The Role of the Expert under the new Code of Civil Procedure

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The coming into force of the new Code of Civil Procedure on January 1, 2016 created some uncertainty for litigation lawyers. One issue was the role of experts in litigation and in particular the emphasis on joint experts and the filing of an expert's report in lieu of testimony. Other provisions that appear to deal a blow to professional secrecy and the litigation privilege could also affect litigation lawyers and their clients. The second paragraph of article 235 C.C.P., which covers the expert's duties, as well as the second paragraph of article 238 C.C.P., which covers testimony taken by an expert, read as follows:

> **"235. Experts are required, on request, to "235. Experts are required, on request, to provide the court and the parties with details on their professional qualifications, the progress of the work and the instructions received from a party; they are also required to comply with the time limits given to them. They may, if necessary to carry out their mission, request directives from the court; such a request is notified to the parties."**
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> **"238. Any testimony taken by the expert is attached to the report and forms part of the evidence."**

The recent Superior Court decision in *SNC-Lavalin inc.* v. *ArcelorMittal Exploitation minière Canada* (2017 QCCS 737) sheds some light on the scope of these provisions and the interpretation given to them by the courts.

The judgment

The Honourable Jean-François Michaud ruled on objections dealing with professional secrecy and the litigation privilege. SNC-Lavalin Inc. ("**SNC**") asked for [Translation] "the experts' letters of

undertaking and the instructions given to them regarding the performance of their mandate". ArcelorMittal Mining Canada and ArcelorMittal Mines Canada Inc. ("**Arcelor**") objected, primarily on the ground of professional secrecy. Arcelor could also have raised the litigation privilege. Before 2016, all solicitor-client communications were confidential and the opposing party did not have access to them. For litigation lawyers, it was their secret garden.

Justice Michaud nonetheless dismissed Arcelor's objection and allowed SNC's request for two reasons. First, the experts described their mandate in their report, which constitutes a waiver of professional secrecy, at least with respect to that description of their mandate. According to the judge, this reasoning also applies to instructions received later which may have changed the scope of the mandate. The judge was also of the opinion that article 235 C.C.P. reduced the extent of professional secrecy and the litigation privilege, which he found to be reasonable given the expert's [Translation] "impartial role and the search for the truth". In *obiter*, the judge states that article 235 C.C.P. applies even though the experts' reports were prepared before the new *Code of Civil Procedure* came into force since that article had immediate effect according to the transitional rules.

Lastly, the judge held that Arcelor would be required to provide SNC with any subsequent instructions it gave its experts, although only those relating to the scope of the mandate and excluding any other discussions between the experts and Arcelor or their attorneys.

In the second part of its application, SNC requested for the documents consulted by Arcelor's experts [Translation] "on which they based their opinion". This essentially covered interviews the experts conducted with some of Arcelor's employees, which were mentioned in their report.

Based on jurisprudence which preceded the reform, the court held that SNC had a right to those interviews if they were recorded and/or transcribed, since the experts' report referred to them. However, if the experts only took notes of the interviews, those notes were protected by professional secrecy and the litigation privilege and Arcelor was under no obligation to provide them to the other party. Justice Michaud also set aside the application of article 238 C.C.P. which, as mentioned, requires that experts attach any testimony taken to their report. His decision was based on the fact that this provision did not exist when the interviews were conducted and article 238 C.C.P. is not retroactive. Without going into detail about transitional law, which is not the subject of this newsletter, it is difficult to see why this article would be treated differently from article 235 C.C.P.

The judge concluded that at some point he will order the experts to meet pursuant to article 240 C.C.P. to "identify the points on which they differ".

Conclusion

This judgment and the provisions on which it is based certainly result in a big change for litigation lawyers. They and their clients will likely have to adjust to the new rules. As mentioned above, this new approach runs counter to not only professional secrecy and the litigation privilege, but also the principle that each party is master of his own evidence. However, debates among experts often lead to more disputes than they resolve. In future, lawyers must be scrupulously clear as to the mandates and instructions given to experts.