



CANADA
PRIVY COUNCIL • CONSEIL PRIVÉ

P.C. 2010-964
August 4, 2010

Whereas, pursuant to paragraph 46(4)(a) of the *Federal Courts Act*, a copy of the proposed *Rules Amending the Federal Courts Rules (Expert Witnesses)*, substantially in the annexed form, was published in the *Canada Gazette*, Part I, on October 17, 2009 and interested persons were invited to make representations with respect to the proposed Rules;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to section 46 of the *Federal Courts Act*, hereby approves the annexed *Rules Amending the Federal Courts Rules (Expert Witnesses)*, made by the rules committee of the Federal Court of Appeal and the Federal Court.

CERTIFIED TO BE A TRUE COPY—COPIE CERTIFIÉE CONFORME

CLERK OF THE PRIVY COUNCIL—LE GREFFIER DU CONSEIL PRIVÉ

RULES AMENDING THE FEDERAL COURTS RULES (EXPERT WITNESSES)

AMENDMENTS

1. Subsection 52(6) of the *Federal Courts Rules*¹ is repealed.
2. The Rules are amended by adding the following after section 52:

Expert Witnesses

- Right to name expert **52.1** (1) A party to a proceeding may name an expert witness whether or not an assessor has been called on under rule 52.
- Expert named jointly (2) Two or more of the parties may jointly name an expert witness.
- Expert's affidavit or statement **52.2** (1) An affidavit or statement of an expert witness shall
- (a) set out in full the proposed evidence of the expert;
 - (b) set out the expert's qualifications and the areas in respect of which it is proposed that he or she be qualified as an expert;
 - (c) be accompanied by a certificate in Form 52.2 signed by the expert acknowledging that the expert has read the Code of Conduct for Expert Witnesses set out in the schedule and agrees to be bound by it; and
 - (d) in the case of a statement, be in writing, signed by the expert and accompanied by a solicitor's certificate.
- Failure to comply (2) If an expert fails to comply with the Code of Conduct for Expert Witnesses, the Court may exclude some or all of the expert's affidavit or statement.
- Exception for certain medical professionals **52.3** The rules governing expert witnesses do not apply to a medical professional who has given or is giving medical treatment or advice to a person if the evidence in relation to the person is limited to one or more of the following subjects:
- (a) the results of an examination;
 - (b) a description of the treatment or advice;
 - (c) the reason the treatment or advice was or is being given; and
 - (d) the results of the treatment or advice.
- Limit on number of experts **52.4** (1) A party intending to call more than five expert witnesses in a proceeding shall seek leave of the Court in accordance with section 7 of the *Canada Evidence Act*.

¹ SOR/98-106; SOR/2004-283



Leave considerations (2) In deciding whether to grant leave, the Court shall consider all relevant matters, including

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

Objection to expert **52.5** (1) A party to a proceeding shall, as early as possible in the proceeding, raise any objection to an opposing party’s proposed expert witness that could disqualify the witness from testifying.

Manner of raising objection (2) An objection may be raised

- (a) by serving and filing a document containing the particulars of and basis for the objection; or
- (b) in accordance with subsection 262(2) or subparagraph 263(c)(i) if, in the case of an action, the objection is known prior to the pre-trial conference.

Expert conference **52.6** (1) The Court may order expert witnesses to confer with one another in advance of the hearing of the proceeding in order to narrow the issues and identify the points on which their views differ.

Presence of parties and counsel (2) Subsection (1) does not preclude the parties and their counsel from attending an expert conference but the conference may take place in their absence if the parties agree.

Presence of judge or prothonotary (3) The Court may order that an expert conference take place in the presence of a judge or prothonotary.

Joint statement (4) A joint statement prepared by the expert witnesses following an expert conference is admissible at the hearing of the proceeding . Discussions in an expert conference and documents prepared for the purposes of a conference are confidential and shall not be disclosed to the judge or prothonotary presiding at the hearing of the proceeding unless the parties consent.

3. Subsection 232(2) of the French version of the Rules is amended by replacing “nouvel interrogatoire” with “réinterrogatoire”.

4. Subsection 258(5) of the Rules is repealed.

5. Rule 262 of the Rules is renumbered as subsection 262(1) and is amended by adding the following:

Objection to expert (2) The pre-trial conference memorandum shall include any known objection to the requisitioning party’s proposed expert witness that could disqualify the witness from testifying and the basis for the objection.



6. Paragraph 263(c) of the Rules is replaced by the following:

(c) any issues arising from any affidavits or statements of expert witnesses, including

- (i) any objection to an opposing party’s proposed expert witness that could disqualify the witness from testifying and the basis for the objection,
- (ii) any benefit to the litigation in ordering the experts to confer with one another in advance of trial in order to narrow the issues and identify the points on which their views differ, and
- (iii) the need for any additional or rebuttal expert witness evidence;

7. Paragraph 279(b) of the Rules is replaced by the following:

(b) an affidavit or statement of the expert witness prepared in accordance with rule 52.2 has been served in accordance with subsection 258(1), rule 262 or an order made under rule 265; and

8. Subsection 280(1) of the Rules is replaced by the following:

Tendering of expert’s evidence at trial

280. (1) Unless the Court orders otherwise, evidence in chief of an expert witness may be tendered at trial by

- (a) the witness reading into evidence all or part of an affidavit or statement referred to in paragraph 279(b); and
- (b) the witness explaining any of the content of an affidavit or statement that has been read into evidence.

Other evidence with leave

(1.1) Despite subsection (1), an expert witness may tender other evidence in chief with leave of the Court.

9. The Rules are amended by adding the following after rule 282:

Expert witness panel

282.1 The Court may require that some or all of the expert witnesses testify as a panel after the completion of the testimony of the non-expert witnesses of each party or at any other time that the Court may determine.

Testimony of panel members

282.2 (1) Expert witnesses shall give their views and may be directed to comment on the views of other panel members and to make concluding statements. With leave of the Court, they may pose questions to other panel members.

Examination of panel members

(2) On completion of the testimony of the panel, the panel members may be cross-examined and re-examined in the sequence directed by Court.

10. (1) Paragraph 299(1.1)(b) of the Rules is replaced by the following:

(b) an affidavit or statement of the expert witness prepared in accordance with rule 52.2 has been served on all other parties at least 60 days before the commencement of the trial; and



Admissibility
of rebuttal
evidence

(2) Subsection 299(1.2) of the Rules is replaced by the following:

(1.2) Except with leave of the Court, no expert witness's evidence to rebut evidence in an affidavit or statement served under paragraph (1.1)(b) is admissible unless an affidavit or statement of the expert witness prepared in accordance with rule 52.2 has been served on all other parties at least 30 days before the commencement of the trial.

11. Subsection 400(3) of the Rules is amended by striking out "and" at the end of paragraph (n) and by adding the following after that paragraph:

(n.1) whether the expense required to have an expert witness give evidence was justified given

- (i) the nature of the litigation, its public significance and any need to clarify the law,
- (ii) the number, complexity or technical nature of the issues in dispute, or
- (iii) the amount in dispute in the proceeding; and

12. The Rules are amended by adding the following after Form 46:

FORM 52.2

Rule 52.2

CERTIFICATE CONCERNING CODE OF CONDUCT FOR EXPERT WITNESSES

(General Heading — Use Form 66)

CERTIFICATE CONCERNING CODE OF CONDUCT FOR EXPERT WITNESSES

I, *(name)*, having been named as an expert witness by the *(party)*, certify that I have read the Code of Conduct for Expert Witnesses set out in the schedule to the *Federal Courts Rules* and agree to be bound by it.

(Date)

(Signature of expert witness)

*(Name, address, telephone and
fax number of expert witness)*

13. The Rules are amended by adding, after Tariff B, the schedule set out in the schedule to these Rules.

COMING INTO FORCE

14. These Rules come into force on the day on which they are registered.



SCHEDULE
(Section 13)

SCHEDULE
(Rule 52.2)

CODE OF CONDUCT FOR EXPERT WITNESSES

GENERAL DUTY TO THE COURT

1. An expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise.
2. This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.

EXPERTS' REPORTS

3. An expert's report submitted as an affidavit or statement referred to in rule 52.2 of the *Federal Courts Rules* shall include
 - (a) a statement of the issues addressed in the report;
 - (b) a description of the qualifications of the expert on the issues addressed in the report;
 - (c) the expert's current *curriculum vitae* attached to the report as a schedule;
 - (d) the facts and assumptions on which the opinions in the report are based; in that regard, a letter of instructions, if any, may be attached to the report as a schedule;
 - (e) a summary of the opinions expressed;
 - (f) in the case of a report that is provided in response to another expert's report, an indication of the points of agreement and of disagreement with the other expert's opinions;
 - (g) the reasons for each opinion expressed;
 - (h) any literature or other materials specifically relied on in support of the opinions;
 - (i) a summary of the methodology used, including any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out, and whether a representative of any other party was present;
 - (j) any caveats or qualifications necessary to render the report complete and accurate, including those relating to any insufficiency of data or research and an indication of any matters that fall outside the expert's field of expertise; and
 - (k) particulars of any aspect of the expert's relationship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court.



4. An expert witness must report without delay to persons in receipt of the report any material changes affecting the expert's qualifications or the opinions expressed or the data contained in the report.

EXPERT CONFERENCES

5. An expert witness who is ordered by the Court to confer with another expert witness
- (a) must exercise independent, impartial and objective judgment on the issues addressed; and
 - (b) must endeavour to clarify with the other expert witness the points on which they agree and the points on which their views differ.

