Expert Witnesses in the Federal Courts

A Discussion Paper of the Federal Courts Rules Committee on Expert Witnesses

Background

The role of the expert witness is to assist the court through the provision of an independent and unbiased opinion about matters coming within the expertise of the witness. This duty is paramount. It overrides the obligations of the witness to the party on whose behalf he or she is called to testify. The evidence of an expert witness should be the independent product of the expert and should not be unduly influenced, in either form or content, by the exigencies of litigation.[1]

A number of jurisdictions, including the Federal Court, have identified potential concerns with respect to the current approach to expert testimony before the Courts.

One issue relates to the independence of expert witnesses. The misapprehension of the role of the expert witnesses in the trial process can result in experts advocating on behalf of a party. Such an approach diminishes the reliability and usefulness of the expert's evidence to the Court.

Another important question to be reviewed is the impact that expert evidence is having on the length of trials and the corresponding increase in the cost of litigation to the parties. This increase in cost raises concerns about the accessibility of the court system to litigants.

A subcommittee of the Federal Courts Rules Committee is currently reviewing the existing rules and practices relating to the tendering of expert evidence before the Federal Courts. As part of this review, the subcommittee is considering whether changes to the Rules might make the tendering of expert evidence more efficient, effective and less costly.

The subcommittee recognizes the potential need for special provision to be made in relation to expert evidence in aboriginal litigation. Aboriginal litigation often involves complex ethno-historical evidence with respect to aboriginal and treaty rights.

Some concerns of the Aboriginal Bar, such as the treatment of elders and oral history, the cross-cultural nature of aboriginal litigation and the central role of history and historiography are unique to this area of law and specific treatment is beyond the scope of this discussion paper

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[1] See: *National Justice Compania Naviera S.A. v. Prudential Assurance Co Ltd.* (the "Ikarian Reefer"), [1993] 2 Lloyd's Rep. 68.

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although the sub-committee has been very conscious of the unique nature of aboriginal litigation in fashioning its general recommendations..

This discussion paper contains a brief description of the issues under consideration by the subcommittee and seeks the input of parties and the profession on possible changes to the *Federal Courts Rules*.

Issue 1—*Recognizing the Duty of Expert Witnesses*

To ensure that experts, retained by a party, understand that their primary duty is to the Court, jurisdictions such as the United Kingdom and Australia require that experts agree to be bound by a Code of Conduct provided to them by counsel.

The subcommittee is considering the adoption of a Code of Conduct for expert witnesses in the Federal Courts. The *Federal Courts Rules* could be amended to require that counsel provide the Code of Conduct to proposed expert witnesses who in turn may be required to agree to be bound by it before giving evidence. Such a Code could be included in a schedule to the Rules.

This Code could, among other things, provide that:

(a) the duty of the expert is to assist the court impartially on matters relevant to his or her area of expertise;

(b) this duty overrides any duty to a party to the proceedings, including the person retaining the expert witness; and

(c) the expert witness is not an advocate for a party.

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Discussion Point #1:

(a) Should a Code of Conduct for expert witnesses be developed?

(b) If so, what should the Code provide?

(c) Should an expert witness be required to agree to be bound by the Code of Conduct before he or she may give evidence?

Issue 2—*Streamlining the Process of Qualifying Expert Witnesses*

To streamline the qualification process and to identify disputes as to whether a witness is qualified to testify as an expert in a particular area, the subcommittee is considering changes to the Rule 258(5) which would require that an affidavit or statement of an expert:

(a) identify the expert witness' proposed area of expertise; and

(b) provide a copy of the expert's *curriculum vitae*.

The process could be streamlined further by requiring the parties to make early objections to the opposing party's proposed experts. This may be achieved by amending Rule 262 to require parties to include any objections to the requisitioning party's proposed experts in their pre-trial conference memoranda.

The requisitioning party would be required, by an amended Rule 263, to make any objections he or she may have to the responding party's proposed experts at the pre-trial conference.

Discussion Point #2

(a) Should Rule 258(5) be amended to require that an expert must set out his or her proposed area of expertise in his or her affidavit or statement and attach a copy of his or her curriculum vitae thereto?

(b) Should parties be required to make any objections to the proposed experts' qualifications either in the pre-trial memoranda or at the pre-trial conference by amending Rules 262 and 263?

Issue 3 – The Content of Expert Reports

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The subcommittee identified some uncertainty among experts and counsel as to the information which must be supplied by the expert in his or her report to ensure that the evidence will assist the Court. In jurisdictions where a Code of Conduct for expert witnesses has been introduced, the code provides a list of the topics that should be addressed by the expert in his or her report. A similar list for the Federal Courts could require the expert's report to include:

- a statement of the issues addressed in the report,
- the qualifications of the expert on the specific issues addressed in the report (the expert's curriculum vitae could also be required to be annexed)
- the facts and assumptions on which the opinions in the report are based (a letter of instructions, if any, could be annexed),
- a summary of the opinions expressed,
- in the case of a report that is provided in response to another expert's report, an indication of the points of agreement and of disagreement with the other expert's opinions,
- the reasons for each opinion expressed,
- an indication of any issues that fall outside the expert's field of expertise,

- any literature or other materials specifically relied upon in support of the opinions,
- a summary of the methodology used, including any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out, and whether a representative of the other party was present, and
- any caveats or qualifications necessary to render the report complete and accurate, including those relating to an insufficiency of data or research.

The Code could also require that any material change affecting the opinions expressed or the data contained in the report be communicated immediately to any party or person in receipt of the report.

Discussion Point #3:

(a) Should a list of the required contents of an expert's report be established either in a code of conduct or otherwise?

(b) Would the items mentioned above comprise an appropriate list of the contents of an expert's report?

Issue 4- *Requiring Expert Witnesses to Confer with One Another in Advance of Trial*

In *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales,*[2] Lord Woolf advocated the introduction of a requirement that expert witnesses meet in advance of trial to narrow the issues for trial thereby encouraging settlement. Following this "conference" the experts may provide a written statement for use at trial identifying the issues or facts on which they agree or disagree. Such a statement may significantly shorten the trial.

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The BC Justice Review Task Force's Proposed Rule 8-3 for the Supreme Court of British Columbia provides that where two or more expert reports on the same issue are delivered, absent a contrary order of the Court, the experts will meet in the absence of counsel to confer and produce a report.[3] These conferences are presumptively privileged.[4]

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[2] London: HMSO, 1996 (the "Woolf Report")

[3] BC Justice Task Force Review, Concept Draft Proposed New Rules of Civil Procedure for the British Columbia Superior Court (July 23, 2007) Part 8 "Experts", proposed rules 8-3 (3) & (4) http://www.bcjusticereviewforum.ca/civilrules/downloads/conceptDraft.pdf

[4] *Ibid*. see proposed rule 8-3(7)

The subcommittee has considered the question of whether expert conferencing may cause additional expense and delay in the Federal Courts. At this time, it is recommending that any amendment providing for expert conferencing in the *Federal Courts Rules* should make it clear that the Rule is subject to the discretion of the Court. To the extent that expert conferencing was introduced into the *Federal Courts Rules* the parties might, once familiar with the benefits of such conferences, initiate the process themselves well in advance of the pre-trial conference.

It is not clear, in the context of the Federal Courts, that expert conferencing in advance of the submission of expert reports should be required. The subcommittee is of the opinion that, at this time, any such requirement to meet should be left to the discretion of the Court. The subcommittee has considered the following possibilities:

(a) expert conferencing could be included among the subjects that parties are required to address at case management, pre-trial and trial management conferences;

(b) the Rules could permit the Court to make directions in respect of expert evidence, and, where appropriate, require the experts to confer without counsel present.

(c) provision could also be made for the Court to direct that the experts confer in the presence of a prothonotary or another judge,

(d) finally, the Court could direct that no evidence of anything said or done at the expert's conference will be admitted in evidence apart from the joint report.

A question arises around the involvement of the parties and counsel in expert conferences. It is not clear whether the absence of counsel would foster or inhibit the independent exercise of judgement by an expert. The issue to be discussed is whether specific provisions for expert conferences held in the absence of counsel should be presumptive or whether counsel should only be excluded by the exercise of the Court's discretion. A further issue relates to the question whether the privileged nature of such communications would purport to preclude subsequent discussions with counsel.

The need for experts to maintain their independence in the course of expert conferencing could be recognized explicitly in a Code of Conduct, which might provide that:

(a) when conferring with another expert, both experts must exercise independent, professional judgment on the issues addressed;

(b) the expert must endeavour to clarify with the other expert witness the points on which they agree and the points that are genuinely in dispute on those issues; and,

(c) the expert must not act on any instruction or request to withhold or avoid agreement with the other expert witness.

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Discussion Point #4:

(a) *Should provision be made in the Rules for expert conferencing?*

(b) *If so, should the conferencing be presumptive or ordered at the discretion of the Court?*

(c) *If so, should it include the possibility that the Court will direct the experts to meet*

 (i) *without counsel present;*

 (ii) *in the presence of a prothonotary or another judge; and/or*

 (iii) *and direct that no evidence of anything said or done at the expert's conference will be admitted in evidence apart from the joint report?*

(d) *Should a code of conduct, if developed, include instructions to experts on their conduct in conferencing with other experts?*

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Issue 5—*Assessors, Court Appointed Experts and Single Joint Experts*

The United Kingdom, Australia and British Columbia have all implemented changes to their rules dealing with court-appointed single joint experts. The aim of these changes is to reduce the costs associated with the calling of multiple experts and to address the issue of lack of objectivity on the part of expert witnesses. Most of these amendments are relatively recent, and little in the way of a 'track record' has been established. Thus, it is difficult to see how and if the rules have been working. Moreover, it should be noted that the rules for *court-appointed* experts have been the subject of some controversy as they fit awkwardly with the principle of party prosecution in which the parties have the main responsibility for defining the issues and establishing the record.

Rule 52 of the current *Federal Courts Rules* provides that the Court may appoint an assessor to assist the Court in understanding technical evidence or to provide a written opinion in a proceeding. This Rule has not been used frequently, but it would appear to serve a similar function to rules providing for court-appointed experts. Assessors and court appointed experts assist the Court directly, and are not primarily guided by counsel in the prosecution or defence of the action. Although assessors do not testify at the trial, where an assessor's view of the evidence could influence the outcome of the trial, it is likely that his or her view would be put to counsel for comment.

Given the similarity between assessors and court appointed experts, it seems unlikely that new provisions for court-appointed experts should be introduced into the *Federal Courts Rules*, instead, where appropriate, greater use should be made of the existing rules for Assessors. However, it may be desirable to make amend the rules to accommodate single joint-experts selected and retained by the parties. This may be a further alternative to party-appointed experts.

Discussion Point #5:

Should provision be made in the Rules for parties to nominate a single joint-expert?

Issue 6—*Application of the Rules Governing Expert Witnesses to both Actions and Applications*

Expert witnesses regularly provide evidence in the Federal Court in both actions and applications. As a result of the structure of the *Federal Courts Rules*, a number of the rules governing expert witnesses are found in Part 4, which applies only to actions. Where appropriate, these Rules might also be made to apply to applications.

Discussion Point #6:

Should the Rules provide that, where appropriate, the provisions for expert evidence in respect of actions also apply to expert evidence in applications?

Issue 7—*The Status of Treating Physicians*

The status of treating physicians who testify at trial has sometimes led to confusion. The BC Justice Review Task Force's Proposed New Rules of Civil Procedure for the Supreme Court of British Columbia specifically address the situation of treating physicians. [5] The proposed rule provides that the rules for expert witnesses do not apply to a doctor or another person who has given, or is giving, medical treatment or medical advice to an injured person where the evidence is:

(a) of the results of any examination made,

(b) a description of the treatment or advice,

(c) the reason the treatment or advice was, or is being given, or

(d) the results of giving the treatment or advice.

Similar provisions could be introduced into the *Federal Courts Rules* to clarify the status of treating physicians.

[5] *Supra* note 4, see proposed rule 8-1(1)(b)(iii)

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Discussion Point #7:

Should provisions be introduced into the Rules to provide for the special status of treating physicians?

Issue 8—*The Need for Cross-Examination*

Occasionally, the parties recognize that there little is to be gained by the cross-examination of an expert. Under these circumstances, considerable expense may be saved by permitting the expert's report to be entered into evidence without requiring the expert to testify either in chief or in cross. The *Alberta Rules of Court* provide that a party seeking to tender expert evidence may "serve notice of intention to have the report entered as evidence without the necessity of calling the expert as a witness." [6]

Rule 279 of the *Federal Courts Rules* currently requires an expert witness to be available at trial for cross examination *unless the Court orders otherwise*. Accordingly, where the parties wished to introduce the expert's report without calling the expert to testify, they would seek leave of the Court. Where the Court believed that, despite such a request, it would be beneficial to have the expert testify, leave would not be granted. The provisions for tendering expert evidence at trial could be amended to permit a similar departure from the requirement of the expert's attendance at trial.

Some Canadian provinces, notably Alberta and Québec, have implemented provisions to create cost consequences for calling an expert to give evidence in-chief or requiring the expert to be available for cross-examination where this unduly lengthened the trial. *While no party should be deprived of the right to cross-examine,* unnecessary time and expense involved in calling an expert witness to give oral testimony could be included in the list of considerations set out in Rule 400(3) of the *Federal Courts Rules*.

Discussion Point #8:

(a) *Should provisions be made in the Rules for tendering expert evidence at trial without cross-examination?*

(b) *Should the Rules provide for costs consequences for unnecessary introduction of expert evidence at trial?*

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[6] See also Rule 218.1(2) *Alberta Rules of Court*

Issue 9— *Panels of Expert Witnesses: "Hot-Tubbing"*

Some Australian jurisdictions have adopted the practice of having panels of experts who are addressing the same issue sworn in together, question each other and answer questions put to them by counsel and the trial judge. This process has become known colloquially as "hot-tubbing" and has met with considerable success. In Canada, this procedure has been introduced by Rule 48 into the *Competition Tribunal Rules*[7]. The *Federal Courts Rules* could be amended to provide for a similar practice.

In addition to providing the Court with discretion to require expert witnesses to testify as a panel, the Court could be permitted to:

(a) identify matters within the expertise of the panel and to pose questions to them;

(b) allow the experts, subject to the direction of the Court, to give their views and comment on the views of other experts in the panel;

(c) allow the experts to pose questions to the other expert witnesses in the panel; and

(d) give the experts the opportunity to make concluding statements

The Rules could also provide that counsel may cross-examine and re-examine expert witnesses upon completion of testimony by the panel of expert witnesses.

Discussion Point #9:

Should the Rules provide discretion to the Court to order experts to testify in panels? If so, what other discretionary powers, if any, should the Rules provide to the Court to facilitate the process?

Issue 10—*Limiting the Number of Experts*

Section 7 of the *Canada Evidence Act*[8] limits the number of expert witnesses that may be called by a party to five, unless leave of the Court is granted for the calling of additional witnesses. It may be desirable to make explicit the Court's ability to exercise discretion and the factors that would be relevant to that exercise of discretion. These factors could include matters such as:

(a) the nature of the litigation, its public significance, and the need to clarify the law,

(b) the number and complexity or technical nature of the issues in dispute, and

[7] S.O.R./94-290

[8] R.S.C. 1985, c. C-5

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(c) the likely expense involved in relation to the amount in dispute.

Discussion Point #10:

(a) *Should provisions be introduced into the Rules to make explicit the Court's ability to exercise discretion in limiting the number of experts that a party could call to testify at trial?*

(b) *Would the factors mentioned above comprise an appropriate list of relevant considerations in the exercise of that discretion?*

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