

SERVICE OF EXPERT WITNESSES' AFFIDAVITS  
PRIOR TO THE PRE-TRIAL CONFERENCE

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The Rules Committee of the Federal Court of Appeal and of the Federal Court  
September 2004

**I. Introduction**

The Rules Committee of the Federal Court of Appeal and of the Federal Court (the Committee) is considering specific amendments to the [Federal Court Rules, 1998](#) (the *Rules*).<sup>1</sup> These amendments would make the admissibility of the evidence of expert witnesses conditional upon the service of affidavits, setting out the proposed evidence of the experts, before the holding of the pre-trial conference under the *Rules*.<sup>2</sup> A subcommittee has been created to examine this issue.

The rationale for this amendment is as follows:

- a) The parties should be ready for trial at the pre-trial conference. Such readiness facilitates the setting of earlier trial dates. All expert reports need to be available at the pre-trial conference to ensure that the parties are ready for trial.
- b) Full and candid settlement discussion is only possible at the pre-trial conference stage if all expert reports are available.
- c) The expense inherent in obtaining expert reports may assist in drawing the attention of litigants to the benefits of settlement at an earlier stage in the process if the reports are required to be available at the pre-trial conference.
- d) Judges and prothonotaries are now abridging the time for the exchange of expert reports because of concern at the late dates on which the reports will otherwise be provided.

This paper discusses the present situation under the *Rules*. It also reviews provisions for the admissibility of expert evidence in other courts. Finally, it proposes amendments to the *Rules* to achieve the goals set out in this paper.

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<sup>1</sup> The *Courts Administration Service Act*, 2002, c.8, came into force on 2 July 2003. There are now two separate courts: the Federal Court of Appeal and the Federal Court. Consequential amendments to the *Federal Court Rules, 1998* were pre-published in the [Canada Gazette, Part I, 31 July 2004](#). As a result of the coming into force of the consequential amendments, the Rules will be cited as the *Federal Courts Rules* and the Committee will be referred to as the Federal Courts Rules Committee.

<sup>2</sup> The *Rules*, eg, Rule 279, refer to “an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor’s certificate...” For the sake of brevity references in this paper to “affidavit” include a “statement...accompanied by a solicitor’s certificate..” where appropriate.

## **II. The Existing Provisions Under the Rules**

The main Rule addressing the affidavits of expert witnesses and, consequentially the admissibility of expert evidence, is [Rule 279](#). [Rule 281](#) addresses admissibility of rebuttal evidence of experts.

In Rule 279, the key wording, for the issue raised by this paper, stipulates that: “Unless the Court orders otherwise, no evidence in chief of an expert witness is admissible at the trial...unless... (b) an affidavit...has been served on all other parties at least 60 days before the commencement of the trial.” Rule 281 stipulates that an affidavit of an expert rebutting the evidence of another expert in an affidavit must be served at least 30 days before the commencement of the trial.

Thus, at present, admissibility of an expert’s evidence at trial hinges on serving the affidavit at least 60 days before the commencement of the trial; 30 days in the case of rebuttal evidence of an expert. There is flexibility provided for the Court granting relief from this requirement because of the initial wording of Rule 279: “Unless the Court orders otherwise...”. Admissibility of expert evidence is not related to the pre-trial conference.

At the same time [Rule 258\(4\)](#), relating to pre-trial conferences, states: “A pre-trial conference memorandum shall be accompanied by a copy of all documents that are intended to be used at trial that may be of assistance in settling the action.” This requirement could include affidavits of expert witnesses. The requirement to include affidavits of expert witnesses is buttressed by [Rule 263\(c\)](#): “Participants at a pre-trial conference must be prepared to address...(c) definition of any issues requiring the evidence of expert witnesses...”

Therefore, the Rules relating to affidavits of expert evidence appear to indicate that any affidavits *in existence at the time of the pre-trial conference* should be made available to the Court and to the other parties ([R.258\(4\)](#)) and that these affidavits can be a subject of the pre-trial conference itself ([R.263\(c\)](#)). Sgayias and others, *Federal Court Practice* (2004), p. 623, in an editorial note, state: “While there is no requirement that notices to admit facts or documents be served or expert reports be prepared for the pre-trial conferences, the requisitioning party may wish to consider taking those steps in order to demonstrate readiness for trial.” (emphasis added)

In sum, there is no requirement to prepare the affidavits of expert witnesses for the pre-trial conference. Some or all of such affidavits can come into existence after the pre-trial and the evidence of the expert will still be admissible at trial so long as the relevant affidavits have been served on other parties at least 60 days, or 30 days in the case of rebuttal, before the trial’s commencement ([R.279 \(b\)](#) and [281](#)).

### **III. Relevant Provisions in the Rules of Other Courts**

There are three overall approaches to admissibility of expert evidence based on service of their reports under the rules of other courts.

A. *Admissibility of Expert Witnesses' Evidence Conditional Upon Service at Some Stated Time Before Trial of that Expert's Report*

In this approach there is no requirement to make written statements of experts available at pre-trial conferences. An expert may testify at trial if a copy of that expert's written statement has been served at some stipulated time before the trial.<sup>3</sup>

B. *Admissibility of Expert Witnesses' Evidence Conditional Upon Service at Some Stated Time Before Trial – Expert Reports Existing at Pre-Trial Conference to be Available*

This approach is similar to that existing under the present *Rules*; see II, above.

Any affidavits in existence at the time of the pre-trial conference are to be made available to the Court and to the other parties.<sup>4</sup> However, admissibility of expert evidence is conditional upon the affidavit of the expert being served on other parties within a certain time before the commencement of the trial.<sup>5</sup>

In Ontario, case law has confirmed that the applicable Rule ([Rule 50.05](#)) applies only to documents in existence at the time of the pre-trial and does not establish that the date of a pre-trial conference is the date which determines what expert evidence may be called at trial.<sup>6</sup>

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<sup>3</sup> The following Rules reflect this approach: [The British Columbia Supreme Court Rules, Rule 40A](#), [Alberta Rules of Court, Rule 218.1](#), [Nova Scotia, Civil Procedure Rules, Rule 31.08](#), and the [Tax Court of Canada Rules \(General Procedure\) Rule 145 \(2\)\(b\)](#), the [Tax Court of Canada \(Informal Rules\) Rule 7](#), [Tax Court of Canada Rules of Procedure respecting the Employment Insurance Act, Rule 25\(4\)](#), [Tax Court of Canada Rules of Procedure respecting the Canada Pension Plan, Rule 25\(4\)](#).

As part of the comprehensive revision of the Rules of Alberta it has been recommended, in the context of management of litigation, that expert reports be provided 90 days from the end of discovery with 30 days for a rebuttal report: see [Alberta Rules of Court Project, Management of Litigation, Consultation Memorandum No. 12.5, March 2003, pp.38-40](#).

<sup>4</sup> [New Brunswick Rules of Court, Rule 50.04\(a\) and \(b\) and 50.12\(f\)](#); [Newfoundland Rules of the Supreme Court, Rule 39.02\(4\)](#); [Ontario Rules of Civil Procedure, 50.05](#); [Prince Edward Island Rules of Civil Procedure, Rule 50.05\(1\)](#).

<sup>5</sup> [New Brunswick Rule 52.01](#); [Newfoundland Rule 46.07](#); [Ontario Rule 53.03\(1\) and \(2\)](#); [Prince Edward Island Rule 53.03\(1\)](#).

<sup>6</sup> *Kungl v. Fallis* (1988), 26 C.P.C. (2d) 102, [1989] O.J. No. 15 (H.C.J.).

C. Admissibility of Expert Witnesses' Evidence Conditional Upon Service of that Expert Witnesses' Report Before Pre-trial Conference

This approach reflects the changes being considered: see I, above.

*Manitoba*

The [Court of Queen's Bench Rules](#) of Manitoba do require that all expert reports be served before the pre-trial conference.

[Rule 53.03\(1\)](#) provides: "A party who intends to call an expert witness at trial shall include as part of the party's pre-trial brief a copy of a report, signed by the expert..."

In addition, [Rule 50](#) deals with Pre-Trial Conferences. Rule 50.01(3), addressing pre-trial briefs, states: "When obtaining a date for a pre-trial conference, a party shall deposit with the court a pre-trial brief that... (d) complies with the requirements of subrule 53.03(1)..."

*Saskatchewan*

[Rule 284D](#) of the Saskatchewan *Rules of Practice and Procedure* requires service of an expert witness report not less than 10 days before the pre-trial conference; Rule 284D(3) requires a report of rebuttal evidence of expert witnesses to be served within 15 days of the assignment of a trial date.

*Québec*

Except with permission of the court, no expert witness may be heard unless his written report has been communicated to all other parties within the time period agreed upon by the parties in their proceeding timetable or, at the very latest, at the time the case is inscribed for proof and hearing in the case of the party inscribing or, in the case of other parties, within 30 days after the inscription (s.331.4 of the [Code of Civil Procedure](#)). The expert reports must then be filed within the time period provided in section 331.7 of the *Code of Civil Procedure*, i.e. no later than 15 days prior to the date set for proof and hearing.

The pre-trial conference can be convened after inscription for proof and hearing and, during this conference, the parties must provide access to the original of the exhibits (including the expert reports, according to section 331.1. *Code of Civil Procedure*) that they have communicated and that they intend to use at the hearing (section 279 *Code of Civil Procedure*).

## Ontario Proposal

The present law in Ontario is stated, above: see discussion under approach *B*.

However, the [Task Force on the Discovery Process in Ontario](#) (November 2003) has recommended that time for serving expert reports be related to the pre-trial/settlement conference.<sup>7</sup> This recommendation was made in the context of a comprehensive review of the discovery process in Ontario. It is generally consistent with the amendments proposed in this paper.

### **IV. The Case For Change**

#### *A. Amendments Consistent with Principles of Case Management*

In the subcommittee's view the case for making the proposed amendments is strong: see I, above, setting out a four point rationale.<sup>8</sup> These amendments appear consistent with the principles of case management. At the same time comments on the proposed amendments are specifically invited.

#### *B. Court's Flexibility Preserved*

Flexibility would be preserved, in terms of the Court being able to grant relief from the stipulated requirements, by retaining the existing initial wording of Rule 279: "Unless the Court orders otherwise...".

### **V. Possible Amendments**

The proposed changes are as follows:

1. Amend Rule 258(4) as follows: DELETE, 5<sup>th</sup> line "in settling the action"; ADD the following words: "...including, but not limited to, all affidavits of experts, or statements in writing signed by the expert and accompanied by a solicitor's certificate, that sets out in full the proposed evidence. [the wording in italics is essentially taken from Rule 279(b)].

The words "in settling the action" are deleted so as not to limit the use of expert affidavits (or any other documents) at the pre-trial conference. The scope of the pre-trial conference is set out in Rule 263.

<b>Current Rule</b>	<b>Proposed Amendment</b>
<b>Documents</b> 258(4) A pre-trial conference memorandum	<b>Documents</b> 258(4) A pre-trial conference memorandum

<sup>7</sup> [Task Force on the Discovery Process in Ontario](#) (November 2003), pp. 128-131.

<sup>8</sup> See also the discussion by the [Task Force on the Discovery Process in Ontario](#): *ibid*.

shall be accompanied by a copy of all documents that are intended to be used at trial that may be of assistance in settling the action.	shall be accompanied by a copy of all documents that are intended to be used at trial that may be of assistance, <i>including, but not limited to, all affidavits of experts, or statements in writing signed by the expert and accompanied by a solicitor's certificate, that set out in full the proposed evidence.</i>
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2. Amend Rule 262 as follows: DELETE, 5<sup>th</sup> line ” seven days” SUBSTITUTE “...20 days”.

This change from seven days to twenty days is to permit some time for the service of the affidavits of expert witnesses in rebuttal by any party seven days before the pretrial conference: see 3 and 5, below.

These time constraints will be exacting. However, at present, Rule 281 stipulates that rebuttal evidence of an expert is only admissible if an affidavit setting out the rebuttal evidence is served 30 days before trial. Thus, the time periods under the present rules (60 days; 30 days) are also demanding.

<b>Current Rule</b>	<b>Proposed Amendment</b>
<p><b>Pre-Trial Conference Memoranda</b>  <b>262.</b> Every party, other than the party who filed the requisition for a pre-trial conference, shall serve and file a pre-trial conference memorandum at least seven days before the date fixed for the conference.</p>	<p><b>Pre-Trial Conference Memoranda</b>  <b>262.</b> Every party, other than the party who filed the requisition for a pre-trial conference, shall serve and file a pre-trial conference memorandum at least <i>twenty days</i> before the date fixed for the conference.</p>

3. Add Rule 262.1: “Every party shall serve, at least seven days before the date fixed for the pre-trial conference, any affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor’s certificate, setting out any evidence of that expert rebutting the evidence of any other expert in an affidavit or statement served under Rule 258(4) or Rule 262.

<b>Current Rule</b>	<b>Proposed Amendment</b>
<p>This Rule does not exist in the current Rules.</p>	<p><b>Service</b>  <b>262.1</b> <i>Every party shall serve, at least seven days before the date fixed for the pre-trial conference, any affidavit, or statement in writing signed by the expert witness and accompanied by a solicitor's certificate, setting out any evidence of that expert rebutting the evidence of any other expert in an affidavit or statement served under Rule 258(4) or Rule 262.</i></p>

4. Amend Rule 279(b) as follows: DELETE, 4<sup>th</sup> line “...has been served...” etc  
 SUBSTITUTE “ ... *accompanies a pre-trial conference memorandum under Rule 258(4) or under Rule 262.*”

Current Rule	Proposed Amendment
<p><b>Where expert may testify</b>  <b>279.</b> Unless the Court orders otherwise, no evidence in chief of an expert witness is admissible at the trial of an action in respect of any issues unless</p> <p>(a) the issue has been defined by the pleadings or in an order made under rule 265;</p> <p>(b) an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, that sets out in full the proposed evidence, has been served on all other parties at least 60 days before the commencement of the trial;</p> <p>(c) the expert witness is available at the trial for cross-examination.</p>	<p><b>Where expert may testify</b>  <b>279.</b> Unless the Court orders otherwise, no evidence in chief of an expert witness is admissible at the trial of an action in respect of any issues unless</p> <p>(a) the issue has been defined by the pleadings or in an order made under rule 265;</p> <p>(b) an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, that sets out in full the proposed evidence <i>accompanies a pre-trial conference memorandum under Rule 258(4) or under Rule 262;</i> and</p> <p>(c) the expert witness is available at the trial for cross-examination.</p>

5. Amend Rule 281 as follows. DELETE, 9<sup>th</sup> line “..at least 30 days...” etc.  
 SUBSTITUTE “...under Rule 262.1.”  
 See explanation in 2, above.

Current Rule	Proposed Amendment
<p><b>Admissibility of rebuttal evidence</b>  <b>281.</b> Except with leave of the Court, no expert evidence to rebut evidence in an affidavit or statement served under paragraph 279(b) is admissible unless an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, setting out the rebuttal evidence has been served on all other parties at least 30 days before the commencement of the trial.</p>	<p><b>Admissibility of rebuttal evidence</b>  <b>281.</b> Except with leave of the Court, no expert evidence to rebut evidence in an affidavit or statement served under paragraph 279(b) is admissible unless an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, setting out the rebuttal evidence has been served on all other parties <i>under 262.1.</i></p>



## **VI. Comments Invited**

**Comments on the proposed amendments and any related issues are invited.  
Comments should be submitted in writing by October 15, 2004 to:**

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