

The future of expert evidence in British Columbia

Doctors are oftentimes called upon to act as expert witnesses in court. The latest proposed changes to the Supreme Court Rules of Court include some fundamental changes to the role of expert witnesses.

The Justice Review Task Force was established in March 2002 with the intention of identifying reforms to help make the justice system more responsive, accessible, and affordable for the general public.¹ Over the past number of years, the task force has been facilitating discussions across the province on justice reform. One of the key recommendations developed through these discussions, and presented in the *Report of the Civil Justice Reform Working Group*, was to review and rewrite the Supreme Court Rules of Court.

A proposed draft of the new rules has been released and Part 8 deals entirely with expert witnesses. The overriding principle is that expert witnesses have a duty to assist the court and are not advocates for any party or any position of any party. Their neutrality must be certified in any report they prepare.

The proposed new rules also give greater consideration to the use of jointly appointed experts. The current rules have some provision for a single expert witness to be appointed and instructed by both parties, but in practice it is seldom used. The proposed changes reflect a dramatic shift to reduce the number of experts involved and encourage the use of jointly appointed experts.

In order to use one jointly appointed expert under the new rules, the parties must agree on the identity of the expert, the issue to be addressed, the facts and assumptions to be considered, the questions to be posed, and

the timing and delivery of the report, as well as who has the responsibility for the expert's fees and expenses. If the parties cannot agree on these matters, the court can decide the terms of the joint appointment. That said, the expert's consent will always be sought prior to any appointment by the court.

Once appointed, the joint expert is the only expert who may give expert opinion at the trial on the particular issue in question. Each party has the right to cross-examine the joint expert.

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Notwithstanding the proposed changes regarding the use of joint experts, the rules still allow for each party to retain their own experts should they so choose. In that case, however, there are also significant changes being proposed. Under the proposed new rules, unless the court orders otherwise or the parties agree, the opposing experts must meet and produce a signed statement setting out the points of difference between them.

The proposed new rules also allow the court to appoint an expert on its own initiative at any stage of the proceedings. This can be done if the court feels doing so would help to resolve an issue in the action. But as always, the expert's consent to such an appointment would be sought.

Other proposed changes include changes to the language relating to expert reports: An "assertive report" is a report tendered by a party in relation to a claim brought by the party. A "responsive report" is a report ten-

dered by a party in relation to a claim brought against him or her.

The timeline for production and delivery of reports would also be amended. Under the new rules, "assertive reports" and reports from joint experts must be delivered at least 84 days before trial, while "responsive reports" must be delivered at least 49 days before trial.

The proposed new rules also clarify what other information must be produced by an expert witness. Upon request, the expert must provide a written statement of the facts relied upon, a record of any independent observations made by the expert, any data compiled by the expert in relation to the report, and the results of any test conducted by or for the expert. This, however, would be the only part of the expert's file that must be produced.

The new civil rules are still under consultation and further changes may be forthcoming. A final draft is expected to go before cabinet in 2008. If approved, the new rules will probably come into effect in 2010. Updates on the status of the proposed changes as well as the most recent draft are available at www.bcjusticereviewforum.ca.

Medical experts have always played a significant role in personal injury litigation, particularly in cases arising from motor vehicle crashes. Consequently, ICBC wants to keep you apprised of any changes that may affect your involvement in these cases going forward.

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Reference

1. Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force, November 2006; www.bcjustice.review.org.