

## Guidelines on the Role of Experts: the Commission des lésions professionnelles Takes Action!

By Marie-Claude Perreault and Isabelle Marcoux



### Introduction

As of June 2004, the Commission des lésions professionnelles (“CLP”) will implement guidelines (“Guidelines”) stating its expectations of expert witnesses, both as regards their written reports and the content of their testimony.

Over the past years, there has been much criticism by CLP adjudicators concerning the involvement of expert witnesses in judicial and quasi-judicial proceedings. Their impartiality and objectivity were often in question.

The CLP decided to examine the issue and formed a working group on the role of experts, its task being to recommend a course of action for improving the quality of expert involvement in contestation proceedings. The working group was thus required to consider the following issues: the concept of “expert”, the impartiality and objectivity of experts, expert reports and testimony, and the availability of experts to testify.

As a result of this exercise, the CLP developed guidelines by drawing specifically on work done in England, Australia and Ontario, and on publications issued by Québec’s College of Physicians and the Ministère de la Santé et des services sociaux (the Guidelines are now available on the CLP Website).

### The Guidelines in greater detail

The purpose of the Guidelines is to publicize the CLP’s expectations of experts, given that experts play a very important role in contestation proceedings (section 1.1). It should be noted that the Guidelines do not in any way modify the rules applied by the CLP in assessing evidence (section 1.2). This means that, even if the expert satisfies the expectations that have been communicated to him or her, the expert’s opinion will still be weighed on the basis of the preponderance of proof.

The Guidelines deal with the report and testimony of a person whose services are retained to give an opinion on a scientific, professional or technical matter and who is accorded the status of expert by the CLP. It must be noted that the Guidelines do not pertain to medical certificates or reports drafted by the worker’s attending physician for the purposes of the *Act Respecting Industrial Accidents and Occupational Diseases* (“AIAOD”).

The Guidelines state that an expert’s role is to enlighten the CLP and assist it in weighing evidence within the expert’s scope of expertise acknowledged by the CLP (section 3). The CLP considered it necessary to insist on three criteria being used to determine the admissibility of evidence, namely: relevance, necessity, and the qualifications of the person who is accorded the status of expert (section 4).

To be accorded the status of expert, a person must demonstrate his or her competence in a relevant sphere of activities. Accordingly, the expert must be able to provide the CLP with information on his or her academic qualifications and professional experience. Once the person is recognized as an expert, he or she can give opinion testimony to the CLP (sections 5.1 to 5.4).

Sections 6.1 to 6.6 set forth the general expectations regarding any expert called upon to collaborate with the CLP. General expectations encompass the following: competence, objectivity and impartiality,



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Marie-Claude Perreault is a member of the Québec Bar and specializes in Labour and Employment Law

compliance with the highest possible prevailing scientific, professional or technical standards, cooperation with the CLP's objective of prompt disposition of the case and knowledge of the legal context in which the opinion is required.

The expert's role is to enlighten the CLP on issues within the scope of his or her expertise, and the expert must always bear in mind that his or her first duty is to the CLP. The expert must also avoid conducting himself or herself as the representative of the party that engaged his or her services and must refrain from commenting on the rules of law applicable to the case submitted (section 6.4).

However, the CLP expects the expert to know the legal context in which the required opinion is to be given (section 6.1.5).

Section 7 of the Guidelines concerns the content of expert reports. First, the CLP expects the expert's report to conform to the requirements of the professional body or association to which the expert belongs. Second, the CLP requires the expert to pay special attention to the following:

- identification of the subjects submitted for expert assessment;
- providing the background to the matter;
- gathering all pertinent information;
- providing a non-partisan statement of all information gathered by the expert;
- giving conclusions substantiated by analysis of the information gathered;

- providing a bibliography of the literature consulted;
- providing a statement and discussion of scientific assumptions that the expert has knowledge of and that may differ from those used in his or her assessment.

The CLP further requires that medical assessments contain the following:

- a description of the circumstances surrounding the appearance of the injury in question;
- a description of the relevant risk factors related to the injury in question;
- a pertinent medical history, including a description of the symptoms and their development and evolution;
- a pertinent personal life history and lifestyle description;
- a detailed description of the objective, physical or mental examination undergone by the worker;
- a precise description of the tests or manoeuvres conducted, the results thereof, both positive and negative, and the criteria used to interpret them;
- the differential diagnosis, where the diagnosis is in dispute.

Lastly, the CLP requires that the expert enclose a statement with his or her report in which he or she attests to his or her knowledge of and compliance with the Guidelines.

## The application, value and probative force of the Guidelines

Given that the Guidelines are not mandatory, their ultimate impact will be directly related to how the parties use them and the judicial or quasi-judicial proceedings. The CLP's avowed purpose is for the Guidelines to acquire a certain authority despite the fact that they are not mandatory. To do this, the CLP will encourage they be invoked by the parties appearing before it and that the commissioners apply them.

The CLP will encourage commissioners to verify whether expert witnesses have properly read the Guidelines. Commissioners will also be asked to mention in their decisions whether or not an expert's participation or demonstration complied with the Guidelines.

The CLP's decision not to make the Guidelines mandatory is explained primarily [translation:] "by the innovative aspect of the measure, by the CLP's desire for experts to voluntarily adopt the Guidelines and by the need to assess over a one-year period the impact of applying the Guidelines."<sup>1</sup> However, given the features implemented by the CLP, it is to be expected that the Guidelines will have the same authority as the *Rules of Evidence, Procedure and Practice*.

<sup>1</sup> Comments regarding the Working Group on the role of experts made by Claude Verge, Direction des services juridiques.

Isabelle Marcoux is a member  
of the Québec Bar and  
specializes in Labour and  
Employment Law



There is no consequence or sanction attached to not signing or failing to provide the expert's declaration set forth in Appendix 1 to the Guidelines. Thus, filing the declaration with the expert report remains strictly optional. However, an expert could probably be cross-examined on his or her reasons for having failed to provide the declaration.

### **Role of the parties in formulating the expert's mandate and in preparing for the expert's testimony**

The parties will henceforth play an important role, not only in preparing for their expert witness's testimony at the hearing, but also in formulating the expert's mandate with a view to the drafting of his or her report. The parties must do the following:

- draft a written mandate, which must be clear, precise and neutral in order to give maximum information to the expert for the purpose of writing the expert report;
- ensure that the expert witness has thoroughly read the Guidelines;
- ensure that the expert has a proper understanding of his or her role and how to perform it. The expert must do the following:
  - assist the CLP to understand and weigh the evidence;
  - remain objective in drafting his or her report and refrain from acting as a representative of the party that has engaged his or her services;
  - stay within his or her field of expertise and, on occasion, acknowledge his or her limitations;
  - amend his or her opinions should circumstances so warrant;

- sensitize the expert witness to the fact that it is important that he or she be able to show independence by maintaining professional autonomy, despite the fact that he or she is remunerated by one of the parties to the dispute;
- inform the expert witness that his or her report or testimony must be as complete and precise as possible to provide the CLP with maximum information pertinent to the case, specifically:
  - by amplifying the analytical process that led to the expert's conclusions;
  - by presenting the most pertinent and recent aspects of the relevant medical theory;
  - by giving reasons, based on the relevant scientific literature, in respect of which he or she rejects other opinions filed as evidence and of which he or she has knowledge;
  - by enclosing with his or her expert report, the expert's declaration in the appendix to the Guidelines;
- ensure that the expert understands the legal framework within which his or her opinion is required (familiarity with the applicable statutes and regulations);
- avoid the expert witness using legal arguments or citing legal provisions to substantiate his or her opinion;
- prepare the expert witness to be able to provide detailed substantiation of every opinion expressed in his or her report, based on prevailing scientific principles and medical standards given that the probative value of an expert's report is directly proportional to the substantiation of the opinion issued;

- ensure that the expert witness has full knowledge of the case and that he or she can answer hypothetical questions asked by the CLP;
- sensitize the expert witness to using easily understood language.

### **Conclusion**

The Guidelines are not a mandatory document; the CLP's intention was not to formulate a code of conduct, but rather a document setting forth its expectations CLP, namely a clear, concise, precise and instructive report.

This probably explains why the Guidelines are not incorporated in the *Rules of Evidence, Procedure and Practice of the Commission des lésions professionnelles*. However, despite the fact that they are not mandatory, it is our view that the Guidelines will be applied in a manner similar to the *Rules of Evidence, Procedure and Practice*.

It will thus be paramount for the parties to ensure that the expert witness is familiar with the content of the Guidelines and that his or her report complies with the above-mentioned principles.

The selection and preparation of the expert witness is clearly of major importance.

Should you require further information, please do not hesitate to contact either of the following attorneys:

Marie-Claude Perreault  
(514) 877- 2958  
mcperreault@lavery.qc.ca

Isabelle Marcoux  
(514) 877-3085  
imarcoux@lavery.qc.ca

or any other member of our team.

**You may contact any of the following members of the Labour and Employment Law group with regard to this bulletin.**



**At our Montréal office**

Pierre L. Baribeau  
Jean Beauregard  
Monique Brassard  
Denis Charest  
Michel Desrosiers  
Jocelyne Forget  
Mathieu Fortier  
Philippe Frère  
Alain Gascon  
Michel Gélinas  
Isabelle Gosselin

Jean-François Hotte  
France Legault  
Guy Lemay  
Carl Lessard  
Dominique L'Heureux  
Josiane L'Heureux  
Catherine Maheu  
Isabelle Marcoux  
Véronique Morin  
Marie-Claude Perreault  
Érik Sabbatini

**At our Québec City office**

Ève Beaudet  
Pierre Beaudoin  
Claude Larose  
Marie-Hélène Riverin  
Madeleine Roy

**At our Laval office**

Pierre Daviault

**Montréal**

Suite 4000  
1 Place Ville Marie  
Montréal, Quebec  
H3B 4M4

Telephone:  
(514) 871-1522  
Fax:  
(514) 871-8977

**Québec City**

Suite 500  
925 chemin Saint-Louis  
Québec City, Quebec  
G1S 1C1

Telephone:  
(418) 688-5000  
Fax:  
(418) 688-3458

**Laval**

Suite 500  
3080 boul. Le Carrefour  
Laval, Quebec  
H7T 2R5

Telephone:  
(450) 978-8100  
Fax:  
(450) 978-8111

**Ottawa**

Suite 1810  
360 Albert Street  
Ottawa, Ontario  
K1R 7X7

Telephone:  
(613) 594-4936  
Fax:  
(613) 594-8783

**Web Site**

[www.laverydebilly.com](http://www.laverydebilly.com)

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