

Evolving court rules on expert evidence

Appraisers providing expert evidence in several Canadian courts – including the Ontario Superior Court, the Nova Scotia Supreme Court and (as of July 1, 2010) the BC Supreme Court – face changes in the court rules which govern expert witnesses' reports and roles. The changes to these trial courts' rules include (1) new requirements for expert witnesses to state in their reports that their evidence is given objectively or in accordance with a duty to assist the court (the wording varies by province), with this prevailing over obligations to the party by whom they are retained; and (2) in some jurisdictions, particularly in BC, greater encouragement for opposing litigants to jointly retain a single expert. Both types of change are intended to reduce the cost and acrimony associated with 'battles of experts' and to make expert evidence more helpful to the courts in which the changes are instituted.

Court rules requiring acknowledgment of experts' duties may alter little in the substantive approach of those witnesses who belong to professional organizations (such as the Appraisal Institute of Canada) which set standards that already encourage objectivity and, indeed, provide for written certifications of impartiality. The new judicial requirement may have a greater influence on the content of reports in previously less regulated fields or fields where a 'hired gun' mentality seems to be widespread; in those fields, experts required to acknowledge their objectivity may think twice about their approach.

More broadly, it is possible that partisanship by an expert witness in breach of his or her written commitment to be objective or to assist the court could now expose that witness to sanctions directly from the court, rather than simply from the professional organization, if



any, to which the expert belongs. The case law in the absence of these court rules has traditionally permitted courts to take a less direct approach, where they may (1) 'punish' the litigant whose expert has been partial, by refusing to admit the expert's report into evidence or giving little weight to it (thus leaving a gap in that litigant's case); and/or (2) criticize experts for lack of objectivity in the course of reasons for judgement on the broader issues. What additional steps, if any, that the courts will take under the new rules remains to be seen.

Certain of the new court rules also address the joint appointment by parties of a single expert to opine on particular issues. The Nova Scotia rules provide for joint appointment on agreement of the parties. The BC rules go further, both in setting out a detailed protocol for joint appointments and in providing that the BC Supreme Court will have the power to order that the expert evidence on one or more issues be given by one jointly instructed expert, even if neither party has requested that such an order be made. In

theory, the appointment of a single expert should reduce the expense to parties, as they will be able to share costs. Given the requirement even for experts retained by a single party to be impartial rather than to serve as the retaining party's advocate, the conclusions in the jointly procured report should also, in theory, be the same as in reports which were separately obtained. However, concerns have been raised over how well this theory will translate into practice, and indeed the concept of joint appointment has not found its way into the new Ontario rules (although they do encourage party agreement on the selection of court-appointed experts, a different issue). Concerns include that parties' resources may be consumed in fighting between themselves on the selection of a jointly appointed expert and the instructions to be given to the expert, or in retaining 'shadow' experts (whose evidence cannot, however, be filed on the same point without leave of the court) to review the jointly appointed expert's conclusions. It will be interesting to see how the practice develops in this regard. 📌