

# **The New Ontario Rules of Civil Procedure:**

## **Do They Go Far Enough Towards Addressing Expert Independence?**

**Research Project for Emerging Issues / Advanced Topics Course**

**Diploma in Investigative and Forensic Accounting Program**

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## **1.0 INTRODUCTION AND RESEARCH PAPER OBJECTIVES**

The Canadian court system has seen an era of skyrocketing litigation costs and lengthy delays in the trial process. The increased use of experts and often times contradicting opinions amongst opposing experts have been cited as contributing to the lengthy delay and high costs of litigation. There is no shortage of cases where the courts have chastised accounting experts for advocating on behalf of their clients rather than assisting the trier of fact in understanding the relevant accounting issues.<sup>1</sup>

In 2006, the Ontario Attorney General Michael Bryant asked the Honourable Justice Coulter Osborne to create the Civil Justice Reform Project (“CJRP”) in order to address the problems facing the civil justice system in Ontario and to make it more affordable and accessible to Ontario citizens. One area that the CJRP examined was with respect to expert evidence. The reforms that were made to the Courts of Justice Act – Rules of Civil Procedure (referred to herein simply as the “Rules”) became effective January 1, 2010 in Ontario. The reforms to the Rules specifically address the use of experts with the objective of promoting independence, objectivity and a more cost efficient litigation process.

This research paper will examine the changes to the Rules as they apply to expert evidence with a view to assessing whether they go far enough in addressing issues of independence and objectivity of accounting experts.

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<sup>1</sup> See Appendix B for a synopsis of various case decisions where forensic accountants have been criticized by the trial judge for lack of independence and other related issues.

In doing so, the research will consider:

- A summary of the key changes to the Rules and the Evidence Act as it pertains to expert evidence and how the changes differ from the old Ontario Rules of Civil Procedure (referred to herein as the “old Rules”).
- An analysis of the precedent setting British case, *The Ikarian Reefer*,<sup>2</sup> as a basis for understanding certain guidelines for expert evidence and duties of expert witnesses and whether reform to the Rules address these basic expert evidence principles.
- Decisions where expert accountants have been criticized by the courts, in order to examine the root problems with flawed accounting expert evidence and whether the reforms to the Rules adequately address these underlying problems.
- The changes made in other jurisdictions such as the United Kingdom and Australia, as a benchmark for assessing whether Ontario needs to consider further changes to the Rules to improve the role and responsibilities of investigative and forensic accountants (“IFAs”) in their capacity as expert witnesses.

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<sup>2</sup> Although *The Ikarian Reefer* case is a British decision, it has been cited in many Canadian court cases as a basis for providing guidelines for the duties of expert witnesses and evidence.

- Interviews of practicing lawyers to obtain their views on whether the Rules address the issues that face our court system when it comes to the independence and objectivity of accounting experts.
- Possible solutions to address any potential shortcomings in the Rules with respect to expert independence and objectivity, having regard to the above.

## **2.0 SCOPE OF RESEARCH MATERIALS**

The Courts of Justice Act - Ontario Rules of Civil R.R.O. 1990, Reg. 194 both prior to December 31, 1999 and the new rules effective January 1, 2010 were relied upon for the foundation of this research paper. Also, the Summary of Findings and Recommendations from the Civil Justice Reform Project, by the Honourable Coulter A. Osborne was a leading publication for purposes of this research report.

Also reviewed were many court case decisions for purposes of analyzing the criticisms that are made of forensic accounting experts regarding independence and objectivity. A list of court cases can be found in Appendix A – Bibliography.

Both Part 5 of the Australian Uniform Civil Procedure and Part 35 of the United Kingdom Civil Procedure Rules were also examined for purposes of determining whether more reform is necessary in Ontario for purposes of controlling expert independence.

Two commercial litigation lawyers in Ontario were interviewed to obtain their perspective on the reforms to the Rules with respect to expert evidence. Specifically, Mr. William Horton of William G. Horton Professional Corporation and Mr. Jason Annibale of McMillan Binch were interviewed as part of the research conducted for this paper.

A copy of the questions provided to the interviewees in advance can be found in Appendix C.

Published articles, textbooks and publications in respect of the reform to the Rules and expert independence were reviewed as part of this research paper. For a listing of specific materials reviewed, refer to Appendix A – Bibliography.

### **3.0 DETAILED ANALYSIS**

#### **3.1 Overview of Research and Findings**

The first section of this research paper is an analysis of the famous British case, the *Ikarian Reefer*,<sup>3</sup> as a basis for understanding the precedent setting guidelines for expert evidence and duties of expert witnesses and whether the changes to the Rules address these basic expert evidence principles. The *Ikarian Reefer* analysis can be found in Section 3.2.

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<sup>3</sup> Although *The Ikarian Reefer* case is a British decision, it has been cited in many Canadian court cases as a basis for providing guidelines for the duties of expert witnesses and evidence.

Even with guidance for providing expert evidence and duties of expert witnesses in landmark cases such as the *Ikarian Reefer*, forensic accountants continue to be criticized by the courts for providing evidence that is not helpful to the trier of fact, biased and based on unsupportable assumptions. In Section 3.2 we also provide a brief analysis of some decisions where expert accountants have been criticized by the courts. The case analysis is provided in order to examine the root problems with flawed accounting expert evidence and whether the reforms to the Rules adequately address these underlying problems.

Section 3.3 is an overview of the Ontario Rules of Civil Procedure (referred to herein as the “old Rules”) as a basis for analyzing the mechanisms that were in place to control expert evidence. Section 3.4 will then provide a discussion of the recommendations by the CJRP as they pertain to expert evidence and the key changes to the Rules and the Evidence Act to analyze how the changes differ from the old Rules.

Even with the many recommendations by the CJRP and implementation of certain recommendations in Ontario, there is still a long way to go in order to have experts work together to resolve issues without the necessity to wait for a trial judge to make determinations about expert evidence.

## 3.2 Defining the Problems The Reform to the Rules Were Intended to Address

### The Standard: The Ikarian Reefer Case and the Role of the Expert Witnesses

The Ikarian Reefer case, a famous British decision rendered by Justice Cresswell in 1993, has been cited in many Canadian court decisions as providing guidelines and basic principles for expert evidence and the duties of expert witnesses (referred to as the “Ikarian Reefer” Code).

The Ikarian Reefer decision provides experts with basic guidelines and principles concerning their duties of expert witnesses. Ultimately, the underlying theme of the Ikarian Reefer decision as it pertains to expert witnesses is that the ultimate duty of experts is to assist the trier of fact – not to advocate for their client. We will briefly analyze the basic expert witness principles that were cited in The Ikarian Reefer case.

This research paper will later contrast the principles highlighted in the Ikarian Reefer decision to the reforms in the Rules to see whether any gaps continue to exist with respect to the Rules governing expert witnesses.

The Ikarian Reefer Code established the following duties and responsibilities for experts:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (“**Independence**”).

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (**“Objectivity”**).
3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (**“Supportable Assumptions”**).
4. An expert witness should make it clear when a particular question or issue falls outside his expertise (**“Relevant Expertise”**).
5. If an expert’s opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (**“Document Scope Limitations”**).
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side’s expert’s report or for any other reason such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court. (**“Communicate Changes in Opinion”**)

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.<sup>4</sup> (**“Exchange of Documents”**)

The Ikarian Reefer decision highlights some of the most basic principles and guidelines for providing expert evidence and the duties of expert witnesses. Concepts such as experts maintaining “independence” and “objectivity” when giving expert opinions and that their ultimate duty is to the trier of fact and not to the party paying their invoices. The Ikarian Reefer decision also highlights the need for supportable assumptions and only giving evidence in areas where experts have the requisite knowledge and experience.

### **Case Law Analysis: Some Root Problems with Flawed Accounting Expert Opinions**

Often times, there are opposing accounting expert witnesses on either side of a dispute. Even with the principles from The Ikarian Reefer decision and the repeated efforts of Canadian judges in citing the roles and responsibilities of expert witnesses, there continues to be criticism by the courts of experts straying from their role as providing independent and objective evidence.

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<sup>4</sup> National Justice Cia Naviera SA v. Prudential Assurance Co Ltd (the “Ikarian Reefer”) [1993]

In order to assess whether the new Rules go far enough, it is first necessary to identify the problems they were designed to address in so far as expert evidence is concerned.

The following section explores several court decisions where forensic accounting experts have been criticized by the courts. The case law analysis will examine the root problem with flawed accounting expert evidence and whether the recommendations by the CJRP with respect to expert evidence and the corresponding reforms to the Rules address these underlying problems.

The criticisms of forensic accounting experts are generally focused around the same few issues as follows:

**Independence** - Not acting in an independent / objective manner and thus providing little or no assistance to the court but rather pushing an outcome that is the best interest of the client.

**Unreasonable Assumptions** – Assumptions that are utilized by accounting experts are unreasonable and / or unsupported by the facts and evidence available.

**Heavy Reliance on Client Representations** – Accounting experts place too much reliance on client prepared information, assumptions, and representations without any corroborating support or testing the representations and ultimate conclusions for reasonableness.

**Flawed Methodologies** – The methodologies and approach put forth by accounting experts result in conclusions that are unreasonable, not intuitive and not tested by logic and common sense.

**Experience** – Accounting experts giving evidence on matters that are outside their area of expertise or making conclusions of finding of fact or legal conclusions.

The case law analysis will specifically focus on the following five cases:

1. Doe v. O’Dell
2. Homelife Realty Services Inc. v. Homelife Performance Realty Inc.
3. Alfano et al v. Piersanti et al
4. Love v. Acuity Investment Management Inc. et al
5. David M. Sherman and Her Majesty the Queen

In all of the above cases, the root problem is the result of the lack of independence and objectivity by expert witnesses in applying their professional judgment (whether intentional or not). The poor application of professional judgment and apparent lack of independence or objectivity by accounting experts is often the function of attempting to achieve an outcome that is in the best interest of the client rather than acting in the best interest of the court. A detailed analysis of the above cases can be found in Appendix B.

### **3.3 Overview of the Old Rules With Respect to Expert Evidence**

The aforementioned legal cases and criticisms of accounting experts by judges came at a time when the old Rules were in place. This is not to suggest that the lack of direction in the old Rules regarding expert evidence is the primary cause of the issues surrounding expert independence and objectivity.

Even though there is a known requirement by accounting experts to remain impartial and have a primary duty to the court (as noted in the *Ikarian Reefer* case as well as many other prominent Canadian case law), there is nothing material or prescriptive in the old Rules reinforcing the basic principles governing expert evidence.

The following section will highlight certain of the old Rules as they pertain to expert evidence – in order to build a framework for purposes of assessing the recommendations made by the CJRP and the adequacy of the reform to the Rules based on such recommendations.

#### **3.3.1 Overview of the Old Rules**

The rules in respect of expert evidence are governed by the Courts of Justice Act, as well as the Evidence Act. The old Rules primarily dealt with procedures such as the number of experts that can testify in a case and the timing for submitting expert reports. However, there are no specific codified rules governing the duty of expert witnesses and their role in the trial process.

Limiting the number of expert witnesses that give evidence at court and procedures on the timing for issuing expert reports may speed up the time to complete a trial but it does not necessarily assist with curbing costs or dealing with independence and objectivity issues.

As demonstrated from the case review Ontario judges continue to criticize accounting experts for their inability to be independent and objective in providing evidence – a problem not necessarily solved by limiting the number of expert witnesses that can give evidence or the timing of when expert reports were filed.

### **3.3.2 Number of Expert Witnesses at Trial**

Section 12 of the Ontario Evidence Act states that without leave of the judge, a party cannot call more than three witnesses that will be providing opinion evidence.

*“Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding.”<sup>5</sup>*

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<sup>5</sup> Ontario Evidence Act, R.S.O. 1990, c. E.23, s. 12.

This rule attempts to control the number of witnesses that will be giving expert evidence at a trial and thus controlling the speed and costs of litigating. However, in practice, Section 12 of the Ontario Evidence Act is often ignored by counsel and expenses for expert witnesses are often already incurred before it is too late for a trial judge to make a decision on the admissibility of more than three experts or inadmissibility of expert evidence. Thus, Section 12 of the Ontario Evidence Act appears to have weaknesses when it comes to controlling the number of expert witnesses that can give evidence and the corresponding time and costs of retaining excessive experts.<sup>6</sup>

The reforms to the Rules are not drastically different in that they do not limit the number of expert witnesses that can give evidence at trial. Rather the CJRP made recommendations to have the number of expert witnesses agreed to by the pre-trial judge well in advance of trial, as discussed in further detail in the next section of this research paper.<sup>7</sup>

### **3.3.3 Timing of Expert Reports**

Rule 53 of the old Rules deals with the timing of submitting expert reports. Rule 53 stated that expert reports were to be filed 90 days before the commencement of trial while rebuttal reports were to be served 60 days before commencement of trial. Any response to the rebuttal would be filed within 30 days before trial.

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<sup>6</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

<sup>7</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

Rule 53 (1) and (2) states the following:

*“A party who intends to call an expert witness at trial shall, not less than 90 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony.*

*A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert setting out his or her name, address and qualifications and the substance of his or her proposed testimony.”<sup>8</sup>*

Although there is no specific requirement under the old rules for experts to sit down and eliminate any common issues, the exchange of the reports in advance of trial is meant to act as a mechanism to highlight and address any material issues prior to trial. However, 90 days before trial may not be sufficient time for parties to resolve differences or to respond to the expert report in a timely fashion, which is a problem regarding the adjournment of cases.

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<sup>8</sup> Courts of Justice Act, R.R.O. 1990, Regulation 194, Rules of Civil Procedure, O. Reg. 348/97, s. 53.

### **3.4 Changes to Expert Evidence Under the CJRP**

There have been several amendments to the Courts of Justice Act to deal with some of the issues surrounding expert evidence. The amendments to the Rules were based on recommendations made by Justice Coulter Osborne from his involvement with the CJRP.

The recommendations from the CJRP and corresponding changes to the Rules, although not complete in their ability to control the independence of expert witnesses, are definitely a step forward.

Reform to civil justice in Ontario started as early as 1996, with the report released by the Ontario Civil Justice Review, with the mandate to find ways to make access to justice more streamlined and efficient. The Canadian Bar Association (CBA) was working in parallel to the Ontario Civil Justice Review in releasing its national recommendations for civil reform in its report titled “Systems of Civil Justice Task Force Report”

After almost a decade since the release of the reports by the Ontario Civil Justice Review and the Canadian Bar Association, there has been evidence of cost and delay in the justice system preventing the average Canadian from accessing the legal system.<sup>9</sup>

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<sup>9</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

In March 2006, the Advocates' Society held a forum, "Streamlining Justice", to continue to find ways to encourage more efficient and cost-effective ways to resolve disputes. The Advocates' Society had an expert witness working group that stated that "the proliferation of experts and lengthy and uncontrolled expert testimony is a major problem in Ontario. Many participants expressed their frustration at the absence of a mechanism to deal with issues related to expert evidence prior to the commencement of a trial."<sup>10</sup>

On June 28, 2006, the Attorney General Michael Bryant asked the Honourable Coulter Osborne, former Associate Chief Justice of Ontario, to lead the Civil Justice Reform Project (CJRP). The mandate of the CJRP was to investigate potential areas of reform to Ontario's civil justice system and propose recommendations that would make access to civil justice for Ontarians more affordable and accessible.

The mandate of the CJRP was to investigate potential areas of reform to Ontario's civil justice system and propose recommendations that would make access to civil justice for Ontarians more affordable and accessible. The Civil Justice Reform Project – Summary of Findings & Recommendations was released on November 20, 2007.

The work of the CJRP was to take into account the following principles and considerations:

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<sup>10</sup> Advocates Society, Final Report: Streamlining the Ontario Civil Justice System, March 2006.

**Access:** Recommendations should promote access to justice for both represented and unrepresented litigants.

**Proportionality:** Recommendations should reflect the principle that the time and expense devoted to civil proceedings should be proportionate to the amount in dispute and / or the importance of the issues at stake.

**One Size Does Not Fit All:** Recommendations should recognize diversity and the different issues facing different jurisdictions, particularly larger urban centres such as Toronto.

**Culture of Litigation:** Recommendations should recognize that rule and other regulatory reform alone might not adequately respond to problems in the system. Ways to foster “cultural change” among the bench and bar should be considered.”<sup>11</sup>

### **3.4.1 Overview of the CJRP as it Pertains to Expert Evidence Rules**

One of the areas of the CJRP’s investigation included “Expert Evidence” in an attempt to curb the costs associated with the increased use of expert witnesses and delay due to adjournments.<sup>12</sup>

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<sup>11</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

<sup>12</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

Three specific issues have been addressed as part of the CJRP review of expert evidence as follows:

1. Whether new mechanisms should be introduced to control the proliferation of experts and expert bias.
2. Whether the time for delivery of expert reports should be altered.
3. Whether there should be greater disclosure of the information on which an expert's own opinion is based.<sup>13</sup>

The following section of this research paper will discuss the specific recommendations that have been made by the CJRP and how the recommendations impact expert independence.

This section also examines the reforms made in other jurisdictions, such as the United Kingdom, Australia and other Canadian provinces and whether there is room for improvement in Ontario's Courts of Justice Act and Evidence Act with respect to further promoting expert independence in the court system.

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<sup>13</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

### 3.4.2 CJRP Specific Recommendations Pertaining to Expert Evidence

The CJRP put forth five recommendations with respect to expert evidence of which four were ultimately codified within the Courts of Justice Act – the Rules.<sup>14</sup>

#### 1. Certification by Experts on Their Duty to the Court

##### Issue:

From the consultations with experts and lawyers, the CJRP indicated that the common issues of “hired guns” and “opinions for sale” were repeatedly identified as issues impacting expert witnesses.<sup>15</sup> As such, a key objective and recommendation of the CJRP was to eliminate the proliferation of experts that gave opinion evidence that was biased in favour of their client.

The CJRP made recommendations to amend the Courts of Justice Act in order to have experts certify their duty to the court. The recommendations put forth by the CJRP regarding certification of their ultimate duty to the court were already implemented in British Columbia, the United Kingdom, and Australia.

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<sup>14</sup> Interestingly, the one recommendation that did not get implemented is in respect of the requirement for experts to meet prior to trial to resolve differences. The CJRP also stated that although members of the working group suggested the need for joint-expert or court appointed experts, this was not practical in all cases and thus the use of joint experts should not be implemented in Ontario.

<sup>15</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

Recommendation by CJRP:

The recommendation was to have experts sign an acknowledgement form that certifies that the expert is aware that their main duty is to the court and this duty overrides any responsibility to counsel and / or the client.

Specifically, the CJRP recommended the following:

*“Adopt a new provision in the Rules of Civil Procedure or Evidence Act to establish that it is the duty of an expert to assist the court on matters within his or her expertise and that this duty overrides any obligation to the person from whom he or she has received instructions or payment. Require the expert, in an expert report, to certify that he or she is aware of and understands this duty.”<sup>16</sup>*

Action Taken in Ontario:

In response to the recommendation by the CRJP, the Rules have been amended to add section 4.1, which essentially codifies the duty of an expert. Specifically, Rule 4.1.01 (1) and 4.1.01 (2) of the Courts of Justice Act states the following:

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<sup>16</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

*“4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,*

*(a) to provide opinion evidence that is fair, objective and non-partisan;*

*(b) to provide opinion evidence that is related only to matters that are within the expert’s area of expertise; and*

*(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.*

*(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.”<sup>17</sup>*

As part of this new reform to have experts acknowledge their duty to the court, there is a requirement for experts to confirm in writing and signing Form 53 – Acknowledgement of Expert’s Duty and appending this certification to their report. The wording for Form 53 can be seen in Exhibit A below.

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<sup>17</sup> Courts of Justice Act - R.R.O. 1990, Reg. 194, Section 4.1.01.

**Exhibit A – Form 53 – Acknowledgement of Expert’s Duty**

**FORM 53**

*Courts of Justice Act*

**ACKNOWLEDGMENT OF EXPERT’S DUTY**

(General heading)

**ACKNOWLEDGMENT OF EXPERT’S DUTY**

1. My name is \_\_\_\_\_ (name). I live at \_\_\_\_\_ (address), in the \_\_\_\_\_ (name of city) of \_\_\_\_\_ (name of province/state).
2. I have been engaged by or on behalf of \_\_\_\_\_ (name of party/parties) to provide evidence in relation to the above-noted court proceeding.
3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
  - a. To provide opinion evidence that is fair, objective and non-partisan;
  - b. To provide opinion evidence that is related only to matters that are within my area of expertise; and
  - c. To provide such additional assistance as the court may reasonably require, to determine a matter in issue.
4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date: \_\_\_\_\_ (signature)

**NOTE:** This form must be attached to any report signed by the expert and provided for the purposes of subrule 53.03(1) or (2) of the Rules of Civil Procedure.

*Do the Rules Go Far Enough to Address Expert Independence?*

Section 4.1 and Form 53 go to the very heart of the problem that is heavily criticized by the courts – the independence of the expert witness. By introducing Section 4.1 in the Courts of Justice Act and requiring experts to sign Form 53 is an attempt to warn experts that there may be consequences to acting as an advocate for their client. The CJRP states that by signing the certification form, it may cause experts to stop and consider the

content of their reports and ultimate opinions and will hopefully reinforce the fact that expert evidence is meant to assist the court with its neutral evaluation of the issues.<sup>18</sup>

According to Mr. William G. Horton, a practicing lawyer and arbitrator in the City of Toronto, Form 53 is more of a “communication device” to ensure that experts know that this is now the standard and expectation by expert witnesses. Mr. Horton explains that having experts sign Form 53 “takes away the deniability factor” that the expert was not aware of the duty to the court. Mr. Horton’s view was that this reform will likely change some people’s behaviour at the margins and should temper expert’s views accordingly.

Irrespective of the intention and views regarding Section 4.1 and Form 53, it is too soon to understand the consequences, if any, that experts will face if they defy their ultimate duty to the court.

*Additional Recommendations:*

Based on the scope of review and research conducted, the following recommendations are put forth as a method of improving expert independence:

- In addition to signing a certification form, experts should provide an oath in court that they are independent and the ultimate duty is to the court

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<sup>18</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

- Expert reports ought to be addressed to the court rather than to legal counsel. Although this is a technicality, it reinforces that the ultimate duty of the expert's opinion is to the court and not legal counsel or the client.
- Formalize a mechanism that allows experts to formally ask the court for direction for purposes of assisting them in carrying out their function.

Support for Additional Recommendations:

Although the signing of a certification form is a step in the right direction to govern expert independence, there is more that can be done. According to Mr. William Horton, the reform to have experts sign Form 53 will likely only change some people's behaviour at the margins.

One recommendation by Mr. Radu Razvan Ghergus of the University of Toronto's Faculty of Law was to treat all expert witnesses as officers of the court and have them swear an oath in front of the judge that their duty is to the court.

*"...all experts should be considered officers of the court when they are appointed to provide expertise in a particular case. Before their appointment either by the parties' agreement or by the court, they should not only certify, but swear an oath in front of the judge that their duty is to the court and that the report is made in conformity to that rule."<sup>19</sup>*

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<sup>19</sup> Radu Razvan Ghergus (2009), The Curious Case of Civil Procedure Reform in Canada, So Many Reforms Proposals with So Few Results, Graduate Program of the Faculty of Law, University of Toronto.

Signing a certification form as well as giving an oath in court that the expert is independent and has a duty to the court may be a more effective method to assure the impartiality of experts.

Australian Rules of Civil Procedure require that an expert's report be addressed to the court rather than to legal counsel. Although this is a technicality, it reinforces that the ultimate duty of the expert's opinion is to the court and not legal counsel or the client.<sup>20</sup>

In addition to certifying to the court that the expert understands the duty to the court and has complied with the duty (similar to Form 53), the Australian Rules of Civil Procedure also require an expert to make additional representations at the end of the report including:

*“(a) the factual matters stated in the report are, as far as the expert knows, true;*

*and*

*(b) the expert has made all enquiries considered appropriate; and*

*(c) the opinions stated in the report are genuinely held by the expert; and*

*(d) the report contains reference to all matters the expert considers significant;*

*and*

*(e) the expert understands the expert's duty to the court and has complied with the*

*duty.”<sup>21</sup>*

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<sup>20</sup> Australian Uniform Civil Procedure, Part 5 – Expert Evidence, Rule 428 (1).

<sup>21</sup> Australian Uniform Civil Procedure, Part 5 – Expert Evidence, Rule 428 (3).

Another interesting perspective that has been adopted in the United Kingdom is a procedure that allows the expert to formally ask the court for direction for purposes of assisting them in carrying out their function. If the expert is implicitly an “officer” of the court and has a duty to the trial judge, then with this responsibility should come the opportunity to ask the court for clarity on issues that will ultimately be of use to the trial judge.

Section 35.14 of the United Kingdom Rules and Practice Directions state the following regarding the expert’s right to ask court for directions:

*“(1) Experts may file written requests for directions for the purpose of assisting them in carrying out their functions.*

*(2) Experts must, unless the court orders otherwise, provide copies of the proposed requests for directions under paragraph (1) –*

*(a) to the party instructing them, at least 7 days before they file the requests; and*

*(b) to all other parties, at least 4 days before they file them.*

*(3) The court, when it gives directions, may also direct that a party be served with a copy of the directions.”*

## 2. Experts Confer Prior to Trial to Narrow Disputed Issues

### Issue:

In arriving at its recommendations, the CRJP refers to the Discovery Task Force proposal that experts meet and confer when there are contradictory expert opinions. The CJRP points out that in other international jurisdictions, such as the UK and Australia, as well as in Alberta and New Brunswick, the pre-trial judge may order experts to meet to work out issues prior to trial.<sup>22</sup>

The old Rules did not make it mandatory for expert witnesses to meet and confer in advance of trial in order to identify differences and make attempts to resolve issues. The CJRP did make specific recommendations to encourage expert witnesses to meet and confer in advance of trial, although nothing has been implemented in Ontario as of yet.

### Recommendations by CJRP:

The CJRP agreed with the reform regarding the “meet and confer” of opposing expert witnesses. Specifically, the CRJP proposed the following recommendation:

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<sup>22</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

*“Permit the presiding judicial official at pre-trials, settlement conferences and trial management conferences to order opposing experts in appropriate cases to:*

- *Meet on a without prejudice basis, to discuss one or more issues in the respective expert reports to identify, clarify and, one would hope, resolve issues on which the experts disagree; and,*
- *Prepare a joint statement as to the areas of agreement, or reasons for continued disagreement where in the opinion of the court*
- *there may be room for agreement on some or all issues,*
- *the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court or*
- *cost or time savings or other benefits can be achieved proportionate to the amounts at stake or the issues involved in the case.”<sup>23</sup>*

The CJRP stated that the above proposed recommendation would allow a peer review by opposing experts and help clarify assumptions and facts that may deter the “hired gun” syndrome.<sup>24</sup>

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<sup>23</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007

<sup>24</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007

Actions Taken in Ontario:

The Rules have not been changed in order to address the “meet and confer” recommendation put forth by the CJRP.

In the case of a summary judgment motion, Section 20.05 (1) and (2) of the Rules remain unchanged as follows.

*“20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.*

*(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,...*

*(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,*

*(i) there is a reasonable prospect for agreement on some or all of the issues, or*

*(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;”*

Absent a summary judgment motion, the decision to have opposing experts meet in advance of a trial to attempt to resolve differences and obtain clarification on assumptions and facts will be left in the hands of legal counsel and their clients.

### *Do the Rules Go Far Enough to Address Expert Independence?*

The decision to not implement reforms to have experts meet and confer on issues seems to have missed the opportunity to address some of the key criticisms by the court, all of which go to the heart of the independence of expert witnesses.

Some of the criticisms by the courts of forensic accounting experts include the use unreasonable assumptions based on the available evidence, heavy reliance on client prepared information without adequate support for opinion and, the use of flawed methodologies that result in inappropriate conclusions.

Generally, experts do not have the opportunity to meet with the other party to a litigation. The next best alternative would be for experts to meet and confer with a view of understanding fully and clearly each parties' position that might not be coming through from the party retaining their respective expert. This would also help with keeping experts honest with one another and reduce the risk of having a hired gun in court.

Another criticism by the CJRP is that the party with the "deeper pockets" will have an advantage by hiring the most qualified and number of experts. By encouraging opposing experts to meet and learn from each other, it will eliminate some of the disadvantages facing the less wealthy litigants and put both parties on a more level playing field. In other words, the less wealthy litigant will have access to the knowledge and resources of the opposing expert indirectly through its own expert.

According to several interviews of several Toronto litigation lawyers, the idea of having opposing experts meet ahead of pre-trial is worthwhile recommendation that in practice works very well in speeding up the trial process and increasing the chances of settlement.<sup>25</sup>

*Additional Recommendations:*

Based on the scope of review and research conducted, the following recommendations are put forth as a method of improving expert independence:

- Consider the recommendations by the CJRP for the mandatory meeting of experts prior to trial to resolve issues. The Rules should be prescriptive on granting a pre-trial or case management judge the power to decide on the process for the meeting of experts, the specific issues to be addressed, the agenda for the meeting as well as the format for the joint-reporting by the experts.
- In the event that experts cannot resolve issues prior to trial, it would also be recommended to consider the role of a referee (i.e., similar to an assessor but with the cost borne by the two litigating parties).

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<sup>25</sup> Interviews of Mr. William Horton of William G. Horton Professional Corporation and Mr. Jason Annibale of McMillan Binch.

- Give the pre-trial or case management judge the power to direct a party to provide information or meetings with party representatives at the request of an expert in order to deal with the problem of scope limitations in expert reports.

*Support for Additional Recommendations:*

Contrary to the Rules, the United Kingdom, Australia and several other Canadian provinces have granted the court powers to direct a discussion between experts in an attempt to resolve issues prior to trial. It is not clear why the CJRP recommendations regarding the meeting of experts prior to trial were not codified into the Rules.

Both the United Kingdom and Australia rules regarding the meeting of experts are more detailed than the recommendations put forth by the CJRP. For example, Rule 35.12 of the United Kingdom Rules and Practice Directions give the court the power to specify the issues which the experts must discuss and the format for reporting back to the court with their results.<sup>26</sup>

The Australian Uniform Civil Procedure provides more detail as to the powers that the courts have regarding the meeting of experts. Section 429B of the Australian Uniform Civil Procedure states the following:

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<sup>26</sup> United Kingdom Rules and Practice Directions, Part 35 – Experts and Assessors, Section 35.12.

*“(2) The court may, for the meeting—*

- (a) set the agenda; and*
- (b) specify the matters the experts must discuss; and*
- (c) direct whether or not legal representatives may be present; and*
- (d) give directions about the form of any report to be made to the court about the meeting; and*
- (e) give any other directions the court considers appropriate.”<sup>27</sup>*

In addition to the meeting of experts, the United Kingdom has introduced a role for “assessors” in Section 35.15 of the United Kingdom Rules and Practice Directions. Specifically, the rule regarding assessors states the following:

*“(2) An assessor will assist the court in dealing with a matter in which the assessor has skill and experience.*

*(3) An assessor will take such part in the proceedings as the court may direct and in particular the court may direct an assessor to –*

- (a) prepare a report for the court on any matter at issue in the proceedings; and*
- (b) attend the whole or any part of the trial to advise the court on any such matter.”<sup>28</sup>*

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<sup>27</sup> Australian Uniform Civil Procedure, Part 5 – Expert Evidence, Rule 428 (2).

<sup>28</sup> United Kingdom Rules and Practice Directions, Part 35 – Experts and Assessors, Section 35.15.

Given the level of attention placed on the meeting of experts before trial by other jurisdictions, it would make sense for the Rules to reconsider the codification of the recommendations made by the CJRP. In fact, the recommendations by the CJRP should be more detailed to discuss the process for the meeting of experts, the specific issues to be addressed, the agenda for the meeting as well as the format for the joint-reporting by the experts.

Mr. William Horton notes that the meeting of experts prior to trial, although helpful in many circumstances, may not be appropriate in all cases. Mr. Horton suggests that it should not be left to the pre-trial or trial judge to enforce the meeting of experts but rather there should be a separate process (“expert witness management”) to manage and govern the use of expert witnesses.

### **3. Timely Delivery of Expert Reports before Pre-Trial**

#### *Issue:*

Rule 53.03 of the old Rules require that expert reports were to be filed 90 days before the commencement of trial while rebuttal reports were to be served 60 days before commencement of trial. Any response to the rebuttal would be filed within 30 days before trial.<sup>29</sup>

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<sup>29</sup> Courts of Justice Act, R.R.O. 1990, Regulation 194, Rules of Civil Procedure, O. Reg. 348/97, s. 53.

According to the CJRP, anchoring the delivery for expert reports so close the trial event has been cited as a problem resulting in trial adjournments. Without earlier production of expert reports, parties are often times unwilling to enter settlement discussions at the pre-trial stage or sooner. Hence, earlier delivery of expert reports will hopefully promote more settlement discussion amongst parties.<sup>30</sup>

Recommendation by CJRP:

The CJRP suggests that the timing for the delivery of expert reports is best left to counsel on a case by case basis. However, where no agreement has been reached, a general default period should be codified in the Courts of Justice Act.

Specifically, the CRJP recommendations with respect to the timing of delivery of expert reports are as follows:

*“Amend the rules to require parties to discuss the number of experts and timing for delivery of expert reports within 60 days of the action being set down for trial. As default, rule 53.03 should be amended to require all expert reports to be exchanged within the 90/60/30 days before pre-trial or settlement conference, subject to the parties agreement otherwise or court order.”<sup>31</sup>*

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<sup>30</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

<sup>31</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

Actions Taken in Ontario:

In response to the recommendation by the CRJP, Section 53.03 (1) and (2) of the Rules have been amended as follows:

*“53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing information listed in subrule (2.1)*

*(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).”<sup>32</sup>*

The new rules regarding the timing for expert reports is an attempt to resolve disputes or clarify assumptions and facts well in advance of trial with the objective of stimulating settlement discussions.

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<sup>32</sup> Courts of Justice Act - R.R.O. 1990, Reg. 194, Section 4.1.01

*Do the Rules Go Far Enough to Address Expert Independence?*

The amendment to Rule 53.03 does not have a direct impact on managing the independence of expert witnesses. Rather, the rule with respect to timing of delivery of expert reports is geared towards controlling the costs associated with litigation by attempting to resolve issues in advance of attending trial as well as reducing the number of adjournments due to late production of expert reports.

Although the earlier production of expert reports is not directly linked to expert witness independence, Rule 53.03 now allows experts the opportunity to meet well in advance of trial in order to resolve differences of opinion. The ability to encourage experts to meet and confer provides an opportunity for both sides to fully and clearly understand each parties' position that might not be coming through from the client retaining their respective expert. This would also help with keeping experts honest and independent with one another and reduce the risk of having a hired gun in court.

Given that the recommendation by the CRJP regarding the mandatory meeting of experts was not taken into consideration by the Courts of Justice Act, the desire to resolve issues in advance of trial will be left to counsel and may not necessarily work in practice.

Another benefit for the delivery for expert reports in advance of pre-trial is that it will allow parties to understand the nature of the opinion being put forth by the expert as well as the specific issues to which the opinion relates.

The process of dealing with expert issues upfront may allow the pre-trial judge to vet expert issues and possibly guide counsel in dealing with experts that are giving evidence on matters that outside their area of expertise or making conclusions of finding of fact or legal conclusions. Moreover, it gives counsel the opportunity to request the expert witness to be discovered in advance of trial.

The closer scrutiny of expert reports at pre-trial will make counsel think long and hard about whether to ultimately produce an expert report that might be perceived as providing irrelevant opinions or having a bias by a pre-trial judge. The aim is to eliminate the number of biased expert reports that ultimately make it to into court, thus making the trial process more efficient and less costly for litigants.

*Additional Recommendations:*

Based on the scope of review and research conducted, the following recommendations are put forth as a method of improving expert independence:

- Give the pre-trial or case management judge the power to direct a party to provide information or meetings with party representatives at the request of an expert in order to deal with the problem of scope limitations in expert reports.

The earlier delivery of expert reports would also be more effective if there was a mechanism in place that encouraged experts to meet and confer on areas of disagreement (as recommended in the previous section of this research paper).

Support for Additional Recommendations:

In the United Kingdom, the courts have the power to direct a party to provide information.<sup>33</sup> This recommendation would also be worthwhile in order to resolve issues both prior to issuing a report and once receiving the opposing experts' report, especially in light of the fact that there is no mandatory meeting of experts prior to trial in Ontario.

The ability of the court to direct a party to provide information at the request of an expert should also limit the problem with expert reports with scope limitations. Scope limitations in expert reports, although necessary and reinforced by the Ikarian Reefer code, are not necessarily helpful to the trial judge at arriving at his / her conclusions.

**4. Content of Expert Reports to Support Opinion**

Issue:

The old Rules had no regulation in terms of the standard content included in expert reports. Specifically, Rule 53.02 of the old Rules stated the following:

*“A party who intends to call an expert witness...serve on every other party to the action a report, signed by the expert setting out his or her name, address and qualifications and the substance of his or her proposed testimony.”<sup>34</sup>*

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<sup>33</sup> United Kingdom Rules and Practice Directions, Part 35 – Experts and Assessors, Section 35.9.

<sup>34</sup> Courts of Justice Act, R.R.O. 1990, Regulation 194, Rules of Civil Procedure, O. Reg. 348/97, s. 53.

Experts did not previously have any guidance or rules governing the type of information that should be included in their reports to support their opinions. The lack of guidance about the degree of information to provide in an expert report might have been a contributing factor for “thin”, unsupported opinions.

Recommendations by the CJRP:

The CJRP made the recommendation to amend rule 53.03 to include the following information in expert reports:

- *Experts name, address and curriculum vitae*
- *A detailed description of the expert’s qualifications and areas of expertise;*
- *A description of the instructions provided to the expert;*
- *The nature of the opinion being sought and the specific issues to which the opinion relates;*
- *A description of research conducted by the expert to be able to reach his / her opinion;*
- *A description of the factual assumptions on which the opinion is based;*
- *The list of documents relied upon in formulating the opinion; and,*
- *The opinion and the basis for the opinion. Where there is a range of opinion on matters dealt with in the report, summarize the range of opinion and give reasons for his / her own opinion.”*<sup>35</sup>

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<sup>35</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

*Actions Taken in Ontario:*

In response to the recommendation by the CRJP, Section 53.03 (2.1) of the Rules have been amended to include the list of items referred to in the CJRP report that must now be included in expert reports.

*Do the Rules Go Far Enough to Address Expert Independence?*

Some of the recent criticisms by judges of forensic accountants, as seen in Appendix B of this paper, include the use of unreasonable and / or unsupported assumptions as well as the use of inappropriate methodologies that result in conclusions that are unreasonable, not intuitive and not tested by logic and common sense. Moreover, accounting experts have been criticized for placing too much reliance on client prepared information without testing the representations and ultimate conclusions for reasonableness.

The amendments made to Section 53.03 (2.1) of the Rules now require experts to include in their report, amongst other things, a description of research conducted by the expert to be able to reach their opinion, a description of the factual assumptions on which the opinion is based and the opinion and the basis for the opinion. Amendments to Section 53.03 (2.1) should help address some of the issues involving the use of unreasonable assumptions and unsupported facts in arriving at the experts opinion – this ultimately helps cure some of the issues regarding expert independence.

*Additional Recommendations:*

Based on the scope of review and research conducted, it is not recommended to provide more direction to expert witnesses in preparing their report as there still needs to be a level of professional judgment that is tailored to the unique circumstances of each case.

*Support for Additional Recommendations:*

Other jurisdictions, such as Australia and the United Kingdom, have made significant changes to their civil procedure rules in order to expand the type of information that must be outlined in an expert report in order to support the opinion. Many of the reforms in other jurisdictions mirror the recommendations put forth by the CJRP that were ultimately codified into the Rules, which ultimately achieve the objective of curing biased expert opinions.

The requirements under 53.03 (2) of the Rules, in conjunction with the Report Section in the IFA Practice Standards are sufficient to guide forensic accountants with the level of detail required to support their opinion.

## 5. Limiting the Number of Experts

### Issue:

Section 12 of the Evidence Act has traditionally been the only mechanism to govern the number of expert witnesses that could give evidence, which limits the number of experts to three, unless there is leave from the trial judge to call more than three experts.<sup>36</sup>

According to the CJRP, Section 12 of the Evidence Act is not an effective tool for minimizing the number of experts since (i) it is often ignored by counsel and the courts and (ii) costs have already been incurred by the parties before the trial judge can deal with admissibility of more than three expert witnesses.<sup>37</sup>

### Recommendations by the CJRP:

With respect to the governing of the number of expert witnesses to be called by a party, the CJRP proposed extensive recommendations for changes to both the Rules as well as the Evidence Act.

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<sup>36</sup> Ontario Evidence Act, R.S.O. 1990, c. E.23, s. 12.

<sup>37</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

The CJRP referred to three mechanisms to control the number of experts, which include (i) the enforcement by counsel and the courts on the three-expert rule in Section 12 of the Evidence Act, (ii) early court involvement with respect to the number of experts and admissibility of expert evidence, and (iii) disallowing cost-recovery where the use of experts and corresponding costs have been incurred unnecessarily.<sup>38</sup>

In achieving the above three objectives, the CJRP proposed the following changes to the Rules:

*“Amend rules 50.01, 76.10, 77.14, 77.15 and 78.10 to require the presiding judicial officer at pre-trials, settlement conferences and trial management conferences to consider and make orders as to the appropriate number of experts that may be called by each side and on particular issues and whether expert evidence is admissible.”<sup>39</sup>*

In addition to the changes to the Rules, the CJRP made the following proposed recommendation for changes to Section 12 of the Evidence Act:

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<sup>38</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

<sup>39</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

*“Amend section 12 of the Evidence Act to:*

- *Make clear that a judge (or officer) presiding at pre-trial events (i.e., pre-trials, settlement conferences, trial management conferences), who may not be the presiding trial judge, may grant leave to call more than three experts (or fewer in simplified procedure cases)...*
  
- *List the following factors for the court to consider in exercising its discretion on the appropriate number of experts:*
  - *Whether the proposed number of experts is reasonably required for the fair and just resolution of the proceeding;*
  - *Whether the proposed number of experts is consistent with the principle of keeping costs and the length of proceeding proportionate to the amount or issue at stake;*
  - *Any other factors relevant to the fair, just, expeditious and cost-effective resolution of the proceeding.”<sup>40</sup>*

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<sup>40</sup> Honourable Coulter A. Osborne, *The Civil Justice Reform Project – Summary of Findings & Recommendations*, November 2007.

Actions Taken in Ontario:

The Rules and the Evidence Act have not been changed in order to address the CJRP's recommendations on controlling the number of experts that can give evidence as well as the timing as to when decisions are made regarding admissibility of expert evidence.

Do the Rules Go Far Enough to Address Expert Independence?

The issue dealing with the number of experts at trial does not directly impact or govern the independence of the evidence ultimately given by expert witnesses. However, the proposed CJRP recommendations went one step further to give the pre-trial judge the power to limit the type of expert evidence that is admissible at trial.

Giving pre-trial judges the power to deal with the admissibility of expert evidence is an important aspect for controlling "hired guns" and irrelevant opinions from ultimately making their way into evidence. Dealing with expert issues upfront will allow the pre-trial judge to vet expert opinions with the aim of eliminating the number of biased expert reports that ultimately make it to into court, thus making the trial process more efficient and less costly for litigants.

Unfortunately, the recommendations by the CJRP regarding the pre-trial control of the number of experts and admissibility of expert opinions were not implemented in Ontario.

Additional Recommendations:

Based on the scope of review and research conducted, the following recommendations are put forth as a method of improving expert independence:

- Encourage the pre-trial judge or formalize a case management process that will deal with the admissibility of expert evidence as well as restricting the number of experts that are allowed to give evidence. The pre-trial judge or case management process ought to deal with expert issues early on in the litigation.

Support for Additional Recommendations:

The complexity and dollar value of a case should be a determining factor as to whether expert evidence is necessary and if so, the number of experts that are required. The decisions regarding the number of expert evidence and admissibility of types of expert opinions should be made early in the litigation process and should be enforceable by the presiding pre-trial judge. This is currently not the case in Ontario, which is contrary to the recommendations of the CJRP as well as the reforms that have been implemented in British Columbia, the United Kingdom and Australia.

Section 50.01 and 76.10 of the Rules require discussion of expert reports and evidence, such as the quantum of damages claims. However, the pre-trial judge does not generally make decisions to restrict the number of experts and type of expert evidence that is

admissible at trial. These types of decisions are generally left to the trial judge – at which point it may be too late to deal with the issues of expert reports given that the costs have already been incurred by the parties.

According to Mr. William Horton, challenging expert credentials and the relevancy of expert opinions is only done at the trial stage – this is really the first time that counsel has the opportunity to object to expert reports. Mr. Horton’s viewpoint is that there should be an “expert evidence plan” that takes form early on in the trial process. The expert evidence plan should require counsel to outline the issues that the experts will raise, the general conclusions and the support for their opinions. If this process is conducted early on, then legal counsel can make decisions prior to trial as to whether they want to challenge the credentials of the opposing experts or alternatively retain their own expert witness.

Mr. Horton’s recommendations for an “expert evidence plan” is not likely given that the legal system in Ontario is currently reluctant to take power away from the trial judge as to the type of evidence that is led.

The following are some additional reforms in other jurisdictions that would be worthwhile considerations for implementation in Ontario.

## **BC Reform**

In British Columbia, there have been proposed reforms arising from the B.C. Civil Justice Reform Working Group. One of the reforms recommends that the case planning conference (“CPC”) judge have control over the admissibility of expert evidence as well as restricting the number of experts that are allowed to give evidence. More importantly, the CPC judge will deal with expert issues early on in the litigation.

*“For those cases involving expert evidence, the CPC judge will facilitate discussion and provide orders and directions with respect to:*

- *which issues require expert testimony*
- *the appropriate number of experts...*

*In exercising discretion to deviate from the rule, the CPC judge will also consider:*

- *the number of issues in the case that require expert evidence, and*
- *the relative benefit to be gained by the proposed expert evidence compared to the cost and time required.”<sup>41</sup>*

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<sup>41</sup> BC Report of the Civil Justice Reform Working Group to the Justice Review Task Force, Effective and Affordable Civil Justice

## **UK Reform**

Similar to the BC reforms, the United Kingdom has introduced legislation that gives the court the duty to restrict expert evidence to that which is reasonable required to resolve the proceedings.

The United Kingdom Rules and Practice Directions, Section 35.1 states the following:

*“Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.”<sup>42</sup>*

Moreover, the United Kingdom requires that all expert reports that are being submitted as evidence obtain the permission by the court. When applying for permission, counsel must demonstrate the experience of the expert in giving the opinion.<sup>43</sup>

Similar to the reforms in BC, the United Kingdom gives the court powers over the admissibility of expert evidence. Furthermore, the United Kingdom must explicitly require the courts permission to put an experts report into evidence.

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<sup>42</sup> United Kingdom Rules and Practice Directions, Part 35 – Experts and Assessors, Section 35.1.

<sup>43</sup> United Kingdom Rules and Practice Directions, Part 35 – Experts and Assessors, Section 35.4.

## 6. Joint-Expert Model

### *Issue:*

The CJRP specifically did not recommend the mandatory use of joint experts. The CJRP noted that in limited circumstances, the parties should discuss retaining a joint expert to reduce costs and avoid time delay due to competing expert opinion.<sup>44</sup> The CJRP's view was that the single expert model, although a good idea, would not necessarily work in practice.

### *Reasons for Non-Recommendation of Joint-Experts:*

Some of the reasons supporting the CJRP's decision not to recommend the single expert model is as follows:

- Parties have different views on the facts and assumptions in litigation that the expert report will ultimately be based.<sup>45</sup>

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<sup>44</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007

<sup>45</sup> Honourable Coulter A. Osborne, The Civil Justice Reform Project – Summary of Findings & Recommendations, November 2007.

- In some jurisdictions such as England and Wales, the single expert report has been successful in eliminating the “hired gun” expert problem but has not necessarily resulted in a reduction in costs since parties are retaining what is known as a “shadow expert” to opine on the joint expert’s report.<sup>46</sup>
- The Civil Justice Reform Working Group in British Columbia also did not recommend a single expert model but rather thought it would be better to leave the decision of a joint expert to the discretion of the case management judge.<sup>47</sup>

The CJRP also indicates that Rule 52.03 in the Courts of Justice Act already has wording that allows for judges to appoint a joint expert. However, the CJRP also points out that this rule is rarely ever used.<sup>48</sup>

*Do the Rules Go Far Enough to Address Expert Independence?*

The joint expert model is one mechanism that can easily cure the problem with expert independence. If an expert is ultimately appointed by the courts under Rule 52.03 and is being paid equally by both parties in litigation, it will reduce the pressure that experts might sometimes feel to meet their client’s expectations or demands.

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<sup>46</sup> U.K., Department of Constitutional Affairs, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms* (March 2001).

<sup>47</sup> BC Civil Justice Reform Working Group Report.

<sup>48</sup> Honourable Coulter A. Osborne, *The Civil Justice Reform Project – Summary of Findings & Recommendations*, November 2007.

However, based on interviews with Mr. William Horton and Mr. Jason Annibale, the idea of having the courts decide on the use of joint-experts is not necessarily the best course of action. Lawyers should be able to utilize the experts that are best suited to understand the issues and that the lawyer is most comfortable working with. Also, in certain circumstances, it is helpful to have experts on both sides of litigation, rather than a joint expert, since professionals often have different opinions on matters that should be brought to the attention of the court so that all perspectives are put on the table.

Based on the scope of review and research conducted, the recommendation is to maintain the current Rules as they pertain to the appointment of joint-expert reports.

#### **4.0 CONCLUSIONS AND RECOMMENDATIONS**

Even with the guidance for providing expert evidence and duties of expert witnesses in landmark cases such as *The Ikarian Reefer*, forensic accountants continue to be criticized by the courts for providing evidence that is not helpful to the trier of fact, biased and based on unsupportable assumptions.

One possible reason for the lack of independence and objectivity by forensic accounting experts is because the old Rules were not prescriptive when it came to providing direction to experts. Rather, the old Rules focused on procedural issues such as the number of experts that can give evidence and the timing for delivering expert reports. There was no guidance or reinforcement in the Courts of Justice Act or the Evidence Act with respect to the duties and responsibilities of expert witnesses.

The reforms made to the Rules with respect to expert evidence, although not entirely rules-based, are certainly more prescriptive and gravitate towards the United Kingdom and Australian process for governing expert evidence. However, the main difference in the Ontario reforms is that they seem to hesitate in shifting powers and the management of expert witnesses away from the trial judge to case manager, pre-trial judge or other expert witness mechanism.

Even with the many recommendations by the CJRP and implementation of certain recommendations in Rules, there is still a long way to go in order to have experts work together to resolve issues without the necessity to wait for a trial judge to make determinations about expert evidence.

Many of the reforms in Australia and the United Kingdom would be worthwhile considerations for Ontario's to deal with expert witness issues well in advance of trial and have expert work together as a mechanism to avoid raising issues at trial that are immaterial or can be easily resolved.

Some of the recommendations put forth in this research paper include:

- In addition to signing a certification form, experts should provide an oath in court that they are independent and the ultimate duty is to the court
- Expert reports ought to be addressed to the court rather than to legal counsel. Although this is a technicality, it reinforces that the ultimate duty of the expert's opinion is to the court and not legal counsel or the client.
- Formalize a mechanism that allows experts to formally ask the court for direction for purposes of assisting them in carrying out their function.

- Consider the recommendations by the CJRP for the mandatory meeting of experts prior to trial to resolve issues. The Rules should be prescriptive on granting a pre-trial or case management judge the power to decide on the process for the meeting of experts, the specific issues to be addressed, the agenda for the meeting as well as the format for the joint-reporting by the experts.
- In the event that experts cannot resolve issues prior to trial, it would also be recommended to consider the role of a referee (i.e., similar to an assessor but with the cost borne by the two litigating parties).
- Give the pre-trial or case management judge the power to direct a party to provide information or meetings with party representatives at the request of an expert in order to deal with the problem of scope limitations in expert reports.
- Encourage the pre-trial judge or formalize a case management process that will deal with the admissibility of expert evidence as well as restricting the number of experts that are allowed to give evidence. The pre-trial judge or case management process ought to deal with expert issues early on in the litigation.

Ultimately, the forensic accounting profession should not simply rely on legislation to govern the independence of its members. Like many professions, it is up to its members and governing bodies to ensure that the reputation of the profession is preserved. The recent publication of the IFA Standard Practices is a good starting point to protect the reputation and credibility of forensic accountants. However, in conjunction with the

reform to the Rules, the IFA profession needs to consider other steps such as disciplinary mechanisms to further enhance the independence and objectivity of forensic accountants when giving evidence in court proceedings.

Expert accountants play an important role not only to the clients that pay their fees but to the courts and the Ontario taxpayers. Ultimately, expert accountants should strive to look for additional steps that can be taken in the civil justice system that will form a system where members of the profession work together to become conflict managers.

## APPENDIX A - BIBLIOGRAPHY

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## **APPENDIX B – SUMMARY OF COURT DECISIONS**

The following appendix is an analysis of several court decisions where the trial judge criticizes the accounting expert for providing evidence that is not independent, unsupportable and based on unreasonable assumptions.

### **Doe v. O’Dell**

In the case of John Doe v. O’Dell, the plaintiff brought an action for damages, including future economic losses, against Father Thomas O’Dell and the Roman Catholic Episcopal Corporation for the Diocese of Sault Ste. Marie on charges of sexual assault.

There were two forensic accounting experts involved in this case that gave evidence on John Doe’s past and future loss of income. The opinions given by the two opposing experts resulted in very different monetary loss amounts. The court ultimately agreed with the evidence provided by the plaintiff’s accounting expert (herein referred to as “PAE”).

In her written decision, the Honourable Justice Katherine Swinton criticized the defendant’s accounting expert (herein referred to as “DAE”) for various reasons including: (i) assumptions not supported by the evidence; (ii) unreasonable methodology for calculating losses; and, (iii) final results do not make intuitive sense.

The overriding comment in the decision suggested that DEA was not objective in giving his evidence.

*“When I look to the two experts’ views with respect to the quantification of the loss of income, I do not find the evidence of [DEA] helpful to my task for a number of reasons. [DEA] appeared to be rather partisan when he gave his evidence. He made several comments that suggested that [PAE] was a biased witness, although I did not find here to be so.”<sup>49</sup>*

In addition to not being objective, the trial judge also criticized the DAE’s use of assumptions as being speculative and not supported by the evidence at trial.

*“In my view, the contingencies relied upon by [DAE] are not real and substantial possibilities; rather; they are mere speculative possibilities which are not supported by the evidence at trial.”<sup>50</sup>*

The trial judge also commented on the DAE’s unreasonable approach and methodology for calculating the plaintiff’s economic losses as follows:

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<sup>49</sup> Doe v. O’Dell [2003], Court File No. 01-CV-212060CM, Paragraph 325.

<sup>50</sup> Doe v. O’Dell [2003], Court File No. 01-CV-212060CM, Paragraph 321.

*“In addition, I find [DAE] method of calculating both past and future loss of income to be unreasonable. His starting point for calculations is 1995. He used Statistics Canada data for 1995 to determine the likely income for a community college graduate, picking the age category of 15 to 24 as the baseline for the year 1995. In contrast, [PAE] used the age category of 25 to 34 for that year, given that the plaintiff turned 25 in March, 1995 and she assumed that he would have been working since 1991. The difference in figures is significant -- \$26,541 versus \$37,066...”<sup>51</sup>*

Lastly, the trial judge criticized the DAE for not testing the reasonableness of his conclusions as a reality check. The trial judge wrote the following in her decision:

*“Equally problematic is [DAE] method of adjusting that figure. He has adjusted that figure both forwards and backwards, using a factor based on the average increase of personal income in Canada and the percentage change in that level from year to year – a percentage that reflects increased income from increased participation in the Canadian workforce, as well as increases in the amount of wages paid to individuals. This leads to some results that intuitively make no sense – for example, in the year 2000, he assumed a 7.06 per cent increase.”<sup>52</sup>*

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<sup>51</sup> Doe v. O’Dell [2003], Court File No. 01-CV-212060CM, Paragraph 326.

<sup>52</sup> Doe v. O’Dell [2003], Court File No. 01-CV-212060CM, Paragraph 327.

In the case of Doe v. O'Dell, the DAE made various judgment calls in preparing his report and providing oral evidence that was contrary to the rules set out in the Ikarian Reefer Code. The issues raised by the trial judge cover all aspects of the types of things forensic accounting experts are not suppose to do.

The criticisms by the trial judge suggest that the DAE rendered an opinion and calculations that were in favour of his client – thus not remaining independent.

**Homelife Realty Services Inc. v. Homelife Performance Realty Inc. et al**

In the case of Homelife Realty Services Inc. v. Homelife Performance Realty Inc., the plaintiff brought an action for loss of service fees amongst other economic losses as a result of a franchise dispute.

There were two forensic accounting experts involved in this case that gave evidence on past and future of loss of service fees, loss of advertising revenue and loss of contingency renewal period. The opinions given by the two opposing experts did not result in materially different monetary loss amounts.

However, the court raised what appear to be serious concerns regarding the credibility and independence of the plaintiff's accounting expert (herein referred to as "PAE").

In her written decision, Madam Justice J. Milanetti criticized the plaintiff's accounting expert for having his objectivity compromised on a number of fronts. The following are some excerpts from Justice Milanetti's decision highlighting some of the issues raised with respect to [PAE] testimony:

*“While clearly experts are retained by one side or the other, the court expects and hopes that an expert will also demonstrate a sufficient level of objectivity to add perspective and credence to any opinions rendered.*

*In this case, [PAE] objectivity was diminished by a number of circumstances, some within and some beyond his control. It would appear for instance, that he was retained by the plaintiff, HomeLife, and to a large extent reported to and liaised with them (or Mr. Eliopoulos at least) rather than through their lawyer (Mr. Birken at the time). This is often a difficult situation to put an expert in.”<sup>53</sup>*

Ultimately, the trial judge ruled that the PAE was too partisan and his evidence was not helpful to the court as he did not distance himself from the viewpoints of his clients.

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<sup>53</sup> Homelife Realty Services Inc. v. Homelife Performance Realty Inc. et al , Court File No. 03-CV-247000 CM, Paragraph 140 and 141

*“At the end of the day I must conclude that [PAE] was too partisan to be terribly helpful. His credibility was significantly diminished by his failure to distance himself from the views/positions of his clients, whether same were credible and objectively-based or not.”<sup>54</sup>*

The criticisms by the trial judge suggest that the forensic accounting expert was a mouth piece for his client’s viewpoints rather than basing his opinion on his own thoughts that are supported by the evidence.

Furthermore, the trial judge pointed out that the forensic accounting expert’s final opinion included scenarios that were contrary to earlier documentation included in his notes and correspondence.

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<sup>54</sup> Homelife Realty Services Inc. v. Homelife Performance Reality Inc. et al , Court File No. 03-CV-247000 CM, Paragraph 148.

*“[PAE] explained his calculation of the loss in-chief, but was confronted with an earlier opinion he rendered (found in his notes and records) wherein he concurred with the view of previous counsel (Birken) that “It would be difficult to claim loss beyond July 2009 end of the term of the agreement”. Despite such position earlier, [PAE] went on to make claim for such losses, presumably on the contrary instructions of HomeLife and Mr. Eliopoulos. While [PAE] explained that this change in stance was the result of a change in the plaintiff’s theory of the case – to make a claim for economic interference, his credibility as an expert was somewhat tarnished, in my view.”<sup>55</sup>*

The following criticism by the trial judge further indicates that the PAE was not relying on underlying source data but rather taking summary information provided to him by the client in preparing his calculations. The trial judge indicates that this is a fatal flaw of any expert witness.

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<sup>55</sup> Homelife Realty Services Inc. v. Homelife Performance Reality Inc. et al , Court File No. 03-CV-247000 CM, Paragraph 143.

*“More troubling however, was [PAE] failure to make any reference to the actual terms of the contract entered into with the replacement franchise HomeLife Neighbourhood. His testimony was at best, confused in this regard. He initially claimed never to have seen the agreement. When confronted with a letter wherein he returned it to Eliopoulos, he said he scanned the agreement only. He further compromised his objectivity before the court by conceding that he relied not on the actual contractual terms, but on Mr. Eliopoulos’ summary of them without ever comparing the summary with the agreement for accuracy. This, in my view, is a fatal mistake for an expert witness to make.”<sup>56</sup>*

Similar to the Doe v. O’Dell case, the PAE in the Homelife Realty Services case made similar mistakes that ultimately led the trial judge to decide that his opinion was too partisan and not helpful to the court.

### **Alfano et al v. Piersanti et al**

A very experienced and qualified forensic accountant was retained as an expert by the defendants in the Piersanti and Gold actions to prepared several expert reports. Counsel for the plaintiffs challenged the independence of the forensic accountant on a *voir dire* on the basis that the expert was acting as advocate rather than an independent and objective witness.

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<sup>56</sup> Homelife Realty Services Inc. v. Homelife Performance Reality Inc. et al , Court File No. 03-CV-247000 CM, Paragraph 147.

In her written decision, the Honourable Madam Justice Ellen M. Macdonald stated the following regarding [DAE] role in the case:

*“An expert should exercise extreme caution on analyzing the facts that support his or her client’s position. In this voir dire, it was very apparent that [DAE] was committed to advancing the theory of the case of his client, thereby assuming the role of an advocate. The content of many of the e-mails exchanged between [DAE] and Mr. Piersanti reveal that [DAE] role as an independent expert was very much secondary to the role of “someone who is trying to their best for their client to counter the other side.” [DAE] became a spokesperson for Mr. and Mrs. Piersanti and, in doing so, did not complete independent verification of key issues in accordance with the standards that are expected of an expert. The key issues, crucial to the determination of this case, if determined on the basis of [DAE] reports would be tainted by the lack of impartiality that is clearly apparent from the content of the e-mails.*

The ultimate disposition of the ruling by Honourable Madam Justice Ellen M. Macdonald was to disqualify [DAE] as an expert in the case.

## **Love v. Acuity Investment Management Inc. et al**

The Love v. Acuity Investment Management Inc. case involves a claim by Mr. Love in an alleged wrongful dismissal case. The accounting experts for the plaintiff were given the mandate to calculate a claims for damage in respect of a shortfall in the commissions paid to Mr. Love as well as the increased commissions that might be earned during the reasonable notice period for dismissal.

The Honourable Justice John C. Moore criticized the [DAE] for placing significant reliance on the client's model for damages without making any material changes or auditing the model for consistency with the facts of the case.

Specifically, Justice John C. Moore states the following:

*“As for [DAE], I was concerned and disappointed to learn that he took a model of damages that Mr. Love had created and put it forward unchanged in any material respect conceptually and un-audited for accuracy of the facts assumed within the model.*

*[DAE] asserted that he did not simply adopt the model prepared by Mr. Love but he admitted that having considered the overall objective of quantifying damages, he felt that this model was "one we could work with". In the result, [DAE] covered scenarios that Mr. Love proposed rather than only scenarios that are reasonable.*

Similar to the trial judge's viewpoint in the Homelife decision, the DAE in the Love decision was criticized for putting forth scenarios that were his client's viewpoints rather than on scenarios that are reasonable.

### **David M. Sherman and Her Majesty the Queen**

The case of David M. Sherman and Her Majesty the Queen deals with an issue under the Income Tax Act as to whether, and to what extent, the appellants are entitled to deduct capital cost allowance (CCA) in respect of computer software acquired by them in 1994.

The Minister of Revenue assumed that the fair market value of the subject software was nil at the time of the acquisition by David Sherman.

The appellants introduced testimony from two expert business valuers from a reputable business valuation firm. The business valuers estimated the value of the software at the relevant time to be in a range from \$1.3 to \$1.9 million.<sup>57</sup>

In her written decision, the Honourable Justice J. Woods criticized the appellant's valuation experts for not going further than the information provided by the appellant in order to support their business valuation. Justice J. Woods concludes the following:

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<sup>57</sup>David M. Sherman and Her Majesty the Queen, Court File No. 2005-1604(IT)G, Paragraph 66.

*“The respondent submits that this valuation is not reliable because it is based to a great extent on Mr. Sherman’s own view as to the potential market for the software. I completely agree with this. Whether there would be a market for the software is a key factor in the valuation of the software, and the considerable reliance that the valuers placed on Mr. Sherman’s self-interested views renders their opinion virtually worthless, in my view.”*<sup>58</sup>

The above case and corresponding criticisms of the business valuers is only one of several examples where accounting / valuation experts are not going beyond the information that is provided to them by their client. The client has a vested interest in the decision by the court and thus might be motivated to provide biased information that favours their position.

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<sup>58</sup> David M. Sherman and Her Majesty the Queen, Court File No. 2005-1604(IT)G, Paragraph 66.

## APPENDIX C – INTERVIEW QUESTIONS

1. Name the most common issues that might impair an expert’s judgment / objectivity.
2. Old Rules – any glaring holes in the old Rules of Civil Procedure with respect to expert evidence that contributed to the number of poor opinions given by experts.
3. Certification from experts in the form of Acknowledgement form...
  - a. Does this certification necessarily provide enough deterrence for experts to continue to give evidence that might be biased, etc?
  - b. What are the potential consequences of signing the certification yet not providing evidence that is in the best interest of court
4. Is there too much / not enough power in the hands of the courts to govern expert witnesses under the new Rules of Civil Procedure?
5. Thoughts on immunity for experts? Should there be more drastic consequences for experts that “cross the line” in the form of disciplinary hearings or fines.
6. How can the courts control against experts giving opinions that are outside their area of expertise?
7. Is there room for joint experts on a file – with selection process from short-list of experts made by the court based on interview / experience etc?
8. Should experts be given full access to both sides of a dispute (and be required to seek interviews from all parties) before rendering an opinion? Would this change infringe on a parties right to privilege (i.e., risk of expert sharing something with one side or the other that would otherwise be considered privileged)?
9. Mandatory meeting / hot-tubing of experts prior to issuing respective reports – is this an effective way for experts to resolve their differences in a more efficient manner before going through the process of multiple reports.
10. Do you think that there are potential areas for improvement to govern the role of experts?
11. Are you aware of any changes made in other jurisdictions regarding the governance of expert evidence that you would like to see implemented in Ontario / Canada?