

THE EVOLVING STANDARDS FOR EXPERT EVIDENCE

**Chair of Presentation:
The Honourable Justice Donna J. Martinson
Supreme Court of British Columbia**

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I. INTRODUCTION

Since the mid-1990's, the number of legal matters requiring the assistance of experts has increased dramatically. A team approach to solving disputes, including the encouragement of jointly retained or Court appointed experts, is more common than in earlier years. Litigants are generally more sophisticated, and opinion evidence plays a prominent role in the process, now more than ever. Throughout this article, we will be canvassing the role of the expert and admissibility of expert evidence, as well as reviewing the trends in recent jurisprudence regarding disclosure of the expert's file and challenges to impartiality. Finally, we will suggest practical tools for counsel when working with experts from retainer to trial.

Many of the comments in this paper are based on a review the current law regarding expert reports. It is absolutely obvious that many of the traditional rules and guidelines are being overtaken by substantial reforms concerned about the

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delay in litigation, the high costs of litigation and proportionality of litigation. It is the writers' expectation that within several years if these reforms move forward and are tested by the judicial system, many of these issues will have been resolved by new decisions and case management standards.

II. THE ROLE OF THE EXPERT: DUTIES AND RESPONSIBILITIES OF EXPERT WITNESSES

Experts, like counsel, must approach a case always mindful that a trial may be necessary, even though statistically most cases settle prior to trial. Experts are either retained by a party or are appointed by the Court, and they are asked to educate and assist the Court or party in developing his or her case. The expert's primary role is always to assist the trier of fact, in an independent and impartial manner.

The oft-quoted case regarding the legal obligation of an expert is an English decision, *Ikarian Reefer*⁴. In Canada, its principles have been applied in all types of proceedings including civil trials, criminal prosecutions and administrative hearings. Below is a passage from that case:

The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form and content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.

⁴ *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd.* ("The Ikarian Reefer"), [1993] 2 Lloyd's Rep 68 (Q.B.D.) (Commercial Court).

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts, which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, the qualification should be stated in the report.
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

Experts often prepare schedules or "draft" calculations or estimate letters for settlement purposes to assist counsel and the clients. However, the expert cannot testify or provide opinion evidence at a trial without delivering a complete and comprehensive report. For example, like paragraph #7 above, a financial expert report must contain a Scope of Review, which lists all documents relied upon and sources of information used in the determination of the expert's findings.

III. PRE-TRIAL

A. Privilege vs. Disclosure

It is important for experts to appreciate how their working papers may be treated in different legal contexts and at various stages in the legal proceeding. “Working papers” include: the expert’s communication with the lawyer; the expert’s communication with the client; the expert’s communication with other experts associated with the case; and notes, records, calculations, and draft reports or draft affidavits including opinions and conclusions.

In the special circumstances of a Court appointed expert, it is suggested that there would be a presumption that all working papers would be available for examination by counsel before trial.

The protection or release of working papers is determined by two competing interests, namely the right of a client to confidentiality or privilege in his or her communications with counsel, and the right of the opposing party to learn, as early and completely as possible, the opinion to be given by the expert and its factual underpinnings, through a process of disclosure.

Simply put, solicitor-client privilege arises where legal advice of any kind is sought. In this context, all communications between the lawyer and client are protected from disclosure.⁵ Solicitor-client privilege may be claimed in relation to third party communications where the third party is considered an agent of the

⁵ See *Solosky v. Canada*, [1980] 1 S.C.R. 821 and for the leading Ontario case, see *General Accident Assurance Company et al. v. Chursz et al.* (1999), 45 O.R. (3d) 321 (C.A.).

client. Generally it will not apply where the third party is retained on instructions from the lawyer, but in *Rice et al v. Lamy*, the New Brunswick Court of Appeal found the adjuster was the client's agent, despite having received instructions from the lawyer, as the documents were prepared to assist the lawyer.⁶

Litigation privilege extends to documents created for the dominant purpose of litigation. The nature of the two privileges has been described as follows: "Solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself."⁷

This obviously encompasses a broad range of information that may be contained in raw data, field notes, records, calculations, correspondence and documents used or created by the expert; and any documents containing this information are potentially producible. While the language of the relevant discovery rules is plain, it is by no means clear what exactly constitutes "finding, opinions and conclusions". Regrettably, the case law does not yield any cohesive rules. For example, in Ontario the law on the key question of whether a draft report must be produced is inconsistent.⁸

The purpose for which the expert has been retained will, in large part, determine the scope of the disclosure requirements. The working papers of an expert who is retained for the sole purpose of preparing for trial and who will not be called upon

⁶ *Rice et. al v. Lamy* (2000), 190 D.L.R. (4th) 486 (N.B.C.A.).

⁷ R.J. Sharpe, "Claiming Privilege in the Discovery Process" (1984) L.S.U.C. Special Lectures 163.

⁸ S.R. Morrison "Drafts of Experts' Reports: An Analysis" (2000) 50 C.L.R. (2d) 76; With respect to expert's notes and documents, see *Allen v. Oulahen* (1992), 10 O.R. (3d) 613 (Gen Div.), *Browne (Litigation Guardian of) v. Lavery* (2002), 58 O.R. (3d) 49 (Sup. Ct.) and *Piche v. Lecours Lumbers Co.* (1993), 13 O.R. (3d) (Gen. Div.); *Flemming v. Laura Secord Inc.*, [2001] O.J. No 2116 (S.C. J.), *St. Elizabeth Home Society v. Hamilton (City)*, [2004] O.J. No. 1418 (SCJ); *Arbesman v. Meighen Demers*, [2003] O.J. No. 2075 (S.C.J.).

to testify at trial, will generally be protected by litigation privilege. If the expert's retainer is limited to assisting in the negotiations and he or she attends negotiation conferences or mediation sessions, any communications or opinions expressed in that context will be privileged or "without prejudice" under the rule that all communications in furtherance of settlement are protected from disclosure to the trier of fact. Counsel often send expert findings that will not be relied on at trial as a component of an offer to settle, thus confirming the privilege.

However, if the expert witness testifies the prevailing view is that all privilege is waived and the entire information available to the expert from all sources including instructions from the client or counsel is available for a cross examination⁹. In one case, the Newfoundland Court of Appeal ordered the production of the opposing party's expert's report even though it was not intended for trial simply because its factual basis was relevant.¹⁰

In a later case, counsel sought the production of drafts of an expert's report in the course of examinations prior to trial.¹¹ In concluding that the draft report constituted findings and therefore were subject to production under the Ontario rule, Nordheimer J. stated:

With respect, I do not agree with the conclusion reached [in *Kelly*¹²]. In my view, draft reports represent, at the very least, preliminary findings, opinions and conclusions of the expert and therefore fall within the scope of the rule. Such an interpretation of the rule would appear to accord with the general principle that the Rules of Civil Procedure are to be 'liberally construed' -

⁹ For a comprehensive paper on this topic outlining various approaches across different provinces, see "Recent Developments Affecting Experts on the Issues of Independence, Draft Reports and Working Papers" as prepared by John Chapman of Miller Thomson LLP and Peter Steger of Navigant Consulting, Inc., Toronto, Ontario in 2007.

¹⁰ *Morissey v. Morissey*, [2000] N. J. No. 362. (NFLD. C.A.).

¹¹ *Aviaco International Leasing Inc. v. Boeing Canada Inc.*, [2002] O.J. No. 3799 (Sup. Ct.) (QL).

¹² *Kelly v. Kelly*, (1990) 42 C.P.C. (2d) 181 (Ont. Unif. Fam. Ct.).

see rule 1.04(1). It also seems to be for the reasons expressed by Ferguson J. in *Browne*¹³, that a party ought to be able to explore with an expert whether he or she changed her views from draft to draft, and, if so, why. It is all part of testing the expert's conclusions. It is also important that this material be produced in advance of the trial so that the trial is not interrupted while such material is reviewed.

In the Ontario decision of *Piché v. Lecours Lumber*,¹⁴ counsel for the plaintiff sought production of an expert witness' entire file *after* the expert began providing testimony. In his reasons, Loukidelis J. outlined four guiding principles:

1. Principles of waiver relating to a privilege claim for documents in an expert's file cannot be said to have been waived simply by calling that witness to give evidence;
2. The privilege can be waived in respect of those facts or premises in the expert's file which have been used to base the expert's opinion and which came to the expert's knowledge from documents supplied to that expert;
3. Whether there is a privilege or not can be ascertained by one of two ways. As in [*Ocean Falls v. Worthington (Canada)*]¹⁵, the judge can examine the documents or materials for which the privilege is claimed. Another way is for counsel, through cross-examination of the expert, to determine whether all or part of the file is privileged; and
4. As a general rule, if facts are supplied that are not found in other evidence, or if certain assumptions are asked to be made in the instructing documents, privilege claimed for those facts or assumptions should be considered waived.

¹³ *Browne, supra* at footnote 8. In Nova Scotia, the Court adopted the *Browne* reasoning and ordered that not only the draft report be produced, but also required production of all information and materials provided to the expert including "discussions with the party, counsel for a party or with a third party." See *Flinn v. McFarland* [2002] NSSC 272.

¹⁴ *Piché v. Lecours Lumber* (1993), 13 O.R. (3d) (Gen., Div.).

¹⁵ *Ocean Falls v. Worthington (Canada)* (1985), 69 B.C.L.R. 124 (S.C.).

In keeping with the *Piché* principles, communications from counsel to an expert will be producible only if they contain facts or premises that form the basis for the expert's opinion. Similarly, a draft report would not be producible except possibly where counsel made notations on facts or premises and supplied the draft back to the expert, and then those were in turn used again to form the basis of the expert's opinion. The *Piché* principles do not seem to go so far as to require the production of draft reports generally.

Although the case law varies and there is no clear appellate authority setting out the specific test for production of the expert's file, Courts appear to be loosening litigation privilege in favour of production. This is not surprising, given that we practice in a legal culture that values early settlement, with minimal use of scarce judicial resources. In this context, counsel and their experts must function on the presumption that all or part of the production of the entire expert's file could be ordered.

As a result, some counsel have developed strategies to specifically limit the exposure. One strategy is simply to limit the information provided to the expert, which is problematic. The expert must be provided with sufficient information to come to an informed, objective opinion. If counsel withholds information from an expert that he or she does not wish to be disclosed for fear that it would be damaging to the case that information might subsequently come to light. Upon cross-examination the absence of that information as a factor in the conclusions reached by the expert might seriously compromise the credibility of the entire report. Moreover, an expert who is properly fulfilling his or her obligations may well be required to disclose the fact in his or her report that he or she received limited information. Another strategy is to restrict written communications and

instructions, especially ones involving strategic or tactical discussions. Keep in mind that if a communication falls within the scope of “findings, opinions or conclusions”, it will be subject to disclosure, whether it is oral or written.

Counsel should discuss the question of litigation privilege and the fulfillment of disclosure requests with the expert in advance, reminding the expert of his or her duty to remain neutral. Some experts have developed their own practices and routinely shred draft reports; others do not. In this electronic age, who believes that draft reports have been shredded and do not exist on a hard drive or server somewhere? Given all of the professional negligence issues, it defies belief that draft reports (with comments by clients and counsel) are not retained somewhere. Depending on the nature of the case and anticipated opposition, counsel may wish to adopt a different strategy. Given that full financial disclosure has become so fundamental to the practice of law, a thorough and transparent practice may be the better approach. In a 2004 Ontario family law decision, a financial expert was taken to task for failing to obtain and consider all relevant information, with very serious consequences for the result.¹⁶

B. Examinations, Discovery and Questioning the Expert

In most Canadian jurisdictions, a party has a right to a pre-trial discovery process at which his or her lawyer will question the opposing party. Two significant divergent theories embedded in the rules emerged in preparation of this paper. There are seemingly restrictive pre-trial examination rules of experts which are

¹⁶ *DeBora v. DeBora*, infra footnote 31.

inconsistent with the principle of streamlining trials and testing whether the experts can agree on some issues prior to trial.

Some counsel tell us that cross examining the expert before trial loses the strategic impact of a scintillating cross-examination of a poorly prepared expert witness in front of the trier of fact. Great drama if it works. The other strategy is to know fully what counsel are facing with the expert, concede in advance the points that appear solid and explore the possibility of settlement. At the very least, early examination can focus counsel and the trier of fact on the points that the experts disagree on and shorten the trial.

The rules vary from province to province regarding pre-trial discovery process of the expert. As set out in the chart below, there are significant differences in each of the current provincial rules dealing with the timing and delivery of an expert report before trial. The relevant timelines from each provincial statute are set out below:

PROVINCE	DELIVERY OF EXPERT REPORT
Alberta	120 days prior to trial; responding report required 60 days prior to trial
British Columbia	60 days prior to trial
Manitoba	At last pre-trial conference before trial
Newfoundland	At least 10 days before trial
New Brunswick	No later than the motions day at which trial is set
Nova Scotia	Within 30 days of filing notice of trial
Ontario	14 days before trial in family cases; Note: 90 days in civil cases
Prince Edward Island	30 days from filing notice for trial
Quebec	Must be in Court record prior to hearing; If motion to vary, at least 10 days before hearing
Saskatchewan	10 days before the pre-trial

It is certainly our view that proposed reforms are necessary to ensure that adequate time is permitted for the timely delivery of expert reports, responding reports and reply reports where appropriate. In Ontario, for example, the Rules of Civil Procedure which applied in family law cases until recently required that expert reports be delivered 90 days prior to trial, responding reports were delivered 60 days prior to trial and reply reports were required at least 30 days prior to trial, thus giving counsel and clients an opportunity to digest the analyses prior to trial.¹⁷ Under the current regime in Ontario in family cases, counsel may see an expert report for the first time only two weeks prior to trial, thus scrambling to retain their own expert to review the report, prepare a responding report and to testify. Not surprisingly, this can lead to adjournments and increased costs to the litigants. We understand that the time lines for delivery of expert reports is under active consideration by the Rules committee.

Likewise, there are differences in the provincial rules dealing with the rights to examine experts as per the attached chart. The relevant excerpts from each provincial statute are attached as an Appendix to this paper. Most of the reforms that are proposed appear to entrench the limiting of expert discovery.

PROVINCE	RIGHT TO EXAMINE PRIOR TO TRIAL	RULE
Alberta	Allows for the cross-examination of Court appointed experts with leave either before trial or at trial; Alternatively a demand can be served to have the expert attend at trial for cross-examination	Rule 218(6)

¹⁷ Ontario Rules of Civil Procedure, R.R.O 1990, Reg. 194, Rule 53.03

	In very long trials the case management justice may allow examination of experts on leave with prescribed conditions	Rule 218.8(1)
British Columbia	Severely restricts the rights to examine expert witnesses before trial	Rule 40(a) and 28
Manitoba	Allows the Court discretion to direct the examination of experts after their report is filed with leave of the Court but under limited circumstances	Rule 36.01(2)
Newfoundland	Discovery and disclosure rules should be liberally applied but Courts have restricted examination of an expert who had litigation privilege	Rule 30.01
New Brunswick	Allows discovery of an expert unless the expert has litigation privilege and will not testify at the trial Note: Rule 52.02 seems more restrictive	Rule 32.06 (3)
Nova Scotia	Allows broad discovery of an expert Note: It appears that the scope of discovery is wider in Nova Scotia than any other Canadian jurisdiction	Rule 31.08(2)
Ontario	A witness (including an expert) may be Questioned before trial either on consent or by Court Order	Family Law Rules 20(4)(5)
Prince Edward Island	Does not include a specific right to examine experts before trial and the general discovery and disclosure rules does not mention experts	53.03
Quebec	Leave is required to examine expert or parties can agree	398(3) C.C.P. 404 C.C.P.
Saskatchewan	There is no right to examine experts before trial. The rule allowing examination of non-parties specifically prohibits its application to experts. Note: it appears that the Courts will allow productions of the expert's file notes before examination in chief and cross examination at trial	Rule 222(A)

*** We polled our colleagues from across the country to provide us with the statutory references in the charts above, and the excerpts from various provincial statutes in the Appendix. The authors of this paper suggest that readers should confer with counsel in their respective jurisdictions regarding same.***

IV. AT TRIAL

A. Test for Admissibility

When counsel choose their expert for trial, they must always consider whether he or she will meet the necessary criteria to be admitted as an expert. The client may be significantly prejudiced if an expert is hired, prepares a report, and then can not testify at trial. Before the expert is permitted to testify at trial, he or she must be qualified as an expert in that particular field. This requires the expert to meet the well-known test as set out by the Supreme Court of Canada in *R v. Mohan*.¹⁸ There are four factors governing the admissibility of expert evidence:

- a. The evidence must be relevant;
- b. The evidence must be necessary to assist the trier of fact;
- c. There must be the absence of any exclusionary rule which would prevent the testimony; and
- d. The expert must be properly qualified.

¹⁸ *R. v. Mohan* [1994] 2 S.C.R. 9

B. Challenges at the Qualifying Stage

i. Testifying outside of their Area of Expertise

Courts are asked to receive evidence from experts who are offered to provide an opinion in a particular area. Once the threshold issue of admissibility has been determined, the question of expertise must be addressed. The Supreme Court of Canada has found that “Evidence outside the expertise of the witness must be disregarded.”¹⁹

Even if the expert is qualified to give evidence in your case, upon examination of the qualifications, he or she may not be qualified to give opinion evidence on all areas in issue.

These principles certainly apply to cases involving financial experts. For example, a business valuator may be retained to value a spouse’s interest in a holding corporation which owns commercial rental property. Although the expert may have the requisite training as a Chartered Business Valuator, and may have testified in this area previously, it would not be appropriate for the expert to provide an opinion on the value of the company without an appraisal or opinion of the commercial property. The valuator’s conclusions on that issue may be of limited value to the trier of fact. Similarly, in high income cases, experts may be retained to opine on the appropriateness of a monthly child support amount of, say, \$10,000 per month. While it may be agreed that such amount is excessive, query whether even a highly qualified expert with accounting and valuation background has the necessary qualifications to provide such evidence.

¹⁹ *R v. Marquard* [1993] 4 S. C. R. 223 (S.C.C.).

ii. Experts with a history of personal relationship with the Client

If the proposed expert has a prior or existing connection to the litigant, be wary of their evidence in expert form. In the 2006 decision of *Poirier v. Poirier*²⁰ the valuation of the Husband's shares in one of his companies was in issue. Both parties retained experts. The Husband did not retain a business valuator; rather, he relied on the testimony of the company accountant. The experts differed in their respective opinions on the appropriate rates of return and other areas. The Husband's expert found the value to be \$750,000 and the Wife's expert found the value to be between \$2.2 million and \$2.3 million.

Mr. Justice Charbonneau found that the Husband's expert was in a "very difficult conflict of interest position" and rejected the valuation of the Husband's expert as being "unreliable and clearly biased". Per paragraph 12 of the decision, His Honour states

"...I have very little faith in the conclusions reached by D&T concerning the value of Carrière & Poirier. I find that D&T is in a very difficulty conflict of interest position. The respondent is a good client of the accounting firm."

There were other problems with the findings by that particular expert as discussed later in this paper. However, this case squarely gives rise to the question of whether retaining the company accountant to provide a valuation opinion itself is a conflict and will automatically lead to a trier of fact qualifying or rejecting the evidence. Clients often prefer to retain their personal accountant or the company accountant as expert for many reasons that may have nothing to do with the personal relationship or an expectation that the findings will be in their favour. It

²⁰*Poirier v. Poirier*, 19 R.F.L. (6th) 197 [2006]

is efficient and less costly for the person who is familiar with the Company and the books and records to prepare an expert report. The client may be more willing to disclose documents and provide information to his or her accountant, and simply feel more comfortable with the process.

The accountant can certainly assist by gathering and providing backup data and documents, attending at examinations or settlement discussions to facilitate disclosure, and preparing income tax calculations. However, if the client's regular or ongoing accountant prepares an expert report or provides a valuation opinion, the report may be inadmissible and the testimony may be rejected. As clearly outlined in *Poirier*, there is an inherent lack of independence due to the existing relationship between the accountant and the company or client.

In addition to the prior relationship, there are other problems with using an accountant as expert. A business valuator can cross-check and objectively test the findings and usefulness of the annual corporate financial statements as prepared by the accounting firm. An accountant does not have the specialized training of a Chartered Business Valuator and the reliability of conclusions regarding value are questionable. Further, many accountants do not have the familiarity with specific components of provincial property division or income analysis necessary to render such an opinion.

For example, we have seen accountants prepare reports with a conclusion as to the value of privately held shares in a business, without taking into account the corresponding consideration of notional disposition costs.²¹ Similarly, income analysis reports have limited use where the author does not have a solid understanding of various Sections of the Child Support Guidelines, simply opining

²¹ *Sengmueller v. Sengmueller* 2 R.F.L. (4th) 232, OCA

that income for tax purposes is the same as income available for support in family law.

The history of a personal relationship with the client as a downfall to expert testimony extends beyond financial experts. In the case of *De Zen v. De Zen*²², the Court commented about the conflicts of interest where the witness, a physician, was evasive and had apparent personal relationship to one of the parties and his family at paragraph 32:

I have grave reservations caused by Dr. Fazl's apparent partnership and lack of veracity. Apart from his demeanour as a witness which involved moments of evasiveness and omission, Dr. Fazl appears to have a connection to Mr. De Zen's father and Royal Plastics which puts his objectivity in real doubt.

When he was asked about his personal relationship with the family, including dinner with the husband's father and a trip paid for by the Husband's company, his responses were inadequate, particularly as to why these factors were not mentioned in his report. With respect to the expert physician, Her Honour concluded at paragraph 36: "I find his evidence untrustworthy as a result of these testimonial indices and place no weight on his opinion."

iii. Experts with a history of personal relationship with Counsel

This is a delicate area. Given the small and interrelated communities that civil litigation involves, all counsel generally have some prior experience with experts in other cases. Counsel should only raise this in clear cases where there is objective evidence of a relationship that would lead an objectively reasonable

²² *De Zen v. De Zen*, 2001 CarswellOnt 2702

person to conclude that the independence of the expert is jeopardized by his or her close relationship with counsel.

The factors that might be considered in determining whether there may be a conflict include:

- Does a certain lawyer repeatedly steer a majority of his or her files to specific and select few experts?
- Does the lawyer meet with the client and expert to deliver instructions, discuss the overall strategy of the case and ask for draft reports before final publication, which appear to affect the result of the conclusion provided?
- Do these experts and counsel have a social or personal relationship??
- Has this expert ever testified on the opposing side of the counsel in question?

Overall, there is a very high standard of true independent thinking that the experts must adopt and counsel must respect, regardless of whether the expert is retained separately by each party, jointly appointed, or Court appointed.

(iv) Court Appointed Experts

Most jurisdictions encourage Court appointed or jointly retained experts. The independent joint expert is allowed full access to the parties and their documents and should be able to streamline the information gathering and reporting. Prior to such appointments, counsel should have input on the process. This may include

what feedback, if any, the expert should give to the parties and at what stage of completion of the report.

However, not every litigant wants the Court to appoint such experts and have them authorized to investigate matters relating to their case. Litigants have found ingenious ways to interfere with the process in open defiance of the intent of the Court orders. There are innumerable ways a recreational litigant can effectively sabotage even well-intentioned Court orders in litigation matters, and counsel must consider whether a Court appointed or joint expert may be appropriate for a particular case.

Some Court appointed experts circulate their final draft report for comments from the clients and counsel before publication. This avoids obvious mistakes but it leads one to question whether the last minute information had any significant influence on the opinions in the final report.

It appears that a Court appointed expert must report only to the Court. If he or she encounters difficulties or resistance, it is suggested that the expert must:

- (i) apply directly to the Court for advice and directions; or
- (ii) write joint letters to counsel outlining the impasse and asking them to solve it and request counsel to launch a further Court application to clarify the issues and allow the expert to proceed.

C. Challenges During Testimony

Even after the expert is qualified and is clearly testifying within his or her expertise, there may still be challenges made to the substantive findings. Some of the common examples are set out below.

i. Testimony based on Hearsay

Often it is necessary for an expert to rely on hearsay evidence as background material when forming his or her opinion. The reliability of the facts upon which the opinion is based is then the underlying foundation for the weight given to an expert report. In *R v. Lavallee*²³, Justice Sopinka stated, “Where an expert’s opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight”. He further stated that, “An expert opinion that is based entirely on unproven hearsay must, if anything, be inadmissible by reason of irrelevance, since the facts underlying the expert opinion are the only connection between the opinion and the case.”

Financial information is by its nature hearsay. Yet, certain financial records are admissible because they are included as exceptions to the hearsay rule. Admissibility of those records is only one step to the testimony being accepted. The reliability and weight to be placed on those records is fundamental to the usefulness of the expert’s opinion.

²³ *R. v. Lavallee*, (1990) 55 C.C.C (3d) 97 (S.C.C.)

In *The Children's Aid Society of Cape Breton-Victoria v. D.(N.)*²⁴, the Court stated, “Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a Court ought to require independent proof of that information.” By way of example, the expert should be cautioned not to rely solely upon schedules prepared by the company bookkeeper for example, without ensuring that the information upon which the schedule was prepared is reliable. To the extent that the bookkeeper has relied on the spouse’s characterization, for example, of expenses being “personal” or “business” without any mechanisms to cross-check same could be a problem.

Justice Wilson, in *R v. Abbey*²⁵ attempted to set out a series of principles concerning the admissibility and weight of an expert report. From that case, it is clear that before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be established.

It may therefore be necessary to call multiple experts, to ensure that all factual bases that are being relied upon by the expert have been independently established. Conversely, when assessing evidence that has been adduced by the opposite party, careful consideration must be given as to whether or not the facts upon which the expert is giving testimony have been established by the evidence. In a business valuation context, as noted elsewhere in this paper, it may be necessary to call more than one expert.

²⁴ *The Children's Aid Society of Cape Breton-Victoria v. D.(N.)*, 2003 CarswellNS 227

²⁵ *R. v. Abbey*, [1982] 2 S.C.R. 24 (S.C.C.)

ii. Testimony Inconsistent with Expert Report

While testifying, an expert can explain matters touched on in the report, but may not testify about matters that are a new theory or position not mentioned in the report and would not have been anticipated from reading the report.

In *Carbon v. Young*²⁶, a decision of the Alberta Queen's Bench, the Court conducted a *voir dire* to deal with the issue of the scope of the expert's report. The Court concluded that the concern about the expert testifying outside the scope of his report could be dealt with during his evidence. The difficulty with that approach is that the opposite side will not have an opportunity to challenge the new theory on its merits, will not have the opportunity to review same with their own expert, and will essentially be faced with "trial by ambush", which is typically discouraged in family litigation.

In *Auto Worker's Village (St. Catherines) Ltd. v. Blaney, McMurtry, Stapells, Freidman*²⁷, the trial Court refused to permit the plaintiff's expert witness to express an opinion on a matter not referred to in his report. However, the Court granted the plaintiff leave to serve a supplementary report. This presumably meant that the plaintiff would then have an opportunity to put forward a new theory and the defendant would be permitted to review the new theory and cross-examine the plaintiff's expert on it, therefore obviating any prejudice to the defendant. Of course, the time delay is addressed on the issue of costs.

²⁶ *Carbon v. Young*, 2004 CarswellAlta 137

²⁷ *Auto Worker's Village (St. Catherines) Ltd. v. Blaney, McMurty, Stapells, Freidman*, (1997) 14 C.P.C. (4th) 152 (Gen. Div.)

iii. Independence, Impartiality, and Expert Bias

The importance of an expert's impartiality and independence cannot be over-emphasized. For instance, the Canadian Institute of Chartered Business Valuators ("CICBV") Code of Ethics and Practice Guidelines and CA*IFA guidelines specifically outline the need for independence and objectivity which must be present in both the expert's written work product, as well as in the expert's unbiased oral opinion evidence.²⁸ It is open to the court to conclude whether an expert is impartial or, in fact, whether or not an expert is partial. This may occur where the expert has an argumentative or adversarial stance during testimony, where the expert seems to assume the role of advocating the case of the party who retained him or her, or where the expert holds fast to an opinion in the face of obvious conflicting evidence. Counsel may challenge an expert's partiality in cross-examination by referring to the expert's expressed views in other cases or publications.

The jurisprudence reveals two different approaches to concerns about impartiality and independence. One line of authority is that evidence of a partial witness is inadmissible since by definition, a partial expert cannot be considered an expert. The prevailing view is that partiality affects the assessment of the expert's credibility and goes to the weight to be given the evidence, rather than to admissibility.

²⁸ See also *Bank of Montreal v. Citak*, [2001] O.J. No. 1096; *Rudberg v. Ishaky*, [2000] O.J. No. 376 (S.C.J.); *Jacobson v. Sveen*, [2000] A.J. No. 365 (Q.B.); *Bank of Montreal v. Citak*, *supra* and *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), R. (3d) (Gen. Div.); and *R. v. Marquard*, [1993] 4 S.C.R. 233.

A handful of recent cases have involved challenges to objectivity and neutrality. In *DeBora v. DeBora*²⁹ both counsel “leveled charges” that the other side’s valuator was acting as an advocate for the party by whom he had been retained. Backhouse J. concluded the husband’s valuator fell short of the independence required of an expert witness. Her main criticism was his failure to account for obvious relevant factors, including the CCRA’s reassessment of the husband’s company and an Inland Revenue audit.

The quote below at paragraph 348 from Justice Backhouse’s reasons serves as an important reminder that in keeping with the principles in *Ikarian Reefer*, an expert has a positive duty to detail the limits of the information provided to him or her at arriving at the opinion. Likewise, if upon receipt of the other’s opinion, he or she changes his or her view, there is a duty to advise. The failure to either consider relevant information, or mention such limitations, might well be fatal:

Mr. Rudson’s conclusions on a number of significant matters were shown to be inaccurate and misleading because he was not in receipt of all of the relevant information – for example, the LIOL financial statements and Mr. Reich’s working papers. Why Mr. Rudson was not provided with a copy of LIOL’s financial statements when he prepared his income analysis report and why, if he asked for them, he did not disclose that his conclusion did not have the benefit of these financial statements, are questions for which no satisfactory answer appears. Suffice it to say, on this record of deliberate falsehoods by the husband and his partner, Mr. Drutz, the failure to produce relevant records in a timely fashion or at all and the failure by Mr. Rudson to access all the relevant information before submitting his reports to the court, I have approached the evidence on behalf of the husband, including Mr. Rudson’s, with extreme caution.

²⁹ *DeBora v. DeBora*, [2004] O.J. No. 4826

In *Kenning v. Kenning*,³⁰ the so-called expert was found to be a knowledgeable farmer with helpful information about farming generally and the parties' particular farming operation. Initially he was qualified as an expert, but subsequently disqualified on the basis that he was friends with both of the parties.

In *Ristimaki v. Cooper*,³¹ a solicitor's negligence case, Stinson J. found one of the four legal experts who gave opinion evidence at trial frequently slipped out of the role of an expert and into the role of an advocate for the defendant. An example was his failure to respond directly to hypothetical questions put to him on cross-examination. The Court's doubts about this witness' lack of neutrality and objectivity led to its reluctance to rely on his opinions.

In the *Poirier* case referred to earlier in this paper³², the relationship between the husband and his expert was problematic at the outset. Also, the draft report of the Husband's valuator concluded a different value which changed after discussions with the Husband. These issues led to a conclusion of the expert's lack of independence.

Similarly, in a recent Manitoba case of *Schreyer v. Schreyer*, 2006 CarswellMan 282, an expert was retained to appraise livestock of a farmer. The expert was qualified to render the opinion, and was found to be honest in his testimony. He relied on information provided by the Wife, who was his housekeeper, and did not engage in any independent verification. At paragraph 80, Master C.W. Sharp found

³⁰ *Kenning v. Kenning*, [1995] M.J. No. 180

³¹ *Ristimaki v. Cooper*, [2004] O.J. No. 2699; For the more recent decision from the Ontario Court of Appeal, see 2006 CarswellOnt 2373

³² *Supra*, footnote 20

the testimony to be “seriously flawed and cannot be called either ‘objective’ or ‘expert’. In the final analysis, it is of very little or any value to this court.”

In the recent case of *LeVan v. LeVan*³³, the Court had to weigh the evidence of two valuation reports, which were agreed to be marked as exhibits at trial. In assessing the testimony of the experts, Her Honour preferred the wife’s valuator over the husband’s valuator at:

I prefer the evidence of Ms. Brent over that of Mr. DeBresser for the following reasons.

Ms. Brent is a senior and respected business valuator who did a comprehensive valuation report, the highest level of report. She gave her evidence the way an independent expert witness ought to - fairly, independently and objectively. At no time did she act as an advocate. She withstood a vigorous cross-examination and was not shaken in any aspect of her testimony.

Mr. DeBresser produced a limited critique of Ms. Brent's report, disagreeing with only one aspect. He took issue with her failure to determine the en bloc value of Wecast. He provided no opinion on the value of the husband's assets at the date of marriage and valuation date. He did not do an income analysis. He did not question any other valuation issues in Ms. Brent's report, including the corporate taxes, discounts and any other aspects of her report. He was very defensive on cross-examination.

This case acts as a reminder to counsel that in preparing for trial, the importance of demeanour, and properly answering questions on cross-examination should be emphasized to even the most seasoned and well-qualified experts.

³³ *LeVan v. LeVan*, 2006 CarswellOnt 5393. See also the Ontario Court of Appeal decision at 2008 ONCA 388. Leave to appeal to the SCC dismissed.

In other decisions, Courts have preferred the opinion of one expert over the other on the basis that one expert lacked neutrality and open-mindedness.³⁴

iv. Other challenges

All experts should be screened to confirm that they are in good standing with their professional governing body. Counsel need to be especially alert to any outstanding complaints or investigations of their experts. Lack of compliance with standards set by the expert's governing body is a common ground to challenge the expert. Counsel may also inquire or cross-examine on previous evidence tendered by the expert or reports in similar areas, and whether or not the Court has accepted or rejected their evidence previously.

The entire area of comparing previous drafts with the final report is a minefield for expert's credibility and counsel ingenuity. To put this concept into perspective, imagine if a justice could be challenged on their final judgment by comparing the final decision with previously discarded drafts.

The evidence presented by the expert should also explore the possibility of relying upon authoritative literature by adoption. As part of an expert's opinion, he or she is permitted to adopt authoritative texts or articles and, in so doing, the authority itself is admitted into evidence. Sometimes, on cross-examination, counsel may seek to impeach an expert by reference to a text, which contradicts what he or she has said. If an expert witness refuses to accept the text as authoritative, the cross-examiner cannot ask any further questions based on the text. Counsel may still be

³⁴ *K.S. v. D.S.*, [2003] N.J. No. 203

able to enter into the relevant portions of the text through his or her own expert witness, provided that expert accepts the text as authoritative. It is also important that the expert explains the relevance of the text to a point or theory in issue. By simply attaching them and saying they are authoritative will not make them admissible.³⁵

In the case of financial experts, consider the wisdom of providing very specific factual assumptions that would lead to a more precise number, or providing a range of factual assumptions, which would lead to a range of values, leaving more scope for negotiation and interpretation. A common and simple example is the date of retirement in a pension valuation. Many actuaries approach this issue by valuing the pension at several retirement dates, including the earliest possible date upon which the pension member can retire with an unreduced pension. Counsel can ask the actuary to produce a range of values and then leave the question of the appropriate retirement date open for discussion or, if necessary, adjudication. Alternatively, counsel can instruct the actuary that it was always the client's intention to work until the age of 65 and to produce only the calculation corresponding to that date. This assumption would be stated in the report. It would then be up to opposing counsel to argue for a different date of retirement, and produce the pension valuation at his or her own expense.

V. PROPOSED REFORMS

At the time of writing this paper, we understand that several jurisdictions, including Alberta, BC, Ontario, Nova Scotia and Quebec are working on reforms

³⁵ *Kutz v. Popwell*, [1994] B.C.J. No. 33

that address some of the above noted issues.³⁶ We are very thankful for the timely involvement of Diana J. Lowe, Q.C., Executive Director, Canadian Forum on Civil Justice, University of Alberta for her assistance and guidance in presenting this section of our paper.

These proposed reforms or pilot projects generally deal with the issue of “proportionality”. This concept involves assessing the amount, importance or complexity of proceedings and weighing it against appropriate time frames to reduce delay and costs. As well, the reforms look into case flow management (ie. Court managed schedules for proceeding), and mandatory mediation type processes prior to entry into civil litigation, discoveries, and retaining of experts.

We will only be focusing on the reforms as they relate to expert evidence and have noted from the proposed reforms the following themes:

A. Encouragement of Jointly Retained Experts

All of these jurisdictions outline that Courts should encourage the parties at an early stage to either select jointly appointed experts to reduce time and costs, or occasionally for the Court to take the initiative to appoint an expert themselves. We have canvassed several members of the judiciary and understand that currently such initiatives are not normally taken by the Courts. We agree with the reforms in this regard and recommend that Judges consider emphasizing the need for joint financial experts in family law cases across the country.

B. Private Expert

If counsel insists upon private experts or responses to the joint experts, these reports should be filed sequentially and well in advance of the trial. Standardization of expert reports is a recurring theme. Finally, there also appears to be a strong trend in these reforms discouraging the experts from giving any oral testimony at trial and Court simply relying upon the written report. In other words, the expert reports would be admitted as exhibits at trial and no experts would be

³⁶ Extensive information about these reforms is available at <http://cfcj-fcjc.org/inventory/> under the heading “experts”. See also the Canadian Judicial Council, Administration of Justice Committee, Sub-committee on Access to Justice (Trial Courts), *Access to Justice: Report on Selected Reform Initiatives in Canada* (Ottawa: Canadian Judicial Council, 2008), online: Canadian Judicial Council http://www.cjc-ccm.gc.ca/cmslib/general/2008_SelectedReformInitiatives_Report_final_EN.pdf.

called upon to expand on or to testify about the contents of the report. If this reform is implemented, it will dramatically change the way that experts write reports as most experts have told counsel that they put 80% of the report in writing and save 20% for the Courtroom. If these proposed reforms are enacted, that strategy will have to be completely rethought.

While we agree that not having experts testify in Chief would be a useful method to limit costs and delays at trial, we are concerned about the opposing party's ability to cross-examine the expert on the very principles that we have outlined in this paper. This is even more important if the examinations of experts are also eliminated at the pre-trial or discovery stage. How then is a party to test the expert's findings, assumptions and conclusions?

Finally, there appears to be a strong movement to put a limitation on the number of experts, whether by issue or by trial. Clearly, the purpose of these proposed reforms is to limit the "battle of the experts" scenario. The recommendation is that the early consideration for the use of a joint expert by the parties is the best practice. Also, many jurisdictions appear to be providing provisions for the Court to order conflicting experts to meet and attempt to reconcile their differences, either with the presence of the parties and/or counsel prior to trial. They are asked to reconcile their opinions, identify the points which divide them and provide an updated report to the Court on the issues that are still outstanding. The draft BC Rules, for instance, would not allow the participation of the parties or their lawyers in these pre-trial discussions.

A summary of some of the provincial proposed reforms is set out below:

ALBERTA

The draft Rules are in the process of being published by the Alberta Law Reform Institute. There appears to be a concern in the consultation memorandum that retaining private experts contribute significantly to many of the concerns in the civil litigation system causing further expense, delay and increasing trial times. There also appears to be concerns about the partisan nature of many experts who appear before the Courts whereby the Courts are being forced, for a technically untrained Judge, to select between competing theories. Leave would be required for the discovery of experts in any action, with a heavy onus upon the party applying.

BC JUSTICE REVIEW TASK FORCE

2010 is their projected implementation of the new Rules (to say this is a highly contentious issue in British Columbia would be an understatement). The proposed Rules seem to be concerned about adversarial bias and polarization. The more complex the issue, the harder it is for the non-expert Judge to determine the extent to which contradictory expert opinions are reliable. Concerns are expressed about cost, waste and duplication in selecting and discarding experts, preparing experts for trial and cross-examination of opposing experts. British Columbia appears to make it clear that, if there are competing experts, they must confer and produce a report outlining areas of disagreement. The initial reports are to be filed 12 weeks before trial, with response reports 7 weeks before trial. There also appears to be proposals that restrict their oral evidence only to situations where direct examination is necessary to clarify terminology in the report or make the report more understandable. There also appears to be emphasis that the expert appointed has a *duty* [author's emphasis] to assist the Court and that duty overrides any obligation the expert may have to a party or the person who is liable for his fees and the party appointing the expert must advise the expert of this duty. The expert must, in his report prepared, certify that he or she is aware of that duty, made their report in conformity with that duty and, if called to give oral or written testimony, give that testimony in conformity with that duty.

NOVA SCOTIA CIVIL RULES REVISION PROJECT

Tentatively approved for January of 2009. This appears to be collaboration between the Supreme Court, the Law Reform Commission, Nova Scotia Barristers Society and the Nova Scotia Department of Justice. They recommend standardization of the forms, including an acknowledgement of the overriding duty to the Court. A party will be allowed to submit written questions to another party's expert for clarification of the report. There would be no discovery of experts as of a right.

ONTARIO ³⁷

Known as the Coulter Osborne Civil Justice Reform Project. Recommendations are that joint experts should not be mandatory but the option should be considered by the parties to reduce costs. Proposed amendments to the Rules of Civil Procedure require Judges at pre-trial settlement conferences or trial management conferences to consider and make Orders regarding the number, if any, of experts to be called and that the number of experts is proportional to the amount at stake.

Explicitly clarify that the duty of an expert is to assist the Court on matters within his or her expertise, overriding obligation to the client, permitting Judges to order opposing experts to meet to identify, clarify and resolve disagreements. The draft reforms even go so far as to suggest that the experts sign a written undertaking to the court confirming their duty to remain objective.

QUEBEC CIVIL PROCEDURE REVIEW

Preference for using written reports only. If an opposing party summons the expert for cross-examination but, in the opinion of the Court, it was unnecessary, costs may be awarded against the summoning party. Pre-requisites for written reports to be filed before giving oral testimony. The Court, of its own accord, can require the experts to meet to reconcile their opinions, identify the points that divide them or report to the Court. Allows the Courts to reduce the costs relating to experts' costs if there is no such need for it.

FEDERAL COURT RULES

Implemented 2006. Basically tries to streamline the production of expert reports at a pre-trial conference and also to resolve the distinction between expert reports in chief and rebuttal and to allow for evidence to be submitted by way of Affidavit in a simplified action.

³⁷ In addition to the reforms above, we have also learned that on December 11, 2008 the Attorney General for Ontario announced a number of new rules, including rules on experts, which will come into force on January 1, 2010. Please see <http://cfcj-fcjc.org/inventory/reform.php?id=62>

VI – CLOSING COMMENTS

For the most part, lawyers approach a case as a problem to be resolved and an agreement to be reached, rather than a case to be argued and won. Lawyers and their clients depend upon the invaluable assistance of experts in understanding, negotiating and, if necessary, litigating their clients' claims. Judges rely on experts to provide opinions on difficult areas in which they have specialized training and knowledge. Experts need to understand the evidentiary structures within which the trier of fact must function, as well his or her instructing lawyer's theory of the case. It is counsel's job to ensure the expert has that comprehension. Likewise, counsel and the expert must work co-operatively to ensure the expert fulfills his or her duty to be independent and impartial, so that the integrity of the process is maintained.

Dealing with financial experts in a family law setting is an exciting area of law and policy reform that is continuously evolving. While the importance of experts and their specialized knowledge and training should not be underestimated, the "battle of the experts" may slowly fade away with the implementation of new rules, and of course, continual judicial intervention.

January 12, 2009

APPENDIX

ALBERTA

Court expert

- 218(1) The court, on its own motion or upon the application of any party in any case where independent technical evidence would appear to be required (including the evidence of an independent medical practitioner) may appoint an independent expert (herein called “the court expert”).
- (2) The court expert shall, if possible, be a person agreed between the parties and failing agreement shall be nominated by the court.
- (3) The question or the instructions submitted to or given to the court expert, failing agreement between the parties, shall be settled by the court.
- (4) The report of the court expert shall be in writing, verified by affidavit, and shall be admitted as evidence at the trial and given such weight as the court thinks fit.
- (5) Copies of the report shall be forwarded by the clerk to the parties or their solicitors.
- (6) Any party may, within 14 days after the receipt of a copy of the report or within such other time as the court directs, apply for leave to examine the court expert on his report and the court, on the application shall
- (a) order the cross-examination of the court expert prior to the trial; or
 - (b) order the cross-examination of the court expert at the trial,
- or both.

Rule 218.1 – Notice to adduce expert evidence

- (1) A party intending to adduce expert evidence at a trial shall, not less than 120 days before the day the trial commences or such other time as may be ordered by the Court, serve on the other parties to the action

- (a) a statement of the substance of the evidence, signed by the expert, including the expert's opinion, the expert's name and qualifications, and a statement from counsel setting out the proposed area of expertise for which qualification as an expert will be sought, and
 - (b) a copy of the expert's report, signed by the expert, on which the party intends to rely.
- (2) The party serving the expert's report may, at the same time, also serve notice of intention to have the report entered as evidence without the necessity of calling the expert as a witness.
- (3) The expert's report shall be entered as evidence at the trial unless, within 60 days after service of the notice under subrule (2) or such further time as the Court allows, the other party serves a statement
- (a) setting out those parts of the report which that party will not agree may be entered as evidence in writing in this way, and
 - (b) giving reasons why that party cannot agree.
- (4) Agreeing to have the expert's report entered as evidence without calling the expert as a witness is not, by itself, an admission of the truth or correctness of the evidence submitted.

Expert's Document

- 218.6(1) At a time as may be directed by the case management judge, each party shall deliver to the other party or parties a document known as an "Experts Document".
- (2) The Experts Document shall
- (a) be signed by the proposed expert, and
 - (b) contain the following information with respect to each expert proposed to be called by the party submitting the document:
 - (i) the name and qualifications of the proposed expert;
 - (ii) the proposed expert's area of expertise;

- (iii) any report prepared by the proposed expert on which any party proposes to rely at trial;
- (iv) where a report referred to in subclause (iii) has not been prepared, a detailed statement of the evidence proposed to be given.

(3) Within 60 days after having been served with an Experts Document, a party shall deliver to the party who served the Experts Document a document known as a “Reply to Expert’s Document”.

(4) The reply to Experts Document must contain the following:

- (a) a statement as to whether or not the qualifications of the proposed expert are accepted;
- (b) if the qualifications of the proposed expert are not accepted, the reasons for non-acceptance;
- (c) a statement as to whether or not the party disagrees with any of the evidence intended to be given by the proposed expert;
- (d) if the party disagrees with any of the evidence intended to be given by the proposed expert, the reasons as to the disagreement.

Demand for expert’s attendance

218.11(1) A party who agrees to have the report entered in evidence may, at the same time as responding to the notice of intention, serve a demand that the expert be in attendance at the trial for cross-examination.

(2) The expert shall not give oral evidence at the trial unless

- (a) a demand has been served, or
- (b) the Court gives leave.

(3) The party who required the attendance of the expert for cross-examination shall pay the costs of the expert’s attendance unless the Court considers that the cross-examination was of assistance and makes a different order about the payment of those costs.

(4) If the party proposing to enter the expert's report receives a demand to produce the expert for cross-examination, the party proposing to enter the report may examine the expert, so long as the examination is not in respect of matters substantially outside the matters covered by the report, and need not rely only on the expert's written report.

BRITISH COLUMBIA

Rule 40A of the British Columbia Supreme Court Rules, which sets out the terms under which expert reports and/or testimony are given at trial, contains no provision for the pre-trial examination of a witness.

However, Rule 28, which provides a method under which one may apply to the Court for an order for the pre-trial examination of a witness, says the following:

28(1) Where a person, not a party to an action, may have material evidence relating to a matter in question in the action, the Court may order that the person be examined on oath on the matters in question in the action and may, either before or after the examination, order that the examining party pay reasonable solicitors' costs of the person relating to the application and the examination.

(2) An expert retained or specially employed by another party in anticipation of litigation or preparation for trial may not be examined under this rule unless the party seeking the examination is unable to obtain facts and opinions on the same subject by other means.

MANITOBA

RULE 36 – TAKING EVIDENCE BEFORE TRIAL

WHERE AVAILABLE – By consent or by order

36.01(1) A party who intends to introduce the evidence of a person at trial may, with leave of the court or the consent of the parties, examine the person on oath or

affirmation before trial for the purpose of having the person's testimony available to be tendered as evidence at the trial.

Discretion of court

36.01(2) In exercising its discretion to order an examination under subrule (1), the court shall take into account,

- (a) the convenience of the person whom the party seeks to examine;
- (b) the possibility that the person will be unavailable to testify at the trial by reason of death, infirmity or sickness;
- (c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial;
- (d) the expense of bringing the person to the trial;
- (e) whether the witness ought to give evidence in person at the trial; and
- (f) any other relevant consideration.

Expert witness

36.01(3) Before moving for leave to examine an expert witness under subrule (1), the moving party shall serve on every other party the report of the expert witness referred to in subrule 53.03(1) (calling expert witness at trial) unless the court orders otherwise.

PROCEDURE

Rule 34 applies

36.02(1) Subject to subrule (2), Rule 34 applies to the examination of a witness under rule 36.01, unless the court orders otherwise.

Exception

36.02(2) A witness examined under rule 36.01 may be examined, cross-examined and re-examined in the same manner as a witness at trial.

EXAMINATIONS OUTSIDE MANITOBA

36.03 Where an order is made under rule 36.01 for the examination of a witness outside Manitoba, the order shall, if the moving party requests it, provide for the issuing of a commission and letter of request under subrules 34.07(2) and (3) for the taking of the evidence of the witness and, on consent of the parties, any other witness in the same jurisdiction, and the order shall be in Form 34E.

BEFORE A JUDGE

36.04 An examination under this rule may be held before a judge.

USE AT TRIAL

Witness available at trial

36.05(1) Any party may use at the trial the transcript and a videotape or other recording of an examination under this rule as the evidence of the witness, but, where the witness is available to give evidence at the trial, the transcript, videotape or other recording shall not be used as the evidence of the witness unless the court orders or the parties agree otherwise.

36.05(2) Use of evidence taken under rule 36.01 or 36.03 is subject to any ruling by the trial judge respecting admissibility.

May be filed

36.05(3) The transcript and a videotape or other recording may be filed with the court at the trial and need not be read or played at the trial unless a party or the trial judge requires it.

NEWFOUNDLAND AND LABRADOR

The Rules

It should be noted that experts are not specifically mentioned in rule 30.01(1), which generally defines "persons who may be examined" during discovery. However, specific guidelines regarding the treatment of expert witnesses are detailed in rule 46.07. The relevant rules state,

Persons who may be examined

- 30.01. (1) At any time before trial, any person, who is within or without the jurisdiction, may be orally examined on oath or affirmation by any party regarding any matter, not privileged, that is relevant to the subject matter of the proceeding.
- (2) Where it is unnecessary, improper or vexatious, the Court may limit the number of persons to be examined and set aside the appointment for the examination of any person.
- (3) The costs of examining more than one person, other than a party, shall, unless the Court otherwise orders, be borne by the party examining.

Expert witness; evidence of and report

46.07. Unless an opposite party has, at least ten days before the commencement of a trial, been given a report of an expert witness who is expected to give evidence on a trial, the evidence shall not be admissible without the approval of the court, which may be granted on such terms as are just.

NEW BRUNSWICK

32.06 Scope of Examination

- (3) A party may obtain discovery of any findings, opinions and conclusions of an expert engaged or consulted by or on behalf of the party being examined or his solicitor and relating to an issue in the actions; but the party being examined need not disclose such information nor the name and address of the expert where
- (a) the only findings, opinions and conclusions of the expert relevant to an issue in the actions were made or formed by him in preparation for contemplated or pending litigation and for not other purpose, and
- (b) the party being examined undertakes that he will not call the expert as a witness at the trial

Expert Witness

52.01 Condition Precedent to Calling Expert Witness at Trial

- (1) Where a party intends to call an expert witness at trial, he shall serve on every other party a copy of the expert's signed report which shall contain, or be accompanied by, a statement containing the expert's name and address and qualifications and the substance of his proposed testimony. Service shall be made as soon as practicable and no later than the Motions Day at which the trial date is fixed.
- (2) Where a party intends to call an expert witness at trial but cannot obtain from him a report, or where, because of the nature of the proposed evidence, the expert is not required by the party to submit a written report, the party may comply with paragraph (1) by serving on every other party a report signed by the party or his solicitor which sets out the name and address and qualifications of the expert and the substance of the evidence he is expected to give.
- (3) A party who has not complied with this subrule shall not call an expert witness without leave of the court.
- (4) Where a report has been served under paragraph (1) or paragraph (2), on motion the court may order that any records, documents or other materials on which the report is based be produced for inspection and copying.
- (5) On consent of all parties, the court may receive in evidence at the trial a report served under paragraph (1) without requiring the expert to attend and give oral evidence.

52.02 Examination of Expert Witness Before Trial

- (1) Where it is impractical or inconvenient for an expert witness to attend the trial, the party intending to call the witness may, with leave of the court or the consent of all parties, examine that witness before the trial for the purpose of having his evidence available for use at trial.
- (2) Before applying under paragraph (1) to the court for leave, the applicant shall comply with Rules 52.01(1) or 52.01(2).

- (3) Where possible, an examination under paragraph (1) shall be conducted before the trial judge.
- (4) Unless ordered otherwise or provided by this rule, the procedure prescribed by Rule 33 shall apply to the examination of a witness under this rule.
- (5) On the examination of a witness under this rule, he may be examined, cross-examined and reexamined in the same manner as a witness at trial.
- (6) An order for, or consent to, the examination of a witness under this rule may provide that the examination be recorded by videotape or other similar means either in addition to or substitutions for a typewritten transcript.
- (7) Where the evidence on an examination under paragraph (1) has been transcribed, the party whose witness has been examined shall serve very party who attended or was represented on the examination, with a copy of the transcript, free of charge unless ordered otherwise.
- (8) A transcript, videotape, or any other recording of evidence taken under this Rule may, as far as it is admissible, be tendered in evidence at the trial by a party to the action, and such parties shall be responsible for providing the equipment required to tender such evidence if it is not otherwise available in the courtroom.
- (9) Where the evidence of an expert witness has been taken under this subrule, he shall not be called to give evidence at the trial, except with leave of the trial judge or unless the trial judge requires his attendance at the trial.

52.03 Medical Expert

- (1) Where, under Rule 52.01 (1) a party has served a report of an expert who is a medical practitioner as defined in Rule 36.01 the report may, with leave of the court, be admitted into evidence without proof of signature, or qualifications or the medical practitioner and without his attendance at trial.

- (2) When an opposite party, within 10 days after service of a report of a medical practitioner under Rule 52.01 (1), serves notice in writing requiring the attendance of the medical practitioner at trial, the report shall not be received in evidence unless the medical practitioner is called as a witness.
- (3) Where a medical practitioner is required to attend and give oral evidence at or before trial and the court is of the opinion that his evidence could have been introduced as effectively by way of a medical report, the court may order the party who required the attendance of the medical practitioner to pay the costs of his attendance.

NOVA SCOTIA

Expert witnesses: Evidence of and report

31.08. (1) Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been

- (a) served on each opposite party and filed with the court by the party filing the notice of trial at the time the notice is filed, and
- (b) served on each opposite party by the person receiving the notice within thirty (30) days of the filing of notice of trial,

the evidence of the expert shall not be admissible on the trial without leave of the court.

- (2) Where an opposite party wishes to conduct discovery examination of an expert, the opposite party shall pay the expert a reasonable fee for his attendance at the examination. If the fee is not paid in advance, the opposite party shall have no right to discover the expert. Unless otherwise ordered, if the opposite party is awarded costs following the trial, that party shall be entitled to recover as a disbursement the amount paid to the expert for his attendance at discovery.

- (3) If the report of an expert does not comply with the requirements of rule 31.08(1), a judge may on the application of an opposite party make an order requiring the party providing the report to comply with the rule 31.08(1) and if such an order is granted, the applicant shall have costs in any event.
- (4) Where a copy of the report has been filed and delivered as provided in rule 31.08(1), the expert shall be required to attend at the trial unless the person receiving the report gives notice that he does not require the attendance of the expert at the trial.
- (5) Where no notice as provided for in rule 31.08(4) has been given and the court is of the opinion that any evidence obtained from the expert at trial does not materially add to the information in the report served under rule 31.08(1), the court may order the party failing to dispense with the attendance of the expert at the trial to pay, as costs, such sum as the court considers just.

ONTARIO

20(4) Other Cases – Consent or Order

In a case other than a child protection case, a party is entitled to obtain information from another party about any issue in the case,

- (a) with the other party's consent; or
- (b) by an order under subrule (5).

20(5) Order for Questioning or Disclosure

The court may, on motion, order that a person (whether a party or not) be questioned by a party or disclose information by affidavit or by another method about any issue in the case, if the following conditions are met:

1. It would be unfair to the party who wants the questioning or disclosure to carry on with the case without it.

2. The information is not easily available by any other method.
3. The questioning or disclosure will not cause unacceptable delay or undue expense.

PRINCE EDWARD ISLAND

Expert Witness

53.03 (1) Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been

(a) served on each opposite party within thirty days of the filing of the notice of trial and

(b) filed with the court within thirty days of the filing of the notice of trial,

the evidence of the expert shall not be admissible on the trial without leave of the judge.

(2) Where a copy of the report has been served and filed as provided in subrule 53.03 (1), the expert shall be required to attend at the trial unless the person receiving the report gives notice that he does not require the attendance of the expert at the trial.

QUEBEC

Code of Civil Procedure, R.S.Q., c. C-25

BOOK II – Introduction of Actions and Applications, Appearance and Case Management

Title V – Proof and Hearing

CHAPTER I – Trial before the Court

SECTION V – Examination of Witnesses

294. Except where otherwise provided, in any contested case the witnesses are examined in open court, the opposite party being present or duly notified.

Any party may demand that the witnesses testify outside each other's presence.

[1965 (1st sess.), c. 80, a. 294]

CHAPTER III – Special Proceedings Relating to Production of Documents

SECTION II – Examination on Discovery, Medical Examination and Production of Documents

§ 1 – Examination on Discovery

398. After defence filed, any party may, after two days notice to the attorneys of the other parties, summon to be examined before the judge or clerk upon all facts relating to the issues between the parties or to give communication and allow copy to be made of any document relating to the issue:

- (1) any other party, or his representative, agent or employee;
- (2) any person mentioned in paragraphs 2 and 3 of article 397;
- (3) with the permission of the court and on such conditions as it may determine, any other person.

The defendant cannot, however, without permission of the judge or, in the case referred to in subparagraph 3 of the first paragraph, the court, examine under this article any person whom he has already examined under article 397.

[1965 (1st sess.), c. 80, a. 398; 1983, c. 28, s. 13; 1984, c. 26, s. 14; 1992, c. 57, s. 420; 1999, c. 40, s. 56; 2002, c. 7, s. 77]

Title V – Proof and Hearing

CHAPTER III – Special Proceedings Relating to Production of Evidence

SECTION III – Examination of Witnesses Out of Court

404. At any stage of the case, the parties may agree, or the court, if it sees fit to do so, may permit that a witness be heard out of court, provided that all the parties are present or duly summoned.

Depositions must in that case be made by way of affidavits sufficiently detailed to establish all the facts necessary to support the conclusions sought or be taken down by stenography or in handwriting before a person authorized to administer oaths and be filed in the record to have the same force and effect as if they had been taken at the hearing.

Notwithstanding the foregoing, the court cannot maintain an application for the annulment of a marriage or a civil union nor, where the defendant has filed a defence, an application for separation from bed and board or divorce or for the dissolution of a civil union unless the evidence of the plaintiff has been given before the court.

[1965 (1st sess.), c. 80, a. 404; 1968, c. 84, s. 4; 1982, c. 17, s. 16; 1986, c. 85, s. 2; 1988, c. 17, s. 3; 2002, c. 6, ss 99]

SASKATCHEWAN

There is no Saskatchewan right to examine expert witnesses prior to trial. To the best of our knowledge, there has not been any case where there has been a pretrial examination of an expert witness in a family case.

There is the ability to examine non parties through third party discovery rules. The Rule specifically prohibits its use for the purpose of examining experts:

222A(1)The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who may have information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.