INFORMATION PACKAGE

CONCERNING

EXPERT OPINION EVIDENCE IN BRITISH COLUMBIA

EFFECTIVE

July 1, 2010

Clayton Shultz & Associates

CONTENTS

INTRODUCTION

Effective July 1, 2010, the existing *Supreme Court Rules, B.C.*, will be repealed and new *Supreme Court Civil Rule*s ("the *Rules*") will come into effect. This initiative was developed during a process that began in 2006 when the Civil Justice Reform Working Group ("the Working Group") was formed. Co-chaired by the then Chief Justice of the Supreme Court, Donald Brenner, and then Deputy Attorney General of British Columbia, Alan Seckel, the Working Group focused on reducing the time, cost, and complexity of civil litigation in British Columbia. Similar initiatives have been undertaken nationally, by the Canadian Bar Association, in most Canadian provinces, as well as in Great Britain and Australia. The groups addressing these issues came to remarkably similar conclusions, including a view that the increasing use and cost of expert opinion testimony had become a major factor in the time, cost, and complexity of civil litigation.

Accordingly, the Working Group proposed that the *Supreme Court Rules, B.C.* be rewritten to set out a significantly more rigorous environment for experts' appointment, primary duty, report content, timing of delivery, supporting document disclosure, and testimony. The Working Group's recommendations were largely accepted and included in Part 11 of the *Rules* that will become effective July 1, 2010.

Many of the *Rules* contain provisions such as "unless the court otherwise orders" in addition to the overarching provision of Rule 11-7(6), which confirms the court's ability to set aside *any* aspect of Part 11. The permissive clauses, other than 11-7(6), have been omitted from this summary in the interest of brevity.

Certain words and phrases have been italicized to highlight provisions that are, in our opinion, counter intuitive. Such emphasis does not appear in the original.

Although we have prepared this attached summary with care, readers are reminded that it has been prepared for information purposes only and not as a substitute for Part 11 itself.

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MAJOR CHANGES

Experts must now certify their duty in writing to the court in every report they provide.

Report types are defined as a “report” (i.e. initial opinion); response; joint; supplemental, and additional.

Deadline for initial reports have increased to 12 weeks and for response (i.e. rebuttal) reports they have been set for 6 weeks. The times expire on the scheduled trial date, not the date upon which the expert is expected to testify.

Experts who are not identified in a case planning conference cannot testify.

Examination in chief will be restricted to clarifying terminology or to make the report more understandable.

The court may appoint its own expert or order the appointment of a joint expert.

Minimum contents of an expert’s report are prescribed.

The contents of a file subject to demand by a party adverse in interest *may* be reduced.

If a cross examination is not helpful to the court, the cost of the expert’s attendance may be ordered.

Joint experts must enter into an agreement settling seven issues before being appointed.

Experts in addition to joint experts cannot testify without leave of the court on the same issue as opined on by the joint expert.

Objections by a party to the admissibility of expert opinion evidence must be made 3 weeks before the scheduled trial date.

The courts have virtually unfettered discretion to change or dispense with any aspect of Part 11.

Certain rules require the expert to acknowledge an awareness of Part 11 and to personally ensure the delivery of his or her report to the appropriate party(s).

EXPERT EVIDENCE - DATES OF IMPORTANCE

Document		Deadline [*Rule*]	
List of witnesses		The earliest of 28 days before the scheduled trial date, the trial management conference, or the case planning conference [7-4(1)(a)]	
Application to call an additional expert		21 days after receipt of the report of a jointly appointed expert [11-3(8)]	
Initial expert report		84 days before the scheduled trial date [11-6(3)]	
Responding report		42 days before the scheduled trial date [11-6(4)]	
Particular expert's documents		As soon as possible [11-6(8)(a)]	
Expert's file		14 days after the request is received or as soon as possible [11-6(8)(b)]	
Objection to the admissability of an expert report		21 days before the scheduled trial date [11-7(2)]	
Demand by a party of record for the attendance of an expert at trial for cross examination		21 days after being served with the expert's report [11-7(2)]	

This summary contains interpretations and assumptions; it is for information purposes only and must not be relied upon as a substitute for Part 11 of the *Supreme Court Civil Rules* . Part 11 is attached hereto. We accept no responsibility for the consequence of any loss sustained by any person's claiming reliance on this summary.

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TERMS HAVING SPECIFIC MEANING IN PART 11			
Additional expert		One whom a party wishes to call, in addition to a joint expert, on an issue *and* to whom the court has granted leave to tender a report [11-3(7)]	
Common expert		An expert retained by two or more parties who are not adverse in interest	
Court's own expert		One appointed by the court on its own initiative [11-5]; this category is distinct from court appointed experts under 11-3(5)	
Joint expert		One appointed by agreement between two or more parties [11-3(1)] or on application to the court [11-3(5)(b)]	
Own expert		One apponted by a party [11-4]	
Provide		The act of delivering a report to a party and the registry, if applicable	
Report		The initial report provided by an expert [11-6(1)]	
Response report		A report tendered in response to an initial report [11-6(4)]	
Serve		The act of delivering an expert's report by a party to other parties of record	
Supplementary report		A report prepared by an expert after the initial and/or the response report has been served when there is a material change in the expert's opinion	
Tender		The act of seeking the court's permission to enter a report into evidence at trial	

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Beyond Numbers

Published by the Institute of Chartered Accountants of British Columbia

New Rules for Expert Witnesses

On the Cover

What you should know about the new Rules of Court before providing expert testimony

In this issue

CA

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Cover Story

Expert Evidence in British Columbia: The New Rules of Court

By Clayton G. Shultz, FCA, FCBV, FCIArb, CArb[1]

On July 1, 2010, new Rules of the Supreme Court of British Columbia will take effect, some of which pertain to expert testimony.[2] The product of seven years' effort by the BC Justice Review Task Force,[3] the new Rules represent a dramatic revision of the existing Rules of Court and are intended by the authors to provide a legal system that is both affordable and expedient.

CAs who provide expert opinions to assist the courts must be aware of the changes from the present system to ensure that their reports and testimony meet all requirements. In the past, the courts have found several of our members deficient in this regard, and ensuring that this does not happen in future will be more challenging under the new Rules, as they are significantly more complex than the existing ones. Timelines, report content, duties, admissibility,[4] and so on are all prescribed in the new Rules, and a deficiency in meeting any *one* of these requirements could cause a judge to reject an expert's work.

Criticism of a CA in a public judgment can be very damaging to the reputation of both the CA and the CA profession. The ICABC considers deficiencies in this arena to be very serious, and its Professional Conduct Enquiry Committee (PCEC) will launch a thorough investigation whenever such matters come to its attention, which can prove very costly for a CA—both financially and professionally.

Given that the new Rules will be in force in less than a year, most new engagements will be subject to these new Rules when or if any such cases are tried. Therefore, CAs who are engaged as experts should now prepare their work in accordance with the new Rules. Without exception, work prepared under the new Rules will satisfy the old ones.

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[1] I am indebted to David Wende, a partner in Alexander Holburn LLP, for both his contribution to and review of this article.

[2] Expert testimony is currently governed by Rule 40A of the *Rules of Court*, which may be accessed at www.courts.gov.bc.ca.

[3] The Task Force was co-chaired by the recently retired Chief Justice of the Supreme Court, the Honourable Donald Brenner, and the Deputy Attorney General of BC, Allan Seckel, QC.

[4] Admissibility refers to the fact that all evidence, including that given by experts, is subject to challenge by the opposing party. If the challenge succeeds, the merits of the evidence will not be considered by the judge. A report that is ruled inadmissible is valueless.

Accordingly, CAs are advised to read the new Rules in their entirety,[5] taking particular note of the changes, which are contained in Part 11.

This article provides an overview of Part 11, as well as some commentary on its practical implications.[6]

First, a bit of history: In November 2006, the BC Justice Review Task Force published a 139-page report entitled *Effective and Affordable Civil Justice*. Under the heading "Limiting the Use of Experts," the Task Force report, quoting an Australian jurist, states that one of the significant cost items in litigation is the use of expert witnesses. According to the report, change is needed for three main reasons: adversarial bias and the polarization of experts; difficulties faced by judges in determining complex issues in the face of conflicting expert evidence; and the high cost of expert participation in the legal process.[7]

In July 2007, the Task Force prepared and distributed a concept draft of the proposed new Rules.[8] This concept draft was opposed by many senior lawyers, who saw the procedural limitations designed to reduce the expense of litigation as detrimental to counsel's ability to uncover the truth. Some of these concerns were subsequently addressed in modifications proposed in May 2008, and the new Rules became law on July 10, 2009, following extensive consultation with the legal community and other interested groups. Again, these new Rules will be effective July 1, 2010.

Witnesses of fact vs. expert witnesses

In discussing expert testimony, it is important to distinguish between witnesses of fact and expert witnesses. The general rule is that witnesses of fact are meant to describe "precisely and exactly his or her observations and no more."[9] In cases where the facts

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[5] The new Rules can be accessed directly at www.ag.gov.bc.ca/justice-reform-initiatives/publications/pdf/CivilRules07-07-09.pdf.

[6] Readers should bear in mind that the trial judge has express discretion to amend many but not all of the new Rules and Subrules, and has overarching discretion at trial to dispense with one or more of the requirements of Part 11—"if the interests of justice require it." Cautious practitioners will remember that the needs of the *parties*, not the expert, will govern the granting of such relief.

[7] BC Justice Review Task Force, *Effective and Affordable Civil Justice*, 2006 (p. 30).

[8] For the Task Force report, the new Rules, public commentary, and other data, go to www.bcjusticereviewforum.ca/.

[9] John Sopinka, Sidney N. Lederman, and Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Butterworths Canada, 1999), p. 605.

are technical or scientific and beyond the ability of the court to make a finding of fact without assistance, the courts have recognized an exception to the general rule and admitted opinions that are "admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury."[10] Such evidence, referred to as "opinion evidence," may be tendered only with the permission of the trial judge.

A CA testifying about the audit procedures that they have performed is a witness of fact; the same CA critiquing or defending the work of another is, in this context, an expert giving opinion evidence. Part 11 does not apply to a CA who is a party to the litigation[11] or to any other witness of fact.

Duty of an expert

In 1994, the Supreme Court of Canada ruled that if *expert* evidence is to be admitted, it must be: (1) relevant to the matter at issue; (2) necessary to assist the judge or jury; (3) not in violation of an exclusionary rule[12]; and (4) given by a properly qualified expert.[13]

New Rule 11-2 states that an expert giving an opinion to the court "has a duty to assist the court and is not to be an advocate for any party." As well, an expert's report must include a written Certification that he or she is: "(a) aware of [that] duty..., (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."

CAs accepting engagements as experts should include the foregoing Certification in their engagement letters, and require both client and counsel to acknowledge in writing their understanding and agreement with the CA's duty as an expert to the court and to the profession.

In considering the responsibilities of an expert under new Rule 11-2, CAs would be well advised to keep in mind the foreword to the ICABC Rules of Professional Conduct with regard to *all* of their professional services. The foreword stipulates that: *"Members do not allow their professional or business judgment to be compromised by bias, conflict of interest or the undue influence of others. The public expects that members will bring objectivity and sound professional judgment to their professional services. It thus becomes essential that a member will not subordinate professional judgment to external influences or the will of others."*

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[10] *R. v. Abbey* [1982], 2 S.C.R. 24.

[11] Subrule 11-1 (1) (b).

[12] All of the time limitations in Part 11 are exclusionary rules.

[13] *R. v. Mohan* [1994], 2 S.C.R. 9.

Appointment of experts

An expert may be appointed separately by the litigating parties; jointly by agreement between the parties; jointly by the trial judge—either on application by a party or on the judge's own initiative; or by the court as its own expert.[14] When more than one expert is appointed to testify on a specific issue, the court may order the experts to confer before serving their respective reports.[15]

When parties jointly appoint an expert, or when a judge appoints a joint expert or court expert, these actions take place during a case planning conference (CPC).[16] Given that a CPC may occur on the request of either party[17] or on the initiative of the court,[18] it is unlikely that many cases will proceed to trial in the absence of one or more CPCs. It is important to note that when a CPC is held, no expert evidence, including that of a party-appointed expert, may be tendered unless provided for in a case planning order.[19]

Experts appointed jointly

The procedures include the following:

1. As a precondition to the joint appointment, the parties and the expert must agree in writing to, among other things: the issue that the opinion may help to resolve; facts or assumptions agreed by the parties; facts not agreed but which a party wishes the expert to consider; the questions to be considered; the timing of the delivery of the report; and the fee arrangement. Absent agreement on these matters, the court is empowered to issue the appropriate orders.[20]
2. Both parties may cross-examine an expert appointed jointly or by the court.[21]
3. The jointly appointed individual is the only expert who can testify on the issues included in the agreement,[22] although the court may grant leave for the evidence of an additional expert if that evidence is deemed "necessary to a fair trial."[23]

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[14] 11-4, 11-3 (1), and 11-5.
[15] 5-3 (1) (k) (iii).
[16] 11-3 (1) cross-referenced to 5-3 (1) (k).
[17] 5-1 (1).
[18] 5-1 (2).
[19] 11-1 (2); note that all judicial appointments of joint experts or the court's own expert will be by way of an order of the court made at or following a CPC.
[20] 11-3 (5).
[21] 11-3 (10) and 11-5 (6).
[22] 11-3 (7).
[23] 11-3 (9).

4. The expert must agree to serve.[24]

The advantages of a court appointment are twofold: There can be no question of the independence and objectivity the expert brings to the engagement as a disinterested individual whose sole purpose is to assist the court; and the expert is wholly protected from any liability for any error in connection with the opinion under the doctrine of "absolute privilege."

At any stage of the litigation, the court, following consultation with the parties, may appoint its own expert and may give directions that include the questions to be addressed, the requirement of the parties to cooperate with the expert, and the fee arrangement. Here again, the appointed expert must formally accept the assignment, and both parties are entitled to cross-examine. *Note:* The fact that an individual or firm has previously tendered a report to one of the parties in connection with the case at hand is not a bar to the appointment of that individual or firm by the court.[25]

Expert reports

An expert's report that is to be tendered as evidence at trial must be signed by the expert and include the Certification described earlier in this article, together with the following information[26]:

(a) The expert's name, address, and area of expertise;
(b) The expert's qualifications and employment and educational experience in their 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) Their opinion respecting each issue and, if various opinions are given, a summary of these opinions and the reasons for the expert's own opinion within that range;
(f) The expert's reasons for their 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 them to form the opinion; and

[24] 11-3 (4) (b) (2).
[25] 11-5 (5).
[26] 11-6 (1).

iii. A list of every document, if any, relied on by the expert in forming the opinion.

The foregoing list is arranged differently from the organizational pattern favoured by some quantitative experts; nevertheless, I recommend that you either use this list as a template for the content of reports delivered under the new Rules or include it in the reports and cross-reference it therein.

Notification

An expert's report must be delivered to all parties of record in the litigation no later than 84 days (12 weeks) before the *scheduled trial date*.[27] This timeline is a change from Rule 40A (3) of the current Rules, which requires that a report be served at least 60 days before the expert *testifies*. Another change relates to Rule 40A (11) of the current Rules, which provides for the "convenience and other commitments of the expert"; the new Rules do not contain a similar provision, however, they do require that notice be given to the expert regarding the scheduled trial date, and specify that the expert must attend for cross-examination.[28]

Responding reports

Unlike some provinces that prescribe the contents of a responding report differently from the initial report, the default position in BC is the above listing of the initial expert report. This issue can, and should, be addressed at a CPC. Responding experts should confer with their instructing lawyers to ensure that the scope of their work is appropriate to the case and included in the case planning order. Responding reports must be served at least 42 days before the scheduled trial date.[29] In all other respects, responding reports must conform to the Rules applicable to initial reports.

Admissibility issues

If a party objects to the admissibility of an expert report, notice must be served on the other party on the earlier of the date of the trial management conference and the date that is 21 days before the scheduled trial date.[30] This provision should forestall the delay

[27] 11-6 (3); note that time deadlines are now divisible by seven to avoid the confusion of a deadline falling on a weekend.
[28] 11-6 (9).
[29] 11-6 (4).
[30] 11-6 (10) and 22-1 (7) (c).

and expense arising from an inadmissibility ruling regarding crucial evidence on the first day of trial.

If an expert's report "changes in a material way," the expert must, "as soon as practicable," prepare a supplementary report, the contents of which must include the Certification, a description of the change, and the reasoning behind it.[31] An expert whose initial report meets the prescribed deadline but who later files a supplementary report to bolster the original, *unchanged* opinion, might face an adverse ruling in respect of the admissibility of the supplementary report.

Supporting documents

The party who serves a report must do the following[32]:

(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; 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 their opinion.

(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.

Since 1987, the requirement of an expert to share their file with the opposing party has been governed by what has become known as the rule in *Vancouver Community College v. Phillips Barrett*.[33] In that decision, Justice Finch (now Chief Justice of British

[31] 11-6 (6) & (7).
[32] 11-6(8).
[33] 20 B.C.L.R. (2d) 289.

Columbia) ruled that an expert loses legal privilege[34] when he or she testifies in court, and, with one exception,[35] thereby makes the entire contents of their file available to the opposing party. The communication in question related to early stage draft reports.[36]

The BC Justice Review Task Force considered that the current interpretations of the ruling in *Vancouver Community College v. Phillips Barrett* increased costs, and proposed to modify the application of the ruling by limiting the type of documents to be made available to the opposing party for review. Subrule 11-6 (8) (a) of the new Rules gives effect to that intention. However, the wording of the following subrule, Subrule 11-6 (8) *(b)* provides that the expert must "make available to the requesting party for review and copying the contents of the expert's file…" A CA's working paper file consists of significantly more data than contemplated in Subrule 11-6 (8) (a). In addition, those CAs who are also members of the Canadian Institute of Chartered Business Valuators (CICBV) are subject to specific requirements with regard to file content.[37]

Therefore, pending judicial clarification, it would be prudent for practitioners to consider dividing their files into three categories: one containing only the Subrule 11-6 (8) (a) documents; one that complies with the professional imperatives of the expert's affiliation(s); and one containing material over which counsel may wish to claim privilege. *All* files should be delivered to the expert's instructing lawyer well before trial.

Testifying in court

Subrule 11-7(5) now codifies what had, in theory, been the law of British Columbia since 1985, but which was not applied uniformly at trial[38]: A report or supplementary report that has not been prepared and served in accordance with the relevant Rules will not be admitted into evidence except by order of the court.[39] In the case of reports that have been served and admitted, unless attendance at trial has been demanded by the

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[34] Legal privilege refers to communications between a lawyer and their client relating to the litigation for which the lawyer was retained. Such communications cannot be disclosed at trial. Communications with an expert, being the lawyer's agent, are similarly protected until or unless they testify.

[35] The exempted documents related to the expert's advice to counsel regarding the cross examination of the opposing party's expert.

[36] 20 B.C.L.R. (2d) 289, paragraph 29.

[37] CICBV Standard 130.

[38] (1985), 62 B.C.L.R. 253 (S.C.).

[39] 11-7 (1)

opposing party within 21 days following delivery, the expert need not attend at trial. Furthermore, he or she *must not* testify unless the party tendering the report considers it necessary to clarify terminology in the report or to otherwise make the report more understandable.[40] Any direct examination of that expert is limited to those matters. Accordingly, an expert will not be afforded the opportunity to shore up a deficient report at trial.

Knowledge is key

It is an unfortunate reality that, despite the imperatives of objectivity, integrity, and competence in the CA profession, a few of our members have been found wanting when giving their opinions to the court. In the past, some judges have refrained from criticizing the professionalism of those who gave opinion evidence; now, however, they are becoming more vocal in articulating instances of bias and incompetence.

Judicial criticism of one CA, particularly in matters of objectivity and bias, is potentially harmful to all CAs. Knowing and adhering to the new Rules will help ensure that we do not incur such criticism, nor the potential costs and professional risks associated with a PCEC investigation.

Sidebar

Practical advice for the expert witness

1. Carefully prepare an engagement letter, and ensure that both the lawyer and the client sign it. In this letter, you should include the wording of the Certificate that will appear in the report, and stipulate that:
   a. No part of your fees as an expert is contingent upon the outcome of the issue; and
   b. The outcome of your work might not coincide with the needs of the client, and, even if it does, there is no guarantee that the presiding judge will agree with this outcome.

2. The utility of an expert's opinion is directly proportionate to the accuracy of the underlying facts on which the opinion is based. Ideally this information is contained in a memorandum from instructing counsel that sets out *all* of the facts on which

[40] 11-7 (5) (a) (ii).

you are meant to rely, and to attach this memorandum as an appendix to your final report .Alternatively, you should require that the lawyer confirm the facts of the case before you come to your final opinion.

3. Remember that the deadline for your expert's report pertains to the delivery of the report to the opposing side. You must have this material in the lawyer's hands well before the deadline to ensure that you've addressed the proper questions, included all the relevant facts, and so on. (Lawyers should be encouraged to cross-examine their own witnesses prior to trial, but this seldom happens.)

4. Be careful with regard to the ICABC's Council Interpretation 201.1/6—criticism of a professional colleague—which requires disclosure *to an opposing colleague* of a *proposed* criticism unless *restricted in writing*. Taken literally, such disclosure could violate legal privilege and frustrate the litigation process. The solution is to obtain the requisite written restriction from the lawyer at the outset of the assignment, before you know if you are going to include criticism in your report. Rule 211.2 of the ICBC Rules eliminates the necessity for the expert to report to the ICABC any apparent breaches by a CA who is assisting the opposing party *unless* the appropriate clearance has been obtained first.

5. Make sure that you are retained by the lawyer, not by the client. If the fee arrangement must be made directly with the client, this arrangement should be set out in the engagement letter. If you are engaged by the lawyer, you act as the lawyer's agent, and communications between you and the lawyer's client are considered privileged—at least until you testify; otherwise, they are not privileged. *Note:* CAs should *never* accept engagements from clients who are acting for themselves in litigation. The reasons are numerous, and include potential violation of the *Legal Profession Act* and insurability issues.

EXPERT EVIDENCE IN THE SUPREME COURT OF BRITISH COLUMBIA

Rule Number	
5-1(6)(b)	Form 20 case plan proposal will include expert witnesses.
5-3(1)(k)	Case plan orders *may* include evidence from one jointly instructed expert; number of experts who may be called; date of report service; issues on which the expert may be called.
7-4(1)(a)	Experts will be included in the list of witnesses on or before the earlier of the case plan order, trial management conference, or 28 days before the scheduled trial date.
7-5(2)	Experts are *generally* not subject to pre-trial examination.
7-5(3)(b)	Affidavit for an application for a pre-trial examination of a witness
9-7(5)(e)	Summary trial application will include expert's report if it conforms to Rule 11-6(1).
9-7(8)(a)	Application for judgment in a summary trial will include an expert report.
9-7(8)(b)	Reports following those served under 9-7(8)(a)&(b) are admissible only if they would be admitted as rebuttable evidence at trial or respond to another application.
9-7(12)(b)	At summary trial, the court may order an expert to attend for cross examination before the court *or another person*.
APPLICATION OF PART 11	
11-1(1)	Part 11 does not apply • to summary trials, except as provided in Rule 9-7, or • when the expert's conduct is at issue.
11-1(2)	No expert opinion may be tendered unless provided for in a case planning order.

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EXPERT'S DUTY	
11-2(1)	The expert's duty is to assist the court.
11-2(2)	Experts must, in *any* report that they prepare, certify that they (a) are aware of the duty to assist the court [11-2(1)]; (b) have made the report in conformity with that duty; and (c) will testify in conformity with that duty.
JOINTLY APPOINTED EXPERTS	
11-3(1)	If two or more parties wish or are ordered to jointly appoint an expert, the following issues must be settled before the appointment: (a) Expert's identity (b) Issue (c) Agreed facts or assumptions (d) Assumptions of fact that a party wants the expert to consider (e) Questions for the expert (f) Timing (g) Responsibility for fees and expenses.
11-3(2)	If the parties agree on the issues in 11-3(1), the parties *and* expert *must* agree in writing. See 11-3(6).
11-3(3)	If the parties *do not agree* on the elements in 11-3(1), any party can apply to settle the terms of the expert's appointment by an application under Part 8, at a case planning conference, or applying to amend the case planning order.
11-3(4)	An application under 11-3(3) must (a) identify the matters in dispute, (b) if they have not agreed on an expert, propose the names of one or more alternates who (i) are qualified and (ii) *have been made aware* of Part 11, and (c) state *any* connection between the expert and *any* party.
11-3(5)	On an application under 11-3(4), the court may (a) settle the terms of the appointment; (b) appoint an expert whether or not he or she was on the 11-3(4)(b) list;

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	(c) make or amend a case plan order.
11-3(6)	The parties and the expert must all agree in writing to the terms agreed or ordered, and the expert must signify that he or she is aware of Part 11 and consents to the appointment. A copy of the agreement must be served on all parties of record.
11-3(7)	Nobody but the joint expert can testify as to an agreed issue without leave of the court.
11-3(8)	An application for leave to tender a report from an additional expert under 11-3(7) must be served within 21 days of the receipt of the joint expert's report.
11-3(9)	The court may grant leave under 11-3(8) if it is satisfied that the evidence of the additional expert is *necessary to ensure* a fair trial.
11-3(10)	Any party of record, including the appointing parties, can cross-examine a joint expert.
11-3(11)	Parties who are not adverse in interest may appoint a common expert.
OWN EXPERTS	
11-4(1)	Parties to an action can appoint their own experts.
COURT'S OWN EXPERT	
11-5(1)	The court may appoint its own expert on its own initiative at any stage of the action if it considers that such an expert can help resolve an issue.
11-5(2)	The court may (a) ask for nominees from the parties who are qualified and are aware of Part 11; (b) enquire as to any connection between a nominated expert and a party; (c) receive materials and make enquiries in order to select an expert.
11-5(3)	The court is not limited to the parties' nominees.

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11-5(4)	The expert must consent to the appointment after he or she has been made aware of the contents of Part 11.
11-5(5)	The court may appoint an expert even if he or she has already given a report on an issue in the action.
11-5(6)	Each party of record may cross-examine the court's own expert.
11-5(7)	After consultation with the parties, the court *must* (a) settle the questions to be addressed by the expert; (b) give the expert appropriate directions; (c) direct the parties to facilitate the expert's ability to provide his or her opinion.
11-5(8)	The court may make additional orders with respect to the examination of the physical or mental condition of a party or the inspection of property.
11-5(9)	The remuneration of the expert *must* be fixed by the court and consented to by the expert; it must include a fee for the report and supplementary reports and for each day of required attendance in court.
11-5(10)	The court may order the expert's remuneration to be paid at the time ordered and/or security for his or her remuneration.
11-5(11)	The court-appointed expert must (a) prepare a report in compliance with Rule 11-6 and send it to both the registry and the parties of record in compliance with the ordered deadline, and, (b) if his or her opinion changes in a material way after it is delivered, prepare a supplementary report in compliance with 11-6 and deliver it as in (a) above.
11-5(12)	Reports and supplementary reports under Rule 11-5 *must* be tendered as evidence at trial.
EXPERT REPORTS	
11-6 (1)	An expert's report tendered as evidence must be signed and include the Rule 11-2(2) certification and the following: (a) his or her name, address, and area of expertise; (b) qualifications, employment, and education in his or her

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	area of expertise; (c) instructions given; (d) nature of the opinion and each issue in *the proceeding* to which the opinion relates; (e) opinion on each issue; if a range of opinions is given, a summary of the range, and the reasons for the expert's opinion within that range; (f) the reasons for the opinion, including (i) factual assumptions, (ii) *any* research leading to the opinion, and (iii) a list of *every* document relied on.
11-6(2)	The assertion of the expert's qualifications is evidence of them.
11-6(3)	Except for a court appointed expert, the expert's report must be served on each party to the action at least 84 days (12 weeks) before the scheduled trial date along with notice that the report is being served under this subrule (a) by a party tendering a report from an additional expert [11-3(9)]; (b) by each party who intends to tender a jointly appointed expert report.
11-6(4)	A party who intends to tender a report responding to one served under the previous subrule must do so at least 42 days (6 weeks) before the scheduled trial date along with notice that the report is being served under this subrule.
11-6(5)	If, after the report of a jointly appointed expert [11-6(3)(b)] is tendered, there is a material change in the expert's opinion, (a) the expert must prepare a supplementary report as soon as practicable *and ensure that it is provided to* • a party who, with leave of the court, intends to tender at trial a report in addition to that of the joint expert [11-6(3(a)], or • each (or both) of the parties who intend to tender the report at trial [11-6(3)(b)]; (b) the party must promptly serve it on every other party of record.
11-6(6)	If, after the report of an additional expert [11-6(3)(a)] or a responding report [11-6(4)] is served and the party intends to tender the report at trial, there is a material change in the expert's opinion,

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	(a) the expert must prepare a supplementary report as soon as practicable and provide it to the party [his or her client], and (b) the party must promptly serve it on every other party of record. *Note: The heading for this subrule is "Supplementary report of own expert," but it is not cross referenced to 11-4. Presumably the words "or otherwise" in 11-3(a) encompasses own experts.*
11-6(7)	A supplementary report prepared by a court's own expert [11-5(11)], a jointly appointed expert [11-6(5)(a)] & [11-6(3)(b)], or a responding report [11-6(6) must (a) be identified as a supplemental report, (b) be signed by the expert, (c) include the 11-2 certification, and (d) explain the change and the reasons for it.
11-6(8)	If a report is provided to a party from an additional expert [11-3(9)] or an own expert [11-4], the receiving party must (a) promptly *after being asked*, serve whichever of the following documents relating to the report have been requested: (i) written statements of the facts upon which the report was based, (ii) a record of any independent observations by the expert, (iii) any data compiled, and (iv) the results of any test or inspection that the expert *has relied on;* (b) *if asked* by a party of record, make available his or her file for review and copying, (i) if less than 14 days before the trial date, as soon as possible; (ii) otherwise, 14 days before the scheduled trial date. *Note: subrule (b) is not cross referenced to subrule (a), so subrule (b) might mean the entire file, including drafts, correspondence, and so on.*
11-6(9)	As soon as the scheduled trial date is set, the person required to serve the report under Rule 11-6 must notify the expert that he or she *may*

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	be called for cross examination.
11-6(10)	A party who objects to the admissibility of an expert report must serve notice of that objection on the earlier of the date of the trial management conference or 21 days before the scheduled trial date.
11-6(11)	If, under 11-6(10), a reasonable notice of an objection to the admissibility of the report could have been given, the objection will not be permitted *at trial*.
EXPERT OPINION EVIDENCE AT TRIAL	
11-7(1)	*Other than the court's own expert* [11-5], opinion evidence must not be tendered at trial unless (a) the opinion evidence has been included in a report prepared and served in accordance with 11-6, and (b) supplementary reports prepared by the *court's own* expert [11-5(11)], joint experts [(11-6(5)], own experts [11-6(6)], additional experts [11-6(6)(a) & 11-3(9)], or responding experts [11-6(4) &11-6(6)] have been prepared and served under 11-6(5) to (7). *Note: The apparent contradiction between the introduction to this subrule and 11-7(1)(b) is that a court's own expert may be unable to comply with 11-6 but should always be able to comply with the subrules relating to supplementary reports*.
11-7(2)	The following apply to a report or supplementary report of an expert: (a) If, within 21 days of having been served with a report or supplementary report, a party of record demands the attendance of the expert at trial [11-7(3)(a) below], the report must not be tendered at trial unless the *appointing party* calls the expert to be cross examined; (b) If no demand is made for the attendance for cross examination [11-3] of an expert, however appointed, within 21 days, (i) the expert need not attend at court, and (ii) the report, if admissible, may be tendered and accepted as evidence.
11-7(3)	A party of record may, within 21 days, demand that an expert whose report has been served in compliance with 11-6 attend at trial for cross examination as follows: (a) If the expert was appointed jointly [11-3] or by the

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	court as its own expert [11-5], *any party of record* may demand the attendance for cross examination by any party of record; (b) If the expert was appointed by a party [11-4] or as an additional expert [11-3(9)], any party of record who is *adverse in interest to the party who appointed the expert* may demand the attendance of the expert at trial for cross examination.
11-7(4)	If the court is of the opinion that a cross examination by demand [11-7(3)] was not of assistance, the party who made the demand may be ordered to pay the other party or the expert an amount that the court considers appropriate.
11-7(5)	A party who appoints an additional expert [11-3(9)] or its own expert [11-4] (a) may not call an expert to give oral evidence unless (i) the expert's attendance has been demanded [11-7(3)] or (ii) the party believes that direct examination is necessary to • clarify terminology or • make the report more understandable; (b) may not cross examine the expert.
11-7(6)	The court may allow an expert to provide evidence even if one or more aspects of Part 11 have not been complied with if (a) one or more of the parties have learned facts that could not reasonably have been included in a report or a supplementary report within the Part 11 time limitations; (b) noncompliance 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 amount of time to respond; (c) the interests of justice require it.

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PART 11 – EXPERTS

RULE 11-1 – APPLICATION OF PART 11

Application of this Part

(1) This Part does not apply to

(a) summary trials under Rule 9-7, except as provided in that rule, or

(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, if a case planning conference has been held in an action, 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 11-2 – DUTY OF EXPERT WITNESSES

Duty of expert witness

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

Advice and certification

(2) If an expert is appointed under this Part by one or more parties or by the court, 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 11-3 – APPOINTMENT OF JOINT EXPERTS

Appointment agreement

(1) If 2 or more parties who are adverse in interest wish to or are ordered under Rule 5-3 (1) (k) to jointly appoint an expert, the following must be settled before the expert is appointed:

(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) of this subrule 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;

(g) responsibility for fees and expenses payable to the expert.

Appointment by parties

(2) If the parties agree on the matters referred to in subrule (1), they and the expert must enter into an agreement under subrule (6).

Application to court

(3) If the parties referred to in subrule (1) are unable to agree on the matters referred to in subrule (1), any party may apply, on an application under Part 8, at a case planning conference or at an application to amend the case plan order, to settle the terms of the expert's appointment.

Application materials

(4) Each of the parties referred to in subrule (1) must submit to the court, on any application for an order referred to in subrule (3), material that

(a) identifies the matters referred to in subrule (1) (a) to (h) that are in dispute and states his or her position on those matters,

(b) if the parties are unable to agree on the identity of the expert, names 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 expert, and

(c) states any connection known to the party between a person named under paragraph (b) and a party to the action.

Powers of court

(5) On an application under subrule (3), the court may do one or more of the following:

(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, identify the person to be appointed as expert, whether or not that expert is named under subrule (4) (b);

(c) if the application is made at a case planning conference or at an application to amend a case plan order, make or amend a case plan order to reflect the orders made under paragraphs (a) and (b) of this subrule.

Agreement

(6) The parties referred to in subrule (1) must enter into an agreement that reflects the terms agreed on under subrule (2) or ordered under subrule (5), 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 served, promptly after signing, on every party of record who is not a party to the agreement.

Role of expert appointed under this rule

(7) Unless the court otherwise orders on an application referred to in subrule (8), 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.

Notice of application

(8) A party wishing to apply under subrule (7) for leave to tender the evidence of an additional expert at trial must, within 21 days after receipt of the joint expert's report, serve on all parties of record the documents that under Rule 8-1 (7) are required for the application.

Additional experts

(9) The court may, on an application referred to in subrule (8) of this rule, grant leave for the evidence of an additional expert to be tendered at trial if the court is satisfied that the evidence of that additional expert is necessary to ensure a fair trial.

Cross examination

(10) Each party of record, including each of the appointing parties, has the right to cross-examine at trial a joint expert appointed under this rule.

Common experts

(11) Nothing in this rule prevents parties who are not adverse in interest from appointing a common expert.

RULE 11-4 – APPOINTMENT OF OWN EXPERTS

When each party may retain their own experts

(1) Subject to Rule 11-1 (2), parties to an action may each appoint their own experts to tender expert opinion evidence to the court on an issue.

RULE 11-5 – APPOINTMENT OF COURT'S OWN EXPERT

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.

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,

(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 appoint an expert under this rule whether or not that expert was named by a party under subrule (2) (a).

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 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 has the right to cross-examine the expert.

Directions to expert

(7) The court, after consultation with the parties of record, must

(a) settle the questions to be submitted to any expert appointed by the court under this rule,

(b) give the expert any directions the court considers appropriate, and

(c) give the parties of record any directions the court considers appropriate to facilitate the expert's ability to provide the required opinion.

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 under Rule 7-6 for

(a) an examination with respect to the physical or mental condition of a party, or

(b) inspection of property.

Remuneration of expert

(9) The remuneration of an expert appointed under this rule

(a) must be fixed by the court and consented to by the expert, and

(b) may include

(i) a fee for the report, and any supplementary reports, required under Rule 11-6, and

(ii) an appropriate sum for each day that the expert's attendance in court is required.

Security for remuneration

(10) The court may make one or both of the following orders without prejudice to any party's right to costs:

(a) an order directing that the expert's remuneration be paid by the persons and at the time ordered by the court;

(b) an order for security for the expert's remuneration.

Reports

(11) An expert appointed under this rule must

(a) prepare a report that complies with Rule 11-6 and send it to the registry, with a copy to each party of record, within such time as the court directs, and

(b) if the expert's opinion changes in a material way after an expert's report is sent to the registry under paragraph (a), prepare a supplementary report that complies with Rule 11-6 and send it to the registry, with a copy to each party of record, within such time as the court directs.

Report must be tendered as evidence

(12) Each report and supplementary report of an expert appointed by the court under this rule must be tendered as evidence at the trial of the action, unless the trial judge otherwise orders.

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.

RULE 11-7 – EXPERT OPINION EVIDENCE AT TRIAL

Reports must be prepared and served in accordance with rules

(1) Unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed by the court under Rule 11-5, must not be tendered at trial unless

(a) that evidence is included in a report of that expert that has been prepared and served in accordance with Rule 11-6, and

(b) any supplementary reports required under Rule 11-5 (11) or 11-6 (5) or (6) have been prepared and served in accordance with Rule 11-6 (5) to (7).

When report stands as evidence

(2) Unless the court otherwise orders, the following apply to a report or supplementary report of an expert:

(a) if, within 21 days after service of the report or within such other period as the court may order, a demand is made under subrule (3) of this rule that the expert who made the report attend at trial for cross-examination, the report must not be tendered or accepted as evidence at the trial unless the appointing party calls the expert at trial to be cross-examined in compliance with the demand;

(b) if no such demand is made under subrule (3) within the demand period referred to in paragraph (a) of this subrule,

(i) the expert whose report has been served under this Part need not attend at trial to give oral testimony, and

(ii) the report, if admissible, may be tendered and accepted as evidence at the trial.

Cross-examination of expert

(3) A party of record may demand that an expert whose report has been served on the parties of record under Rule 11-6 attend at the trial for cross-examination as follows:

(a) if the expert was jointly appointed under Rule 11-3 or was appointed by the court under Rule 11-5, any party of record may, within the demand period referred to in subrule (2) (a) of this rule, demand the attendance of the expert for cross-examination by that party or by any of the other parties of record;

(b) if the expert was appointed by a party under Rule 11-4 or by a party with leave of the court granted under Rule 11-3 (9), any party of record who is adverse in interest to the party who appointed that expert may, within the demand period referred to in subrule (2) (a) of this rule, demand the attendance of the expert for cross-examination.

Costs of cross-examination

(4) If an expert has been required to attend at trial for cross-examination by a demand under subrule (3) and the court is of the opinion that the cross-examination was not of assistance, the court may order the party who demanded the attendance of the expert

to pay to the other party or to the expert costs in an amount the court considers appropriate.

Restrictions on calling expert as witness at trial

(5) Unless the court otherwise orders, if a party appoints an expert under Rule 11-3 (9) or 11-4,

(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 (3) of this rule, or

(ii) the expert's report has been served in accordance with Rule 11-6, 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 this Part

(6) 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 served 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 tender evidence in response, or

(c) the interests of justice require it.