Advancement of Expert Testimony Rules Before The Canadian International Trade Tribunal

January 25, 2016

On December 21, 2015 (published on the CITT web-site January 12, 2016), the Canadian International Trade Tribunal ("Tribunal") issued its tariff classification/refund decision in EMCO Corporation Westlund v. The President of the Canada Border Services Agency (CITT File No. AP-2014-042). There is an interesting issue hidden in the case – whether a witness qualifies as an expert. This was a hot topic in Canadian courts in 2015. It is also a hot topic before the Tribunal.

During the proceedings, EMCO attempted to qualify one of its witnesses as an expert and counsel for the President of the Canada Border Services Agency ("CBSA") objected on the grounds that the witness "lacked the requisite independence and impartiality due to his vested interest in the outcome of the case". In the end, the Tribunal allowed the witness to testify as an expert, but indicated that the evidence was accepted based on the witness's personal experience (not as an expert).

The Tribunal has interesting analysis concerning expert testimony:

> "17. In *R. v. Mohan*, the Supreme Court of Canada enunciated the following four criteria to consider when assessing the admissibility of expert evidence:
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> - relevance;
> - necessity in assisting the trier of fact;
> - absence of any other exclusionary rule of evidence; and
> - a properly qualified expert.
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> 18. In the same decision, the Supreme Court of Canada commented that the purpose of expert witness testimony, especially with respect to scientific matters, is to ". . . furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.
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> 19. More recently, the Supreme Court of Canada commented on the issue of the impartiality and independence of expert witnesses in *White Burgess Langille Inman v. Abott and Haliburton Co.* In sum, the decision holds that, where questions regarding the impartiality or independence of a proposed expert witness are raised, at common law, the witness can be qualified and his or her evidence admitted where the trier of fact is satisfied (1) that the witness is able and willing to provide fair, objective and non-partisan evidence (this is not meant as an onerous threshold) and (2) in the discretion of the trier of fact, that the potential helpfulness of the evidence is not outweighed by the risks associated with it. If the evidence is admitted, the trier of fact assigns it the weight appropriate in the circumstances, including in light of impartiality and independence concerns.

> 20. At the Tribunal's request, and in accordance with the approach suggested by the Supreme Court of Canada in *White Burgess*, Mr. Curro stated, under oath, that he understood that his duty as an expert witness would be to provide fair, objective and unbiased evidence to assist the Tribunal in rendering its decision and that he was able to discharge this duty. The CBSA was then permitted to challenge the proposed expert on this statement and on his qualifications.
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> 21. With respect to the fact that Mr. Curro is an employee of the manufacturer of the goods in issue, the Tribunal noted that, in *White Burgess*, the Supreme Court of Canada held that "[i]n most cases, a mere employment relationship with the party calling the evidence will be insufficient to [render the evidence of the proposed witness inadmissible]." The Supreme Court of Canada then listed other situations that would be of concern, such as a direct financial interest in the outcome of the litigation or where the expert assumes the role of an advocate for one of the parties."

The Tribunal was satisfied with Mr. Curro's attestation and determined that he did not have an interest other than the employment relationship and allowed his expert testimony. The Tribunal was satisfied that Mr. Curro could provide the degree of independence and impartiality required by the Tribunal.

In the end, EMCO was successful on the tariff classification point and, therefore, was entitled to receive the refunds. More importantly than the win, there is clarification on the use of experts before the Tribunal.

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