

**Supreme Court of Nova Scotia**

Justice John M. Davison



NOVA SCOTIA

The Law Courts  
1815 Upper Water Street  
Halifax, Nova Scotia  
B3J 1S7

424-8229

## MEMORANDUM

### *“CIVIL PROCEDURE RULES REVISION PROJECT”*

**TO:** Steering Committee

**FROM:** Evidence Working Group

**DATE:** May 19, 2005

**RE:** **FINAL REPORT**

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The members of the Evidence Working Group are:

Justice John M. Davison (Chair)  
Justice Jamie Saunders  
Justice Robert Wright  
Dan Campbell, Q.C.

George W. MacDonald, Q.C.  
Sandra MacPherson-Duncan, Q.C.  
Scott Norton, Q.C.  
John E.S. Briggs  
William Laurence

The Group has held seven meetings during which it has considered rules which relate directly to evidence, the content and timeliness of expert reports and the discovery or non-discovery of expert witnesses. During these deliberations the N.S. Law Reform Commission has kept detailed Minutes of the discussions and provided helpful resource materials and comparative analysis.

## **Contents and Timeliness of Experts Reports**

In Ontario the initial report is to be filed and served at least 90 days before the date for trial. A response to this report must be filed and served 60 days before trial and a response to this report is to be filed 30 days before trial. The Group agreed with the suggestion of one member that 30 days was insufficient time to direct a response to the initial report. The party may have to reply to unanticipated issues raised by the plaintiff and on occasion would have to secure the services of an expert to reply to the initial report. The proposal was advanced that the initial report should be filed and served 120 days before trial and that a response should be filed and served 45 days before trial.

A member raised the inquiry as to whether the Notice of Trial would be the triggering mechanism with respect to the timeliness of expert reports. It was pointed out that the Management of Litigation Working Group was recommending a new approach to be initiated by a Date Assignment Conference. The proposal would eliminate a Notice of Trial. One of the aims of the earlier Date Assignment Conference was to secure a date for trial in the future. It was observed that if the Management of Litigation proposal is approved all pre-trial items must be concluded 90 days before trial. The 90 day period is derived by combining the requirement to have a pre-trial conference not less than 60 days before trial with a finish date 30 days before the pre-trial. It was substantially agreed by the Committee that they should retain their recommendation of service of the reports 120 days and 45 days before trial. If these dates offend the recommendations of the Management of Litigation Group, the Steering Committee should resolve any discrepancies that arise between the proposals from the various Groups.

The Group agreed that there should be a standardization of reports. The suggested content of reports is set forth in Schedule "A".

The Group agreed that there should be a distinction drawn between the reports of treating physicians and the reports of experts retained for the purpose of litigation. Consideration was given to the fact that treating physicians do not have the time or the resources to complete an extensive report. It was pointed out that evidence from treating physicians tend to be mostly factual in nature and that the facts could be obtained from the physician's files which would eliminate the necessity for the treating physician to prepare

an additional report. By the consent of the parties the physician's notes could provide evidence but if the treating physician's evidence took the form of or contained an opinion then similar to any other expert a separate report would have to be prepared and would have to comply with the criteria for an expert's report.

An expert witness may not testify with respect to an issue, except with leave of the court in extraordinary circumstances, unless the substance of his or her testimony with respect to that issue is set out in:

- (a) a report served under this rule; or
- (b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial.

An order of the court pursuant to the above paragraph shall not be made unless the court is satisfied that:

- (a) the testimony does not result in an unfairness to any other party;
- (b) compliance with the order will not unduly delay the trial; and
- (c) compliance with the order will not result in unreasonable expense for other parties.

A party may put to an expert instructed by another party questions in writing about his or her report provided:

- (a) the questions may be submitted only once;
- (b) the questions must be put within 30 days of the service of the expert's report; and
- (c) the questions must be solely for the purpose of clarification of the report.

### **Discovery of Experts**

This issue generated discussion during a couple of meetings. There was unanimous agreement among those present at the meeting that there should be no discovery of experts as of right. There was a legitimate disagreement as to what had been agreed at a previous meeting. Three persons understood that the proposal to allow written questions of experts was meant to entirely replace the discovery of experts. Three other members believed the agreement related to the requirement to obtain leave to discover an expert with leave only available in limited circumstances.

### **Medical Examination - Rule 22**

Clarify the wording so it is apparent more than one examination may take place. Perhaps some of the words should be in the plural.

There should be a sub-rule in 22.01 to permit application to court to combat abuse by reason of requests for an unreasonable number of examinations.

Rule 22.04 should have a sub-rule directing any medical report pursuant to Rule 22 to conform with the proposed contents for expert reports.

### **Court Experts - Rule 23**

In Rule 23.02 there should be a provision that the report conforms with the new proposed rules on expert reports.

### **Inspections of Real and Personal Property - Rule 24**

If inspections lead to opinions which require expert reports they should conform with the new proposed rule on expert reports.

The Rule should make provision for the issue of costs on inspection.

## **Miscellaneous Rules Relating to Evidence**

The Nova Scotia Law Reform Commission prepared tables comparing the Nova Scotia Rules of Evidence to the Rules in Ontario, British Columbia, the Federal Court and the present Rules of Alberta. Discussion relating to these comparisons took place over several meetings and conclusions of the Committee are set out in this final report.

### **1. How are facts to be proved?**

- Unless it is otherwise ordered or an enactment or rule otherwise provides, a witness shall be examined orally and in open court [R.31.02(1)].
- The court may, at a trial, make an order concerning the method of proving any fact or document or of adducing any evidence if it appears that the order can be safely made having due regard to the interests of justice [R.31.10(1)].

There is no suggested changes to these sub-rules.

### **2. Evidence by telephone, audio visually or otherwise**

It was recommended that Rule 18.07 be changed to provide as follows:

#### **Recording and Reporting of Discovery Evidence**

18.07(1) Unless the parties consent or the court otherwise orders, the evidence on the examination for discovery shall be sound recorded and transcribed by a court reporter and it shall not be necessary for the depositions to be read over to and signed by the person examined.

(2) With the leave of the court or on consent of the parties, the examination for discovery may be conducted by telephone conference or video conference or any other form of electronic communication and/or may be recorded by video recording by such means as will provide an accurate display of the evidence.

(3) Where the examination is taken by an official court reporter, it shall not be necessary for an examiner to be present at the examination and the reporter shall be deemed to be an examiner within the meaning of this rule.

(4) The depositions so taken when certified by the person taking the same as correct are deemed to be the original depositions.

(5) The rules relating to the use of a deposition shall apply to an examination recorded by video recording and a party seeking to tender in evidence the recording of an examination for discovery or any part of it shall do so by producing a copy of the recording of the examination (or the part) certified by a court reporter.

### **3. May evidence at trial be used in subsequent hearings?**

It was suggested that Rule 37.09, which is entitled “Evidence on hearing of application”, be extended by putting in 39.09(6) which would read as follows:

Evidence on a hearing may, with leave of the court, be used at any subsequent stage of the proceedings for any purpose by any party.

(This suggestion is meant to preclude any concerns about whether a party who has filed an affidavit before trial might be able to simply file that affidavit at trial without being cross-examined.)

### **4. Read former evidence - Rule 31.14**

Evidence taken in another proceeding may, if admissible, be read,

(a) on an *ex parte* application, by leave of the court obtained at the time of making

the application; and

- (b) in any other case, upon the party desiring to use the evidence giving two (2) days' previous notice to every opposing party of his intention to read the evidence.

It was agreed to retain this sub-rule but change the two days' previous notice to ten days' previous notice.

## **5. Evidence on motion**

There is a suggested change to Rule 37.09 to read as follows:

- 37.09(1) Evidence on a hearing may be given,
  - (a) by an affidavit or statutory declaration made pursuant to Rule 38;
  - (b) by a statement of facts agreed upon in writing by all the parties;
  - (c) by any evidence obtained on discovery and admissible under the applicable rule;
  - (d) with leave of the court,
    - (i) by any witness in person, or
    - (ii) any other method of proving any fact or document or of adducing any evidence if it appears that the order can be safely made having due regard to the interest of justice.

(Rule 31.10(1) provides the court, in relation to trials, with a broad power regarding

evidence but a similar provision is not found in the application section. It would be appropriate to add a similar provision at Rule 37.09. The suggested change is the addition of 37.09(1)(d)(ii) and it incorporates the relevant language from Rule 31.10.)

**6. Order may be varied**

Rule 15.08 is not a matter for the Evidence Committee - it is more of an enforcement rule.

**7. Trial judge to exercise control**

This topic deals with Rule 31.03 and it was noted that in Ontario the Rule permits the judge to recall a witness. There was an inquiry as to whether this power is in the court's inherent jurisdiction and the matter was left with the Group reflecting on the appropriateness of adding a reference to recalling a witness. (This reflection was not done.) Please note the Ontario Rule is similar to our Rule 31.02(2).

**8. Leading questions on direct examination**

This relates to Rule 31.03(2) and the Committee found there was no need for change.

**9. Use of Interrogatories at Trial**

This relates to Rule 19.06(1) and 19.06(2). There were no suggestions for change but the Rules would be of relevance to the Discovery Working Group.

**10. Transcripts: objection to the admissibility thereof**

It was pointed out that Rule 18.14 mentions the use of depositions "so far as admissible under the Rules of Evidence" and Rule 32 is entitled "Evidence by Deposition". It was suggested "deposition" should be defined. It was also stated there was no need to make a Rule in Nova Scotia similar to Rule 40.31 of the British Columbia Rules.

**11. Transcripts: custody**

It was decided no rule relating to custody of transcripts need to be added to the Nova Scotia Rules.

## **12. Evidence that is admissible only with leave**

Ontario is the only jurisdiction which has a rule involving admissible evidence with leave of the trial judge and it was suggested that we add an additional sub-rule to Rule 31, the contents of which were:

31?(1) Unless with leave of the trial judge, a party shall not be permitted to produce the following evidence at trial:

- (a) any document that the party seeking to introduce it failed to disclose as required by these rules;
- (b) any document or testimony which was objected to on the ground of privilege that was not abandoned at least 90 days before the commencement of the trial except to impeach the credibility of a witness;
- (c) which is the subject of any refusal to disclose information on discovery and which was not disclosed in writing;
- (d) which is the subject of any failure to correct in a timely manner any answers given on discovery that has been discovered by the party to have been incorrect or incomplete when made or is no longer correct or complete;
- (e) where the party has failed to serve an expert's report as required by these rules.

**13. Evidence by examination of a witness**

Evidence on a hearing may be given with leave of the court by any witness in person (37.09(1)(c)).

There is no need to change this Rule.

**14. Evidence of particular facts**

31.05 The court may, by order, permit the evidence of any particular fact to be given,

- (a) by affidavit as provided in Rule 31.04;
- (b) by the production of documents or entries in books, or of true copies thereof;
- (c) where the fact is or was a matter of common knowledge either generally or in a particular district, by the production of a specific newspaper which contains a statement of that fact.

It was agreed that there is no need to change the wording in this Rule but it might be clearer if it was placed next to Rule 31.10(1).

**15. Evidence by examination for discovery**

18.14(1) should remain, but in sub-paragraph (c) on the third line the words “or his attendance” should be replaced by “and his attendance”.

**16. Cross-examination of adverse party**

It was believed that Rule 31.03(3) was a very useful Rule as to achieve the same result in other jurisdictions one would have to declare a witness as hostile.

**17. Calling an adverse party as a witness**

Rule 31.28 should be changed by providing service of a subpoena on the other party's solicitor "at least 14 days prior to trial". It was felt that the five day time limit was short and that 14 days would be consistent with the pre-trial conference timeline. This change should be coordinated with the recommendations of the Management of Litigation Committee.

**18. General comments on Rule 31**

It was agreed that with respect to both Rule 31.28 and Rule 31.03 "an adverse party" should replace "an opposing party".

**19. Evidence by affidavit**

There were no changes suggested for this Rule.

**20. Rule 31.07 - Limitation of plans, etc., in evidence**

It was suggested that the time period of ten days is too short and that we should probably try to get to a uniform time period with respect to Rules and that would suggest 14 days would be a reasonable amount of time for this Rule. This change should be coordinated with the recommendations of the Management of Litigation Committee.

**21. Rule 31.11 - Revocation or variation of Orders made under foregoing Rules**

No changes were suggested.

**22. Rule 31.12 - Depositions: when receivable in evidence at trial**

After considerable discussion it was agreed that Rule 31.12 is fine in terms of intention but potentially confusing in terms of language. It was recommended that the term “deposition” should be defined or another term should be used. It was stated that some people think deposition means discovery, while others think it means commissioned evidence.

**23. Rule 31.13 - Use of evidence obtained on discovery**

No changes were suggested for this Rule.

**24. Limitations on admissibility of documents**

Rule 31.15(2) indicates that sub-rule (1) does not apply to a document that is used solely as a foundation for, or as a part of a question in, cross-examination or re-examination.

It was agreed to leave this Rule as it is. Reference was made to the *O'Brien* case, which indicated a surveillance video tape is only to be used for impeachment purposes and in that event it does not have to be produced.

**25. Rule 31.17 to Rule 31.22 inclusive**

No need for changes.

**26. Determination of foreign law**

Several comments were made with respect to Rule 31.23. It was suggested that the ten day time requirement is too short and that a 14 day period would be more consistent with the previous decisions of the Committee. Also to be considered is the proposal of the Management of Litigation Committee and how this time period would affect their proposal if it is accepted. It was also mentioned that any expert may have to testify with respect to foreign law and would have to comply with the proposed new Rule on expert reports.

**27. Subpoenas**

In relation to Rule 31.24(2) it was agreed that the Rule should be clarified to allow any Prothonotary's office to issue a subpoena and this would cure the situation where some Prothonotaries only issue subpoenas from the Prothonotary's office which issued the Originating Notice.

## **28. Affidavits and Exhibits**

It was suggested that Rule 38 should be amended to codify the requirements identified in the *Waverley* case with the use of affidavit evidence. The Chair questions whether this is necessary.

## **29. Deposition or Commission Evidence**

It was agreed that Rule 32 as presently written was confusing and set out unworkable procedures. The term deposition is not defined, nor is commission evidence. It was suggested the Rule should be amended to change the title to one which would encompass a broad variety of evidence taking formats which could be tailored by the court to meet the particular circumstances of the parties. The title "Evidence (other than discovery) on oath or affirmation before or during trial" was suggested as a term which could encompass depositions, commission evidence, examinations on consent, and other conceivable formats.

The group agreed that the parties should be able to consent to a form of examination under oath or affirmation with the testimony available to be tendered as evidence at trial.

Further, a broad discretion should be conferred upon the court to consider a variety of factors, including the law of the jurisdiction in which the witness resides. It was agreed that it should be incumbent upon the applicant to outline what the foreign jurisdiction may require and the rule should reflect this onus. A proposal for Rule 32.01 is attached to this report as "Schedule B".

With the reworking of Rule 32.01 as proposed and the broad discretion conferred therein, much of the remainder of Rule 32 would become redundant. Rule 32.02, Rule 32.04, 32.06, 32.10, 32.11, 32.14 could be deleted. Rule 32.05 would delete reference to "letter of request". Reference to "deposition" in the remaining provisions would be amended

to “examination (other than discovery) under oath or affirmation before or during trial”.

It was further recommended that rule 32.09 be amended to permit videotaping, digital recording and examination by teleconference or videoconference in keeping with the change in technology.

It was also recommended that Rule 32.12 be amended to make it clear that the testimony obtained pursuant to Rule 32.01 may be used as evidence at the trial or hearing without further qualification.

Finally, the committee also recommended that the broad discretion outlined in Rule 32.01 should also be incorporated in Rule 19 with respect to Interrogatories.

JMD/hm

## **Schedule “A”**

### **Expert witness: Evidence of and report**

- (1) Any party relying upon a report containing the opinion of an expert shall serve a copy of the report on each opposite party at least 120 days prior to the commencement of the trial.
- (2) Any party receiving a report pursuant to (1) that wishes to file a report that responds to the report received shall serve a copy of the responsive report on each opposite party at least 45 days prior to the commencement of the trial.

### **Content of Report**

- (3) The report containing the opinion of an expert shall include:
  - (a) details of the expert’s relevant qualifications;
  - (b) details of the literature and other materials used in making the report;
  - (c) a statement of all assumptions made by the expert;
  - (d) disclosure of any tests or experiments carried out upon which the expert relied, the names of persons who conducted the experiments or tests, and the qualifications of those persons;
  - (e) reasons for each opinion expressed in the report;
  - (f) the facts, matters and assumptions on which the report proceeds and of the documents and other materials that the expert has been instructed to consider;
  - (g) a declaration that the expert has included in the report everything the expert regards as being relevant to the opinion expressed and that the report draws to the attention of the court any matter which would affect the validity of that opinion.
  - (h) any other matter which affects the substance of the expert’s proposed testimony.
- (4) The party serving a copy of the report shall at the same time serve each opposite party with a copy of any photograph, plan, calculation, analysis, measurement, survey report or other extrinsic material which are relied upon by the expert.
- (5) If at any later stage in the proceedings the expert changes his or her opinion on a material matter, that change shall be communicated in writing without delay to each party to whom the report has been provided and, where appropriate, to the court.
- (6) The party serving a copy of the report shall at the same time provide to each opposite party a written statement of the qualification of the expert that the party serving the report intends to request from the court at the time of its introduction.
- (7) No opinion evidence will be permitted that is not set out in the report, unless with leave of the court which shall only be granted in extraordinary circumstances.

## **Schedule “B”**

### **Evidence (other than discovery) on oath or affirmation before or during trial**

Rule 32.01:

(1) So far as is practicable this rule applies to the examination of a person both inside and outside of Nova Scotia.

(2) On the consent of the parties or by order of the court a person may be examined on oath or affirmation before or during trial, with that person's testimony available to be tendered as evidence at the trial.

(3) The court may grant an order for an examination on oath or affirmation of any person at any place in such manner and on such terms as the court thinks just and convenient. In making such an order the court may take into account:

- (a) the convenience of the person whom the party seeks to examine;
- (b) the possibility that the person will be unavailable to testify at trial, by reason of death, infirmity or sickness;
- (c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial;
- (d) the expense of bringing the person to trial;
- (e) whether the witness ought to give evidence in person at the trial;
- (f) the laws of the jurisdiction in which the witness resides (the onus being on the applicant to provide the court with that information); and
- (f) any other relevant consideration.

(4) Any person within the jurisdiction:

- (a) who is about to leave the jurisdiction; or
- (b) who from illness or infirmity is unable to travel;

may be examined without an order before a commissioner after five (5) clear days notice of the time and place of the examination has been given to the person and all other parties.

(5) When a person, who receives a notice under paragraph (4) refuses to give evidence, the court may grant an order under paragraph (3) for his examination.

(6) In making an order pursuant to Rule 32.01, the court may make an order for payment of costs of the examination as the court deems just and appropriate.