THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

January 18, 2010

Chantelle Bowers
Secretary of the Rules Committee
of the Federal Court of Appeal
and the Federal Court
90 Sparks Street, 10th Floor
Ottawa, ON K1A 0H9

Dear Ms. Bowers:

Re: ***Rules Amending the Federal Court Rules (Expert Witnesses)***
Canada Gazette, Part I, October 17, 2009

The Intellectual Property and Aboriginal Law Section of the Canadian Bar Association (CBA Sections) welcome the opportunity to respond to proposed changes to the Federal Court Rules (the Proposed Rules), contained in the October 17, 2009 edition of Canada Gazette, Part I. This submission follows our previous submissions to the Federal Courts from the Intellectual Property Section, Maritime Law Section and Aboriginal Law Section of the CBA in response to its discussion paper on the same subject. Our outstanding concerns in those submissions are reiterated below, along with comments arising out of the Proposed Rules.

(1) Recognizing the Duty of Expert Witnesses

We agree that experts should be aware that their role is that of independent advisor to the Court, and should be made aware of this duty to the Court before tendering a report or giving evidence.

Proposed Rule 52.2 (which would apply to both applications and actions) would require an affidavit or statement of an expert to be accompanied by a certificate signed by the expert. In signing the certificate, the expert would expressly acknowledge having read the Code of Conduct for Expert Witnesses (Code) and agree to be bound by it. The Code is set out in a schedule to proposed Rule 52.2.

The Code has been drafted to deal with issues that typically arise in commercial litigation, but is framed as a rule of general application. The parameters of the Code may not be appropriate for all experts in all circumstances, for example in the context of Aboriginal litigation. An Aboriginal expert in linguistics or traditional practices, like hunting or trapping, may also be a member of a particular Aboriginal nation. The elder or expert may have a sense of representing that nation and have ethical duties arising from cultural norms.

Paragraph 3 of the Code states, "An expert is not an advocate for a party." This creates a potential conflict for experts who are members of an Aboriginal nation called upon to assist the Court with

understanding aspects of Aboriginal culture, language and practice. Experts should not be barred from giving testimony or being recognized as an expert because they are a member of the Aboriginal nation that is a party to the action.

Likewise, anthropological researchers are bound by a Code of Ethics that requires them to "do everything in their power to ensure that their research does not harm the safety, dignity, or privacy of the people with whom they work, conduct research, or perform other professional activities…"

The imposition of the Code on all experts in all cases could lead to unfair criticism of a witness on cross-examination by placing obligations arising from their cultural identity (or ethical obligations to an Aboriginal nation) in apparent conflict with the obligations of the Code.

We recommend that proposed Rule 52.2(c) be amended to require that the expert affidavit of statement outline the expert's understanding of their duty to the Court and the ethical parameters within which the expert is giving evidence, having regard to the factors in the Code. Both the U.K. Rules of Court and the Australian Court have adopted this approach. In those jurisdictions, experts set out explicitly in the report, that they are aware of, and understand the duty to the Court in giving evidence. This would facilitate full disclosure of the expert's understanding of their ethical obligations and allow for tailoring of the wording as appropriate to the circumstances of the case.

(2) Streamlining the Process of Qualifying Expert Witnesses

We agree that the Rules should be amended to require a party to make any challenges to the qualifications of the adverse party's expert at an early stage in the proceedings.

However, we question whether such challenges should confined to the pre-trial stage. The party filing a requisition for trial may not have received the opposing party's reports when the requisition is filed. Not all of the expert reports may be served when the pre-trial conference is convened.

We suggest that challenges to the qualifications of the opposing party's expert be made within a set time (e.g. 30 or 45 days) after the date when the expert affidavit is served. This would not preclude the court from fixing, through case management, another deadline to deal with challenges to expert affidavits, or from having the issues addressed in a pre-trial conference (in the case of actions).

(3) Requiring experts to confer in advance of trial

Proposed Rule 279.1 would give the Court the discretion to order a pre-trial conference of expert witnesses.

Although it may be useful for the Court to have a variety of procedural tools to facilitate the conduct of litigation, we believe that an expert conference should only be ordered where the parties agree. If expert conferences are ordered without the consent of all parties, the procedure will likely add to the cost of litigation without a concomitant benefit. It would adversely affect a party's ability to define its litigation strategy and present its case as it sees fit. A party's fundamental right to counsel and to be heard would be undermined.

It is our understanding that the complexity of patent litigation (in particular, pharmaceutical patent litigation) is the impetus for this proposal. This litigation is typically hard fought and the subject matter tends to be highly technical. The high economic stakes that typically characterize this specialized commercial litigation means that the parties and counsel are very concerned about how their case is organized and wish to control how it is presented. In many instances, the parties will be litigating the same issues in multiple jurisdictions and may wish to have the same expert(s) testify in the concurrent cases.

In many cases, this provision could be viewed as a tactical opportunity to size up the adversary's expert and obtain information to challenge or impeach the expert, either before this Court or a court in another jurisdiction. Although the documents prepared for and discussions within an expert conference would be confidential, this would be very difficult to enforce with certain types of information.

Further, if a party had already identified weaknesses in the evidence of its adversary's expert, and had planned its cross-examination accordingly, the strategy could be compromised if the topic is canvassed in a privileged expert discussion before trial.

An expert conference mandated without consent, especially when coupled with a requirement that the experts prepare a joint report, would create a further stage in an already protracted process. .

The rates charged by experts vary depending on their qualifications. It is not uncommon for an expert to charge between $200 and $500 per hour, or more. Experts frequently reside in another city or country, and their attendance at a conference will require additional travel. The parties pay not only the travel expenses but also often for travel time. While skilled in their particular field of expertise, experts may be unfamiliar with the litigation process. Faced with an unfamiliar experience (especially if Canada is not the expert's home country), both counsel and the expert will want to meet in preparation for a conference. The client would be required to pay for the time spent by counsel preparing the expert for the expert conference. The total cost associated with an expert conference will be considerable.

Expert conferences would also contribute to delay. They would require identifying an additional time when all experts and counsel are available. The scheduling issues would be further compounded if the conference is to take place in the presence of a judge or prothonotary.

The application of the Proposed Rules on expert conferences to proceedings under the *Patented Medicines (Notice of Compliance) Regulations* (PMNOC) would be especially challenging, as another procedural stage would increase the time pressures in this litigation.

In practice, the concept of expert conferences poses many problems. It assumes that issues in the case can be neatly characterized as "expert issues" and that resolving them requires only the application of expertise. However, the issues experts address are frequently highly dependent on the facts and assumptions given to each expert by their instructing party. It is difficult to imagine how experts could confer when the facts and assumptions given to each expert are different.

There is a danger that experts instructed by the court to confer may feel obligated to provide a joint report, notwithstanding their different facts and assumptions. This would implicitly require the experts to determine the factual circumstances of the case. This is the explicit role of the judge. 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 were stated in the joint report. Where the facts and assumptions are not set out, how would the joint opinion 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. The assumption seems to be that the experts will be professional persons with the ability to identify, discuss and resolve issues, and then put their thoughts in writing in a comprehensive and coherent fashion.

This is not always the case. For example, in Aboriginal litigation, an expert may have derived expertise from a lifetime of work but not necessarily have the skills to identify and analyze legal issues that would be required to prepare a joint report. This person might find the experts' conference to be an intimidating experience.

In some areas and particularly again in the context of Aboriginal law, experts often have diametrically opposed views and methodologies. The trial court can benefit from seeing the different interpretations of history, archaeology or anthropology, where those differences are critical to the relevant issues.

The personalities of the experts may dictate the outcome of the conference. With expert conferencing and a joint report the views of the expert with the more forceful personality may dominate, regardless of the scientific reality.

Finally, and perhaps most importantly, a conference of experts could 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 expert conferencing and the preparation of a joint report, concessions may be made without the involvement of either counsel or the client. These concessions could have a fundamental impact on the outcome of the case. This is contrary to the right to be heard and the right to counsel.

Some might say this criticism is contrary to the expert's duty to the court. However, the expert's duty to the court begins when they are retained and should be reflected in their report which the party has elected to present as part of its case.

Narrowing issues for trial are better addressed between the parties at case management conferences. A case management judge can discuss with the parties whether it is appropriate for experts to meet in advance to frame the issues or narrow them in advance of trial. The experts conference should only happen where both parties agree it would be worthwhile.

In conclusion, we understand the objective of having complex issues narrowed, but this should not occur by imposing this requirement on the parties (with the concomitant costs and delay), unless they agree.

(4) 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."[1] 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.[2] It is our view that the selection of the joint expert will be extremely difficult in most cases and there is a strong likelihood that the parties will not be able to agree.

The parties may have different views of the qualifications and experience an expert should have. In many cases, each party will have to retain their own expert to determine the issues to put to the single expert, to review and to advise on the report of the expert.

Even where the parties are able to agree on an expert, the compromise may be the expert who is least objectionable to each side. Here, the single expert approach is unlikely to be best for determining the truth. Further, even a well qualified and well intentioned expert can be wrong. It is not clear how the parties could test the opinions of a single expert selected by them or the court. Where the expert gets it wrong, how could the parties bring this to the attention of the court? Cross-examination is the 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, who is in effect their own witness. Even if permitted, effective cross-examination would be hampered because there is no possibility of calling

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1 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.

2 *Ibid,* at 71-72.

another expert in rebuttal. The joint expert approach is fundamentally at odds with the primary purpose of the Rules which is to see that the truth is ascertained and justice is done.

If a joint expert is permitted to testify, we recommend that both sides be permitted to cross-examine.

(5) Application of rules Governing Expert Witnesses to Actions and Applications

The automatic extension of these proposals to applications could create further delay and expense in the proceedings. It is contemplated that proceedings by way of application be summary in nature.

The difficulties will be especially acute in PMNOC proceedings, which already tax the resources of litigants and the Court. PMNOC proceedings have already become overly protracted and expensive. If expert conferences, "hot-tubbing" (discussed below) and mandatory *viva voce* testimony were instituted, the time pressure in having these matters decided will become more constricted, and the expenditure of resources will increase significantly.

PMNOC proceedings are not intended to be finally dispositive of patent infringement and validity. The outcome of a PMNOC case, decided by way of application, creates no estoppels to a more thorough canvassing of issues in the context of an infringement and validity action.

We do not believe that any benefits associated with the proposed amendments will offset the disadvantages in the form of added cost and delay.

(7) Need for Cross-examination

The proposed amendment to Rule 280 would give the Court an overriding discretion to require an expert to testify, even where the parties have agreed otherwise.

We have strong reservations about this procedure. This approach represents a shift to an inquisitorial model of litigation, away from the adversarial system that is the bedrock of the Canadian legal system.

For reasons given elsewhere, we oppose the introduction of new procedural steps that would diminish the ability of litigants to organize and present their case. Not only would this affect a party's right to be heard, it would impose additional costs in securing the attendance of the witness, and compensating the expert for time and travel costs.

If the intended purpose is to enable the capacity of the Court to have an expert available as a tutor to the judge to lay a scientific foundation for contested areas, these circumstances are best dealt with on *ad hoc* basis, during case management.

(8) Concurrent Expert Evidence, or "Hot-tubbing"

The proposed rule giving the Court an overriding discretion to require 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.

The concept of having expert testimony put forward by way of panel ("hot-tubbing") is borrowed from a practice in Australia. It is our understanding that hot-tubbing is not widely used in Australian litigation and only where the parties consent. Moreover, its usefulness remains controversial in that jurisdiction.

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, is likely to result in procedural difficulties. Experts are not trained in civil procedure, and have no real understanding of relevance or admissibility of

evidence issues. Counsel routinely experience difficulty in having experts limit their opinion reports to the relevant issue before the court. Allowing 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, the change would result in an entire panel of unrepresented persons attempting to advance their positions.

A major risk of hot-tubbing is having one expert who is more aggressive attempt to dominate the panel discussion, and intimidating other experts who are less aggressive or more junior from advancing their opinion. Hot-tubbing assumes that the experts present equally well, which is not the case. Expert with more reserved personalities, or who seek to be more even-handed in their approach, can be easily overshadowed. The party who has retained that expert may be prejudiced as a result. The role of personality is less apparent where the experts give evidence and are cross-examined sequentially.

Further, it would be difficult to control the boundaries of the panel discussion. If a pre-trial expert conference has been convened, one expert may pose a question during hot-tubbing that is designed to elicit a specific response based on something another person said during the pre-trial conference, even though those discussions are intended to be confidential.

Accordingly, hot-tubbing is likely to exacerbate the risk that experts will seek to advocate on behalf of the party who has retained them. Indeed, panel evidence may motivate counsel to place greater emphasis on assertive personality traits when selecting an expert, not level of expertise and special knowledge.

Further, hot-tubbing will undoubtedly increase the costs of litigation. The cost of preparing an expert for participation in the hot-tub will be significant. This will probably require preparation so that the expert is ready to field questions from counsel, the presiding judge and other experts on the panel. Counsel will also have to prepare their expert with questions to pose to the other experts in an attempt to elicit testimony favorable to the client's position. All this would be done without benefit of having the expert know, in advance, the specific direct examination questions that will be asked and the manner in which they will be asked. Scientific experts are generally not trained in the advocacy skill of cross-examination. The process would also tend to favour the expert with a more adversarial bent.

Given that patent litigation is often pursued in multiple jurisdictions concurrently, the Proposed Rules are likely to act as a disincentive for a party to use the same expert in all jurisdictions, thus further increasing the overall cost associated with litigation.

The proposed hot-tubbing rule would be of general application. The practice would generally not be a positive development in aboriginal law. Often, the court cannot assess the importance and complexity of different expert opinions until the evidence is actually heard. The trial judge's findings of fact and acceptance of expert opinions carries significant consequences, including being relied upon by appellate courts.

(9) Cost Consequences

Rule 400 gives the presiding judge broad discretionary power over the amount and allowance of costs, and to whom they may be paid. Rule 400(3) lists the factors that the Court may consider in exercising its discretion to award costs.

The Proposed Rules would add a new factor (n.1), namely "whether the expense required to have an expert give evidence was justified," having regard to what is at stake in the litigation. We have reservations about this provision. A successful party should not be placed in the position of having to justify the amount it chooses to spend on retaining experts, as a prerequisite to being awarded costs.

Litigation is inherently unpredictable and circumstances can change over its course. A party's decision to retain a particular expert should not be second-guessed at a later stage, especially where the decision is underpinned by the party's own assessment of the issues and their importance to that party's commercial interests. Moreover, the hourly rate of the expert is set by the expert, not the party. Litigants are free to plan their litigation strategy, and spend their own money, as they see fit. The fees charged by expert witnesses are driven by market forces.

There is already a mechanism to ensure that a party is not burdened by reimbursing an adversary for unduly high expert fees. Rule 400 provides the Court with discretion to limit the quantum of fees recoverable on a party and party bill of costs. Indeed, it is not uncommon for that discretion to be exercised. In several recent cases, the Court has issued directions that recoverable disbursements for expert's fees are to be capped.

Additionally, the remedy of assessment of a bill of costs remains available. An assessment officer has discretion to limit the recovery of expenses that are unreasonably high.

In these circumstances, we see little rationale for the proposed amendment, as it largely duplicates the existing provisions of Rule 400.

Conclusion

The CBA Sections appreciate the opportunity of providing these comments, and trust 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 Proposed Rules.

Yours truly,

(Original signed by Kerri Froc for Alexandra Steele and Bradley D. Regehr)

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