

**Identifying Best Practices
for the Role and Scope of the
Financial Expert Witness
in Canadian Civil Courts**

Research Project for Emerging Issues/Advanced Topics Course

Diploma in Investigative and Forensic Accounting Program

University of Toronto

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June 20, 2007

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Table of Contents

Introduction.....	Page 3
Unique Nature of the Expert Witness.....	Page 7
Role of the Expert Witness.....	Page 9
Admissibility of Expert Testimony.....	Page 12
Qualifying as an Expert.....	Page 15
Provincial Rules.....	Page 18
Chart: Comparison of Rules of Civil Procedure Relating to Expert Witnesses in Canadian Jurisdictions.....	Page 22
Court Reforms.....	Page 26
Woolf Reforms.....	Page 26
Provincial Reforms.....	Page 31
Chart: Recommendations for Canadian Court Rule Reform Relating to Expert Witnesses.....	Page 32
Best Practices for the Role and Scope of the Financial Expert Witness In Canadian Civil Court.....	Page 40
Research Questionnaire.....	Page 40
View of the Role of the Financial Expert Witness.....	Page 42
Best Practices Identified.....	Page 50
Engagement of the Financial Expert Witness.....	Page 52
Best Practices Identified.....	Page 58
The Financial Expert Report.....	Page 60
Best Practices Identified.....	Page 69
Financial Expert Evidence in Court.....	Page 71
Best Practices Identified.....	Page 76
Conclusion.....	Page 77
Appendix A – Expert Questionnaire Results.....	Page 80
Appendix B – Counsel Questionnaire Results.....	Page 91
Appendix C- Judge Questionnaire Results.....	Page 102
Bibliography.....	Page 110

Introduction

“Common law courts have since the 14th century recognized that certain exceptional issues require the application of special knowledge lying outside the experience of the usual trier of fact. Expert evidence became admissible as an exception to the rule against opinion evidence in those cases where it was necessary to provide a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate.”¹

The question is not whether expert evidence is necessary in Canadian court. As Judge Learned Hand stated “No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is how it can do so best...”² In the past half century, technological advances have increased the complexity of litigation. This has resulted in a marked increase in the need for expert witnesses to assist the court in understanding the issues involved. As the expert’s involvement has become more common place in the courts it has exposed the experts to close scrutiny and in some cases strong rebukes by Canadian judges.

Answering the question of how the court can best use expert knowledge has become more critical. According to Michael Code, a lawyer who teaches at U of T’s law school,

¹ R. v. D.D.[2000] S.C.J. no. 43 at para 50

² Williams, Judge R. James, Grasping a Thorny Baton..A trial judge Looks at Judicial Notice and Courts’ Acquisition of Social Science, Canadian Family Law Quarterly v.14, p.179-232,1996 p.1 www.fact.on.ca/judiciary/williams96_pdf (accessed May 2, 2007)

there is a growing hostility towards expert evidence in Canadian courts.³ Judge Sopinka summarized this growing hostility when he said, “Modern litigation has introduced a proliferation of expert opinions of questionable value. The significance of the costs to the parties and the resulting strain upon the judicial resources can not be overstated. When the door to the admission of expert evidence is opened too widely, a trial has the tendency to degenerate into a contest of experts with the trier of fact acting as referee in deciding which expert to accept.” (Mohan, *supra*, at p.24)⁴

Clearly, expert witnesses and the evidence they proffer are seen as a significant part of the widespread concerns about the Canadian judicial system regarding the costs and delays in our court system which are making the justice system inaccessible to average Canadians.⁵ These concerns have also drawn attention to the role of the Judge in controlling the proliferation of expert testimony. In a Supreme Court ruling Mr. Justice Ian Binnie encouraged the judge to act as a “gatekeeper” to ensure that the expert is truly relevant and helpful.⁶ Counsel who retain the experts, indicated at the policy forum, Streamlining the Ontario Civil Justice System, held in Toronto on March 9, 2006, that “there was a consensus that proliferation of experts, and lengthy and uncontrollable expert testimony, is a major problem in Ontario.”⁷ The recognition that counsel plays a role in this problem, which by no means is limited to Ontario, has prompted discussion

³ Blackwell, Richard. “The Case Against Expert Witnesses” *Globe and Mail*, Nov. 29, 2006 from http://www.theglobeandmail.com/servlet/story/lac.20061129.rlawmain29/ppvstory?url_article accessed Dec. 21, 2006

⁴ R. v. D.D.[2000] S.C.J. no. 43 para 50

⁵ Final Report Streamlining the Ontario Civil Justice System, A Policy Forum, Thursday, March 9, 2006, p13 www.advocates.ca/pdf/Final_Report.pdf (accessed April 22,2007) p 1

⁶ Blackwell, Richard. “The case against expert witnesses”. *Globe and Mail*, Nov. 29, 2006 retrieved Dec. 21, 2006 from http://www.theglobeandmail.com/servlet/story/lac.20061129.rlawmain29/ppvstory?url_article

⁷ Final Report Streamlining the Ontario Civil Justice System, A Policy Forum, Thursday, March 9, 2006, p13 www.advocates.ca/pdf/Final_Report.pdf (accessed April 22,2007) p 13

and consideration of law reform initiatives by law societies across Canada. The Canadian Institute of Chartered Accountants has also addressed these concerns by issuing the *Standard Practices for Investigative and Forensic Accounting Engagements* with the purpose of protecting the public by improving the consistency and comparability of the practice of chartered accountants who perform this work.⁸ All three groups, judiciary, legal profession and experts, must continue to concern themselves with developing constructive methods to improve the role of the expert in court.

The role of expert witness is to serve the court and their involvement in the litigation process in Canada is governed by court procedural rules and rules of evidence and legal precedence as well as in the CICA professional standard guidelines. However, these rules and guidelines specifically allow the expert to exercise their professional judgement within this challenging environment. Given the skepticism of the court, it is clear that some experts are fulfilling their role in a more professional manner than others. The fact remains that expert assistance is often essential for the court and lawyer's failure to consult an expert can and has constituted professional negligence⁹ so it is important to identify the Best Practices for the Role and Scope of Financial Experts to enable the experts to exercise professional judgement while complying with the rules and guidelines to better serve the court.

Best practices do not provide a checklist for everyone to follow but are flexible practices that evolve over time based on continuous education and evaluation to meet current

⁸ CICA, *Standard Practices for Investigative and Forensic Accounting*, Nov. 2006

⁹ Prehogan, Kenneth, *A Microscopic Look at your Forensic and Investigative Reports*, Association of Certified Forensic Investigator of Canada, 9th Annual Fraud Conference & Workshop, May,6,7&8, 2007 p 2

challenges. They complement, not supplant, the existing rules. However, there may be need for practices to be reinforced by rules in some situations.

Best practices are not subject to peer review or standards development process, so no one in particular is charged with establishing best practices or monitoring compliance. The best practices relating to the role and scope of the financial expert witness have been identified not through research alone but based on direct input from knowledgeable, experienced financial experts, litigation counsel, the primary user of the expert services and judges, who experts are to serve. The rationale for questioning each of the three groups on their views of best practices was to determine whether there is consistency in the understanding and expectations of the expert witness and present recommendations based on the responses to ensure expert witnesses will be retained appropriately and when retained will better assist the trier of fact in the future.

The three groups shared their opinions on best practices through a questionnaire tailored to each party's perspective. The questionnaires were designed to rank multiple answers to questions based on importance or agreement for efficiency. Additional comments were encouraged to expand on questions, touch on areas that were not included in the questions or note recommendations. In some cases meetings were arranged to complete the questionnaire. The questionnaires were anonymous to encourage full participation and disclosure.

This paper will summarize and analyze the questionnaire responses on the Best Practices for the Role and Scope of the Financial Expert in Canadian Civil Court in an effort to

address the general concerns related to expert witnesses. To put the Best Practices into context this paper will provide information regarding the present procedural rules governing expert witnesses in Canadian jurisdictions, the recommendations from the ongoing law reform initiatives, legal precedence relating to expert witness as well as the newly established IFA Standard Guidelines as they relate to expert witnesses. This paper will not serve as a comparison of the role and scope of financial expert in other jurisdictions but will consider those rules and practices only as it relates to their influence on practices and reform initiatives in Canada.

Unique Nature of the Expert Witness

To understand the present concerns that the increasing use of expert witnesses is not necessarily adding value but contributing to the costs and delays in our court system, it is important to consider the development of the role of the expert witness in Canadian courts. The administration of justice in Canada, as in other common-law jurisdictions, is based on the adversarial system. The “assumption that underlies the adversarial system is that the mutually contentious striving of relatively equal advocates will make truth and justice apparent to the judge and, if different, the fact finder.”¹⁰

In searching for this truth, a fundamental premise in the Canadian judicial system is that a witness can only testify to facts within his knowledge, observation or experience.

Witnesses can only describe his observations, any inferences or conclusions from the

¹⁰ Bubela, Tania M., Expert Evidence: The Ethical Responsibility of the legal Profession, Alberta law Review, (2004)41Alta.L.Rev.853-870, www.lexisnexis.com/ca/legal/results/docview.pdf, p43 (accessed May 2,) 2007

witness' observations are prohibited.¹¹ An exception to this common law "opinion rule" has been made for experts. Because of their specialized knowledge, experts can testify as to matters observed, information from others as it pertains to the foundation of their conclusions and opinions, the state of knowledge in their field and give opinions to assist the trier of fact in appreciating the significance of facts in evidence and drawing the appropriate inferences.¹² This assistance is required when the issue "falls outside the likely range of knowledge and experience of the trier of fact"¹³ rendering him incapable of formulating the correct the opinion on his own. It is the only time that opinions are allowed to be expressed and taken into account in court. The exceptional nature of expert testimony in the civil litigation process is explained in *R. v. Nahar* as follows:

"In considering the admissibility of opinion evidence, it is important to recognize that such evidence is, of course, normally not admissible. Witnesses are generally not permitted to testify to the opinions they hold. The principal exception to that rule is the opinion of an expert witness. Evidence of such witnesses is admissible to prove a relevant fact, or to prove relevant facts, where such cannot be satisfactorily proven in some other way."¹⁴

Mr. Justice Dickson elaborates on the assistance that the expert witness provides the court, saying,

"Witnesses testify to facts. The judge or jury draws inferences from facts. With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary"¹⁵

¹¹ Bubela, Tania M., *Expert Evidence: The Ethical Responsibility of the legal Profession*, Alberta law Review, (2004)41 Alta.L.Rev.853-870, www.lexisnexis.com/ca/legal/results/docview.pdf, p43 (accessed May 2,) 2007

¹² Ibid. p43

¹³ *R. v. D.D.*[2000] S.C.J. no. 43 para 50

¹⁴ *R. v. Nahar* [2004], 181 C.C.C.(3d)449, 2004 BCCA 77

¹⁵ *R. v. Abbey* (1982), 2 S.C.R. 24

Two legal questionnaire participants explained that in “theory the role of the expert witnesses was to draw inferences and state his opinion on hypothetical situations. The opinion was not based on any specific knowledge of the case, but on assumptions provided in court. An expert should be able to come off the street and give opinion. Didn’t need report, just exhibits presented in examination in chief for clarification and to help trier of fact follow along. The expert was a practicing professional who only testified on occasion. This is not done anymore. Issues are too complicated, unrealistic to think it could be done without detailed information from the case.”¹⁶

The expert witness also differs from the lay witnesses in that they are paid by a party to the litigation. Although as Lord Woolf has said,

“...if an expert was properly qualified to give evidence, then the fact he was employed by one of the parties would not disqualify him from giving evidence.”¹⁷

This sentiment was reiterated by Lord Justice May when he stated

“There is no overriding objection to a proper qualified person giving opinion evidence because he is employed by one of the parties.”¹⁸

Despite these comments both unique characteristics have made courts suspicious of expert witnesses.

Role of the Expert Witness

Due to the growing complexity of litigation, judges have had to defer to or rely on expert evidence with increasing frequency which has created concerns in the courts about the

¹⁶ Best Practices for the Role and Scope of a Financial Expert Witness in Canadian Courts, Counsel Questionnaire Results, Q.14, View of Role of Financial Expert Witness

¹⁷ Phillips, Anthony Woolf: Is it working? Wed, 29 November 2000 Experts, p. 2
www.mayerbrownrowe.com/publications/article.asp?id=537&nid=6 (accessed May 2, 2007)

¹⁸ Phillips, Anthony Woolf: Is it working? Wed, 29 November 2000 Experts, p. 2
www.mayerbrownrowe.com/publications/article.asp?id=537&nid=6 (accessed May 2, 2007)

role of the expert witness. Accepting that the expert is essential to litigation, Canadian courts have clarified the role of the expert through jurisprudence rather than defined in the provincial rules of civil procedure.

A 1993 British decision in *National Justice Compania S.A. v. Prudential Assurance Co. Ltd.* which is commonly referred to as the *Ikarian Reefer* has been cited in many Canadian decisions relating to defining the role of the expert witness and establishing guidelines for expert evidence. They have also been adopted in section 700 Expert Testimony of the CICA's *Standard Practices for Investigative and Forensic Accounting Engagements*. Judge Cresswell, believing that certain expert witnesses' misunderstanding of their duties and responsibilities had drawn out the trial, listed in the *Ikarian Reefer*, the following duties and responsibilities of expert witnesses in civil cases.

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise...An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert should make it clear when a particular question or issue falls outside his expertise.¹⁹

The first and second points sum up the primary role of the expert which is to provide and to be seen to provide independent assistance to the Court. The expert must act independently and not as an advocate of the party who hired him. The preeminence of the

¹⁹ *National Justice Compania S.A.v. Prudential Assurance Co. Ltd. (The Ikarian Reefer)*[1993] 2 Lloyds Rep. 68 [1993] 2Lloyd's rep. 68 (com.Ct Q.B. Div)

duty to provide independent assistance to the court has been recognized in many

Canadian decisions. For example, in *Perricone v. Baldassarra*, Macdonald J. stated:

If the person rendering the evidence assumes the role of advocate, he or she can no longer be viewed as an expert in the legally correct sense; instead, he or she must be viewed as advocating the case of a party with the attendant diminishment in the credibility or the report. Expert opinions guide the court but they do not determine the matters which are to be determined by the court.²⁰

Macdonald J. reiterated it in *Fellowes, McNeil v. Kansas General International Insurance Company Ltd. et al.* saying

Experts must not be permitted to become advocates. To do so would change or tamper with the essence of the role of the expert, which was developed to assist the court in matters which require a special knowledge or expertise beyond the knowledge of the court.²¹

Justice Farley was a little blunter when stating the importance of experts maintaining their independence. In *Toronto Dominion Bank v. E. Goldberger Holdings Ltd.*, he said;

Experts must conduct themselves as objective neutral assisters of the court and, if they fail to fulfill this function, their testimony should be ruled inadmissible and therefore ignored after they have been eviscerated.²²

The court's insistence on objectivity and independence from expert witnesses is because the courts must, by its nature, defer to expert testimony. The court has found that the best test for objectivity occurs when the court is satisfied that his opinion would not change regardless of which party retained him.²³ The results of that test may show the expert's opinion is one-sided despite evidence to the contrary, the expert has adopted an argumentative attitude or the expert sees himself as part of the litigation team. Although avoiding the breaches of independence is difficult because of the adversarial nature of the

²⁰ *Perricone v. Baldassarra* [1994] O.J. No. 2199 at para. 22

²¹ *Fellowes, MacNeil v. Kansa General International Insurance Company Ltd. et. Al.* 40 O.R. (3d) 456

²² *Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.* [1999] O.J. No. 5324

²³ Mitchell, Paul, Special Issue: Civil Justice and Civil Justice Reform, The Uncertain Duty of the Expert Witness, *Alberta Law Review*, (2005)42Alta.L.Rev.635-675 www.lexisnexis.com/ca/legal/search/homesubmitForm.do (accessed May 2, 2007) p.9

system, experts can not advocate because unlike lawyers they give evidence under oath. They are not permitted to advance arguments they do not believe. Experts like other witnesses, must testify as to what they believe is actually true given the circumstances.²⁴ If the court believes the expert is partial or lacks independence the court may discount or refuse to admit evidence given by the expert, regardless of the necessity and reliability of their testimony. The traditional Canadian approach has been that concerns about the independence of an expert witness affect the weight given to the testimony rather than its admissibility. The question now is whether that is consistent with the new gatekeeper approach to expert evidence advanced by the Supreme Court of Canada in J.-L.J. which implies the exclusion of evidence.²⁵

Admissibility of Expert Testimony

The call for judges to act as gatekeeper implies that courts were also concerned about the content of the expert's testimony. The court worried that "too liberal an approach" to the admission of expert evidence would lead trials to degenerate into "nothing more than a contest of experts" and convert the trier of fact into a "referee in deciding which expert to accept."²⁶ However, it is important to distinguish the tendency for experts to be biased from testimony from two equally valid but conflicting expert opinions. The courts must remain tolerant of a legitimate difference of opinion between experts. A genuine divergence of opinion is essential the adversarial process. Assuming the trier of fact will recognize genuine divergence of opinion and rule accordingly, there is still as Judge

²⁴ Mitchell, Paul, Special Issue: Civil Justice and Civil Justice Reform, The Uncertain Duty of the Expert Witness, Alberta Law Review, (2005)42Alta.L.Rev.635-675 www.lexisnexis.com/ca/legal/search/homesubmitForm.do (accessed May 2, 2007) p 8

²⁵ Ibid. p. 11

²⁶ Ibid. p 5

Sopinka wrote "... a danger that expert evidence will be misused and will distort the fact-finding process"²⁷ In response the courts have placed limits on the admissibility and use of experts in court proceedings.

The criteria for admissibility of expert opinion evidence were established by Judge Sopinka in the 1994 Supreme Court ruling in R. v. Mohan.

1. It must be relevant, including a finding of logical relevance (it tends to prove a matter at issue) and legal relevance (its probative value outweighs its prejudicial effect);
2. It must be reasonably necessary in the sense that it provides information likely to be outside the experience and knowledge of a judge and jury;
3. The evidence must emanate from a properly qualified expert; and
4. It must not infringe an exclusionary rule (credibility, character, privilege, etc.)²⁸

Expert evidence was relevant if it was so related to a fact in issue that it tends to establish it.²⁹ However, evidence that is otherwise logically relevant may be excluded ... if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.³⁰ This practice is an attempt to curb the delays and expense that have come to infect the judicial process.

The second point Mohan states that an expert's testimony must be "reasonably necessary". This is a higher standard than the first, necessary goes beyond relevant and helpful. The criteria for establishing the necessity of an expert is explained in the following quote.

²⁷ Blackwell, Richard. "The case against expert witnesses". Globe and Mail, Nov. 29, 2006 retrieved Dec. 21, 2006 from http://www.theglobeandmail.com/servlet/story/lac.20061129.rlawmain29/ppvstory?url_article

²⁸ R. v. Mohan [1994] 1S.C.R. 656, at Para 18.

²⁹ Ibid. para 20

³⁰ Ibid. para 21

Expert evidence must be necessary in order to allow the fact finder: 1) to appreciate the facts due to their technical nature, or; 2) to form a correct judgement on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge. (The Law of Evidence in Canada (2nd ed. 1999), at p. 620³¹

Major J. set out the requirements of the tests of necessity by saying

‘The second requirement of the Mohan analysis [necessity] exists to ensure that the dangers associated with expert testimony are not lightly tolerated. Mere relevance or helpfulness is not enough. The evidence must also be necessary’.³²

However “the required necessity is necessity that the trier of fact receives the information expressly by way of expert evidence, and not simply necessity that it receives the information at all. If the trier of fact can receive the required information in some other fashion than expert opinion, the expert evidence is unnecessary.’³³

The Mohan decision acknowledges the court’s reluctance to admit expert testimony that is not necessary and reliable and requires trial judges to review expert evidence more rigorously making the admissibility more difficult.

In admitting expert opinion into evidence, the court, to some extent delegates a part of its fact finding function to a witness.³⁴ As result of this kind of judicial reliance, the expert must understand his role is to interpret fact to help the court to decide not usurps the function of the trier of fact by deciding issues of the case. This is a fine line and the final point in Mohan required clarification in the following exclusionary rules which apply to an expert’s report.

1. an expert is not permitted to make findings of fact or rulings of law, rather that is the role of the trial judge
2. the expert cannot make findings of law as that is also within the role of the trial judge

³¹ R. v. D.D.[2000] S.C.J. No. 44 para 47

³² R. v. D.D.[2000] S.C.J. No. 44 para 47

³³ R. v. Roger [2005] B.C.J. w 1580

³⁴ Woods, Thomas S. Impartial Expert or “Hired Gun”: Recent Developments at Home and Abroad, www.lawsonlundel.com/resource/hiredgun.pdf (accessed April 28, 2007) p. 2

3. Experts should not make argument in the guise of opinions.³⁵

Expert evidence that contravenes an exclusionary rule of evidence is inadmissible notwithstanding that it meets other criteria for admissibility.³⁶

The Mohan criteria are valuable guidelines, but they have not provided definitive direction to the courts. The party tendering the expert evidence has the evidential and legal burden to satisfy the Mohan admissibility criteria on a balance of probabilities.³⁷ Whether the evidence will satisfy the Mohan criteria is not a matter of strict precedence.³⁸ Expert evidence admissible in one case may not be admissible in another depending on the circumstances. The language in the criteria is open to interpretation and may be applied differently by different judges. It may be difficult for a lawyer to determine, prior to trial, whether expert testimony will be found to be inadmissible. The rules have taken on a character whereby their application is more a matter of discretion than of precise legal characterization.³⁹

Qualifying as an Expert

According to Mohan, the court also has the responsibility to determine that “The evidence must emanate from a properly qualified expert”. The court has the authority to preclude a witness from providing expert testimony if the witness does not qualify as an expert. “An expert is qualified to give opinion evidence when he is shown to have

³⁵ Murray v. Gualuska[2002]B.C.J. No.2674 p.15

³⁶ Prehogan, Kenneth, A Microscopic Look at your Forensic and Investigative Reports, Association of Certified Forensic Investigator of Canada, 9th Annual Fraud Conference & Workshop, May,6,7&8, 2007 p.4

³⁷ Ibid. p.4

³⁸ Ibid. p. 4

³⁹ Williams, Judge R. James, Grasping a Thorny Baton, Canadian Family Law Quarterly v.14, 1996 p.1
www.fact.on.ca/judiciary/williams96.pdf (accessed May 2, 2007)

acquired special or peculiar knowledge through study or experience in respect of matters on which he undertakes to testify. The question is not simply whether the witness is an expert. It is whether the witness has expertise to offer an opinion in the relevant area.”⁴⁰ The expert’s status may come from formal training or experience or both. As long as the court is satisfied that the witness is sufficiently experienced in the subject matter at issue, the court will not be concerned whether his skill was derived from specific studies or practical training, although that may affect the weight to be given the evidence.⁴¹

In the US qualification of an expert is addressed by Rule 702 which was enacted to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.⁴² The application of intellectual rigor offers one of the most important gate keeping standards when Canadian judges are evaluating the testimony of those who have been put forward as expert witnesses. Too often experts offer no defense at all for their choice of a particular approach; or they say it has always been done that way or that a number of courts have employed that approach. This is not evidence of intellectual rigor; nor does it meet any of the criteria for reliability or relevance set out by the Canadian courts.⁴³ Judges

⁴⁰ Prehogan, Kenneth, A Microscopic Look at your Forensic and Investigative Reports, Association of Certified Forensic Investigator of Canada, 9th Annual Fraud Conference & Workshop, May,6,7&8, 2007 p.5

⁴¹ Ibid. p.5

⁴² Bruce, Christopher J., The Role of Expert Evidence, Economica Ltd. The Expert Witness Newsletter summer 1999 vol 4 no 2 www.economica.ca/ew42p2.htm (accessed April 28, 2007) p.5

⁴³ Ibid p. 5

increasingly insist that lawyers demonstrate the need for the testimony, and that the experts are truly qualified according to Michael Code.⁴⁴

While voir dires are commonly held to consider the admissibility of expert evidence in a criminal context, such hearings are rare in Canadian civil proceedings.⁴⁵ Lawyers who participated in the questionnaire commented that in their experience only about 1% of experts presented to the court were disqualified by the judge and one judge reiterated that non qualification of experts did not happen enough.⁴⁶ The lawyers explained that because Canadian trials were more commonly presided over by judges, rather than juries, judges were reluctant to refuse evidence and were more willing to accept experts as they may provide evidence that will assist the court or as one lawyer commented it may make it easier for the judge.⁴⁷

The US is more aggressive about assessing the reliability of expert's evidence. However, Canada has not followed the United States model which includes pre-trial Daubert hearings requested by counsel for the court to assess the admissibility of expert evidence. Although the hearings are part of extensive US court reforms known as the Daubert trilogy brought about to control the admissibility of so called "junk science", the hearing does alert the trial judge to potential disputes concerning experts and require the court to strictly evaluate and make a preliminary determination concerning the

⁴⁴ Blackwell, Richard. "The case against expert witnesses". Globe and Mail, Nov. 29, 2006 retrieved Dec. 21, 2006 from http://www.theglobeandmail.com/servlet/story/lac.20061129.rlawmain29/ppvstory?url_article

⁴⁵ Bubela, Tania M., Expert Evidence: The Ethical Responsibility of the legal Profession, Alberta law Review,(2004)41Alta.L.Rev.853-870, www.lexisnexis.com/ca/legal/results/docview.pdf p.48

⁴⁶ Best Practices for the Role and Scope of a Financial Expert Witness in Canadian Courts, Counsel Questionnaire Results, Q.8, Giving Evidence in Court Appendix B

⁴⁷ Ibid. Q.13, View of the Role of Financial Expert Witness, Appendix B

admissibility of proposed evidence.⁴⁸ This pretrial process could apply to experts not proffering ‘junk science’. One legal questionnaire participant felt that “although it is more significant in the US because they have more jury trials than in Canada, it could still offer a preview of the opponent’s expert case at an earlier stage than a voir dire hearing allows, thus reducing the need to hire responding experts if not necessary and reduce the amount of unnecessary expert testimony in Canada by drawing the judges’ attention to admissibility in a more formal manner.”⁴⁹

Unfortunately, the tests for reliability, as they are currently articulated set the threshold for admissibility relatively low and even though trial judges have been encouraged to act as “gatekeepers”, it is likely that questionable expert evidence is still being admitted.⁵⁰ The court must focus on the appropriate use of expert evidence and strictly evaluate the need. The judge must ensure that the expert understands his duty to the court, is not biased and that the expert evidence will not mislead the trier of fact. The Rules of Civil Procedure give the judges responsibility for the experts that testify in court but as of yet, no criteria for the evaluation of the information has been established in Canada. It is currently at the judge’s discretion to determine what evidence can be used as a basis for the decision.⁵¹ It may be that courts have sufficient powers to control and manage expert evidence, but do not always use these powers effectively.⁵²

⁴⁸ Reeg, Kurtis B, Bebout, Cawood K. What’s it all about Daubert?
<http://www.mobar.org/journal/1997/novdec/debout.htm> (Accessed May 11, 2007)

⁴⁹ Best Practices for the Role and Scope of a Financial Expert Witness in Canadian Courts, Counsel Questionnaire Results, Q.9, Giving Evidence in Court

⁵⁰ Bubela, Tania M., Expert Evidence: The Ethical Responsibility of the legal Profession, Alberta law Review,(2004)41Alta.L.Rev.853-870,p.22 www.lexisnexis.com/ca/legal/results/docview.pdf p.48

⁵¹ Ibid. p. 54

⁵² Ibid. p. 50

Provincial Rules

The courts power to control and manage expert evidence come from the procedural rules and the Evidence Act so it is important to review each of the jurisdictions present rules as they apply to experts.

In Canada, the federal courts as well as all provinces and territories except Quebec, are common law jurisdictions which trace their history to England. Quebec is a civil law jurisdiction, borrowing its law from France. There are significant differences in the civil and common law systems and there are significant differences in the laws that apply in Quebec compared to the rest of the country. For that reason the following chart only considered the procedural rules in the common law provinces and the federal court.

The court procedural rules for each province and the federal courts govern the conduct of all civil actions brought before the court. The rules of Evidence control the presentation of facts before the court, regulating both what matters are and are not admissible before the court and the method by which admissible facts are placed before it.⁵³ Each province has its own set of procedures including rules governing the use of expert witnesses and expert evidence. It is valuable to understand and compare these rules as background for considering the best practices for expert witnesses as they must comply with the current

⁵³ Prehogan, Kenneth, A Microscopic Look at your Forensic and Investigative Reports, Association of Certified Forensic Investigator of Canada, 9th Annual Fraud Conference & Workshop, May,6,7&8, 2007 p.4

rules. The rules relating to experts have been summarized in the reference chart beginning on page 22, for ease of comparison.

When reviewing this chart it is important to consider the striking similarities and differences within the different jurisdictions. The following areas have been highlighted because they have specifically been considered by provincial reform commissions in light of reforms in jurisdictions outside of Canada or were addressed as issues by the participants in the Best Practices questionnaires. These points will be discussed in more detail in the sections dealing with Provincial Reforms and Best Practices.

Similarities

- In all jurisdictions the expert's duty to the court has not been specified. This is important in light of the fact that independence is viewed as such an important criteria for the expert witness and one that appears to be the most significant breach that expert's make in court.
- The criteria for the admissibility of expert testimony is not codified but based on jurisprudence in all jurisdictions. This has created some uncertainty as judges' interpretations may vary.
- There are no rules to order the use of joint experts, with the exception of B.C.'s Expedited Procedure Rule 68 that allows court ordering a single joint expert to be used.⁵⁴
- All jurisdictions allow for the court to appoint an expert although it exercised rarely.

⁵⁴Rule 68, www.ag.gov.bc.ca/courts/civil/info/rule_68_brochure.pdf (accessed May 11,2007)

- Judges must qualify all experts for testimony and counsel can bring a Voir Dire Motion to establish credibility of the expert. It appears that Voir dire motions are not common in civil courts and the judges do not disqualify experts enough.

Differences

- There are a variety of rules on the limit of the number of expert witnesses allowed to testify and in some cases no limits. This is important considering the general perception that there are too many expert witnesses, causing delays and high costs.
- There are differences in the prescribed criteria for the form of expert reports. This is important as establishing consistency and comparability in reports will assist the court.
- Although most jurisdictions have not rule requiring pretrial conferences, Alberta judges may order them in Very Long trials⁵⁵ as well as New Brunswick judges who may order them in connection with settlement conferences. Pretrial conferences are beneficial for disclosure and reducing the number of contentious issues between opposing experts.
- B.C. is markedly different from other jurisdictions in that they have an implied waiver of solicitor client privilege over working papers and other communication when the expert takes the stand. This results in more disclosure which is sometimes used to challenge the expert's credibility. It also seems to have resulted in the hiring of shadow experts who provide privileged advice to counsel but increase litigation costs.⁵⁶

⁵⁵ Alberta Rules of Court Project, Expert Evidence and Independent Medical Examinations, Feb. 2003, www.law.ualberta.ca/alri/docs/cm12-3.pdf (accessed April 28, 2007)

⁵⁶ Woods, Thomas S. Impartial Expert or "Hired Gun": Recent Developments at Home and Abroad, www.lawsonlundel.com/resource/hiredgun.pdf (accessed April 28, 2007)

Comparison of Rules of Civil Procedure Relating to Expert Witnesses in Canadian Jurisdictions

	Federal Court Rules	Alberta Rules of Court	B.C. Supreme Court Rules	Ontario Rules of Civil Procedure	Manitoba Court of Queen Bench Rule	Saskatchewan Rules of Practice and Procedure	PEI Rules of Civil Procedure	New Brunswick	Newfoundland/Labrador Supreme Court Rules	Nova Scotia Civil procedure Rules
Expert's Duty to the Court Specified	Not Specified although role to assist the trier of fact is based on jurisprudence	Not Specified although role to assist the trier of fact is based on jurisprudence	Not specified although role to assist the trier of fact is based on jurisprudence Recommended that rules be amended to include expert certification	Not Specified although role to assist the trier of fact is based on jurisprudence	Not Specified although role to assist the trier of fact is based on jurisprudence	Not Specified although role to assist the trier of fact is based on jurisprudence	Not Specified although role to assist the trier of fact is based on jurisprudence	Not specified although role to assist the trier of fact is based on jurisprudence	Not Specified although role to assist the trier of fact is based on jurisprudence	Not Specified although role to assist the trier of fact is based on jurisprudence
Criteria for admissibility of Expert testimony	Not codified, based on jurisprudence ⁵⁷	Not codified, based on jurisprudence	Not codified, based on jurisprudence	Not codified, based on jurisprudence	Not codified, based on jurisprudence	Not codified, based on jurisprudence	Not codified, based on jurisprudence	Not codified, based on jurisprudence	Not codified, based on jurisprudence	Not codified, based on jurisprudence
Limit on the number of experts to testify	Limited to 5 per side per issue Evidence Act, RS 1985 C-5, s7	No limit	Silent on Limits except in Expedited Procedure Project Rule 68 Cases where limited to 1 expert	Limited to 3 without leave from court Evidence Act 12	Limited to 3 without leave from court Evidence Act s25	Limited to 5 per side per issue Evidence Act, RSS 1978, c.S-16,s.48	Silent on Limits	Limited to 3 per side per issue Evidence Act, c.E-11,s.23	May be limited by the court 46.05	May be limited by the court in the pretrial conference 36.01(d)
Joint experts	No rule	No rule	No rule except Expedited Procedure Rule 68 allows court to order parties to use single joint expert. Court provides instructions based on party input 68(41)(j)	No rule	No rule	No rule	No rule	No rule	No rule	No rule

⁵⁷R v. Mohan, [1994] 2S.C.R.9

	Federal Court Rules	Alberta Rules of Court	B.C. Supreme Court Rules	Ontario Rules of Civil Procedure	Manitoba Court of Queen Bench Rule	Saskatchewan Rules of Practice and Procedure	PEI Rules of Civil Procedure	New Brunswick	Newfoundland/ Labrador Supreme Court Rules	Nova Scotia Civil procedure Rules
Court appointed Expert	Court has right to appoint expert with limited scope 52	Court has right to appoint expert 218 Parties can still appoint their own expert 218(4)	Court has right to appoint expert and provide instructions with party consultation 32A(1)	Court on own initiative or by motion of the parties, has right to appoint expert with limited scope 52.03(1)	Court has right to appoint expert with limited scope 52.03(10)	Court has right to appoint expert with limited scope 288	Court has right to appoint expert with limited scope 52.03	Court has right to appoint expert with limited scope 54.03	Court has right to appoint expert 35.01(1) any party can call 1 expert on giving reasonable notice 35.05	Court has right to appoint expert with limited scope 23
Prescribed Criteria for Form of expert report	Report signed with Name, address, qualifications and the substance of proposed testimony 53.03	Certain matters to be addressed 218.1(1) but no detailed requirements for content Practice note 10 has criteria for reports on economic loss or damage	Name, address, qualifications and facts and assumptions on which the opinion is based 40A(5)	Report signed with Name, address, qualifications and the substance of proposed testimony 53.03	Signed Report ,No other criteria 53.03(2)	Name, address, qualifications and the substance of proposed testimony with written report 284D(1)	Full opinion, including essential facts on which the opinion is based, summary of qualifications and summary of grounds for each opinion 53.03(1)	Signed report with Name, address, and qualifications and substance of his opinion 52.01(1)	No criteria	Full opinion, including essential facts on which the opinion is based, summary of qualifications and grounds for each opinion 31.08 Judge can order to comply 31.08(3)
Timelines for exchange of expert reports	60 days before trial for primary 279(b) 30 days for rebuttal 281	120 days before trial for primary 218.1(1) and 60 days for rebuttal 218.1(2)	60 days prior to being tendered into evidence for primary 40A2 no rebuttal specified	90 days prior to trial for primary 60 days for rebuttal 53.03(1)	Included in pretrial brief 53.03	10 days prior to pretrial conference for primary 15 days of assignment of trial date for rebuttal 284(C) 284(D)3	30 days of filing notice of trial for primary 53.03 No rebuttal	As soon as practical but no later than the Motions date 52.01(1)	10 days prior to trial 46.07 No rebuttal	30 days of filing notice of trial for primary 31.08 No rebuttal

	Federal Court Rules	Alberta Rules of Court	B.C. Supreme Court Rules	Ontario Rules of Civil Procedure	Manitoba Court of Queen Bench Rule	Saskatchewan Queen's Bench Rules	PEI Rules of Civil Procedure	New Brunswick	Newfoundland/Labrador Supreme Court Rules	Nova Scotia Civil procedure Rules
Sanctions if break timing rules	Expert not admissible without leave 279	Expert not admissible without leave 218.1	Expert not admissible without leave 40A(7)	Expert not admissible without leave 53.03(3)	Expert not admissible without leave 53.03(3)	Expert not admissible without leave	Expert not admissible without leave 53.03(1)	Expert not admissible without leave 52.01(3)	Expert not admissible without leave 46.07	Expert not admissible without leave, Judge may order to comply 31.08(3)
Objections to expert report	Voir Dire Motion brought by counsel during direct examination to establish credibility of expert or Judge qualify Expert at trial	Objection filed 60days after primary report and 30 days after rebuttal 218.14(1)	Voir Dire Motion brought by counsel during direct examination to establish credibility of expert or Judge qualify Expert at trial	Voir Dire Motion brought by counsel during direct examination to establish credibility or expert or Judge qualify Expert at trial	Voir Dire Motion brought by counsel during direct examination to establish credibility or expert or Judge qualify Expert at trial	Voir Dire Motion brought by counsel during direct examination to establish credibility or expert ,Judge qualify Expert at trial	Voir Dire Motion brought by counsel during direct examination to establish credibility or expert or Judge qualify Expert at trial	Voir Dire Motion brought by counsel during direct examination to establish credibility or expert or Judge qualify Expert at trial	Voir Dire Motion brought by counsel during direct examination to establish credibility or expert or Judge qualify Expert at trial	Voir Dire Motion brought by counsel during direct examination to establish credibility or expert or Judge qualify Expert at trial
Pretrial conferences of Experts	At pretrial conference memorandums must include affidavits from experts 258(4)	Optional in Very Long Trial Actions, Judge may order 218.9(1)	No rule.	No rule	No rule	No rule	No rule	Connection with settlement conferences judges may order expert conference 50.09	No rule	No rule
Experts examined for discovery	Right to examine with leave from the court 280(3)	Only in Very Long Trial Actions with leave from the court and limited to report 218.8	Expressly excluded unless other side can't obtain facts or opinions on subject any other way 28.2	No right to examine and expressly excluded from non-parties that can be examined with leave 31.10	No right to examine and expressly excluded from non-parties that can be examined with leave 31.10	No right to examine and expressly excluded from non-parties that can be examined with leave 222A	May be discovered with leave	Expert not precluded from discovery 32.10	Right to examine on matters that are not privileged with leave from the court 31	Right to examine on matters that are not privileged with leave, opposite party must pay for attendance 18.01

	Federal Court Rules	Alberta Rules of Court	B.C. Supreme Court Rules	Ontario Rules of Civil Procedure	Manitoba Court of Queen Bench Rule	Saskatchewan Queen's Bench Rules	PEI Rules of Civil Procedure	New Brunswick	Newfoundland/Labrador Supreme Court Rules	Nova Scotia Civil procedure Rules
Requirement for the Expert to attend Trial	Must be available for trial but with leave of court and consent of parties report alone may be read 279, 280	May call to testify 218.13 written opinion can be admitted as correct 230.1	Oral testimony optional. Adverse party may demand attendance for examination and pay costs 40A(3)	Silent on whether expert attendance can be dispensed with	Report alone is admissible but any party may require attendance for cross examination 53.03	Either party may require expert to attend with receive 10 days	Required to attend unless party receiving report gives notice not required 53.03(2)	Report alone acceptable with consent from all parties 52.01(5)	Silent on whether expert attendance can be dispensed with	Required to attend unless party receiving report gives notice not required 31.08(4)
Guidelines Governing Conduct of Expert	No rule. Handled by professional bodies	No rule. Handled by professional bodies	No rule. Handled by professional bodies	No rule. Handled by professional bodies	No rule. Handled by professional bodies	No rule. Handled by professional bodies	No rule. Handled by professional bodies	No rule. Handled by professional bodies	No rule. Handled by professional bodies	No rule. Handled by professional bodies
Restricted Privilege - Expert Witness Draft reports and file producible in Court	Although no consensus, trend is to the restriction of litigation privilege regarding the files of expert witness based on jurisprudence	Although no consensus, trend is to the restriction of litigation privilege regarding the files of expert witness based on jurisprudence	Yes. Based on jurisprudence there is an implied waiver of solicitor client privilege over working papers and most other communication when expert witness called to stand. ⁵⁸	Based on jurisprudence Litigation privilege does not apply to file documents that influenced the opinion unless part of lawyer's litigation brief ⁵⁹	Although no consensus, trend is to the restriction of litigation privilege regarding the files of expert witness based on jurisprudence	Although no consensus, trend is to the restriction of litigation privilege regarding the files of expert witness based on jurisprudence	Although no consensus, trend is to the restriction of litigation privilege regarding the files of expert witness based on jurisprudence	Based on jurisprudence Litigation privilege does not apply to file documents that influenced the opinion unless part of lawyer's litigation brief ⁶⁰	Although no consensus, trend is to the restriction of litigation privilege regarding the files of expert witness based on jurisprudence	Although no consensus, trend is to the restriction of litigation privilege regarding the files of expert witness based on jurisprudence
Review of Rules, including Expert Rule, ongoing	Yes. Rules Committee Amendments 2004	Yes. Alberta Rules of Court Project	Yes. New Supreme Court Rules Effective and Affordable Justice	Yes. Civil justice Reform Project	Yes. Manitoba law Reform Commission					Yes. Civil Procedure Rules Revision Project 2005

⁵⁸ Vancouver Community College v. Phillips, Barratt (1987), 20 BCLR

⁵⁹ General Accident Assurance Company et al. v. Chrusz et al. (1999), 45 OR(3d) 321 (CA)

⁶⁰ Edgar v. Ault et al.(2000), 184 DLR (4th)747(NBCA)

Court Reforms

As noted, the general concern about the judicial process has motivated many common law jurisdictions, to review their court rules in an effort to make justice less time consuming and more affordable. Experts are seen as part of the problem and the rules relating to the role of expert witnesses are also being reviewed. One of the leaders in civil court reforms is Great Britain, where what has become known as the Woolf reforms have been implemented. A detailed review of the Woolf reforms which affect expert witnesses is important as they have impacted many of our provincial considerations for reform.

Woolf Reforms

In 1994 Lord Woolf was invited by the British government to examine the civil justice system in order to improve access to justice and reduce the cost of litigation. Lord Woolf made a series of recommendations for law reform that aimed to change the culture of litigation. These were principles of openness and co-operation between the parties, the concept that control of the litigation should be wrested from the parties and placed with the court, the concept that all litigation should be proportionate to the value of the case (in terms of monetary value or what is at stake), and the principle that court-based litigation should be the last resort. The major recommendations were brought into force by the Civil Procedure Rules 1997.⁶¹

When considering the problems of the civil justice system, Lord Woolf identified experts as high on his list. There were problems with the inappropriate and excessive use of experts, their expense, availability for trial, unevenness and complexity of their reports and most crucially a

perception that they were not always independent of those instructing them.⁶² A large litigation support industry, generating a multi-million pound fee income, has grown up among professions such as accountants, architects and others. With the abundance of experts, counsel often uses them as a weapon to take advantage of the opposing side's lack of resources or knowledge. This goes against all principles of proportionality, access to justice and the purpose of the adversarial system to achieve just results.⁶³

Woolf explains the objectives for the reforms to the Civil Procedure Rules as follows:

“I do not recommend a uniform solution, such a court appointed expert for all cases. My overall objective is to try, from the start, to foster an approach to expert evidence which emphasizes the expert's duty to help the court impartially on matter within his expertise, and encourage a more focused use of expert evidence by a variety of means. We should avoid mounting a contest between opposing experts where justice can be achieved between the parties without it. The key to achieving this is flexibility, there is no single answer that would apply to all cases.⁶⁴

Contributions to the inquiry from experts themselves suggest that there is a degree of uncertainty among them as to their duties, and a perceived conflict between their professional responsibilities and the demands of the client who is paying their fee. Experts would welcome the formal recognition of their role as advisers to the court rather than advocates of the parties.”⁶⁵

The significant rules in the Civil Procedure Rules which apply to expert witnesses are summarized as follows:

CPR 35.3 states

- (1) It is the duty of an expert to help the court on the matters within his expertise.
- (2) This duty overrides any obligation to the person from whom he has received instruction or by whom he is paid.

CPR 35.10 notes the following must be included in the expert report

⁶¹ Musgrove, Robert, Lord Woolf's Reforms of civil justice, their impact, and the future for civil justice reform in England and Wales, *The Advocates' Society Journal*, 25 *Advocates' Soc.J.No.1.* 4-10 p118

⁶² Preysner, Professor John, *The Management of Civil Cases: The Courts & Post-Woolf Landscape*, www.dca.gov.uk/research/2005/9_2005_full pdf. (accessed May 7, 2007)

⁶³ Woolf, Rt. Honourable the Lord, Master of the Rolls, *Access to Justice Final Report* July 1996, p.2 www.dca.gov.uk/civil/final/sec3c.htm (accessed Apr. 27, 2007)

⁶⁴ *ibid* p12

⁶⁵ *ibid* p 28

- it must be addressed to the court, with a statement that his duties are understood (It does not imply that the expert is to be instructed by the court, but is intended to concentrate the expert's mind as he writes the report on his paramount duty to the court.⁶⁶)
- the substance of all material instructions must be disclosed
- where there is a range of opinions, they must be summarized and reasons given for coming to the opinion that he does practice direction 35
- a statement of truth must be included practice direction 35

CPR 35.1 and 35.4 emphasize the courts power to limit the number of experts. It is the duty of the parties to justify to the court why an expert is required. The courts are scrutinizing such applications carefully.

CPR 35.7 states that if the court agrees that expert evidence on an issue is required, it may order that such evidence be given by one expert only. That expert is agreed by the parties and, if they cannot agree, the court can prescribe some mechanism for such an expert to be decided upon. This will generally be an appointment by the president of the relevant professional body, and not by the court. The court acknowledges that due to the size and complexity of many of the cases dealt with in the Commercial court, single experts will not frequently be appropriate. The court envisages that a party may wish to appoint its own expert to advise in circumstances where a single joint expert is appointed. The court however, casts doubt on whether a party will be able to recover those costs.

Rule 35.12 envisages discussions between party appointed experts to identify and to narrow the issues and to produce a statement as to what is agreed and what remains in issue. It is important that experts communicate at the earliest possible stage in the case to establish that they are answering the same questions or addressing the same issues.⁶⁷

In addition to the revised Civil Procedure Rules, the Civil Justice Council has issued a Protocol for the instruction of Experts to give Evidence in Civil Claims. This Protocol recognized the Expert witnesses perform a vital role in civil litigation and to enhance that role, offers guidance to experts and those instructing them in the interpretation and compliance with Part 35 of the

⁶⁶ Woolf, Rt. Honourable the Lord, Master of the Rolls, Access to Justice Final Report July 1996, p.30 www.dca.gov.uk/civil/final/sec3c.htm (accessed Apr. 27, 2007)

⁶⁷ *ibid* p 48

Civil Procedure Rules. The protocol is not codified but does set standards for the use of experts and the conduct of experts and counsel to best serve the court.⁶⁸

In England, they have also launched the Expert Witness Institute, Lord Woolf acts as president, is an umbrella organization covering all professions, to promote high standards for expert evidence, which offers educational programs, standards and accreditation.⁶⁹

Before considering recommendation of the Woolf reforms to any Canadian Jurisdiction it is important to consider whether they have been successful in their objective of improving access to justice and reducing the cost of litigation. More specifically consider the success of reforms related to experts; whether there has been a reduction in the inappropriate and excessive use of experts; the unevenness and complexity of their reports and a change to the perception they were not always independent.⁷⁰ The reforms have been in place for 10 years, sufficient time to measure success.

In summary, the English civil procedure reforms are working reasonably well. The English system is controlling some of the more burgeoning aspects of litigation, such as the use of experts and document disclosure. It is able to do this because the court has the authority to

⁶⁸ Civil Justice Council, Protocol for the instruction of Experts to give Evidence in Civil Claims, www.justice.gov.uk/civil/procrules_fin/contents/form_section_images/practice_directions/pd35_pdf_esp/pd35_prot.pdf

⁶⁹ Laydon, Michael, Learning to be Good Witness, Accountancy Age 14 Dec. 1996
www.managementconsultancy.co.uk/articles/print/2014714. (accessed April 21, 2007)

⁷⁰ Preysner, Professor John, The Management of Civil Cases: The Courts & Post-Woolf Landscape, www.dca.gov.uk/research/2005/9_2005_full pdf. (accessed May 7, 2007) p.22

intervene in the way in which cases are managed. The court is able to do this because it has the resources as a result of the caseload falling to a considerable, even remarkable, extent.⁷¹

The most tangible effect of the Woolf reforms is that litigation in the High Court has reduced by about 80% and litigation in the county courts by over 20%. The overall decrease in general litigation has been 25 to 30 %.⁷² From various surveys, 80 – 90% of lawyers have stated they are in favour of the reforms and consider that the reforms have improved the civil justice system.⁷³

As for the comments that relate specifically to the reforms to expert witnesses, the expert's duty to the court and the presumption of a single joint expert in fast track cases have been successful in terms of proportionality, cost and driving out the "hired gun" expert. Joint experts are being used in 41% of the cases involving any expert witness. 56% of the respondents expressed some concerns about the use of single joint experts, with increasing costs from party shadow experts being frequently mentioned as "front loading" the case fees.⁷⁴ Although others consider that procedures are front ended as far as expense go but it has promoted better informed settlements. Parties appear generally happy to accept the report of a joint expert in the smaller cases.⁷⁵ 82% of lawyers felt that the single joint experts were appropriate in fast-track cases, a slimmer majority, 54% thought they were appropriate in the more complex multi-track cases.⁷⁶ For larger

⁷¹ Musgrove, Robert, Lord Woolf's Reforms of civil justice, their impact, and the future for civil justice reform in England and Wales, The Advocates' Society Journal, 25 Advocates' Soc.J.No.1. 4-10, p.116-125 para. 71

⁷² Ibid. para 30

⁷³ Ibid para. 33

⁷⁴ New Supreme Court Rules www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf

⁷⁵ Musgrove, Robert, Lord Woolf's Reforms of civil justice, their impact, and the future for civil justice reform in England and Wales, The Advocates' Society Journal, 25 Advocates' Soc.J.No.1. 4-10, p.116-125 para 41

⁷⁶ New Supreme Court rules www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf appendix N

cases, Woolf says the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence. It is hoped in the majority of cases it will not only be the first step but the last.⁷⁷ The court appears to have control over the number of experts in larger cases by determining how many experts will be instructed and on what issues.

Beyond the procedural reforms, the quality of experts and their reports is also fairly well controlled by the Expert Witness Institute, originally headed by Lord Woolf, and a small number of powerful representative bodies, which have various informal accreditations and training schemes in place to ensure good quality work.⁷⁸

Provincial Reforms

The law and institutions are constantly tending to gravitate. Like clocks, they must be occasionally cleansed, and wound up and set to true time. Henry Ward Beecher⁷⁹

It appears Canadian jurisdictions have realized it is time to set their procedural rules to true time and have embarked on reform reviews, often looking to the Woolf Reforms for guidance.

Recommendations of the various provincial reforms currently underway are summarized in the following chart. The highlights are discussed in detail following the chart.

⁷⁷ Musgrove, Robert, Lord Woolf's Reforms of civil justice, their impact, and the future for civil justice reform in England and Wales, *The Advocates' Society Journal*, 25 *Advocates' Soc.J.No.1*. 4-10, p.116-125 para. 43

⁷⁸ *Ibid.* para.49

⁷⁹ *Ibid.* para 2

Recommendations for Canadian Rule Reform Relating to Expert Witnesses

	Federal Court Rules Committee Amendments 2004⁸⁰	Alberta Rules of Court Project	British Columbia New Supreme Court Rules Effective and Affordable Justice	Ontario Civil Justice Reform Project	Manitoba Law Reform Commission	Nova Scotia Civil Procedure Rules Revision Project 2005
Goal of Reform consideration	To encourage full and candid settlement discussions to reduce matters for trial	Reforms to advance justice system objectives for civil procedure such as fairness, accessibility, timeliness and cost effectiveness	That all proceedings are dealt with justly and pursuant to the principles of proportionality	Enhance access to justice by developing means to promote more efficient, less expensive dispute resolution	To address costs and delays of litigation	Comprehensive review and revision to deal with concerns about delays, costs and undue complexity of court proceedings
Express Confirmation of Expert's Duty to the Court	Not Specifically addressed	Not Specifically addressed	Recommended that rules be amended to include expert certification that duty to the court overrides duty to party who pays	Support rule mandated certification of duty of expert to the court in report	Not Specifically addressed	Not Specifically addresses
Instructing Experts in a Transparent manner	Not specifically addressed.	Not specifically addressed.	Issues for expert to be determined by Judge in case planning conference	Support transparent instruction of experts	Not specifically addressed.	Material, assumptions and facts instructed to consider be included in report
Limit on the number of experts to testify	No change	No change. Will limit numbers by giving advance notice of expert with summary of evidence and allowing objections	To be determined by Judge in case planning conference	Court to regulate number of experts based on principles of fairness and proportionality. Increased vigilance by court to ensure admissibility	No change	No change recommended
Use of Single Joint Experts wherever appropriate	Not specifically addressed	Recommended use by consent or with leave of the court only. Requiring use would cause delays and court applications to deal with selection and instruction. Conclusion requiring single joint experts was not practical	To be considered by judge in case planning conference. Applies in Rule 68 Expedited Procedure cases but success has not been determined to support recommend broad requirement of single joint experts.	Remains the option of the parties. Single joint expert unsuitable in certain cases. Did not decide on how experts to be selected if parties did not agree. Believed that less dramatic reforms as certifying obligation and information exchange would achieve results	Where parties agree to appointment of joint expert.	Not addressed specifically

⁸⁰ www.fca-caf.gc.ca/bulletins/notices/discussion_en.pdf (accessed May 10, 2007)

	Federal Court Rules Committee Amendments 2004	Alberta Rules of Court Project⁸¹	British Columbia New Supreme Court Rules Effective and Affordable Justice⁸²	Ontario Civil Justice Reform Project⁸³	Manitoba⁸⁴ Law Reform Commission	Nova Scotia Civil Procedure Rules Revision Project 2005⁸⁵
Court appointed Expert	Not change recommended	No change recommended	To be determined by judge in case planning conference. This right although already in existence is underused and should be considered when appropriate.	No change recommended	Expand use to save costs, provide a moderate view when there are 2 expert extremely divergent views, or to equalize financial access to experts. Court will select if parties can't agree, court provide instructions with consultation with parties. Expert available for cross examination	No change recommended
Prescribed Criteria for Form of expert report	No change recommended	Draft guidelines for Experts include requirements for common matters addressed or that should be addressed in expert reports, recommendation that these be included in the rules	Not specifically addressed	Not specifically addressed	Not specifically addressed	Recommend standardized reports to include qualifications, details of literature and material used, statement of assumptions, reasons for opinions, facts, matters and assumptions instructed to use, declaration that all relevant material considered
Timelines for exchange of expert reports	Reports must be available 20 days prior to pre-trial conference for primary report and 7 days prior for rebuttal.	No change.	To be determined by judge in case planning conference	Recommended by Task Force on the Discovery Process in Ontario that serving expert reports be related to pre-trial settlement conference	Not specifically addressed	Recommended change to 120 days before trial for primary report and 45 days for rebuttal

⁸¹ www.law.ualberta.ca/alri/docs/cm12-3.pdf (accessed April 28, 2007)

⁸² www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf

⁸³ www.advocates.ca/pdf/Final_Report.pdf

⁸⁴ www.gov.mb.ca/justice/mlrc/pubs/publications.html

⁸⁵ www.courts.ns.ca/rules_revision/revision.html

	Federal Court Rules Committee Amendments 2004	Alberta Rules of Court Project	British Columbia New Supreme Court Rules Effective and Affordable Justice	Ontario Civil Justice Reform Project	Manitoba	Nova Scotia Civil Procedure Rules Revision Project 2005
Pretrial conferences of Experts, if two or more are needed	At pretrial conference memorandums must include affidavits from experts	Recommend conferences should remain optional in Very Long Trial Actions. No support for requiring conferencing due to cost and time delays. If conferencing identified weak expert would just hire new one causing more delays.	Necessity of expert conferences to be determined at Case Planning conference	Guideline best practice that experts confer on without prejudice basis to arrive at a list of areas of disagreement. List to be provided to parties and filed with court. Would narrow issues prior to trial. More active case management to resolve issues of expert evidence supported.	No rule	Not specifically addressed
Experts examined for discovery	Not specifically addressed	Recommend the court be permitted to grant leave for discovery but that it should only be in exceptional circumstances and there be a heavy onus on party seeking discovery to justify necessity.	Not specifically addressed	Unanimously rejected pre-trial discovery of experts as too costly and increase delays	Not specifically addressed	No discovery as of right
Expert Files producible in court	Not specifically addressed	Not specifically addressed	Recommend that only material upon which the expert has relied is producible in court. This change is to eliminate current need to hire shadow expert to prevent disclosure of communication	If expert testifies, obligation arises to make available prior to testimony expert's file, including draft reports	Not specifically addressed	Not specifically addressed
Guidelines Governing Conduct of Expert	Handled by professional bodies	Not to be included in rules left to professional bodies to govern. Include best practices to assist experts preparing for court appearance	No rule. Handled by professional bodies	No rule. Handled by professional bodies	No rule. Handled by professional bodies	To be handled by professional bodies

Lord Woolf's conclusions about the English system mirror concerns expressed about the civil justice systems across Canada; the system is too slow, too expensive and too complex and experts are part of this problem.⁸⁶ Ontario's Final report Streamlining the Ontario Civil Justice System, A Policy Forum also noted that civil litigators were increasingly concerned that the costs and delays in resolving civil disputes in our courts made our civil justice system inaccessible to average Canadians. Enhanced resources would be of help but participant acknowledged that the time has come to foster thoughtful discussion and debate on law reform measures aimed at streamlining the civil justice system.⁸⁷ These sentiments have been reiterated by all active law reform groups in BC, Alberta, Manitoba as well as the Federal Court.

It has been recognized that there is a need to limit the use of experts and eliminate the adversarial nature of experts. The Honourable Geoffery Davies, A.O. summarized the reasons why change from the traditional approach was necessary as follows

- Adversarial bias and polarization – the natural human tendency to feel the need to do your best for the side you represent results in the polarization of opinions and may result in a distortion of both the real question and the real answer. The result is often a “battle of the experts”
- Complexity – the more complex the question the harder it is for the non-expert judge to determine the extent to which contradictory expert opinions are reliable.

⁸⁶ Dennis, Craig P., Proportionality: a More Effective Tool, www.bcjusticereview.org/working_group/.../cle_paper_09_29_05.pdf accessed May 17, 2007

⁸⁷ Final Report Streamlining the Ontario Civil Justice System, A Policy Forum, Mar. 9, 2007, www.advocates.ca/pdf/Final_Report.pdf (accessed April 22, 2007)

- Cost- There is waste and duplication in selecting and discarding experts, preparing experts for trial and cross-examining opposing experts.⁸⁸

The participants in the Ontario also expressed frustration at the absence of a mechanism to deal with issues relating to expert evidence prior to the commencement of a trial as well as concern about the failure, except in rare cases, of experts to share information with each other and the absence of any provision in the rules for a conference of opposing experts focused on attempting to narrow the issues prior to trial.⁸⁹

Each of the law reform groups considered the Woolf Reforms given their apparent success. As noted those reforms were aimed at changing the culture of litigation by wresting the control of the litigation from the parties and placing it with the court and sought to introduce principles of openness which included a number of measures targeted at the proliferation of expert evidence including defining the expert's overriding duty to the court, use of the single joint expert, pre-trial conferences. The applicability and practicality of each of these measures have been seriously considered and debated by the Canadian jurisdictions before making their recommendations. The significant recommendations that relate to expert witnesses that have come out of the provincial and federal law reform task forces are as follows.

- ▶ Both B.C. and Ontario law reform groups recommended that the Rules be amended to include the expert certification that duty to the court overrides any obligation to the party

⁸⁸ New Supreme court rules – effective and Affordable Justice, www.bcjusticereview.org/working_group/civil_justice/cjrwg_report_11_06.pdf (Accessed May 11, 2007)

⁸⁹ Final Report Streamlining the Ontario Civil Justice System, A Policy Forum, Mar. 9, 2007, www.advocates.ca/pdf/Final_Report.pdf (accessed April 22, 2007)

who retained them. The expert is to include the certification that they are aware understand this duty. The purpose of this recommendation is to remind experts that they are not advocates but are to provide independent assistance to the court. It is believed that there can be no downside to including the expert certification in the Rules and there is hope that it will reduce the adversarial nature of the relationship between experts which is contributing to the costs and delays of court proceedings.⁹⁰ Equally important is the fact that inclusion in the Rules will also remind counsel of the expert's duty to the court and reduce the pressure exerted for the expert to abandon independence to support counsel's view.

► Ontario and Nova Scotia support the transparent manner of instructing experts. This is important to making reports with diverging opinions more understandable and comparable by ensuring the users are clear about the instructions that serve as a basis for the expert's opinion.

► Also to aide in ensuring expert reports are more understandable and comparable and therefore more useful to the court, Alberta's law reform group developed draft guidelines that set out the matters addressed or that should be addressed in an experts report and recommended that they should be included in the rules. The requirements were similar to Nova Scotia's recommended standardized reports which includes expert qualifications, details of material reviewed, statement of assumptions, reasons for opinion, facts matters

⁹⁰ Final Report Streamlining the Ontario Civil Justice System, A Policy Forum, Mar. 9, 2007, www.advocates.ca/pdf/Final_Report.pdf (accessed April 22, 2007)
New Supreme court rules – effective and Affordable Justice, www.bcjusticereview.org/working_group/civil_justice/cjrwg_report_11_06.pdf Accessed May 11, 2007

and assumptions instructed to use and a declaration that all relevant material was considered.

▶ Although all jurisdictions have codified the court's right to appoint experts, both B.C. and Manitoba felt that the right was underused and should be considered more often when appropriate. Given the adversarial court system where the litigants gather the information, it was felt that there must be consent for this practice and the method of selection.

However, it was felt that justice is best served when all relevant information is before the courts and that there would be situations where an issue could be resolved quickly at little cost with a court appointed expert.

▶ The provincial law reform groups' support of the use of single joint experts was only with consent. In BC it is common in Rule 68 Expedited Procedure cases but because it had not been thoroughly tested it was not recommended the single joint experts should be a general requirement. It was recognized that with the use of joint experts come issues regarding selection and instructions which may cause additional delays.⁹¹

▶ There was no support for required pre-trial conferencing for experts. It was recognized that it would be very helpful to narrow issues, however, it was recommended that they remain optional or encouraged as best practices due to potential increased cost and time delays. It was believed that in conferencing, if a weak expert was identified then counsel would just hire another one, running up costs and causing time delays. The same rationale was used for the unanimous rejection of pre-trial discovery of experts.

▶ The BC New Supreme Court Rules group considered the current BC jurisprudence, which recognizes the calling of an expert witness to testify at trial as a waiver of the solicitor-

⁹¹ Alberta Rules of Court Project, Expert Evidence and Independent Medical Examinations, Feb. 2003, www.law.ualberta.ca/alri/docs/cm12-3.pdf (accessed April 28, 2007)

client privilege that normally exempts experts from revealing their communications with the client's lawyer. As a result, opposing counsel routinely required production of the expert's entire file during testimony in order to discredit the opinion of the expert. To avoid this disclosure requirement but still obtain the needed advice from experts, some counsel hired one expert to testify at the trial and a second expert who will not appear at trial but who will only provide the party with advice. The advising expert's file remains protected from disclosure. Although B.C. was applauded across Canada for this tough approach to experts it multiplies cost. Interestingly, the recommendation from the law reform group is that the benefits gained from full disclosure of an expert's file are outweighed by the cost of the resulting incentive to hire a second consulting expert so experts whose reports are served must disclose only the facts, upon which the expert has relied in forming his opinion. The disclosure must be made early in the proceedings. The goal is that this will eliminate the cost of the second expert.

The Judicial Law Reform groups were unanimous in their recommendation that guidelines governing the conduct of experts should be handled by the experts' professional bodies. The CICA has taken the lead, similar to the Expert Witness Institute with its educational programmes, including the accredited DIFA program and the Standard Practices for Investigative and Forensic Accounting Engagements which were published in November with the goal to improve the quality of the expert witness. The CICA, although only applicable to CA's represents a large percentage of the financial experts in Canada. The Institute has acknowledge the criticisms and has prepared standards and offered education to cover all aspect of an engagement in order to protect the public by ensuring consistency with a minimum standard or

practice and a framework for the application of professional judgement.⁹² The Institute also determines appropriate disciplinary actions for non compliance. Although it is still early yet, the standards have been considered by the courts as a measure of acceptable expert practice and are certain to improve the quality and consistency of expert CA's. The CICA has set the standard for other professional organizations to consider in order to improve the quality of their expert witnesses.

Best Practices

The discussion about current Canadian civil procedural rules, reform initiatives and judicial precedence serves as important background information for the discussion about the best practices for the role and scope of the financial expert witness in Canadian civil courts.

Best practices are not fixed, they are flexible practices and their evolvement and development are affected by the current environment. They serve to complement the existing rules to assist experts in better serving the courts.

Research Questionnaires

The best practices relating to the role and scope of the financial expert witness have been identified not through research alone but directly from knowledgeable, experienced financial experts, litigation counsel, who retain the experts, and judges, who experts serve. A separate questionnaire was designed for each of the three groups, to review the role and scope of the expert witness from their perspective in the litigation process. It has been acknowledged that experts contribute to the problems of cost and delay that seem to have impaired our judicial system, but each group needs to consider their involvement in the role of the expert witness in

⁹² CICA Standard Practices for Investigative and Forensic Accounting Engagements, Nov. 2006, Alliance for Excellence in Investigative and Forensic Accounting

the system in order to effect a positive change. Obtaining data on the same issues from different points of view facilitated an analysis of the consistency of the understanding and expectations of the expert witness, bringing attention to the practices of each groups that may require modification if the expert is to better serve the court.

The questionnaires dealt with topics including the role of the expert; the expert engagement, reports, and giving evidence in court from each group's perspective. The questionnaires were designed to rank multiple answers to the questions based on importance or agreement for efficiency. Additional comments were encouraged to expand on questions, touch on areas that were not included in the questions or note recommendations. In two cases meetings were arranged to complete the questionnaire. The questionnaires were anonymous to encourage full participation and disclosure.

The recipients in each group were selected based on my mentor's recommendations and the rankings of the top experts and commercial litigators included in *Lexpert's Guide to the Leading 500 Lawyers in Canada*. This selection process ensured that the participants had the breadth of knowledge and experience across the country to provide meaningful input. Questionnaires were sent to 16 experts, with 7 responding for a 44% response rate; questionnaires were sent to 12 counsel, with 5 responding for a 42% response rate; and questionnaires were sent to 4 judges, with 2 responding for a 50% response rate. To put the response rate in perspective, a conversation with an analyst from Gregg, Allen, Sullivan & Woolstencroft: The Strategic Counsel, indicated that a 20% to 30% response rate for a general or blind survey is considered good. The responses provide very meaningful data, despite the relatively small sample size

because of the depth of expertise of the highly regarded population. The judges had an average of 13 years on the bench and had qualified over 100 financial expert witnesses.⁹³ Counsel had an average 31 years of experience as commercial litigators and had retained an average of 25.4 financial experts.⁹⁴ The experts had an average of 19.4 years of experience and had qualified as experts an average of 18.8 times.⁹⁵ The summary of each group's responses is included in Appendices A, B and C.

The questionnaire responses have been analyzed in order to develop Best Practices for the role and scope of the Financial Expert in Canadian Civil Court and the major issues are presented according to the questionnaire categories. The objective is to address the general concerns about expert witnesses that have been outlined. The complete questionnaire responses should be reviewed.

View of the Role of the Financial Expert Witness

The focus of this section of the questionnaire was to address the fact that experts always owe a duty to exercise reasonable skill and care to those who have retained them but they have an overriding duty to assist the court on matters within their expertise.⁹⁶ Experts can not serve the interest of those who retain them they must provide opinions which are independent, regardless of the pressures of litigation. Remember what Justice Farley said in *Toronto Dominion Bank v. E. Goldberger Holdings Ltd.*;

Experts must conduct themselves as objective neutral assisters of the court and, if they fail to fulfill this function, their testimony should be ruled inadmissible and therefore ignored after they have been eviscerated.⁹⁷

⁹³ Best Practices, Judge Questionnaire Results, Qualifications Appendix C

⁹⁴ Best Practices, Counsel Questionnaire Results, Qualifications Appendix B

⁹⁵ Best Practices, Expert Questionnaire Results, Qualifications, Appendix A

⁹⁶ Civil Justice Council, Protocol for the instruction of Experts to give Evidence in Civil Claims, www.justice.gov.uk/civil/procrules_fin/cotents/form_section_images/practice_directions/pd35_pdf_esp/pd35_prot.pdf

⁹⁷ *Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.* [1999] O.J. No. 5324

When asked which stakeholders the expert serves, 6 of 7 experts said the court, 1 said the firm. As one expert noted “the best service you can provide your client and counsel is to honour that obligation and be an independent objective witness to the court.”⁹⁸ Based on the questionnaire it appears that the experienced experts are aware of their duty as the majority also ranked objectivity and independence as the most important consideration when accepting an engagement.

When counsel was asked who an expert was supposed to serve one lawyer commented, “Independence is most important...an experienced expert must be independent or will have no career or a very short one. Lawyers who try cases on a regular basis will demand independence or their case will be in trouble.”⁹⁹ However, of the 5 experienced counsel 3 ranked the only the court as most important, 1 ranked Counsel, Client (Party to the action) and Court as all being most important and 1 participant ranked Counsel as most important. What is startling however is that when asked who the expert actually served, only 1 selected the court as most important; 2 selected the court, counsel and client as all being most important and again 1 selected counsel as most important.¹⁰⁰

The judges’ response was even more dramatic, both judges said the court was the least important stakeholder that the expert actually served and ranked the expert’s firm, himself and the client as the most important parties that the expert actually served. Counsel was ranked 2nd and 3rd by the

⁹⁸ Best Practices, Expert Questionnaire Results, View of the Role of expert Witness, Q.1 Appendix A

⁹⁹ Best Practices, Counsel Questionnaire Results, View of the Role of Expert Witness, Q.8 Appendix B

¹⁰⁰ Ibid, Q.8 and Q9

judges. As one judge explained “The court is the technical answer based on duty. However, in practice many so called experts think of court last and themselves first.”¹⁰¹

There is certainly a wide disparity in the perception of who the expert is to serve which emphasizes how difficult it may be for expert’s to uphold this duty. The perception is confirmed in the responses to the question about the experts’ primary role in court. All 7 experts indicated it was to provide independent opinion to assist the court regardless of the client’s opinion¹⁰² however the lawyers were split on whether they agreed that maximizing the client’s position was the primary role or providing an independent opinion.¹⁰³ The judges both responded that they agreed maximizing the client’s position was actually the primary role and even more surprising only one judge agreed with providing an independent opinion while the other thought it was to comply with counsel’s requests.¹⁰⁴

The expert’s may have responded to the questionnaire based on theory rather than practice because as one lawyer said “experts are human and do get involved” and another commented “Everyone is an advocate it is how well you can appear dispassionate.”¹⁰⁵ As the judge pondered in *Abbey National Mortgages PLC v. Key Surveyors Nationwide Limited ORS [1996]3a11 er184*

For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties on litigation often tend...to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties.

Experts must be conscious of this perception and not behave in any way that may contribute to actual or perceived bias. An example is a long term relationship between an expert and a party,

¹⁰¹ Best Practices, Judge Questionnaire Results, View of the Role of Expert Witness, Q.9 Appendix C

¹⁰² Best Practices, Expert Questionnaire Results, View of the Role of Expert Witness, Q.4 Appendix A

¹⁰³ Best Practices, Counsel Questionnaire Results, View of the Role of Expert Witness, Q.11 Appendix B

¹⁰⁴ Best Practices, Judge Questionnaire Results, View of the Role of Expert Witness, Q.12 & 13 Appendix C

including cases where the expert has testified for the party on other occasions, this may make the expert more partisan and cast doubt on the expert's independence. When asked if lawyers would accept a recommendation from the client when selecting a financial expert a lawyer commented that "you have to be careful about recommendation of client, not independent, looks bad when asked on cross how many times testified for the client."¹⁰⁶ Although it may be financially lucrative, experts should be careful about developing close relationships with client as it intensifies the human urge to get involved.

In addition to human nature, the expert has to deal with the pressure that "lawyers choose to make us, or try to make us advocates." "They want you to help advocate a position which may or may not be supportable that they want to argue."¹⁰⁷ In a broad survey of expert witnesses from 128 criminal and civil trials found that 77% of expert witnesses felt pressured by the lawyers dealing with the case to strengthen favourable evidence and place less emphasis on unfavourable evidence. 57% of experts were also urged to be less tentative.¹⁰⁸ Although one expert claimed "if requested or pressured to reach a certain result"¹⁰⁹ he would refuse the work, experts still succumb to that pressure more often than they should. This does not excuse lawyers from exerting undue pressure and they should be aware it will only hurt their case.

Although, one lawyer said, "lawyers who try cases on a regular basis will demand independence"

¹¹⁰ a reminder to counsel of the experts role is required. The B.C. and Ontario law reform

¹⁰⁵ Best Practices, Counsel Questionnaire Results, View of the Role of Expert Witness, Q.9 Appendix B

¹⁰⁶ *ibid* Q.5

¹⁰⁷ Best Practices, Expert Questionnaire Results, View of the Role of Expert Witness, Q.7 Appendix A

¹⁰⁸ Bubela, Tania M., Expert Evidence: The Ethical Responsibility of the Legal Profession, Alberta Law Review, (2004)41Alta.L.Rev.853-870,p.22 www.lexisnexis.com/ca/legal/results/docview.pdf para.53

¹⁰⁹ Best Practices, Expert Questionnaire Results, View of the Role of Expert Witness, Q.3 Appendix A

¹¹⁰ Best Practices, Counsel Questionnaire Results, View of the Role of Expert Witness, Q.8 Appendix B

initiatives recommended that the rules of civil procedure be amended in accordance with the Woolf reforms, to include a certification by the expert that the expert's duty to the court overrides the duty to the party who retained them may serve this purpose. The fact that the expert must make this certification will remind him of his duty and he will be more conscious of controlling the human urge to get involved in the case. The fact that it is codified in the court rules will also remind lawyers that they must resist encouraging experts to breach this duty. Counsel does have an ethical obligation to represent a client resolutely and within the bounds of the law but it remains to be seen whether the provision of partisan experts is a duty to the client that outweighs a lawyer's professional and ethical obligation to the court.¹¹¹ The provincial law societies should develop a Protocol for the Instruction of Experts to give Evidence in Civil Claims to provide guidance to counsel who retain experts similar to the Protocol produced by the Civil Justice Council in England. This would not be part of the court rules but a standard practices code.¹¹² This type of directive was endorsed by the Alberta Rules of Court Project.

Although, some experts do not uphold their duty to provide an independent opinion to the court, it is also important to distinguish the expert who is advocating for his own independent opinion which seems to happen "all too often." It appears he is advocating for or trying to maximize the client's position because as one lawyer commented "If you call them as a witness it is because they support the position you are taking. Therefore, it only makes sense that the expert battles to win as they believe in their position which happens to support yours."¹¹³ It may be difficult for experts not to engage in this battle to win because the current complexity of the cases they

¹¹¹ Bubela, Tania M., Expert Evidence: The Ethical Responsibility of the Legal Profession, Alberta Law Review, (2004)41Alta.L.Rev.853-870,p.22 www.lexisnexis.com/ca/legal/results/docview/ para.6, 38

¹¹² Civil Justice Council, Protocol for the instruction of Experts to give Evidence in Civil Claims, www.justice.gov.uk/civil/procrules_fin/cotents/form_section_images/practice_directions/pd35_pdf_esp/pd35_prot.pdf

¹¹³ Best Practices, Counsel Questionnaire Results, View of the Role of Expert Witness, Q.10 Appendix B

become intimately involved in the client's business while consider all documents necessary to establish their opinion. This is a change in the role of experts, as two lawyers explained, "In theory the opinion should be hypothetical, not based on any specific knowledge of the case. In the old days the experts came of the street to give an opinion based on a hypothetical set of assumptions provided which were similar to the case. Issues are too complicated now, unrealistic to think it could be done without detailed information of the case."¹¹⁴ It seems that in this hypothetical situation an expert could be more dispassionate about his opinion. Although the circumstances have changed it may serve the expert well to recall the theory of a hypothetical opinion in an attempt to eliminate the advocacy for one's own opinion.

The courts must remain tolerant of legitimate support for the experts' own opinion based on reasonable assumptions that fit the circumstances of the case but only if the expert is not too aggressive in his support. The expert is expected to explain his opinion but must remember to be "objective and open minded, if there is an error admit it, but if you are correct, stick by your principles."¹¹⁵ Sticking by your principles however, should not be interpreted as advocating or selling your opinion to the court. As one expert stated "you have to have integrity and do your selling of the right answer to the client, not the court."¹¹⁶ In the adversarial system, cross examination remains among the most important means for ensuring the opposing experts adheres to the independent duty to the court and counsel tend to have leeway in cross examining on matters going to the independence and impartiality of an opposing expert. If the opinion is supportable and reasonable it will withstand cross-examination without the advocacy of the expert resulting in the court giving the opinion the consideration it deserves. There is nothing to

¹¹⁴ Best Practices, Counsel Questionnaire Results, View of the Role of Expert Witness, Q.14 Appendix B

¹¹⁵ Best Practices, Expert Questionnaire Results, View of the Role of Expert Witness, Q.5 Appendix A

be gained by winning “the battle of the experts” as it is admonished by the court for lack of independence and will immediately ruin a reputation. It appears this confidence to objectively state rather than sell the opinion comes with experience.

Although there are cases where an expert may be advocating for his own independent opinion and a change in presentation may alter the court’s perception, there are cases where the expert’s have breached their duty and advocate for an opinion that is unreasonable in order to maximize the client’s position. One lawyer explains the problem by saying that “a cottage industry has been created for experts and they spend 90% of their time being experts, they do not practice. They are making a living at it and if you have to make a living you may cross the line. There are good experts and there are bad experts all trying to make a living. Lawyers encourage this cottage industry.”¹¹⁷ In this situation lawyers, who want to fulfill their duty as an advocate for their client, are more likely to find an expert that will opine on what is asked of them to earn a living. Experts must apply the test for independence which is whether an expert would express the same opinion if given the same instructions by an opposing counsel before providing each opinion. This will reduce the number of experts who may cross the line.

In order to alleviate this problem, it is important that “the control of experts has to come from the top down. The judges need to be more disciplined. There is no incentive for the experts and the lawyers to make changes.”¹¹⁸ As one judge said “...many act as advocates/cheerleaders for client – which should result in disqualification – but many judges are soft on experts”,¹¹⁹ thus allowing experts to breach their duty unscathed. Although one judge acknowledged that he

¹¹⁶ Best Practices, Expert Questionnaire Results, View of the Role of Expert Witness, Q.4 Appendix A

¹¹⁷ Best Practices, Counsel Questionnaire Results, Giving Evidence in Court, Q.8 Appendix B

disqualified experts because they were mere advocates, both judges agreed disqualifying experts did not happen often enough. Judges should be stricter on enforcing the expert's adherence to their primary duty not just by giving it less weight but by disqualifying the expert. Disqualifying the expert eliminates the time and costs wasted by hearing expert evidence only to have it given no weight. It may also reduce the risk of incorrect decisions being made in part because of reliance on expert evidence skewed by a lack of impartiality or independence. An increase in disqualifications is consistent with the earlier references to the judge's duty to act as gatekeeper to eliminate the possible dangers of biased expert evidence. However, judicial precedence must provide clearer direction as to when expert evidence will be excluded or discounted to assist the judges. In this case both lawyers and experts would be more diligent in upholding the duty as they would be well aware of the criteria and consequences. Eventually this would reduce the number of weak members or "hired guns" in the expert cottage industry.

Although the tone at the top is always important, the courts can also rely on professional discipline from self-regulating professional associations. Professional regulation and discipline of expert witnesses will be supplementary to and may be a result of the courts' discounting or exclusion of their evidence, not a substitute. However, courts must articulate a clear test or set of criteria to aid in determining when the expert's independence has been compromised to an extent warranting sanction. The CICA's *Standard Practices for Investigative and Forensic Engagements, (Standard Practices)* does state in section 700.02(a) that "expert witnesses have a duty to provide independent assistance to the Tribunal by way of objective unbiased testimony in relation to matters within their expertise."¹²⁰ (A tribunal is defined as any trier of fact)

¹¹⁸ Ibid. Q8

¹¹⁹ Best Practices, Judge Questionnaire Results, View of the Role of the expert Witness Q.11 Appendix C

¹²⁰ CICA Standard Practices for Investigative and Forensic Accounting Engagements, Nov. 2006, Alliance for Excellence in Investigative and Forensic Accounting

Although the Institute falls short of stating that this duty overrides the duty to the party that retained the expert it certainly sets a clear standard that would warrant disciplinary action if the court indicated there was a breach by the CA's who are governed by the standards.

The *Standard Practices* and accreditation programs also serve to improve the quality and consistency of expert witnesses. The published standard practices provide a basis for evaluating experts by counsel and the courts. By providing a framework for the application of professional judgement, they will also assist in eliminating the "hired gun" expert who is harming the reputation of experts as a whole by providing any opinion for a fee.

Based on the foregoing, suggested **Best Practices for the Role of the Expert Witness** are as follows.

- **Uphold the primary duty to the court by providing independent opinion evidence to assist the court regardless of the client's position. In this case there may be need for some practices to be reinforced by rules. Codifying the expert's duty in each jurisdiction's court rules will reinforce the utmost importance of the duty to experts and counsel.**
- **Develop ongoing educational conferences with counsel, judges and the IFA Alliance. This would promote consistency of understanding and expectations of the expert's role. The development of a Protocol for the Instruction of Experts to give Evidence in Civil Claims should be considered by law societies as a practice direction similar to the Protocol produced by the Civil Justice Council in England. This will provide guidance to counsel to ensure they do not promote the expert's breach of their**

duty to the court and remind them that providing partisan experts is not part of their ethical obligation to provide resolute representation of a client.

- Experts must explain and defend their opinion to the court but remain professional, objective, even dispassionate and open minded to alternatives. There is no need to sell an opinion that is reasonable and supported by the circumstances of the case. The court knows that an expert is asked to testify because his opinion supports the counsel's case. When an expert advocates strongly for his own opinion it appears that he is advocating for the client and results in the judge needlessly discrediting an objective opinion. The complexity of current issues require extensive involvement in the details of the case so it is important to remember the original premise that experts were to provide opinions on hypothetical situations.**
- Apply the test for independence which is whether an expert would express the same opinion if given the same instructions by an opposing counsel before providing each opinion. This will reduce the number of experts who may cross the line.**
- Judges must set the tone at the top and adhere to their duty a gatekeeper and establish clear guidelines as to when expert evidence will be excluded or discounted due to an expert's lack of independence. This will provide counsel with guidelines to ensure they retain an independent expert that will be accepted by the court.**
- Promote increased awareness, continued adherence and acceptance of the standards by experts and the court of the CICA Standard Practices for Investigative and Forensic Accounting Engagements, released in November, 2006, will serve as a benchmark for acceptable expert conduct. It will ensure consistency and comparability for the public and the court and as the basis for disciplinary actions**

and provide a framework for the application of professional judgement thus eliminating the “hired gun” experts. Judicial precedence based on the standards will also serve as a tool to inform counsel of what acceptable practices are for an expert. The *Standard Practices* must be subject to ongoing review and updating to address current issues and continue to be useful to experts and the court.

Engagement of the Expert Witness

The focus of this section was to address the concerns that there is a proliferation of expert evidence that is contributing to the cost and delays in the court system. It was acknowledged by counsel that “generally, the most important issue is whether the issue requires expert knowledge”,¹²¹ but the current court issues beg the question is whether this criteria is consistently applied when retaining an expert.

When experts were asked whether lawyers understood the role of the expert and used them appropriately, the experts tended to attribute the lack of understanding or misuse on counsel’s “inexperience” claiming that “most good lawyers do understand your role and allow you to carry it out in a professional manner.”¹²² The experts also felt that judges level of understanding was related to experience although one expert did acknowledge that judges “did need to be educated, the standards would help.”¹²³

Again these comments are in contrast to the judges and counsel’s response. They acknowledged that they “don’t think lawyers and the court truly understand what experts are for and they are

¹²¹ Best Practices, Counsel Questionnaire Results, View of the Role of the Expert, Q.3 Appendix B

¹²² Best Practices, Expert Questionnaire Results, View of the Role of the expert, Q.7 Appendix A

overused.”¹²⁴ One judge was harsher saying that “most lawyers are not financially sophisticated, so they can be led by the nose by financial experts” and the same goes for judges who “used to be lawyers, so most not financially sophisticated.”¹²⁵ This lack of financial sophistication is the basis for the fact that counsel thought a very important factor in retaining an expert is if the opposing side has retained an expert. Counsel noted that “you have to have an expert if the other side does. Can not take the risk of being able to discount them on cross-examination, a lawyer is not an expert so can not expect to discredit an expert on cross, need expert to refute the other side’s expert. Need expert rebuttal.”¹²⁶ Hence, we have the battle of the experts that result in such harsh complaints from the courts.

The battle of the experts would be acceptable if it was a genuine divergence of opinion on an issue that is truly beyond the general knowledge of the trier of fact. However this does not always seem to be the case. The increase in the use of experts is because as one judge said, “many lawyers believe an expert is necessary when the exercise is a simple arithmetic calculation. They try to give it great weight.”¹²⁷ Another judge said that “everyone wants to rely on an expert, too many snake oil salesmen out there.”¹²⁸ One counsel agreed that “financial experts are used to calculate, that is not necessary, should be for more complex issues.”¹²⁹ The majority of counsel responded that the expert witness was to provide calculations based on

¹²³ Ibid Q8

¹²⁴ Best Practices, Counsel Questionnaire Results, View of the Role of the Expert, Q.13 Appendix B

¹²⁵ Best Practices, Judge Questionnaire Results, View of the Role of the Expert, Q.14 Appendix C

¹²⁶ Best Practices, Counsel Questionnaire Results, View of the Role of the Expert, Q.3 Appendix B

¹²⁷ Best Practices, Judge Questionnaire Results, View of the Role of the Expert, Q.14 Appendix C

¹²⁸ Ibid Giving evidence in Court,Q13

¹²⁹ Best Practices, Counsel Questionnaire Results, View of the Role of the Expert, Q.13 Appendix B

instructions. In the CICA audio recording of the Standards Forum, Ivor Gottschalk said the “perception of lawyers is that two accountants can come up with two different findings.”¹³⁰

This was supported by the fact that although the majority of counsel thought reports should be fully supported opinions, some thought calculations and estimates were appropriate too.¹³¹

The inappropriate overuse of experts does not fall solely at the feet of counsel. As one lawyer noted, “Judges like to hear them, it makes it easier on them.”¹³² It was estimated that “less than 1% of experts are excluded. Canada has more judge trials so judges hate to exclude evidence, may need the help. Judges will listen to experts.”¹³³ Another contributing factor is that “many judges do not have broad life experiences and not much financial experience so they allow financial experts in when it is not necessary.”¹³⁴

It is clear that stricter standards and more education is required for each group as to when an expert witness should be retained. The *Standard Practices* cites in section 100.08 (a) that these engagements require the application of professional accounting skills, investigative skills and an investigative mindset. Section 100.16 states that the IFA Alliance believes the definition will be useful in helping practitioners in other disciplines recognize when they need the skills of IFA practitioners. As noted these standards were only issued in November, 2006 but with their promotion through educational forums with counsel and acceptance in court decisions, they will provide more guidance for counsel to determine when an expert’s services are required. This will reduce the hiring of experts as calculators however, it is also important for experts to apply

¹³⁰ CICA Standards Practices for IFA Engagements Forum Nov.7, 2006, audio, www.cica.ca/html/ifa/index_files/default.htm

¹³¹ Best Practices, Counsel Questionnaire Results, Reports Q2, Appendix B

¹³² Best Practices, Counsel Questionnaire Results, View of the role of the Expert Q13, Appendix B

¹³³ Best Practices, Counsel Questionnaire Results, Giving evidence in Court Q.8 , Appendix B

¹³⁴ Best Practices, Judge Questionnaire Results, View of the Role of the Expert, Q.15 Appendix C

these standards when accepting engagements. Accepting only engagement where expert knowledge is truly required may initially be hard on business but in the long term it will enhance the expert's reputation by maintaining the professional standards of an expert. As these standards only apply to CA's it would be very valuable if other professional organizations followed the CICA's lead to assist in the education of their experts and counsel on when the services are required.

The court also has an important role to play in reducing the number of inappropriate expert witnesses. This would be made easier if the courts considered returning to the system that Justice Farley implemented as Chief Justice. As one lawyer explained "Farley had tried to ensure that the judges had business knowledge but that does not happen anymore. The court system is democratic so any judge who wants to work the commercial list is allowed."¹³⁵ If judges had general business knowledge then they may be less likely to require an "expert" as more issues would be within their general knowledge making an expert only necessary to deal with truly complex matters not mere calculations.

The court must also develop clearer criteria for the admissibility of expert testimony. This should be done through judicial precedence as given the scope of expertise it may be difficult to codify. Now it is vague and at the discretion of the judge, so lawyers are more likely to hire an expert to add weight to a basic issue. With clear guidelines, lawyers would be aware when an expert will be qualified by the court and only retain experts in those situations. Judges must insist that lawyers demonstrate the need for the expert evidence according to these guidelines. To reduce

¹³⁵ Best Practices, Counsel Questionnaire Results, Giving Evidence in Court, Q8, Appendix B

the amount of ineffective expert testimony, judges must be strongly encouraged to act as a gatekeeper, strictly evaluating the expert and the evidence to ensure the court only hears evidence that is reliable, relevant and necessary from a qualified expert. Providing evidence which is necessary is a higher standard than just helpful. The scope for qualifying an expert “should be restricted to narrow area of true competence”¹³⁶ although one judge noted he had failed to qualify an expert because he “qualified generally not specifically”¹³⁷, both judges agreed that disqualification should be more common.

During qualification experts must “understand what they are capable of doing and not stray too far from your expertise. To stretch what you say you will do ends up hurting you and your client in the end.”¹³⁸ A lawyer commented that if “judge criticizes competence then damages reputation and an expert needs to preserve reputation.”¹³⁹ Voir dire hearings to determine the admissibility of expert evidence should be more common in civil cases as they will also reduce the number of unnecessary or unqualified experts. Judges have been given the authority to control the use of experts under the rules of civil procedure and they must be diligent in exercising them.

To reduce the number of useful experts testifying, the courts and counsel should also consider the use of single joint experts where appropriate. As one expert describe the situation as ideal, because it keeps control in the hands of the parties and does appear to promote independence and duty to the court. This concern about expert lack of independence has certainly led to renewed interest in the use of single joint experts. However, one lawyer commented, the use of single

¹³⁶ Best Practices, Judge Questionnaire Results, Giving Evidence in Court, Q.1 Appendix C

¹³⁷ Ibid, View of the Role of the Expert, Q4

¹³⁸ Best Practices, Expert Questionnaire Results, View of the Role of the Expert, Q.2 Appendix A

¹³⁹ Best Practices, Counsel Questionnaire Results, View of the Role of the Expert, Q 11 Appendix B

joint experts is “not likely, if they could have agreed on an expert, they would have settled. They are at trial because they can not settle.”¹⁴⁰ Even Woolf had noted that single joint experts may not be appropriate in commercial litigations due to the complexity of the matters. Currently only BC’s Rule 68 addresses joint experts and the success has yet to be determined. Provincial law reform initiatives noted that requiring use would cause delays and court applications to deal with selection and instruction and experts worried about the payment of fees. There is also the concern that counsel will retain expert consultant to critique the joint expert which would result in increase costs. Despite the concerns single joint experts would reduce expert testimony and as noted have been considered successful in England as part of the Woolf reforms so they should be considered more often.

The overuse of experts in the judicial system have also renewed interest in a century’s old rule of using court appointed experts in appropriate situations. Although BC and Nova Scotia’s reform initiatives note that this existing right of judges was underused, the problem with the use of court appointed experts is that “system is adversarial, neither encourages or permits court initiative, only time judge would do is with the consent of the parties.”¹⁴¹ One lawyer said “court appointed experts are not good because then judges are delegating job of deciding issue. Judge unlikely to reject the court appointed expert’s opinion. On cross need expert to rebut to know what questions to ask so lawyers end up retaining expert anyway.”¹⁴² This raises concerns about bias and will increase the cost of litigation that the system is trying to control. Despite the obvious problems both joint and court appointed experts would reduce the proliferation of expert

¹⁴⁰ Best Practices, Counsel Questionnaire Results, Giving evidence in Court Q9, Appendix B

¹⁴¹ Best Practices, Judge Questionnaire Results, View of the Role of the Expert, Q.7 Appendix C

¹⁴² Best Practices, Counsel Questionnaire Results, Reports Q1, Appendix B

evidence and should be considered and applied when appropriate. Since they provide unique problems for experts as far as accepting instructions and dealing with conflicting assumptions, the CICA standards may consider including specific standards relating to this unique engagement for experts.

The application of these measures would alter the current judicial culture where lawyers seem to put excessive reliance on the authority of an expert witness to give weight to issues of general knowledge points and substance to their case and some judges who appear to be unwilling to exclude expert evidence on basic issues as it is easier for them to rely on “expert” authority. Altering the culture will have a domino effect because as noted, when one side hires an expert the opposing side believes it also has to hire an expert. These changes would reserve expert witnesses for providing opinions on the truly complex issues that are beyond the general knowledge of the trier of fact where a correct decision could not be reached without the expert testimony. This will reduce the amount of expert testimony and ultimately serve the professional profile of experts as they will be applying the intellectual rigor that establishes an expert.

Based on this discussion, a summary of the **Best Practices for the Engagement of a Financial Expert Witness** are as follows.

- **Experts must be diligent about accepting engagements to testify in court that truly require the intellectual rigor of an expert. Although initially hard for business this practice will ultimately enhance their reputation and that of the profession.**

- **The broad promotion through increased educational forums, application by the courts and compliance monitoring of the *Standard Practices* which address what constitutes an expert engagement will provide the necessary guidance to experts and counsel to determine when an expert should be engaged. This will avoid the overuse of qualified experts and help eliminate “experts” who do not meet the standards and maintain the professionalism of experts.**
- **Development of the previously recommended Protocol for the Instruction of Experts to give Evidence in Civil Claims could provide counsel with guidance for retaining experts to ensure they are truly necessary.**
- **Establish clear narrow guidelines through legal precedence for qualifying experts to ensure they are truly competent and necessary, not just helpful. Judges must accept their role as gatekeeper and apply the guidelines rigorously. Experts must also be sure to restrict their opinions to areas where they have true expertise not general knowledge. This stricter compliance and clarification of the Mohan criteria will reduce the amount of unnecessary or unqualified expert testimony.**
- **Strongly encourage that judges in the commercial courts have general financial knowledge to reduce the reliance on experts for issues that are not beyond the knowledge of the trier of fact.**
- **The court and counsel should consider a single joint or court appointed expert when appropriate to reduce the amount of expert evidence. The CICA Alliance for Excellence in Investigative and Forensic Accounting may consider developing standards for experts to deal with this unique engagement.**

The Expert Report

The focus of the questions in this section was the best practices relating to the expert's report. The report is essential as it documents the opinion and serves as the basis for the oral testimony. Each jurisdiction's court rules stipulate that each side's expert's report must be exchanged to promote full disclosure at a variety of points prior to trial however, submitting the report as evidence is not stipulated. Although one lawyer notes that the "report is strictly inadmissible. The report is rarely not accepted by the judge as evidence but the evidence is really what is given on the stand. Other witnesses just give oral testimony, but judges are lazy and want to take report so they can refer to it in the decision."¹⁴³ Both judges agreed that if the report is relied on it will be submitted as evidence. Mr. Justice Sopinka explained the reasons for the expert report being marked as an exhibit at trial as follows:

An expert's report should be marked as an exhibit at trial. This ensures that the expert will be able to refer to the report during this evidence. Marking the report as exhibit also means that the trier of fact will have a copy of the report during deliberations. If the expert's report is persuasively written the parties introducing it into evidence can only benefit from having it in the hands of the judge or jury.¹⁴⁴

In *Marchand Litigation Guardian of v. Public General Hospital Society of Chatham*, the Ontario Court of Appeal explained the relationship between the expert's testimony and the report in the following way:

'While testifying, an expert may explain and amplify what is in his or her report but only on matters that are latent in or touched on by the report. An expert may not testify about matters that open up a new field not mentioned in the report.'¹⁴⁵

Although reasonable, as one lawyer explained "the problem is so much is in writing not all of it is covered in the oral testimony or cross examination so information gets into evidence that is not

¹⁴³ Best practices, Counsel Questionnaire Results, View of the Role of the Expert, Q 14 Appendix B

¹⁴⁴ Prehogan, Kenneth, A Microscopic Look at your Forensic and Investigative Reports, Association of Certified Forensic Investigator of Canada, 9th Annual Fraud Conference & Workshop, May,6,7&8, 2007 p.5

¹⁴⁵ Prehogan, Kenneth, A Microscopic Look at your Forensic and Investigative Reports, Association of Certified Forensic Investigator of Canada, 9th Annual Fraud Conference & Workshop, May,6,7&8, 2007 p 6

touched on in oral evidence. The judges uses the report in making his decision so the expert's report becomes so important even more important than the oral evidence. That is why it becomes a battle of the experts.”¹⁴⁶

In the questionnaires, the majority of counsel agreed that the court focused more on the written report because as one lawyer explained, “this type of evidence is difficult to give orally. The oral testimony serves to show the court that the expert knows what he/she is talking about and whether the court should rely on the report.”¹⁴⁷ Although one judge said it depends on the case the other judge agreed that the court put more weight on the report. In contrast, the experts tended to agree the court focusing on the oral evidence especially the cross examination. This perception may be a result of the fact the court uses the oral testimony to determine whether to rely on the report can.

The importance of the expert's report to the court is evident however the best practices for development of the report must be considered. When asked what materials were requested for review, the experts unanimously said all materials available to determine and identify what is relevant to the opinion. Although one lawyer commented that “lawyers do not have the skill or knowledge to determine what the expert will need”¹⁴⁸ when asked the same questions counsel and judges were evenly divided between providing all material the expert requests and material that counsel feels is necessary to provide opinion. Those responding that counsel should determine materials may have identified just the initial exchange of documents believing as one lawyer commented that “counsel provides what appears to be relevant, advise what else is

¹⁴⁶ Best practices, Counsel Questionnaire Results, View of the Role of the Expert, Q 14 Appendix B

¹⁴⁷ Ibid

available. The expert requests additional documents or finds additional documents as necessary to complete the report.”¹⁴⁹

Without risking an incorrect assumption, it is important for experts to clarify with counsel that they must control the material considered to develop their own opinion. This must also include material that is adverse to the opinion because as one judge criticized “they often only look at facts that support the position they represent.”¹⁵⁰ Considering contrary information and explaining the reasons it is not applicable, adds important credibility to the report. Being considerate of the fees, experts would be advised to take the time in planning to focus their requests and explain to counsel the relevance of the material so it is not viewed as a means to increase fees. Justifying requests may become less of an issue as counsel becomes clearer on the role of experts as previously discussed.

The questionnaire also raised the issue about counsel input into the expert’s approach to the engagement. Counsel and judges agreed that instructions as to scope were appropriate, although some experts agreed with that, the majority would accept input or consultation only. It is essential for experts to clearly understand their mandate as stipulated in *Standard Practices* section 200.01 because the most irritating complaint about experts is “a failure to fully comprehend the assignment before beginning work. This causes needless costs and delays of the delivery of a useful product.”¹⁵¹ Once the mandate is clear, experts must also be clear with

¹⁴⁸ Best Practices, Counsel Questionnaire Results, Engaging the Expert, Q 1 Appendix B

¹⁴⁹ Best Practices, Counsel Questionnaire Results, Engaging the Expert, Q1, Appendix B

¹⁵⁰ Best Practices, Judge Questionnaire Results, View of the Role of the Expert Witness, Q11 Appendix C

¹⁵¹ Best Practices, Counsel Questionnaire Results, Giving Evidence, Q11 Appendix B

counsel about the need to plan and perform the engagement independently while “keeping lawyers in the loop as to what you are doing.”¹⁵²

The court expressed a strong interest in being aware of the applicable instructions and materials, stating that “court is entitled to know with precision what the expert was asked to do, what was given and perhaps what wasn’t given and what the expert considered relevant.”¹⁵³ However when asked to consider Woolf’s reform, which the Ontario reform initiative supported, to make expert instructions transparent by outlining both oral and written instructions in the report, lawyers were generally not in agreement. They believed at least oral instruction would be covered by privilege or that oral instructions could be misunderstood.¹⁵⁴ The experts agreed that material, relevant instructions that, “if not given, may have otherwise affected the work performed or the conclusions reached”¹⁵⁵ should be disclosed.

The purpose of Woolf’s reform was to make the expert reports more understandable and comparable by the courts, which is particularly important when reconciling conflicting expert opinions. The *Standard Practices* do note in section 600.08 (l) that the report should include sufficient information to enable the user to relate the findings and conclusions to the supporting analyses, information and documents. Although Section 600.08(e),(h) and (i) specifically mention inclusion of the purpose, approach with rationale for selecting approach and any underlying assumptions with reasons for reliance, there is no reference specifically to instructions. Although as one expert pointed out the instructions generally are included “if

¹⁵² Best Practices, Expert Questionnaire Results, Approach to Engagement, Q6, Appendix A

¹⁵³ Best Practices, Judge Questionnaire Results, Engagement of the Expert Witness, Q1&3 Appendix C

¹⁵⁴ Best Practices, Counsel Questionnaire Results, Engagement of the Expert Witness Q5, Appendix B

¹⁵⁵ Best Practices, Expert Questionnaire Results, Reports, Q4 Appendix A

relevant to the report, such as ‘we have been asked to assume...’¹⁵⁶ it would be valuable to include at least the written instruction as required disclosure in the *Standard Practices* and court rules as the law reform initiatives have suggested. These written instructions from counsel should be complete with minimal off the record verbal instructions, this transparency will make the reports more useful to the courts by giving them a clear indication of the mandate.

In performed the work it was expected by all groups that experts would perform sufficient work to ensure that assumptions both within their expertise and from other experts were reasonable which complies with *Standard Practices* section 400.10 and .11 or at least plausible. Without performing this due diligence the expert will be discredited by the judge as in the case Hallett v. R. where the judge criticized the expert for accepting revenue figure from a third party without undertaking sufficient due diligence to ascertain their reasonableness and made assumptions about inflation which were not explained in his report.¹⁵⁷

The assumptions noted in that case were clearly within the expert’s scope or knowledge, however, each group recognized that it is difficult to establish the reasonableness of the assumptions as to fact provided by counsel and in some cases they may have to be noted and “taken without due diligence.”¹⁵⁸ In contrast, Ivor Gottschalk noted that experts are “not human calculators, taking any assumptions and fact pattern that client gives us and stand up in court and recite that.”¹⁵⁹ Experts must apply common sense to the fact patterns. However counsel pointed out that “if there are unreasonable assumptions about facts it is because parties are not realistic

¹⁵⁶ Best Practices, Expert Questionnaire Results, Reports, Q4 Appendix A

¹⁵⁷ Soriano, Errol D., Assumptions in the Valuators Report, LECG Expert Insight <lecg_canada@lecg.com> Personal e-mail to Adele Imrie

¹⁵⁸ Best Practices, Expert Questionnaire Results, Reports, Q4 Appendix A

¹⁵⁹ CICA Standards Practices for IFA Engagements Forum Nov.7, 2006, audio, www.cica.ca/htl/ifa/index_files/default.htm

about them or would have settled, that is why they end up in court. If they fail it is because the lawyer did not do homework.”¹⁶⁰ In some cases the judge’s harsh criticism of an expert’s use of unreasonable assumptions is clearly not the expert’s responsibility alone, counsel must accept responsibility as well. As one lawyer noted “it is not that the experts do not do enough work in most cases, they do have to take some information at face value and the lawyer has to try to prove facts but don’t know how the trier of fact will decide.”¹⁶¹ When criticizing experts, the lawyer went on to explain, “Judges are trying to write an opinion that won’t get overturned, have to pick one side so they will say that the assumptions were unreasonable. That is not criticism of the expert in all cases. The facts were not reasonable. This is not a career ender for the expert.”¹⁶²

Despite this supportive interpretation, experts must ensure that they comply with the *Standard Practices* and determine the reasonableness of the assumptions within their expertise and those received outside their competence and expertise using common sense, industry standards and independent research. When establishing reasonableness, it is essential that experts are very clear about the level of expertise and do not overestimate their competency. Experts must consider the business reality and avoid what one expert claimed as common complaint of experts, “not adequately understanding the subject business.”¹⁶³ Experts must also be very careful not to argue as to whether the assumed facts are actually proven or show an inappropriate eagerness to assist the retaining party as this will be viewed as advocacy by the court.

¹⁶⁰ Best Practices, Counsel Questionnaire, Engagement of the Expert Witness, Q3 Appendix B

¹⁶¹ Ibid

¹⁶² Best Practices, Counsel Questionnaire Results, Engaging the Expert Witness Q3 Appendix B

¹⁶³ Best practices, Expert Questionnaire, Giving Evidence Q 9, Appendix A

Counsel must recognize that they have a critical role to play in ensuring fact assumptions and assumptions on matter of law are reasonable and will be supported by other evidence. Counsel must do their homework and consider each premise and assumption in the expert's report as an issue to be established, either by the expert or by other evidence. As Cresswell said

... A lawyer has a duty to determine whether he believes expert testimony will be admissible before attempting to introduce such evidence. To be an effective advocate, the lawyer must vigorously prepare for the presentation of facts and law and, in doing so, needs to test the accuracy and reliability of any testimony, including expert testimony that he wishes to introduce¹⁶⁴

The previously recommended Protocol for the Instruction of Experts to give Evidence in Civil Claims would be useful to reinforce this obligation of counsel to their client.

Accepting that no one can predict how the trier of fact will decide, both experts and counsel must present the most reasonable case. This raises the question of how much input counsel should have in the report. There was general consensus in the three groups that lawyers should only provide input as to fact. However, there was no consensus as to the proper treatment of draft reports. The judges and counsel agreed the draft reports should be kept as evidence. One lawyer stated "that it looked better in court if can produce drafts."¹⁶⁵ However, that same lawyer's Practice is to discuss the opinion orally with experts before receiving a draft report so only a few style changes would be required. On the contrary experts all agreed that the draft reports should be destroyed. One expert was specific about destroying internal works in process but retaining drafts that go to counsel. The issue has been contentious for a while, because of the concern that the drafts could be called into evidence by opposing counsel to discredit the experts. Many

¹⁶⁴ Bubela, Tania M., Expert Evidence: The Ethical Responsibility of the Legal Profession, Alberta Law Review,(2004)41Alta.L.Rev.853-870,p.22 www.lexisnexis.com/ca/legal/results/docview.pdf para.38

experts rely on firm policy when asked about destroying draft reports and as one lawyer said “I tell experts that they are not required to retain them. I never tell them to destroy them because that would be destroying evidence.”¹⁶⁶ Although considered by the court, clear consistent direction related to handling of draft reports must come from judicial precedence.

The retention of draft reports was not the only issue relating to expert files addressed by the questionnaire. Each group was asked about the materials that should be included in the expert’s files. All groups agreed all materials reviewed should be maintained. The *Standard Practices* section 500.01 states “working paper should contain or have reference to all information used and relied upon” and section 500.03 states that while it is neither necessary nor practical...to document ...every observation, consideration or conclusion, practitioners need to document matters that, in their professional opinion, are important to support their work and/or relevant in reaching their findings, opinions and/or conclusions.” These standards should not be interpreted to mean only material relied on. Experts must consider relevant contrary material and explain why it does not apply to reduce the perception of bias and promote independence. If the material has been carefully considered and reasonably does not apply the expert should be able to explain without being discredited.

Experts are legitimately concerned that working paper files may be produced in court and used to discredit them. Currently in B.C. it is the case that solicitor- client privilege is deemed to be waived when the expert takes the stand which has only served to heighten expert’s concerns in the rest of the country. It is important to note again that because this practice encouraged the

¹⁶⁵ Best Practices, Counsel Questionnaire Results, Reports, Q 8, Appendix B

¹⁶⁶ Best Practices, Counsel Questionnaire Results, Reports, Q8, Appendix B

retention of “shadow” experts who were covered by privilege, the B.C. law reform initiative recommended that only material relied on will be producible because the additional cost of the shadow experts did not outweigh the advantages of additional disclosure.

In addition to considering the factors that affect the development of the final report it is important to consider the report itself. Although the role of the expert is to assist the court by “narrowing and simplifying issues” there were comments by both counsel and experts that the reports were “too technical, can’t simplify issues”, they are “too confusing, unclear in findings, make simple issues too complicated” and experts have an “inability to write in clear and simple manner.”¹⁶⁷ When this is the case, clearly experts have failed to assist the trier of fact. To fulfill their role the expert report must be clear, concise and free of professional jargon. A complex report does not impress the court on the contrary it fails to assist them and is often given less consideration because of lack of understanding.

To deal with the complexity of expert reports and make them more understandable and comparable Woolf recommended standardizing the expert report. This was not codified but included as a Protocol by the Civil Justice Council. One lawyer agreed that there is a “need for some consistency in what the court receives”¹⁶⁸ but the questionnaire participants agreed that expert reports were too complicated and the court rules not flexible enough to codify the report standards. Section 600.08 of the *Standard Practices* has a good guideline for report contents. However, one judge noted that the court should be responsible for standardization of reports not professional bodies. This follows the recommendation of the Alberta law reform initiative that

¹⁶⁷ Best Practices, Counsel Questionnaire Results, Giving Evidence, Q 11, Appendix B

¹⁶⁸ Ibid Reports, Q3

draft guidelines be appended to the court rules. Until this is in place it is important that experts comply with the *Standard Practices* to ensure reports are as consistent and comparable and a result useful to the trier of fact. The application of these standards in judicial precedence will serve to inform counsel and the court of acceptable report format although education of counsel by the IFA Alliance will promote awareness.

Further to the discussion, recommended **Best Practices Relating to Expert Reports** are as follows.

- **Experts must clarify counsel’s understanding that experts must control the material considered to develop an independent opinion. Being considerate of the fees, experts would be advised to take the time in planning to focus their requests and explain to counsel the relevance of the material so requests are not viewed as a means to increase fees.**
- **Experts must ensure they fully comprehend the assignment before beginning work. This will eliminate needless cost and delays of the delivery of a useful report. Once the mandate is established, experts must also be clear with counsel about the need to plan and perform the engagement independently while keeping lawyers informed of the steps being taken.”**
- **In addition to reviewing material that supports their opinion, experts must consider relevant materials that are contrary to their opinion and establish why the material was not applicable to the matter under consideration. The *Standard Practices* should not be interpreted to mean only material relied on. A more comprehensive report gives the court a better understanding of the issues, adds**

credibility to the report and reduces the perception of bias and promotes independence. If the material has been carefully considered and reasonably does not apply the expert should be able to explain without being discredited.

- As required by the Standard Practice section 400.10 and 400.11 experts must establish the reasonableness of assumptions within their scope of expertise and those provided by others. Therefore, it is essential that experts are very clear about their level of expertise and do not overestimate their competency. Experts should also ensure that their competency relates specifically to the subject business, not just general knowledge. For assumptions provided by others, experts must use common sense, industry standards and independent research whenever possible to assess reasonableness. This due diligence makes the report credible and more useful to the court.**
- Counsel must understand that it is critical they uphold their duty to the client to consider each premise and assumption in the expert's report as an issue to be established, either by the expert or by other evidence. It can not be predicted how the trier of fact will rule however the decision should not be affected by claims that are mere speculation.**
- Development of the previously recommended Protocol for the Instruction of Experts to give Evidence in Civil Claims would be useful to reinforce counsel's obligation to their client to ensure each assumption is supported and would also assist counsel in understanding of and complying with expert's control of material reviewed and performing the engagement independently.**

- **The report must be clear, concise and free of professional jargon. A complex report does not impress the court it fails to assist them and is often given less consideration because of lack of understanding**
- **The report should include all written instructions from counsel with minimal off the record verbal instructions, this transparency makes reports more useful to the courts.**
- **Clear consistent direction related to handling of draft reports must be established by judicial precedence.**
- **Reports submitted to the court should be standardized to improve understanding and comparability. Although recommended that these guidelines be handled by the courts, until this is in place it is important that experts comply with the *Standard Practices* to ensure reports are as consistent and comparable and more useful to the trier of fact when reconciling conflicting expert reports.**

Expert Evidence in Court

The ultimate test for the expert witness is testifying in court. The expert “needs the whole package, must be articulate, must present well, and have experience testifying”¹⁶⁹ to be successful in court. The expert must be well prepared to enter court and the questionnaire addressed the issue how involved counsel should be in the preparation of expert witnesses. There was stark contrast in the responses; both judges and the majority of counsel agreed that lawyers should provide guidance to expert witnesses. One lawyer explained that they “treat experts like any other witness. Rehearsal is critical for all witnesses. A script is necessary to prepare the expert for examination in chief. He must be informed of and comfortable with the

questions to be asked.”¹⁷⁰ Another stated that they “continually cross examine until ready. Provide guidance. Make sure the report is reasonable and the expert is ready”¹⁷¹ and these meetings are to ensure the “report is understood, what was the mandate, what did they review, what was the conclusion and what did they base their decision on.”¹⁷² Counsel was clear that these preparatory meetings did not take place until the report was complete.

On the other hand, the majority of experts stated that they prepared independently for testifying in court. This is discrepancy is difficult to reconcile amongst experienced professionals. However it appears that if the report is complete prior to preparation and therefore can not be compromised, that preparation with counsel can only assist the expert. Based on the responses of the judges the court seems to expect preparation of experts as they would with other witnesses. This preparation, which should not extend to scripted questions and answers for fear of appearing biased, will also assist in ensuring that all assumptions made by the expert have been supported by the expert or through other evidence presented by counsel. An experienced expert will ensure that counsel does not cross the line and jeopardize their independence during preparation.

The questionnaire also dealt with the issue of discovery of experts by right which all provincial law reform initiatives rejected due to cost and delay. Counsel was split on this issue although one lawyer who supported it actually thought that it would “save money in the end. It is bad that the first time lawyers gets to talk to opposing expert is in court. Trials are too long because no

¹⁶⁹ Best Practices, Counsel Questionnaire Results, View of the Role of the Expert, Q6 Appendix B

¹⁷⁰ Best Practices, Counsel Questionnaire Results, Giving Evidence, Q5 Appendix B

¹⁷¹ Ibid

¹⁷² Ibid

disclosure in advance. If experts were discovered would probably have more cases settled.”¹⁷³

One judge supported the proposal because “getting to the truth is helpful.”¹⁷⁴ One lawyer

opposed to the idea noted that the “subject matter is privileged and may never be used at trial”¹⁷⁵

The majority of experts were in favour of discovery by right as long as “it isn’t a fishing expedition without results, the court would not be impressed with a waste of the court’s time.”¹⁷⁶

It appears that there are advantages to discovery of expert witnesses. Given the concern that counsel would just retain new experts if their expert did not perform well in discovery causing delays and increased costs, the court may restrict scope of discovery as they do in some jurisdiction’s rules for expedited trials. Counsel may have to justify need for discovery to obtain leave from the court and it may have time restrictions and restrictions on the scope of questions to ensure strict focus on the report. The court may impose restrictions on time delays for retaining new experts to discourage this practice. The process of discovery of experts is worth reconsidering with conditions as the early disclosure of information can be very beneficial to the judicial process and the issues of cost and delays that plague it.

The benefits of early disclosure would also be enhanced by the practice of pre-trial conferencing of experts. As noted, the practice was often order by Justice Farley to encourage experts to discuss issues and prepare a one page list of areas that they disagreed to narrow the issues requiring attention in court. Judges, counsel and experts all agreed that this would be a good practice because “litigation is an expensive process everyone wins if they share information

¹⁷³ Best Practices, Counsel Questionnaire Results, Giving Evidence, Q1, Appendix B

¹⁷⁴ Best Practices, Judge Questionnaire Results, Giving Evidence, Report, Q9, Appendix C

¹⁷⁵ Best Practices, Counsel Questionnaire Results, Giving Evidence, Q1, Appendix B

¹⁷⁶ Best Practices, Expert Questionnaire Results, Giving Evidence, Q1, Appendix A

earlier and come to agreement.”¹⁷⁷ Alberta, B.C. and Ontario all recommended that this was a good practice but one that should be optional, not by right and without prejudice. It seems there is support for this initiative and pretrial conferencing should be used whenever possible to facilitate narrowing the issues and early disclosure which will reduce trial time. With experience it may established as a practice of right.

The questionnaire also addressed the important issue of immunity for expert testimony. The experts were as expected, all in favour of immunity with the exception of fraudulent acts. The lawyers and judges were split. Although the supporters mentioned exceptions for gross negligence or intentional/willful misconduct there was the concern that if there was no immunity the litigation would never stop.¹⁷⁸

In Canada, expert witnesses enjoy protection from the doctrine of witness immunity which has been developed over hundreds of years by the common law. The courts have supported this doctrine because without the protection from being sued for what they say in court the witness may not give full and free testimony which would deprive the court of valuable evidence, particularly expert evidence.¹⁷⁹ The justification is that it has not been conferred for the individual expert’s benefit, but rather for the benefit of the public in the form of a more efficient administration of justice. It is necessary for the adversarial system to work. If immunity is lifted, experts may be more selective about the cases they choose to assist which is no help to the court.

¹⁷⁷ Best Practices, Counsel Questionnaire results, Giving Evidence, Q9 Appendix B

¹⁷⁸ Best Practices, Counsel Questionnaire results, Giving Evidence Q6 Appendix B

¹⁷⁹ Patrick, Kelly, “Suit could chill expert testimony”, National post Monday Feb. 12, 2007

www.canada.com/nationalpost/story.html?id=311c2732-38e4-4ffa-b18c-1fa79749d685 accessed Apr 30, 2007

Not everyone agrees that experts should continue to enjoy immunity. Paid experts should be liable to their clients for the performance of their professional duties. “Why should expert witnesses enjoy immunity that other professionals don’t. They should be responsible for their negligence or bad faith. One has to remember liability does not automatically arise from making a mistake or an error in judgement.”¹⁸⁰ “Indeed, it may be argued that a legal regime of civil liability would make experts more likely to act in accordance with their obligations of independence and impartiality, as it would require experts to internalize the cost of failure to comply with those obligations.”¹⁸¹

The unanimous affirming of absolute immunity has been challenged recently, in the court of Appeal in *Reynolds v. The City of Kingston Police Services Board, et al*, [2007] O.J. No.900 reversed the lower court decision that the expert, Dr. Smith, was protected by witness immunity. This case, although it has not been dealt with at trial, seems to suggest that the “expert witness may be liable for their actions if it is their personal involvement or preparatory work which gives rise to their evidence. It does not seem to suggest that experts, who are retained purely for the purposes of a hearing or trial, could be held liable for their evidence.”¹⁸² So to the extent that this case against Dr. Smith, suggests that the absolute immunity rule is less than absolute, it still appears the exceptions to this rule will be few and far between. There is no implication that Canada will change its stance on immunity in the near future but the jury is still out. This case should be monitored for any impact it may have on financial experts work to develop their opinion and the testifying of that opinion.

¹⁸⁰ Carlson, Daryl-Lynn, Focus: Expert’s blanket Immunity challenged, www.injusticebusters.com accessed April 28 2007

¹⁸¹ Ibid

Based on the foregoing, the **Best practices for Expert Evidence in Court** are as follows.

- **Preparation of experts by counsel to give evidence should not be discouraged as it can only assist in ensuring that all assumptions made by the expert have been supported by the expert or through other evidence presented by counsel. This preparation should not extend to scripted questions and answers for fear of appearing biased, and experts must ensure that counsel does not cross the line and jeopardize their independence. Standard Practices may consider addressing the issues of expert witness preparation to provide guidelines.**
- **The process of discovery of experts should be reconsidered with strict conditions to establish need by counsel, restrict scope and time to prevent abuse, or delays and additional costs that may be incurred by retaining new experts if discovery discredits experts. The early disclosure of information can be very beneficial to the judicial process and alleviate the problems of cost and delays.**
- **Pre-trial conferencing of experts should be used whenever possible to facilitate narrowing the issues and early disclosure to reduce trial time and encourage settlement. This may begin with leave from the court or by consent and with experience it may develop to a practice of right.**
- **The CICA and experts should monitor the court's decision on expert witness immunity in the Reynold's case for possible impact on the work and testifying of financial experts.**

¹⁸² LeBlanc, Bernard C., Professional Practice and liability on the Net, Steinecke Maciura LeBlanc, Professional Regulation and Discipline Vol 8 No.5 Feb, 2007 www.sml-law.com/publications/newsletter.asp accessed May 7, 07

Conclusion

The Canadian Judicial system is subject to pressing issues relating to costs and delays which are making justice inaccessible to the average Canadian. The same issues have been addressed in other common law jurisdictions which have resulted in the implementation of successful reforms. In Canada the wheels of change have started to turn with several provincial law societies establishing committees who are mandated to investigate and make reform recommendations. There is a general consensus amongst the law reform initiatives that expert witnesses and their testimony are a contributing factor that must be addressed in this process. It is critical that changes be made because the complexity of litigation means that the expert witness has a necessary role however, it is currently viewed as a wasteful proliferation of expert testimony. The demand for the expert testimony will only increase as the complexity of litigation intensifies in the future which will magnify the current problems.

Although experts are necessary, the issue is as one judge explained “Bad experts can make a case more complex, good experts are an asset.”¹⁸³ A good expert is one that provides independent assistance to the court on matters that are beyond the knowledge of the trier of fact. However, it is clear that some experts act as advocates; opine on matters beyond their expertise or based on unreasonable assumptions; and are retained to testify on matters that were within the general knowledge of the trier of fact. It is the overuse of these experts of questionable value that are contributing to the problems in the Canadian Court system. The question is whether the experts are solely responsible.

¹⁸³ Best Practices, Judge Questionnaire Results, Expert Evidence, Q16, Appendix C

To address this point, questionnaires were sent to experienced experts, lawyers and judges as each is very involved in the role and scope of the expert witness in court. The objective was to determine whether there was consistency amongst the groups in the understanding of the role and scope of the financial expert witness. The responses served as the basis for identifying best practices for the financial expert witness. The responses clearly demonstrated that there is little consistency amongst the three groups which certainly contributes to the general court dissatisfaction with experts. The best practices identified to improve the role and scope of the expert applied to each group. Without reiterating the specific best practices identified, it is important to note that the prevailing factor was the requirement of ongoing guidance and direction for each of three groups to clarify their role as it relates to financial expert witness.

The CICA has taken the lead in this area with the development of the Standard Practices for Investigative and Forensic Accounting Engagements. Although only recently released, with time and increased awareness, these standard practices will serve as a measure of acceptable expert practices for the courts, guide experts in exercising their professional judgement, inform lawyers and provide consistency to the public. To be truly valuable, these practices must remain flexible and evolve to address areas such as testifying and emerging issues identified in the Best Practices such as expert discovery and single joint experts. The Institute must also be diligent about using these standards for disciplinary measures to ensure the quality of experts.

The provincial law reform initiatives are also evaluating the procedural rules relating to expert witnesses. Although these initiatives are essential there is a need to address partisanship of experts as well as disclosure. There is a need for a set of guidelines established for counsel

dealing with less formal issues such as retaining and instructing experts. This initiative must be aligned with the Standard Practices to ensure consistency of expectations for both experts and lawyers. Counsel must also be willing to adopt a less adversarial court system with procedures such as pre-trial conferencing. This will reduce the conflict that experts face to uphold their duty to the court

The most important change required to reduce the proliferation of experts is the tone at the top. Judges must truly embrace their role as gatekeeper to ensure that only qualified experts whose testimony is necessary, not just helpful, address the court. Once the judges clarify what is acceptable and necessary expert testimony and apply it consistently then lawyers and experts will respond accordingly.

There is no question that the expert cottage industry has provided opportunities for unethical experts, who lawyers are more than willing to retain in an attempt to add weight to weak arguments. This is damaging to the case, the court system and reputation of experts. All three groups; judiciary, counsel and experts, must continue to concern themselves with developing constructive methods to improve the role of the expert in court and must work together to enact these changes. This will change the culture of the system and ensure that financial experts provide the valuable and necessary opinions that the court requires to settle disputes. The goal is to combine the original intention of expert testimony with the current complex litigation issues. It is not an easy task but one that must be undertaken for the good of the court system and the professional reputation of financial experts. The Best Practices identified based on valuable input from experienced participants should be considered as a solid starting point.

**Best Practices for the Role and Scope of an Expert Witness in Canadian Courts
Expert Questionnaire Results**

Qualifications

- | | |
|---|--|
| 1. Professional Designations obtained. | CA, CPA,CBV, CA-IFA, FCBV, ASA, CIRP |
| 2. Number of years in practice? | Range 11 to 36 years, Average 27.5 years |
| 3. First year giving evidence as an expert witness. | Range from 1979 to 2000 |
| 4. Number of times qualified as an Expert Witness. | Range 6 to 40 times, Average 29.4 times |
| 5. Provided Expert testimony in the following jurisdictions (check) | |
| ▪ Court | 7 |
| ▪ Tribunals | 6 |
| ▪ Regulatory Body | 0 |
| ▪ ADR hearing | 5 |

View of Role of Expert Witness

1. Which stakeholders do you serve?	<u>1 most important</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 least important</u>
▪ Firm (profitability/fees)	1	1	1	1	2
▪ Staff (training)			2	3	2
▪ Client (counsel)		2	4	1	
▪ Client (party to action)		3	4		
▪ Court	6	1			

Comments:

- We are to aid the court on complex matters
- No rank for firm, would not do work if not economical
- Very difficult to rank
- Although you are in the business to provide your client with the best service your first obligation as an expert witness is to the court. The best service you can provide your client and counsel to the client is to honour that obligation and be an independent objective witness to the court. The court is interested in what the expert witness has to say as that is the basis on which it will make a decision. If you are helpful and informative and professional it is more likely the court will heed what you have to say in making its decision.

2. Factors that impact acceptance of engagements.	<u>1 most important</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 least important</u>
▪ Objectivity/Independence	3	3			
▪ Budget		1	1	3	1
▪ Timing		1	2	3	1
▪ Staff resources			2	1	2
▪ Expertise	2	2	2		
▪ Strength of the client’s case	1		1		4

Comments:

- Strength of client’s case ranged a 6 from 3 experts – it was even less than the least important consideration
- 1 participant said needed all of 1-5 in order to do work. #6 is complex, as liability strength is not something we are qualified to assess and quantification strength has to do with the work we do
- It is important you understand what you are capable of doing and not stray too far from your expertise. To stretch what you can say you will do ends up hurting you and your client in the end. A good cross examination will always find out where you have stretched too far.

3. *In what circumstances, if any, would you refuse an engagement?*

Comments:

- **Disreputable client (4)**
- **Lack of funds (5)**
- **Not appropriate expertise (3)**
- **If not independent/objective (4)**
- **If requested or pressured to reach a certain result**
- **Lawyer not willing to accept objective view (2)**
- **If I do not agree with the position of the client**
- **If I do not have the time, resources and information to a complete professional job (2)**
- **Scope limitations**

4. *Your primary role as an expert witness is to :*

	<u>1 agree</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 disagree</u>
▪ Maximize client's position			2		5
▪ Comply with requests of retaining counsel	1	1	3		2
▪ Maximizing fees on engagement				1	6
▪ Providing opinion for fee	2		3		3
▪ Providing independent opinion to assist the court regardless of client's position	7				

Comments:

- **We are to provide opinion**
- **We have to be aligned with the counsel's legal assumptions, hence the need to comply with counsel's requests – you also have to have integrity and do your selling of the right answer to the client, not the court**
- **It is not your main goal because you have to have to have a supportable position. You can help to maximize his situation by considering a range of reasonable outcomes supported by reasonable assumptions and the court will decide based on the evidence provided. You can help the court by providing the range and you comments and which one you believe is reasonable. You do not want to make unreasonable assumptions to maximize a claim that ultimately will affect your credibility and risk having your report thrown out.**
- **depends what the requests are. If they are reasonable and do not affect your objectivity and your own opinion than they should be considered**
- **Your job is providing your independent opinion to the court. One that is supportable and reasonable and that will withstand cross examination.**

5. *In the Ikarian Reefer, Cresswell J. was quoted as saying “We do not think it is an exaggeration to say that the parties seem to have become more intent on winning the battle of the experts than on establishing the facts upon which their respective cases were based.” Are experts advocates for their own position? Do you agree or disagree?*

Comments:

- **Experts have to be objective and open minded-if there is an error, admit it, but if you are correct, stick by your principles**
- **Once an expert establishes their opinion it is hard to get them to reconsider (in most cases)**
- **Experts should only advocate for their opinion. Their opinion should be unbiased and based on facts and circumstances of the case. Some experts clearly don't adhere to this basis principle**
- **Experts can lose site of their real role. I have seen many experts tend towards advocacy inappropriately**
- **Not if done properly. Advocates should be admonished.**
- **Do not agree that experts are advocates. This is the role of counsel**

6. <i>It is the role of the expert witness to provide :</i>	I agree	2	3	4	5 disagree
▪ Wide range of answers depending on the facts of the case		1	1		3
▪ Most likely range based on expertise	4		1		
▪ Specific amount		1	2	1	1
▪ Scenario analysis where there are distinct differences in approach to damage quantification	1	1	3		

Comments:

- **Ranges and scenarios are ok if there are unknown variables**
- **Answer depends on fact and what is appropriate to the case. Cannot rank**
- **Only use scenarios if based on different assumptions of facts to be determined by court**
- **Depends on situation and what assists the court. Job is to assist the court in an area it does not have expertise to do. This means narrowing the range and in some cases may be a specific amount. May also have scenarios depending upon which assumptions are proven correct.**
- **It all depends on the issues and your mandate. The expert can take on a number of these roles and be useful and informative to the court. Common sense will usually dictate what you can and can not do.**

7. *In general, do you think lawyers understand the role of expert witnesses and use them appropriately? If not, what specifically do they not understand?*

- Scope of Work **Often do not understand the need to speak to specific individuals**
- Timing **Often have unreasonable expectations**
- Fees **Usually ok**
- Independence **Usually ok**
- Types of Reports (estimates/calculations/opinions) **Still some confusion here (3)**
- Other **Objectivity/credibility. They understand, they choose to make us(or try to make us) advocates**

Comments:

- **Not as well educated on types of reports**
- **Inexperienced counsel may not understand some or all of the above**
- **It all depends on the lawyer. There are lawyers that will try and limit your scope, bring you in at the last minute and put pressure on your fees and try to direct you in writing your report. They want you to help advocate a position which may or may not be supportable that they want to argue it. Most good lawyers do understand your role and allow you to carry it out in a professional manner.**

8. *In general do you think judges understand the nuances of expert witness' reports (estimate v. calculation) and value their assistance in court?*

If not, what specifically do they not understand?

- **Calculations usually give weight to opinion**
- **Depends on experience as both judge and lawyer**
- **Role of expert to give opinion not estimates or calculations**
- **Experts sometimes fail to explain the differences in the level of assurance in the different reports to the court**
- **They do not need to be educated, the standards help**
- **Understand somewhat; value assistance**
- **It is a bit hit and miss. If the report is clear and straightforward yes. However some reports deal with quite complicated issues, with many assumptions that need to be explained so that the court can fully understand what the expert is trying to communicate in his report.**

9. Does the court focus more on report or oral evidence?

- Technically oral evidence, but the report is helpful (3)
- Combination
- Should be the same. They are very interested to see if opinion withstands cross examination
- Oral
- The cross examination of the expert on his report is what the court will focus on if it contradicts the report. Oral evidence is very important but the report is your evidence. Sometimes the court has not read the report so the oral evidence becomes very important as it directs the court to the main issues.

10. An expert witness' reputation is based on :

	1 agree	2	3	4	5 disagree
▪ The number of times expert's evidence accepted by the trier of fact	2	1	2	1	
▪ Quality of the written report	2	1	3		
▪ Quality of the oral evidence	4		3		
▪ C.V.	4		2		1

Comments:

- The judge is the ultimate test for the expert
- You are as good as your last case. A good reputation takes years to establish and one case to destroy

Approach to the Engagement

1. In planning engagements rank the following factors 1 most important 2 3 4 5 least important

▪ Budget	1		4	1	
▪ Whether retained by defense or plaintiff					6
▪ Case law precedence	1	1	1	3	
▪ Past opinions provided	4		2		
▪ Published Articles/texts	1	3		2	

Comments:

- None of these is overly important
- The facts of the case are important. Case law on quantification is not as helpful for our issues since the facts will be different in each case. Don't do work if budget is insufficient
- Need a budget to do a proper job

2. Do you provide fixed fee estimates for engagements? 4 Yes 3 No

If so, on what percentage of your engagements? 5 to 20% For preparation of report

3. Does a fixed fee effect the engagement's :

	1 agree	2	3	4	5 disagree
▪ Scope		1			3
▪ Opinion					4
▪ Timing		1			3
▪ Usefulness			1		3

Comments:

- A fixed fee assumes the work will be complete
- Fixed fee builds in what client needs and what it will cost
- You should be doing the quality of work regardless of whether the fee is fixed or not

4. *If the budget is inadequate to complete the assignment, you would:* 1 agree 2 3 4 5 disagree
- | | | | | | |
|---|---|---|---|---|---|
| ▪ Stop work and advise the client | | | 2 | | 2 |
| ▪ Complete the assignment despite non recoverable fees | | 2 | 2 | | |
| ▪ Bill additional work | 3 | | | 1 | |
| ▪ Restrict scope based on fee | | | | 1 | 3 |
| ▪ Advise client of additional cost but will not demand payment for completion | 1 | | 1 | | 2 |

Comments:

- **Depends on what was committed to and how flexible the engagement letter is as to who pays**
- **Some of your actions will depend on the reasons for an inadequate budget. If you underestimated the amount of time, it becomes your business problem but should not impact the completion of your work product. If the scope and extent of the work changed you have a right to ask for fair compensation and discuss the budget with your client before the completion of the assignment.**

5. *In planning an engagement the material requested includes:* 1 most important 2 3 4 5 least important
- | | | | | | |
|---|---|--|---|---|---|
| ▪ All materials available to determine and identify what is relevant to opinion | 7 | | | | |
| ▪ Rely on counsel to provide the materials necessary to provide opinion | | | 1 | 1 | 4 |
| ▪ Rely on client to provide documents | | | 1 | 1 | 4 |
| ▪ Restrict analysis to productions of party | | | 1 | 2 | 3 |
| ▪ Independently obtain relevant industry material | 2 | | 3 | 1 | |

Comments:

- **We qualify our reports for any restriction in scope**
- **You need what you need to do the job**

6. *In planning methodology of engagement, will accept from counsel:* 1 agree 2 3 4 5 disagree
- | | | | | | |
|---|---|---|---|---|---|
| ▪ Instructions as to scope | 2 | | | 3 | 2 |
| ▪ Instructions as to method | | | | 1 | 6 |
| ▪ Input or consultation only | 3 | | 3 | | 1 |
| ▪ Assistance in identifying approach in similar cases | 1 | 3 | 1 | | 3 |
| ▪ No input | | | 1 | | 6 |

Comments:

- **Method must match case law**
- **You are the expert and know what needs to be done – but you will keep lawyers in the loop as to what you are doing**

7. *Before using assumptions in opinion report, identify the steps taken* 1 agree 2 3 4 5 disagree
- | | | | | | |
|---|---|---|---|---|---|
| ▪ Identify assumptions only, no other work performed | | | 1 | 1 | 3 |
| ▪ Identify assumptions, determine plausibility based on expertise | 4 | | 2 | | |
| ▪ Identify assumptions and complete sufficient due diligence to satisfy self they are reasonable in the circumstances | 5 | 1 | | | |
| ▪ Identify assumptions and complete sufficient due diligence to satisfy self they are likely in the circumstances | 2 | 3 | 1 | | |
| ▪ Do nothing – implicit in reading report | | | 1 | | 4 |

Comments:

- **Many assumptions are given by counsel, many are insisted by me as expert, as information is not available**
- **Depends on the assumptions and the ability to review given expertise**
- **Legal assumptions should be taken without due diligence**

8. *In providing an opinion have you relied on other expert's opinions?* **7 Yes, if necessary**

9. Percentage of engagements that you would rely on other experts. **Range from don't know to 33% of the time but 100% when necessary,**

10. How do you choose an expert?

	1 most important	2	3	4	5 least important
▪ Provided by counsel			4		
▪ Within firm		1		2	1
▪ Best available outside expert	5				
▪ Cost considerations				1	3
▪ Recommended by others	1	1		2	1

Comments:

- **Depends on circumstances**
- **If after my analysis, review and interview I feel the expert is qualified and the work done is appropriate in the circumstance, I have no problem using other experts**
- **You need to be comfortable with the expert, therefore recommendation is key – can also be within the firm if you have the confidence in the individual (because you know them and their abilities – works well for seamless delivery as well)**

11. Identify steps to evaluate qualifications and reliability of other expert

	1 agree	2	3	4	5 disagree
▪ No steps taken					6
▪ Obtain references regarding reputation			6	1	
▪ Review the source of their information		2	1	2	1
▪ Review previous reports prepared		1	1	2	1
▪ Review past reported decisions		2		2	1

Comments:

- **Will review report and will only refer to / rely on if satisfied with qualifications, expertise, methods etc**

12. Identify steps to evaluate the plausibility of other expert's assumptions

	1 agree	2	3	4	5 disagree
▪ Rely completely, don't review just note assumptions in report				1	4
▪ Review for plausibility		3		2	
▪ Perform due diligence against known industry standards			2	2	1
▪ Other (please indicate) Discuss with expert, client and counsel alternatives and reasons for assumptions					

Comments:

- **Depends on situation and comfort level**

13. If identify inadequacies in other expert's report :

	1 agree	2	3	4	5 disagree
▪ No steps taken; they stand on their own			1		4
▪ Communicate your findings with expert to obtain amended opinion	5		1		
▪ Note them in report, take no other action			1	1	3
▪ Independently perform additional procedures		1	2		2
▪ Withhold opinion if independent verification can not be completed		2	1	2	N/A

Comments:

- **Might not rely on their report, or seek other expert**
- **See if there is a misunderstanding that can be cleared up. Can agree to disagree but in the end you are there to assist the court so if you rely on a report with an error that doesn't help much**
- **This need to be resolved, can't withhold report, can make further assumptions, can qualify report, if so counsel will not use, so it will get resolved**

Conducting the engagement

1. *Is the opinion report prepared:*

	<u>1 most often</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 least often</u>
▪ Personally	2	3			
▪ By junior staff					
- with your supervision	3				1
- without your review					5
▪ With counsel's input	1		4		1
▪ By other experts				2	2

Comments:

- **Usually a combination but requires significant involvement by senior expert**
- **Always certain input necessary from legal point of view**
- **Use other experts if necessary and required**
- **Mostly by senior staff with my supervision and input on key issues and my editing or writing of key sections**
- **Counsel and client will always review draft**

2. *If there is a material scope limitation*

	<u>1 agree</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 disagree</u>
▪ Report based on documents reviewed			3	2	
▪ Report the scope limitation			6		
▪ Qualify report			5	1	
▪ Use alternative methods to complete engagement			2	2	1
▪ Only prepare report if there is full, unfettered access to information				4	3

Comments:

- **Depends on the severity of the scope limitation**
- **Note if limitation, can sometimes still produce a meaningful report working around it**
- **Case law says must deal with limitation via disclosure**

3. *Policy on file documentation is that files should include :(check one)*

▪ All material reviewed	4
▪ Only material relied on	
▪ No firm policy in place	2

Comments:

- **At least all material relied on may be impractical to include all material reviewed**
- **No firm policy, but if it is relevant we keep it. Sometimes there are peripheral things looked at that are blind alleys and may not be always retained**

4. *Policy on file documentation is that Draft Reports are to be :(check one)*

▪ Maintained as court evidence	1
▪ Destroyed so not considered by court	4
▪ No firm policy in place	

Comments:

- **Some jurisdictions require that drafts be maintained**
- **None of the above. Keep drafts that go to counsel, but internal works in process are not maintained**

5. *Draft reports are delivered to client :* 1 most often 2 3 4 5 least often

▪ Personally in hard copy	1	1	1		
▪ Electronically	2				1
▪ In hard copy via fax or courier			4		1

Comments: Always delivered to counsel

Reports

1. What type of report do you think is appropriate for court? 1 agree 2 3 4 5 disagree

- | | | | | | |
|------------------------------------|---|--|---|---|---|
| ▪ Calculations | | | 1 | 1 | 2 |
| ▪ Estimates | | | 2 | 1 | 1 |
| ▪ Opinion which is fully supported | 5 | | | | |
| ▪ All reports are appropriate | | | | 1 | 6 |

Comments:

- **As long as the court knows what it is and weighs it accordingly**
- **Depends on circumstances and the specific issue. The type of report will affect weight given to report by trier of fact**
- **Other reports are useless, experts are required to give their opinion**
- **Depends. Estimates and opinions are usually what is done – rarely a calculation could be done but circumstances are unique as it naturally has little expert value**

2. In preparing reports will accept 1 agree 2 3 4 5 disagree

- | | | | | | |
|---|---|---|---|---|---|
| ▪ No input for counsel | | 1 | 1 | | 4 |
| ▪ Factual edits from counsel | 5 | | 2 | | |
| ▪ Substantive edits from counsel | | 1 | 2 | 1 | 3 |
| ▪ Allow counsel to write sections of the report | | | | | 6 |

Comments:

- **No substantive edits as that is not your own opinion**
- **Can listen to comments since they may observe something you do not**

3. In preparing reports, if client is given the opportunity to review, will accept 1 agree 2 3 4 5 disagree

- | | | | | | |
|--|--|--|---|---|-----|
| ▪ No input from client | | | | 1 | 5 |
| ▪ Factual edits from client | | | 5 | 2 | |
| ▪ Substantive edits from client | | | | 3 | 1 2 |
| ▪ Allow client to write sections of the report | | | | | 6 |

Comments:

- **No substantive edits as that is not your own opinion**
- **Can listen to comments since they may observe something you do not**

4. Should an experts' report include all instructions received from counsel?

Comments:

- **All instructions that, if not given, may have otherwise affected the work performed or the conclusions reached**
- **Generally does if relevant to the report, such as “we have been asked to assume...”**
- **Yes if accepted and agreed upon**
- **Requirement depends on rules – see UK and Caribbean rules**
- **Yes if they are part of the retainer**
- **No**
- **All material instructions**

5. When preparing reports your practice is to : (check one)

- | | |
|---|---|
| ▪ Have the report reviewed by your partner/s for substantive comments | 7 |
| ▪ Have the report proof read only | |
| ▪ No third party review | |

Comments:

6. *Should an expert's report be addressed to the court?*

Comments:

- **No to counsel – in privilege 5**
- **It is addressed to the party who retained you or to whom you are asked to report**
- **In theory it should be. In practice it is most often addressed to counsel**

7. *When you critique reports of the opposing expert*

	<u>1 agree</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 disagree</u>
▪ Point out flaws in order to undermine or embarrass other experts	1				5
▪ Point out flaws and prepare reply report to inform other expert	2		2		1
▪ With permission of counsel meet with opposing expert to discuss differences	1	2	2		
▪ Don't prepare critique, provide information to counsel for cross examination of opposing expert			3	1	1
▪ Don't prepare written document use information to critique opposing expert in examination			1	1	2
				2	1

Comments:

- **Purpose of critique is to assist in identifying differences and issues for purpose of resolution. Approach to critique depends on issues and facts of the case**
- **Not allowed to give comments on matters not in report. Not good to be too nitpicky, focus on the key issues**
- **Depends on what you are retained to do**

Giving Evidence in Court

1. *Do you think experts should be questioned and their files available during Discovery by right?*

Why or why not?

- **Yes it will help to avoid issues later on**
- **They can be and I don't have a problem as long as it isn't a fishing expedition without results, the court will not be impressed with a waste of the court's time. You should have some grounds for concern if you are going there**
- **Whatever rules permit is fine**
- **Yes if a report has been prepared at that time**
- **YES, full disclosure to court**
- **No – the process is too cumbersome and drawn out already. It allows fishing expeditions and is wasteful process**

2. *In qualifying expert witnesses to give evidence, the court should*

	<u>1 agree</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 disagree</u>
▪ Qualify as a general financial expert	1		2		3
▪ Qualify based on the matters touched on in the 4 corners of the report	3	1	1		
▪ Based on expertise in accounting and damages	3	1	1		
▪ Qualify to answer narrow questions to assist court	1	2	1		1

Comments:

- **Depends on facts, report, issues and expertise**
- **Depends on what is needed, but the court will want to be reasonably narrow in what qualified as**

3. *Expert witness evidence is discredited in court most often because :* 1 most often 2 3 4 5 least often

▪ Experts use unreasonable assumptions that are not substantiated	3	2	1		
▪ Experts opine on matters beyond their scope of expertise		1	2	2	1
▪ Experts act as advocates for their client	2	1	3	1	
▪ Expert has insufficient expertise			3		3
▪ Insufficient work performed to support opinion		1	1	3	1

Comments:

- **Seen all of these and they are equally likely**

4. In preparing to give evidence in court, you normally :
- | | 1 most often | 2 | 3 | 4 | 5 least often |
|---|--------------|---|---|---|---------------|
| ▪ Receive guidance from counsel | | 1 | 5 | | |
| ▪ Receive a script of questions from counsel | | | | | 7 |
| ▪ Prepare independently | | 5 | | | |
| ▪ Consider views of other experts | 1 | 2 | | 3 | |
| ▪ Consider facts you have become aware of since filing report | 3 | 3 | | | |

Comments:

- **Depends on style of counsel and the case materials, but need to be yourself**

5. Should Expert Witnesses continue to receive absolute immunity in Canada?

- **Yes unless their actions were fraudulent**
- **Yes but if they have been found to have deliberately misled the court, why should they have immunity**
- **Legal question**
- **Yes! (3)**

6. Should negligence be an exception to absolute immunity?

- **OK**
- **No**
- **The issue is how negligence would reasonably be determined**
- **No, legal question**
- **Good question because this is harder to determine fairly and the risk of a bad call by the court could destroy a career and livelihood. If we could be confident of no bad calls by the court, then maybe we could live without the exception**
- **Yes but it depends on how you define negligence as gross or material in nature**

7. In a Globe and Mail article “The case against expert witnesses” Michael Code, a lawyer who teaches at U of T law school, is quoted as saying that “there is a growing hostility towards expert evidence. There is a sense in the courts that expert evidence has proliferated too much. Expert testimony lengthens and complicates trials, and makes them more expensive.” Do you agree?

Comments:

- **No. experts are needed in order to provide the court with the input it needs to make an informed decision. The challenge lies in finding a credible, objective expert**
- **No, it is necessary**
- **In some cases yes – it has been abused, but there are valid and valuable reasons to have experts when not abused**
- **Certainly the ideal situation is one expert agreed by both parties, and/or retained by the court, problem is the collection of fees**
- **Expert evidence has a place and a role but should be focused and well defined**
- **Yes but it depends on the expert and how they are used by counsel. It does add to the cost but if used properly an expert can help focus the court on the relevant issues**
- **They have said this for 20 years**

8. *If in agreement, would following changes be benefit to the court?* 1 most beneficial 2 3 4 5 least beneficial

- | | | | | | |
|--|---|---|---|---|---|
| ▪ Views of all experts heard after fact witnesses for both sides have given evidence | 1 | 1 | 2 | | |
| ▪ Require a pretrial conference for experts to resolve inconsistent understanding of the facts, if no agreed statement of fact then experts reconcile response to both sets of facts | 2 | 1 | | | 1 |
| ▪ Bifurcate the proceedings into liability/finding of fact and expert testimony - The expert provide examinable testimony or a report based on the courts ruling of fact | | | 3 | 1 | 1 |
| ▪ Joint expert or if the sides can not agree the court appoints one expert | 3 | | 1 | | 1 |
| ▪ Other | | | | | |

Comments:

- **Can't have experts determining which facts are going to be found to be correct by the court**

9. *What do you think is the most common complaint or weakness of financial experts?*

- **Unreasonable assumptions (2)**
- **Too technical – can't simplify the financial issues**
- **Poor reports**
- **Poor evidence**
- **Become advocate for client/bias (3)**
- **Scope limitation**
- **Do not adequately understand the subject business**
- **Too confusing, unclear in findings, make simple issues too complicated. Too adversarial, too biased for their client, advocate, lack of business reality.**

**Best Practices for the Role and Scope of a Financial Expert Witness in Canadian Courts
Counsel Questionnaire Results**

1. *In what area of law do you specialize?* **Corporate, commercial, securities, civil litigation**
2. *Number of years in practice?* **Range from 24 to 35 years Average 31 years**
3. *Presented cases in the following jurisdictions (check) all*
 - Superior Court 5
 - Federal Court Trial Division 4
 - Federal Appeal Court 4
 - Provincial Appeal court 5
 - Supreme Court 4
 - Tribunals 4
 - Regulatory Body 4
 - ADR hearing 5

View of Role of Financial Expert Witness

1. *Have you retained a financial expert witness?* **5 yes**
2. *If yes, approximately how many times?* **Range from 10-20 to close to 50 times, Average 25.4 times**
3. *Factors impacting whether Financial Expert Witness is retained*

	<u>1 most important</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 least important</u>
▪ Financial Complexity of case	4	1			
▪ Strength of the client's case			3	1	
▪ Budget		1		2	1
▪ Timing				2	2
▪ Whether the opposing side has retained an expert	3			2	

Comments:

- **whether an opinion is required that is beyond the knowledge of the court**
- **Have to expert if other side does, can not take risk being able to discount them on cross examination – a lawyer is not an expert so can not expect to discredit expert on cross so need expert to refute the other side's expert. Need expert rebuttal.**
- **Generally the most important issue is whether the issue requires expert knowledge**

4. *Point in judicial process do you retain a Financial Expert? :*

	<u>1 most often</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 least often</u>
▪ Preparing pleading	2	1	1	1	
▪ Discovery	3	2			
▪ Just prior to court				1	2
▪ After opposing side has retained an expert	1	1	1	1	

Comments:

- **As early as possible, even before pleadings**
- **Aware that there are some lawyers who try and hire them all so other side can't – need client with lots of money, experts not happy when they realize that they won't do any work just take retainer – some do this as a game/strategy**

5. You select a financial expert based on :	<u>1 most important</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 least important</u>
▪ Reputation of the Expert	3	2			
▪ Best available Expert	4	1			
▪ Professional directory				1	4
▪ Quality of books or articles published by the expert		1	2	1	
▪ Number of times the expert has testified on the winning side in other cases		1	1	1	
▪ Recommendation from other counsel		3		1	
▪ Recommendation of client			2	1	
▪ Fee			1		1
▪					

Comments:

- do a Quicklaw search on experts other decisions to see if they have ever been chastised by judges
- must be careful about recommendation of client, not independent looks bad when asked on cross how many times testified for client
- will use recommendations from counsel, need references

6. A financial expert witness's good reputation is based on:	<u>1 agree</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 disagree</u>
▪ Number of times expert's evidence accepted by trier of fact	4		1		
▪ Quality of the written report	1		2	1	
▪ Quality of the oral evidence	2		2		
▪ C.V.			1	4	

Comments:

- need the whole package, must present well, must be articulate, have testifying experience

7. Identify steps to evaluate qualifications and reliability of financial experts	<u>1 agree</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 disagree</u>
▪ No steps taken			1		3
▪ Obtain references regarding reputation		3	1	1	
▪ Review the source of their information		1		1	2
▪ Review previous reports prepared			1	2	1
▪ Review past reported decisions		2		1	

Comments:

- meet with expert first see how well they present themselves, articulate, must feel that they can work together, has experience, meeting very important

8. Which stakeholders is financial expert to serve?	<u>1 most important</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 least important</u>
▪ Expert's Firm			2		2
▪ Himself			1	1	1
▪ Client (counsel)	2		1	1	
▪ Client (party to action)	1		2		1
▪ Court	4		1		

Comments:

- Independence most important - rather have expert tell him what he doesn't want to hear, an experience expert must be independent or will have no career or very short one. Lawyers who try cases on a regular basis will demand independence or their case will be in trouble.

9. Stakeholders the financial expert actually serves? 1 most important 2 3 4 5 least important

▪ Expert's Firm			3		1
▪ Himself			3		1
▪ Client (counsel)	3			1	
▪ Client (party to action)	2		2		
▪ Court	3		1		1

Comments:

- **Good experts, experienced ones, who testify regularly, know that they serve the court, need to be independent or their testimony won't be given weight and their career will be short. But experts are human and do get involved in case.**
- **Everyone is an advocate, it is how well you can appear to be dispassionate**

10. In the *Ikarian Reefer*, Cresswell J. was quoted as saying "We do not think it is an exaggeration to say that the parties seem to have become more intent on winning the battle of the experts than on establishing the facts upon which their respective cases were based." Are experts advocates for their own position? Do you agree or disagree?

Comments:

- **If they are advocates, judge will give them no credibility. There is a hole because of less competence.**
- **To a certain extent that is true. If you call them as a witness it is because they support the position you are taking. Therefore, it only makes sense that the expert battle to win as they believe in their position which happens to support yours.**
- **Unfortunately all too often**
- **Experts provide opinion evidence, are expected to explain their opinion**
- **Strongly agree**

11. Counsel views primary role of a financial expert witness in court is to 1 agree 2 3 4 5 disagree

▪ Maximize client's position	2	1		1	
▪ Comply with requests of retaining counsel		2	2		
▪ Provide opinion for lowest cost				2	2
▪ Providing opinion for fee		2	1	1	
▪ Providing independent opinion to assist the court regardless of client's position	2	1			2

Comments:

- **Those that regularly give evidence know their role. If judge criticizes independence or competence then damages reputation, need to preserve reputation.**
- **Ultimately, I do not call as witnesses experts whose opinions are not helpful**

12. It is the role of the financial expert witness to provide : 1 agree 2 3 4 5 disagree

▪ Calculation based on instructions	3				1
▪ Wide range of answers depending on the facts of the case	1		1	1	1
▪ Most likely range based on expertise and factual support	1	2	2		
▪ Specific amount based on the financial experts understanding of the facts		1	3	1	
▪ Scenario analysis where there are distinct differences in approach to damage quantification –	1	1		1	1

Comments:

- **Scenarios necessary because don't know what finding of facts will be**

13. *In general, do you think lawyers understand the role of financial expert witnesses and use them appropriately?*

- **Yes**
- **Some yes, some no**
- **Most competent counsel understands the role. Some do not use them appropriately**
- **Don't think lawyers and the court truly understand what experts are for and they are overused**
- **Judges like to hear them – makes it easier or them**
- **Financial experts are used to calculate – that is not necessary – should be for more complex issues**

If not, what specifically do they not understand?

- Scope of work 1
- Timing
- Fees
- Opinion 3
- Independence 3
- Other

14. *Does the court focus more on written report or oral evidence?*

- **Written report – don't stray into areas beyond expertise, oral must be straightforward, connected, articulate – need both. Theory is opinion should be hypothetical, not based on any specific knowledge of the case, asked to give opinion based on assumptions provided. An expert should be able to come off the street and give opinion. Wouldn't need report just exhibits presented in examination in chief for clarification and to help trier of fact follow along. This is not done any more. Issues are too complicated, unrealistic to think it could be done without detailed info of case. Have to give valuation. Example would be what is the value of CIBC shares. In old days would give value based on hypothetical of company assumed to have same traits as CIBC – now can't do that too many variables – have to give opinion on CIBC shares – ultimate decision (see later)**
- **More on the written report because this type of evidence is difficult to give orally. The oral testimony serves to show the court that the expert knows what he/she is talking about and whether the court should rely on the report**
- **Both equally**
- **Both, but oral evidence is more important**
- **Written report although the court would never acknowledge that fact**
- **Report is rarely not accepted by the judge as evidence but the evidence is really what is given on the stand. Other witnesses just give oral testimony, but judge is lazy and wants to take report so he can refer to it in his decision.**
- **The problem is so much is in writing not all of it is covered in the oral testimony or cross examination so information gets into evidence that is not touched on in oral evidence. The judge uses the report in making his decision so the expert's evidence becomes so important even more important than the oral evidence. That is why it becomes a battle of the experts.**

Approach to the Engagement of the Expert Witness

1. *Do you retain financial experts on the basis of a fixed fee?*

- **No, clients do require budgets and regular billings**
- **No, just fixed hourly rate**
- **Not usually**
- **Yes**

2. *If so, on what percentage of your engagements?* **75%, less than 10**

3. Does a fixed fee effect the financial expert witness':	<u>1 agree</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 disagree</u>
▪ Scope	1	1			
▪ Opinion		2			
▪ Timing				2	
▪ Usefulness	1			1	

4. A financial expert is retained to provide advice for:	<u>1 most important</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 least important</u>
▪ Approach and Assessment of case	4				
▪ Discovery questions		1	2		1
▪ Document requests				3	1
▪ Cross Examination questions		2	2		
▪ Critique of opposing expert report	1			2	
▪ Calculations to facilitate settlement		2	2		
▪ Opinion only		1			2

Comments:

- Hire them early each stage is very important. Consultants will be more common in future because comments are privileged and once expert on stand there is no privilege. Issues are so complicated will need consultant to help so you don't have to worry about independence.

Engagement of a Financial Expert Witness

1. Retaining an financial expert, material provided includes:	<u>1 most important</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 least important</u>
▪ All materials available to allow the expert to determine and identify what is relevant to opinion	2		2	1	
▪ Counsel to provide the materials counsel feels are necessary to provide opinion	2		1	1	
▪ Rely on client to provide documents					1
▪ Restrict to productions of parties			1	3	1

Comments:

- lawyers do not have the skill or knowledge to determine what the expert will need
- Meet with expert and explain theory of clients and ask does it make sense. What do you need to establish an opinion? Clients complaint about experts is cost, can be 60-70% of costs. But have to let expert do what is necessary and see what is required to be comfortable with opinion. So it will hold up in court. Expert is one area that a lawyer can not cut costs because don't have the knowledge to do that without damaging case.
- Counsel provides what appears to be relevant, advise what else is available. The expert requests additional documents or finds additional documents as necessary to complete report

2. When retaining a financial expert, will provide the expert with:	<u>1 agree</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5 disagree</u>
▪ Instructions as to scope	4				
▪ Instructions as to method				2	2
▪ Input or consultation only		1	2		
▪ Assistance in identifying approach in similar cases		3	1		
▪ Assistance in writing expert report		1	1		2
▪ No input, financial expert to outline mandate	1		1	1	2

Comments:

- Meet with expert when he is in a position to express opinion. Discussion is oral. Cross examine the expert and ensure both parties are comfortable with the opinion. If that doesn't work get the next expert. Then ask the expert to prepare report – know what it will say so there is no need for edits on substance. May just have a few style edits.

3. *Providing assumptions relevant to opinion, expect the financial expert to :* 1 agree 2 3 4 5 disagree
- Accept assumptions as provided, no other work required 1 1 1
 - Determine plausibility of assumptions based on expertise 1 3 1
 - Complete sufficient due diligence so the expert is satisfied they are reasonable in the circumstances 4 1
 - Complete sufficient due diligence so the expert is satisfied they are likely in the circumstances 1 2

Comments:

- **If expert doesn't ensure that the assumptions are at least plausible but better reasonable then he will have a very short career. Must do the exploring required to ensure they are. Will not hold up in court. Facts are not established so never perfect answer. Expert must admit negative point on stand for credibility. If unreasonable assumptions about facts it is because parties are not realistic about them or would have settled – that is why they end up in court. If they fail it is because lawyer did not do homework**
- **If the assumptions are not accepted can not fault the expert because they only get one side of the case**
- **It is not that they do not do enough work in most cases, they have to take some info at face value and lawyer has to try to prove facts but don't know how trier of facts will decide**
- **Judges are trying to write an opinion that won't get overturned, have to pick one side so they will say that the assumptions were unreasonable. That is not a criticism of the expert in all cases. The facts were not reasonable. This is not a career ender for the expert**

4. *When the financial expert must rely on another expert's opinion expect the financial expert to* 1 agree 2 3 4 5 disagree
- Accept assumptions as provided, no other work required 1 1 1
 - Establish reputation of other expert, if acceptable no other work required 2 1
 - Complete sufficient due diligence so the expert is satisfied they are reasonable in the circumstances 3 1 1
 - Complete sufficient due diligence so the expert is satisfied they are likely in the circumstances 2 2 1

Comments: would be best if satisfied they are likely but facts are not decided so hard to say what is likely

5. *Should all instructions, verbal or written provided by counsel to the financial expert be disclosed in the expert report? Why or why not?*
- **No. will send letter to expert with instructions and note meeting. But do not want the discussions outlined. If expert asked about meeting will say that what was discussed is what was laid out in the letter**
 - **No. much is privileged**
 - **No. Written instructions should be included but because verbal instructions are easily misunderstood or miscommunicated they should not be included**
 - **It should. But never is**
 - **Yes. Best practice is to disclose all assumptions at early stage, rather than in X-examination**

6. *Identify steps to evaluate plausibility of financial expert's assumptions :* 1 agree 2 3 4 5 disagree
- Rely completely 1 2
 - Review for plausibility 1 2 1
 - Ensure assumptions supported by factual evidence or other experts 2 2
 - Perform due diligence against known industry standards 2 2
 - Other (please indicate)

Comments: Facts not established. Review in meeting with expert until comfortable. Question the expert to ensure it makes common sense.

7. <i>If identify inadequacies in the financial expert's report</i>	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>disagree</u>
▪ No steps taken; they stand on their own						3
▪ Communicate your findings with expert to obtain amended opinion	1	1	2			
▪ Do not submit expert witness report	1	2	1			
▪ Independently perform additional procedures				2	1	
▪ Rewrite the report and ask expert to accept changes			1		2	
▪ Retain another expert	2	2	3			

8. <i>When retaining expert to critique report of opposing expert, expect expert to</i>	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>disagree</u>
▪ Point out flaws in order to undermine and embarrass other experts			1	1		1
▪ Point out flaws and prepare reply report to inform other expert			2	1	1	
▪ With permission of counsel meet with opposing expert to discuss differences				1	1	2
▪ Don't prepare critique just provide information to counsel for cross examination of opposing expert	1			2	1	
▪ Don't prepare written document use information to critique opposing expert in examination in chief	1				1	

Comments:

- **Need expert rebuttal can not rely on cross to discredit expert. Lawyers do not know enough to risk that in cross**

Reports

1. *Should financial expert reports be addressed to the court?*

Why or Why not?

- **No. court did not retain expert. Court appointed experts not good because then they are delegating job of deciding issue. Judge is unlikely to reject the court appointed experts opinion. On cross need expert to rebut so know what questions to ask – lawyers end up retaining expert anyway**
- **No. Report is strictly inadmissible**
- **No. To counsel who retained him**
- **No. To comply with the Rules, expert provides information to retaining counsel to disclose to opposing counsel in advance of trial. In my experience, experts write counsel not court.**
- **No. In our jurisdiction that would be viewed as odd. The court knows that the expert has been retained by the party litigant to address the report to the court is to suggest false independence.**

2. <i>What type of report is appropriate for a financial expert to submit to court</i>	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>disagree</u>
▪ Calculations	1	2	1			
▪ Estimates	1	1				1
▪ Fully supported opinions	4					
▪ All types of reports are acceptable	2	1				1

Comments:

- **depends on instructions – what is required**

3. *Should standards for expert reports be included in court rules of procedure?*

- **No, can't make rules about this**
- **No. too difficult as these are so many types of reports**
- **YES!!!**
- **Established by civil law**
- **Report standards should be in the rules, but not too restrictive, couldn't throw out report because didn't do one of the steps. Need some consistency in what the court receives.**
- **Standard practices from professional bodies are good because can say that expert did not meet standard**

4. *If there is a material scope limitation, expect the expert*
- | | <u>1 agree</u> | <u>2</u> | <u>3</u> | <u>4</u> | <u>5 disagree</u> |
|---|----------------|----------|----------|----------|-------------------|
| ▪ Report based on documents reviewed | 1 | 2 | 1 | | |
| ▪ Report the scope limitation | 4 | | | | |
| ▪ Qualify report | 2 | 1 | 1 | | |
| ▪ Use alternative methods to complete engagement | | | 1 | 2 | |
| ▪ Only prepare report if there is full unfettered access to information | 1 | | | | 5 |

5. *Expect draft reports to be delivered by financial expert :*
- | | <u>1 most often</u> | <u>2</u> | <u>3</u> | <u>4</u> | <u>5 least often</u> |
|-----------------------------------|---------------------|----------|----------|----------|----------------------|
| ▪ Personally in hard copy | | 1 | | | 2 |
| ▪ Electronically | 3 | | | | 1 |
| ▪ In hard copy via fax or courier | | 1 | 1 | | 1 |
| ▪ Don't review draft reports | 1 | | | | 3 |

Comments:

- o **Meeting with expert will handle review, don't expect draft until have met and discussed opinion. Draft report has no surprises.**

6. *When financial expert is preparing reports, will provide*
- | | <u>1 agree</u> | <u>2</u> | <u>3</u> | <u>4</u> | <u>5 disagree</u> |
|--------------------------------|----------------|----------|----------|----------|-------------------|
| ▪ No input | | | | | 3 |
| ▪ Factual edits | 4 | | | | |
| ▪ Substantive edits | 1 | | | 1 | 1 |
| ▪ Write sections of the report | | | 1 | | 2 |

Comments: Only very few style edits. Know what report will say from meeting. Should never receive report with problems

7. *When expert preparing report, if client has opportunity to review, allow:*
- | | <u>1 agree</u> | <u>2</u> | <u>3</u> | <u>4</u> | <u>5 disagree</u> |
|--|----------------|----------|----------|----------|-------------------|
| ▪ No input from client | | 2 | | | 3 |
| ▪ Factual edits from client | | 2 | 2 | | |
| ▪ Substantive edits from client | | | | 2 | 1 |
| ▪ Allow client to write sections of the report | | | | | 3 |

Comments: Only allow client to give factual information. No report input.

8. *Recommend that Financial Expert's Draft Reports be :(check one)*
- | | |
|--|---|
| ▪ Maintained as court evidence | 4 |
| ▪ Destroyed so not considered by court | |
| ▪ No firm policy in place | 1 |

Comments:

- **Would be a better world if drafts retained. If everything is covered in meeting and only a few style changes then should keep them. Looks better in court if can produce drafts. Only tell expert that they are not required to keep drafts – never tell them to destroy them that is destroying evidence. Have to produce notes so tell them to take very few notes – do it orally. Expert shouldn't be taking notes at first meeting.**

9. *Financial Expert's files should include:(check one)*

- | | |
|---------------------------|---|
| ▪ All material reviewed | 5 |
| ▪ Only material relied on | |

Comments: All material reviewed – opposing lawyer should get to cross examine them on everything they looked at and ask them why it was not used

Giving Evidence in Court

1. Should financial experts be included in discovery and their files available for discovery by right?

Why or why not?

- Save money in the end. It is bad that the first time lawyer gets to talk to opposing expert is in court. Trials too long because no disclosure in advance. If experts were discovered would probably have more cases settled. Would be more efficient. Should enhance pretrial disclosure.
- Yes. Courts have gone in this direction to the surprise of many experts
- No. Subject matter is privilege and may never be used at trial
- No too much discovery already

2. Qualifying financial expert witnesses to give evidence, court should : 1 agree 2 3 4 5 disagree

- | | | | | | |
|--|---|---|---|---|---|
| ▪ Qualify as a general financial expert | | 1 | 1 | | 1 |
| ▪ Qualify based on the matters touched on in the 4 corners of the report | 4 | | | | |
| ▪ Based on expertise in accounting and damages | | 1 | 1 | 1 | |
| ▪ Qualify to answer narrow questions to assist court | | 1 | | 2 | 1 |

Comments: Specific questions. During qualification lawyer says that he is proposing to ask the expert specific questions on specific issue ask expert to provide opinion on specific issue.

3. Financial expert evidence discredited in court most often because 1 most often 2 3 4 5 least often

- | | | | | | |
|---|---|---|---|---|---|
| ▪ Experts use unreasonable assumptions that are not substantiated | 2 | 1 | 1 | | |
| ▪ Experts opine on matters beyond their scope of expertise | 1 | 1 | | 1 | |
| ▪ Experts act as advocates for their client | 2 | | 2 | | |
| ▪ Expert has insufficient expertise | | | 1 | 1 | 1 |
| ▪ Insufficient work performed to support opinion | | | 1 | 1 | 1 |

Comments: Smart experts don't do this. Often assumptions not right because of the finding of facts – don't know how it will be decided. The expert did everything right. If judge says experts assumptions are not reasonable then there was not enough work done before – lawyer should have done more work to ensure the assumptions made sense

4. Do you have concerns retaining an expert to answer the ultimate question for the court to decide?

If so, what are your concerns?

- No. common. Should be hypothetical but issues too complicated. CIBC shares example – ask expert to give opinion on value of shares, this is the ultimate question that the court has to decide.
- No. Assuming all facts are agreed upon.
- In the right case this is appropriate and necessary, and the courts have accepted such opinion evidence
- The ultimate question is for the judge.
- In our courts experts have their place. They are an important part of the evidence matrix but they are only a part
- Usually financial experts do not answer ultimate question just give one piece, the judge decides such as the terms of the contract etc
- It could be possible if all other terms are agreed to and the value is the only piece needed to be decided then they would be answering the ultimate question.

5. *Preparing financial expert to give evidence in court you normally* 1 most often 2 3 4 5 least often
- | | | | | | |
|--------------------------------------|---|---|---|---|---|
| ▪ Provide guidance to the expert | 3 | | 1 | | |
| ▪ Provide a script of questions | 1 | 1 | | | 1 |
| ▪ Expert is to prepare independently | | | | 1 | 2 |

Comments:

- **Continually cross examine until ready. Provide guidance. Make sure report is reasonable and the expert is ready.**
- **I treat expert like any witness. Rehearsal is critical for all witnesses. A script is necessary to prepare the expert for examination in chief. He must be informed of and comfortable with the questions to be asked**
- **Do prep the expert witnesses. The meeting is to understand report – what was the mandate, what did they review, what is the conclusion, what do you base the decision on**
- **But do not meet with experts before written report is completed.**

6. *Should Expert Witnesses continue to receive absolute immunity in Canada?*

- **Yes if not then litigation will never stop. (3)**
- **No (2)**

7. *Should negligence be an exception to absolute immunity as has been the case in the U.S.?*

- **No, should not change law based on bad expert (Dr. Smith) (3)**
- **Yes, gross negligence or intentional misconduct (2)**

8. *In a Globe and Mail article “The case against expert witnesses” Michael Code, a lawyer who teaches at U of T law school, is quoted as saying that “there is a growing hostility towards expert evidence. There is a sense in the courts that expert evidence has proliferated too much. Expert testimony lengthens and complicates trials, and makes them more expensive” Do you agree?*

Comments:

- **Code is right. There is not way to knock out expert before trial. Less than 1% of experts are excluded. Canada has more judge trials so judge hates to exclude evidence may need the help. Judge will listen to experts.**
- **Yes. But we still need our experts, in appropriate cases, to assist the court**
- **No. In our courts experts have their place. They are an important part of the evidence matrix but they are only a part**
- **A cottage industry has been created for experts – they spend 90% of their time being experts, this is their business, they do not practice.**
- **They are making a living at it, when you have to make a living you may cross the line.**
- **There are good experts and bad experts, all trying to make a living**
- **Originally the experts dealt with hypothetical situations and so would not need to deal with all the pleadings and research. They carried on their practices and only went to court the odd time.**
- **Lawyers encourage this cottage industry**
- **To reduce the abuse of experts need proactive judges**
- **Many judges do not have broad life experiences and not much financial experience so they allow financial experts in when it really is not necessary.**
- **The court system is democratic so any judge who wants to work the commercial list is allowed. Farley had tried to ensure that the judges had business knowledge but that does not happen anymore.**
- **There are too many judges in Ontario – 1000 judges only 123 in UK**
- **The control of experts needs to come from the top down. The judges need to be more disciplined. There is no incentive for the experts or lawyers to make changes.**
- **Woolf reforms are good practices, Ontario should consider them**

9. *Would the following changes be of benefit to the court?* 1 most beneficial 2 3 4 5 least beneficial

- | | | | | | |
|--|---|---|---|---|---|
| ▪ Views of all experts heard after fact witnesses for both sides have given evidence | 1 | 1 | 1 | 1 | |
| ▪ Require a pretrial conference for experts to resolve inconsistent understanding of the facts, if no agreed statement of fact then experts reconcile response to both sets of facts | 2 | 1 | 1 | | |
| ▪ Bifurcate the proceedings into liability/finding of fact and expert testimony - The expert provide examinable testimony or a report based on the courts ruling of fact | | | | 3 | 1 |
| ▪ Joint expert or if the sides can not agree the court appoints one expert | | | 1 | 2 | 1 |

Comments:

- **Not likely, if they could have agreed on an expert would have settled. At trial because can not compromise. Expense of rebuttal experts behind the scenes, sophisticated clients**
- **Bifurcating not practical. Take long to decide facts then appeal then experts come appeal again will go on and on.**
- **Pretrial conference is a good idea. Farley used to order experts to meet to come to agreement on as any points as possible. It is an expensive process everyone wins if they share the info earlier and come to agreement. He is retired, not as common now.**
- **Recommendation is to have an in limite Daubert hearing which is a pretrial hearing that will allow both sides to question expert and eliminate report or parts of the report. This happens early enough that if the expert stays in then other side hires their own if expert is eliminated then that expense is not necessary. This is common in US because have more jury trials so need to control experts but in Canada we have more judge trials. But it would still be a help.**

10. *Cases are becoming more complex and generally financial experts are an asset to the case. Do you agree?*

Comment:

- **Yes. (5)**

11. *What is the most common complaint or weakness of financial experts?*

- **Expense can be more expensive than lawyers**
- **They become advocates rather than offering independent, technical information**
- **Inability to write in clear and simple manner**
- **Inability to take complex concepts in giving oral testimony and make them simple**
- **Lack of independence**
- **This is difficult to answer because there is not one single complaint that is most common. The most initiating one is a failure of the expert to fully comprehend the assignment before beginning work. This causes needless cost and delays delivery of a useful product.**

Best Practices for the Role and Scope of a Financial Expert Witness in Canadian Courts Judge Questionnaire Response Summary

Qualifications

1. *Prior to judicial appointment, what area of law do you specialize in? Corporate/ commercial Litigator*
Number of years in practice. **Range of 21 to 31 years. Average 26 years**
2. *Preside over which of the following jurisdictions (check)*
 - Superior Court 2
 - Federal Court Trial Division
 - Tribunals
 - Regulatory Body
 - ADR hearing 1
3. *Number of years on the bench?* **Range of 9 to 17years. Average is 13 years**

View of Role of Financial Expert Witness

1. *Have you ever qualified a financial expert witness?* **Yes**
2. *If yes, approximately how many times?* **Range from 10 to 42 cases 4 experts per case**
3. *Have you ever failed to qualify a financial expert witness?* **Yes (2)**
4. *If yes, Why?*
 - **Valuation witness who was not able to give definition of FMV despite several tries**
 - **Others who were mere advocates/cheerleaders**
 - **While qualified generally not specifically eg. General CA vs. Auditor**
5. *Have you ever appointed a financial expert witness?* **No**
6. *If yes, approximately how many times?*
7. *It is not common practice for the Court to appoint experts. Why?*
 - **System is adversarial, neither encourages or permits court initiative, only time judge would do so would be with consent of parties**
8. *Would it be beneficial to the court if this right were exercised more often? Why or Why not?*
 - **Only way would be for judiciary to strongly suggest that best practice to appoint common expert**
 - **one way I dealt with this was requiring experts to meet and discuss then provide one page sheet listing points of difference**
 - **only if an accredited body would oversee independence and parties could retain their own as a check**

9. Which stakeholders do you think the financial expert is to serve? 1 most important 2 3 4 5 least important
- | | | | | | |
|----------------------------|---|---|---|--|---|
| ▪ Expert's Firm | | | | | 2 |
| ▪ Himself | | | 1 | | 1 |
| ▪ Client (counsel) | | | 2 | | |
| ▪ Client (party to action) | 1 | 1 | | | |
| ▪ Court | 1 | 1 | | | |

Comments:

- **This is technical answer based on duty. However, in practice many so called experts think of court last and themselves first.**

10. Which stakeholders do you think financial expert actually serves? 1 most important 2 3 4 5 least important
- | | | | | | |
|-----------------------------|---|--|-----|---|---|
| a. Expert's Firm | 1 | | | 1 | |
| b. Himself | 1 | | 1 | | |
| c. Client (counsel) | | | 1 1 | | |
| d. Client (party to action) | 1 | | | 1 | |
| e. Court | | | | | 2 |

11. In the *Ikarian Reefer*, *Cresswell J.* was quoted as saying “We do not think it is an exaggeration to say that the parties seem to have become more intent on winning the battle of the experts than on establishing the facts upon which their respective cases were based.” Are experts advocates for their own position? Do you agree or disagree?

Comments:

- **Yes, many also many advocates/cheerleaders for client – which should result in disqualification – but many judges soft on experts**
- **Agree, they often only look at facts that support the position they represent**

12. Court views primary role of financial expert witness in court to: 1 strongly agree 2 3 4 5 strongly disagree
- | | | | | | |
|---|---|---|---|--|---|
| ▪ Maximize client's position | 1 | 1 | | | |
| ▪ Comply with requests of retaining counsel | 1 | | 1 | | |
| ▪ Providing independent opinion to assist the court regardless of client's position | 1 | | | | 1 |

Comments:

13. The primary role of financial expert in court actually is 1 strongly agree 2 3 4 5 strongly disagree
- | | | | | | |
|---|---|--|---|--|---|
| ▪ Maximize client's position | 2 | | | | |
| ▪ Comply with requests of retaining counsel | 1 | | 1 | | |
| ▪ Providing independent opinion to assist the court regardless of client's position | 1 | | | | 1 |

Comments:

14. In general, do you think lawyers understand the role of the financial expert witnesses and use them appropriately?

- **Most lawyers not financially sophisticated – so can be led by the nose by financial “experts”**
- **Many lawyers believe an expert is necessary when the exercise is a simple arithmetic calculation. They try to give it great weight.**

If not, what specifically do they not understand?

- Scope of work
- Timing
- Fees
- Independence/duty to the Court

Comments: All of the above

15. In general do you think judges understand the nuances of a financial expert witness' reports (estimate v. calculation v. opinion) and value their assistance in court?

- No
- Yes

If not, what specifically do they not understand?

- Judges used to be lawyers, so most not financially sophisticated

16. Does the court put more weight on the report or the oral evidence?

- Depends on situation/circumstances
- Report

Engagement of a Financial Expert Witness

1. counsel retains financial expert material provided should include 1 most important 2 3 4 5 least important
- | | | | | | |
|---|---|---|---|---|---|
| ▪ All materials available to allow the expert to determine and identify what is relevant to opinion | 1 | 1 | | | |
| ▪ Counsel to provide the materials necessary to provide opinion | 1 | 1 | | | |
| ▪ Rely on client to provide documents | | | 1 | | 1 |
| ▪ Restrict to productions of party | | | | 1 | 1 |

Comments:

- Court should be able to know with precision and what the expert was asked to do and what the expert considered relevant

2. When counsel retains expert, counsel should provide expert with: 1 most important 2 3 4 5 least important
- | | | | | | |
|---|---|--|---|--|---|
| ▪ Instructions as to scope | 2 | | | | |
| ▪ Instructions as to method | | | 1 | | 1 |
| ▪ Input or consultation only | | | 2 | | |
| ▪ Assistance in identifying approach in similar cases | | | 2 | | |
| ▪ No input | | | | | 2 |

Comments:

- Each case really differ

3. Should all instructions, oral or written, provided by counsel to the financial expert witness be disclosed to the court?

Why or why not?

- Yes provided opposing counsel requests that. Candor is good
- Yes court is entitled to know what was asked, what was given and perhaps what wasn't given

4. When counsel or other experts have provided assumptions used in formulating the opinion expect the financial expert to 1 strongly agree 2 3 4 5 strongly disagree

- | | | | | |
|---|---|---|--|---|
| ▪ Accept assumptions as provided, no other work required | | 1 | | 1 |
| ▪ Determine plausibility of assumptions based on expertise | 2 | | | |
| ▪ Complete sufficient due diligence so the expert is satisfied they are reasonable in the circumstances | 2 | | | |
| ▪ Complete sufficient due diligence so the expert is satisfied they are likely in the circumstances | | 2 | | |

Comments:

- Individual cases may provide different rankings

5. *Steps to evaluate plausibility of financial expert's assumptions* 1strongly agree 2 3 4 5 strongly disagree
- Rely completely 2
 - Review for plausibility 2
 - Ensure assumptions are supported by factual evidence or other experts 2
 - Other (please indicate)
6. *If identify inadequacies in the financial expert's report:* 1strongly agree 2 3 4 5 strongly disagree
- No steps taken; they stand on their own 1
 - Ask clarifying questions at the end of oral evidence 1
 - Disregard expert witness report 1
 - Arrive at conclusion of damages by alternative means 1

Comments:

- **Cannot envisage the circumstance to ask question in direct evidence but if X-exam has damaged evidence may attempt to rehab provided within rules**
- **If disregard report must disclose**
- **Difficult to rank each will be depend on whether or not the expert can be regarded as overall reliable and credible**

7. *When a financial expert is retained to critique report of the opposing expert expect the expert to* 1strongly agree 2 3 4 5 strongly disagree
- Point out flaws in order to undermine or embarrass other experts 1
 - Point out flaws and prepare reply report to inform other expert 1
 - With permission of counsel meet with opposing expert to discuss differences 1
 - Prepare no critique just provide information to counsel for cross examination of opposing expert 1 1
 - Prepare no written document use information to critique opposing expert in examination in chief 1

Comments:

- **Have to get instruction to inform other expert**
- **Preparing critique is not retainer, but could be restricted to this**

8. *Should mandatory pretrial conferencing include financial experts to established agreed statement of facts and identify issues of disagreement?*
Why or why not?

- **Experts do not deal in facts but rather on opinions based on assumed facts which have to be proven for opinion to be reliable**
- **It will depend on the case and issues a whether or not counsel and the judge can understand the basis for difference between the experts**

9. *For issues where no agreement can be reached, should financial experts reconcile their response to both sets of facts?*
Why or why not?

- **Expert will be asked in X-exam to assume other facts**
- **Often impossible if they end the reconciliation with opinion**

Reports

1. *Is it necessary for financial expert reports to be submitted as evidence to the court?*
Why or Why not?

- **If relied on. However if not relied on, still to be disclosed to other side if asked**
- **Not in court system to date, it will depend on individual cases**

2. *Should financial expert reports be addressed to the courts?*
Why or why not?

- **Better practice but never done.**

3. *Should Rules of Civil Procedure include standardized format for expert reports or is that better handled by the professional body to which the expert belongs?*

Comments:

- **Better to be dealt with by the Court, civil rules not flexible enough, good is English practice**
- **yes**

4. *If a material scope limitation, useful to court if financial expert* 1strongly agree 2 3 4 5 strongly disagree

- | | | | | | |
|--|---|--|--|--|---|
| ▪ Report based on documents reviewed | | | | | 1 |
| ▪ Report the scope limitation | 1 | | | | |
| ▪ Qualify report | 1 | | | | |
| ▪ Use alternative methods to complete engagement | | | | | 1 |
| ▪ Only prepare report if full unfettered access to information | 1 | | | | |

- **All of these qualify as 1's depending on the circumstances**

5. *When financial expert preparing report, expect counsel to provide* 1strongly agree 2 3 4 5 strongly disagree

- | | | | | | |
|--------------------------------|---|--|---|--|---|
| ▪ No input | | | | | 1 |
| ▪ Factual edits | 2 | | | | |
| ▪ Substantive edits | | | | | 1 |
| ▪ Write sections of the report | | | 1 | | 1 |

Comments:

- **Input related to factual edit to correct/clarify only**
- **It will depend on counsel writing parts may be misconstrued and in some cases may be appropriate as background narrative**

6. *When the financial expert is preparing report, if client is given the opportunity to review, expect client to provide* 1strongly agree 2 3 4 5 strongly disagree

- | | | | | |
|--|---|--|---|---|
| ▪ No input from client | | | 1 | 1 |
| ▪ Factual edits from client | 2 | | | |
| ▪ Substantive edits from client | | | 1 | 1 |
| ▪ Allow client to write sections of the report | | | | 2 |

Comments:

7. *Financial Expert's Draft Reports to be: (check one)*

- Maintained as court evidence **Yes - possible evidence**
- Destroyed do not consider draft reports

Comments: Depends – no fixed rule

8. *Financial Expert's files should include:(check one)*

- All material reviewed **YES (2)**
- Only material relied on
- No firm policy in place

9. *Do you think experts should be questioned and their files provided during Discovery by right?*
Why or why not?

- **Yes. Getting to the truth is helpful**
- **depends**

Giving Evidence in Court

1. In qualifying financial expert witness to give evidence, court should 1strongly agree 2 3 4 5 strongly disagree

- Qualify as a general financial expert
- Qualify based on the matters touched on in the 4 corners of the report 1
- Based on expertise in accounting and damages
- Qualify to answer narrow questions to assist court

Comments:

- **Qualification should be restricted to narrow area of true competence**

2. When qualifying a financial expert, the court considers : 1most important 2 3 4 5 least important

- Reputation of the financial expert 1 1
- C.V. of financial expert 1 1
- Number of times the financial expert has been qualified 1 1
- Specific expertise 2

3. Identify steps to evaluate qualifications and reliability of experts 1strongly agree 2 3 4 5 strongly disagree

- No steps taken
- Obtain references regarding reputation
- Review the source of their information 1
- Review previous reports prepared
- Review past reported decisions

Comments:

4. Have you ever excluded a financial expert from testifying?

How often?

- **Valuation witness and others who were mere advocates**
- **One time**

5. In general, how often are experts excluded from testifying?

- **Not often enough**
- **When not qualified**

6. Should this happen more often?

7. A financial expert's testimony is considered by court based on: 1most important 2 3 4 5 least important

- Reputation of the expert 1 1
- Objectivity/independence of the expert while being examined and cross examined 1 1
- Quality of the written report 2
- Openness to other points of view while giving testimony 1 1

8. In preparing an expert to give evidence in court you expect counsel to:(check one)

- Provide guidance to the expert **Yes (2)**
- Provide a script of questions
- Expert is to prepare independently

9. The financial expert witness is to provide the court with : 1strongly agree 2 3 4 5 strongly disagree

- Wide range of alternatives for the court to choose from 1 1
- Most likely amount based on expertise 2
- Analysis of methodologies where there are distinct differences in approach to damage quantification 2

10. Financial Expert witness evidence is discredited in court because : 1 most often 2 3 4 5 least often

- | | | | | |
|---|---|---|---|---|
| ▪ Experts use unreasonable assumptions that are not substantiated | | 1 | 1 | |
| ▪ Experts opine on matters beyond their scope of expertise | 1 | | 1 | |
| ▪ Expert usurps the role of the trier of fact | | 1 | 1 | |
| ▪ Experts act as advocates for their client | 1 | | 1 | |
| ▪ Expert has insufficient expertise | | | 2 | |
| ▪ Insufficient work performed to support opinion | | | | 1 |

11. Should Expert Witnesses continue to receive absolute immunity in Canada?

- Yes with the possible exception of willful misconduct
- No

12. Should negligence be an exception to absolute immunity as has been the case in the U.S.?

- No
- Yes

13. In a Globe and Mail article “The case against expert witnesses” Michael Code, a lawyer who teaches at U of T law school, is quoted as saying that “there is a growing hostility towards expert evidence. There is a sense in the courts that expert evidence has proliferated too much. Expert testimony lengthens and complicates trials, and makes them more expensive” Do you agree?

Comments:

- Yes everyone wants to rely on expert – too many snake oil salesmen out there

14. If in agreement, would the following changes be of benefit to the court?

- Views of all experts heard after fact witnesses for both sides have given evidence **Possible**
- Require a pretrial conference for experts to resolve inconsistent understanding of the facts, if no agreed statement of fact then experts reconcile response to both sets of facts **Possible**
- Require a pretrial hearing to determine admissibility of proposed expert testimony, similar to the US in limine Daubert hearing **Possible**
- Bifurcate the proceedings into liability/finding of fact and expert testimony - The expert provide examinable testimony or a report based on the courts ruling of fact **too complicated and expensive because time consuming**
- Joint expert selected or if the sides can not agree the court appoints one expert
- Other – **requiring experts to meet and discuss then provide one page sheet listing points of difference**

Comments: **Joint expert would depend may be applicable in an individual case**

15. Given the complexity of some issues, do you find that experts are being retaining to answer the ultimate question for the court to decide?

If so, what are your concerns?

- Yes, they fail to appreciate the Mohan test
- It usurps the trier of fact, particularly jury

16. Cases are becoming more complex and generally financial experts are an asset to the case. Do you agree?

Comments:

- Bad experts can make a case more complex, good experts are an asset
- Yes

17. If you agree, what are the benefits of a financial expert witness?

- Please see Mohan
- Narrow and simplify issues

18. *What are the most common complaints about financial expert witnesses?*

- **Advocate/cheerleader**
- **Not necessary except to complete calculation after factual findings**

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