

# The Recent Evolution of Expert Evidence in Selected Common Law Jurisdictions Around the World

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## 1. Forward

In our adversarial litigation system, expert evidence occupies a grey area between fact evidence and judicial determination; expert evidence is based on opinion, rather than fact, and is only permitted in specified circumstances and under particular conditions.

The courts in various common law jurisdictions have historically recognized the unique nature and limitations of expert testimony, and have set clear rules and exceptions governing the admissibility of expert evidence.

Notwithstanding these safeguards, it is submitted that the probative value of expert evidence is, by its nature as opinion evidence, subject to the frailties of human nature and therefore often viewed by stakeholders with some apprehension.

Recently, the role of the expert and the manner in which opinion evidence is entered into evidence have been thrust into the spotlight thanks in no small part to instances in different common law jurisdictions where expert evidence has led to a miscarriage of justice, notably in Canada, in the recent case of Dr. Charles Smith.<sup>1</sup>

*“In cases...where the expert’s opinion is critical and the charges are so serious, tragic outcomes in the criminal justice system are hardly surprising. While Dr. Smith, as the pathologist giving expert evidence, must bear primary responsibility for these deficiencies, those charged with overseeing his performance cannot escape responsibility. Indeed, neither can other participants in the criminal justice system—Crown, defence and the court. Each had an important role to play in ensuring, so far as possible, that results in the criminal justice system were not affected by flawed expert testimony [emphasis added].”<sup>2</sup>*

The ramifications from events such as the Smith affair (and other cases of miscarriage of justice in other jurisdictions) are felt well beyond the particular litigation; rightly or wrongly, some point to these events as evidence that the system is in need of repair.

Partially in response to these events, the rules of civil procedure (in Canada and in other common law jurisdictions) have recently been revised and expanded. These new rules further empower the courts, in their role as gatekeeper, to guard against improper conduct by experts.

The findings from the Smith inquiry also emphasize the need for governing bodies to remain vigilant and proactive in their oversight responsibilities. In our view, this is a call to action.

This paper examines several recent emerging trends and practices concerning the use of expert opinion evidence.<sup>3 4</sup>

- 1 Dr. Charles Smith was a Canadian pathologist and director of the Ontario Pediatric Forensic Pathology Unit at the Hospital for Sick Children in Toronto. From 1982 to 2003 he conducted hundreds of autopsies and provided testimony in many criminal cases. A public inquiry in 2008 revealed fundamental errors in Dr. Smith’s work. Dr. Smith later said that he believed his role was to advance the theories of the Crown. Several criminal convictions that resulted from his testimony have since been overturned.
- 2 *Inquiry into Pediatric Forensic Pathology in Ontario: Final Report*, the Hon. Stephen Goudge, 2008.
- 3 The contents of this paper are subject to important restrictions (see Appendix B).
- 4 Our examination consisted of a review of the findings from recent formal public inquiries, court decisions and enacted legislation in Canada, the United Kingdom, Australia, the United States and in International Arbitration (collectively referred to herein as the “Jurisdictions”). We are particularly thankful to Mr. Earl Cherniak, Q.C. who reviewed a draft of this paper and provided valuable insights throughout the process. We would also like to extend our gratitude to Owain Stone (KordaMentha), Alina Niculita (Shannon Pratt Valuations), and James Patterson (J.D. Melbourne Law School) for providing us with additional information. Our methodology and scope of review are provided in Appendix A.

## 2. A Better Mousetrap—The First Steps Toward Recent Procedural Reform

The rules governing the use of expert evidence in the UK, Australia, Canada, International Arbitration and, to a lesser degree, in the United States have changed considerably in the last 15 years.

The genesis for recent reform dates back to 1996 when Lord Woolf, then Master of the Rolls in the UK, published his seminal report *Access to Justice* (the “Woolf Report”). Lord Woolf’s mandate was to review aspects of the civil justice system and outline recommendations to improve it.

He noted that the civil justice system in the UK was slow and expensive, and he credited the proliferation of expert evidence as a contributing factor.

From his recommendations, the UK Civil Procedure Rules (the “CPR”) were enacted in 1998. The CPR, which largely replaced the Rules of the Supreme Court, were designed to improve access to justice and to make the civil justice system more responsive and less expensive. Several changes were implemented to the rules governing the use of expert evidence, which we discuss subsequently in this report.

More recently, a review of the civil justice system conducted by the Australian Law Reform Commission in 1995 led to changes in the Australian Federal Court Rules in 1998. In Canada, the Federal Court Rules Committee undertook a similar process in 2008, leading to changes to the Federal Court Rules governing expert evidence in 2010. It is noteworthy that both reviews concluded that expert evidence required further regulation and oversight.

In contrast to the general trend, there has been some antipathy towards increased regulation in the United States.

Perhaps as a result of the increased flexibility in the various international arbitration jurisdictions, international arbitration has been at the forefront of exploring novel approaches to introducing expert evidence into proceedings. We discuss more of these novel approaches in Section 5.

For ease of reference, we outline a timeline of key events in each jurisdiction at Appendix C-1.

## 3. By Invitation Only—The Court’s Role as Gatekeeper

### Introduction—The Natural Tension

*“Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These gentlemen are usually required to speak, not of facts, but to opinions: and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them.”* The Honourable John Pitt Taylor, 1885<sup>5</sup>

Concerns over the independence and objectivity (in fact and appearance) of experts providing opinion evidence in court proceedings are not new. In our adversarial litigation system, it should come as no surprise that guarding against what we term “advocacy by experts” has, for more than a century, been a major focus for stakeholders.

Since Taylor was quoted over 100 years ago, the role and conduct of the expert has become even more contentious as the use of expert evidence in civil litigation has expanded significantly to encompass, for example, new and often novel sciences and analytical approaches.

<sup>5</sup> A Treatise on the Law of Evidence, John Pitt Taylor, 1885.

For example, in the seminal Canadian case *R. v. Mohan*,<sup>6</sup> the court held:

*“There is a danger that expert evidence will be misused and will distort the fact finding process. Dressed up in scientific language, which the jury does not easily understand, and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.”*

More recently, the Federal Court Rules Committee in Canada said, “...the misapprehension of the role of the expert witness in the trial process can result in experts advocating on behalf of a party. Such an approach diminishes the reliability and usefulness of the expert’s evidence to the Court [emphasis added].<sup>7</sup>”

We submit that apprehension concerning expert evidence is widespread. For example, a recent survey of U.S. attorneys and judges conducted by the Federal Judicial Centre<sup>8</sup> found that adversarial bias was believed to be the single most important problem with expert evidence in US courts.<sup>9</sup>

There is no shortage of U.S. cases where the usefulness of expert evidence has been questioned. In our view, it is important to differentiate cases where the court has not accepted the expert’s opinion (based on the merits of the expert’s work) from cases where the court has not accepted the expert (based on his/her conduct prior to or during the trial). It is submitted that the former is a function of the adversarial system, is to be expected and is commonplace; the latter (i.e., advocacy by experts) is of grave concern to all stakeholders.

This concern is evident from decided court cases. For example, in the United States (Delaware) case of *Finkelstein v. Liberty Digital Inc.*, the judge highlighted the burden imposed on the court by biased experts:

*“Men and women who purport to be applying sound, academically-validated valuation techniques come to this court and, through the neutral application of their expertise to the facts, come to widely disparate results, even when applying the same methodology. These starkly contrasting presentations have, given the duties required of this court, imposed upon trial judges the responsibility to forge a responsible valuation from what is often ridiculously biased ‘expert’ input.”<sup>10</sup>*

In the United Kingdom, the often cited Woolf Report framed the issue of advocacy by experts with this observation – “most of the problems with expert evidence arise because the expert is initially recruited as part of the team which investigates and advances a party’s contentions and then has to change roles and seek to provide the independent expert evidence which the court is entitled to expect.”<sup>11</sup>

In this section of our study, we examine the duties of experts in various jurisdictions as those duties have been established in common law, codes of practice and statutory regulation. Our focus is on what we consider to be the most important attributes of expert testimony being the independence and objectivity of the testifying expert and the reliability/usefulness of the proffered opinion evidence.

6 [1994] 2 S.C.R. 9 at pg 17.

7 *Expert Witnesses in the Federal Courts: A Discussion Paper of the Federal Courts Rules Committee on Expert Witnesses*, The Federal Court of Canada Rules Committee, 2008 at pg 1.

8 The Federal Judicial Centre is a research and education agency for the federal courts, created by Congress in 1967 to promote improvements in judicial administration in the courts of the United States.

9 *Judge and Attorney Experiences, Practices and Concerns Regarding Expert Testimony in Federal Civil Trials*, Federal Judicial Center, Carol Kafta et al., 2002

10 C.A. No. 19598, 2005 Del. Ch. LEXIS 170 at pg 29.

11 *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, Lord Woolf, 1995 at Ch 23 para 5.

## The Trend Towards Increased Codification—Recent Initiatives in Selected Common Law Jurisdictions

Recent amendments to the rules of procedure in various jurisdictions have sought common objectives —further defining the expert’s duty to the court and placing further limits on the allowable scope of the expert’s evidence.

A summary of the current rules in the various jurisdictions is provided in Appendix C-2.

For example, the UK Civil Procedure Rules state that *“it is the duty of experts to help the court on matters within their expertise... This duty overrides any obligation from whom the experts have received instructions or by whom they are paid.”*<sup>12</sup>

The wording of the UK Civil Procedure Rules should be familiar to Canadian and Australian practitioners. Recent amendments to the Federal Court Rules in Canada<sup>13</sup> and the Federal Court Rules in Australia<sup>14</sup> adopt a similar definition of the expert’s duty.

In the Federal Court of Australia, for example, *“An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential...An expert witness’ paramount duty is to the Court and not to the person retaining the expert.”*<sup>15</sup> Many provincial and territorial jurisdictions within Canada and Australia<sup>16</sup> have similar stipulations.

Other common elements in several jurisdictions include the requirement that experts formally acknowledge their duty to the court, and also that they agree to abide by a code of conduct.

It is noteworthy that the expectations of the courts have not changed with the “new” rules. Rather, we submit that the new rules shine a brighter spotlight on pre-existing obligations, a subtle (or not) reprimand. The practical goals of the new rules are to further define (restrict) the expert’s role in the litigation process, and to remind the expert of his/her obligations in each instance where opinion evidence is being provided.

In Canada, formal acknowledgement of the expert’s duty to the court is in the form of a signed certificate appended to the expert’s report.<sup>17</sup> In the United Kingdom and within many jurisdictions in Australia, experts are required to state in their report that they understand their role and responsibilities as stipulated in the code, and have complied with these requirements as they pertain to the current matter before the court.

International arbitration (“IA”), by its nature, draws from an assortment of influences including both common law and civil law, and there is some variance between the different IA regimes. That said, the trend is towards increased scrutiny.

For example, the International Bar Association (the “IBA”) amended the Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”) in 2010 to require that party-appointed experts disclose any present or past relationship with the parties, their legal advisors, and the arbitral tribunal. Prior to 2010, experts were only required to disclose relationships with the parties. The IBA Rules now also

12 The United Kingdom Civil Procedure Rules (CPR) – Part 35.3.

13 Specifically, Rule 52.2 in 2010.

14 Specifically, Rule 23 and Practice Note 7 (CM7) in 1998.

15 Practice Note CM7, Federal Court of Australia, 2011.

16 For example, the Family Court of Australia, the Supreme Court of New South Wales, the Supreme Court of Victoria, and others.

17 For example, Form 52.2 from the Federal Courts Rules. Similar requirements have been adopted in many provincial jurisdictions.

require that party-appointed experts include an express statement of independence in their report, something previously required only of tribunal-appointed experts.<sup>18</sup>

The United States provides a notable exception to the trend towards increased codification of conduct —the Federal Rules of Evidence do not include a code of conduct for experts and do not formally define the expert’s duty to the court. Further, the US rules do not require a signed acknowledgement or certificate of independence from the expert (e.g., when serving an expert report).

Given that many of the amendments to codes of conduct have only been recently implemented, there is little empirical evidence which speaks to whether formally defining the expert’s duty has resulted in a meaningful change in the practice of experts or the reliability of the expert evidence (in fact and as perceived by the various stakeholders).

Critics of the increased codification contend that a formalized process does not (and cannot be expected to) meaningfully alter the existing practices of experts. They point to the fact that the concepts underlying the expert’s duties are not new and in fact experts have been bound to “tell the truth” for as long as there has been expert evidence.<sup>19</sup>

Still, supporters of a formal protocol suggest that not all expert witnesses actually understand their role as impartial advisors and, while the rules are unlikely to dissuade bad behavior in all cases, it will give reason for pause and at least remind experts of the need for “*caution and humility*.”<sup>20</sup>

### The Court as Gatekeeper

While debate continues on whether increased codification has led to a meaningful change concerning the conduct of experts, it is clear that courts in all jurisdictions remain vigilant in their role as gatekeeper vis-à-vis the expert’s independence and objectivity. In the Supreme Court of Canada decision of *R. v. J. –L.J.*,<sup>21</sup> the court said:

*“The court has emphasized that the trial judge should take seriously the role of ‘gatekeeper’. The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.”*

Prior to the recent trend towards increased codification, the courts in Canada, the United States, Australia and the United Kingdom established somewhat consistent common law on the role of experts. Recent common law decisions often reference the seminal 1993 English decision of *Ikarian Reefer*,<sup>22</sup> a court decision which preceded much of the recent debate and procedural reform in these jurisdictions. In essence, *Ikarian Reefer* outlined that the duty and responsibility of an expert was to provide independent assistance to the court.<sup>23</sup>

In the United States, the conduct of experts is often assessed by the judge on a case by case basis with reference to what is known as the “*Daubert Standard*”. The *Daubert Standard* is a sort of litmus test regarding the admissibility of expert witness testimony that arose from three seminal cases, collectively referred to as the “*Daubert Trilogy*.”<sup>24</sup>

18 *Lost in Translation? The Independence of Experts under the 2012 IBA Rules*, The European & Middle Eastern Arbitration Review, James Barratt, 2012.

19 *After Objectivity: Expert Evidence and Procedural Reform*, Sydney Law Review, Gary Edmond (2003).

20 *Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts*, Queen’s Law Journal, David M. Paciocco, 2009.

21 [2000] 2 S.C.R. 600 (S.C.C) at para 28.

22 *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd.*, (“*The Ikarian Reefer*”), [1993] 2 Lloyd’s Rep. (Q.B.D.)

23 *Expert Evidence: The Requirement of Independence*, Charles Pugh et al., 2009.

24 Specifically, *Daubert v. Merrell Dow Pharmaceuticals*, *General Electric Co. v. Joiner*, and *Kumho Tire Co. v. Carmichael*

In 2000, the Federal Rules of Evidence in the United States were amended in an attempt to codify the structure of the Daubert Standard. Rule 702 now reads:

*“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”<sup>25</sup>*

Of note, the U.S. Federal Rules of Evidence do not address the expectations concerning the duty of experts.

A 2002 study conducted in the United States reported that the percentage of post-*Daubert*<sup>26</sup> cases in which expert evidence was admitted in federal courts, without limitations, fell significantly. The courts’ increasing concern over partisanship in expert evidence was cited as a contributing factor to the limitations being placed on expert evidence.<sup>27</sup> We summarize the most commonly cited “issues” with expert testimony in civil cases, as reported in the study (pre and post Daubert), at Appendix C-3 of this report.

The English High Court decision in *Pearce v. Ove Arup Partnership Ltd & Ors*<sup>28</sup> provides a recent and vivid example of the court’s vigilance in its role as gatekeeper. There, a professional architect had given evidence on whether the design of a building had been plagiarized. The judge concluded that the expert had acted as an advocate and failed to uphold his duty to the court. The decision, handed down just three years after the UK Civil Procedure Rules were amended to include a definition of the expert’s duty and a requirement that the expert acknowledge this duty in his/her report, states:

*“At the end of his report, [the expert] said he understood this duty. I do not think he did... Now there is no rule providing for specific sanctions where an expert witness is in breach of his Part 35 duty [from the recently amended UK Civil Procedure Rules]. Nor is there any system of accreditation of expert witnesses... So there is no specific accrediting body to whose attention a breach of the duty can be drawn. Most (but not all) expert witnesses, however, belong to some form of professional body or institute. I see no reason why a judge who has formed the opinion that an expert had seriously broken his Part 35 duty should not, in an appropriate case, refer the matter to the expert’s professional body if he or she has one...[Emphasis added]<sup>29</sup>”*

The suggested interface between the court as gatekeeper and the expert’s governing body as custodian of the profession continues to be a hot-button issue.

Returning to *Pearce*, the story has a further twist. The expert’s governing body (the Royal Institute of British Architects) took up the matter of the expert’s conduct and a disciplinary committee found the judge’s criticisms “...had been based on a series of factual inaccuracies and incorrect conclusions.”<sup>30</sup> In the end, the committee of professional architects not only dismissed the judge’s referral for discipline but also went a step further in suggesting the judge’s decision in the matter was incorrect.

There is no shortage of recent examples from other common law jurisdictions highlighting expert evidence gone awry.

25 Rule 702, the United States Federal Rules of Evidence.

26 The study compared the results of surveys conducted of US judges in 1991 (pre-Daubert) with similar surveys conducted of US judges and US attorneys in 1998 and 1999, respectively (post-Daubert).

27 *Increasing Complexity and Partisanship in Business Damages Expert Testimony: The Need for a Modified Trial Regime in Quantification of Damages*, John W. Hill et. al., University of Pennsylvania Journal of Business Law, 2009.

28 [2001] EWHC Ch 455 (2nd November, 2001).

29 *Pearce v. Ove Arup Partnership Ltd & Ors* [2001] EWHC Ch 455 (2nd November, 2001), at 60.

30 Judge Jacob Slammed for Expert Witness Flak, Brendan Malkin, *The Lawyer*, 2003.

For example, in Canada, in *Alfano v. Piersanti*,<sup>31</sup> an expert prepared a forensic accounting report and the court concluded that he had become an advocate for his client's position. This finding was based in large part on the court's consideration of email correspondence between the expert and counsel. The issue was summarized as follows:

*"...It was very apparent that [the expert] 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 [the expert] and [the client] reveals that [his] role as an independent expert was very much secondary to the role of 'someone who is trying to do their best for their client to counter the other side'....[The expert] became a spokesperson for [the client] and, in doing so, did not complete independent verification of key issues in accordance with the standards that are expected of an expert."<sup>32</sup>*

And, in the recent Canadian case *Gould v. Western Coal Corporation*,<sup>33</sup> an expert was similarly challenged for what were viewed to be inappropriate efforts to advance the client's case. In the judge's words, the expert had an *"inclination to find a boogie man under every bed. When light is actually shone on the subject, it disappears."*

The point was further clarified:

*"The willingness of an expert to step outside his or her area of proven expertise raises real questions about his or her independence and impartiality. It suggests that the witness may not be fully aware of, or faithful to, his or her responsibilities and necessarily causes the court to question the reliability of the evidence that is within the expert's knowledge."<sup>34</sup>*

The repeated admonishment of experts in recent court decisions serves as a constant reminder to all stakeholders that there is room for improvement in how expert evidence is tendered in our litigation system. While the courts are the gatekeeper, a recent Canadian decision succinctly summarizes the challenge:

*"This gatekeeper function directly collides with the general requirement that the parties to an action must be afforded the opportunity to lead the most complete evidentiary record consistent with the rules of practice. This fundamental tension can only be resolved by the careful and consistent application of the rules of evidence [emphasis added]."<sup>35</sup>*

## Conclusion

Expert evidence has been, and remains, an important part of the litigation process. It is submitted that in the context of our current adversarial system, the natural tension between experts and their clients is unavoidable.

This tension is not a new phenomenon and experts have been held to a high standard of conduct for some time.

That said, there is a discernible trend in various jurisdictions to increase codification of the expert's conduct; we submit that this trend highlights a continued frustration with what we term *"advocacy by experts."*

The jury is still out on whether increased codification will curb advocacy by experts. However, it is clear to us that future opportunities may exist for professional bodies to contribute further on this important issue.

31 2009 CanLII 12799 (ON SC).

32 2009 CanLII 12799 (ON SC) at 11.

33 *Gould v. Western Coal Corporation* (2012 ONSC 5184).

34 *Gould v. Western Coal Corporation* (2012 ONSC 5184) at 85.

35 *Dulong v. Merrill Lynch Canada Inc.* (2006), 80 O.R. (3d) 378 (Ont. S.C.J.).

## 4. State the Nature of Your Business—Reporting Requirements for Expert Reports

### The Nature and Purpose of the Expert's Report

The rules in each jurisdiction provide only general instruction to experts with respect to the format of the tendered report. The courts have, perhaps, recognized that specific reporting requirements will vary based on the facts and circumstances of that particular case and that a detailed description of reporting requirements is therefore generally counterproductive.

That said, there are what we would characterize as general reporting requirements in each jurisdiction studied. In particular, there is some commonality among reporting requirements pertaining to the expert's expertise, independence and objectivity.

We provide a summary of the reporting requirements of expert witnesses in each of the jurisdictions surveyed at Appendix C-4. We discuss noteworthy findings below.

### Instructions and Assumptions

Courts in various jurisdictions have noted that differences in opinions proffered in a particular case often arise from differences in the instructions provided to each expert or the assumptions underlying the expert's analysis, rather than genuine differences in professional opinion.

The courts are often left to wonder what the opinion of each expert would have been had they each received identical instructions. As a judge of the Federal Court of Australia has said:

*"Often in my experience at the Bar, the real dispute between experts did not lie in their conclusions at all. Rather, it was that they had proceeded on different assumptions. Because they were briefed by the particular litigant paying them, they were not asked to opine as to whether, if they accepted the other experts' assumptions, they would come to the same conclusion as the other expert. Instead, the experts debated the assumptions. This was largely a sterile exercise for them, since they did not have knowledge of the primary facts."<sup>36</sup>*

One universal requirement is that the expert explicitly state what issue(s) he/she is addressing. The requirement appears to be aimed at containing differences in expert's opinions to genuine issues of dispute rather than differences in the instructions given to each expert. For example, in the UK Civil Procedure Rules, "[t]he expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written."<sup>37</sup>

All jurisdictions also require that the expert's report outline the basis for all opinions and the material information/analysis relied upon in reaching these conclusions.

### The Expert's Qualifications and Experience

Opinion evidence is a special type of evidence in that it speaks to the expert's opinion on a matter in dispute (rather than providing facts). Fundamental to this process is the basis for the opinion.

There is no substantive debate in any of the jurisdictions that the expert's state of mind is an appropriate avenue of inquiry. Examination of exogenous factors and circumstances that may have influenced the expert's perceptions and interpretations (read: independence) in the matter at hand is widely viewed to be appropriate.

An individual's expertise is most often based on some combination of formal training and experience.

<sup>36</sup> *Using the Hot Tub—How Concurrent Expert Evidence Aids Understanding*, The Hon. Justice Steven Rares, New South Wales Bar Association Continuing Professional Development Seminar, 2010.

<sup>37</sup> UK Civil Procedure Rules, Part 35.10 (3).

In all jurisdictions, there is a basic requirement for the expert to outline his/her qualifications in the matter at hand (prior to providing testimony) so that they can be probed by opposing litigants, and ultimately assessed by the trier of fact (in the role as gatekeeper). In all jurisdictions, the expert must be qualified by the court and the assessment is based in large part on information in the expert's curriculum vitae. This requirement is often satisfied by appending the expert's curriculum vitae to the report.

In some jurisdictions, the types of information to be disclosed in the curriculum vitae are not codified and the contents are the exclusive purview of the expert. In other jurisdictions, the required disclosure is codified.

For example, the U.S. Federal Rules of Civil Procedure require that the proposed expert provide a "... list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition."<sup>38</sup>

In the United States, the expert's qualifications may form the basis of a "*Daubert challenge*,"<sup>39</sup> particularly if the expert's curriculum vitae fails to adequately detail professional experience specific to the industry or the precise area(s) of expertise relevant to the matter at hand.<sup>40</sup>

### Explicit Acknowledgement of the Expert's Duties and Obligations

In Canada, Australia, and the United Kingdom, codes of procedure specify that the expert acknowledge in the report that he/she agrees to be bound by the code of conduct (including the expert's overriding duty to the court).

In the United Kingdom, this duty to the court is further emphasized by a requirement that experts address their report directly to the court. This differs from the common practice in other jurisdictions where the report is typically addressed to the retaining party (litigant and/or litigant's counsel).

In the United States, the expert is required to disclose "*a statement of the compensation to be paid for testimony in the case.*"<sup>41</sup> There is no such requirement in Canada, the UK, or Australia. Unanimous is the view that contingent fees are inappropriate as they impair the independence of an expert witness. For example, in the United Kingdom:

*"Payments contingent upon the nature of the expert evidence given in legal proceedings, or upon the outcome of a case, must not be offered or accepted. To do so would contravene experts' overriding duty to the court and compromise their duty of independence."*<sup>42</sup>

### Conclusion

The persistent concern regarding experts has recently led to reduced autonomy for experts regarding the contents of their report. The trend towards more particular reporting requirements, which have been driven in part by professional bodies, but to a large extent by the rules of procedure in the various jurisdictions, now mandate positive affirmation of the expert's roles and responsibilities.

Whether the increased specification of mandated reporting requirements has addressed the concerns is unclear. However, it is clear to us that as long as advocacy by experts remains a major issue (in perception or in reality), the risk of further regulation of experts' conduct and the contents of experts' reports will persist.

38 Rule 26 (2) (v) of the Federal Rules of Civil Procedure.

39 A "Daubert Challenge" is a hearing conducted before a judge in which the admissibility of expert evidence is challenged by opposing counsel. The term was coined from the US Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

40 *Expert Reports*, John L. Tate, et al., Stites & Harbison PLLC, 2012.

41 Rule 26 (2) (vi) of the Federal Rules of Civil Procedure.

42 Protocol for the Instruction of Experts to Give Evidence in Civil Claims, Civil Justice Council, 2004.

## 5. What Price Justice? New and Innovative Approaches to Expert Evidence and the Impact on the Cost of Litigation

*“[An] important question to be reviewed is the impact that expert evidence is having on the length of trials and the corresponding increase in the cost of litigation to the parties. This increase in cost raises concerns about the accessibility of the court system to litigants [emphasis added].<sup>43</sup>”*

Litigation costs are a concern in all jurisdictions and there is recent emphasis on process improvement to ensure that expert evidence is efficiently developed and presented.<sup>44</sup>

One of the principal findings of the Woolf Report in the UK was that the cost of litigation was becoming excessive:

*“A large litigation support industry, generating a multi-million pound fee income, has grown up among professions such as accountants, architects and others, and new professions have developed such as accident reconstruction and care experts. This goes against all principles of proportionality and access to justice. In my view, its most damaging effect is that it has created an ethos of what is acceptable which has in turn filtered down to smaller cases. Many potential litigants do not even start litigation because of the advice they are given about cost, and in my view this is as great a social ill as the actual cost of pursuing litigation [emphasis added].<sup>45</sup>”*

More recently in the UK, Lord Justice Jackson undertook another comprehensive review of the civil justice system, publishing his report *Review of Civil Litigation Costs* (the “*Jackson Report*”) in 2009. The Jackson Report was commissioned in response to further concerns from the judiciary in England and Wales that the cost of litigation was disproportionate to the issues at hand. With respect to expert evidence, Jackson said:

*“There is nothing fundamentally wrong with the manner in which evidence is currently adduced in civil litigation, by way of witness statements and expert reports. The only substantial complaint which is made is that in some cases the cost of litigation is unnecessarily increased because witness statements and expert reports are unduly long [emphasis added].<sup>46</sup>”*

A 2002 study conducted by the Federal Judicial Center in the United States echoed this sentiment. The study, based on a survey of US judges and attorneys, found that excessive costs were the second most important problem with expert evidence, after concerns over the expert’s independence.<sup>47</sup>

The view that expert evidence is expensive is not new. Until recently, the dialogue amounted to resigned complaint, not actionable reform. This is beginning to change.

Rules committees and other stakeholders are now focused on the possible substance and form of procedural reform, the objective being to reduce costs of opinion evidence while maintaining the tenets of the adversarial judicial system favored in each jurisdiction.

New and innovative approaches to expert evidence are emerging, each with proponents and detractors. Some recent innovations, each of which has been implemented in one or more of the jurisdictions, are discussed below.

43 Expert Witnesses in the Federal Courts: A Discussion Paper of the Federal Courts Rules Committee on Expert Witnesses, The Federal Court Rules Committee of Canada, 2008.

44 Some of the novel approaches to this issue are discussed later in this paper

45 Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, Lord Woolf, 1995.

46 *Review of Civil Litigation Costs: Final Report*, The Hon. Lord Justice Jackson, The Ministry of Justice (UK), 2009.

47 *Judge and Attorney Experiences, Practices and Concerns Regarding Expert Testimony in Federal Civil Trials*, Federal Judicial Center, Carol Kafta et al., 2002.

### Concurrent Evidence (“Hot Tubbing”)—Everyone into the pool!

Concurrent evidence, better known by the rather unfortunate colloquial term “hot tubbing” (in reference to the necessity for expert panels to share close quarters while providing concurrent evidence at trial) is a relatively new phenomenon, although Australia has some experience with the process dating back to the 1970s.

Hot tubbing proponents point to a significant reduction in the total time required to examine multiple experts (individually) and the resulting reduction in the cost of litigation.

While there are no hard and fast rules to hot tubbing, the general framework is somewhat consistent across jurisdictions.

First, each expert may be required to prepare his/her own opinion report.

Next, the experts may review each other’s reports, and then confer to prepare a joint statement on the issues to which they agree and disagree. This conference may be conducted with, or without, counsel.

At trial, each expert testifies (either alone or in the hot tubbing format) in regard to the areas of agreement and disagreement between the experts, and presents his/her position on each of the issues that remains in dispute.

Next, in regard to the areas of disagreement, each expert comments on the analyses and conclusions presented by the other expert in his/her written report (and/or during testimony).

After each expert has testified, both experts are questioned together—the questions can be formulated by counsel, the court, or both. Counsel may then have the opportunity to cross-examine the experts on their answers.

In Australia, the practice of concurrent evidence dates back to its use in commercial tribunals in the 1970s.<sup>48</sup> More recently, Australian courts have also made extensive use of the practice.<sup>49</sup>

Anecdotal evidence (primarily from Australia, given the longer history) suggests that in addition to saving costs, hot tubbing also reduces the adversarial nature of cross-examination because experts are asked to address differences in professional opinion in real time, under the watchful eye of the court and the litigants, and are also asked to strive to reach agreement (where feasible) on some if not all issues in dispute.

Agreement is often found quickly. “Because each expert knows his or her colleague can expose any inappropriate answer immediately, and also can reinforce an appropriate one, the evidence generally proceeds directly to the critical, and genuinely held points of difference.<sup>50</sup>” By focusing only on areas of contention, particularly during cross-examination, there is said to be a significant reduction in the time required to examine each expert.

Justice Steven Rares of the Federal Court of Australia has, over the years, spoken out extensively on the topic of hot tubbing and has presided over many cases in which the method was used. Justice Rares is a proponent, stating:

*“Experts generally take the various courts’ expert codes of conduct very seriously. After all, in general they value their reputations and integrity. But more fundamentally, the...process often reveals that one party’s case*

48 *Hot-Tubbing Experts—Should Lawyers Like It?*, Canadian Lawyer Magazine, Judy van Rhijn, 2011.

49 For example, in the Federal Court of Australia, the Supreme Court of New South Wales, the Supreme Court of Queensland, and others.

50 *Expert Evidence in Copyright Cases: Concurrent Expert Evidence and the ‘Hot Tub,’* Federal Judicial Scholarship, The Hon. Justice Steven Rares, 2009.

*on a critical point will succeed or fail. This is because the experts are able to understand, through professional exchanges, what each has said and on what assumptions.<sup>51</sup>*

Hot tubbing is beginning to take hold in other jurisdictions.

In Canada, recent changes to the Federal Court Rules in Canada, as well as provincial jurisdictions, allow for this approach.<sup>52</sup> The Federal Court Rules, for example, state “[e]xpert witnesses shall give their views and may be directed to comment on the views of their panel members and to make concluding statements. With leave of the Court, they may pose questions to other panel members.<sup>53</sup>”

For example, in *Apotex Inc. v. Astrazeneca Canada Inc.*,<sup>54</sup> the court first followed the traditional approach for expert evidence—direct examination, cross examination and reply. The court then conducted a “hot tubbing” session where both experts testified concurrently to answer questions from the judge (under oath). Each litigant’s counsel was then permitted to ask follow up questions (to both experts) arising from the hot tubbing exchange with the judge.

Feedback from Canada is preliminary, and it is fair to say that the jury is still out.

Hot tubbing has its detractors. One recurring complaint is that the format (an “expert panel”) may favor those experts who are more confident, assertive, and/or persuasive in their testimony. The weight that the court applies to the findings of each expert may be influenced by factors other than the merits of the evidence itself. This observation is also applicable in the more traditional court setting, although perhaps to a lesser extent, because counsel retains more control over the delivery of the testimony.

Also, the Australian experience demonstrates that hot tubbing requires that the judge take a more active role in the proceedings. Because the process is comparatively less structured, responsibility often falls to the judge to moderate the discussion between the experts. Counsel is not always keen to cede control of the expert in this fashion.

The Jackson Report revealed that sentiment towards the practice is mixed. Broadly speaking, Lord Jackson found that support for hot tubbing from advocates and judges in various UK courts fell into three camps a) outright support; b) cautious support subject to a pilot program; and c) outright opposition.

The Jackson Report ultimately recommended that the practice of concurrent evidence be piloted in cases where the experts, lawyers, and the judge all consent to its use, stating “*if the results of this [pilot] are positive, then consideration should be given to amending Part 35 [of the UK Civil Procedure Rules] so that it expressly enables the judges to direct that the concurrent evidence procedure be used in appropriate cases.*<sup>55</sup>” Lord Jackson notes that the practice might be particularly effective in valuation disputes.

Early results from the pilot program appear promising.

*“The evidence of the pilot to date suggests that there are time and quality benefits to be gained from the use of the concurrent evidence procedure for expert evidence. So far there is no evidence of significant disadvantages from the point of view of the judiciary, counsel, solicitors or experts themselves. What is needed is a larger evidence base so that the use of the procedure in different kinds of cases can be evaluated and a wider range of experience relating to rigor and costs can be analyzed.”<sup>56</sup>*

51 *Using the Hot Tub—How Concurrent Expert Evidence Aids Understanding*, The Hon. Justice Steven Rares, New South Wales Bar Association Continuing Professional Development seminar, 2010.

52 For example, see Rule 282.1 of the Federal Courts Rules in Canada.

53 Paragraph 282.1 of the Federal Court Rules.

54 *Apotex Inc. v. Astrazeneca Canada Inc.* 2012 FC 559.

55 *Review of Civil Litigation Costs: Final Report*, The Hon. Lord Justice Jackson, The Ministry of Justice (UK), 2009.

56 *Manchester Concurrent Evidence Pilot – Interim Report*, UCL Judicial Institute, 2012.

In the United States, lawyers have resisted hot tubbing, primarily because the process reduces counsel's control over their expert. While hot tubbing is not expressly prohibited, there are no specific provisions in the Federal Rules of Evidence specifying its use. Currently, there appears to be no imminent plan to formally adopt the hot tubbing approach, and the current preference is to maintain the traditional method of examining and cross-examining party-appointed experts individually.<sup>57</sup>

The prevalence of hot tubbing in international arbitration, which procedurally draws on a number of different influences, varies considerably among different jurisdictions; however, the approach is becoming more prevalent.<sup>58</sup>

For example, the IBA Rules provide that the arbitral tribunal may, upon the request of a party, or on its own motion, vary the conventional order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other.<sup>59</sup>

Similar provisions exist with other arbitral bodies including, for example, the Chartered Institute of Arbitrators Rules.<sup>60</sup>

A 2012 survey of international arbitrators conducted by White & Case LLP<sup>61</sup> found that 60% of respondents had experience with the hot tubbing method in international arbitration proceedings in the last 5 years. Nearly two thirds of those respondents said, based on their experience, it should be done more often.<sup>62</sup>

In summary, the limited experience to date suggests to us that hot tubbing is generally seen as a positive development, and when applied appropriately, can potentially reduce litigation costs and improve outcomes.

While there are some practical complications, its use in Australia has been credited with changing the psychology of experts, thereby reducing the incidence of advocacy by experts.

The Australian Law Reform Commission summarized the experience with hot tubbing in the Australian Federal Court as follows:

*"It has been the [federal court] judges' experience that having both parties' experts present their views at the same time is very valuable. In contrast to the conventional approach, where an interval of up to several weeks may separate the experts' testimony, the panel approach enables the judge to compare and consider the competing opinions on a fair basis. In addition, the Court has found that experts themselves approve of the procedures and they welcome [them] as a better way of informing the Court. There is also symbolic and practical importance in removing the experts from their position in the camp of the party who called them."<sup>63</sup>*

And,

*"When used in appropriate cases, concurrent evidence seems likely to become a very useful method to achieve our goal of reaching the correct or preferable decision in the matters that come before us."<sup>64</sup>*

57 *Getting into the Hot Tub: How the United States Could Benefit from Australia's Concept of Hot Tubbing Expert Witnesses*, Elizabeth Reifert, University of Detroit Mercy Law Review, 2011.

58 For example, in Austria, Korea, Japan, and Hong Kong. Refer to the IBA Arbitration Country Guides (2012) at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64>

59 *The IBA Rules on the Taking of Evidence in International Arbitration*, International Bar Association, 2010, specifically Article 7, 3(f).

60 *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration*, Chartered Institute of Arbitrators, Article 7.

61 Consisting of in-house counsel, private practitioners, and arbitrators

62 *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, White & Case LLP, 2012.

63 *Managing Justice: A review of the federal civil justice system*, Report No. 89, the Australian Law Reform Commission, 1999.

64 *Concurrent Evidence in the Administrative Appeals Tribunal: The New South Wales Experience*, the Hon. Justice Garry Downes, 2004.

While hot tubbing is not a panacea, there is little doubt that it holds promise to be a valuable tool.

### Table for One—Jointly Appointed Experts

Another approach being tested in many jurisdictions is the use of a single (jointly appointed) expert. Recent amendments to the Federal Courts Rules in Canada, for example, now allow parties to “*jointly name an expert witness,*” provided all parties consent.<sup>65</sup>

Under this approach, a single expert is retained to opine on a given subject matter and that expert is instructed jointly by both parties, or by the court. The parties are encouraged to agree on a single set of instructions. However, where parties fail to agree on such instructions, separate instructions may be given by each party and the areas of disagreement are documented.<sup>66</sup> Alternatively, the court may step in to establish the parameters for the mandate.

In the UK, the Woolf Report suggested that “*single experts should be used wherever the case (or the issue) is concerned with a substantially established area of knowledge and where it is not necessary for the court directly to sample a range of opinions.*”<sup>67</sup>

Of particular note, the Woolf Report specifically identified valuation cases as being ideal candidates for this approach.<sup>68</sup>

The UK Civil Procedure Rules were amended on the heels of the Woolf Report. The rules now allow the court latitude to direct a single joint expert to give evidence on an issue. The parties are given the opportunity to choose the joint expert, but the court will appoint the joint expert if the parties are unable to agree.

The findings of the Woolf Report were largely confirmed in the Jackson Report which recommended that single experts be appointed whenever possible, and in particular in cases where experts are opining on comparatively less controversial quantum issues.<sup>69</sup>

Influenced by the Woolf Report reforms in the UK, the use of joint experts in Australia has become more common and is now permitted under the rules of civil procedure in some jurisdictions.<sup>70</sup> The Supreme Court of Queensland, for example, requires that expert evidence be given by a single expert whenever practical, provided that it does not compromise the interests of justice. Multiple experts are permitted only when allowed by the court, and only when necessary to ensure a fair trial.<sup>71</sup>

To date, there is no specific guidance given under the Federal Rules of Evidence in the United States for the use of joint experts, and there appears to be a general preference for the existing system of cross-examining party-appointed experts.

International arbitrations have, on occasion, employed tribunal appointed experts, but the use of opposing party experts is more common.

While the Federal Court Rules in Canada require consent from both parties to call an expert jointly, recent amendments to the BC Supreme Court Rules allow a judge to order that “*the expert evidence on any one or more issues be given by one jointly-instructed expert.*”<sup>72</sup>

65 Specifically, see Rule 52.1.

66 For example, as outlined at paragraph 17.7 of the UK Civil Justice Council Protocol for Instruction of Experts to Give Evidence in Civil Claims.

67 *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, Lord Woolf, 1995.

68 *The Changing Face of Expert Witnesses*, The Family Court of Australia, 2001.

69 *Review of Civil Litigation Costs: Final Report*, The Hon. Lord Justice Jackson, The Ministry of Justice, 2009.

70 For example, the Supreme Court of New South Wales, the Supreme Court of Queensland, and the Family Court of Australia.

71 Uniform Civil Procedure Rules of the Supreme Court of Queensland Ch 11 Part 5.

72 BC Supreme Court Civil Rules, 5-3 (1) (k).

*In the recent B.C. case of Four L. Industries v. Muskwa Valley Ventures Ltd., a jointly appointed expert valuator was ordered by the court despite “vigorous opposition” from one party. The judge said, “While in this case, the amount at issue is not yet resolved and will not be until an opinion has been obtained...the amount is likely modest. In such circumstances, proportionality suggests that an effort should be made to avoid duplication of the costs of obtaining an expert report which is the likely outcome if a joint report is not ordered [emphasis added].<sup>73</sup>”*

The use of a joint expert can reduce the total time and cost of litigation by eliminating the need for each party to retain his/her own expert. It is also said to mitigate a so-called “hired gun” mentality, termed “advocacy by experts” earlier in this paper. This, in turn, it is hypothesized, leads to improved settlement prospects and trial decisions<sup>74</sup>.

A study undertaken shortly after changes were made to the UK Civil Procedure Rules, where the practice is still relatively uncommon, concluded that “the change to a single joint expert appears to have worked well.” The study, conducted by the UK Department of Constitutional Affairs said, “It is likely that [the use of single joint experts] has contributed to a less adversarial culture, earlier settlement and may have cut costs.<sup>75</sup>”

Critics of the approach argue firstly that differing views on a particular subject matter are not always the result of bias. Conflicting expert evidence often reflects a genuine difference of professional opinion within the expert’s field.

Second, when a judge has ordered that evidence be given by a single expert, it can also be said to limit the evidence that parties are allowed to call.<sup>76</sup>

Third, cost savings are debatable. While the practice can reduce costs in relatively simple cases, some note that cost savings are not as apparent in more complicated litigation.

For example, in Australia, it is typical for each party to engage their own “shadow” expert to assist in preparing for cross-examination of the jointly appointed expert.

In North America, this shadow role is referred to as litigation consulting.

Thus, in some cases, the use of a single expert does not necessarily extinguish each party’s need to retain their own expert, and the joint retainer actually contributes an additional burden of cost to the proceedings. Anecdotal evidence from Australia is that the practice is falling somewhat out of favour with Australian courts. Most telling, perhaps, is that many jurisdictions in Australia have not followed the lead of the Supreme Court of Queensland in requiring that all evidence be given, by default, by a single expert.<sup>77</sup> It appears the practice has been reserved only for simple matters.

In the United Kingdom, the Woolf Report warns:

*“The appointment of a neutral expert would not necessarily deprive the parties of the right to cross examine, or even to call their own experts in addition to the neutral expert if that were justified by the scale of the case. Anyone who gives expert evidence must know that he or she is at risk of being subjected to adversarial procedures, including vigorous cross-examination. This is an essential safeguard to ensure the quality and reliability of evidence.<sup>78</sup>”*

<sup>73</sup> *Leer and Four L. Industries v. Muskwa Valley Ltd.*, 2011 BCSC 930.

<sup>74</sup> *The Changing Face of Expert Witnesses*, The Family Court of Australia, 2001.

<sup>75</sup> *Emerging Findings: An Early Evaluation of the Civil Justice Reforms*, UK Lord Chancellor’s Department, 2001.

<sup>76</sup> *IP25 - Expert Witnesses*, the New South Wales Law Reform Commission, 2004.

<sup>77</sup> *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last*, Doug Jones, Arbitration International, 2008.

<sup>78</sup> *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, Lord Woolf, 1995.

It is fair to say that the efficacy of this approach is still being debated, and the empirical results to date are inconclusive.

### Expert Conferences and Joint Expert Statements

So far, we have discussed two alternative approaches to expert evidence—concurrent evidence and jointly appointed experts. A third approach, viewed as a sort of hybrid of these alternatives, is expert conferences.

The objective of an expert conference is to foster discussion between the experts, and to narrow the focus of the trial to only the genuinely disputed issues, with a view to ultimately reducing the time and cost of the litigation.<sup>79</sup>

In Canada, recent amendments to the Federal Court Rules give the court discretion to order that expert witnesses “confer with one another in advance of the hearing of the proceeding in order to narrow the issues and identify the points on which their views differ.”<sup>80</sup>

What does that entail?

Experts meet in advance of trial to discuss their findings, exchange information, and identify areas of agreement and disagreement. If so instructed, experts will draft a joint statement, which is served to the court, to assist in better understanding the basis for the differences of opinion.

Anecdotally, expert conferences are often ordered by the court prior to, or in concert with, the pre-trial conference.

In the UK, the Woolf Report recommended that the UK courts, when reasonable to do so, require a pre-trial meeting of experts with a view to narrowing the issues at hand. The Woolf Report said, “There has been widespread support for my suggestion that experts’ meetings were a useful approach to narrowing the issues. In areas of litigation where experts’ meetings are already the usual practice, there is general agreement that they are helpful.”<sup>81</sup>

The Jackson report also encouraged the use of expert conferences whenever practical.

The UK Rules state “The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to—(a) identify and discuss the expert issues in the proceedings; and (b) where possible, reach an agreed opinion on those issues.”<sup>82</sup>

In Australia, influenced in part by reforms in the UK emanating from the Woolf Report, several Australian jurisdictions now encourage the use of expert conferences. In particular, Federal Court judges and Family Court judges have increasingly directed the parties’ experts to confer with one another prior to trial.<sup>83</sup>

Such efforts are to be undertaken in good faith. The Australian Federal Court Rules state:

“If experts retained by the parties meet at the direction of the Court, it would be improper for an expert to be given, or to accept, instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement about matters of expert opinion, they should specify their reasons for being unable to do so.”<sup>84</sup>

79 *The Changing Face of Expert Witnesses*, The Family Court of Australia, 2001.

80 The Federal Court Rules, 52.6 (1).

81 *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, Lord Woolf, 1995.

82 UK Civil Procedure Rules, Part 35.12 (1).

83 *Managing Justice: A review of the federal civil justice system*, Report No. 89, the Australian Law Reform Commission, 1999.

84 The Australia Federal Court Rules, Practice Note CM7, Section 3.

Lawyers in Australia have expressed some concern over relinquishing control of the proceedings in this fashion; however, there has generally been little apprehension from Australian courts and the practice is becoming more common. For example, in cases where parties do not consent to the use of a jointly appointed expert, the court may order that the party appointed experts meet in advance of trial with a view to narrowing the issues.

In the United States, the use of expert conferences is not common. There are no specific provisions for its use under the Federal Rules of Civil Procedure.

In international arbitration, both the IBA Rules and Chartered Institute of Arbitrators Rules (for example) provide for the use of expert conferences it appears (anecdotally) that the practice is gaining in popularity.<sup>85</sup>

The 2012 survey conducted by White & Case LLP reports that expert witnesses are “rarely” directed to confer in advance of the hearing in order to identify the issues on which they agree/disagree, however, over half of respondents said the procedure of directing expert witnesses to confer in advance of the hearing is useful. The study concludes that “these results illustrate a disconnect between the current and preferred practices, suggesting that arbitrators should direct expert witnesses to confer in advance of the hearing more often than is currently done.”<sup>86</sup>

## 6. Conclusions

Expert evidence has been a vital part of the adversarial litigation process. Few would dispute the need for this type of evidence, and many would say it is all the more important today, given the heightened complexities of daily life.

But it is also fair to say that expert evidence is seen by some, notably some members of the judiciary, as somewhat of a necessary evil, as it occupies the grey space between fact evidence and judicial interpretation.

Indeed, the increased codification of an expert’s duties has seemingly led to an increase in the rate at which courts are admonishing the conduct of experts (albeit our observation on this point is anecdotal).

By its nature, opinion evidence is subject to the fragilities of the human condition, and the potential for substandard expert evidence to lead to injustice is real (as the Smith affair in Canada clearly illustrates). Common law, codes of conduct and regulating bodies provide important guidance to experts and the “rules of engagement” concerning this special type of evidence will no doubt continue to evolve in the future.

Further to that point, we submit that it is in the best interest of stakeholders to familiarize themselves further with novel approaches to introduce and scrutinize expert evidence in litigation—hot tubbing, joint retainers and expert conferences/joint statements, in particular. Although these approaches do not yet have a long track record in Canada, they are generally seen as being positive developments to the litigation landscape and are becoming increasingly common practice in other jurisdictions.

Respectfully submitted,

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<sup>85</sup> *Experts and Expert Witnesses in International Arbitration: Advisor, Advocate, or Adjudicator*, Giovanni De Berti, 2011.

<sup>86</sup> 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, White & Case LLP, 2012.

## Appendix A—Study Methodology and Scope of Review

Formally, our study covers the federal courts of Canada, the United Kingdom (England and Wales), the United States, and Australia. On occasion, we have also commented on territorial jurisdictions within Canada and Australia, and various jurisdictions of international arbitration.

The findings of our study were based on our review of the following resources in each jurisdiction:

- a. The rules of civil procedure governing the use of expert evidence;
- b. Selected judicial studies, reviews, and discussion papers;
- c. Secondary legal sources including journals, essays, and articles;
- d. Selected academic research papers;
- e. Selected case law; and
- f. Interviews with experts and lawyers.

The following is a list of the important documents that we reviewed in the course of our research. For ease of reference, we have included hyperlinks for online access (where available).

### Canada

Rules Amending the Federal Courts Rules (Expert Witnesses), Federal Courts Act, August 4, 2010.  
[www.gazette.gc.ca/rp-pr/p2/2010/2010-08-18/html/sor-dors176-eng.html](http://www.gazette.gc.ca/rp-pr/p2/2010/2010-08-18/html/sor-dors176-eng.html)

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[www.fca-caf.gc.ca/bulletins/notices/ExpertWitness\\_Discussion\\_en.pdf](http://www.fca-caf.gc.ca/bulletins/notices/ExpertWitness_Discussion_en.pdf)

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Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts, Queen's Law Journal, David M. Paciocco, 2009.  
[litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=34+Queen%27s+L.J.+565&key=24926fb2cebc41c1af79ea9871708980](http://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=34+Queen%27s+L.J.+565&key=24926fb2cebc41c1af79ea9871708980)

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### Cases referenced:

*R. V. Mohan* [1994] 2 S.C.R. 9

*R. v. J.-L.J.*, [2000] 2 S.C.R. 600 (S.C.C)

*Alfano v. Piersanti*, 2099 CanLII 12799 (ON SC)

*Gould v. Western Coal Corporation* (2012 ONSC 5184)

*Dulong v. Merrill Lynch Canada Inc.* (2006), 80 O.R. (3d) 378 (Ont. S.C.J.)

*Apotex Inc. v. Astrazeneca Canada Inc.* 2012 Carswell Nat 1648 Federal Court, 2012

*Leer and Four L. Industries v. Muskwa Valley Ltd.*, 2011 BCSC 930

## United States

The United States Federal Rules of Civil Procedure, 2010.

[www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf)

The United States Federal Rules of Evidence, 2011.

[www.law.cornell.edu/rules/fre/](http://www.law.cornell.edu/rules/fre/)

Judge and Attorney Experiences, Practices and Concerns Regarding Expert Testimony in Federal Civil Trials, Federal Judicial Center, Carol Kafta et al., 2002.

[bulk.resource.org/courts.gov/fjc/judattex.pdf](http://bulk.resource.org/courts.gov/fjc/judattex.pdf)

Increasing Complexity and Partisanship in Business Damages Expert Testimony: The Need for a Modified Trial Regime in Quantification of Damages, John W. Hill et. al., University of Pennsylvania Journal of Business Law, 2009.

[www.law.upenn.edu/journals/jbl/articles/volume11/issue2/HillHoganKaramLangvardt11U.Pa.J.Bus.L.297%282009%29.pdf](http://www.law.upenn.edu/journals/jbl/articles/volume11/issue2/HillHoganKaramLangvardt11U.Pa.J.Bus.L.297%282009%29.pdf)

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*Finklestein v. Liberty Digital, Inc.*, C.A. No. 19598, 2005 Del. Ch. LEXIS 170

*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

*Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)

*General Electric Co. v. Joiner*, 522 US 136 (1997)

## United Kingdom

The United Kingdom Civil Procedure Rules (CPR) – Part 35.

[www.justice.gov.uk/courts/procedure-rules/civil/rules/part35](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35)

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## **Appendix B—Restrictions**

This paper provides a summary of certain developments in various jurisdictions and is not intended to be legal or other advice. This paper is provided for discussion purposes only and reliance on the contents for any other purpose is strictly prohibited. The authors of this paper, and Campbell Valuation Partners Limited, are not responsible for losses or other adverse consequences to any party arising from the contents of this paper.

## Appendix C-1

### Summary of Some Key Developments in Various Jurisdictions

Canada	
2008	The Federal Court Rules Committee on Expert Witnesses identifies potential concerns with respect to the use of expert witnesses in civil proceedings. A published paper highlights concerns over expert independence as well as the time and cost of civil litigation.
2010	The Federal Court Rules are amended to reflect a number of findings from the discussion paper undertaken by the Federal Rules Committee. These include a codified expert duty and provisions for the use of single experts, expert conferences, and concurrent evidence.
United Kingdom	
1996	Lord Woolf's report " <i>Access to Justice</i> " concludes that civil litigation is too costly and calls for reforms to the rules of civil procedure, including a number of changes concerning the use of expert evidence.
1998	New UK Civil Procedure Rules (CPR) are enacted for civil cases in England and Wales. The CPR are designed to improve access to justice and draw on the recommendations made by Lord Woolf. Several changes relate to the use of expert evidence, including a codified expert duty and provisions for the use of single experts and expert conferences. Limitations are also placed on the use of experts in fast track cases.
2009	Lord Jackson's report " <i>Review of Civil Litigation Costs</i> " concludes that the cost of litigation is becoming disproportionate to the issues at hand. Several recommendations are made concerning the use of expert evidence, including encouraging the use of single experts whenever practical and encouraging a pilot program for the use of a concurrent approach to expert examination.
Australia	
1995	A review conducted by the Australian Law Reform Commission is published and concludes that the federal civil justice system is becoming excessively adversarial and is having a damaging effect on the delivery of justice. Several recommendations are made concerning expert witnesses, principally, that a formal expert duty must be adopted.
1998	Influenced by the work of the Australian Law Reform Commission and the Woolf Report in the UK, the Federal Court Rules are amended to include guidelines for expert witnesses, a formal expert duty and provisions for the use of single experts, expert conferences, and concurrent evidence.

United States	
<b>1993</b>	Daubert v. Merrell Dow Pharmaceuticals first establishes the standard for admitting expert testimony in federal courts. This seminal case is followed by <i>General Electric Co. v. Joiner</i> (1997) and <i>Kumho Tire Co. v. Carmichael</i> (1999) (collectively, the “Daubert Trilogy”).
<b>2000</b>	Rule 702 of the Federal Rules of Evidence is amended in response to Daubert and to the many cases applying Daubert. The amendment provides general standards that the courts are to use to assess the reliability, helpfulness, and admissibility of expert testimony.

## Appendix C-2 The Expert's Duty

	Canada	United States	United Kingdom	Australia
Is the expert's duty formally defined under the federal rules of civil procedure?	<p><b>Yes.</b></p> <p>The expert's duty is defined under Section 52 of the Federal Courts Rules (Expert Witnesses). The expert duty is also formally defined under many provincial jurisdictions.</p>	<p><b>No.</b></p> <p>Rules governing the disclosure of expert testimony are outlined at Rule 26 (a) (2) of the Federal Rules of Civil Procedure; however, the expert's duty is <u>not</u> formally defined in the federal rules.</p>	<p><b>Yes.</b></p> <p>The expert's duty is defined in the UK Civil Procedure Rules (CPR) - Part 35. Further guidance is given under Practice Direction 35 - <i>Experts and Assessors</i>.</p>	<p><b>Yes.</b></p> <p>The expert's duty is defined in the Federal Court Rules at Rule 23. Further guidance is given under Practice Note 7 (CM7). The expert duty is similarly defined under many state jurisdictions.</p>
How is the expert's duty defined?	<p>The expert is bound by a code of conduct.</p> <p>The expert's duty is set out in the schedule to Rule 52.2 "Code of Conduct for Expert Witnesses":</p> <p>"An expert witness named to provide a report for use as evidence, or to testify in a proceeding, <u>has an overriding duty to assist the Court impartially on matters relevant to his or her areas of expertise.</u></p>	<p>Not applicable.</p>	<p>The expert is bound by a code of conduct.</p> <p>The expert's duty is set out at 35.3 of the UK Civil Procedure Rules: "<u>It is the duty of experts to help the court on matters within their expertise... This duty overrides any obligation to the person from whom the expert has received instructions or by whom they are paid.</u>" [Emphasis added]</p>	<p>Practice Note CM7, Paragraph 1.1 to 1.3 defines the duty of experts as follows: "An expert witness <u>has an overriding duty to assist the Court on matters relevant to the expert's area of expertise... An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential... An expert witness's paramount duty is to the Court and not to the person retaining the expert.</u>" [Emphasis added]</p>

	Canada	United States	United Kingdom	Australia
<p><b>Is the expert required to sign a certificate or acknowledge their understanding of any specific duty or obligation to the court?</b></p>	<p><u>This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.</u> [Emphasis added]</p> <p><b>Yes.</b> Section 52.2 of the Federal Court Rules now states that an affidavit or statement of an expert witness shall: "<i>be accompanied by a certificate in Form 52.2 signed by the expert acknowledging that the expert has read the Code of Conduct for Expert Witnesses set out in [The Federal Court Rules] and agrees to be bound by it.</i>"</p>	<p>Not applicable.</p>	<p><b>Yes.</b> CPR - Part 35 requires that experts specifically acknowledge their understanding of this duty in the body of their report. CPR Part 35 (10) (2) states: "At the end of an expert's report there must be a statement that the expert understands and has complied with their duty to the court."</p>	<p><b>Yes.</b> Rule 23.12 of the Federal Court Rules requires that counsel provide an expert with a copy of CM7. CM7, 2.1 (b) states that an expert report must: "Contain an acknowledgement at the beginning of the report that the expert has read, understood and complied with the Practice Note [CM7]."</p>

	Canada	United States	United Kingdom	Australia
<b>When were the rules governing the duty of experts last amended?</b>	<p>Rules amending the Federal Courts Rules (Expert Witnesses) were introduced in 2010.</p> <p>The amended rules were the result of a process undertaken by the Federal Court Rules Committee originating in 2008 with a discussion paper titled "Expert Witnesses in the Federal Courts."</p>	<p>Not applicable.</p>	<p>Rules governing the duty of experts are now outlined in CPR Part 35 and were enshrined through amendments made to the CPR in 1998.</p> <p>Changes to the CPR were influenced primarily by Lord Woolf's seminal "Access to Justice" report published in 1996 which examined, among other issues, the role of experts in civil proceedings.</p>	<p>CM7 was originally introduced in 1998, for the first time formally defining the duty of experts.</p> <p>The original draft of CM7 references Lord Woolf's "Access to Justice" report published in 1996 in the UK as well as the landmark British case <i>Ikarian Reefer</i>.</p>

## Appendix C-3 Summary of Statistics Reported by US Federal Judicial Centre Study (2002) [1]

### Frequency of Post-Daubert Problems With Expert Testimony in Civil Cases as Reported by Judges and Attorneys (1998,1999)

Experts abandon objectivity and become advocates for the side that hired them

Excessive expense of party-hired experts

Expert testimony appears to be of questionable validity

Conflict among experts that defies reasoned assessment

Disparity in level of competence of opposing experts

Expert testimony not comprehensible to the trier of fact

Expert testimony comprehensible but does not assist the trier of fact

Failure of parties to provide discoverable information concerning experts

Attorneys unable to adequately cross-examine experts

Indigent party unable to retain expert to testify

Delays in trial schedule caused by unavailability of experts

Experts poorly prepared to testify

	Mean Judges (average)		Mean Attorney (average)	
	Rating [2]	Rank	Rating [2]	Rank
	3.69	1	3.72	1
	3.05	2	3.4	2
	2.86	3	3.05	4
	2.76	4	3.13	3
	2.67	5	3.02	5
	2.49	6	2.66	6
	2.43	7.5	2.63	7
	2.43	7.5	2.62	8
	2.32	9	2.05	11
	2.1	10	2.13	10
	2.03	11	1.76	12
	1.98	12	2.29	9

[1] Source: Judge and Attorney Experiences, Practices and Concerns Regarding Expert Testimony in Federal Civil Trials, Federal Judicial Center, Carol Kafta et al., 2002.

[2]The average rating from respondents using a scale of 1 to 5 to denote the frequency with which they encountered a problem.

## Appendix C-4 The Formal Reporting Requirements of Experts

	Canada	United States	United Kingdom	Australia
Do the rules of civil procedure include specific requirements re: content and/or form of expert reports?	Yes. The Federal Court Rules (Form 52.2) outline the required content of an expert's report. Similar guidance is given in many provincial jurisdictions.	Yes. Rule 26 (a) (2) (B) of the Federal Rules of Civil Procedure outlines required disclosures for an expert's report.	Yes. Part 35 of the UK Civil Procedure Rules at 35.10 outlines the required content of an expert's report. Further direction is given at Practice Direction 35.	Yes. Part 23.02 of the Federal Court Rules outlines required content of an expert's report. Further direction is given at Practice Note CM7. Similar guidance is given in many state and family court jurisdictions.
<b>Content required in the expert's report:</b>				
The expert's qualifications and/or current CV	Yes.	Yes.	Yes.	Yes.
Disclosure of any persons who have carried out any examinations, measurements, or tests, their qualifications, and whether these procedures were performed under supervision of the expert	No.	No.	Yes.	No.
Acknowledgement of the expert's duty	Yes.	No.	Yes.	Yes.

	Canada	United States	United Kingdom	Australia
A list of recent cases in which the expert has testified	No.	Yes.	No.	No.
Disclosure of the compensation paid to the expert	No.	Yes.	No.	No.
Requirement that the report be addressed to the court and not to the parties who have retained the expert	No.	No.	Yes.	No.
Disclosure of specific instructions given to the expert or specific questions asked of the expert	No. [1]	No.	Yes.	Yes.
A specific report format	No.	No.	No. [2]	No.
Disclosure of the basis for all opinions and the facts relied upon in reaching conclusions	Yes.	Yes.	Yes.	Yes.

	Canada	United States	United Kingdom	Australia
A specific requirement to identify all areas where there is a range of opinions on the issue at hand	No.	No.	Yes.	No.
Experts poorly prepared to testify	Yes.	No.	Yes.	Yes.

[1] Source: Judge and Attorney Experiences, Practices and Concerns Regarding Expert Testimony in Federal Civil Trials, Federal Judicial Center, Carol Kafta et al., 2002.

[2] The average rating from respondents using a scale of 1 to 5 to denote the frequency with which they encountered a problem.

**Appendix C-5  
Alternative Approaches to the Use of Expert Evidence**

	Canada	United States	United Kingdom	Australia
<b>Concurrent evidence or "hot tubbing"</b>	<p>The use of concurrent evidence is allowed in the Federal Court Rules. Similar provisions exist in many provincial jurisdictions.</p> <p>282.1 <i>The Court may require that some or all of the expert witnesses testify as a panel after the completion of the testimony of the non-expert witnesses of each party or at any other time that the Court may determine.</i></p> <p>282.2 (1) <i>Expert witnesses shall give their views and may be directed to comment on the views of other panel members and to make concluding statements. With leave of the Court, they may pose questions to other panel members....</i></p>	<p>No specific provisions for the use of concurrent evidence exist under the Federal Rules of Evidence.</p>	<p>No specific provisions for the use of concurrent evidence exist under the UK Civil Procedure Rules. The practice was recommended in the Jackson Report and is now being piloted in several UK courts.</p>	<p>The use of concurrent evidence is allowed in Federal Court Rules Part 23. Similar provisions exist in many state jurisdictions.</p> <p>23.15 <i>If 2 or more parties to a proceeding intend to call experts to give opinion evidence about a similar question, any of those parties may apply to the Court for one or more of the following orders:</i></p> <p><i>... (g) that each expert be sworn at the same time and that the cross-examination and re-examination be conducted by putting to each expert in turn each question relevant to one subject or issue at a time, until the cross-examination or re-examination is completed;</i></p>

	Canada	United States	United Kingdom	Australia
	(2) On completion of the testimony of the panel, the panel members may be cross-examined and re-examined in the sequence directed by the Court.			(h) that each expert gives an opinion about the other expert's opinion; (i) that the experts be cross-examined and re-examined in any particular manner or sequence.
<b>Joint single experts</b>	From the Federal Court Rules: 52.1 (2) Two or more of the parties may jointly name an expert witness. Similar provisions exist in many provincial jurisdictions.	No specific provisions for its use exist under the Federal Rules of Evidence.	From the UK Civil Procedure Rules Part 35: 35.7 (1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert.	No specific provisions for the use of single experts exists under the Federal Court Rules; however, the practice is allowed in many state jurisdictions within Australia.
<b>Expert Conferences</b>	From the Federal Court Rules: 52.6 (1) The Court may order expert witnesses to confer with one another in advance of the hearing of the proceeding in order to narrow the issues and identify the points on which their views differ...	No specific provisions for its use exist under the Federal Rules of Evidence.	From the UK Civil Procedure Rules Part 35: 35.12 (1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to – (a) identify and discuss the expert issues in the proceedings; and	From the Federal Court Rules Part 23: 23.15 If 2 or more parties to a proceeding intend to call experts to give opinion evidence about a similar question, any of those parties may apply to the Court for one or more of the following orders:

Canada	United States	United Kingdom	Australia
<p>(4) A joint statement prepared by the expert witnesses following an expert conference is admissible at the hearing of the proceeding. Discussions in an expert conference and documents prepared for the purposes of a conference are confidential and shall not be disclosed to the Judge or Prothonotary presiding at the hearing of the proceeding unless the parties consent. Similar provisions exist in many provincial jurisdictions.</p>		<p>(b) where possible, reach an agreed opinion on those issues.</p>	<p>(a) that the experts confer, either before or after writing their expert reports; Similar provisions exist in many state jurisdictions.</p>
<p><b>Experts poorly prepared to testify</b>                      [1] Source: Judge and Attorney Experiences, Practices and Concerns Regarding Expert Testimony in Federal Civil Trials, Federal Judicial Center, Carol Kafta et al., 2002.                      [2] The average rating from respondents using a scale of 1 to 5 to denote the frequency with which they encountered a problem.</p>			