

## The New BC Supreme Court Civil Rules And Admissibility Of Expert Reports

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One of the biggest changes in the new BC Supreme Court Civil Rules are those with respect to the requirements for admissibility of expert reports. These changes are significant for ICBC and other Personal Injury Lawyers because these types of lawsuits are heavily dependent on expert opinion evidence. From medical doctors to engineers to vocational specialists, personal injury trials are perhaps the more reliant on expert evidence than any other type of trial.

One thing we should all keep in mind is that as of July 1, 2010 ongoing lawsuits will be *deemed to be started* under the new rules. This means that any report ordered now that will be used in trial after July 1, 2010 will have to comply with the new rules. For this reason it is vital that lawyers and expert witnesses alike become immediately familiar with the new Civil Rules.

Under the current Supreme Court Rules expert evidence admissibility is governed by Rule 40-A. This rule sets out rather minimal requirements for a report to be held admissible. Rule 40A(2) requires that expert reports be exchanged "*to every party of record at least 60 days before the statement is tendered in evidence*" and Rule 40A(5) requires that the reports set out "*the qualifications of the expert, the facts and assumptions on which the opinion is based, and the name of the person primarily responsible for the content of the statement*"

Under the new BC Civil Rules admissibility of expert reports are set out in Rule 11-6. Below I reproduce Rule 11-6 in its entirety. On review it is clear that the new rule has significant changes compared to the current Rule 40A.

One of the most obvious changes is the time when expert evidence needs to be exchanged. Currently reports need to be exchanged 60 days before they are put into evidence. The new rule requires reports to be exchanged at least 84 days '*before the scheduled trial date*' and goes on to create a second category of reports called "*responding reports*" which need to be served "*at least 42 days before the scheduled trial date*"

The other significant change relates to requirements for admissibility. Rule 11-6(1) requires experts to be much more clear and detailed about how they arrived at their opinions as compared to the current Rule 40A. Although, to be fair, these changes are really little more than a codification of the common law that has developed around Rule 40-A.

The new rule also improves on the disclosure obligations to opposing counsel. Under the current rule opposing counsel is not entitled to review the experts working files and materials until he takes the stand. This can lead to unnecessary delay and surprise at trial. Under the new Rule 11-6(8) opposing parties are entitled to fulsome pre-trial disclosure of the experts materials which will let lawyers better prepare for cross examination.

Other parts of Rule 11 contain interesting provisions about court appointed experts, joint experts and the role of the expert in the lawsuit. I hope to write about these shortly. Overall these improvements will likely be for the better, however, lawyers and doctors can be stubborn and it may take some adjustment for all of us to get used to these changes.

## **RULE 11-6 – EXPERT REPORTS**

### **Requirements for report**

(1) 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 11-2 (2) and must set out the following:

- (a) the expert's name, address and area of expertise;
- (b) the expert's qualifications and employment and educational experience in his or her area of expertise;
- (c) the instructions provided to the expert in relation to the proceeding;
- (d) the nature of the opinion being sought and each issue in the proceeding to which the opinion relates;
- (e) the expert's opinion respecting each issue and, if there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range;
- (f) the expert's reasons for his or her opinion, including
  - (i) a description of the factual assumptions on which the opinion is based,
  - (ii) a description of any research conducted by the expert that led him or her to form the opinion, and
  - (iii) a list of every document, if any, relied on by the expert in forming the opinion.

### **Proof of qualifications**

(2) The assertion of qualifications of an expert is evidence of them.

### **Service of report**

(3) Unless the court otherwise orders, at least 84 days before the scheduled trial date, an expert's report, other than the report of an expert appointed by the court under Rule 11-5, must be served on every party of record, along with written notice that the report is being served under this rule,

- (a) by the party who intends, with leave of the court under Rule 11-3 (9) or otherwise, to tender the expert's report at trial, or
- (b) if 2 or more parties jointly appointed the expert, by each party who intends to tender the expert's report at trial.

### **Service of responding report**

(4) Unless the court otherwise orders, if a party intends to tender an expert's report at trial to respond to an expert witness whose report is served under subrule (3), the party must serve on every party of record, at least 42 days before the scheduled trial date,

- (a) the responding report, and
- (b) notice that the responding report is being served under this rule.

**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
- (b) if asked to do so by a party of record, make available to the requesting party for review and copying the contents of the expert's file relating to the preparation of the opinion set out in the expert's report,
- (i) if the request is made within 14 days before the scheduled trial date, promptly after receipt of that request, or
  - (ii) in any other case, at least 14 days before the scheduled trial date.

**Notice of trial date to expert**

(9) The person who is required to serve the report or supplementary report of an expert under this rule must, promptly after the appointment of the expert or promptly after 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.

**Notice of objection to expert opinion evidence**

(10) A party who receives an expert report or supplementary report under this Part must, on the earlier of the date of the trial management conference and the date that is 21 days before the scheduled trial date, serve on every party of record a notice of any objection to the admissibility of the expert's evidence that the party receiving the report or supplementary report intends to raise at trial.

**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.