

## EXPERTS AND LAW REFORM RECOMMENDATIONS

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When disputes arise in construction projects, fire losses or other aspects of personal and business life, technical expertise is often required to assist not only in resolving the matter in question but potentially to provide opinions on any remediation required and the cause of any damage incurred. Experts may become involved at various stages to provide independent and objective opinion evidence to assist the dispute-resolution process or the court. Recent law reform recommendations, if implemented, will have an impact on the role of experts in relation to British Columbia's courts.

Usually a witness's opinion is not admissible as evidence with the exception being the opinion of an expert witness in a particular field provided for the purpose of assisting the court in understanding matters of a technical nature. Rule 40A of the *Supreme Court Rules* governs the use of expert witnesses in British Columbia. They must be properly qualified and have the appropriate experience to provide the opinions sought. The instructing lawyer should collaborate with the expert to ensure that there is an understanding of the issues involved and the questions that need to be answered. Experts will usually be asked to draft opinion reports based on questions posed in the context of assumed facts. These reports often cover three different topics which, generally speaking, are:

- the cause of the problem at issue (i.e. causation)
- the standard of care required in the circumstances
- the quantum of damages, remediation and so forth.

Experts may later be required to give evidence in court on their opinions.

The Civil Justice Reform Working Group (Group) has recommended changes in the role that expert witnesses play in litigation in British Columbia's courts. These proposals have been prompted by a need to:

- reduce the costs of litigation
- avoid experts from being polarized and advocating for the party they are associated with

- allow the courts to obtain objective, unbiased information and opinions.

The Group proposes that rules be established to ensure that experts understand and will certify that their duty is to the court and not to parties that provide instructions or payment for their services. It further recommends that judges, not counsel, determine which issues an expert witness will opine on. A judge would also decide how many experts a court needs to hear, if joint experts or a court appointed expert would be appropriate, and the deadlines the experts should meet. The Group suggests that a plaintiff and a defendant have one expert each for cases involving less than \$100,000, although a judge could change that allotment. This recommendation has, in fact, been incorporated into the Rule 68 pilot project, the expedited litigation rule for cases claiming less than \$100,000.

One of the Group's more important recommendations is that experts make early disclosure of information on which they intend to rely in their reports, including test results. This proposal would eliminate the requirement that experts disclose the entire contents of their files to all parties. The expert information would be limited to "facts" and "test results", although it is unclear what is encompassed by "facts" in this context. Intertwined in this proposed legal environment is the possibility that the court may require opposing experts to meet and confer on issues prior to the trial of the matter; to help opposing sides determine the areas of agreement and disagreement and thereby pinpoint the contentious issues.

The Group also believes that judges are underutilizing their ability to have independent experts appointed by the courts and recommends greater use of this existing court procedure. It does not go so far as to require that only one joint, court-appointed expert be utilized in litigation. Currently, the United Kingdom and Australia have implemented reforms involving court appointed, joint experts, but the Group felt it was too early to take this step in B.C.

Upon receiving input from the public on the Group's recommendations, the Justice Review Task Force recently released a set of draft rules for further public consultation. It remains to be seen what recommendations, if any, will ultimately find favour with the government in this ongoing process.