Tendering Evidence in Construction Cases: By Affidavit or *Viva Voce* (Oral) Testimony?

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He flung himself upon his horse and rode madly off in all directions.

. . . Stephen Leacock

Tendering Affidavit Evidence

I was counsel in a complex construction case. In play were millions of dollars in claims and counterclaims arising out of the design and construction of a large infrastructure project. The pleadings disclosed legal issues relating to construction deficiencies, design defects, causation, compensable and non-compensable delays, unforeseen subsurface conditions, and scope-of-work issues. Thousands of project documents were catalogued, scanned, and exchanged.

Significantly, many of the project documents and correspondence revealed factual discrepancies and disagreements between the parties, and there was an abundance of credibility issues. The testimony of fact witnesses, therefore, was expected to be critical in order to provide a foundation for the anticipated opinions of expert witnesses.

The arbitrator had ordered that the evidence-in-chief should be tendered by way of sworn affidavits from each fact witness, rather than by the usual and ordinary procedure of *viva voce* (oral) testimony. The thinking was that this protocol would be more expeditious and cost-effective. Indeed, many counsel prefer this method of introducing evidence, expressing the view that it speeds the process along, saves hearing time, does not increase costs, and leads to better and clearer results.

When I initially received the opponent's affidavits well in advance of the arbitration hearing, I combed through them to attempt to ascertain whether they contained any allegations which could test and challenge the credibility of the witnesses. It was immediately clear that the affidavits were drafted by lawyers. The words, the turns of phrases, the phraseology, and the references to legal issues were not of the sort typically used by witnesses in construction cases. So, on a macro level, the affidavits could be challenged on that basis. But the affidavits were also riddled with

allegations, claims, and arguments which offended the rules of evidence, and all or parts of them raised issues of admissibility.

When the arbitrator asked counsel their views on whether he should apply the common law rules of evidence at the hearing, I readily consented to that approach, and was pleased that my colleague, the opposing counsel Mr. Smith, did not object.

The way it worked at the hearing was that, after the witness was sworn, Mr. Smith would introduce the affidavit of his witness and would have it marked as an exhibit for identification purposes. He then asked the witness to identify the affidavit and his signature on it; to confirm that the facts contained in it were true and correct when he signed it and that they continued to be so; and to identify himself and his role in the project. He then invited me to cross-examine, and then sat down, feeling that the entirety of the affidavit testimony had been successfully submitted into evidence. Cross-examination and any re-examination were then to be conducted orally and transcribed.

Before even before addressing the first witness, I stood to register my objections to the affidavit, and then embarked on a bold strategy of challenging the affidavit on a number of fronts, pointing out evidentiary shortcomings in the affidavit -- irrelevancies, numerous opinions, hearsay, double-hearsay, disclosure of privileged information, and so on. I then asked the arbitrator to strike out whole paragraphs, and large swaths of other paragraphs, which he was apparently prepared to do. In the end, I was successful in striking out about 30% of the affidavits of all of the witnesses; and this was before I asked a single substantive question of any of them.

My attack on the affidavits also served to discredit some of the damages which were being claimed by the opposing party; and, before I began my cross-examination, Mr. Smith conceded that some of his client's claims for damages, totaling in the tens of thousands of dollars, had been reconsidered and were withdrawn.

Following from that, my cross-examination then challenged the "spin" of the drafting which was obviously undertaken by Mr. Smith or one of his associates. Was the actual testimony that of the witness or the lawyer? I asked the witness whether he had drafted the affidavit (answer: no);

whether he dictated parts of it (answer: no); whether the actual words in the affidavit were his (answer: no); whether he understood the words which were used (answer: some no); and whether he used those words in his daily conversations (answer: no).

During a break in the proceeding, I went into the hallway outside the hearing room, and was surprised to encounter a colleague who was a retired judge from England. He was now a full-time arbitrator, and coincidentally had come to Canada for an arbitration where the hearing was taking place in the very next room to where my hearing was proceeding. I told him about my success, as counsel, in excising large portions of the opponent's affidavit evidence, and he simply smiled and said that they did not do it that way in England – "*life's too short*". Distinguishing between admissibility and weight, he stated that in his world, most evidence is admitted, and the arbitrator would then decide what weight it is to be given.

Tendering Viva Voce (Oral) Evidence

I was also counsel in another major construction case. There, a critical witness I was calling to testify *viva voce* had just arrived from Europe the day before the hearing began. I had never met him, and our communication up until that point in time was entirely through telephone calls and correspondence. He showed up at the hearing obviously still tired from his long trip, and wearing tattered blue jeans, scuffed shoes and an ill-fitting jacket. Sitting in the witness box, he leaned so far back in his chair that everyone in the room was taking bets as to whether and when the unbalanced chair would collapse under his weight. When I asked him questions, he would take an inordinate amount of time to answer, giving the impression that he was not particularly informed or prepared. Despite some damaging cross-examination by opposing counsel, I managed to shuffle him off the stand and out of the room quickly. I had hoped that his testimony, critical as it was, did not unduly prejudice my client's case.

It was clear that this particular witness' testimony would have benefitted had it instead been submitted in the form of an affidavit. An affidavit does not describe body language; does not indicate whether the witness is articulate or logical; does not disclose the state of the witness' attire or demeanour; and secures the benefit of the "spin" imposed on the testimony by counsel. To the

extent that any of those factors were to assist in the evaluation of credibility, the decision writes itself.

What if his evidence were tendered in the form of an affidavit? My own view is that, even though he would nevertheless be exposed to cross-examination, at least his written evidence would have been more smooth, articulate, and credible. Let the opposing counsel worry about how compelling the witness' answers were on cross-examination.

These anecdotes squarely raise the issue of whether the evidence should be tendered by way of affidavit or by *viva voce* testimony. How does one decide which is the better approach? That question has generated a high-level debate amongst legal scholars.

The Boundaries of the Debate

Credibility: A fundamental issue is whether an arbitrator is able assess the credibility of a witness when direct testimony is presented in writing or orally.

When a fact witness' evidence is submitted in affidavit form detailing the witness' recollection of events, an experienced arbitrator, during cross-examination, will not likely have a problem evaluating the credibility of the witness. If the arbitrator ensures that documentary discovery is thorough and complete, then the tools for an effective cross-examination have been provided to counsel and there is little to be lost by having direct testimony submitted in writing. However, if documentary discovery is not thorough and incomplete, then the cross examiner will have significantly less at his disposal to undermine the witness' story, and the arbitrator might very well find himself wondering whether the story presented in the affidavit was that of the witness or that of his lawyer.

On the other hand, where the testimony is *viva voce*, the arbitrator has the opportunity and ability to assess witnesses by observing their behaviour, demeanour, frankness, readiness to answer, coherence and consistency, and to evaluate their credibility. Furthermore, the drama of *viva voce* testimony, including the witness' body language and ability to recall events accurately; as well as the possibility of unexpected admissions or statements, serves to put a thumb on the scale in evaluating the alternative approaches.

Additionally, an arbitrator will often exclude witnesses from the hearing room before they testify so that their testimony will not be tainted or influenced by hearing the evidence of other witnesses. If a witness were not excluded from the hearing room, the fact that they had heard the testimony of other witnesses may affect their credibility, and therefore the weight of their testimony.

Advance review: Written statements provide the arbitrator and opposing counsel with the opportunity to gain an understanding of, and to evaluate, the direct testimony evidence well in advance of the in-person hearing and any cross-examination. The witness' testimony would therefore be more predictable than if it were submitted orally.

Memory Distortion: Studies exploring the science of human memory have revealed that, particularly in complex engineering construction projects, human memory is fragile and malleable and that memories could become unwittingly corrupted and distorted. If a project participant were to keep detailed and complete records of the project, however, then it may not matter whether his evidence is submitted to the arbitrator in written or oral form. But if he were to rely strictly on his memory, then *viva voce* testimony would probably be less reliable than affidavit evidence since the events may have taken place years earlier, and the witness may have moved on to other roles, other projects, or other employment. Memory distortion can be remediated if the witness were given an opportunity, in advance, to investigate the facts for inclusion in an affidavit rather than simply struggling to remember them while preparing for his testimony or while in the witness box.

Burden of Proof: Written witness statements have the effect of shifting the burden of proof to the opposing party. Typically drafted by legal counsel, written statements are often calculated so that, standing alone, they are designed to diminish or eliminate any risk of the type of impeachment which could occur during direct oral examination of a witness.

International Arbitration: Legal writers have observed that written witness statements are the norm in international arbitration based in Europe, Asia and the Middle East, usually because lawyer involvement in drafting (and perhaps putting an influential "spin" on) affidavit testimony is far less prevalent or tolerated in those cultures than in other countries.

Written vs Oral Communications: Academic scholars have opined on the differences between written and oral communications, and have concluded as follows:

- Written language can be significantly more precise. Written words can be chosen with greater deliberation and thought, and a written argument can be extraordinarily sophisticated and intricate;
- A reader can read quickly or slowly or even stop to think about what he has just read. A reader always has the option of re-reading; and its mere possibility has an effect upon a reader's comprehension;
- A speaker, though, has more ability to engage the audience psychologically and to use complex forms of non-verbal communication;
- Oral communication can be significantly more effective in expressing meaning to an audience. This distinction between precision and effectiveness is due to the extensive repertoire of signals available to the speaker: gestures, intonation, inflection, volume, pitch, pauses, movement, visual cues such as appearance, and a whole host of other ways to communicate meaning. A speaker has significantly more control over what the listener will hear than the writer has over what the reader will read.

Cost: A legal writer has commented that crafting affidavit testimony is labour intensive, and therefore costly, because "*every word* [is] *researched, fixed, revised, reconsidered, criticized, amended, reconsidered, contrasted, and then done once or twice more for quality control*".