

Federal Courts Rules Committee
Expert evidence in the Federal Courts
UPDATE
March 16, 2009

A. Background

On March 7, 2008, a committee established by the Federal Court, presented a report on expert witnesses in the Federal Court to the Federal Court of Appeal and Federal Court Rules Committee (the “Federal Courts Rules Committee” or the “plenary committee”).

The Federal Courts Rules Committee established a subcommittee on expert witnesses to further study the issues raised by the Federal Court. A discussion paper, seeking the input of the profession and parties on ten specific issues, was published in May 2008. The subcommittee received comments from IPIC, Dimock Stratton LLP, the CBA Aboriginal Bar Section, the Department of Justice and the CBA Maritime Law Bar¹. A summary of the comments was prepared and circulated to the subcommittee.

The subcommittee met on October 31, 2008, to discuss the comments received in response to the discussion paper and to re-evaluate the proposed amendments set out in the report provided to the plenary committee on March 7, 2008. A further report was prepared for the Federal Courts Rules Committee meeting of November 28, 2008. A copy of the comments received from the profession was attached as an appendix to that report.

The plenary committee approved the amendments proposed by the subcommittee in principle. Drafting instructions were prepared and sent to the legislative drafting section of the Department of Justice in January, 2009.

The Federal Courts Rules Committee notes that there is an interest in the legal community to receive an update on the progress of the draft rules regarding expert witnesses. While the drafting instructions are not available to the public, the subcommittee thought that it would be useful to provide this update for all members of the bar and the public.

The following is a summary of the decisions reached by the Federal Courts Rules Committee with respect to the issues set out in the May, 2008, discussion paper.

B. Issues and Recommendations

(1) Issue 1: Recognizing the duty of expert witnesses

¹ These comments were not received until December 2008 and were circulated to the members of the subcommittee on receipt.

Having carefully reviewed the comments received, the Committee has approved the inclusion of a Code of Conduct as a Schedule to the *Federal Courts Rules*. It has also approved the subcommittee's recommendation that rule 258(5) be amended to require counsel to provide an expert witness with a copy of a Code of Conduct; and to file a certificate signed by the expert acknowledging that the expert agrees to be bound by the Code of Conduct.

Where an expert does not agree to be bound by the Code and no certificate is filed pursuant to rule 258(5), the amendment to rule 279 would preclude the admission of the expert's evidence.

Several of the responses received from the profession raised concerns about how breaches of the Code that become apparent during trial would be sanctioned. The Committee has considered these concerns and has concluded that any breach of the Code by an expert likely would be taken into consideration by the Trial Judge when determining the weight to be given to the expert's evidence. As noted above, the failure to agree to be bound by the Code would preclude the expert from testifying pursuant to the proposed amendment to Rule 279(1)(b).

(2) Issue 2: Streamlining the process of qualifying expert witnesses

To assist in streamlining the qualification process and to identify situations where there are disputes as to whether a witness is qualified to testify as an expert, the Federal Courts Rules Committee has accepted the subcommittee's recommendation that Rule 258(5) require that the expert witness' proposed area of expertise be identified when the witness' report is delivered, and that a copy of the expert's *curriculum vitae* be delivered with the report.

Requiring parties to challenge the qualifications of experts at an earlier point in the proceeding would further streamline the qualification process. This goal may be achieved by requiring parties, other than the requisitioning party, to include any objections they may have to the requisitioning party's proposed experts in their responding pre-trial conference memoranda. The requisitioning party would be required to make any objections it may have to the responding party's proposed experts at the pre-trial conference.

Comments received from the profession noted that additional affidavits or statements of experts may be filed after the pre-trial conference and that the rules should be sufficiently flexible to allow for subsequent challenges to the qualification of experts. The Federal Courts Rules Committee has therefore accepted the recommendation that rules 262 and 263 be amended to require that any "known objections" be raised.

(3) Issue 3: The content of expert reports

There was some uncertainty about what should be included in an expert report so that the report will be of assistance to the Court. Some expert reports are tendered without setting out the expert's qualifications or identifying his or her proposed area of expertise. Where a report is tendered in this way, it is difficult to determine whether the proposed expert is qualified to provide an opinion.

Codes governing the conduct of expert witnesses generally provide a list of what should be included in the expert's report where such codes have been adopted.

The subcommittee has reviewed the lists used in other jurisdictions and has developed a list suitable for use in proceedings in the Federal Courts. This list was set out in the Discussion paper published by the subcommittee in May 2008. (http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Rules) In response to comments from the profession, the Federal Courts Rules Committee has modified section 2(1) of the Code to read "should include" instead of the originally proposed "must include". The plenary committee and subcommittee will continue to review this issue as drafting proceeds.

A concern was raised by the profession in relation to the scope of proposed paragraph (g) ("an indication of any issues that fall outside the expert's field of expertise"). It was suggested that the scope of this paragraph was overly broad. The Federal Courts Rules Committee has linked this requirement to the caveats and qualifications in paragraph (j) to narrow the scope of the requisite identification to issues relevant to the report.

(4) Issue 4: Requiring expert witnesses to confer in advance of the trial

After reviewing and discussing the comments of the profession on this issue, the plenary committee has determined that the Rules should be amended to permit for discretionary expert conferences where the parties consent or, where directed by the Court. Discretion to make directions regulating the conduct of such conferences will be given to the Court. All discussions held during such a conference would be considered to have been made on a without prejudice basis and therefore be inadmissible at trial, unless the experts and all parties to the action agree to admit them. Counsel will be present as of right, except where both parties consent to have the experts meet in their absence.

The Federal Courts Rules Committee has also determined that it would be advisable to extend the application of the Code of Conduct to expert conferences.

(5) Issue 5: Assessors, Court appointed experts, and single joint experts

The Federal Courts Rules Committee has accepted the recommendation of the subcommittee and has approved an amendment to the Rules that will allow parties to nominate a single joint expert. Such a nomination could only be made with the consent of all parties.

(6) Issue 6: Application of the Rules governing expert witnesses to applications

Expert witnesses regularly provide evidence to the Federal Court in both actions and applications. As a result of the structure of the *Federal Court Rules*, a number of the rules governing expert witnesses are found in Part 4, which is limited in application to actions. Where appropriate, these Rules should also apply to the procedure for expert witnesses in applications under Part 5 of the Rules.

Accordingly, the Federal Courts Rules Committee has approved in principle the extension of the rules governing expert witnesses to experts providing evidence in applications where appropriate. The manner in which this should be done will be determined in consultation with the legislative drafters.

(7) Issue 7: Status of treating physicians

No comments from the profession were received with respect to this proposed amendment. The Federal Courts Rules Committee therefore intends to amend the Rules to exclude treating physicians from the application of the rules governing expert evidence.

(8) Issue 8: The need for cross-examination

Occasionally, the parties recognize that there little is to be gained by requiring an expert to testify even though the substance of the expert's evidence will be of use to the Court. The proposed amendment to Rule 280 will ensure that the Court has an overriding discretion to order an expert witness to testify before the Court where the judge deems it necessary. This discretion will be exercisable even where both parties have consented to the evidence being read into the record or otherwise introduced.

(9) Issue 9: Concurrent expert evidence "hot-tubbing"

Some Australian jurisdictions have adopted the practice of having panels of experts, who are addressing the same issue, sworn in together. This enables them to question each other and be questioned by counsel and the trial judge. Concurrent expert evidence has become known colloquially as "hot-tubbing" and has met with considerable success in Australia.

In Canada, concurrent evidence has been introduced into rule 48 of the *Competition Tribunal Rules*, S.O.R./94-290.

The Federal Courts Rules Committee has accepted the recommendation of the subcommittee that a procedure to allow for experts to provide concurrent evidence be included in the Federal Courts Rules. However, the Committee has determined that

experts should not be allowed to pose questions to other experts on the panel without leave of the Court due to concerns raised by the profession.

(10) Issue 10: Limiting the number of experts

Section 7 of the *Canada Evidence Act*² limits the number of expert witnesses that may be called by a party to five, unless leave of the Court is granted for the calling of additional witnesses. The Federal Courts Rules Committee has accepted the recommendation that the Court's ability to exercise this discretion and the factors that would be relevant to that decision be made explicit in the Rules. The proposed factors to be considered are:

- (a) the nature of the litigation, its public significance, and the need to clarify the law,
- (b) the number and complexity or technical nature of the issues in dispute, and
- (c) the likely expense involved in relation to the amount in dispute.

The Committee has also accepted the subcommittee's recommendation that rule 400(3) be amended to explicitly provide cost consequences for the unnecessary tendering of expert evidence at trial.

All of the decisions set out above were made with a view to obtaining a first draft of the proposed amendments to facilitate future consultation with the profession and parties. The proposed amendments will be pre-published in Canada Gazette Part I and comments received on the content of those amendments will be considered by both the subcommittee and the plenary committee.

² R.S.C. 1985, c. C-5