The Supreme Court of the Northwest Territories

NOTICE TO THE PROFESSION

EVIDENCE SUMMARIES (RULE 326)

The revised Rules of Court introduce a far-reaching change to trial procedure by the requirement in Rule 326 for the parties to exchange, before trial, written summaries of the oral evidence to be given by each witness intended to be called at the trial. The judges of the court think it may be helpful to provide further commentary on this innovative rule.

The rule is adapted from Order 38, Rule 2A, of the English Supreme Court Practice first adopted in 1986. In the years since then the rule has been extended so that it now applies to all civil actions in England.

The rule is intended to extend the bounds of pretrial discovery to the area of trial evidence by way of written statements from each witness as to the evidence they intend to give when called at the trial. The rule is procedural in nature and does not change the substantive law of evidence in any way. It is an aspect of disclosure; not an alternative to proving facts at trial. It removes, however, some of the more controversial and confrontational aspects of the adversarial process by enabling all parties to know before the trial precisely what facts are intended to be proved at the trial, and by whom, and thereby to reduce the delays and costs occasioned by "surprises" at the trial. This procedure should also promote the settlement of cases since the parties will have the factual evidence before them and will be able to make a more realistic appraisal of the strengths and weaknesses of their own and each other's cases. It should also encourage the parties to make admissions of facts and improve the process of cross-examination by identifying and isolating the issues in dispute.

The rule is intended to operate on the basis of mutuality as between the parties so as not to give any one party an unfair advantage. For that reason the rule requires that the evidence summaries be exchanged by the parties on or before the tenth day before the trial.

NOTE: The evidence summaries are distinct from the "trial brief" required by Rule 325. The trial brief of each party is to be filed with the court. The evidence summaries are to be exchanged by the parties but not filed with the court. Hence they should not be made part of the trial brief.

There are a number of issues which arise from the rule:

Form and Content of Summaries:

Subrules 326(1) and (2) provide that the summary shall be a written summary of the oral evidence to be given by a witness intended to be called on any issue of fact. By necessity, the summary is confined to the evidence that the witness will give at trial, i.e., the anticipated evidence-in-chief. It must contain only that evidence that the witness will be permitted to give at trial. Therefore, it should not contain hearsay, opinions, or matters of a scandalous or irrelevant nature. They should be confined to matters of fact within the witness' knowledge.

The summary should not seek to anticipate the evidence of a witness of the opposite party and to contradict it or to otherwise deal with it. It is not the function of the summary of a witness to answer questions that may be put in cross-examination, but only to answer such questions as would be asked in the examination-in-chief.

The rule does not relate to expert witnesses (a subject dealt with in Part 18 of the Rules of Court).

The form of the summary should be, as the name suggests, a point-form summary. It should be similar, for example, to a "can say" statement prepared for a police brief. The summary should be expressed in the first person and it should commence by stating:

(a) the full name of the witness;

(b) the residence and occupation of the witness; and,

(c) whether the witness is a party, somehow related to a party, or has an interest in the case.

Subrule 326(3) requires that the summary be signed and the truth of its contents verified. This may be done by signing the summary before a commissioner for oaths in like manner as a statutory declaration or an affidavit. It should of course be dated.

If circumstances require it, a party may serve an amended evidence summary prior to trial. Counsel, as officers of the court, would be expected to bring to the attention

of other counsel in a case any misstatements or inaccuracies in an evidence summary.

Where No Summary Available:

Subrule 326(4) provides that where an evidence summary is not available or the witness is unable to sign it, counsel for the party shall provide an explanation of the circumstances and an outline of the anticipated evidence of that witness. Subrule (6) provides sanctions should the explanation be unsatisfactory or counsel's outline be inaccurate.

Witness Called or Not Called at Trial:

Certain points are necessarily implied by the rule.

The provision of an evidence summary does not compel the party to call that witness. Where the witness is not called no party may use the evidence summary as evidence in the trial. Common courtesy would dictate that counsel advise other parties before trial if a witness will not be called.

The parties may, however, agree to file an evidence summary as the evidence of a witness. This may be quite appropriate for proof of non-contentious or admitted facts. This procedure is analogous to the facility to receive affidavit evidence at trial under Rule 351.

Where the party serving the evidence summary of a witness does call that witness at the trial, counsel must confine the evidence-in-chief to the substance of what is contained in the summary. Counsel should not lead evidence which is not included in the summary unless (i) the other parties consent, or (ii) the presiding judge allows it in the interests of justice, or (iii) such additional evidence relates to new matters which have arisen in the course of trial. If the evidence of the witness differs from or contradicts the contents of the summary, it may be the subject of cross-examination as with any other prior inconsistent statement. If there are situations where the summaries prove deficient, then sanctions as contemplated by the rule may be implemented.

Substantive Laws of Evidence:

As previously stated, this rule is procedural. It affects no change to the substantive law of evidence. Therefore, the provision of an evidence summary will not make admissible evidence that would otherwise be inadmissible.

Parties and witnesses are still entitled to invoke privilege to prevent disclosure. Of course, by virtue of this rule, if some point is not contained in the summary then no evidence on that point can be led from the witness at trial. If the point is raised in cross-examination, the witness may then raise privilege to prevent answering (if applicable).

If, for any reason, such as privilege, security of the witness, or some other extraordinary ground, a party wishes to withhold serving an evidence summary, application for an order dispensing with this requirement should be made well before the trial.

The aim of this rule is to enable the parties and the trial judge to concentrate on the real issues in dispute so as to expeditiously resolve the case. This "Notice" is meant to address some of the common questions arising from its implementation and to give guidance as to the approach expected from counsel.

Dated this 3rd day of December, 1996, and issued by direction of the judges of the Supreme Court.

Justice J.E. Richard
Justice J.Z. Vertes
Justice V.A. Schuler