Medical Association, "Principles of Medical Ethics," online: American Medical Association <www.ama-assn.org/ama/pub/category/2512.html> and "Medical Testimony E-9.07," online: American Medical Association <www.ama-assn.org/apps/pf_new/pf_online/f_n=browse&doc=policyfiles/HnE/E-9.07.HTM&&s_t=&st_p=&nth=1&prev_pol=policyfiles/HnE/E-8.21.HTM&nxt_pol=policyfiles/HnE/E-9.01.HTM&> ("The medical witness must not become an advocate or a partisan in the legal proceeding"); American College of Surgeons, "Statement on the physician acting as an expert witness" (March 2004), online: American College of Surgeons <www.facs.org/fellows_info/statements/st-8.html>; American College of Medical Genetics, "Guidelines for expert witness testimony for the specialty of medical genetics" (November/December 2000), online: American College of Medical Genetics <www.acmg.net/resources/policies/pol-008.pdf>; American Psychological Association, "Ethical Principles of Psychologists and Code of Conduct," online: American College of Medical Genetics <www.apa.org/ethics/code2002.html>; American Academy of Physician Assistants, "Guidelines for the Physician Assistant Serving as an Expert Witness," online: American Academy of Physician Assistants <www.aapa.org/gandp/witness.html>.

263 *Woolf Report, supra* note 56 at 139.

264 *Supra* note 78.

witnesses are members of professional organizations and subject to professional discipline.[265] As a result, efforts are underway by experts' organizations in some jurisdictions to treat expert witnesses as professionals in their own right, and to promulgate codes of conduct to govern them.[266] Such discipline will be more effective for "repeat players" in the expert witness market than for "one off" experts.[267] Whether professional organizations are likely to regulate or take seriously expert witnessing remains an open question. It is by no means certain that they will do so.[268]

Professional regulation and discipline of expert witnesses is likely to be supplementary to the courts' discounting or exclusion of their evidence, not a substitute for it. This could change if courts refused to admit expert evidence from witnesses who were not members of professional organizations that have promulgated codes, and thus subject to professional discipline. But it is not clear that this would provide an appropriate solution. Not all experts are professionals. In addition, requiring professional organizations to adopt individual codes of conduct is likely to be an inefficient way to subject expert witnesses to discipline. As we discuss in the next section, a more effective approach may be for the courts to adopt their own codes of conduct for expert witnesses.

6. IMPOSITION OF EXPERT WITNESS CODES

Courts in some jurisdictions have addressed partiality on the part of expert witnesses by imposing codes of conduct on experts who appear before them. In New South Wales, Victoria and in the Federal Court of Australia, for example, expert witnesses must adhere to codes modelled on the principles set out in *The Ikarian Reefer*.[269] The Federal Court of Australia guidelines specify that an expert witness has an "overriding duty" to assist the court, that he or she "is not an advocate for a party" and that the expert's "paramount duty is to the Court" rather than the party retaining the expert.[270] The New South Wales *Supreme Court Rules* and Victoria *Supreme Court Rules* set out a code of conduct for expert witnesses that is very similar to that in the Federal Court of Australia guidelines. Both require retaining parties to provide the code to experts.[271] The New South Wales and South Australia *Rules* also provide that an expert report that does not contain an acknowledgement that the expert

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265 Again, there is some uncertainty as to whether this is the case: Parker, *supra* note 141 at 1382 ("most expert witnesses are bound by some code of professional ethics").

266 The notable examples in England are the Academy of Experts, the Society of Expert Witnesses and the Expert Witness Institute's "The Law and You — Code of Guidance on Expert Evidence: A Guide for Experts and Those Instructing Them for the Purpose of Court Proceedings" (December 2001), online: The Academy of Experts <www.academy-experts.org> ["Code of Guidance on Expert Evidence"]. The Academy of Experts' "Code of Guidance For Experts and Those Instructing Them" (1 June 2001), online: The Academy of Experts <www.academy-experts.org> was favourably referred to in *Peet v. Mid-Kent Healthcare Trust*, [2002] 1 W.L.R. 210 at para. 24 (C.A.). However, agreement on a single code appears elusive: Clements, *supra* note 126 at 66-67.

267 Posner, *supra* note 179 at 98.

268 Clements, *supra* note 126 at 65.

269 *Supra* note 37.

270 "FCA Guidelines," *supra* note 59 at guideline 1.

271 Victoria, *Supreme Court Rules* (Vic.), r. 44, Form 44A.

has read the code and agrees to be bound by it shall not be admitted into evidence,[272] a position the courts have enforced.[273] Similarly, all evidence from an expert witness is inadmissible absent a written acknowledgement from the expert to that effect.[274] Amendments to the *High Court Rules* of New Zealand in 2002 are very similar.[275] In Queensland, the expert's report must contain written confirmation that the expert understands and has complied with the duty to the court.[276]

There have been parallel developments in England. Appendix 11 to the *English Commercial Court Guide* contains rules for expert witnesses modelled on the *Ikarian Reefer* principles. The *Guide* specifies that counsel must bring those rules to the attention of experts they retain "at the earliest point."[277] Moreover, expert reports must contain a signed "statement of truth" from the expert.[278] In *Field v. Leeds City Council*, the Court insisted that an expert who was an employee of a party demonstrate that he had full knowledge of the duties of an expert witness, including the requirement of objectivity, before being permitted to testify.[279] The Academy of Experts in England has promulgated a declaration for experts to adopt in their reports, which acknowledges that their primary duty is to the court rather than the retaining party.[280] Some have argued that courts should look to the ethical rules of professional organizations in fashioning principles to govern the admissibility and weight of expert evidence, and that substantial ethical violations by expert witnesses should lead to the exclusion of their evidence.[281]

Expert witness codes would fulfill several functions. First, they would place expert witnesses on notice as to their role and duties and educate them, the parties and counsel. The emphasis is on educating expert witnesses — many of whom may not be repeat players, and thus less likely to be aware of their responsibilities as expert witnesses — before they give evidence. Second, codes would provide an express basis to challenge the expert's evidence in situations of partiality or lack of independence. Third, expert witness codes would enable appropriate disciplinary measures to be taken by the courts where the expert witness did not fulfill his or her duties. Whether ethical codes are best imposed by the courts or left to

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272 *New South Wales Supreme Court Rules*, Part 36, r. 36.13(c), Schedule 11(K). The Federal Court of Australia's Practice Direction accompanying the "FCA Guidelines" also indicates that counsel should provide an expert witness with a copy of the Guidelines: "FCA Guidelines," *supra* note 59. See also Courts Administration Authority, South Australia, "Practice Direction 46A: Guidelines for Expert Witnesses in Proceedings in the Supreme Court of South Australia" (17 May 2002) at para. 5.10, online: Courts Administration Authority, South Australia <www.courts.sa.gov.au/lawyers/index.html>; Victoria Civil and Administrative Tribunal, "Practice Note VCAT-2: Expert Evidence," online: Victoria Civil Administrative Tribunal <www.vcat.vic.gov.au/CA256902000FE154/Lookup/VCAT_Practice_Notes/$file/practice_note_vcat%20_2.pdf>; South Australia, *Supreme Court Rules*, (S.A.), r. 38.01(7).

273 *Commonwealth Development Bank of Australia Pty. Ltd. & Anor v. Cassegrain*, [2002] NSWSC 980 (S.C.).

274 *New South Wales Supreme Court Rules*, r. 36.13(c)(2).

275 *NZHCR*, *supra* note 246, r. 330A, Schedule 4.

276 *Queensland Uniform Civil Procedure Rules, 1999*, r. 428(3)(c).

277 *English Commercial Court Guide*, *supra* note 252, H2.4.

278 *Ibid.*, H2.8, Appendix 11.

279 *Supra* note 146 at para. 19.

280 "Code of Guidance on Expert Evidence," *supra* note 266.

281 Shuman & Greenberg, *supra* note 191 at 6.

professional regulatory bodies remains unclear,[282] but codes imposed by the courts are likely to play a central role.

V. CONCLUSION

The trend toward increased scrutiny of the impartiality and independence of expert witnesses is growing. With few exceptions, however, courts have thus far failed to articulate a clear test, set of factors or presumptions to aid in determining when the expert's impartiality and/or independence has been compromised to an extent warranting sanction.[283] The principles from *The Ikarian Reefer*[284] have been adopted to outline the appropriate role of the expert, but they are set out in broad terms. As a result, determinations that an expert's evidence is inadmissible or that it will be given little weight often seem conclusory rather than analytical. Moreover, the sanctions imposed to combat expert partiality or lack of independence are varied, and there is disagreement over what constitutes an appropriate sanction.

The level of scrutiny and sanction for bias of lay witnesses, experts and decision-makers falls along a spectrum. The evaluation of experts for bias falls somewhere in the middle. That placement stems directly from the role of the expert in the litigation process. Decision-makers tend to rely more heavily on the evidence of experts than that of lay witnesses, such that bias on the part of lay witnesses is not subject to as severe sanction as bias on the part of experts. By contrast, as the very outcome of the case depends on the reasoning of the decision-maker, bias on his or her part is treated more severely.

While it is unlikely that expert witnesses would ever be subject to the same degree of scrutiny as decision-makers, the recent case law suggests an increased proceduralization of the expert's role. *The Ikarian Reefer*[285] principles highlight that experts are no longer treated like lay witnesses, whose testimony is admitted if it is relevant, even if biased; instead, biased expert testimony may be excluded. The exclusion of relevant expert testimony due to partiality or a lack of independence is closer to the disqualification of a judge for the appearance of bias. In some cases, experts have been scrutinized and sanctioned on a standard historically reserved for judges. This approach fails to recognize the unique role of the expert witness. The expert is, in the end, a *witness*. The judicial deference and reliance on expert witnesses is hardly a rational basis for treating experts as though they were judges.[286] There is no reason to confuse an expert with a judge, yet the exclusion of expert evidence tainted by partiality or a lack of independence does precisely that.

Of course, expert partiality or lack of independence should not be condoned. Experts should be carefully scrutinized for partiality or a lack of independence. The preferable sanction would be to give less weight to the evidence of an expert who is partial or lacks

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282 *ALRI Consultation Memorandum*, *supra* note 12 at para. 105.

283 *Stephen*, *supra* note 80 is an exception. The Saskatchewan Court of Queen's Bench listed a number of factors to be considered in determining whether the relationship between counsel and an expert indicates partiality.

284 *Supra* note 37.

285 *Ibid.*

286 *Fagenblat*, *supra* note 43 at paras. 27-28.

independence. Recognizing that experts occupy a unique position in the litigation process, courts should also consider imposing more novel techniques, mechanisms and sanctions to curb partiality and lack of independence. The use of court appointed and jointly appointed experts may prove useful in this regard. They are more desirable than exclusion of expert evidence in that they do not limit the availability of relevant and necessary evidence to the trier of fact.

The increased judicial scrutiny of expert witnesses is most aptly captured by contemporary reference to the trial judge as "gatekeeper." The implication is that the trial judge must protect the sanctity of the judicial process from the possible dangers of expert evidence. *Mohan*[287] marked the beginning of a more critical analysis of expert evidence by Canadian courts. *The Ikarian Reefer*[288] and other recent cases suggest that the role of the expert is now also being considered more closely. Greater clarity as to when expert evidence will be excluded or discounted due to an expert's partiality or lack of independence is required. Yet there is a danger that increased scrutiny of experts will be detrimental to the truth finding process. A rule excluding expert testimony because of concerns about lack of impartiality or independence may be too severe. Limiting the weight given to such testimony, or using more novel control mechanisms, is more likely to produce a workable balance of fairness and expense.

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[287] *Supra* note 8.
[288] *Supra* note 37.