Can an Expert Report be Inadmissible for Bias as a Preliminary Stage? The Superior Court of Quebec decides

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The *Code of Civil Procedure* gives a party the ability to apply for the dismissal of an expert report as soon as it is disclosed by the adverse party. This process is governed by the courts. In the decision in *Safran Nacelles v. Learjet inc.*[1], rendered in August 2019, the Superior Court granted an application to dismiss an expert report and excluded it even before the trial was held, after finding that its author did not have the requisite impartiality to enlighten the court.

Facts

In 2007, Bombardier Inc. (hereinafter "Bombardier") retained the services of the plaintiffs, Safran Nacelles and Safran Landing Systems (hereinafter jointly referred to as "Safran"). Safran became a supplier of Bombardier in connection with the Learjet 85 program.

In October 2015, Bombardier stated that it was forced to abandon its program, citing poor sales as the reason for doing so. However, Safran felt that the contracts, which were binding on the parties, had been terminated without cause and claimed damages.

In 2018, in the context of the proceedings instituted by Safran, Bombardier filed an expert report in the court record which determined the reasons for the abandonment of the Learjet 85 program. In particular, the expert analyzed the market trends, reviewed Learjet sales, and compared them with the sales of competing products.

However, the expert had been an employee of Bombardier since 2007 and was even the head of the market analysts team at Bombardier. Thus, his work had served as the basis for Bombardier's decision to terminate the program.

Decision

Justice Thomas M. Davis, of the Superior Court, dismissed Bombardier's expert report after stating the requirements of objectivity, impartiality and thoroughness associated with the expert's work[2]. He also noted that the purpose of the expert's report is to enable the trial judge to assess the technical, scientific or specialized aspects involved in the proceeding before him or her. The expertise should extend beyond matters within the knowledge and experience of the judge, without however taking the form of a legal opinion or pleading[3].

Where expert evidence does not meet these criteria, it can be rejected at the preliminary stage, but

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only in cases where the inadmissibility of the evidence is clear.

While judge Davis acknowledged the great experience of Bombardier's expert, he noted that this experience was acquired in the context of his job[4]. Furthermore, the judge also noted that the expert's work was key to Bombardier's decision to terminate the Learjet 85 program[5]. The expert was involved in the program, participated in presentations made to Bombardier's suppliers, and would undoubtedly have to testify at trial as a witness to the facts. The judge concluded that he was [translation] "*the main supplier of the information that enabled Bombardier's management to make its decision*"[6], making him an advocate for Bombardier's position, and therefore biased.

Noteworthy points of decision

Since the current *Code of Civil Procedure* came into force on January 1, 2016, the debate on the admissibility of expert reports should normally take place prior to trial. Article 241 of the *Code of Civil Procedure* provides that a party may, at that stage, apply for the dismissal of the report on grounds of irregularity, substantial error or bias.

However, whether an expert is biased is sometimes an issue that is difficult to resolve prior to trial. Both judges and lawyers have a tendency to leave this issue to the assessment of the judge on the merits and deal with it as a question of probative value.

Therefore, there are few examples of situations, in the course of proceedings, that justify the dismissal of an expert report on grounds of bias. Judge Davis's decision in the case of *Safran Nacelles v. Learjet inc.* is one of the most instructive. It is all the more interesting as it was rendered solely on the issue of bias, in the absence of any other form of irregularity in the report.

For judge Davis, it was not the expert's job with the defendant Bombardier that led to the dismissal of his report, but rather, the fact that his conclusions formed the very basis of the decision that was being attacked by Safran, i.e. the main issue in the debate between the parties.

The judge's reasons were consistent with two other decisions of the Superior Court in which the substantial involvement of the experts in the facts at issue justified the dismissal of their reports on grounds of bias[7].

The question of the admissibility of expert reports must be reviewed on a case by case basis. Our team can advise you on this issue and assist you in choosing an appropriate expert.

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1. 2019 QCCS 3269.
2. *Id.*, para. 23.
3. *Id.*, para. 25.
4. *Id.*, para. 28.
5. *Id.*, para. 29.
6. *Id.*, para. 30.
7. *Procureure générale du Québec c. L'Unique Assurances générales*, 2018 QCCS 2511; *Roy v. Québec (Procureure générale)*, 2016 QCCS 1829.

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