



# Canadian Guidelines for Forensic Psychiatry Assessment and Report Writing: Overarching Principles for Civil Psychiatry Assessments

Lisa Ramshaw, MD, DPhil, FRCPC<sup>1</sup>; Treena Wilkie, BScH, MD, FRCPC<sup>1</sup>; Sumeeta Chatterjee, MD, FRCPC<sup>1</sup>;  
Jeff Waldman, MD, FRCPC<sup>2</sup>; Brad Booth, MD, FRCPC, DABPN<sup>3</sup>;  
Graham Glancy, MB, ChB, FRCPsych, FRCPC<sup>1</sup>

The authors would like to thank the National Working Group (Todd Tomita, Alberto Choy, Mansfield Mela, Jeff Waldman, Richard Schneider, Brad Booth, Jocelyne Brault, Mathieu Dufour, and Aileen Brunet) for their essential contributions. They would also like to thank expert reviewers Roy O'Shaughnessy, Hy Bloom, Fabien Gagnon, and Michael Colleton.

Reviewed and approved by the Canadian Academy of Psychiatry and the Law (CAPL)  
Board of Directors on June 28, 2022.

**STATEMENT OF INTENT:** CAPL Resource Guide for Reference and Training

In civil proceedings, a psychiatric opinion is often required to assist decision-makers, including employers, unions, insurance companies, tribunals, professional regulators, school boards, human rights commissions, appeal commissions, civil courts (family court and litigation proceedings), and other decision-making boards or committees. As in all forensic reports, the forensic assessor determines who they can send or release the report to. Many of the processes of providing expert opinion in civil cases are like those in criminal cases, as described in the *Canadian Guidelines for Forensic Psychiatry Assessment and Report Writing: General Principles*. However, there are also important general principles specific to or emphasized in civil cases.

There are currently four Canadian guidelines for civil assessments and reports: Disability, Fitness to Work/Practise, Personal Injury, and Professional Misconduct and Malpractice. A psychiatrist might consult in the following areas:

- Employment issues (see the *Canadian Guidelines for Forensic Psychiatry Assessment and Report Writing: Violence Risk Assessment* for workplace threats and aggression)

- Immigration
- Family law
- Mental health law

The courts have raised concerns about increased risk of bias in civil proceedings (1); the Supreme Court similarly weighed in, reviewing concerns and confirming the role of expert witnesses. (2) In response, several provinces have outlined specific legislation to address these concerns.

The Ontario Rules of Civil Procedure was the first in a series of provincial legislations to include rules that dictate the role and processes of experts in civil proceedings. (3) The British Columbia Supreme Court developed the Court Rules Act, a set of rules for civil proceedings that includes a comprehensive section on expert witnesses (part 11, notably rules 11-2, 11-6, and 11-7). (4) Other provincial legislation includes the Nova Scotia Civil Procedure Rules and the Quebec Code of Civil Procedure. (5,6) Relevant case law includes the *Ikarian Reefer* rules. (7) The rules enunciated in *R v. Mohan* (8) speak to the admissibility of experts in criminal proceedings. The Goudge Inquiry into pediatric forensic pathology in Ontario commented on several facets of expert opinion. (9) *White*

*Burgess Langille Inman v. Abbott and Haliburton Co.* (2) and *Meady v. Greyhound Canada Transportation Corp.* address various aspects of expert opinion, though these decisions speak primarily to the admissibility of expert evidence. (10) Case law and rules of procedure that address the expert's role in civil cases in Canada have followed a 1993 English decision referred to as *Ikarian Reefer*. (7) This was a shipping fire case, but expert evidence was a significant issue. Although not fully adopted in Canada, Mr. Justice Cresswell set out the following duties and responsibilities of expert witnesses in civil cases in his ruling:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one.
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports. (11)

These duties and responsibilities of expert witnesses are consistent with those set out in the Canadian Academy of Psychiatry and the Law (CAPL) ethics guidelines. (12) The *Ikarian Reefer* case was the basis for the BC Supreme Court Rules (4) for civil proceedings in the section on expert witnesses (part 11, rules 11-2, 11-6, and 11-7). These rules outline an expert's duty and the process by which they may give evidence in written form and at trial. For example, experts are required to include the following in their report:

- Their qualifications
- Employment and educational experience in their area of expertise

- The nature of the opinion being sought
- Issues in the proceeding relevant to the opinion being sought

Within the report, the expert must also justify their opinion, describe the factual assumptions upon which their opinion is based, describe any research conducted that led them to form their opinion, and list the documents they relied on. Additionally, the expert must certify they are providing the court with an opinion and have a duty to assist the court, not be an advocate for any party. The Nova Scotia Civil Procedure Rules (5) are similar to the BC rules (4) and provide additional guidelines for the trier of fact when considering evidence from treatment providers:

A judge who presides at the trial of an action, or the hearing of an application, or who makes a determination under Rule 55.15 must exclude expert opinion evidence of a treating physician who provides a narrative instead of an expert's report, unless the party offering the evidence satisfies the judge that the other party received information about the opinion, and about the material facts upon which it is based, sufficient for the party to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination of the physician. (6, Rule 55.14)

Ontario's Rules of Civil Procedure are a succinct set of rules that speak to the expert's duty, as follows:

Rule 4.1.01 subrule (1) states it is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

- (a) to provide opinion evidence that is fair, objective and non-partisan;
- (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
- (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. (3)

## Duty Prevails

Subrule (2) states that the duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

As described by Booth et al in 2021, although the duty of the expert witness is to assist the decision-maker and the process of justice, medical ethical duties to the individual being assessed must not be ignored. Physicians must still abide by their professional obligations to patients outlined in provincial regulations that indicate that while conducting third-party assessments, the physician is to be fair and respectful to the evaluatee. (13)

Ontario, BC, Nova Scotia, and most recently Quebec have formally outlined the specific duties of an expert (2, para 28–29). For physicians in other provinces, there were no specific rules or guidelines on an expert’s role in communicating with third-party decision-makers at the time of publication. However, it would seem reasonable to incorporate the practices outlined into any assessment for civil proceedings. As noted above, these rules are consistent with CAPL’s ethics guidelines. (12)

Many cases involve large amounts of background information and records. The expert assessor’s task is to review and analyze these records, as there may be conflicting opinions or data within them. The assessor must state which of these opinions have been accepted and rejected and why this is the case. They might also explain why their assessment is the most compelling interpretation among the alternative constructions based on the data.

### Author Affiliations

<sup>1</sup>Department of Psychiatry, University of Toronto, Toronto, Ontario, Canada.

<sup>2</sup>Department of Psychiatry, University of Manitoba, Winnipeg, Manitoba, Canada.

<sup>3</sup>Department of Psychiatry, University of Ottawa, Ottawa, Ontario, Canada.

## REFERENCES

1. Booth BD, Watts J, Dufour M. Lessons from Canadian courts for all expert witnesses. *J Am Acad Psychiatry Law* 2019;47(3):278–285.
2. *White Burgess Langille Inman v. Abbott and Haliburton Co.* [2015] SCC 23.
3. Rules of Civil Procedure, RRO 1990, Reg 194.
4. Supreme Court Civil Rules, BC Reg 168/2009.
5. Nova Scotia Civil Procedure Rules, Royal Gaz Nov 19, 2008.
6. Code of Civil Procedure, CQLR c C-25.01.
7. *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd. (the “Ikarian Reefer”)* [1993] 2 Lloyd’s Rep 68.
8. *R v. Mohan* [1994] 2 SCR 9.
9. Goudge ST. Inquiry into pediatric forensic pathology in Ontario. Toronto (ON): Ontario Ministry of the Attorney General; 2008.
10. *Meady v. Greyhound Canada Transportation Corp.* [2015] ONCA 6.
11. Horton WG, Mercer M. The use of expert witness evidence in civil cases. *Advoc Q* 2004;29:153.
12. Canadian Academy of Psychiatry and the Law. Ethical guidelines for Canadian forensic psychiatrists [Internet]. Ottawa (ON): Author; 2019. [Accessed 2023 June 21] Available from: <https://www.capl-acpd.org/wp-content/uploads/2019/06/CAPL-Ethics-FIN-Rev2019-EN.pdf>
13. Booth BD, Watts J, Chaimowitz G. Third-party assessments/independent medical evaluations. *Can J Psychiatry* 2021;66(3):323–332.