Daubert comes to Canada

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Canadian courts are increasingly concerned about the quality of evidence at class action certification hearings. As a result, first steps are being made towards Daubert-like rules of admissibility.

Daubert refers to a trilogy of Supreme Court of the United States decisions establishing admissibility standards for expert evidence — judicial gatekeeping. A particular goal is to ensure expert evidence is relevant, reliable, and the product of a sound methodology. A 2010 Seventh Circuit Court of Appeals ruling, American Honda Motor Company Inc. v. Allen, held that a full Daubert review is required if an expert’s evidence is critical to class certification. Last year, SCOTUS, in Wal-Mart Stores Inc. v. Dukes, suggested the same without having to finally decide the issue.

So in the U.S., anecdotal evidence is out; class certification judges are to engage in a rigorous evidentiary analysis entailing some overlap with a claim’s merits. This increased scrutiny across the border on certification issues has not gone unnoticed in Canada.

Some Canadian lawyers have been skirting basic rules of evidence for years — seeking to establish each of the identifiable class, common issue, and preferable procedure requirements without a robust evidentiary record. These deficiencies have generally fallen into three overlapping categories:

• Class counsel’s own evidence on contested points;

• hearsay evidence; and

• inadmissible expert evidence.

**Class counsel as witness**

Class counsel are not in a reasonable position to be both lawyer and witness on the class certification motion. Provincial rules of professional conduct proscribe lawyers from submitting affidavit evidence on contentious issues. Exceptions have been developed where affidavits deal with purely formal or uncontroverted matters. Documents attached to a lawyer’s affidavit, purporting to deal with substantive matters that strike at the core of the certification motion, are not purely formal or uncontroverted matters.

Having class counsel be cross-examined, and challenged on their credibility, potentially compromises their role as counsel and their duties to the court. It raises concerns about the proper administration of justice. And legal argument belongs in a brief — not a lawyer’s affidavit!

**Hearsay evidence**

Class certification affidavits must be confined to a statement of facts within the personal knowledge of the deponent or to other evidence the deponent could give if testifying as a witness in court. An affidavit may contain statements of the deponent’s information and belief if, but only if, the source of the information and the fact of the belief are specified.

Deponents often fail to identify the source of information or to offer any rationale for a belief in information put forward from unidentified sources. It is not credible to accept a general assertion at the outset of a class certification affidavit as to belief in all information thereafter deposed. Failing to attest to belief in specific facts and documents, particularly when no source is provided for each document, is not a technical objection — it is a fundamental flaw and the offending paragraphs are subject to being struck.

To be admitted for the truth of their contents, a document must be shown to be what it purports to be or a true copy of the original and signed or written by the person by whom it purports to be signed or written. It is appropriate to exclude documents from evidence unless the party can properly authenticate them or establish that they ought to be admitted pursuant to a recognized hearsay rule exception. Business records are subject to particular requirements of proof under provincial evidence acts.

Downloads from the internet uploaded to class certification affidavits pose serious difficulties — the affiant in most cases could not possibly attest to a belief in the truth of their contents or to authenticate them. Under Canadian case law, reliability of web site information depends on various factors including careful assessment of its sources, independent corroboration, consideration as to whether it might have been modified from what was originally available, and assessment of the objectivity of the person placing the information online. When these factors cannot be ascertained, little or no weight will be given.

Such documents often contain inadmissible triple hearsay, legal or factual opinion, argument, and advocacy. Opposing counsel have no practical opportunity to cross-examine the author of the document or regarding its context.

**Expert evidence**

The third area where Canadian courts are more closely scrutinizing evidence at or prior to certification is “expert” evidence — frequently filed by persons not so qualified and on topics not suitable for such evidence.

Our courts are increasingly vigilant against impermissible attempts to introduce expert evidence through an unqualified lay witness. Opinion evidence can only be tendered through a properly qualified expert. The role of drawing inferences and conclusions is that of the court, not that of the deponent. An affidavit from a non-expert must not contain opinion evidence, legal or factual argument, or advocacy.

For example, in a case involving medical or scientific issues of causation, it is necessary to adduce expert evidence to establish a reasonable basis in fact for the existence of a common issue appropriate for certification. In Williams v. Canon Canada Inc., an Ontario judge rejected the purported expertise of a “jack-of-all-trades” purporting to be an internet analyst.