



2008 FALL SEMINAR

BRITISH COLUMBIA EXPROPRIATION ASSOCIATION

PANEL DISCUSSION: EXPERT EVIDENCE IN EXPROPRIATION CASES

MR. JUSTICE ERIC RICE, Supreme Court of British Columbia

RICHARD CROSSON, Partner, Ernst & Young

ALAN HINCKS, Ministry of Attorney General

P.D. (DON) MACDONALD, Partner, Borden Ladner Gervais, Moderator

1.0 PURPOSE OF, CRITERIA FOR EXPERT EVIDENCE

- 1.1 The purpose of expert evidence is to provide evidence of some scientific, technical or specialized knowledge that is outside the sphere of expertise of the trier of fact.
- 1.2 In *R. v. Mohan*, [1994] 2 S.C.R. 9, para. 17; [1994] S.C.J. No. 36, Mr. Justice Sopinka stated that the admission of expert evidence depended upon the application of the following criteria:
 - (a) relevance;
 - (b) necessity in assisting the trier of facts;
 - (c) the absence of any exclusionary rule; and
 - (d) a properly qualified expert.
- 1.3 Rule 40A, Evidence of Experts, of the Rules of the Supreme Court of British Columbia, states, in subsection 5, that the statement of an expert shall set out:
 - (a) the qualification 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.

2.0 QUALIFICATIONS OF THE EXPERT

- 2.1 In addition to education and experience, what should an expert put in a report with respect to his or her qualifications?
- 2.2 Should the report include a *curriculum vitae*?
- 2.3 Should a *curriculum vitae* be custom cut to highlight those experiences and qualifications that demonstrate the witnesses expertise in the subject matter of a particular case?

2.4 With respect to qualifications, will the Courts likely permit real estate appraisers to testify outside of the scope of his or her qualifications?

2.5 What is the lawyer's job regarding the qualification of an expert? the expert's job? the court's?

3.0 PREPARING THE REPORT

3.1 In *Vancouver Community College v. Phillips Barratt* [1988] B.C.J. No. 710, Mr. Justice Finch (as he then was) stated:

"I in no way wish to condemn the practice of an expert's editing or rewriting of his own reports prepared for submission in evidence, or for that matter, prepared solely for the advice of counsel or litigants. Nor do I wish to condemn the practice of counsel consulting with his experts in the pre-trial process while "reports" are in the course of preparation. It is, however, of the utmost important in both the re-writing and consultation processes referred to that the expert's independence, objectivity and integrity not be compromised. I have no doubt that in many cases these ends are achieved, and counsel and experts alike respect the essential boundaries concerning the extent to which a lawyer may properly discuss the expert's work product as it develops towards its final form."

3.2 Should parties consider hiring a "consulting" expert whose advice they never intend to tender in Court?

3.3 Is there information that ought not to be given to an expert?

3.4 How should a lawyer request a report from an expert?

3.5 Should a lawyer give an expert a copy of the Statement of Claim and Statement of Defence?

3.6 Should a lawyer give an expert copies of Discovery transcripts?

3.7 How can a lawyer know, when first instructing an expert, what facts or assumptions the expert will require or rely on for his or her opinion.

3.8 Should all the facts on which an opinion is based be contained in one part of the report or is it permissible to sprinkle them throughout a report?

3.9 Should all the assumptions on which an opinion is based be contained in one part of the report heading or is it permissible to sprinkle them throughout a report?

3.10 Would it be a good idea to include either the lawyer's letter of instructions and/or the appraiser's letter of engagement as an appendix to an expert report?

- 3.11 Should the expert seek clarification from the lawyer of facts and assumptions when preparing the report?
- 3.12 What are the pros and cons of an expert and counsel communicating orally rather than by email, memo or letter?
- 3.13 What should an expert be told about notes, working materials and drafts?
- 3.14 Should experts destroy draft report reports as new ones are created?
- 3.15 Should lawyers destroy draft reports as revised ones are received?
- 3.16 What are the unique features, if any, of preparing valuation reports in expropriation proceedings?
- 3.17 What are the unique aspects, if any, of providing instructions to appraisers or business valuers in expropriation proceedings?

4.0 EXAMINATIONS IN CHIEF

- 4.1 In proceedings before the Expropriation Compensation Board, where evidence rules were somewhat relaxed, significant portions of the hearing could involve the evidence in chief of expert witnesses. This is not usually the case in the Supreme Court of B.C. In fact, in *Pedersen v. Degelder* (1985) 62 BCLR 253, 2 C.P.C. (2d) 205, the Court stated that viva voce evidence from an expert whose opinion has been set out in a written statement [or report] is redundant unless the evidence is required for the purpose of (1) explaining an apparent ambiguity in the statement or (2) technical terms in the statement that are not readily understandable. How will the Courts deal with the evidence in chief of expert witnesses in expropriation proceedings in the Supreme Court?
- 4.2 In proceedings before the Expropriation Compensation Board, experts would often give evidence with respect to matters which were not expressly dealt with in their written reports. How will the Courts deal with efforts to tender additional evidence in this fashion?
- 4.3 The record in proceedings before the Expropriation Compensation Board often contained hearsay evidence. What is hearsay evidence? How will the Courts deal with hearsay evidence in experts' reports in expropriation proceedings?
- 4.4 How will lawyers, experts and the Courts deal with references to market or economic studies that are referred to and relied upon in experts' reports?
- 4.5 It appears that Courts have sometimes treated appraisal evidence a bit differently than they have treated other kinds of evidence. For example, in foreclosure proceedings, one often was faced with an affidavit to which was appended an appraisal report which did not comply with Rule 40A of the Rules of Court regarding expert reports. Often, the response to such evidence, was to reply with an affidavit of a legal assistant to which was appended an appraisal report from the appraiser for the adverse party. How does one

properly get appraisal evidence before the Court? Will the Courts treat appraisal reports in the same manner that it does other expert reports?

- 4.6 Should expert reports contain a statement that they are prepared for the purposes of negotiation and should not be used for any other purpose? What is the effect of such a statement in a report which ends up as a expert report before a Court?
- 4.7 To what extent will the British Columbia Supreme Court consider decisions of the Expropriation Compensation Board?

5.0 CROSS EXAMINATIONS

- 5.1 How should a lawyer prepare an expert for cross-examination?
- 5.2 How should an expert prepare himself or herself for cross-examination?
- 5.3 What do you perceive to be a common mistake of expert witnesses while under cross-examination?
- 5.4 What do good experts do while under cross-examination?
- 5.5 What do poor experts do while under cross-examination?
- 5.6 What does the Court focus on during cross-examinations?
- 5.7 Should counsel spar with an expert if counsel believes the expert report is wrong?
- 5.8 Richard, as a chartered accountant and a certified business evaluator, what do lawyers do that bugs you most?
- 5.9 Alan, are there any particular difficulties you have encountered in instructing real estate appraisers?

6.0 ON BEING A WITNESS

- 6.1 Richard, tell us about your best and worst experiences as an expert witness.
- 6.2 Alan, thinking about your best witness (other than Richard), what made him or her so good?
- 6.3 Judge Rice, can you share with us your observations about the traits of good and bad witnesses?

7.0 COURT'S USE OF EXPERT REPORTS

- 7.1 In some cases, it appears the Expropriation Board "cherry picked" evidence from appraisal reports of both parties. Will Supreme Court Judges do the same?

8.0 SPECIAL JUDGES FOR EXPROPRIATION CASES?

- 8.1 There is a common perception that some judges are designated to hear cases in certain areas such as criminal law, family law and bankruptcy law. Is it likely the Supreme Court of British Columbia will develop a specialized bench to deal with expropriation claims?

9.0 PROPOSED NEW RULES OF COURT

- 9.1 What effect will the proposed new Rules of Court have on the preparation of expert reports? on expert testimony?

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
 - (b) the testimony of the witness under subrule (3) is inadmissible unless the court otherwise orders.

Notice of trial date to expert

- (8) A party who delivers a statement shall, on delivery or when a trial date has been obtained, whichever is later, inform the expert of the trial date and that the expert may be required to attend at trial for cross-examination.

Demand to cross-examine

- (9) A party to whom a statement has been delivered under subrule (2) and who is adverse in interest to the party delivering the statement may, by demand to that party, require the attendance of the expert at trial for cross-examination.

Idem

- (10) The expert need not attend at trial unless the demand is made within a reasonable time after delivery of the statement.

Idem

- (11) The convenience and other commitments of the expert shall be taken into account in determining whether the demand has been made within a reasonable time.

Costs of cross-examination

- (12) If an expert has been required to attend for cross-examination and the court is of the opinion that the cross examination was not of assistance, the court may order the party who required the attendance of the expert to pay, as costs, a sum the court considers appropriate.

Notice of objection to expert evidence

- (13) A party who receives a written statement under subrule (2) or (3) shall notify the party delivering the statement of any objection to the admissibility of the evidence that the party receiving the statement intends to raise at trial.

Idem

- (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.



CONCEPT DRAFT

PROPOSED NEW RULES OF CIVIL PROCEDURE

OF

THE BRITISH COLUMBIA SUPREME COURT

MAY 15, 2008

PART 8 – EXPERTS

RULE 8-1 –APPLICATION OF PART 8

Application of this Part

- (1) This Part does not apply to
 - (a) summary trials under Rule 9-8, except as provided in that rule, or [40A (1)]
 - (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, 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 8-2 –DUTY OF EXPERTS

Duty of expert

- (1) In giving an opinion to the court, an expert appointed under this Part has a duty to assist the court and is not to be an advocate for any party or any position of any party.

Advice and certification

- (2) If an expert is appointed under this Part, the expert must, in any report he or she prepares under this Part, certify that he or she
 - (a) is aware of the duty referred to in subrule (1),
 - (b) has made the report in conformity with that duty, and
 - (c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

RULE 8-3 –APPOINTMENT OF JOINT EXPERTS

Appointment agreement

- (1) Without limiting the power of the court to appoint a joint expert under Rule 4-5 (1) (j), if 2 or more parties who are adverse in interest wish to jointly appoint an expert, the appointing parties must enter into a written agreement under subrule (6) of this rule on the following matters:
 - (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) 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 to the agreement;
 - (g) which of the parties is to deliver the expert's report under Rule 8-6 (4) (a);
 - (h) liability for fees and expenses payable to the expert.

Appointment by parties

- (2) If the parties referred to in subrule (1) are able to agree on the matters referred to in subrule (1), the parties may jointly appoint the expert.

Application to court

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

Powers of court

- (4) On an application under subrule (3), the court may
 - (a) settle the terms of the appointment referred to in subrule (1) (a) to (h),
 - (b) if the parties are unable to agree on the identity of the expert, appoint an expert, whether or not that expert is named under subrule (5) (b), and
 - (c) make or amend a case plan order to reflect the orders made under paragraphs (a) and (b) of this subrule.

Application materials

- (5) Each of the parties referred to in subrule (1) must submit to the court, on any request or application for an order referred to in subrule (3), material that
 - (a) states his or her position on the matters referred to in subrule (1) (a) to (h) that are in dispute,

- (b) names one or more experts 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, and
- (c) states any connection known to the party between an expert named under paragraph (b) and a party to the action.

Agreement

- (6) The parties referred to in subrule (1) must enter into an agreement that reflects the terms agreed on under subrule (1) or ordered under subrule (4), and
 - (a) the agreement must be signed by each party to the agreement,
 - (b) the agreement must be signed by the expert to signify that he or she
 - (i) has been made aware of the content of this Part, and
 - (ii) consents to the appointment reflected in the agreement, and
 - (c) a copy of the agreement must be delivered, promptly after signing, to every other party of record who is not a party to the agreement.

Role of expert appointed under this rule

- (7) Unless the court otherwise orders, if an agreement is made under this rule for a joint expert to give expert opinion evidence on an issue, the joint expert is the only expert who, in relation to the parties to the agreement, may give expert opinion evidence in the action on the issue.

Cross examination

- (8) Each party of record to an action referred to in subrule (7), including each of the appointing parties, has the right to cross-examine a joint expert referred to in subrule (7).

Common experts

- (9) Nothing in this rule prevents parties who are not adverse in interest from appointing a common expert and, in that event, Rule 8-4 applies.

RULE 8-4 –APPOINTMENT OF OWN EXPERTS

When each party may retain their own experts

- (1) Subject to Rule 8-1 (2), parties to an action may each appoint their own experts to tender expert opinion evidence to the court on an issue.

Experts to confer

- (2) If 2 or more reports are delivered under Rule 8-6 in relation to the same issue, the experts who prepared those reports must confer and must, at least 35 days before the scheduled trial date, produce and sign a statement setting out the points of difference on that issue between or among them
 - (a) unless the court otherwise orders, or
 - (b) in the case of reports delivered by a medical practitioner or a registrant within the meaning of the *Health Professions Act*, unless the court otherwise orders or the parties otherwise agree.

Court may make directions in relation to statement

- (3) The court may provide directions to the experts referred to in subrule (2) respecting
 - (a) matters to be
 - (i) considered by them when conferring, and
 - (ii) referenced in the statement,
 - (b) the form of the statement, or
 - (c) any other matter the court considers will further the object of these Supreme Court Civil Rules.

Delivery of statement

- (4) Promptly after receipt of a statement produced by experts under subrule (2), the parties who appointed those experts must deliver a copy of the statement to all other parties of record.

Privilege

- (5) Except for the statement referred to in subrule (2), evidence of anything done or said or of any admission made at the conference referred to in that subrule is not admissible at a trial of the action unless the experts and all parties of record to the action agree.

RULE 8-5 –COURT APPOINTMENT OF EXPERTS

Appointment of experts by court

- (1) Subject to this rule, the court may, on its own initiative at any stage of an action, appoint an expert if it considers that expert opinion evidence may help the court in resolving an issue in the action. [32A (1)]

Materials required by court

- (2) In deciding whether to appoint an expert under this rule in relation to an issue in an action, the court may
 - (a) ask each party of record to name 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 an expert under this rule,
 - (b) require each party of record to state any connection between an expert named under paragraph (a) and a party to the action, and
 - (c) receive other material and make other inquiries to help decide which expert to appoint.

Court may name different expert

- (3) The court may, under subrule (1), appoint an expert whether or not that expert was named by a party to the action under subrule (2).

Expert must consent

- (4) The court may appoint an expert under this rule if the expert consents to the appointment after he or she has been made aware of the content of this Part.

Previous report not a bar

- (5) The court may appoint an expert under this rule in relation to an issue even if that expert has already given a report to a party to the action on the issue or on another issue in the action.

Consequences of court appointment

- (6) Unless the court otherwise orders, if an expert is appointed under this rule to give expert opinion evidence on an issue, each party of record to the action has the right to cross-examine the expert.

Directions to expert

- (7) The court, after consultation with the parties of record, must settle the questions to be submitted to any expert appointed by the court under this rule and may give directions to the expert and the parties to facilitate the expert's ability to provide the required opinion. [32A (3)]

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 for
- (a) inspection of property under Rule 6-6 (4), or
 - (b) the examination with respect to the physical or mental condition of a party under Rule 6-6 (1). [32A (4)]

Remuneration of expert

- (9) The remuneration of an expert appointed by the court must be fixed by the court and consented to by the expert, and may include a fee for the report and any supplementary reports required under Rule 8-6 and an appropriate sum for each day that the expert's attendance in court is required. [32A (5)]

Security for remuneration

- (10) The court may make one or both of the following orders, without prejudice to either party's right to costs:
- (a) directing that the expert's remuneration be paid by the persons and at the time ordered by the court;
 - (b) for security for the expert's remuneration. [32A (6)]

Report must be tendered as evidence

- (11) Each report and supplementary report of an expert appointed for the court under this rule must be tendered as evidence at the trial of the action, unless the trial judge otherwise orders. [32A (8)]

RULE 8-6 –EXPERT REPORTS

Definitions

- (1) In this rule:

“assertive report” means a report of an expert’s opinion if the report is tendered by a party in relation to a claim brought by the party;

“responsive report” means a report of an expert’s opinion if the report is tendered by a party in relation to a claim brought against the party.

Requirements for report

- (2) An expert’s report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 8-2 (2) and must set out the following
- (a) the expert’s qualifications;
 - (b) the facts and assumptions on which the report is based;
 - (c) the name of the person primarily responsible for the content of the report. [40A (5)]

Proof of qualifications

- (3) The assertion of qualifications of an expert is evidence of them. [40A (6)]

Delivery of report

- (4) Subject to subrule (5), the following applies to a report prepared by an expert under this rule:
- (a) if the expert is a joint expert appointed under Rule 8-3, the party referred to in the agreement under Rule 8-3 (1) (g) must deliver the report to the other parties of record on or before the delivery date set for that report in the case plan order applicable to the action;
 - (b) if the expert is a party’s own expert appointed under Rule 8-4, the party who appointed the expert must deliver the report to the other parties of record on or before the delivery date set for that report in the case plan order applicable to the action;
 - (c) if the expert is appointed for the court under Rule 8-5, the party referred to in the order of appointment, or, if no party is referred to in the order, the party who filed the notice of trial, must deliver the report to the other parties of record on or before the delivery date set for that report in the case plan order applicable to the action.]

Delivery date set in case plan order

- (5) Unless the court otherwise orders, a delivery date set in the case plan order applicable to the action must be not later than the following:

- (a) in the case of a report of a joint expert appointed under Rule 8-3 or an expert appointed for the court under Rule 8-5, 84 days before the scheduled trial date;
- (b) in the case of an assertive report of a party's own expert appointed under Rule 8-4, 84 days before the scheduled trial date;
- (c) in the case of a responsive report of a party's own expert appointed under Rule 8-4, 49 days before the scheduled trial date. [40A (2) and (3)]

Supplementary report

- (6) If, after the report of a joint expert appointed under Rule 8-3 or an expert appointed for the court under Rule 8-5 is delivered under this rule, 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 delivered to the party who delivered the report under subrule (4), and
 - (b) the party to whom the supplementary report is delivered under paragraph (a) must promptly deliver that supplementary report to the other parties of record.

Requirements for supplementary report

- (7) A supplementary report under subrule (6) must
 - (a) be identified as a supplementary report,
 - (b) be signed by the expert,
 - (c) include the certification required under Rule 8-2 (2), and
 - (d) set out the change in the expert's opinion and the reason for it.

Production of documents

- (8) Unless otherwise ordered, if a report of a party's own expert appointed under Rule 8-4 is delivered under subrule (4) of this rule, the party who delivers the report must,
 - (a) in the case of a request by any party of record for any of the following, promptly after receipt of that request deliver to the requesting party,
 - (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, and
 - (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
 - (b) in the case of a request by any party of record for the expert's file, make the contents of the expert's file available to the requesting party for review and copying,

RULE 8-7 – EXPERT OPINION EVIDENCE AT TRIAL

Reports required

- (1) Unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed for the court under Rule 8-5, must not be tendered at trial unless a report of that expert has been prepared and delivered in accordance with Rule 8-6. [40A (2) and (7)]

When report stands as evidence

- (2) Unless the court otherwise orders, the following apply to an admissible report or supplementary report of an expert:
 - (a) if a demand is made under subrule (4) of this rule that the expert who made the report or supplementary report attend at trial for cross examination, the report must not be tendered or accepted as evidence at the trial unless the expert is called by the appointing party to be cross-examined in compliance with the demand;
 - (b) if no demand is made under subrule (4) within 21 days, or such other period as the court may order, after delivery of the report,
 - (i) the expert whose report has been delivered under this Part need not attend at trial to give oral testimony, and
 - (ii) the report may be tendered and accepted as evidence at the trial. [40A (10)]

Statement to be provided

- (3) If a statement is produced by experts under Rule 8-4 (2), a report of one of those experts that is tendered as evidence under subrule (2) (b) of this rule must, when the report is tendered as evidence, be accompanied by the statement if that statement has not already been provided to the court.

Cross-examination of expert

- (4) A party of record may require that an expert whose report has been delivered to the parties of record under Rule 8-6 attend at the trial for cross-examination as follows:
 - (a) if the expert was jointly appointed under Rule 8-3 or appointed for the court under Rule 8-5, any party of record may require the attendance of the expert for cross-examination by that party or by any of the other parties of record; [32A (10)]
 - (b) if the expert was appointed by a party under Rule 8-4, any party of record who is adverse in interest to the party who appointed that expert may require the attendance of the expert for cross-examination. [40A (9)]

Costs of cross-examination

- (5) If an expert has been required to attend at trial for cross-examination under this rule and the court is of the opinion that the cross-examination was not of assistance, the court may order the party who required the attendance of the expert to pay, as costs, an amount the court considers appropriate. [40A (12)]

Restrictions on calling expert as witness at trial

- (6) Unless the court otherwise orders, if a party appoints an expert under Rule 8-4,
 - (a) the party must not call the expert to give oral evidence at trial unless
 - (i) the expert's attendance has been demanded under subrule (4) of this rule, or
 - (ii) the expert's report has been delivered in accordance with Rule 8-6 (4) and (5), the party believes direct examination of the expert is necessary to clarify terminology in the report or to otherwise make the report more understandable and any direct examination of that expert is limited to those matters, and
 - (b) the party must not cross-examine the expert at trial.

When court may dispense with requirement of Part

- (7) At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more of the requirements of this Part have not been complied with, if
 - (a) facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and delivered within the time required by this Part,
 - (b) the non-compliance 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, or
 - (c) the interests of justice require it. [40A (16)]

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MR. JUSTICE ERIC RICE, Supreme Court of British Columbia

RICHARD CROSSON, Partner, Ernst & Young

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 - (c) the name of the person primarily responsible for the content of the statement.

2.0 QUALIFICATIONS OF THE EXPERT

- 2.1 In addition to education and experience, what should an expert put in a report with respect to his or her qualifications?
- 2.2 Should the report include a *curriculum vitae*?
- 2.3 Should a *curriculum vitae* be custom cut to highlight those experiences and qualifications that demonstrate the witnesses expertise in the subject matter of a particular case?

2.4 With respect to qualifications, will the Courts likely permit real estate appraisers to testify outside of the scope of his or her qualifications?

2.5 What is the lawyer's job regarding the qualification of an expert? the expert's job? the court's?

3.0 PREPARING THE REPORT

3.1 In *Vancouver Community College v. Phillips Barratt* [1988] B.C.J. No. 710, Mr. Justice Finch (as he then was) stated:

"I in no way wish to condemn the practice of an expert's editing or rewriting of his own reports prepared for submission in evidence, or for that matter, prepared solely for the advice of counsel or litigants. Nor do I wish to condemn the practice of counsel consulting with his experts in the pre-trial process while "reports" are in the course of preparation. It is, however, of the utmost important in both the re-writing and consultation processes referred to that the expert's independence, objectivity and integrity not be compromised. I have no doubt that in many cases these ends are achieved, and counsel and experts alike respect the essential boundaries concerning the extent to which a lawyer may properly discuss the expert's work product as it develops towards its final form."

3.2 Should parties consider hiring a "consulting" expert whose advice they never intend to tender in Court?

3.3 Is there information that ought not to be given to an expert?

3.4 How should a lawyer request a report from an expert?

3.5 Should a lawyer give an expert a copy of the Statement of Claim and Statement of Defence?

3.6 Should a lawyer give an expert copies of Discovery transcripts?

3.7 How can a lawyer know, when first instructing an expert, what facts or assumptions the expert will require or rely on for his or her opinion.

3.8 Should all the facts on which an opinion is based be contained in one part of the report or is it permissible to sprinkle them throughout a report?

3.9 Should all the assumptions on which an opinion is based be contained in one part of the report heading or is it permissible to sprinkle them throughout a report?

3.10 Would it be a good idea to include either the lawyer's letter of instructions and/or the appraiser's letter of engagement as an appendix to an expert report?

3.11 Should the expert seek clarification from the lawyer of facts and assumptions when preparing the report?

AM 3.12 What are the pros and cons of an expert and counsel communicating orally rather than by email, memo or letter?

11 3.13 What should an expert be told about notes, working materials and drafts?

11 3.14 Should experts destroy draft report reports as new ones are created?

AM - won't 3.15 Should lawyers destroy draft reports as revised ones are received?

3.16 What are the unique features, if any, of preparing valuation reports in expropriation proceedings?

3.17 What are the unique aspects, if any, of providing instructions to appraisers or business valuers in expropriation proceedings?

4.0 EXAMINATIONS IN CHIEF

4.1 In proceedings before the Expropriation Compensation Board, where evidence rules were somewhat relaxed, significant portions of the hearing could involve the evidence in chief of expert witnesses. This is not usually the case in the Supreme Court of B.C. In fact, in *Pedersen v. Degelder* (1985) 62 BCLR 253, 2 C.P.C. (2d) 205, the Court stated that viva voce evidence from an expert whose opinion has been set out in a written statement [or report] is redundant unless the evidence is required for the purpose of (1) explaining an apparent ambiguity in the statement or (2) technical terms in the statement that are not readily understandable. How will the Courts deal with the evidence in chief of expert witnesses in expropriation proceedings in the Supreme Court?

4.2 In proceedings before the Expropriation Compensation Board, experts would often give evidence with respect to matters which were not expressly dealt with in their written reports. How will the Courts deal with efforts to tender additional evidence in this fashion?

4.3 The record in proceedings before the Expropriation Compensation Board often contained hearsay evidence. What is hearsay evidence? How will the Courts deal with hearsay evidence in experts' reports in expropriation proceedings?

4.4 How will lawyers, experts and the Courts deal with references to market or economic studies that are referred to and relied upon in experts' reports?

4.5 It appears that Courts have sometimes treated appraisal evidence a bit differently than they have treated other kinds of evidence. For example, in foreclosure proceedings, one often was faced with an affidavit to which was appended an appraisal report which did not comply with Rule 40A of the Rules of Court regarding expert reports. Often, the response to such evidence, was to reply with an affidavit of a legal assistant to which was appended an appraisal report from the appraiser for the adverse party. How does one

properly get appraisal evidence before the Court? Will the Courts treat appraisal reports in the same manner that it does other expert reports?

4.6 Should expert reports contain a statement that they are prepared for the purposes of negotiation and should not be used for any other purpose? What is the effect of such a statement in a report which ends up as a expert report before a Court?

4.7 To what extent will the British Columbia Supreme Court consider decisions of the Expropriation Compensation Board?

5.0 CROSS EXAMINATIONS

5.1 How should a lawyer prepare an expert for cross-examination?

5.2 How should an expert prepare himself or herself for cross-examination?

5.3 What do you perceive to be a common mistake of expert witnesses while under cross-examination?

5.4 What do good experts while under cross-examination?

5.5 What do poor experts do while under cross-examination?

5.6 What does the Court focus on during cross-examinations?

5.7 Should counsel spar with an expert if counsel believes the expert report is wrong?

5.8 Richard, as a chartered accountant and a certified business evaluator, what do lawyers do that bugs you most?

5.9 Alan, are there any particular difficulties you have encountered in instructing real estate appraisers?

6.0 ON BEING A WITNESS

6.1 Richard, tell us about your best and worst experiences as an expert witness.

6.2 Alan, thinking about your best witness (other than Richard), what made him or her so good?

6.3 Judge Rice, can you share with us your observations about the traits of good and bad witnesses?

7.0 COURT'S USE OF EXPERT REPORTS

7.1 In some cases, it appears the Expropriation Board "cherry picked" evidence from appraisal reports of both parties. Will Supreme Court Judges do the same?

8.0 SPECIAL JUDGES FOR EXPROPRIATION CASES?

- 8.1 There is a common perception that some judges are designated to hear cases in certain areas such as criminal law, family law and bankruptcy law. Is it likely the Supreme Court of British Columbia will develop a specialized bench to deal with expropriation claims?

9.0 PROPOSED NEW RULES OF COURT

- 9.1 What effect will the proposed new Rules of Court have on the preparation of expert reports? on expert testimony?

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
 - (b) the testimony of the witness under subrule (3) is inadmissible unless the court otherwise orders.

Notice of trial date to expert

- (8) A party who delivers a statement shall, on delivery or when a trial date has been obtained, whichever is later, inform the expert of the trial date and that the expert may be required to attend at trial for cross-examination.

Demand to cross-examine

- (9) A party to whom a statement has been delivered under subrule (2) and who is adverse in interest to the party delivering the statement may, by demand to that party, require the attendance of the expert at trial for cross-examination.

Idem

- (10) The expert need not attend at trial unless the demand is made within a reasonable time after delivery of the statement.

Idem

- (11) The convenience and other commitments of the expert shall be taken into account in determining whether the demand has been made within a reasonable time.

Costs of cross-examination

- (12) If an expert has been required to attend for cross-examination and the court is of the opinion that the cross examination was not of assistance, the court may order the party who required the attendance of the expert to pay, as costs, a sum the court considers appropriate.

Notice of objection to expert evidence

- (13) A party who receives a written statement under subrule (2) or (3) shall notify the party delivering the statement of any objection to the admissibility of the evidence that the party receiving the statement intends to raise at trial.

Idem

- (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.



CONCEPT DRAFT

PROPOSED NEW RULES OF CIVIL PROCEDURE

OF

THE BRITISH COLUMBIA SUPREME COURT

MAY 15, 2008

PART 8 – EXPERTS

RULE 8-1 –APPLICATION OF PART 8

Application of this Part

- (1) This Part does not apply to
 - (a) summary trials under Rule 9-8, except as provided in that rule, or [40A (1)]
 - (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, 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 8-2 –DUTY OF EXPERTS

Duty of expert

- (1) In giving an opinion to the court, an expert appointed under this Part has a duty to assist the court and is not to be an advocate for any party or any position of any party.

Advice and certification

- (2) If an expert is appointed under this Part, the expert must, in any report he or she prepares under this Part, certify that he or she
- (a) is aware of the duty referred to in subrule (1),
 - (b) has made the report in conformity with that duty, and
 - (c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

RULE 8-3 –APPOINTMENT OF JOINT EXPERTS

* Appointment agreement

- (1) Without limiting the power of the court to appoint a joint expert under Rule 4-5 (1) (j), if 2 or more parties who are adverse in interest wish to jointly appoint an expert, the appointing parties must enter into a written agreement under subrule (6) of this rule on the following matters:
 - (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) 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 to the agreement;
 - (g) which of the parties is to deliver the expert's report under Rule 8-6 (4) (a);
 - (h) liability for fees and expenses payable to the expert.

Appointment by parties

- (2) If the parties referred to in subrule (1) are able to agree on the matters referred to in subrule (1), the parties may jointly appoint the expert.

Application to court

- * (3) If the parties referred to in subrule (1) are unable to agree on the matters referred to in subrule (1), the parties may apply, at a case planning conference or at an application to amend the case plan order, to settle the terms of the appointment referred to in subrule (1) (a) to (h).

Powers of court

- (4) On an application under subrule (3), the court may
 - (a) settle the terms of the appointment referred to in subrule (1) (a) to (h),
 - * (b) if the parties are unable to agree on the identity of the expert, appoint an expert, whether or not that expert is named under subrule (5) (b), and
 - (c) make or amend a case plan order to reflect the orders made under paragraphs (a) and (b) of this subrule.

Application materials

- (5) Each of the parties referred to in subrule (1) must submit to the court, on any request or application for an order referred to in subrule (3), material that
 - (a) states his or her position on the matters referred to in subrule (1) (a) to (h) that are in dispute,

- (b) names one or more experts 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, and
- * (c) states any connection known to the party between an expert named under paragraph (b) and a party to the action.

Agreement

- (6) The parties referred to in subrule (1) must enter into an agreement that reflects the terms agreed on under subrule (1) or ordered under subrule (4), and
 - * (a) the agreement must be signed by each party to the agreement,
 - (b) the agreement must be signed by the expert to signify that he or she
 - (i) has been made aware of the content of this Part, and
 - (ii) consents to the appointment reflected in the agreement, and
 - (c) a copy of the agreement must be delivered, promptly after signing, to every other party of record who is not a party to the agreement.

Role of expert appointed under this rule

- * (7) Unless the court otherwise orders, if an agreement is made under this rule for a joint expert to give expert opinion evidence on an issue, the joint expert is the only expert who, in relation to the parties to the agreement, may give expert opinion evidence in the action on the issue.

Cross examination

- (8) Each party of record to an action referred to in subrule (7), including each of the appointing parties, has the right to cross-examine a joint expert referred to in subrule (7).

Common experts

- (9) Nothing in this rule prevents parties who are not adverse in interest from appointing a common expert and, in that event, Rule 8-4 applies.

RULE 8-4 - APPOINTMENT OF OWN EXPERTS

When each party may retain their own experts

*

- (1) Subject to Rule 8-1 (2), parties to an action may each appoint their own experts to tender expert opinion evidence to the court on an issue.

Experts to confer

- (2) If 2 or more reports are delivered under Rule 8-6 in relation to the same issue, the experts who prepared those reports must confer and must, at least 35 days before the scheduled trial date, produce and sign a statement setting out the points of difference on that issue between or among them

conference

- (a) unless the court otherwise orders, or
(b) in the case of reports delivered by a medical practitioner or a registrant within the meaning of the *Health Professions Act*, unless the court otherwise orders or the parties otherwise agree.

Court may make directions in relation to statement

- (3) The court may provide directions to the experts referred to in subrule (2) respecting
- (a) matters to be
- (i) considered by them when conferring, and
- (ii) referenced in the statement,
- (b) the form of the statement, or
- (c) any other matter the court considers will further the object of these Supreme Court Civil Rules.

Delivery of statement

- (4) Promptly after receipt of a statement produced by experts under subrule (2), the parties who appointed those experts must deliver a copy of the statement to all other parties of record.

Privilege

*

- (5) Except for the statement referred to in subrule (2), evidence of anything done or said or of any admission made at the conference referred to in that subrule is not admissible at a trial of the action unless the experts and all parties of record to the action agree.

RULE 8-5 – COURT APPOINTMENT OF EXPERTS

Appointment of experts by court

- (1) Subject to this rule, the court may, on its own initiative at any stage of an action, appoint an expert if it considers that expert opinion evidence may help the court in resolving an issue in the action. [32A (1)]

Materials required by court

- (2) In deciding whether to appoint an expert under this rule in relation to an issue in an action, the court may
- (a) ask each party of record to name 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 an expert under this rule,
 - (b) require each party of record to state any connection between an expert named under paragraph (a) and a party to the action, and
 - (c) receive other material and make other inquiries to help decide which expert to appoint.

Court may name different expert

- (3) The court may, under subrule (1), appoint an expert whether or not that expert was named by a party to the action under subrule (2).

Expert must consent

- (4) The court may appoint an expert under this rule if the expert consents to the appointment after he or she has been made aware of the content of this Part.

Previous report not a bar

- (5) The court may appoint an expert under this rule in relation to an issue even if that expert has already given a report to a party to the action on the issue or on another issue in the action.

Consequences of court appointment

- (6) Unless the court otherwise orders, if an expert is appointed under this rule to give expert opinion evidence on an issue, each party of record to the action has the right to cross-examine the expert.

Directions to expert

- (7) The court, after consultation with the parties of record, must settle the questions to be submitted to any expert appointed by the court under this rule and may give directions to the expert and the parties to facilitate the expert's ability to provide the required opinion. [32A (3)]

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 for
- (a) inspection of property under Rule 6-6 (4), or
 - (b) the examination with respect to the physical or mental condition of a party under Rule 6-6 (1). [32A (4)]

Remuneration of expert

- (9) The remuneration of an expert appointed by the court must be fixed by the court and consented to by the expert, and may include a fee for the report and any supplementary reports required under Rule 8-6 and an appropriate sum for each day that the expert's attendance in court is required. [32A (5)]

Security for remuneration

- (10) The court may make one or both of the following orders, without prejudice to either party's right to costs:
- (a) directing that the expert's remuneration be paid by the persons and at the time ordered by the court;
 - (b) for security for the expert's remuneration. [32A (6)]

Report must be tendered as evidence

- (11) Each report and supplementary report of an expert appointed for the court under this rule must be tendered as evidence at the trial of the action, unless the trial judge otherwise orders. [32A (8)]

RULE 8-6 –EXPERT REPORTS

Definitions

(1) In this rule:

“**assertive report**” means a report of an expert’s opinion if the report is tendered by a party in relation to a claim brought by the party;

“**responsive report**” means a report of an expert’s opinion if the report is tendered by a party in relation to a claim brought against the party.

Requirements for report

(2) An expert’s report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 8-2 (2) and must set out the following

- (a) the expert’s qualifications;
- (b) the facts and assumptions on which the report is based;
- (c) the name of the person primarily responsible for the content of the report.[40A (5)]

Proof of qualifications

(3) The assertion of qualifications of an expert is evidence of them. [40A (6)]

Delivery of report

(4) Subject to subrule (5), the following applies to a report prepared by an expert under this rule:

- (a) if the expert is a joint expert appointed under Rule 8-3, the party referred to in the agreement under Rule 8-3 (1) (g) must deliver the report to the other parties of record on or before the delivery date set for that report in the case plan order applicable to the action;
- (b) if the expert is a party’s own expert appointed under Rule 8-4, the party who appointed the expert must deliver the report to the other parties of record on or before the delivery date set for that report in the case plan order applicable to the action;
- (c) if the expert is appointed for the court under Rule 8-5, the party referred to in the order of appointment, or, if no party is referred to in the order, the party who filed the notice of trial, must deliver the report to the other parties of record on or before the delivery date set for that report in the case plan order applicable to the action.]

Delivery date set in case plan order

(5) Unless the court otherwise orders, a delivery date set in the case plan order applicable to the action must be not later than the following:

- * (a) in the case of a report of a joint expert appointed under Rule 8-3 or an expert appointed for the court under Rule 8-5, 84 days before the scheduled trial date; 84 days
- (b) in the case of an assertive report of a party's own expert appointed under Rule 8-4, 84 days before the scheduled trial date; 84
- (c) in the case of a responsive report of a party's own expert appointed under Rule 8-4, 49 days before the scheduled trial date. [40A (2) and (3)] 49

Supplementary report

- (6) If, after the report of a joint expert appointed under Rule 8-3 or an expert appointed for the court under Rule 8-5 is delivered under this rule, 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 delivered to the party who delivered the report under subrule (4), and
 - (b) the party to whom the supplementary report is delivered under paragraph (a) must promptly deliver that supplementary report to the other parties of record.

Requirements for supplementary report

- (7) A supplementary report under subrule (6) must
- (a) be identified as a supplementary report,
 - (b) be signed by the expert,
 - (c) include the certification required under Rule 8-2 (2), and
 - (d) set out the change in the expert's opinion and the reason for it.

Production of documents

- * (8) Unless otherwise ordered, if a report of a party's own expert appointed under Rule 8-4 is delivered under subrule (4) of this rule, the party who delivers the report must,
- (a) in the case of a request by any party of record for any of the following, promptly after receipt of that request deliver to the requesting party,
 - * (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, and
 - * (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
 - * (b) in the case of a request by any party of record for the expert's file, make the contents of the expert's file available to the requesting party for review and copying,

- (i) if the request is made within 14 days before the date set for trial, promptly after receipt of that request, or
- (ii) in any other case, at least 14 days before the date set for trial.

Notice of trial date to expert

- (9) The person who is required to deliver the report or supplementary report of an expert under this rule must, on delivery or when a trial date has been obtained, whichever is later, inform the expert of the scheduled trial date and that the expert may be required to attend at trial for cross-examination. [40A (8)]

Notice of objection to expert opinion evidence

- * (10) A party who receives an expert report or supplementary report under this Part must deliver to all other parties of record notice of any objection to the admissibility of the evidence that the party receiving the report or supplementary report intends to raise at trial. [40A (13)]

When objection not permitted

- (11) Unless the court otherwise orders, if reasonable notice of an objection could have been given under subrule (10), the objection must not be permitted at trial if that notice was not given. [40A (14)]

RULE 8-7 – EXPERT OPINION EVIDENCE AT TRIAL

Reports required

- (1) Unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed for the court under Rule 8-5, must not be tendered at trial unless a report of that expert has been prepared and delivered in accordance with Rule 8-6. [40A (2) and (7)]

When report stands as evidence

- (2) Unless the court otherwise orders, the following apply to an admissible report or supplementary report of an expert:
 - (a) if a demand is made under subrule (4) of this rule that the expert who made the report or supplementary report attend at trial for cross examination, the report must not be tendered or accepted as evidence at the trial unless the expert is called by the appointing party to be cross-examined in compliance with the demand;
 - (b) if no demand is made under subrule (4) within 21 days, or such other period as the court may order, after delivery of the report,
 - (i) the expert whose report has been delivered under this Part need not attend at trial to give oral testimony, and
 - (ii) the report may be tendered and accepted as evidence at the trial. [40A (10)]

Statement to be provided

- (3) If a statement is produced by experts under Rule 8-4 (2), a report of one of those experts that is tendered as evidence under subrule (2) (b) of this rule must, when the report is tendered as evidence, be accompanied by the statement if that statement has not already been provided to the court.

Cross-examination of expert

- (4) A party of record may require that an expert whose report has been delivered to the parties of record under Rule 8-6 attend at the trial for cross-examination as follows:
 - (a) if the expert was jointly appointed under Rule 8-3 or appointed for the court under Rule 8-5, any party of record may require the attendance of the expert for cross-examination by that party or by any of the other parties of record; [32A (10)]
 - (b) if the expert was appointed by a party under Rule 8-4, any party of record who is adverse in interest to the party who appointed that expert may require the attendance of the expert for cross-examination. [40A (9)]

Costs of cross-examination

- (5) If an expert has been required to attend at trial for cross-examination under this rule and the court is of the opinion that the cross-examination was not of assistance, the court may order the party who required the attendance of the expert to pay, as costs, an amount the court considers appropriate. [40A (12)]

Restrictions on calling expert as witness at trial

- (6) Unless the court otherwise orders, if a party appoints an expert under Rule 8-4,
- (a) the party must not call the expert to give oral evidence at trial unless
 - (i) the expert's attendance has been demanded under subrule (4) of this rule, or
 - (ii) the expert's report has been delivered in accordance with Rule 8-6 (4) and (5), the party believes direct examination of the expert is necessary to clarify terminology in the report or to otherwise make the report more understandable and any direct examination of that expert is limited to those matters, and
 - (b) the party must not cross-examine the expert at trial.

When court may dispense with requirement of Part

- (7) At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more of the requirements of this Part have not been complied with, if
- (a) facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and delivered within the time required by this Part,
 - (b) the non-compliance 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, or
 - (c) the interests of justice require it. [40A (16)]