

SUMMARY OF SUBMISSION

1. **Basis of the submission:** This submission is grounded on the following considerations which we would expect to be shared by a majority of counsel, judges, administrators and participants in the civil justice system:
 - (a) The fundamental objects of the civil justice system are the just, speedy and inexpensive resolution of disputes on their merits.
 - (b) 'Proportionality', that is, the idea that the resources dedicated to a particular dispute should be proportionate to its importance, having regard to the amount in issue and any points of principle raised, is an important secondary objective. Rules which result in a correct resolution at a prohibitive cost or delay are as unacceptable as rules which result in an affordable and timely but arbitrary result.
 - (c) There is room for improvement in our present system. Where there is a reasonable level of confidence that a proposed change will significantly promote just, speedy and inexpensive resolution of disputes, it should be adopted, otherwise it should not. The expected benefit needs to be significant because changing rules will create uncertainty and cost.
 - (d) Reforming the rules can only be one part of the package. It must also include review of other aspects of the administration of justice so that, for instance, trials and hearings happen expeditiously. There are important changes that might be achieved by way of practice direction or through changes in judicial administration. In companion initiatives, consideration should also be given to legal, judicial and professional education and training.
2. **Guiding principles for the rules** In reflecting upon the object of the just, speedy and inexpensive resolution of disputes on their merits, we have derived 11 principles which we offer as guides in assessing the current rules and proposals for reform. They are attached as schedule A.
3. **Expeditious trial dates:** In our view the single most effective improvement that can be made in the pursuit of just, speedy and inexpensive resolution of cases is to ensure that cases are resolved at an early date. This not only promotes speedy resolution, which clients value greatly, but also discourages the proliferation of costs, and diminution of the quality of justice that inevitably results from a more extended process. In our view an early trial date imposes discipline in the pre-trial process far more effectively than an early judicial case conference and is a potent encouragement to settle at an early date. We therefore propose that changes be made to facilitate the final resolution of all cases up to 10 days in trial length within a year (excluding personal injury cases with unresolved medical conditions) and shorter cases in less time. We recognize that this may sometimes limit a party's access to his or her first choice of counsel. Our proposal in this regard is to be found in schedule B.
4. **Judicial case management part 1— no case planning conferences and orders:** We are of the view that the proposal for case planning conferences and orders at an early stage is

not practical, will add a layer of unnecessary process and expense for the parties, will waste significant judicial resources, (even though the parties can agree to a case planning order) and will cause delays by preventing further steps being taken. Detailed plans of this nature cannot be made at so early a stage in the proceeding, would require too much amendment and are unlikely to achieve the positive results envisaged. There can be no reasonable level of confidence that this proposal would significantly assist in the attainment of just, speedy and inexpensive resolution of disputes and reasonable confidence that it would detract from those objects. In our view judicial resources are far better spent in trial management conferences, which we deal with below.

5. **Pleadings:** We are concerned with two aspects of the concept draft. First, we believe that the proposed prohibition on pleading facts in the alternative (proposed R 2-1(6)) is unjustifiable. There are situations in which a plaintiff, or a defendant, is entitled to succeed on either one of two inconsistent factual scenarios and cannot predict which will be found by the court. The inconsistency may involve differences in the accounts given by independent witnesses, or in the inferences to be drawn from facts obtained from the opposing party. It is not in the interests of justice that a party should be required to choose one or the other scenario, in these circumstances. Our second concern is with the proposed requirement of a statement of belief in the pleadings. This point has been the subject of much discussion. With respect for those who believe otherwise, we very much doubt that this requirement will change the manner in which cases are pleaded in a positive way.

6. **Putting some limits on discovery - document production:** We agree that in a significant number of commercial cases (particularly document intensive cases) there has been an expansion of the discovery process (both documentary and oral) and a corresponding increase in costs, which makes it more difficult to achieve a just, speedy and inexpensive resolution of such disputes. We were initially attracted, as a cost saving measure, to the creation of a more restricted relevance test for the production of documents which would exclude the obligation to produce documents on the sole ground that they might lead to a train of inquiry. Our conclusion, however, is that an absolute rule against the production of such documents would too drastically inhibit the pursuit of the truth. We are of the view that the concept draft is correct to seek a compromise by providing for a more narrow initial scope of production with the ability to seek greater production. However, we think that rules should encourage the parties to confer as to what is required. First, parties should be required to identify with reasonable specificity the additional categories of documents they seek. Second the factors to be considered by the court in allowing or rejecting further production should be set out. This will encourage a dialogue between the parties as to what discovery is really required and provide guidance to the courts, parties and the profession as to the factors to be taken into account in coming to the right balance between additional discovery for the purpose of ascertaining of the truth versus the imposition of costs and incurring of delays. Our proposal is attached as schedule C.

7. **Putting some limits on discovery – examinations:** We also agree that cost effectiveness could be improved if a more focused and collaborative approach was taken to examinations for discovery. We recognise that how to achieve this is controversial and

there is room for reasonable people to disagree. On balance we agree that imposing time limits on the examinations is a reasonable approach, with appropriate safeguards. However, we are of the view that 3 hours is not a reasonable time limit and the rules should not impose unreasonable time limits, even where the parties can consent to an extension. The estimated time required for the trial provides an indication of the amount of time reasonably required for discovery. We suggest that two 5 hour days is a more reasonable basic time limit, which should be automatically extended by one day per scheduled week of trial in excess of two weeks, up to a maximum of 5 days, subject to further extension by consent or court order. As with document production the factors to be considered by the Court on an application to vary these default limits should be set out so that the Court, parties and the profession are guided as to how the appropriate balance is to be reached. Interrogatories should be an alternative and not an addition to oral discovery, absent consent or order. Our proposal is attached as schedule D.

8. **Streamlining procedural applications and deterring unreasonable positions with costs:** The procedure for deciding simple procedural applications should be streamlined to avoid delay and unnecessary costs. Easy access to the court in such cases encourages parties to be reasonable. Such applications should be resolved with the bare minimum of supporting documents and with reduced notice. There should be the ability to resolve such disputes in a telephone conference hearing or by limited submissions by letter, as alternatives to a hearing in chambers. An attempt should be made to set up a chambers scheduling system with a view to reducing the amount of time spent waiting to get on, which is source of unnecessary expense. Most importantly, the costs regime for procedural applications (simple or otherwise) should be changed so that the default provision is that the unsuccessful party pays the costs of the application forthwith and that the costs are fixed by the judge or master who hears the application. This will deter the taking of unreasonable positions and the associated unnecessary costs. Our chambers proposal is attached as schedule E.
9. **Experts:** Some of the Concept Draft proposals are sound. In particular, notice should be given of responsive reports, the rule that privilege is waived when an expert takes the stand should be abolished, and experts should be required to acknowledge, in their reports, their obligation of professional objectivity. If a requirement that experts 'meet and confer' is introduced, we believe it is important that the meeting may take place in the presence of counsel. We believe that the most important improvement that might be made in relation to expert evidence would be steps taken to discourage the admission of expert evidence that is unnecessary for judicial fact-finding. This is something that could best be addressed, not through the rules, but possibly by way of practice direction and we would urge the court to consider an initiative along these lines. Our proposal is attached as schedule F.
10. **Encouraging settlement:** The rules should encourage settlement in two ways. First, the rules provide the parties with an efficient and timely rights-based alternative to settlement. This enables the participants to appreciate the consequences of a failure to agree; provides the information required to negotiate on a principled basis and sets out a default procedural timeline, including a final resolution date, as a discipline for the negotiation process and incentive to agree. Second, the rules should make provision for

facilitated settlement discussions at various stages. While the rules should be drafted with considerations of settlement in mind, their effectiveness as a rights-based dispute resolution process cannot be compromised; because not only would that derogate from the effectiveness of the litigation process, it would also indirectly derogate from ADR processes which occur in the shadow of the litigation process.

11. **Judicial case management part 2 – active trial management conferences:** We agree that trials have become significantly longer and more expensive in many cases and this negatively impacts upon the ability to provide just, speedy and inexpensive resolutions. One way that this can be addressed is through a more active judicial trial management conference program. A trial management conference should be held approximately 55 days before the scheduled trial date. The purpose of this conference is to ensure that, until or unless it is settled, the case will proceed to trial in an orderly and efficient manner, thereby reducing costs and unnecessary adjournments. A substantial investment of judicial resources is warranted at this stage of the proceeding and the ability of the court to assist in managing the case from that point forward will significantly promote the just, speedy and inexpensive resolution of cases. In our view careful consideration should be given in this conference to the state of the pleadings and whether they accurately capture the real issues in dispute; timely and efficient completion of the discovery process; assessment of the state of any expert evidence; identification of witness and, in appropriate cases, the exchange of brief will-say statements; commencement of scheduling discussions; and consideration of the length of the trial and any possible adjournment issues. Judges and masters should be able and encouraged to schedule follow up conferences in person or by telephone and continue the active process through to trial.
12. **Trial procedure – more vigorous exclusion of inadmissible evidence:** Another significant way in which trial length can be reduced is through a return to a greater willingness to rule irrelevant evidence inadmissible and otherwise enforce the exclusionary rules of evidence. Admitting irrelevant evidence on collateral questions has a snowball effect. It may be that a practice direction could initiate this change in approach. Consideration should also be given to changing the standard of appellate review on questions of admissibility to “clearly incorrect” with increased deference to the trial judge. In addition, trial judges should be permitted to discourage parties from exploring unhelpful collateral issues. These proposals should also be supported by law school, professional and judicial education and training.
13. **Avoid unnecessary wording and terminology changes:** Changes to the wording of rules or the terminology employed should be avoided in the absence of good reason for the change. If a rule is subject to considerable change, every effort should be made to shorten and simplify it.
14. **Jurisdictional issues:** The small claims procedures in the Provincial Court are simple and user friendly by comparison to those in the Supreme Court of British Columbia. This is proportionality in action. Cost considerations and access to justice are of the greatest concern in cases where the amount in issue is not substantial. The most direct approach to addressing these considerations would be to raise increase the monetary limit of the

Provincial Court's civil jurisdiction. The Supreme Court should remain a court of greater procedural complexity and sophistication.

Schedule A

Guiding Principles

1. The primary purpose of the rules is to facilitate the just, speedy and inexpensive resolution of disputes on their merits. 'Proportionality', that is, the idea that the resources dedicated to a particular dispute should be proportionate to its importance, having regard to the amount in issue and any points of principle raised, is an important secondary objective.
2. The rules may encourage settlement in two ways. First, by providing the parties with an efficient, rights-based alternative to settlement, so that participants are able to appreciate the consequences of a failure to agree. Secondly, by making provision for facilitated settlement discussions at various stages.
3. A proceeding is defined, for the court and for the parties, by an exchange of pleadings. It is resolved by a hearing or hearings at which factual issues are resolved by the court on the basis of evidence and admissions.
4. In between the exchange of pleadings and the hearing which resolves the case is a period during which the parties learn more about the case. The rules should facilitate this process without permitting a party to impose unnecessary or undue burdens on an opposing party.
5. One function of the rules is therefore to provide a menu of possible procedures for the investigation and resolution of the case. The procedures that are most appropriate for the resolution of a particular dispute vary widely and should be adapted to the situation. If the parties can agree on the appropriate procedure, that agreement should be determinative or, where a public interest (such as the allocation of judicial time, or the best interests of a child) is involved, carry substantial weight. The parties are almost always in a better position than the court to assess their needs and interests.
6. The rules should always provide a default procedure.
7. If one party seeks an alternative to the default procedure, it should have easy access to the court to decide the question, with a minimum of procedural formality.
8. Parties who lose procedural applications should be liable in costs payable immediately, unless the court is satisfied that the losing position was taken reasonably.
9. Court appearances that do not contribute to the resolution of the case should be unnecessary.
10. Parties should be required to conclude their investigations and preparations and confirm their readiness for trial sufficiently far in advance of the hearing that

unnecessary adjournments will be avoided, but not so far in advance that they will be forced to prepare the case more than once.

11. Court orders should be granted on the basis of a record that is sufficiently clear and certain to permit the exercise of an effective right of appeal.

Schedule B

Proposal Concerning Trial Scheduling and Management

Scheduling

1. On expiry of the time set for the filing of the statement of defense, either party should be at liberty to set the matter down for trial.
2. The time to the date set for trial should be set according to the length of trial. The following guidelines are proposed:
 - (a) a trial date for a trial estimated at 2-3 days should be available approximately 8 months from the date of request by a party;
 - (b) a trial date for a trial estimated at 4-5 days should be available approximately 10 months from the date of request by a party;
 - (c) a trial date for a trial of between 6-10 days should be available approximately one year from the date of request by a party;
 - (d) a trial date for a trial of between 11-15 days should be available approximately 15 months from the date of request by a party;
 - (e) a trial date for a date of trial of 16 days or more should be available within 18 months at the request of a party.
3. On setting the date for trial, a party should be required to indicate whether the trial is being set by consent, and to set out available dates provided by all parties of record. If a party objects to the trial being set, that fact should be identified in the document requisitioning the trial. If the parties cannot agree on the length of trial, that should also be identified in the document requisitioning the trial date.
4. It should not be the expectation of parties or their counsel that unavailability of counsel of choice on a date reasonably close to the guideline date will forestall the trial being set. In the case of competing estimates of the length of trial, the parties should expect that the matter will be set to the earliest date possible. In particular, if a longer estimate can be accommodated without delaying the trial unduly, that will be done. Otherwise, the trial will be set for the shorter time estimate.
5. There will of course be exceptions to the guidelines. One instance is the case of personal injury litigation, where such matters as prognosis cannot be accurately estimated at the close of pleadings. The attempt of a defendant to prematurely set such a trial would be a valid objection. However, the intent of the guidelines, using estimated length

of trial as a proxy for complexity, is to ensure that any party to litigation can fix a date that will bring it to a reasonably expeditious end.

6. Any objection to the trial date being set that a party wished to pursue will be resolved by an application for an adjournment in Chambers, promptly after the trial has been set. The burden on such an application should be to show a substantive reason why the trial cannot be prepared within the time provided by the guideline or cannot be heard within the time estimated for trial. These applications will ordinarily be heard as commonplace procedural applications.

7. Classes of proceedings which are currently being case managed should continue to be case managed. These include cases set for over twenty days and class actions. Case management should also be available on consent or, as below, in advance of trial, where necessary to ensure a matter is prepared to proceed as scheduled.

Trial Management

7. The cornerstone of management for all cases is a trial management conference, to be scheduled for approximately 55 days prior to the scheduled commencement of the trial.

8. The purposes of the conference include confirming the estimated length of trial, ensuring discovery processes have been substantially completed and that trial preparation is otherwise sufficiently advanced to proceed to trial.

9. At the trial management conference, the Court would have the various powers existing under the present Rules for case management conferences. While it should remain for counsel to seek orders, the Court should actively explore the readiness of the matter for trial and scheduling issues in any event of issues being raised by counsel. A trial management conference record or memorandum should be prepared by the trial management conference judge for use of the trial judge

10. The 55 day time frame is selected with a view to a date that is far enough in advance of the trial to allow for outstanding issues to be resolved, but near enough that discovery preparation has been substantially completed, and any affirmative expert reports have been delivered. The trial management conference can provide an opportunity for counsel and the trial management conference judge to:

(a) review the pleadings with a view to both narrowing the issues between the parties (by exploring what admissions can be made) and ascertaining whether any amendments are necessary;

(b) with or without application, ensure that the Court is aware of outstanding discovery issues in order to ensure they are appropriately pursued and/or resolved;

(c) explore the expert evidence delivered and anticipated with a view to not only ascertaining the status in relation to the trial date, but also hearing from the parties whether expert evidence has been delivered or is contemplated that another party considers is not necessary;

(d) in a preliminary way, scheduling to the extent possible, the witnesses anticipated at trial.

11. To the extent that it is apparent on application, or agreed by the parties that the trial date will exceed the allotted time, the trial should be rescheduled to the earliest date available that provides for additional time necessary.

12. If necessary to ensure that the trial date is met, on request of either party at the trial management conference, the trial management conference judge may schedule further trial management conferences over which that judge shall preside. The trial management judge may update the trial management conference memorandum as necessary arising from any such follow up conferences.

13. The trial management conference memorandum should be made available to the trial judge who will discuss scheduling issues with the parties at the outset of the trial.

Comment

The timely setting of a fixed trial date, at the request of any party, will promote not only control on delay, but also will assist in reducing the cost of litigation. Neither party should be held hostage to the willingness of the other to delay the matter indefinitely without substantive cause that relates to the determination of the matter on its merits. We believe that the availability of counsel of choice should not prejudice other parties to the litigation in bringing the process to an end. Under such a system, counsel will be responsible to advise a client on taking on a file of any substantive scheduling issues which would result in inability to meet the guidelines, and either refuse the brief or obtain agreement to alternative counsel, should that become necessary.

The purpose of the guidelines is to provide sufficient time for a case to be prepared, while attempting to promote efficiency and a relatively early resolution. The guidelines are an attempt to balance these issues. They also are designed to encourage counsel to discuss the likely time needed at an early date and to compromise, where possible.

Further, current practice allows a party to defeat the setting of a matter for an early trial date by giving a lengthier estimate of the time required for trial. This is to be discouraged by attempting to resolve such differences without delaying the hearing date, or, subject to application, by preferring the shorter estimate in setting the date for trial.

As a matter approaches trial, the Court has a substantial interest in ensuring the case is being properly prepared and that in the administration of its resources. The trial management conference is introduced to enable the Court to not only resolve issues between the parties but to exercise that interest. Accordingly, it is anticipated that issues of scheduling and preparation will routinely be canvassed. These issues, in their broader sense, may also include a review of the pleadings to ensure they properly reflect what is in dispute and what is not. They will also include a canvass of what expert evidence has been exchanged and is anticipated.

In this, the proposal is not that the Court makes orders for which the parties have not applied. It is intended that the Court use its position to question, and where appropriate press counsel on what is intended by a pleading, whether portions are being pursued, and whether admissions can be made. We are of the view that in many cases such a review will enable issues to be clarified and narrowed.

Further, the case management conference is timed to reflect the stage of the proceeding when affirmative expert evidence should have been delivered. As such, and consistent with the proposals we have made concerning expert evidence, the trial management conference can provide an opportunity to discuss the need for and timing of expert evidence on a given topic. Again, it is not proposed that the trial management conference judge will make orders concerning the admissibility of the evidence contemplated. Nevertheless, an active discussion of the nature of the case and its requirements may assist in narrowing the unnecessary use of expert evidence or a party's investment in rebuttal expert evidence of questionable utility.

Schedule C

Proposed Rules in Relation to Document Production

1. Parties must list and produce the documents in their possession, power or control that could be reasonably relied upon by any party at trial within 60 days of the close of pleadings, or such other period as may be agreed or fixed by court order.
 - (a) The obligation is an ongoing one; if a party becomes aware of documents it intends to rely upon following preparation of its list, it must list and produce the documents reasonably promptly.
 - (b) The obligation to produce documents is subject to claims of privilege.
 - (c) A party may refrain from listing privileged documents unless the opposing party requires that an itemized list of privileged documents be provided, in which case an itemized list will be provided unless the court orders otherwise.
2. Following the close of pleadings, a party may demand that an opposing party list and produce additional categories of documents in the possession, power or control of the opposing party by delivering a Demand for Discovery of Documents which shall enumerate the categories of documents sought with reasonable specificity.
 - (a) At any time, following delivery of an initial Demand for Discovery of Documents, a demanding party may deliver a Supplemental Demand identifying additional categories of documents sought with reasonable specificity.
 - (b) Following receipt of a Demand for Discovery of Documents or a Supplemental Demand, the opposing party shall advise the demanding party in writing within 30 days whether it takes the position that any part of the Demand is unwarranted, specifying the extent to which the Demand is accepted and the extent to which objection is taken, and providing a timetable according to which the documents will be listed and produced.
3. Subject to any directions given by the court, a party shall list and produce the documents in its possession, power or control that its opponent has demanded and that it has not objected to produce, together with any additional documents required by the court's directions, according to the timetable for production or, if no timetable has been provided, within 60 days from delivery of the Demand.
4. Following delivery of a party's response to a Demand for Discovery of Documents (including a Supplemental Demand), either party may seek directions from the court in relation to any part of the Demand to which objection has been taken or the timetable for production.

- (a) In providing directions with respect to the production of documents, the court shall consider, in the exercise of its discretion:
 - (i) Whether the categories of documents sought will assist either party to prove its case, disprove its opponent's case, or put either party on a legitimate train of enquiry;
 - (ii) Whether the Demand is appropriately specific;
 - (iii) The timing of the Demand in relation to the close of pleadings, the expected trial date, and the course of the proceedings;
 - (iv) The cost and time to be expended in producing the documents, having regard to the amount in issue or seriousness of the issue;
 - (v) The amount of time reasonably required to list and produce the documents;
 - (vi) Whether the costs of producing the documents in question should be borne by the requesting party or the producing party, either provisionally or in any event of the cause;
 - (vii) In the case of a Supplemental Demand, the reason why the documents in question were not sought earlier and whether the producing party will be put to unreasonable trouble or expense in the circumstances (having regard to any provision made for payment of costs by the demanding party).
- 5. The obligation to produce documents is an ongoing one. If a party subsequently becomes aware of documents in its possession, power or control that should have been listed, it must list and produce the documents reasonably promptly.
- 6. Nothing in this rule prevents a party from requesting documents identified in an examination for discovery, but if such a request is objected to, the court may consider this factors identified above in ruling on the objection.
 - (a) Subject to any agreement between the parties, documents produced in consequence of questions asked in an examination for discovery will be listed by the producing party on a supplementary document list.

Comment

In commercial litigation, *Peruvian Guano* document discovery serves the interests of justice but often imposes substantial unnecessary expense on the party giving discovery. The idea underlying this proposal is that the parties should be encouraged to confer and agree upon the scope of production and the court should resolve any disagreements, either as to the necessary scope of production or as to timing. Because the obligation to produce imposes substantial costs on the producing party, the demanding party should

have to articulate and be prepared to justify the scope of production sought. On the other hand, *Peruvian Guano* disclosure is often appropriate and should not be foreclosed by the rule; rather, it should be targeted to issues in relation to which it is necessary.

The requirement of a Demand that identifies the documents sought 'with reasonable specificity' is a part of US procedure under the Federal Rules, but I have not sought to copy that scheme generally. The specificity requirement is necessary to prevent demanding parties from simply saying 'I want all your documents that satisfy *Peruvian Guano*'. A demand that is too specific may be just as bad as a demand that is not specific enough. The standard of reasonable specificity would have to be developed in the BC jurisprudence.

It may be said that the proposal risks that significant documents will not be produced because counsel neglected to ask for them. Under the existing rules, significant oral admissions may not be obtained because counsel has not asked questions in an examination for discovery. It may be suggested that this is really no different.

One advantage of the process described in the proposal is that it should be easier for unrepresented litigants to understand and follow.

The requirement of a document list remains because it has the advantage of identifying what has been produced, and what has not. The proposal is consistent with the developing practices and protocols for dealing with electronic evidence.

Schedule D

Proposal for imposing limits on examinations for discovery and interrogatories and other reform of the present rules

1. The examination for discovery of a party or its representative (the “witness”) shall be limited in length to two days unless extended. A day shall comprise 5 hours of examination time. The limit on the length of an examination for discovery is extended in the following circumstances:
 - (a) Where the trial is set for longer than 10 days, the limit on the examination for discovery is extended by one day for each additional week of trial up to a maximum of 5 days;
 - (b) By consent of the party being examined or whose representative is being examined;
 - (c) By court order.
2. Where parties have a commonality of interest, their right to examine the witness shall be limited to a total among them all of two days, subject to extension as provided for in paragraph 1, and the limit shall be divided among them as agreed, or failing agreement, equally.
3. The scope of examination is limited to matters that are relevant to the issues in the proceeding, as determined by the pleadings, and not privileged, and the names and addresses of witnesses.
4. The witness shall take reasonable steps to prepare for the examination, including considering, where provided, advice from the examining party as to the matters to be covered and the relevant documents. An examining party may adjourn a discovery where the witness is not reasonably prepared.
5. An examination for discovery need not be conducted on consecutive days but, subject to paragraph 4, a party may not require a witness to be examined on more than two occasions.
6. Outstanding questions or questions to which objection was taken may be answered by letter and the answers shall be treated for all purposes as if given under oath by the witness.
7. The scope of the “implied” undertaking of confidentiality should be expressly set out in the rule.

8. If there is to be a difference between the use of answers given by persons other than an individual party (in this proposal described as “representatives”) and the use of answers given by an individual party, the difference should be expressly set out in the rules.
9. A party shall not issue interrogatories unless it foregoes its right to conduct any examination for discovery, or with leave of the court. The scope of interrogatories is the same as for an examination for discovery.
10. The rules concerning examination or discovery and interrogatories may be varied by consent or by court order.
11. On an application under this rule (a “Discovery Application”), which will ordinarily be a commonplace procedural application, the court shall consider, in the exercise of its discretion the following factors, as applicable:
 - (a) The complexity of the case;
 - (b) The amount in issue or the seriousness of the issue;
 - (c) The extent to which the matters in issue in the proceeding are within the means of knowledge of the party being examined rather than the applicant;
 - (d) The extent of any examination already conducted;
 - (e) The nature and extent of questions left outstanding for reply, objections taken to questions and interrogatories;
 - (f) The cost, time and inconvenience of the proposed further discovery, and the extent, if any, to which the applicant agrees to fund the cost of it; and any order the court may make as to costs of the further discovery;
 - (g) Any issues of privilege;
 - (h) The timing of the application in relation to the expected trial date and the course of the proceedings;
 - (i) Any concerns raised by the applicant as to the failure of the witness to take reasonable steps to prepare for the examination or as to inappropriate interference in the discovery, as disclosed by the transcript of any discovery conducted to date;
 - (j) Whether the witness, if a representative, was put forward by the respondent or selected by the applicant;
 - (k) The importance of the proposed further discovery to the just resolution of the dispute, including consideration, where provided, of the subject matters to be canvassed and the purpose of further examination.

12. On an application to compel answers to outstanding questions or to questions to which objection has been made, the questions which are the subject matter of the application, if numerous, shall be organised in the Outlines of the parties into categories to which the same principles or approach apply.
13. On a Discovery Application, the court's discretion as to costs includes ordering:
 - (a) Increased witness attendance fees for further examination for discovery;
 - (b) witness costs for the answering of outstanding or objected to questions;
 - (c) Special costs of past or future examinations or responding to outstanding or objected to questions.
14. Other aspects of the existing rule concerning discoveries should continue to apply.

Schedule E

Proposal in Relation to Chambers Practice

1. The rules should permit the parties to obtain the court's assistance to resolve a procedural dispute as quickly and informally as is reasonable, having regard to what is at stake.
2. Some applications heard in chambers involve the determination of the parties' substantive rights. These include summary judgment and summary trial applications, the hearing of a petition, stated cases, hearings on a point of law and contempt applications.
3. Other applications (here, 'procedural applications') fall into 2 broad categories:
 - (a) applications that involve substantial disputes of law or fact or the assessment of complicated materials in the exercise of the court's discretion; and
 - (b) other applications (here, 'commonplace procedural applications').
4. An application that is not a commonplace procedural application should be governed by a procedure involving an exchange of written argument, or written outlines of argument, and the submission of a full chambers record to the court.
 - (a) In particular, the procedure should continue to provide for an exchange of written argument, or written outlines of argument, only after affidavit materials have been exchanged.
 - (b) It would be desirable if applications anticipated to last less than a day could be set for hearing at a fixed time.
5. Where the parties agree that an application is a commonplace procedural application, the rules should permit the application to be made:
 - (a) In chambers, by bare notice of motion on 3 clear days notice;
 - (b) At a pretrial conference or in a telephone conference with the court, by bare notice of motion or a document tendered to the court in which the order sought is stated, on such notice as is appropriate in the circumstances;
 - (c) By letter delivered to the court without oral submissions pursuant to leave granted by the court.
6. To the extent that a commonplace procedural application requires evidence of facts, evidence of the facts will be provided, if necessary, by affidavit.

7. Where an applicant proposes that an application should be considered as a commonplace procedural application and a respondent disagrees, the question will be decided as a preliminary matter.
 - (a) If the application is being heard orally, all parties' submissions on the preliminary question of whether the application should be considered as a commonplace procedural application should not require more than 15 minutes in total.
 - (b) If the court decides that the application should not be considered as a commonplace procedural application, it will give directions for the exchange of materials and hearing of the application.

8. The usual outcome should be that a contested procedural application (whether commonplace or otherwise) will result in an order under which the unsuccessful party is required to pay costs to the successful party forthwith. To this end, at the conclusion of any contested procedural application, the court should consider:
 - (a) whether there is any reason why costs should not be awarded to the successful party;
 - (b) whether there is any reason why costs, if awarded, should not be payable forthwith;
 - (c) having regard to oral submissions made at the hearing, whether there is any reason why the court cannot fix the costs payable immediately; and
 - (d) if the court cannot fix the costs payable immediately, whether it should fix the costs payable following written submissions to the court that heard the application, or direct that the costs should be assessed by the Registrar.

Schedule F

Proposed rules in relation to expert evidence.

1. The exchange of expert reports should be coordinated with the other notice periods contemplated by the proposed rules.
2. Written notice of reply opinions should be provided.
3. The rule that privilege is waived over the expert's file when he or she gives evidence should be abolished.
4. Experts should be required to acknowledge that their professional obligation is to be objective.
5. If provision is made requiring experts to confer to determine whether it is possible to limit or define areas of disagreement in their opinion and the basis for it, the rule should permit the conference to take place in the presence of counsel.

Comments

There is general agreement that too many experts give evidence occasionally when it is unnecessary to rely on expert evidence. The proliferation of experts is in part a function of rapidly increasing scientific knowledge about all kinds of matters that previously were not understood with the benefit of expert knowledge. This is a fact of life about which little can be done.

Sometimes, however, experts are called where they are not needed either because one counsel responds to expert opinion being prepared by his opponent or because it is difficult to predict whether a court will find the evidence helpful. We do not see a way to deal directly with this issue in the rules, but do think it would be helpful if the court were to make a policy statement by way of practice directive stating, first, the court considered view that expert evidence should be tendered only where it is necessary, and, second, announce the court's intention to deal with expert evidence found to have been unnecessary by way of a separate order of costs, in an appropriate case.

We also do not think that the problem, to the extent that there is one, of too many experts giving evidence can be addressed in the absence of the court developing a body of jurisprudence which has the effect of identifying areas in which the Court is confident that they can find facts without expert assistance.

We consider that the proposed rules allowing the court to deal directly with experts or to identify a single expert is most problematic. Experts who have been retained by parties are in the possession of privileged and confidential information which they cannot be expected to be able to protect its dealing directly with the court.