EXPERTS:
JUDGES NEED TO BRING REAL CHANGE

By Art Vertlieb, Q.C., and Ian Knapp

An expert in a trial is a witness who, unlike most witnesses, is permitted to give opinion evidence. These special witnesses are given such a privilege because they have demonstrated to the court that they "have acquired special or peculiar knowledge through study or experience in respect of matters on which he or she undertakes to testify".[1] These witnesses are to be independent, in the sense that their primary duty is to assist the court and not to advocate for a party. This duty was described aptly by Mr. Justice Finch (as he then was):[2]

> Once he becomes a witness, however, his role is substantially changed. His opinions and their foundation are no longer private advice for the party who retained him. He offers his professional opinion for the assistance of the court in its search for the truth. The witness is no longer in the camp of a partisan. He testifies in an objective way to assist the court in understanding scientific, technical or complex matters within the scope of his professional expertise. He is presented to the court as truthful, reliable, knowledgeable and qualified. It is as though the party calling him says: "Here is Mr. X, an expert in an area where the court needs assistance. You can rely on his opinion. It is sound. He is prepared to stand by it. My friend can cross-examine him as he will. He won't get anywhere. The witness has nothing to hide."[3]

The purpose of experts is to help the trier of fact make sense of evidence of a technical nature, and they "provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate".[4]

There has been an explosion of scientific and academic insight into virtually all aspects of our lives, coupled with the high degree of professional specialization in our society. As a consequence, expert evidence now permits courts to engage in a level of investigation beyond that which was historically possible. The importance of this evidence cannot be overstated.

Whereas, in the past, expert evidence was relatively uncommon and, where it did appear, took up a relatively short amount of court time, modern expert evidence regularly takes up more trial time than the evidence of parties to a dispute. The examination and cross-examination of experts in even the most straightforward cases can take many hours of court time, directing judicial resources into pursuing questionable lines of inquiry and cross-examination.

Expert evidence is valuable and necessary, but it should not overwhelm the trial process. This challenge is not unique to British Columbia. As noted by Justice Brown of the Ontario Superior Court of Justice in *D'Addario v. Englobe Corp.*, modern trials today take far too long and put a significant strain on scarce judicial resources.[5] The challenge we face today is seeking ways to ensure that the evidence is available and presented to courts, but not in such a way as to overwhelm our judicial system.

Some advocate for the reduction in the number of experts giving evidence. However, we believe experts bring valuable information to the table, and their evidence ought to continue to be received. We advocate for a change in the way expert evidence is dealt with at trial. The time has come for courts to become more assertive in managing the trial process by imposing time limits on the examination and, more importantly, upon the cross-examination, of expert witnesses. We emphasize cross-examination for experts in this article because the Rules of Court already restrict the scope of an examination-in-chief of an expert who has delivered an expert report. We believe the present Rules of Court provide assistance to the court process.

ADMISSIBILITY

The admission of expert evidence in civil proceedings is subject to several preconditions. First, several preconditions are prescribed by statute and rules which all counsel are general aware of. A report must be tendered in evidence a set period of time before a trial begins.[6] The content of an expert's report is strictly regulated by the Rules of Court and must include a certification that the expert understands his or her primary duty to the court.

Expert evidence must also be admissible according to the laws of evidence, and this is determined in a two-step analysis.[7] The party seeking to tender the evidence must first establish certain preconditions to admissibility on a "threshold level" the evidence must be relevant and necessary to assist the trier of fact; the expert must be properly qualified; and there must be no applicable exclusionary rules of evidence which would render the opinion inadmissible.[8]

If the first hurdle is overcome, the court must then act as a "gatekeeper" and determine whether the benefit of the expert evidence outweighs the risks posed by its introduction. This analysis requires the court to determine whether the expert evidence sought to be tendered "is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence".[9] After an expert report is tendered, the opposing party is entitled to demand the production of a large portion of the expert's entire file respecting his or her report and evidence at various stages throughout the proceedings, but before trial.[10]

EARLY ATTITUDES TOWARDS EXPERT EVIDENCE

Expert evidence has been an important source of evidence for courts for centuries. Although it is a commonly held belief that courts, have always mistrusted experts, this is not entirely correct. Courts have historically recognized the need for qualified individuals to provide judges with scientific knowledge, and they have readily accepted the evidence of experts.

As early as the 16th century, courts heard from individuals with peculiar knowledge and experience who were able to use their expertise to assist judges in drawing certain conclusions from evidence adduced at trial. The benefits of this assistance were readily acknowledged. In 1554, in *Buckley v. Rice*, Justice Saunders commented:

> If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we

> do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation.[11]

The landmark case respecting the role of an expert in a trial, *Folkes v. Chadd*,[12] came almost 200 years after Buckley and established the rule that expert evidence was only admissible on matters that lay outside the common knowledge of the trier of fact. *Folkes* was an action in trespass, brought by a landowner who had constructed an embankment to prevent the flooding of certain fields owned by him. Local officials alleged that this caused the harbour to fill up with silt and they sought to remove the embankment. After an interlocutory injunction was issued by the court of Chancery, the common law courts were tasked with deciding whether the embankment was the cause of the accumulation of silt. Despite limiting the scope of an engineer's testimony, Lord Mansfield acknowledged the importance of the expert's evidence:

> It is objected that Mr. Smeaton is going to speak, not as to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed ... Mr. Smeaton understands the construction of harbours, the causes of their destruction, and how remedied. In matters of science no other witnesses can be called ... I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received.

CHANGING PERSPECTIVES

In the mid-1800s, judges began to express skepticism towards expert evidence. One of the most recognizable such cases is *Thorn v. Worthing Skating Rink Company*,[13] where Master of the Rolls Jessel complained of the difficulty in finding an unbiased expert and expressed serious misgivings towards the evidence given by experts retained by parties. This view was also expressed by Lord Campbell during his speech in the *Tracy Peerage Case*:

> I dare say he is a very respectable gentleman, and did not mean to give any evidence that was untrue; but really this confirms the opinion I have entertained, that hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked ...[14]

THE MODERN VIEW OF EXPERT EVIDENCE

Judicial skepticism as shown by 19th-century judges has not diminished in modern times. Judges continue to cast a suspicious eye on witnesses paid to provide opinions on important issues in dispute. However, courts recognize the value of this sort of evidence in the search for truth.[15] The result is a judicial system that cautiously welcomes expert evidence but puts strict boundaries on its reception and scrutinizes the evidence at every stage of proceedings.

Bias is still very much on the minds of Canadian judges, although this concern has been subsumed into a broader suspicion towards expert evidence: that having a learned witness give evidence in the form of opinions presents a serious risk of distorting the basic fact-finding function of a court. Justice Sopinka explained:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.[16]

This concern was shared by Chief Justice McEachern:

> [S]erious prejudice may arise in cases tried by a jury where such evidence is admitted at trial. Such prejudice may sometimes override the probative value of such evidence. This is because there is a risk that juries may sometimes be influenced unduly by expert testimony.[17]

In spite of the dangers of expert evidence, courts continue to be alive to its value. It has been said that expert evidence plays an "essential role" in criminal courts,[18] and Justice Doherty of the Ontario Court of Appeal recently said:

> Despite justifiable misgivings, expert opinion evidence is, of necessity, a mainstay in the litigation process. Put bluntly, many cases, including very serious criminal cases, could not be tried without expert opinion evidence.[19]

The recent decision of *White Burgess*[20] highlights this tension. The case involved allegations of professional negligence against a company's former accountants. At trial, the plaintiffs called the company's subsequent accountants to give expert evidence. The admissibility of this opinion was challenged on the basis of bias. Speaking for the court, Justice Cromwell engaged in a thorough analysis of the law respecting the admissibility of expert evidence in an attempt to balance the value of expert evidence with the dangers of its admission at trial.

The decision in *White Burgess* is significant: Questions of bias and partiality will now rarely be a basis for excluding an expert report, unless it can be shown the expert is either unwilling or unable to fulfill his or her overriding duty to the court as an independent witness. It is now clear that questions of bias and partiality will be left largely to the trier of fact to assess and weigh. We submit to the reader that this decision is a clear indication from our highest court that courts should welcome expert evidence, albeit with some caution.

ON PROPORTIONALITY

Proportionality, although not strictly a new concept, has gained a significant degree of prominence of late. All participants in the justice system are aware that our courtrooms have become overwhelmed with backlogs and delay. Too many members of society struggle to access the courts, while those with means turn to other methods of dispute resolution perceived to be more efficient. Both outcomes are less than desirable.[21] Recently, the Supreme Court of Canada, in *Hryniak v. Mauldin*, emphasized the need for courts to change their perceptions of traditional litigation and devise new ways to promote fair, yet efficient, resolution of disputes:

> [T]he procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.[22]

Our Rules of Court require proportionality to be considered at all stages, the goal being a "just, speedy, and inexpensive determination of every proceeding on its merits".[23] The Rules of Court further describe three elements of proportionality that must be considered: the amount involved in the proceeding, the importance of the issues in dispute, and the complexity of the proceeding.[24] The authors respectfully suggest that "proportionality" as it is embodied in the Rules of Court involves more than a simple case-by-case cost-effort analysis; it is a challenge to all of us to interpret and apply all of our Rules of Court and processes in a way that fosters efficient and just resolution of all disputes on their merits.[25]

Unfortunately, courts may not give enough attention to considerations of proportionality vis-a-vis expert evidence in light of the prominent role this evidence plays in most trials today. It is often expected of counsel to assemble an extensive number of reports, sometimes on only minor issues in the litigation. Assembly of a report in and of itself can be very costly to a litigant, but this is only the starting point. Once at trial, each expert may then be cross-examined at length by counsel on his or her qualifications and attestations, in addition to the content of the report:

The Supreme Court of Canada has signaled concerns regarding the proportionality of expert evidence in some cases.[26] In *R. v. D.D.*, Justice Major stated bluntly:

> Expert evidence is time-consuming and expensive. Modern litigation has introduced a proliferation of expert opinions of questionable value. The significance of the costs to the parties and the resulting strain upon judicial resources cannot be overstated.[27]

CURRENT STATE AND CHALLENGES FACED

Clearly, expert evidence plays, and has played for centuries, an important role in trials. There can be no doubt as to its value and, in many cases today, necessity. Yet the traditional rules respecting the introduction and challenging of this evidence are no longer suited to the volume of this evidence and our courts are becoming overwhelmed. It is not unusual today to hear of trials lasting for several months or even, in some cases, many months.

This phenomenon has a direct bearing on access to justice.[28] The longer a trial takes, the higher the cost to the litigants. Year-long trials are simply unaffordable for most people. Most members of society cannot afford to pay for modern litigation, and those who can often choose not to. We are being left with a cumbersome, time-consuming and expensive judicial system. Litigants, particularly institutional litigants, are more commonly eschewing our courts for private resolution of their disputes. Some have lost faith in our judicial system to provide quick and effective resolution of disputes. The authors do not question the appropriateness of alternative dispute resolution, but the courts are an essential public institution that must remain accessible to all. Further, our common law system relies on a diverse body of cases being adjudicated to properly evolve with society.[29]

A substantial amount of time in these trials is spent on expert evidence. Controlling this evidence at trial must be seriously considered.

TRIAL MANAGEMENT CONFERENCES AND ORDERS

It is time for our courts to begin incorporating proportionality into matters of litigation beyond pre-trial applications, and use those tools available in Rule 12-2 of the Rules of Court to expedite trials in a fair but efficient manner, particularly when it comes to expert evidence at trial.

As an essential element to our proposal, parties need to use the trial management conference to set out, in more detail, what a case is about and what issues are truly in dispute.

Rule 12-2(8) provides for the following orders to be made:

> The judge or master presiding at a trial management conference may consider the following and, without limiting the ability of the trial judge or master to make other orders at trial, may, whether or not on the application of a party, make orders respecting one or more of the following:
>
> (a) a plan for how the trial should be conducted;
>
> (b) whether or not the trial or any part of it is to be heard without a jury, on any of the grounds set out in Rule 12-6(5);
>
> (c) amendment of pleadings within a fixed time;
>
> (d) admissions of fact at trial;
>
> (e) admission of documents at trial, including
>
> (i) agreements as to the purposes for which documents may be admitted, and
>
> (ii) the preparation of common books of documents and document agreements;
>
> (f) imposing time limits for the direct examination or cross-examination of witnesses, opening statements and final submissions;
>
> (g) directing that a party provide a summary of the evidence that the party expects one or more of the party's witnesses will give at trial;
>
> (h) directing that evidence of witnesses be presented at trial by way of affidavit;
>
> (i) respecting experts, including, without limitation, orders that the parties' experts must, before the service of their respective reports, confer to determine and report on those matters on which they agree and those matters on which they do not agree;

(j) directing that the parties present opening statements and final submissions in writing;

(k) respecting when and how an issue between the party filing a third party notice and the third party may be tried;

(l) adjournment of the trial;

(m) directing that the number of days reserved for the trial be changed;

(n) directing the parties to attend a settlement conference;

(o) adjourning the trial management conference;

(p) directing the parties to attend a further trial management conference at a specified date and time;

(q) any other matter that may assist in making the trial more efficient;

(r) any other matter that may aid in the resolution of the proceeding; and

(s) any orders the judge or master considers will further the object of these Supreme Court Civil Rules.

The authors note there are many tools at the disposal of the court that may be used to manage a trial in line with proportionality. We focus on sub-rule (f), which permits trial management judges and masters to put time limits on the examination and cross-examination of witnesses. It is suggested that this rule can be used to ensure that parties maximize the efficiency of their examinations and cross-examinations. The authors have found no cases in which a judge or master in British Columbia has utilized this provision.

CROSS-EXAMINATIONS

Wigmore said that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth". Following in that vein, the Supreme Court of Canada has referred to cross-examination as "a faithful friend in the pursuit of justice and an indispensable ally in the search for truth".[30] It would not be an overstatement to suggest that a party's right to cross-examine an adverse witness is one of the cornerstones of the adversarial trial process which has served us so well for generations. Cross-examination has the ability to "expose falsehood, rectify error, correct distortion or to elicit vital information which would otherwise remain forever concealed".[31] There can be no doubt that it is one of the most important mechanisms for uncovering truth in our judicial system.

Courts are reluctant to take any steps to control this fundamental right. This is understandable, as judges are correctly loath to interfere in proceedings in such a way as to distort the fact-finding process; after all, the primary role of the trial judge is to consider the issues, hear the evidence, apply the law and render judgment. This concern is of particular import in criminal matters, where an individual's liberty is at stake, and the accused must be afforded the right to make full answer and defence.[32] An accused stands against the vast investigative resources of the state;

cross-examination is often the only means that he or she has to resist the case presented by the Crown. Civil matters, however, bring different considerations and rules for discovery that do not exist in criminal proceedings.

The right of cross-examination is not unfettered, and counsel and parties have been cautioned not to abuse it.[33] Cross-examination is not an "unbridled licence" to engage in any line of questioning and is bounded by requirements of relevance and good faith, while harassment, misrepresentation, repetitiousness and sneaking evidence in through the back door are all prohibited.[34] In regulating cross-examination, our law gives trial judges broad discretion to ensure fairness and to see that justice is done and seen to be done. They are tasked with balancing the need for a fair trial with a need to ensure that cross-examination is conducted in a proper and ethical manner.[35]

Time limits on cross-examinations are not a new concept to common law trials. Ontario employs a "simplified procedure" to resolve disputes involving more straightforward issues. Cross-examinations, among other elements of a traditional trial, in these simplified proceedings can be subject to strict time limits. These limits were placed as part of a broader effort to give people "fast and inexpensive access to the courts".[36] Ontario courts will make similar orders in motions for summary judgment. Where a judge determines that a matter is not suitable for summary judgment, he or she may direct a limited trial on certain issues raised by affidavits tendered. As a part of this order, time limits may be imposed on the cross-examination of the affiants.[37]

We engage in this brief analysis to illustrate that, while cross-examination is rightly seen as one of the most important aspects of the trial process, it is not a right of unlimited scope conferred on all litigants, and the imposition of time limits on cross-examinations in certain circumstances is already done. Like any other process afforded to a party in court, it has boundaries and is subject to judicial discretion.

LIMITING THE CROSS-EXAMINATION OF EXPERTS

As we have attempted to demonstrate earlier in this article, expert evidence has a long tradition of providing information of immense value to courts. Nevertheless, its proliferation in recent years has begun to put unsustainable pressure on our judicial system. We believe that the traditional approach of permitting counsel an unlimited time to examine and cross-examine experts should be reconsidered in some cases. Courts need to manage their process in such a way as to ensure that valuable evidence is received without overwhelming trials. This can be done by allowing trial judges to use their judgment and experience to provide realistic timelines for trials where counsel appears unable to do so.

Although there are many possible solutions to the problem identified in this article, we have chosen to focus on limiting the cross-examination of experts, primarily for two reasons:

(a) A significant amount of time today is spent cross-examining experts, where such time spent is neither proportionate to the proceedings nor useful. Efficiencies can be found in regulating this process.

(b) Unlike evidence from fact-based witnesses, the opinions and evidence of experts are subject to procedural and legal preconditions respecting the veracity of the evidence, and are subject to other forms of challenge that the evidence of regular witnesses is not. These have been described briefly earlier in this article.

We suggest that courts ought to begin using Rule 12-2(8)(f) to place time limits on the cross-examinations of experts in certain instances. This will involve interfering, to a limited extent, with counsel's right of cross-examination. We do not make this suggestion lightly; however, we do not believe that this is an unwarranted intrusion. The benefit of a more efficient and accessible judicial system should far outstrip the modest costs to limiting some ineffective cross-examinations.

As has been noted, cross-examination is not an unfettered right and is always subject to a judge's discretion to ensure fairness and see justice done. The Rules of Court, in explicitly giving judges discretion to place time limits on cross-examinations while requiring judges and masters to consider proportionality, have arguably added proportionality as a relevant consideration respecting what is "fair" in guiding the exercise of the court's discretion in limiting cross-examinations in civil matters. Proportionality is closely related to accessibility, and we suggest that an inaccessible system cannot be regarded as fair, no matter the results it is seen to produce.

This article is not advocating for courts to take an aggressive stance on all cross-examinations, nor is it suggesting that judges impose arbitrary time limits on the cross-examination of all experts. In general, counsel are efficient and finish their cross-examinations within time estimates provided. The purpose of this article is to suggest that our courts have been given the tools to limit unreasonable estimates and put pressure on counsel to be more efficient with their time in certain aspects of trials which can quickly get out of control. We propose that courts use Rule 12-2(8)(f) to scrutinize time estimates provided by counsel respecting the cross-examination of experts at trial management conferences if those time estimates are clearly neither realistic nor proportional, and impose time limits to "pull [parties] back to the Proportionate Way".[38]

The rule relied upon exists within the provisions of our Rules of Court respecting the trial management conference, an event which must occur approximately a month before trial. By that time in litigation, it is not unreasonable to suggest that counsel will have a thorough understanding of the case and be able to present a succinct overview to the court. The court will then be able to assess whether or not the time estimates provided by counsel are reasonable and ensure that the case is tried within the time allotted by counsel, and avoid adjournments if possible.

This is not to say that a time limit on the cross-examination of an expert placed at a trial management conference will be the final word. If counsel legitimately needs more time to complete a difficult cross-examination, the courts will have the essential context to reassess the time needed and decide whether to grant counsel more time to pursue what has been, or appears to be, a fruitful line of inquiry, or end a cross-examination in which counsel have been engaged

in a largely Sisyphean task. By exercising the discretion given to them by the Rules of Court, judges can assist the parties to be more efficient in their conduct of cases.

With so many pressures on our system, it is no longer sufficient simply to permit counsel to explore each and every detail in an expert's report at their leisure, at enormous cost both to the parties to the proceedings and to the tax-payer subsidizing the litigation. As Madam Justice Karakatsanis in *Hryniak* notes, the modern emphasis on proportionality "requires judges to actively manage the legal process in line with the principle of proportionality".[39]

We are encouraging judges to find efficiencies, not to take shortcuts. Judges should use the discretion given to them to constrain unreasonable time estimates of counsel after a trial management conference which has adequately set out the issues in dispute and expert reports have been tendered.

Several factors alleviate any harm caused by the limitation of a party's right to cross-examine an expert, and the Rules of Court provide mechanisms to reduce the potential mischief and ensure that the truth of a matter is brought out. First, and perhaps most importantly, parties wishing to introduce expert evidence must do so by tendering a report well in advance of trial. This report gives counsel the ability to plan an efficient cross-examination of the expert at a very early stage. In some ways, this is a very similar scenario to cross-examinations in Ontario simplified actions, whereby cross-examinations are time limited but based on affidavits in the hands of counsel. Parties may also tender reply reports to address many deficiencies in the other party's expert evidence, alleviating the need for some cross-examination. Finally, as has been noted, the enforcement of a time limit imposed at a trial management conference is always subject to the discretion of a trial judge.

We recognize that trial judges will also need support from appellate courts if they are to be more assertive in managing their process. Any reluctance by the trial courts to embrace this approach would be understandable if there is indecisiveness or hesitation from above. The Supreme Court of Canada in *Hryniak* was supportive of trial courts taking more assertive steps to control their own process. We hope that this decision can be followed up on in the future, with even stronger support for trial judges exercising their discretion in a more active manner to control proceedings in light of modern realities. Hopefully there will be opportunities for the appellate courts to show support as we have suggested.

In an era of scarce judicial resources, it makes no sense to simply allow counsel to tell trial judges how long proceedings will take without further question. Judges must be able to have some input into the management of proceedings. Our trial judges are experienced and talented jurists, and we are confident that they will set realistic limits where necessary once they have had the opportunity to review the material allegations and issues in dispute at a proper trial management conference.

CONCLUSION

Expert evidence has played a vital role in our judicial system for centuries, providing courts with important insight and understanding. Unfortunately, the evidence, with its increasing prominence, has in recent years become a significant burden on our judicial system.

Contrary to what some may suggest, the solution is not putting limits on the number of experts or on the evidence that experts give. Experts play a vital role in the fact-finding process, and we do not believe curtailing the assistance they provide the court is the answer. We believe the solution is to look for efficiencies in the manner in which the evidence is given. Although there is no single fix to the problems faced, we hope that one change-use of Rule 12-2(8)(f) to provide more focused and streamlined proceedings will be adopted. We have excellent judges; let them use their talents to make a difference.

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[1] *R v Mohan*, [1994] 2 SCR 9 at 23, 31.
[2] Rule 11-2(1).
[3] *Vancouver Community College v Philips, Barratt* (1987), 20 BCLR (2d) 289 (SC).
[4] *R v Abbey*, [1982] 2 SCR 24 of 42.
[5] 2012 ONSC 4380 at para 16.
[6] *Evidence Act*, RSBC 1996, c 124, ss 10 to 12, *Supreme Court Civil Rules*, Rule 11-6(3)
[7] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at par 23 [*White Burgess*].
[8] *R V Mohan*, supra note 1.
[9] *R V Abbey*, 2009 ONCA 624, [2009] OJ No 3534 at par 76.
[10] Rule 11-6(8).
[11] (1554), 1 Plowd 118 at 124.
[12] (1782), 3 Doug 157 [*Folkes*].
[13] (1876), 6 Ch D 415.
[14] (1839, 1843) 19 Cl & Fin 154, 8 ER 700 (UKHL).
[15] See *White Burgess*, supra note 7 at para 1.
[16] *R v Mohan*, *supra note* 1 at 21.
[17] *R v Ryan* (1993), 26 BCAC 43, 80 CCC (3d) 514 at para 7.
[18] *R v J (IJ)*, [2000] 2 SCR 600 at para 25.
[19] *R v Abbey*, 2009 ONCA 624 at para 73.
[20] *Supra* note 7.
[21] For judicial commentary on this phenomenon and its effects, see *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*], and *Trial Lawyers Association of British Columbia v British Columbia*, 2014 SCC 59, [2014] 3 SCR 31.
[22] *Hryniak*, supra note 21 at para 29.
[23] Rule 1-3(1).
[24] Rule 1-3(2).
[25] A similar sentiment was expressed by Mr. Justice Brown of the Ontario Superior Court of Justice in *George Weston Ltd. v Domtar Inc*, 2012 ONSC 5001.
[26] See *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, [2011] 2 SCR 387 at para 76.
[27] [2000] 2 SCR 275 at para 56.
[28] This concern is reflected in part One of "A Modern, Transparent Justice System", the provincial white paper issued by the Ministry of Justice in October 2012.
[29] See *Hryniak*, supra note 21 at para 26.
[30] R v Lyttle, [2004] 1 SCR 193 at para 1.
[31] *Ibid.*
[32] *Ibid* at paras 2, 41, 42.
[33] *Ibid* at para 44.
[34] *Ibid* at paras 44, 50, 51.
[35] *Ibid* at paras 45, 51.
[36] *Roche v Pijawka* [1997], 33 OR (3d) 700 (Gen Div).
[37] See, for example, *Kristenseh v Schisler*, 2014 ONSC 1976.
[38] *George Weston Ltd v Domtar Inc*, supra note 25 at para 16.
[39] *Hryniak*, supra note 21.

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