Preaching to the Choir

The Use of Internal Experts in Canadian Litigation

By Ryan P. Krushelnitzky and Sandra L. Corbett, QC

Who better to provide expert evidence on a product than a client's own engineer or designer who has spent years working with the product? Often, in a product liability case, the individual with the best knowledge about an allegedly defective product will be a client's own "internal expert." Despite this obvious benefit to using an internal expert, there are risks that Canadian courts will find that these internal experts lack the independence necessary for the admission of their opinions, or alternatively, that those opinions warrant any weight.

This is unlike the American experience, in which, for example, Federal Rule of Civil Procedure 26 expressly contemplates disclosure of an expert report from an internal expert "whose duties as the party's employee regularly involve giving expert testimony."

The Supreme Court of Canada has emphasized that a trial judge should "take seriously" the role of "gatekeeper" and scrutinize the admissibility of an expert's opinion to prevent an opinion which may "distort the fact-finding process." *R. v. J.-L.J.*, [2000] 2 S.C.R. 600.

The independence of an expert witness is one of the factors that will be scrutinized by a trial judge in determining the admissibility and weight of the expert's opinion. This requirement for independence has even been codified in the procedural rules of court for three Canadian provinces: Ontario, Nova Scotia, and Saskatchewan.

The role of an expert in Canada is to provide the trier of fact with assistance in understanding matters that are beyond the trier of fact's knowledge. The concern with internal experts in Canada is that they lack the necessary independence to do so. Canadian courts have long held that an expert is "not to be an advocate for one party, but an independent expert." *Interamerican Transport Systems Inc. v. Canadian Pacific Express & Transport Ltd.*, [1995] O.J. NO. 3644 (Ont. Gen. Div.).

This requirement for independence will often result in an internal expert's opinion being deemed inadmissible. For example, in the Manitoba decision *Prairie Well Servicing Ltd. v. Tundra Oil & Gas Ltd.*, 2000 MBQB 52, a defendant called its own general manager to provide expert evidence on estimated recovery from an oil well. Justice Mykle, of the Manitoba Queen's Bench, disregarded the evidence of that internal expert, finding that he was "too connected to one side of this litigation for his opinions to have much value" and that he was "not an independent expert witness." Justice Mykle emphasized the Canadian view that "to be credible, an expert witness ought to be independent."

Nevertheless, there is currently some uncertainty in Canada over whether internal expert opinion is inadmissible, or whether to admit it with the question of bias going toward weight. Canada-wide, the courts have tended to adopt a mixed approach: obvious and serious impartiality will result in a court excluding expert evidence, while a court will admit less seriously biased evidence or evidence that the court perceives as less biased but factor the bias into the weight assigned to the expert evidence.

Clarification of this contentious area of Canadian law is imminent, with leave recently granted to appeal in *Abbott and Haliburton Co. v White Burgess Langille Inman,* [2013] NSCA 66, by the Supreme Court of Canada.

Given the uncertainties, while a party involved in litigation in Canada should not plan to call an internal expert to give opinion evidence at trial, this does not mean that there is no value to involving internal experts in Canadian litigation. The particular knowledge and experience that an internal expert has can be leveraged in a number of ways, including the following:

- Using an internal expert to provide privileged advice about the nature of the allegations surrounding a product and to provide privileged critiques of the opposing side's own expert evidence. Written reports prepared by a non-testifying internal expert for the predominant purpose of assisting an ongoing litigation will be privileged and need never be disclosed.
- Using an internal expert to identify potential independent experts. For example, an independent expert may know of an individual who held a similar position in a competitor company who is now retired who would make an ideal expert.

Think Globally, continued on page 90

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Think Globally, from page 87

- Using an internal expert to provide fact evidence at trial, either as the party's corporate representative, or as a fact witness.
- Using an internal expert during a trial to provide counsel with advice on strategies to cross-examine or to address the opposing side's expert.

In sum, despite the value of an internal expert's unique knowledge about a product, the courts will restrict the use of such an expert in Canadian product liability litigation. A court will have concerns about independence and objectivity of an internal expert's opinion and could exclude it or assign little weight to it.

So a party involved in a product liability lawsuit in Canada will need to use an internal expert's knowledge and experience in other ways, rather than planning to use that expert as a testifying expert witness. FD