



The Lifecycle of An Expert

Presentation to the British Columbia Expropriation Association
October 23, 2009


Vanessa Desbiens, AACI, P.App.,
Cunningham & Rivard Appraisals (Vancouver) Ltd.

Emily Mak, Borden Ladner Gervais LLP







■ **Introductory Remarks**



The Phone Rings...


- Call from the client to an appraiser
- Call to a lawyer
- What steps in the negotiation have already been taken?
- What steps in the expropriation?
- Has the expropriating authority already provided a report?
- Has the owner obtained one?







The Driving Forces


- Purchase and sale?
- Section 3 agreement?
- Section 6 expropriation?


 BORDEN
LADNER
GERVAIS

 Cunningham
& Rivard

No Deal. Marshall Your Evidence


- A compensation claim is all about valuation of the claim, and it is the experts who are going to make or break your case
- Determine the evidence needed for your claim and the expert required for that evidence
- Keep in mind the "big picture" that the claim may proceed to a trial


 BORDEN
LADNER
GERVAIS

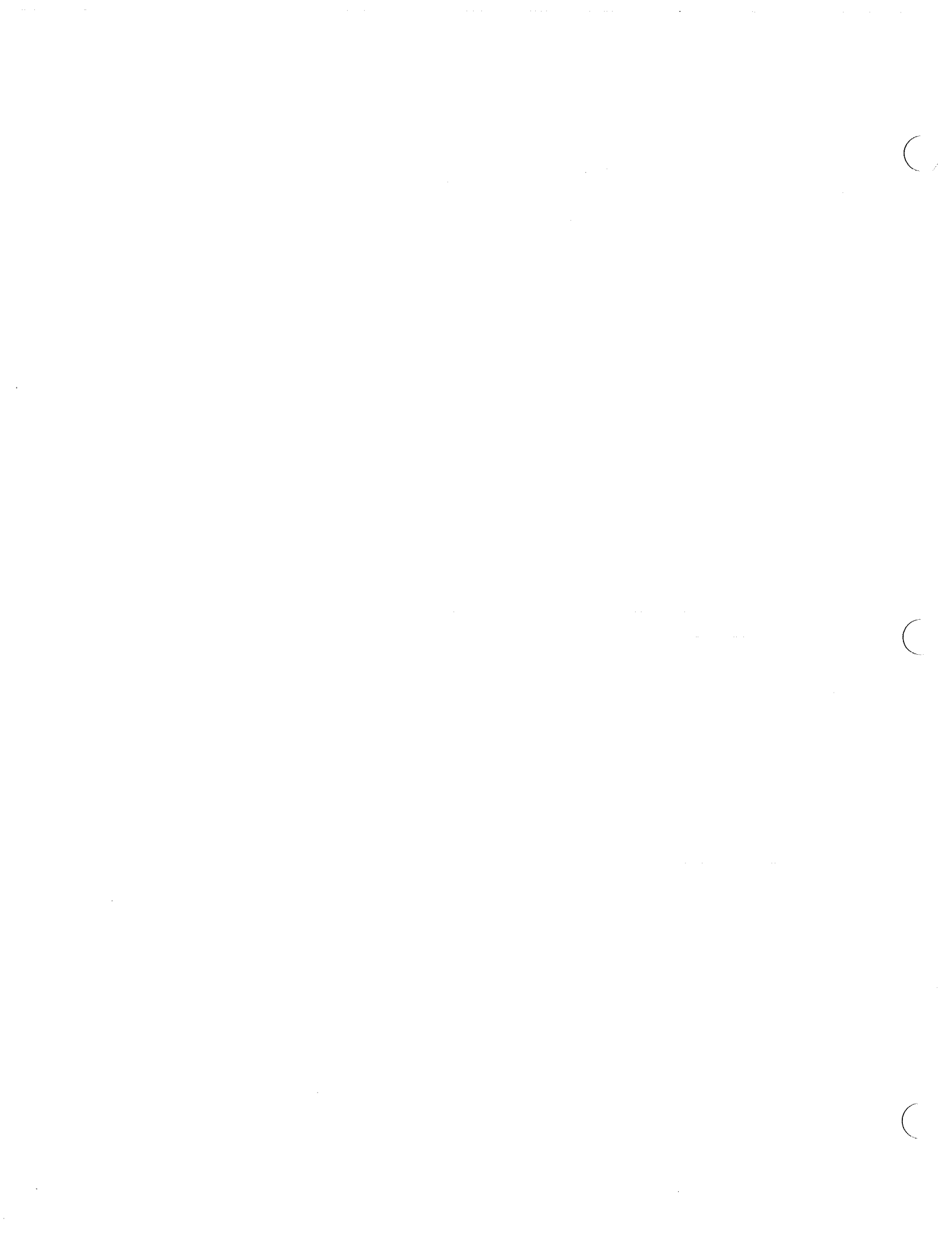
 Cunningham
& Rivard

Retaining an Expert

- **Considerations**
 - Professional qualifications
 - Reputation, credibility
 - Communication skills
 - Good witness
 - Prior trial experience
 - See *Expropriation Act* General Regulation definition of persons who may prepare appraisal reports

 BORDEN
LADNER
GERVAIS

 Cunningham
& Rivard



Determining the Role of the Expert

- Consultant?
- Trial expert?

BORDEN LADNER GERVAIS

Cunningham & Rivard

What Can an Appraiser Do For You?

- Consulting Report
 - Appraisal consulting
 - General consulting

BORDEN LADNER GERVAIS

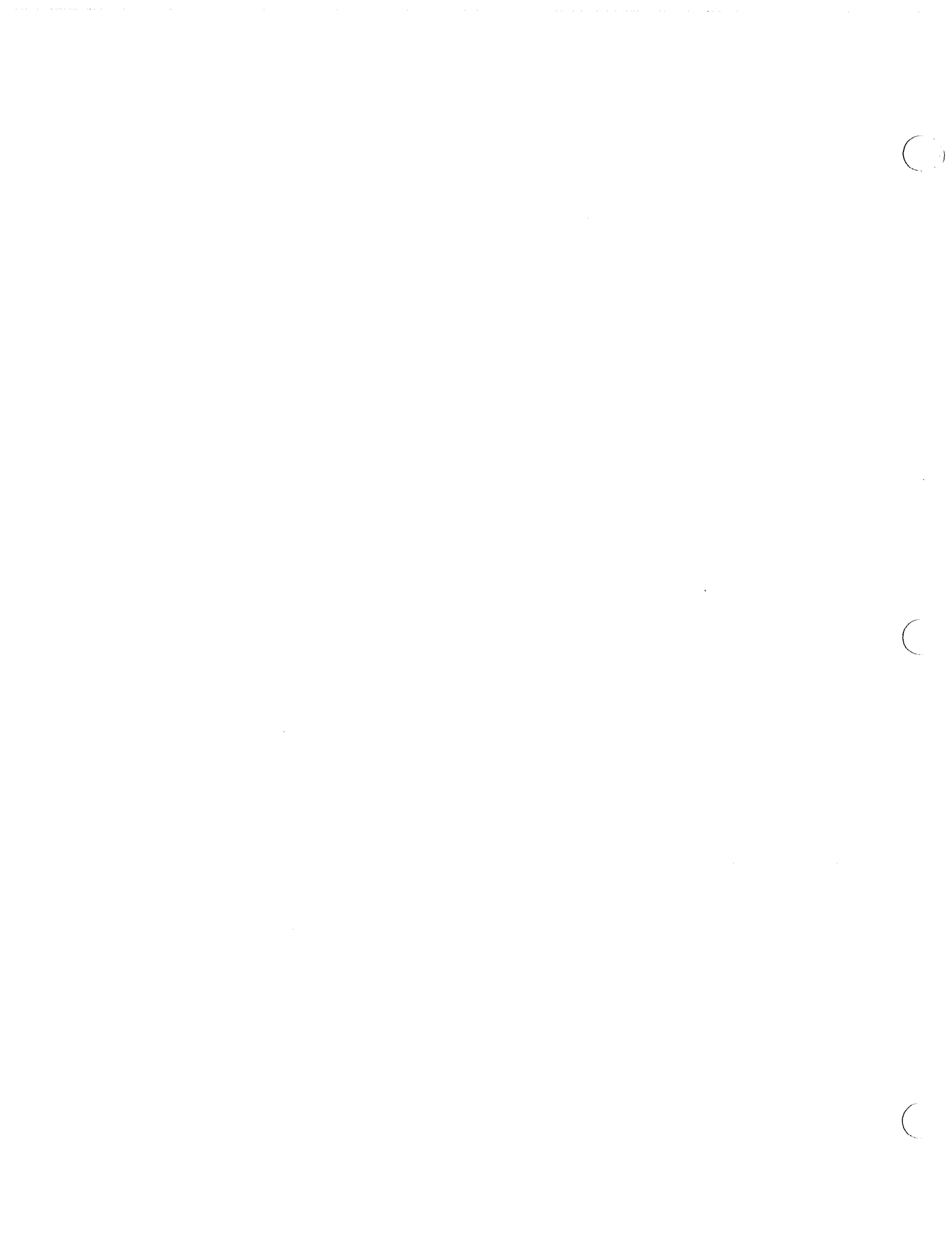
Cunningham & Rivard

What Can an Appraiser Do For You? (cont.)

- Technical Review
 - What is the object of the review?
 - Distinction between an appraisal review and a second opinion of value



BORDEN LADNER GERVAIS

Cunningham & Rivard





**What Can an Appraiser Do For You?
(cont.)**

- **Appraisal Report**
 - Why should you get an appraisal?
 - What information should be supplied to the appraiser?
 - What should you expect in the report?
 - Points requiring special attention


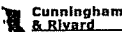
Instructing the Expert

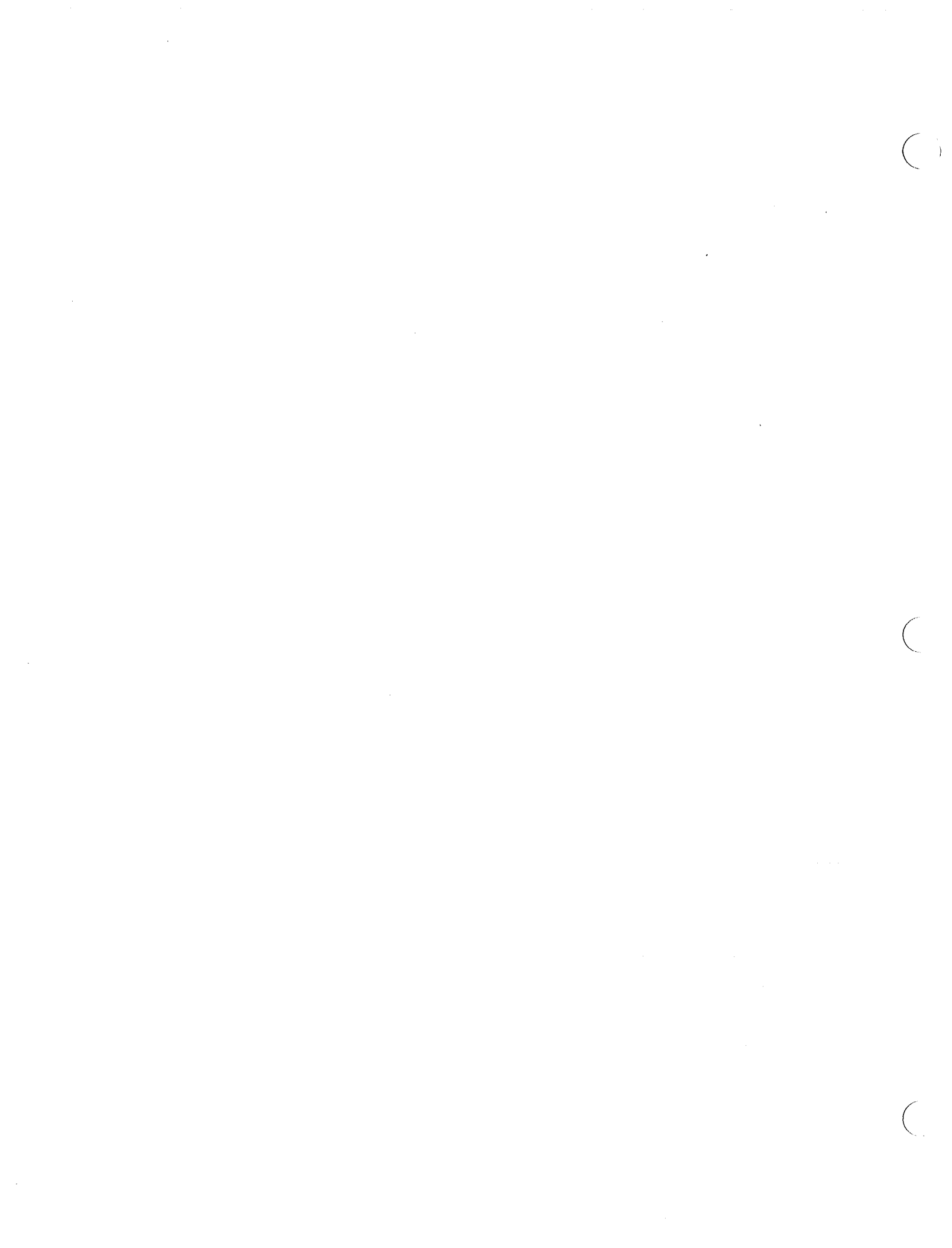
- The retainer letter
- Legal requirements of an expert's report
- Assumptions and facts; opinion(s) sought; source of facts, analysis and research conducted; opinion and conclusion

Being the Expert


- Don't let the lawyer put words in your mouth!
- Clear communication with the lawyer
- Organizing and maintaining files, documenting your work to support opinions
- Going beyond the scope of your expertise
- If parameters of the assignment change, scope of work and opinion sought could change


 



The Separation of Church and State


- The line between *clarification* of an expert's analysis and conclusions, and *directing* the expert
- The role of the expert: assist the court, not an advocate


 BORDEN
LADNER
GERVAIS

 Cunningham
& Rivard

Privilege Issues


- Making offers and admissions prior to the commencement of a claim
- Waiving privilege
- Disclosing reports


 BORDEN
LADNER
GERVAIS

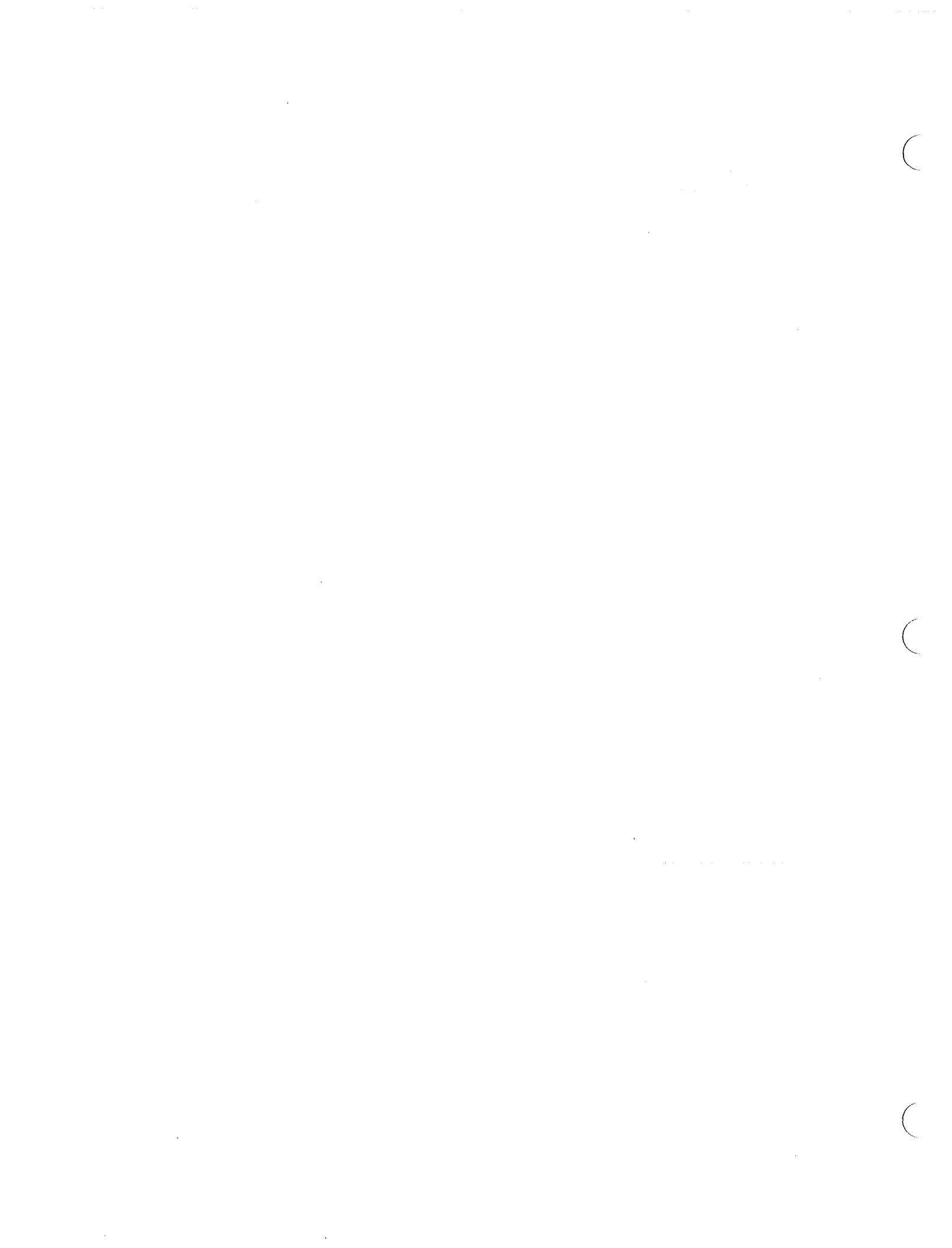
 Cunningham
& Rivard

We'll See You In Court



- Prepare the expert witness for trial
- Overview of the conduct of a trial
- Cross-examination is where the rubber hits the road (challenges to assumptions, source of facts; independence and impartiality; credibility, persuasiveness, communication skills)
- Tips on the expert's conduct as a witness

 BORDEN
LADNER
GERVAIS

 Cunningham
& Rivard





Trial is Over, Go for drinks!



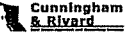

The New Rules of Court for Experts

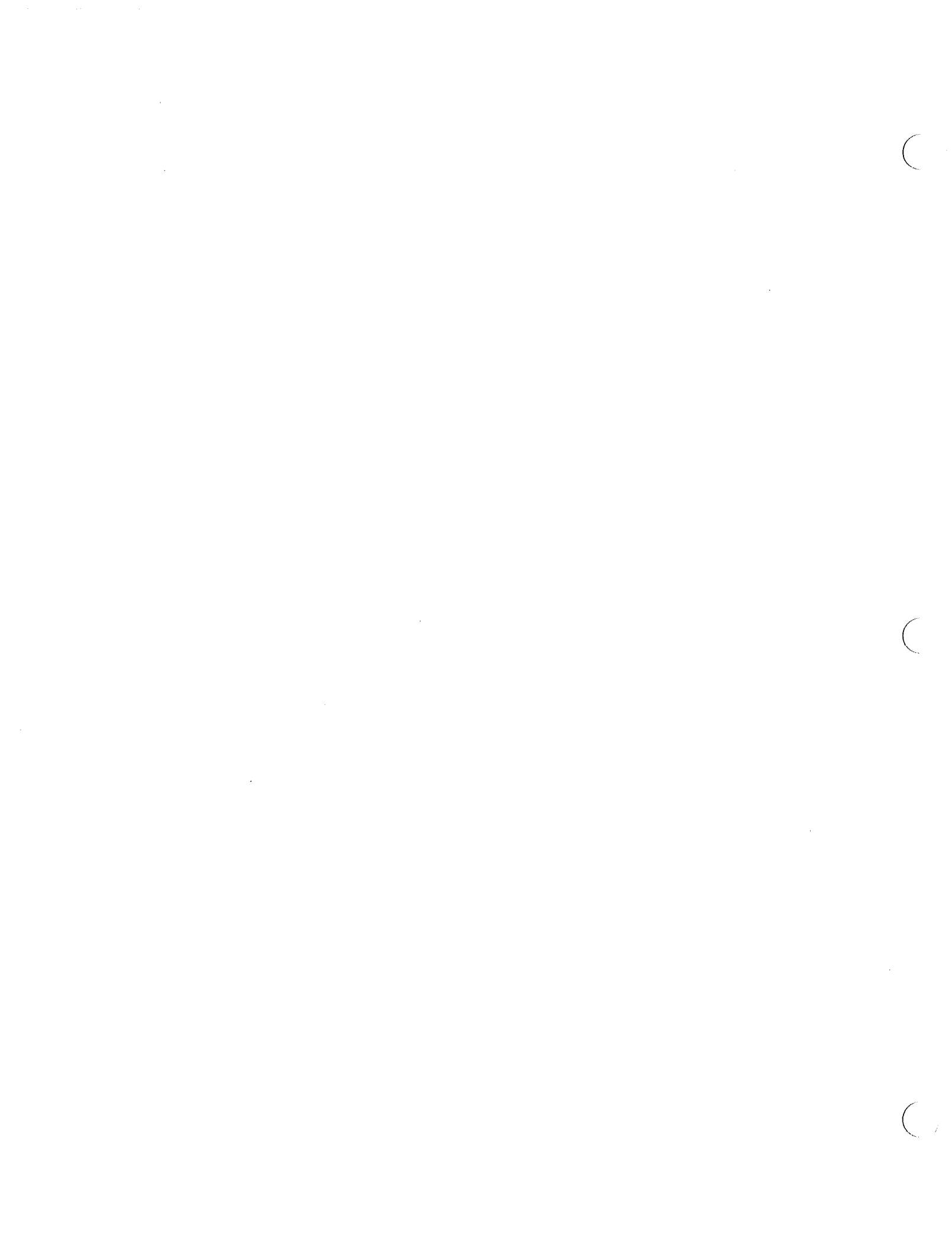
- When - July 1, 2010
- Why - Codifies the role and duties of an expert

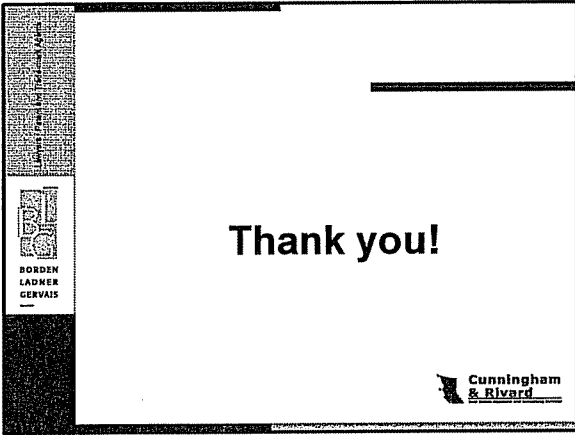


The New Rules of Court for Experts (cont.)

- What's new
 - process for the appointment of a joint expert
 - timing of delivery/exchange of expert reports
 - timing of disclosure of expert's work file
 - new requirements of an expert report: instructions provided, nature of opinion sought, the issue in the proceeding to which the opinion relates, and the expert's methodology
 - list of documents relied on must be listed









SUPREME COURT CIVIL RULES
Rule 11-1 – Application of Part 11

PART 11 – EXPERTS

RULE 11-1 – APPLICATION OF PART 11

Application of this Part

- (1) This Part does not apply to
 - (a) summary trials under Rule 9-7, except as provided in that rule, or
 - (b) a witness giving evidence in an action in relation to a matter if that witness is an individual whose conduct is in issue in the action in relation to that matter.

Case plan order

- (2) Unless the court otherwise orders, if a case planning conference has been held in an action, expert opinion evidence must not be tendered to the court at trial unless provided for in the case plan order applicable to the action.

RULE 11-3 – APPOINTMENT OF JOINT EXPERTS

Appointment agreement

- (1) If 2 or more parties who are adverse in interest wish to or are ordered under Rule 5-3 (1) (k) to jointly appoint an expert, the following must be settled before the expert is appointed:
 - (a) the identity of the expert;
 - (b) the issue in the action the expert opinion evidence may help to resolve;
 - (c) any facts or assumptions of fact agreed to by the parties;
 - (d) for each party, any assumptions of fact not included under paragraph (c) of this subrule that the party wishes the expert to consider;
 - (e) the questions to be considered by the expert;
 - (f) when the report must be prepared by the expert and given to the parties;
 - (g) responsibility for fees and expenses payable to the expert.

Appointment by parties

- (2) If the parties agree on the matters referred to in subrule (1), they and the expert must enter into an agreement under subrule (6).

Application to court

- (3) If the parties referred to in subrule (1) are unable to agree on the matters referred to in subrule (1), any party may apply, on an application under Part 8, at a case planning conference or at an application to amend the case plan order, to settle the terms of the expert's appointment.

Application materials

- (4) Each of the parties referred to in subrule (1) must submit to the court, on any application for an order referred to in subrule (3), material that
 - (a) identifies the matters referred to in subrule (1) (a) to (h) that are in dispute and states his or her position on those matters,
 - (b) if the parties are unable to agree on the identity of the expert, names one or more persons who
 - (i) are qualified to give expert opinion evidence on the issue, and
 - (ii) have been made aware of the content of this Part and consent to being appointed as expert, and
 - (c) states any connection known to the party between a person named under paragraph (b) and a party to the action.

Powers of court

- (5) On an application under subrule (3), the court may do one or more of the following:
 - (a) settle the terms of the appointment referred to in subrule (1) (a) to (h);

SUPREME COURT CIVIL RULES
Rule 11-4 – Appointment of Own Experts

RULE 11-4 – APPOINTMENT OF OWN EXPERTS

When each party may retain their own experts

- (1) Subject to Rule 11-1 (2), parties to an action may each appoint their own experts to tender expert opinion evidence to the court on an issue.

SUPREME COURT CIVIL RULES
Rule 11-5 – Appointment of Court's Own Expert

- (c) give the parties of record any directions the court considers appropriate to facilitate the expert's ability to provide the required opinion.

Contents of order appointing expert

- (8) The order appointing an expert under this rule must contain the directions referred to in subrule (7) and the court may make additional orders to enable the expert to carry out the directions applicable to him or her, including, on application by a party, an order under Rule 7-6 for
 - (a) an examination with respect to the physical or mental condition of a party, or
 - (b) inspection of property.

Remuneration of expert

- (9) The remuneration of an expert appointed under this rule
 - (a) must be fixed by the court and consented to by the expert, and
 - (b) may include
 - (i) a fee for the report, and any supplementary reports, required under Rule 11-6, and
 - (ii) an appropriate sum for each day that the expert's attendance in court is required.

Security for remuneration

- (10) The court may make one or both of the following orders without prejudice to any party's right to costs:
 - (a) an order directing that the expert's remuneration be paid by the persons and at the time ordered by the court;
 - (b) an order for security for the expert's remuneration.

Reports

- (11) An expert appointed under this rule must
 - (a) prepare a report that complies with Rule 11-6 and send it to the registry, with a copy to each party of record, within such time as the court directs, and
 - (b) if the expert's opinion changes in a material way after an expert's report is sent to the registry under paragraph (a), prepare a supplementary report that complies with Rule 11-6 and send it to the registry, with a copy to each party of record, within such time as the court directs.

Report must be tendered as evidence

- (12) Each report and supplementary report of an expert appointed by the court under this rule must be tendered as evidence at the trial of the action, unless the trial judge otherwise orders.

SUPREME COURT CIVIL RULES

Rule 11-6 – Expert Reports

Supplementary report of joint or court-appointed expert

- (5) If, after an expert's report is served under subrule (3) (b), the expert's opinion changes in a material way,
- (a) the expert must, as soon as practicable, prepare a supplementary report and ensure that that supplementary report is provided to the party who served the report under subrule (3), and
 - (b) the party to whom the supplementary report is provided under paragraph (a) of this subrule must promptly serve that supplementary report on every other party of record.

Supplementary report of own expert

- (6) If, after an expert's report is served under subrule (3) (a) or (4), the expert's opinion changes in a material way and the party who served the report intends to tender that expert's report at trial despite the change,
- (a) the expert must, as soon as practicable, prepare a supplementary report and ensure that that supplementary report is provided to the party, and
 - (b) the party must promptly serve that supplementary report on every other party of record.

Requirements for supplementary report

- (7) A supplementary report under Rule 11-5 (11) or under subrule (5) (a) or (6) (a) of this rule must
- (a) be identified as a supplementary report,
 - (b) be signed by the expert,
 - (c) include the certification required under Rule 11-2 (2), and
 - (d) set out the change in the expert's opinion and the reason for it.

Production of documents

- (8) Unless the court otherwise orders, if a report of a party's own expert appointed under Rule 11-3 (9) or 11-4 is served under this rule, the party who served the report must,
- (a) promptly after being asked to do so by a party of record, serve on the requesting party whichever one or more of the following has been requested:
 - (i) any written statement or statements of facts on which the expert's opinion is based;
 - (ii) a record of any independent observations made by the expert in relation to the report;
 - (iii) any data compiled by the expert in relation to the report;
 - (iv) the results of any test conducted by or for the expert, or of any inspection conducted by the expert, if the expert has relied on that test or inspection in forming his or her opinion, and

RULE 11-7 – EXPERT OPINION EVIDENCE AT TRIAL

Reports must be prepared and served in accordance with rules

- (1) Unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed by the court under Rule 11-5, must not be tendered at trial unless
 - (a) that evidence is included in a report of that expert that has been prepared and served in accordance with Rule 11-6, and
 - (b) any supplementary reports required under Rule 11-5 (11) or 11-6 (5) or (6) have been prepared and served in accordance with Rule 11-6 (5) to (7).

When report stands as evidence

- (2) Unless the court otherwise orders, the following apply to a report or supplementary report of an expert:
 - (a) if, within 21 days after service of the report or within such other period as the court may order, a demand is made under subrule (3) of this rule that the expert who made the report attend at trial for cross-examination, the report must not be tendered or accepted as evidence at the trial unless the appointing party calls the expert at trial to be cross-examined in compliance with the demand;
 - (b) if no such demand is made under subrule (3) within the demand period referred to in paragraph (a) of this subrule,
 - (i) the expert whose report has been served under this Part need not attend at trial to give oral testimony, and
 - (ii) the report, if admissible, may be tendered and accepted as evidence at the trial.

Cross-examination of expert

- (3) A party of record may demand that an expert whose report has been served on the parties of record under Rule 11-6 attend at the trial for cross-examination as follows:
 - (a) if the expert was jointly appointed under Rule 11-3 or was appointed by the court under Rule 11-5, any party of record may, within the demand period referred to in subrule (2) (a) of this rule, demand the attendance of the expert for cross-examination by that party or by any of the other parties of record;
 - (b) if the expert was appointed by a party under Rule 11-4 or by a party with leave of the court granted under Rule 11-3 (9), any party of record who is adverse in interest to the party who appointed that expert may, within the demand period referred to in subrule (2) (a) of this rule, demand the attendance of the expert for cross-examination.

Costs of cross-examination

- (4) If an expert has been required to attend at trial for cross-examination by a demand under subrule (3) and the court is of the opinion that the cross-examination was not of assistance, the court may order the party who demanded the attendance of the expert

SUPREME COURT CIVIL RULES
Rule 24-1 – Transitional Pleadings

PART 24 – TRANSITION

RULE 24-1 – TRANSITIONAL PLEADINGS

Definitions

- (1) In this Part:
- “address for delivery”, “appearance”, “requisition”, “statement of claim”, “statement of defence” and “writ of summons” have the same meanings as they had in the former Supreme Court Rules;
 - “transitional proceeding” means a proceeding that was started before July 1, 2010.

These rules apply to transitional proceedings

- (2) A transitional proceeding is deemed to be a proceeding started under these Supreme Court Civil Rules.

Pleadings deemed to be a notice of civil claim

- (3) If the person who started a transitional proceeding did so by filing a writ of summons or a writ of summons and statement of claim,
- (a) the person is deemed to be the plaintiff in the proceeding, and
 - (b) the writ of summons is, or the writ of summons and statement of claim collectively are, deemed to be the notice of civil claim in the proceeding.

Requisition deemed to be a notice of civil claim

- (4) If the person who started a transitional proceeding did so by filing a requisition,
- (a) the person is deemed to be the plaintiff in the proceeding, and
 - (b) the requisition is deemed to be the notice of civil claim in the proceeding.

Petition

- (5) If the person who started a transitional proceeding did so by filing a petition,
- (a) the person is deemed to be the petitioner in the proceeding, and
 - (b) the petition is deemed to be the petition in the proceeding.

Appearance and statement of defence deemed to be a response to civil claim

- (6) If a person filed, in a transitional proceeding referred to in subrule (3) or (4), an appearance with or without a statement of defence, statement of defence to counterclaim or statement of defence to third party notice, as the case may be,
- (a) the person is deemed to be a defendant, defendant by way of counterclaim or third party, as the case may be, in the proceeding, and
 - (b) the appearance is, or, if the person filed both an appearance and a statement of defence, statement of defence to counterclaim or statement of defence to third party notice, as the case may be, the filed documents collectively are,

SUPREME COURT CIVIL RULES
Rule 24-1 – Transitional Pleadings

Step in ongoing proceeding

- (14) If a step in a proceeding is taken before July 1, 2010, the former Supreme Court Rules apply to any right or obligation arising out of or relating to that step if and to the extent that that right or obligation is to have effect before September 1, 2010.

Trial management conference

- (15) If the trial of a transitional proceeding is scheduled to begin before October 1, 2010,
- (a) a trial management conference may be held in the transitional proceeding at any time, or
 - (b) if a trial management conference was not required to be held in relation to the transitional proceeding under the former Supreme Court Rules, the trial may proceed without a trial management conference.

Court may decide

- (16) If there is any dispute in relation to the procedure to be applied to or followed in a proceeding referred to in this rule, any party may seek directions.

Rule 40A — Evidence of Experts

[en. B.C. Reg. 55/93, s. 14, eff. Aug. 30, 1993]

Application

- (1) This rule does not apply to summary trials under Rule 18A, except as provided in that rule.

Admissibility of written statements of expert opinion

- (2) A written statement setting out the opinion of an expert is admissible at trial, without proof of the expert's signature, if a copy of the statement is furnished to every party of record at least 60 days before the statement is tendered in evidence.

Admissibility of oral testimony of expert opinion

- (3) An expert may give oral opinion evidence if a written statement of the opinion has been delivered to every party of record at least 60 days before the expert testifies.

Idem

- (4) The statement also may be tendered in evidence.

Form of statement

- (5) The statement shall set out or be accompanied by a supplementary statement setting out the following:
 - (a) the qualifications of the expert;
 - (b) the facts and assumptions on which the opinion is based;
 - (c) the name of the person primarily responsible for the content of the statement.

Proof of qualifications

- (6) The assertion of qualifications of an expert is prima facie proof of them.

Admissibility of evidence

- (7) If a statement that does not conform to subrule (5) has been delivered
 - (a) it is inadmissible under subrules (2) and (4), and

- (14) No objection under subrule (13) of which reasonable notice could have been given, but was not, shall be permitted at trial unless the court otherwise orders.

Dispensing with statement

- (15) At trial, the court may dispense with the requirement of delivery of a statement.

Idem

- (16) Without limiting the generality of subrule (15), the court may dispense with the requirement of delivery of a statement on one or more of the following grounds:

- (a) where facts have come to the knowledge of the party tendering the witness after the delivery of the statement of that witness's evidence, that could not, with due diligence, have been learned in time to be reduced to a further statement and delivered within the time required by this rule;
- (b) where the non-delivery is unlikely to cause prejudice
 - (i) by reason of an inability to prepare for cross-examination, or
 - (ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to present evidence in response;
- (c) where the interests of justice require it.

Time

- (17) Before or at trial, the court may extend or abridge the time limits set out in this rule.