REPORT OF WILL-SAY STATEMENTS WORKING GROUP

RECOMMENDATION NO. 15

INTRODUCTION:

The original Task Force subcommittee on Recommendation 15 (David Tavender, Chair, Associate Chief Justice Oliphant, Tom Macdonald, Bernard Faribault) was expanded to include a number of members from the Judiciary (Justices Vertes, Blair, Matheson, Orsborn, Moir, Armstrong and Lagacé) in order to assess "whether it is useful and fair to require will-say documents in civil cases to compel early disclosure of anticipated evidence, and to assess the impact of such a requirement on delay, costs and discovery" (Recommendation No. 15). The Subcommittee retained the services of Professor Lee Stuesser of the University of Manitoba Law School in order to assist its deliberations. Professor Stuesser's report of June 1998 (attached to this report) was reviewed by the working group. A Subcommittee (consisting of Justice Blair, Prof. Stuesser, Tom Macdonald and David Tavender) then examined the advisability of conducting pilot projects and consulted with several sources (including Professor Carl Baar of Brock University and Jeff Leon of the Ontario Advocates' Society). The Subcommittee has received strong support for the recommendations which emerged and are summarized in this report.

SUMMARY:

The Civil Justice Implementation Committee accepts the Will-Say Working Group's recommendation that one or more pilot projects be established at suitable locations in order to obtain reliable data as to whether the use of pre-discovery witness' summaries will assist in reducing discovery cost and delay and help parties to achieve earlier, effective settlements. Virtually all of those who have participated in the Working Group have the conviction that the early exchange of informal, relatively simple witness summaries following the guidelines set out in this report ought to contribute to the reduction in discovery cost and delay. It is also believed that the early exchange of witness summaries, in combination with case management and early alternate dispute resolution, should assist parties in focussing quickly and efficiently on key

issues and help to achieve early and effective settlements. The depth of these convictions has been separately expressed by former Chief Justice Brian Dickson and former CBA president Tom Heinzman this way: "Properly used, the witness summary recommendation may be the most creative reform in the Civil Justice Task Force Report." These convictions, however, are not supported by hard data or general experience in other jurisdictions. The Working Group accordingly supports the need for at least one and perhaps several pilot projects in different Canadian jurisdictions in order to determine whether, in our Canadian context, an early exchange of witness summaries will prove to be as beneficial as many participants in the Working Group expect.

PROPOSED WITNESS SUMMARY RULES:

What follows is a statement of the procedural rules which the Working Group would recommend for consideration in any jurisdiction contemplating a pilot project or the implementation of an early exchange of witness summaries.

Rule 1: A party to an action shall include in that party's Affidavit of Documents a separate list of all lay and expert witnesses on which that party might reasonably expect to rely at the trial of the action and shall include with that list a brief summary of the substance of each witness' expected testimony.

Rule 2: Where a party after providing the names of potential witnesses and their summaries under Rule 1 discovers a new witness on whose evidence that party might reasonably expect to rely at the trial, that party shall forthwith disclose to other parties the identity of the new witness and a brief summary of the substance of that witness' expected testimony.

Rule 3: The brief summary of the substance of each witness' expected testimony referred to in Rules 1 and 2 is intended for the purposes of disclosure only and the contents of such summary shall not be admissible for examination for discovery or trial purposes.

Rule 4: *A party may not call as a witness at the trial of the action a person whose name and summary of evidence has not been disclosed in accordance with Rules 1 and 2, except with leave of the court.*

DISCUSSION OF RULES:

The rules stated above were developed by the Working Group with some clear principles in mind that underscored what was being proposed and what was being rejected. Prof. Stuesser's report is useful to understand the background of these principles. What follows is a brief discussion of those principles:

1. Informal, without prejudice, non-costly. A major concern was to avoid the high costs and detail associated with the use in the United Kingdom of witness statements for trial purposes. Any statement that could be utilized at trial, according to the experience reported by Lord Woolf, would predictably be very detailed, carefully drafted and extremely expensive. Keeping the witness statements brief, simple and inadmissible should reduce the amount of time and detail associated with the preparation of the statements and yet permit meaningful early disclosure without significantly adding to the burden of costs.

2. Timing of disclosure. Disclosure before the close of pleadings would add without benefit an additional step and associated costs for all of those cases which are either undefended or are likely to settle without any discovery. Disclosure after discoveries, while useful (as in the Northwest Territories) for trial purposes and late settlement efforts, would be of no benefit to the discovery process or to early ADR and case management. Disclosure of witness summaries in conjunction with the filing of an Affidavit of Documents (which is usually the first formal step after the close of pleadings) is therefor utilized in the proposed rules so that the disclosure will occur in defended cases at an early stage to permit parties to focus on the main elements of the other party's case and have, where necessary, limited early discoveries. It is perceived that a significant portion of the examination for discovery process is devoted to learning the other party's case that must be met at trial. Early, required disclosure of that opposing case ought in theory to eliminate or shorten discoveries and facilitate earlier settlement.

3. Minimal changes to existing practice tied closely to Case Management and early ADR. The discovery of documents and the names of material witnesses (both supporting and adverse) are routinely available under existing procedures in most provinces. The additional earlier disclosure of the identity of witnesses on whom a party intends to rely at trial (that is excluding adverse witnesses) together with a brief summary of the substance of that witness' expected testimony is not seen to be a substantial departure from existing practice. Most of this information will have to be disclosed through the discovery process and through case management and pre-trial procedures in any event. The only significant change is to bring forward in point of time when a preliminary, without prejudice disclosure should take place. Parties who have prepared their cases for pleading and Affidavit of Documents purposes may be expected to have much of the required information well in hand. The added disclosure contemplated by these Rules is not accordingly expected to be disruptive or costly. The benefits of early disclosure however could be considerable. Case Management can focus on what and how further disclosure or discovery should proceed, and early ADR steps could be integrated with limited discovery where some discovery might assist the settlement process.

4. Class of witnesses. The recommended rules contemplate the disclosure of expected trial evidence of both expert and lay witnesses on whom the party intends to rely at trial. This excludes potential adverse witnesses and that portion of the evidence of witnesses not intended to be relied on at trial. Respect for the privilege created for the solicitor's brief is well established in Canadian jurisdictions. Obliging parties to disclose potentially adverse testimony would involve a fundamental change from existing practices, which the Working Group is not prepared to endorse. This is to be contrasted with Rule 26.1(4) of the *Rules of Civil Procedure* for the Superior Courts of Arizona cited in Prof. Stuesser's report. The early disclosure of expert testimony has been included on the basis that expert testimony can be determinative in many cases; the earlier a brief summary of the expert testimony intended to be relied on is disclosed the earlier should the parties be able to engage in meaningful settlement negotiations and the more focussed should be examinations for discovery.

5. Potential abuses and sanctions. Precluding a party from relying on evidence which has not been disclosed in accordance with the proposed Rules is perceived to be a significant sanction in and of itself. Other sanctions may be required to the extent that the contemplated procedures are abused. It may be for example that the "brief summary of the substance of each witness' expected testimony" could become so brief as to provide no meaningful disclosure. Requiring however a "meaningful" disclosure may force parties into such a detailed and careful disclosure that the statements will no longer be relatively simple and inexpensive. It may also be that the disclosure of sensitive evidence from an adverse or hostile source may raise concerns about potential witness tampering. These are examples of issues that might best be studied in the course of a pilot project before adopting a final set of rules. Further, case management judges ought to be able to assist the parties in minimizing abuses.

PILOT PROJECTS:

With funding in place of approximately $20,000 and the assistance of experts (such as Professors Stuesser and Baar) and a small on-going working group, a pilot project should be conducted in at least one province in combination, if possible, with case management and early ADR programmes. Toronto, Manitoba and Alberta have been identified as potential pilot project locations. Prof. Carl Baar has indicated a willingness to assist in the design and monitoring of a pilot project programme that would test out the concepts incorporated in this report and generate data to address the fundamental question of whether the early exchange of witness summaries promotes early settlement, reduces the need for exhaustive examinations for discovery and, in conjunction with case management and early ADR, will reduce the costs and delay associated with civil litigation.

CONSULTATION AND IMPLEMENTATION:

The Working Group proposes that this report be distributed widely to the judiciary, the profession, court administrators and the public. The Working Group will receive input and work

closely with any jurisdiction that indicates a willingness to undertake a pilot project. Professors Stuesser and Baar in conjunction with the Working Group will be asked to provide services to any jurisdiction willing to undertake a pilot project with the expectation that pilot projects will be monitored and the results analysed and circulated. To the extent that extensive data is produced a final analysis and report may require separate funding.

Dated September 22, 1998.

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E. David D. Tavender, Q.C. (Chair)