

PRELIMINARY DISMISSAL OF AN EXPERT REPORT IN QUEBEC LAW

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Product liability, class actions, latent defect cases, expropriation or construction cases: expert reports are at the centre of the evidence adduced in numerous cases and are often subject to bitter debates between the lawyers representing each of the parties.

Article 241 of the Code of Civil Procedure

Since the new *Code of Civil Procedure* has come into force^[1], article 241 C.C.P. provides that the hearing on the dismissal of all or part of an expert report is to be held before the hearing on the merits, that is, ten (10) days after the party becomes aware of the ground(s) for dismissing the report. In line with previous case law, possible causes of dismissal are irregularity, substantial error and bias.

Case law has specified what interpretation is to be given to the causes for dismissal, especially grounds of irregularity. The qualification of the 10-day time limit as being a strict time limit has also given rise to extensive discussion. In a recent decision^[2], the Superior Court reviewed case law dealing with causes of irregularity and confirmed a tendency in case law to the effect that the 10-day time limit is not a strict one.

Before the new C.C.P. came into force, the hearing on the admission of an expert report was generally held during the hearing on the merits and the grounds for dismissal were not clearly defined. On one hand, the court had to determine if the report:

- was relevant;
- helped it in its appreciation of the facts; and
- did not contain any ground for dismissal.^[3]

The court would then have to determine if the expert who wrote the report was sufficiently qualified.^[4] Then, after conducting a cost-benefit analysis, it had to determine if the probative value of the report was greater than its prejudicial effect.^[5] There is no doubt that this method of analysis inspired the legislator in drafting article 241 C.C.P. and the leading cases which were rendered before it came into force continue to be cited up to now.

Irregularity as a Ground for Dismissal

Several grounds may warrant the total or partial dismissal of an expert report on the basis of irregularity. These namely include:

- An expert assuming the judge's role and giving a legal opinion and/or analyzing simple facts;^[6]
- An expert report based on unproven facts;^[7]
- An expert report containing affirmations which are not based on technical findings and which are accordingly not relevant to the professional field in which the expert works;^[8]
- Lack of details about the methodology used and about the reliability of the report;^[9]
- Lack of relevancy of the report in connection with the issues being litigated;^[10]
- The filing of a second expert report in the same discipline as the first one, without the court's prior authorization.^[11]

Substantial Error as a Ground for Dismissal

Substantial error as a ground for dismissal is [translation] "a substantive defect or a defect in procedure sufficient to invalidate a decision."^[12] The courts consider that for an expert report to contain a substantial error, it must affect the basis of the report, thereby invalidating it.^[13] An example of such an error would namely be an expert report based on techniques which have no connection to the field in question.^[14]

Bias as a Ground for Dismissal

Bias as a ground for dismissal may be summarized as showing bias for one party to the detriment of the other party.^[15] In other words, the expert's objectivity is compromised because he has a direct interest in or a connection to the case or to a party.^[16] It is accordingly insufficient to merely have an appearance of bias to rule that an expert report is to be dismissed on this basis at a preliminary step.^[17] On the other hand, the appearance of bias, without necessarily entailing the dismissal of the expert report at a preliminary stage, may either affect the expert's credibility and ultimately bring a judge to consider that the report has little probative value or convince a judge hearing the case on the merits to dismiss the report at the hearing on the merits.^[18]

The 10-Day Time Limit is Not Strict

The time limit provided for notifying an application for the dismissal of an expert report is 10 days.^[19] That being said, case law is full of decisions in which applications for dismissal were made once the time limit was expired. The Westmount Square decision confirms this tendency in case law, to the effect that the 10-day time limit is not strict^[20], even adding that [translation] "word to that effect must get around."^[21]

Case law underscores the following: the debate on this point must be held before the hearing on the merits, in

a quest for proportionality, judicial efficiency, to limit the issue to what is necessary and to prevent a party from filing an expert report in reply to inadmissible evidence.^[22] Moreover, nothing prevents a judge hearing such a preliminary application, from referring the matter to the judge hearing the case on the merits in any matter in which there are exceptional circumstances or a lingering doubt subsists, and especially in cases in which the probative value overlaps the issue of admissibility as such, of the expert report.^[23]

On the basis of what precedes, the issue of the time limit to apply for the dismissal of an expert report now seems settled. As far as the grounds for the dismissal of an expert report are concerned, case law is full of examples which may help litigants in determining what constitutes such grounds under article 241 C.C.P.

by Eric Stachecki and Yassin Gagnon-Djalo

[1] ch. C-25.01 [**C.C.P.**].^[ps2id id='1' target='']

[2] *Syndicat des copropriétaires du Westmount Square v. Royal & Sun Alliance du Canada, société d'assurances*, 2020 QCCS 1079 [**Westmount Square**].^[ps2id id='2' target='']

[3] *R. v. Mohan*, [1994] 2 SCR 9, p. 20-26 [**Mohan**]; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), para. 19 [**White Burgess**].^[ps2id id='3' target='']

[4] *Mohan*, p. 20-26; *White Burgess*, para. 19.^[ps2id id='4' target='']

[5] *Mohan*, p. 20-26; *White Burgess*, para. 19-20.^[ps2id id='5' target='']

[6] Donald BÉCHARD in *Le Grand Collectif – Code de procédure civile, commentaires et annotations*, [Code of Civil Procedure, Comments and Annotations] vol. 1, Montréal, Éditions Yvon Blais, 2019, p. 1433-1435 and 1444-1448; *Du Sablon*, para. 14, 16 et 21; *Construction Savite Inc. v. Construction Demathieu & Bard (CDB) Inc.*, 2017 QCCS 579, para. 21-24 [**Savite**]; *Westmount Square*, para. 64-65, 70, 93 and 119; *Lavoie v. Promutuel assurances Portneuf-Champlain*, 2017 QCCS 5796, para. 27-31 [**Lavoie**]; *Ville de Montréal v. Propriétés Bullion Inc.*, 2017 QCCS 1187, para. 47 [**Propriétés Bullion**]; *Holding Transport*, para. 13-15; *Cardinal v. Bonneau*, 2018 QCCA 1357, para. 63 [**Cardinal**]; *Gauthier v. Raymond Chabot Inc.*, 2017 QCCS 317, para. 24-25 [**Gauthier**].^[ps2id id='6' target='']

[7] Donald BÉCHARD dans *Le Grand Collectif – Code de procédure civile, commentaires et annotations*, [Code of Civil Procedure, Comments and Annotations] vol. 1, Montréal, Éditions Yvon Blais, 2019, p. 1433-1435 et 1443-1444.^[ps2id id='7' target='']

[8] *Westmount Square*, para. 61-66.^[ps2id id='8' target='']

[9] *Cardinal*, para. 14, 16, 39, 70.^[ps2id id='9' target='']

[10] *Saint-Adolphe-D'Howard (Municipalité de) v. Chalets St-Adolphe Inc.*, 2007 QCCA 1421, para. 14 and 22-27; *Bernatchez v. Blanchet Allard*, 2016 QCCS 3199, para. 18 [**Bernatchez**].^[ps2id id='10' target='']

[11] *Pagé Construction v. Municipalité de St-Séverin de Proulxville*, 2018 QCCS 1855, para. 35-36 [**Pagé**].^[ps2id id='11' target='']

[12] *Bernatchez*, para. 35.[ps2id id='12' target='']

[13] *Bernatchez*, para. 36.[ps2id id='13' target='']

[14] *Bernatchez*, para. 36.[ps2id id='14' target='']

[15] *Bernatchez*, para. 40.[ps2id id='15' target='']

[16] *Du Sablon*, para. 24-26; *Safran Nacelles v. Learjet Inc.*, 2019 QCCS 3269, para. 27-34.[ps2id id='16' target='']

[17] *Du Sablon*, para. 25.[ps2id id='17' target='']

[18] *Syndicat des copropriétaires du Furness Inc. v. 2641-3245 Québec Inc.*, 2018 QCCS 4764, para. 16-19 and 27-28.[ps2id id='18' target='']

[19] Art. 241 C.C.P.[ps2id id='19' target='']

[20] *Westmount Square*, para. 114-116 and 120-121.[ps2id id='20' target='']

[21] *Westmount Square*, para. 97.[ps2id id='21' target='']

[22] *Du Sablon*, para. 10-11; *Westmount Square*, para. 110-111; *Holding Transport*, para. 19; *Propriétés Bullion*, para. 24.[ps2id id='22' target='']

[23] *Cardinal*, para. 33, 58; *Gauthier*, para. 15.[ps2id id='23' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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