THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 3, 2009

Chantelle Bowers
Secretary of the Rules Committee
Federal Court of Appeal
Ottawa, ON K1A 0H9

Dear Ms. Bowers:

Re: Discussion Paper – Expert Witnesses

Further to our conversation in December, I write to you again on behalf of the Federal Bench and Bar Liaison Committee with respect to the Federal Court of Appeal and Federal Court's Rules Committee discussion paper on expert witnesses.

In August, 2008, I forwarded to you the submissions of the Aboriginal Law Section and the Intellectual Property Section of the Canadian Bar Association. Attached is a supplemental submission prepared by the CBA's National Maritime Law Section, with apologies for its lateness. In the main, these submissions are consistent with the previous CBA Section submissions. As we noted in our previous letter, the differences in nuance amongst the submissions reflect the unique practice issues relating to these areas of law in the Federal Courts.

We trust that our feedback will be helpful to the Rules Committee, and we thank you for the opportunity to contribute to its work.

Yours truly,

(Original signed by Kerri A. Froc for Simon Barker)

Simon Barker
Chair, Federal Bench and Bar Liaison Committee

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Expert Witnesses in the Federal Court

NATIONAL MARITIME LAW SECTION
CANADIAN BAR ASSOCIATION

February 2009

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Maritime Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Maritime Law Section of the Canadian Bar Association.

TABLE OF CONTENTS

Expert Witnesses in the Federal Court

Expert Witnesses in the Federal Court

I. INTRODUCTION

The Canadian Bar Association's National Maritime Law Section (CBA Section) is pleased to offer its response to the Federal Court Rules Committee Discussion Paper on Expert Witnesses. Like other stakeholders, we are in favour of procedural rules that maximize the utility of experts to the Court and the parties, streamline their testimony, and minimize the attendant cost. However, we wish to ensure that these efficiencies are not accomplished by requiring too great a sacrifice of parties' ability to present their case as they think best with the benefit of guidance from their legal counsel. In this light, we offer our comments below.

A. Issue 1 – Recognizing the Duty of Expert Witnesses

We agree that there should be a mechanism to ensure that an expert retained by a party understands that the expert's primary duty is to the Court; however, rather than a Code of Conduct, we believe that an amendment to the *Rules* should require counsel to advise an expert of the following:

(i) the duty of the expert is to assist the Court impartially on matters relevant to his or her area of expertise;

(ii) this duty overrides any duty to a party to the proceedings, including the person retaining the expert witness; and

(iii) the expert witness is not an advocate for a party.

Counsel would be required to file a signed certificate certifying that counsel has advised the expert of these elements of his or her duty to assist the Court. In addition, the expert would be required to acknowledge in the expert's report that the expert has been advised of the duty.

In British Columbia, the Report of the Civil Justice Reform Working Group to the BC

Justice Review Task Force[1] refers to the U.K. *Rules of Court*, which includes such a duty, and states that Queensland, Australia has taken the same approach. The Report recommends adoption of such a rule similar to the U.K. and Australian Rules, and additionally recommends that experts certify, as part of their report, that they are aware of and understand this duty.[2]

B. Issue 2 – Streamlining the Process of Qualifying Expert Witnesses

We agree that Rule 258(5) should be amended to require an expert to set out his or her proposed area of expertise and attach a copy of his or her curriculum vitae. The civil rules of court in many Canadian jurisdictions require that an expert report specify the qualifications of the expert. This is commonly accomplished by attaching a copy of the expert's *curriculum vitae* to the expert report.

We agree that parties should be required to make any objection to a proposed expert's qualifications in advance of trial, but we believe that the objection should be required to be made within 30 days of the objecting party's receipt of the expert report, or at such time as the Court may direct. The difficulty in requiring any objections to be made in the pre-trial memoranda is that the party making the requisition for a pre-trial conference may not have received the opposing party's expert reports at the time the requisition is filed with a pre-trial conference memorandum. Also, at the time of the pre-trial conference, it is possible that not all expert reports will have been served. Our recommended 30-day period to make objections after receipt of an expert report provides sufficient time for the report to be reviewed and any objections made. If for any reason a shorter or longer period of time may be required by the parties or the Court, the Court can make a direction to the parties.

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1 Civil Justice Reform Working Group, *Effective and Affordable Civil Justice* (Vancouver: Justice Review Task Force, 2006).

2 *Ibid.* at 30-31.

C. Issue 3 – Content of Expert Reports

We agree that the *Rules* should be amended to set out requirements for an expert's report to ensure that the evidence will assist the Court. Again, provincial and territorial rules of civil procedure commonly require expert reports to contain the expert's qualifications and the substance of the expert's opinion.

We agree that the following information, as listed in the Discussion Paper, could be required:

- a statement of the issues addressed in the report;
- the facts and assumptions on which the opinions in the report are based (a letter of instruction, if any, could be annexed);
- a summary of the opinions expressed;
- the reasons for each opinion expressed;
- an indication of any issues that fall outside the expert's field of expertise;
- any literature or other material specifically relied upon in support of the opinion;
- 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 the other party was present; and
- any caveats or qualifications necessary to render the report complete and accurate, including those relating to an insufficiency of data or research.

The Discussion Paper refers to two further potential requirements for the expert's report:

- the qualifications of the expert on the specific issues addressed in the report (the expert's curriculum vitae could also be required to be annexed); and
- 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.

We agree that the Rules could require an expert's curriculum vitae to be annexed to the expert report, as is commonly the practice in the superior courts of the provinces and territories. It is also possible that the expert report could set out the area of expertise for which the party will seek to qualify the expert at trial. If these matters are included in the expert report, the qualifications of the expert on the issues in the report will be apparent. For a report that is provided in response to another expert's report, the general nature of the report is to set out the points of disagreement. We do not recommend that the expert be required to indicate the points of agreement.

Finally, as recommended in discussion point #1, above, the expert should be required to include in the expert report an acknowledgement that the expert has been advised of the duty to assist the Court impartially.

D. Issue 4 – Requiring Experts to Confer with One Another in Advance of Trial

We have two primary concerns with respect to a rule requiring expert conferences. First, we are concerned that requiring expert conferences will add to the costs of litigation without a concomitant benefit. Second, depending on how the rule is implemented, expert conferences could adversely affect a party's right to counsel and to be heard, both fundamental rights.

The introduction of a requirement that experts confer with each other and prepare a report is, of course, an additional step in the proceeding and it will therefore have cost consequences for the parties. These additional costs could be very significant. The rates charged by experts vary depending on the qualifications of the expert. It is not uncommon for a professional expert to charge between $200 and $300 per hour and in some cases, it is more. In addition, often the expert resides in a different city, or even overseas, and his/her attendance at a conference will require travel. The parties pay not only the travel expenses but also for the expert's time spent travelling. The expert can also be expected to meet with counsel in preparation for a conference and the client will therefore be required to pay not only for the expert's time but also for the time spent by counsel. The total cost

to the client of an expert conference will therefore be considerable. This additional cost must be weighed against the benefit to be achieved at a conference. Specifically, will the costs saved at trial be greater than the costs of the conference? We believe that in many cases, the costs of the expert conference will be significantly more than any savings at trial.

The concept of expert conferencing in practice is likely to be very problematic. The fundamental problem is that it assumes the issues can be neatly characterized as "expert issues" and that all that is required to resolve them is the application of expertise. In practice, the issues experts have to address are frequently highly dependent on the facts and assumptions given to each expert by their instructing party and these facts and assumptions are often different. It is difficult to imagine how experts could confer in these circumstances. There is a danger that experts who are instructed by the court to confer may feel obligated to provide a joint report notwithstanding that they have different facts and assumptions. If so, this would implicitly require the experts determine the factual circumstances of the case even though they are not in a position to do so. The problem would be compounded if the conference was privileged, as there would be no means of ascertaining or verifying the facts and assumptions on which the joint report was based, unless they happen to be stated in the joint report. Where the facts and assumptions are not set out, how is the joint opinion to be tested? This is akin to the problem of the single joint expert, which we address below.

Expert conferencing assumes that all experts are created equal. More specifically, the assumption seems to be that the experts will be professional persons who have the ability to identify issues, discuss them, resolve them and then put their thoughts in writing in a comprehensive and coherent fashion. This is not always the case with experts, particularly in the area of shipping. Many of the experts called in admiralty cases are not persons of learning but are mariners who have spent their entire career at sea. They have knowledge of seamanship and the seas but do not have well developed analytical or writing skills. Such experts would find the experts conference to be an intimidating, if not daunting,

experience. They would not know how to go about analyzing issues or writing a joint report.

Additionally, the personalities of the experts may dictate the outcome of the conference. Not all experts have forceful personalities; some are aggressive and some are meek. With expert conferencing and a joint report, there is a danger that the views of the expert with the more forceful personality may dominate regardless of the scientific reality.

Finally, and perhaps most importantly, there is a serious concern that a conference of experts will adversely affect the fundamental right of a party to have the advice of counsel and to be heard. At present, significant concessions in a case are usually made by counsel only after consultation with the client and with the instructions of the client. With the expert conferencing, it is feasible that concessions will be made without the involvement of either counsel or the client. In many cases, such concessions will have a fundamental impact on the outcome of the case. This is contrary to the right to be heard and the right to counsel.

We appreciate that some might say the above criticism is contrary to the expert's duty to the court, but this would be incorrect. The expert's duty to the court begins when the expert is retained and should be reflected in the expert's report which the party has elected to present as part of its case. The parties and their counsel must be involved in any conference that might alter the evidence the party has elected to present. The parties have the right to know how and why the opinions have changed and the right to ensure that the opinions have changed for valid reasons. This can only be done by allowing the parties and their counsel to fully participate in any expert conferencing.

Accordingly, the CBA Section supports a limited amendment to the Rules in relation to expert conferencing. The amendment should provide that the court have discretion to order a conference of experts in appropriate cases, but subject to the parties and counsel being present and permitted to participate fully. Provided that counsel and parties are

permitted to participate fully in the conference, then it should be privileged with only the resulting joint report admissible at trial.

However, the Rules Committee may wish to consider an alternative to a separate conference of experts that would have the same benefits but reduce the attendant costs. This would be to amend the Rules to allow for experts to be included in a pre-trial or preferably, a dispute resolution conference, in appropriate cases.

E. Issue 5 – Assessors, Court Appointed Experts and Single Joint Experts

The Ontario Civil Justice Reform Project (OCJRP) Report considered and rejected the single or joint expert model saying it was "a good idea that will not work in practice in too many cases."[3] The OCJRP Report noted that a frequent difficulty with a single expert will be that the parties have different views of the factual foundations on which the expert report is to be based.[4] The Alberta Law Reform Institute in its Consultation Memorandum No. 12.3 entitled, "Expert Evidence and Independent Medical Examinations,"[5] considered that a joint expert rule would likely cause more problems than it would solve and pointed out that such a requirement would cause delays and likely multiple court applications. We agree with these criticisms of the joint expert approach. We would add that the court-appointed or joint expert approach likely will not reduce expert witness costs and may in fact increase them. In many cases, if not all, the parties will also have to each retain their own expert to determine what issues should be put to the single expert, to review and to advise on the report of the expert.

It is our view that the selection of the joint expert will be extremely problematic in most cases and there is a strong likelihood that the parties will not be able to agree on the selection of an expert because they will have different views of the facts and assumptions

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3 The Honourable Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings and Recommendations* (Toronto: Ministry of the Attorney General, 2007) at 71.

4 *Ibid,* at 71-72.

5 Edmonton: Alberta Law Reform Institute, 2003.

upon which the expert should base the opinion. In addition, the parties may very well have different views of the qualifications and experience that an expert should have. Where the parties cannot agree on an expert, it would not be fair and would not further the ends of justice for the court to appoint an expert or to select between the positions of the parties at an early stage. It will be very rare that the court will be sufficiently informed of the nuances of the case to know the qualifications and experience an expert should have or what facts should be given to the expert. This is information the parties have and, prior to trial, they will almost always be in a better position than the court to determine these matters.

The decision of the Supreme Court of Canada in *Porto Seguro Companhia De Seguros Gerais v. Belcan S.A.*[6] is relevant. In that case, the Court considered whether the prohibition on expert evidence where assessors sit in admiralty actions should be changed. The Court held that the rule violated the principle of *audi alteram partem*, the right to be heard:

> The rule against expert evidence where a judge sits with assessors in admiralty cases suffers from four defects. First, the prohibition on expert evidence violates the principle of natural justice of the right to be heard, *audi alteram partem.* This principle confers the right on every party to litigation to bring forth evidence on all material points. Trial judges possess a discretion to limit evidence or exclude evidence where its relevance is outweighed by the prejudice it may cause to the trial process. But the principle that every litigant has a right to be heard goes against the exclusion of an entire category of evidence. To say that a litigant cannot call any expert evidence on matters that are at issue in the litigation is to deny the litigant's fundamental right to be heard.[7]

Imposing a single expert on the parties whether by requiring the parties to chose a joint expert or by the court imposing an expert is similarly a denial of the parties' fundamental right to be heard. Accordingly, we would oppose any amendment to the Rules that would require the parties to agree to a single joint expert.

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6 [1997] 3 S.C.R. 1278.

7 *Ibid.* at para. 29.

While our primary concern is that a single expert not be imposed on the parties, we believe that in any case, the single expert approach is not the best approach for determining the truth. Even a well qualified and well intentioned expert can be wrong. It is not clear how the parties can test the opinions of a single expert that has been selected by them or the court. Where the expert does get it wrong, how can the parties bring this to the attention of the court? Cross-examination is the single most effective tool in the common law for ascertaining the truth. However, it is unclear whether a party would be permitted to cross-examine a joint expert, which is in effect their own witness. Even if it were permitted, effective cross-examination will be hampered because there is no possibility of calling another expert in rebuttal. Therefore, the joint expert approach is fundamentally at odds with the primary purpose and principals of the Rules which is to see that the truth is ascertained and justice is done. At the very least, if the Rules provide for joint experts, cross-examination must be allowed.

F. Issue 6 – Applications of the Rules Governing Expert Witnesses to Both Actions and Applications

We agree that the rules governing expert witnesses should apply to applications as well as actions.

G. Issue 8 – Need for Cross Examination

We agree with prior CBA Section submissions that Rules 279 and Rule 400(3)(i) and (j) address the issue of cross-examination of experts and costs consequences for unnecessary or lengthy cross-examination, and that it does not appear that further rules revisions are necessary.

H. Issue 9 – Panels of Expert Witnesses: Hot-Tubbing

Significant changes are being proposed in an attempt to obtain more objective evidence from experts, and to limit the number of experts required in an action. However, we are concerned that the proposed change to allow panels of experts to be sworn in together and then be questioned by each other, by counsel and by the trial judge, may actually increase costs and complicate the opinion evidence before the Court.

Allowing everyone in the courtroom the opportunity to question all experts on a panel,

including allowing other members of the panel to question each other, may result in procedural difficulties. Experts are not trained in civil procedure, and do not have any real understanding of relevance or admissibility of evidence issues. As counsel, we have all experienced difficulty in attempting to have experts limit their opinion reports to the relevant issue before the court. Allowing the experts to cross-examine each other may result in delays and time wasting that often occurs when unrepresented litigants are attempting to advance their case. Essentially, such a change would result in an entire panel of unrepresented persons attempting to advance their positions.

We are also concerned that the proposed "hot-tubbing" rule will result in a mistaken impression that the expert who is more aggressive or a more accomplished speaker is the better expert. The more aggressive expert will attempt to dominate the "panel discussion," and may successfully intimidate other experts who are less aggressive or more junior from advancing their opinion. In response, counsel may begin selecting experts based on personality traits as opposed to level of expertise and special knowledge. We are not convinced that a panel discussion is the best way for the Court to hear, understand and appreciate an expert's opinion on an issue.

Under the current system, all counsel have an opportunity to question each expert on the stand, as does the trial judge. We can see no benefit in an amendment that will allow a panel discussion of experts in the courtroom.

I. Issue 10 – Limiting the Number of Experts

We do not believe it is necessary, but are not strongly opposed to a proposed change to make explicit the Court's ability to exercise discretion in limiting the number of experts that a party could call to testify at trial in a manner that is consistent with the *Canada Evidence Act*. We suggest that the change should read that additional experts will be permitted with leave of the Court, or with the consent of all parties.

II. CONCLUSION

The CBA Section appreciates the opportunity of providing these comments, and trusts that they will be of benefit to the Rules Committee. We look forward to further engagement in this discussion as the Rules Committee continues its consideration of the role of experts before the Federal Court.