CIVIL PROCEDURE AND PRACTICE: RECENT DEVELOPMENTS

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This article provides an overview of recent leading developments in the law and practice of civil procedure. The focus is on procedural rather than substantive law. The discussion includes recent procedural changes regarding pleadings, discovery, interlocutory applications, evidence, modes of trial and the calculation and apportionment of costs.

Cet article donne un aperçu des derniers développements importants dans le domaine du droit et de la pratique des procédures civiles. L'emphase est mise sur les procédures plutôt que sur le droit substantiel. La discussion porte aussi sur les récents changements de procédures relatifs aux plaidoiries, à la divulgation, aux demandes de décisions interlocutoires, à la preuve, aux modes d'instruction ainsi qu'au calcul et à la répartition des frais.

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I. INTRODUCTION

There have been, over the past several years, a number of significant amendments to the *Alberta Rules of Court*.[1] They have been followed by many decisions which work out the effect of the amendments on the practice of civil litigation in Alberta. In addition to addressing the effects of rule changes, the courts of Alberta have continued to be busy addressing procedural aspects of all stages of legal proceedings. The result is an ever-growing body of case law with which counsel must be familiar, at least in broad terms, to ensure the effective and efficient conduct of a civil action.

The following overview is presented in an effort to provide, in such an outline form, the leading developments in the law and practice of civil procedure over the past several years. As with previous articles of this nature, we have placed our emphasis on the aspects of each area in which there have been significant changes or noteworthy confirmations of established principles, and have largely limited our comments to procedural, rather than substantive, aspects of the law.[2]

II. PLEADINGS

A. SERVICE

1. WITHIN ONE YEAR OF FILING

The 1997 amendments to r. 11,[3] particularly as they pertain to the exact date upon which a statement of claim expires, have put an end to much service-related confusion and litigation. However, one service-related issue that has received a significant amount of judicial treatment in recent years is that of standstill agreements.

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1 Alta. Reg. 390/68 [*Rules*]. All subsequent references to rules refer back to the *Alberta Rules of Court*.

2 Space limitations have prevented us from dealing with developments in a number of areas. We have left out discussion on topics of more peripheral interest, with the main restrictions being as follows: for interlocutory applications, we have limited our review to a few general procedural questions, and not discussed specific forms of application; we have not reviewed recent cases on the implied undertaking regarding discovery evidence; our review of rules on evidence is limited to the expert evidence rules of general application; we have not included a number of cases on liability for costs which may be imposed on impecunious litigants, non-parties, self-represented litigants, administrative tribunals, and counsel personally; and we have not included any material on appeals and orders and judgments.

3 Alta. Reg. 269/97.

In *Vaters v. Calgary Cab*,[4] the Court considered whether a standstill agreement arose as a result of a courtesy copy of the statement of claim in a personal injury action being provided to the adjuster. On the facts, there was no evidence of service of the statement of claim on the defendant within 12 months of the filing date, no order to extend time for service, and no order for substitutional service on the adjuster. Though counsel for the plaintiff and the adjuster exchanged medical documentation and were attempting to negotiate a settlement, Master Laycock, upon concluding that personal service upon the defendant had not been effected during the prescribed period, struck the statement of claim. In his view (which was ultimately affirmed by the Court of Appeal), the existence of a standstill agreement is a question of fact[5] and, in the circumstances at issue, the adjuster "never led plaintiff's counsel to believe that service was not required in a timely manner."[6]

The issue of whether a standstill agreement could be inferred was also discussed in *Hohnstein v. Gunther*.[7] Prior to the expiration of the service period, the plaintiff obtained an *ex parte* order renewing the statement of claim for a three-month period.[8] The defendant insurer sought to vacate the *ex parte* order, set aside the subsequent service, and dismiss the claim. According to the agreed facts, the defendant's insurance adjuster, during the currency of the service period, requested and agreed to pay for the plaintiff's medical documentation, and also requested a settlement proposal.[9] In addition, even after the expiry of the service period, the adjuster made a further request for a settlement proposal. The court concluded that the plaintiff's solicitor was justified in presuming from the dealings between the parties and the inference that liability was not in issue that a standstill agreement had been reached.[10]

An analogous circumstance to the inference of a standstill agreement was addressed in *Virji v. Kramer*,[11] wherein the statement of claim was not served within the 12-month period specified in r. 11(1). During the currency of the service period, the parties engaged in various settlement negotiations, exchanged medical documentation, and discussed the possibility of mediation. Approximately two months after the expiry of the service period, the defendant's insurance adjuster wrote to the plaintiff advising that because the statement of claim had not been served or renewed, she was closing her file. The plaintiff then brought an application to renew the statement of claim. The Court first noted the absence of any correspondence

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4 (2000), 263 A.R. 374 (Q.B.M.), aff'd. by Q.B. [unreported], aff'd. (2001), 286 A.R. 107 (C.A.) [*Vaters*].

5 *Ibid.* at para. 16. In *Wasyleshko v. Chamakese* (1999), 228 A.R. 384 at para. 14, the Court of Appeal concluded that in order to find a standstill agreement, "one would expect a clear and unequivocal assertion to that effect in the sworn deposition."

6 *Vaters, supra* note 4 at para. 18. But see *Glenn v. Nordell* (2000), 282 A.R. 108 (Q.B.M.), wherein Master Laycock found that a standstill agreement had been established in circumstances where an adjuster, having received a courtesy copy of a statement of claim, requested plaintiff's counsel not to file default judgment without giving adequate notice, and where there were also ongoing settlement negotiations.

7 (2000), 274 A.R. 1 (Q.B.), aff'd. (2001), 293 A.R. 399 (C.A.) [*Hohnstein*].

8 Rule 11(9) governs applications to extend the time for service of a statement of claim.

9 In both *Kapki v. Palacz* (1998), 221 A.R. 5 (Q.B), aff'd. (1999), 228 A.R. 373 (C.A.) [*Kapki*] and *Brennan v. Morris* (1994), 148 A.R. 241 (Q.B.), the Court found that a standstill agreement could be inferred from what was said and done between the parties and how they conducted themselves *vis-à-vis* each other.

10 *Kapki, ibid.* at para. 35. See also *Martinez v. Hogeweide* (1998), 209 A.R. 388 (C.A.) [*Martinez*].

11 (2001), 285 A.R. 181 (Q.B.M.), aff'd 2003 ABCA 152 [*Virji*].

evidencing a standstill agreement.[12] Yet notwithstanding that the plaintiff had failed to establish the existence of a "true standstill clock stopping, time tacking standstill agreement,"[13] the Court concluded that the real question was whether it was clear that the time limits for service would not be relied upon. The Court held that, following the reasoning in *Kapki* and based on the negotiations between the parties, the plaintiff was estopped[14] from relying on the strict time limits for service.[15]

The decision in *Syvenky v. Woo*[16] is also worthy of note. The unrepresented plaintiffs[17] issued a statement of claim within the limitation period and subsequently engaged in settlement negotiations with the defendant's insurance adjuster. The Court, based on the nature and tone of the settlement negotiations, concluded that a standstill agreement had been reached.[18] Approximately nine months into the service period, the defendant's insurance adjuster wrote to the plaintiffs advising that settlement negotiations had stalled and that the defendant would be relying on "all defences and other remedies provided by the law hereon in."[19] Notwithstanding the expiration of the service period, newly appointed plaintiffs' counsel obtained an order renewing the statement of claim for a further three months.

The Court identified sufficient facts to impute a standstill agreement but concluded that the agreement expired upon the plaintiffs subsequently being advised that liability was being contested. The Court, however, went one step further and found that, following termination of the standstill agreement, "there was sufficient time for the plaintiffs to consult a lawyer or apprise themselves of the applicable rules."[20]

The issue of renewal has also received judicial consideration in the context of the courts' jurisdiction to grant such relief as it deems equitable and just pursuant to ss. 8 and 10 of the *Judicature Act*.[21] The jurisprudence in this regard is clear: Alberta courts will not be prevented from exercising this jurisdiction where there is merely a "technical" breach of the *Rules* that does not "affect the equities between the parties."[22] In *Fehr v. Immaculata Hospital*,[23] the Court refused to exercise its discretion where the plaintiff sought a renewal

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12 But see *Martinez*, *supra* note 10. The Court found that the exchange of correspondence between the parties was tantamount to a standstill agreement.

13 *Virji*, *supra* note 11 at para. 34.

14 For a clear and concise explanation of the distinction between a standstill agreement and estoppel, see *Lundrigan v. Kundert* (2001), 290 A.R. 160 (Q.B.M.) at 164-65, wherein Master Laycock declined to renew the statement of claim following expiration of the service time limits.

15 Interestingly, notwithstanding that it was the plaintiffs who failed to strictly follow the service requirements, costs of the application were awarded against the defendants. For a better understanding of the Court's overall reasoning, see the comments of Fruman J. in *Kapki*, *supra* note 9 at 375.

16 2003 ABQB 288 [*Syvenky*].

17 Counsel for the plaintiff cited the decision in *Meyer v. Vasiu* (2002), 313 A.R. 315 (Q.B.) for the proposition that the standards of what constitutes a reasonable belief is lower for an unrepresented plaintiff.

18 The Court, in finding a standstill agreement, relied principally on the decision in *Martinez*, *supra* note 10.

19 *Syvenky*, *supra* note 16 at para. 5.

20 *Ibid.* at para. 32.

21 R.S.A. 2000, c. J-2.

22 *MacNeil v. Hodgin* (1998), 215 A.R. 133 at para. 18 (Q.B.).

23 (1999), 253 A.R. 188 (Q.B.). The decision provides a useful summary of the effect of r. 11 and the law of waiver.

of the statement of claim approximately ten years following expiration of the service time limits.

Lastly, the decision in *Hansraj v. Ao*[24] provides a comprehensive review of the rules respecting service *ex juris*[25] in the context of this issue. In *Hansraj*, the plaintiff issued his statement of claim only days prior to the expiration of the limitation period. Approximately six months later, a courtesy copy of the claim was sent to the defendant's insurance adjuster. Upon experiencing difficulties serving the defendant, the plaintiff obtained an *ex parte* order for substitutional service *ex juris* and a renewal of the statement of claim. Upon the statement of claim expiring, counsel for the defendant unsuccessfully brought an application to set aside the statement of claim. On appeal, Slatter J. held that the affidavit in support of substitutional service *ex juris* was wholly deficient in that it failed to address the requirements of either of r. 23[26] or 31.[27] He allowed the appeal on the basis that the order authorizing service was improperly obtained and could not be cured *nunc pro tunc*.[28]

2. *EX JURIS*

Alberta courts have recently emphasized the need for adequate evidence to support applications for service *ex juris*.:

- In *Patel v. Friesen*,[29] Master Laycock, upon receiving an *ex parte* written request for service *ex juris*, provided an exhaustive summary of the procedural and factual requirements. He further commented that an order for service *ex juris* granted on the basis of insufficient materials is of no value, as the opposing counsel will invariably succeed in having service set aside without the need for cross-examination.[30]
- Counsel for the defendant in *Stainton v. Milner Fraser*[31] sought to have an order for service *ex juris* set aside on the basis that the affidavit in support was deficient. The deponent had based her opinion and belief that the plaintiff had a reasonable cause of action on information only, but had failed to cite the source of her belief and did not provide any facts upon which her beliefs were founded.[32] Master Waller found that the lack of proper evidence precluded him from exercising his discretion under r. 558 to cure the non-compliance.[33]

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24 (2002), 4 Alta. L.R. (4th) 124 (Q.B.), additional reasons at (2002), 4 Alta. L.R. (4th) 147 (Q.B.) [*Hansraj*].

25 See *ibid.* at 141-43.

26 The rule governs substitutional service.

27 The rule sets forth the requirements of an affidavit in support of an order for service *ex juris*.

28 See Henry Campell Black, *Black's Law Dictionary*, 5th ed. (Minnesota: West Publishing, 1979) [*Black's*] *s.v.* "*nunc pro tunc*": literally "now for then ... a phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect...."

29 (2002), 1 Alta. L.R. (4th) 310 (Q.B.M.).

30 See *Alberta Cement Corp. v. Bakewell* (1999), 256 A.R. 191 (Q.B.) for a review of the law in relation to r. 31.

31 (1999), 249 A.R. 104 (Q.B.M.).

32 The procedural and factual requirements of affidavits in support of service *ex juris* are governed by rr. 305 and 31.

33 See *Oberg v. Foothills Provincial General Hospital* (1999), 232 A.R. 263 at 269 (C.A.) for a discussion of the test under r. 558, which permits the court to cure irregularities.

- In *Leister v. Whitstone*,[34] Master Breitkreuz exercised his discretion under r. 558 where the defendant was served personally in Saskatchewan in the absence of an order for service *ex juris*. The court found that the non-compliance at issue was a procedural irregularity as opposed to a nullity,[35] and ordered the issuance of service *ex juris* on a *nunc pro tunc* basis.

B. THIRD PARTY NOTICES

1. SUBSTANTIVE ISSUES

Notwithstanding the general proposition that a third party notice should only be struck in the clearest of cases,[36] third party proceedings were struck in the following two cases, both of which involved claims under the *Tort-Feasors Act*[37] against solicitors over missed limitation periods.

- In *Wallace v. Litwiniuk*,[38] the plaintiff retained the defendant solicitors to prosecute her claim arising out of a motor vehicle accident. The limitation period passed without a statement of claim having been filed. The plaintiff brought a negligence action against her former solicitor who, in turn, filed a defence and issued a third party notice against the tort-feasor, claiming that the plaintiff's injuries arose solely as a consequence of his negligence and therefore made him liable for contribution and indemnity. The third party proceedings were set aside on the basis that the *Tort-Feasors Act* intends to permit contribution only in the case of joint or concurrent tort-feasors.[39]
- In *Leoppky v. McWilliams*,[40] the plaintiff was in two separate motor vehicle accidents resulting in the commencement of two actions. The plaintiff settled and discontinued the first action. The defendant in the second action issued a third party notice against the defendant in the first action (notwithstanding that the first action had been settled), on the basis that he caused or contributed to the injuries alleged by the plaintiff in the second action. The Court of Appeal struck the third party notice on the basis that damages sustained in two unrelated motor vehicle accidents were not "the same damage" for the purposes of the *Tort-Feasors Act*.[41]

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34 (2000), 96 Alta. L.R. (3d) 372 (Q.B.M.).

35 Generally speaking, courts have been reluctant to find nullities. See *e.g. Myskiw v. Wynn* (1977), 4 A.R. 464 (C.A.); *Bridgeland Riverside Community Assn. v. Calgary (City)* (1982), 37 A.R. 26 (C.A.).

36 See *Dilcon Constructors v. ANC Developments* (1994), 155 A.R. 314 (C.A.); *Burnco Rock Products v. Schomburg Industries (Canada)* (1998), 228 A.R. 163 (C.A.).

37 R.S.A. 2000, c. T-5.

38 (2001), 281 A.R. 115 (C.A.).

39 *Ibid.* at 121. The *Wallace* decision comes on the heels of the Court of Appeal's decision in *DeBoer v. Raymaker (Darryl J.) Professional Corp.* (2000), 250 A.R. 312 (C.A.), in which the court refused to set aside a third party notice that had been filed in similar circumstances.

40 (2001), 281 A.R. 281 (C.A.) [*Leoppky*]. For a consideration of the decision in *Leoppky*, see *Rebel Heart Water Hauling Ltd. v. Southside Equipment Sales Ltd.*, 2003 ABQB 226.

41 *Leoppky*, *ibid.* at para. 8.

The courts have also addressed the suitability of setting aside third party proceedings in the context of the rules governing summary judgment and the striking out of pleadings.[42] In *Agrium Inc. v. Chubb Insurance Co. of Canada*,[43] an insured brought an action against its insurer for failing to cover losses incurred as a result of employee theft. The insurer filed a third party notice against the employees involved in the theft and the corporations alleged to have been unjustly enriched by the illegal activity. The insured brought an application to set aside the third party notice on the basis that the notice had failed to disclose a cause of action.[44] The Court set aside the third party notice, holding that there must exist a relationship between the defendant and the third party for there to be recovery on the basis of unjust enrichment.

In *Jager Industries v. Canadian Occidental Properties*,[45] the Court considered the applicability of r. 159 for summary judgment to third party notices. In *Jager Industries*, the plaintiff, who discovered contamination of land at the site of an abandoned well, brought an action against the defendants who were responsible for removal of the well. The defendants commenced third party proceedings based on indemnity provisions contained in the relocation agreement. The third parties brought an application for summary judgment. Justice Rooke ultimately concluded, after thoroughly considering the general proposition described in *Canada Deposit Insurance Corp. v. Prisco*[46] and subsequent cases,[47] that it is not necessary for a third party to demonstrate "special circumstances" as a precondition to obtaining summary judgment. He further indicated that if he was required to find "special circumstances," he would have found them to simply be that the third party claim did not disclose a triable claim for contribution and indemnity.[48]

2. LATE ISSUANCE

Rule 66(4) stipulates that a third party notice is to be filed within six months of the statement of defence and served within 30 days of filing. However, it provides no guidance as to the circumstances in which the court should extend the time allowed for filing and serving a third party notice. In recent years, our courts have affirmed a three-pronged test consisting of inordinate delay, absence of a credible excuse, and prejudice.[49]

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42 *Cerny v. Canadian Industries Ltd.*, [1972] 6 W.W.R. 88 (C.A.) is clear that the test for striking out a third party notice is the same as the test for striking out a statement of claim.

43 (2002), 318 A.R. 355 (Q.B.).

44 The principles governing the striking out of pleadings generally pursuant to r. 129(1)(a) were discussed in *Tottrup v. Lund* (2000), 255 A.R. 204 (C.A.) [*Tottrup*]. See the more detailed discussion of this case in the summary judgment section, *infra*.

45 (2000), 273 A.R. 1 (Q.B.), appeal dismissed without written reason [*Jager Industries*].

46 (1996), 181 A.R. 161 (C.A.).

47 See *Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 208 A.R. 179 (Q.B.) and *Dechant v. McKechnie Agency* (1999), 253 A.R. 14 (Q.B.M.).

48 The decision in *Jager Industries* also provides a useful review of the evidentiary requirements necessary to defeat an application for summary judgment. See the more detailed discussion of this case in the summary judgment section, *infra*.

49 See *Penn West Petroleum v. Koch Oil* (1993), 142 A.R. 168 (Q.B.); *Principal Group (Bankrupt) v. Alberta* (1997), 198 A.R. 238 (Q.B.). See also *Lister v. Calgary (City)* (1997), 193 A.R. 218 (C.A.), wherein the Court of Appeal commented on the need for evidence in support of an application to extend the time for filing a third party notice.

In *Kaptian v. Hardy*,[50] Moore C.J.Q.B., in the context of a motor vehicle personal injury action, suggested an alternative to the traditional three-pronged test and stipulated that the length of any delay is relevant as it relates to the reasonableness of an excuse for the delay, prejudice because of the delay, and the benefits to be achieved by using the third party procedure. He split the test into two parts, namely, that any delay after the expiry of the six-month period requires a reasonable excuse, and if the defendant has a reasonable excuse, the court then has to balance the potential prejudice to the third party and plaintiff.[51]

The approach suggested in *Kaptian* was, however, rejected in the subsequent cases of *Flight v. Dillon*[52] and *Dean v. Kociniak*.[53] In *Flight*, again in the context of a motor vehicle personal injury action, Moreau J. disagreed with the requirement that a lapse of the six-month period requires a reasonable excuse. She held:

> I am of the view that the proper test for an application to strike a third party notice is as suggested by the authorities which preceded *Kaptian, supra* and that prejudice is still a factor to be weighed along with the nature of the delay and whether it can be reasonably excused, unless the delay is significant. In that event, the absence of a reasonable excuse for the delay overpowers any need on the party of the third party to demonstrate actual prejudice.[54]

In *Dean*, the Court agreed with the decision in *Flight* and simply suggested that the "sequential test" described in *Kaptian* was not inflexible and that the length of the delay, the explanation for the delay, and the relative prejudice to the two parties are to be considered "concurrently when the Court exercises its discretion to allow or reject a late Third Party claim."[55]

C. AMENDMENT OF PLEADINGS

1. GENERALLY

The amendment of pleadings with leave of the court is governed by r. 132, which reads as follows: "The court may at any stage of the proceedings allow any party to alter or amend his pleadings or other proceedings in such manner and on such terms as may be necessary for the purpose of determining the real question in issue between the parties."

In *Canadian Deposit Insurance Corp. v. Canadian Commercial Bank*,[56] the Court reaffirmed the general rule that the ability to amend a pleading is broad:

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50 (1999), 251 A.R. 291 (Q.B.) [*Kaptian*].

51 *Ibid.* at 295. See also *Kwik-Kopy Printing Canada v. Skoreiko*, 2002 ABQB 835, which attempts to reconcile the recent decisions with respect to extending time under r. 66(4).

52 (2001), 284 A.R. 117 (Q.B.) [*Flight*]. See also *Young v. Regional Capital Properties*, 2001 ABQB 1051.

53 (2001), 289 A.R. 201 (Q.B.) [*Dean*]. See also *Builders Holdings Ltd. v. Gasland Properties Ltd.* (2001), 2 Alta. L.R. (4th) 231 (Q.B.).

54 *Flight, supra* note 52 at para. 28.

55 *Dean, supra* note 53 at para. 66.

56 (2000), 82 Alta. L.R. (3d) 382 (Q.B.).

> There are only four exceptions to the rule. First, an exception exists when the amendment would cause serious prejudice that cannot be repaired by a payment of costs. Second, an amendment will not be allowed when it would be hopeless; an amendment that would have been struck had it been in the pleadings originally will not be allowed. Third, the Court will disallow the amendment where it would add a new cause of action or a new party outside the limitation period. Fourth, the amendment will be disallowed when it, or the failure to plead it earlier, is indicative of bad faith.[57]

In *Mikisew Cree First Nation v. Canada*,[58] the Court of Appeal specifically addressed the evidentiary requirements necessary to amend pleadings. The Court was clear that amendments that are "trivial, or merely clarify wording or correct details" probably will not require evidence, but that in keeping with a long line of Alberta authority,[59] amendments that allege new facts of substance will require at least some evidence regardless of whether there is a limitation issue.[60]

Notwithstanding the general rule that a pleading can be amended at any time, in *Banister v. Alberta*[61] Sullivan J. set aside an amended statement of claim on the basis that the proper parties were named after the expiry of the applicable limitation period. In *Banister*, the plaintiff was struck in the eye by a crossbow and was treated at the Banff Mineral Springs Hospital and subsequently at Foothills Hospital in Calgary. The plaintiff alleged that he received negligent care at both hospitals, but was not immediately able to identify his treating physicians. Almost four years after receiving treatment, the plaintiff obtained a fiat allowing him to name specific physicians in place of various John and Jane Does. On appeal, the Court concluded that the circumstances at issue did not give rise to a correctable misnomer and, even if the concept of misnomer was applicable, the defendants had been seriously misled. In addition, the plaintiff had not been diligent in seeking to identify the misnamed defendants.

The case of *Dusty's Saloon v. W.M.I. Waste Management of Canada*[62] is a reminder that r. 132 permits amendments to pleadings "not only on the application of one of the parties, but on the court's own initiative in circumstances when an amendment is required to address a real issue between the parties."[63] The plaintiff contracted with the defendant for the provision and maintenance of "porta-potties" during the Calgary Stampede. While one of the porta-potties was being serviced, a foul odour seeped into the saloon, causing patrons to leave. The plaintiff sued only in negligence. The Court questioned, upon hearing all of the evidence, whether a finding of nuisance could be made where that cause of action had not been pleaded. Given that it was unclear whether the defendant would have presented different

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57 *Ibid.* at para. 11. The same test was applied in *Marin v. Rask* (2000), 282 A.R. 308 (Q.B.). See also *Milfive Investments v. Sefel* (1998), 216 A.R. 196 (C.A.).

58 (2002), 303 A.R. 43 (C.A.) [*Mikisew Cree First Nation*].

59 See *Crown Life Insurance v. A.E. Lepage (Ont.)*, [1989] A.U.D. 152 (C.A.); *Wil-Ton Construction v. Amerada Minerals Corp. of Canada Ltd.* (1989), 98 A.R. 296 (C.A.); *Udovitch Estate v. Helm Estate* (2001), 286 A.R. 185 (C.A.).

60 *Mikisew Cree First Nation*, *supra* note 58 at para. 26.

61 (2000), 274 A.R. 178 (Q.B.) [*Banister*].

62 (2001), 279 A.R. 187 (Q.B.) [*Dusty's Saloon*].

63 *Ibid.* at para. 25.

evidence at trial or would have asked different or additional questions on cross-examination or on examinations for discovery, the court disallowed the amendment.[64]

2. AFTER EXPIRY OF LIMITATION PERIOD

The coming into force of the new *Limitations Act*[65] on 1 March 1999 has given rise to a significant amount of judicial commentary over the appropriate test to be applied in granting leave to amend pleadings to add a claim or new parties after the limitation period has expired. Traditionally, there have been two approaches to determining whether an amendment should be allowed after the expiration of a limitation date: the functional approach[66] and the analytical approach.[67]

In *Neis v. Yancey*,[68] the Court of Appeal contrasted these two approaches. Under the "functional approach," the Court held that:

> an amendment should be allowed regardless of whether it involves a new cause of action or a change of parties or the curing of a nullity, whenever the defendant has received such timely notice that there could be no prejudice to the interests sought to be protected by the limitations statute, and that the defendant should have the burden of proving the prejudice.[69]

In contrast, the Court of Appeal held that the analytical approach, long favoured by Alberta courts,[70] is based on

> a legislated presumption of prejudice from suing too late. Whether or not the courts agree with the presumption, they are bound by it, unless the plaintiff can establish special circumstances rebutting that presumption. Whereas, with the functional approach, despite the legislated presumption of prejudice, the onus is placed on the defendant to establish additional prejudice.[71]

In *Austec Electronic Systems Ltd. v. Mark IV Industries Ltd.*,[72] the Court suggested that application of the analytical approach has been largely tied to the restrictive wording of the now repealed *Limitation of Actions Act*.[73] Under the "new regime" of the *Limitations Act*, specifically s. 6 (which addresses claims being added to a proceeding), the Court held that

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64 The Court also commented that an award of costs would not provide the defendant with a suitable remedy and significant prejudice would be suffered.

65 R.S.A. 2000, c. L-12.

66 First advocated by Professor Watson in "The Amendment of Proceedings after Expiry of Limitation Periods" (1975) 53 Can. Bar Rev. 237.

67 The root of the analytical approach is *Weldon v. Neal* (1887), 19 Q.B.D. 394 (C.A.), as modified in Canada by the Supreme Court of Canada in *Basarsky v. Quinlan*, [1972] S.C.R. 380.

68 (1999), 250 A.R. 19 (C.A.) [*Neis*].

69 *Ibid.* at para. 16.

70 See *Madill v. Alexander Consulting Group* (1999), 237 A.R. 307, wherein the Court of Appeal rejected the functional approach.

71 *Neis*, *supra* note 68 at para. 17. See also *385268 B.C. Ltd. v. Alberta (Treasury Branches)* (2000), 267 A.R. 384 (Q.B.) for a sequential three-step analysis of the analytical approach.

72 (2001), 285 A.R. 154 (Q.B.) [*Austec*].

73 R.S.A. 1980, c. L-15 [*Limitations Act*].

the legislature has adopted the functional approach.[74] Since the decision in *Austec*, Alberta courts have been applying the functional approach to actions falling under the new *Limitations Act*.[75]

III. DISCOVERY BY PRODUCTION OF RECORDS

A. RULE CHANGES

Significant changes to the requirements for production of documents, or "records" as the *Rules* now describe them, became effective 1 November 1999.[76] The main changes introduced by the new rules may be summarized as follows:

- The rules discarded the well-known term "document" (which had been given an expansive definition and judicial interpretation), in favour of the term "record," which is also defined expansively as "the physical representation or record of any information, data or other thing that is or is capable of being represented or produced visually or by sound, or both."[77]
- There is a new definition regarding the scope of what a party must produce. Rule 187(1) requires all parties to file and serve on all other parties to an action "an affidavit of records," and, by r. 187.1(2), the affidavit of records must disclose "relevant and material records." The definition of "relevant and material" in r. 186.1, which applies to both record production and oral examinations, is as follows:

> For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

As will be seen, this definition has been held to narrow the scope of both forms of discovery.

There is now greater emphasis on deadlines in filing affidavits of records. Under former practice, a party was required to be served with a notice to produce documents before its obligation to make documentary discovery arose. There was a ten-day deadline for such production by affidavit in the rules, but because this period was too short for all but the simplest of cases, the practice had evolved to the point where a party effectively had a non-

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74 *Austec, supra* note 72 at paras. 38-40. See also *Stout Estate v. Golinowski Estate* (2002), 299 A.R. 13 (C.A.); *Alberta v. Railink Ltd.*, 2003 ABCA 69; and *Marlborough Ford Sales Ltd. v. Ford Motor Co. of Canada, Ltd.*, 2003 ABQB 298 for further comments on the functional approach to the amendment of pleadings.

75 See *Wilson v. Turnbull* (2002), 4 Alta. L.R. (4th) 85 (Q.B.); *Stout Estate v. Golinowski Estate* (2002), *ibid.*; *Plett v. Blackrabbit* (2001), 100 Alta. L.R. (3d) 362 (Q.B.); *Nichwolodoff v. Edmonds* (2001), 291 A.R. 384 (Q.B.); *Weiss v. Czarniecki* (2000), 296 A.R. 347 (Q.B.); *385268 B.C. Ltd. v. Alberta (Treasury Branches)* (2001), 299 A.R. 194 (C.A.); *Fujiki-Shannon v. Gill Estate* (2001), 294 A.R. 122 (Q.B.M.). See also *Rocklake Enterprises Ltd. v. Timberjack* (2001), 293 A.R. 124 (C.A.).

76 The changes were introduced primarily by Alta. Reg. 172/99, with some subsequent changes for further clarity.

77 See r. 186.

specific, reasonable period within which to file and serve its affidavit. There were no sanctions for not acting reasonably, unless a party breached a court order directing the filing by a certain date. Rule 187(6) now requires a plaintiff to file and serve its affidavit of records within 90 days of service of the first statement of defence, and a defendant to file its affidavit of records within 90 days of service of its own statement of defence on the plaintiff. There is no longer a requirement for a notice to produce documents, as the time deadlines are automatic. Non-compliance with the deadlines gives rise to significant costs, taxable and payable forthwith, under r. 190(1).

Pursuant to r. 188.1, where the case is complex, or where there are difficulties caused by volume or location of records, or there is "other sufficient reason," the court on application may modify the deadlines for filing and serving affidavits of records. The rules do not provide for a modification of the deadlines by agreement of the parties. In practice, such agreements are common, although it is of course important for all parties in an action to agree to any extensions. Furthermore, as the deadlines and their mandatory nature are seen as being an integral part of the amendments,[78] it would be unwise to enter into agreements simply waiving the requirements of the rules. It is questionable whether such agreements would be enforceable in view of the express provisions relating to production of records, and the court may be unwilling to accept such an agreement as being "sufficient cause"[79] in any event. However, in some circumstances counsel might do well to agree upon an extension to a specified date, or to simply agree that a new deadline may be imposed upon (for example, 30 days' written notice).

Most of the other main aspects of record production remain unchanged in substance, although there have been some changes to rule numbers and terminology. For example, r. 192(1) contains the deemed authenticity provision, as well as the sending and receiving provisions that were formerly in r. 190, and r. 192(2) and (3) allow a party to serve notice that it disputes those deeming provisions. Rule 198 (which bears the same number as the comparable old rule) contains the protection that disclosure or production of a record does not, of itself, constitute an acknowledgment of relevance and materiality.

B. FORMAL REQUIREMENTS

There have been a number of decisions by masters and Queen's Bench judges addressing whether costs must be imposed for late delivery of an affidavit of records. The decisions of Lee J. in *Sustrik v. Alberta AG-Bag Ltd.*[80] and Watson J. in *Wagner v. Petryga Estate*[81] illustrate similar approaches to the new provisions, albeit with different results.

In the *Sustrik* decision, Lee J. approved Master Quinn's observations in *Grzybowski v. Fleming*[82] that "Rule 190 was designed to be draconian, and that the Rule does not speak of prejudice or delay resulting from the non-compliance."[83] The case before Lee J. seemed to

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78 *Govenlock v. Govenlock* (2001), 284 A.R. 399 (Q.B.) [*Govenlock*].
79 Rule 190(1), discussed below.
80 (2001), 301 A.R. 192 (Q.B.) [*Sustrik*].
81 (2001), 292 A.R. 320 (Q.B.) [*Wagner*].
82 (2000) ABQB 259.
83 *Supra* note 80 at para. 21.

involve relatively minor and technical breaches of the deadlines, and he found that the various applications over the parties' obligations on affidavits of records was "a needless waste of everyone's valuable resources and time."[84] Rule 190 expressly contemplates some discretion available to the court by the requirement that there be a finding that the deadline was breached "without sufficient cause." In this regard, Lee J. exercised his discretion not to impose a penalty upon the plaintiff for late delivery in the matter before him.[85] He found that the parties' arguments about affidavits of records and costs sought because of late delivery had led to results contrary to the objectives of the new provisions, which were designed to expedite matters.

There appear to be more substantive concerns about late filing of an affidavit of records in the *Wagner* case decided by Watson J. The defendant was obliged to file and serve its affidavit of records by November 28, 2000, but did not file until April, 2001, after the plaintiff had filed a motion seeking a remedy. The plaintiff's counsel had written on a number of occasions demanding the affidavit of records, and the defendant's only excuse appeared to be a winter vacation in Phoenix and concern about having original documents couriered back and forth. Justice Watson quickly disposed of the suggestion that the plaintiff had not made its demands sufficiently clear, finding that "a key purpose of the rule change was to make the requirements automatic and not subject to demands as between counsel."[86] In commenting on the words of r. 190(1) to the effect that a party would be liable to pay a penalty in costs if it failed in its obligations "without sufficient cause," he observed:

> The concept of "without sufficient cause" is not a foreign one to legal discourse. In this context, it would seem to contemplate a form of reasonable excuse which is either beyond the control of the party upon whom the obligation falls or arises from the very complexity and difficulty necessarily associated with the requirement as applied to the particular case. The "cause" must be case specific, not generic. The terms of rule 188.1 shed some light on that interpretation since extensions can be granted due to the complexity of the case, or the volume or location of the records or other sufficient reason.[87]

Justice Watson ultimately found there not to be sufficient cause for the failure to file the affidavit of records on time, holding that the rule, "tough as it is, was not created solely for the benefit of the parties but for the larger benefit of the administration of civil justice."[88]

Justice Watson also was required to consider how to calculate costs under r. 190(1) in *Wagner*. He found the rule to clearly provide for an automatic finding of double costs based upon Schedule C, as determined by the statement of claim, and further held that the Court should not go below double costs (although it might go higher), as the rule was intended to provide for an automatic response in costs, with a significant deterrent effect.

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84 *Ibid.* at para. 22.

85 The plaintiff had filed and served its affidavit of records within 90 days of filing of the second statement of defence, but outside 90 days of the first statement of defence. See also Lee J.'s decision in *Govenlock, supra* note 78, where he also exercised his discretion not to impose the double costs penalty, but gave some costs for the application to the party seeking to impose the double costs penalty.

86 *Wagner, supra* note 81 at para. 15.

87 *Ibid.* at para. 17.

88 *Ibid.* at para. 26.

C. SCOPE: "RELEVANCE AND MATERIALITY"

The courts have already determined that the new concept of "relevance and materiality," introduced by the recent amendments to the *Rules*, will lead to narrower discovery, both documentary and oral. In *Hirtz v. Public Trustee (Alta.)*,[89] the Court held as follows:

> The 1999 amendments to rules 186.1, 187.1(2), and 200(1.2) narrowed the scope of relevance for written and oral discovery, excluding tertiary relevance. However, the files sought here plainly have secondary relevance, especially because the distinction between policy and operational decisions probably has to be applied in a suit like this one. The files may well throw light on that, or lead to discussions or documents directly relevant to the issues on the pleadings.[90]

Unfortunately, the brief judgment does not elaborate on the distinction between "secondary" and "tertiary" relevance. For purposes of the matter before the Court, the material seemed producible under either the old or new rules.[91]

The new test was also considered in the context of documentary production by Johnstone J. in *Liu v. West Edmonton Mall Property*,[92] wherein the plaintiff brought an action for alleged breaches of duties of care in relation to injuries sustained while using a waterslide. Justice Johnstone refused to order production of the defendant's safety logs and incident records from the first-aid station relating to other parts of the waterpark for the previous calendar year. She found that the new rule was designed to reduce the scope of relevance, that conjecture was not sufficient to lead to production, and that no "fishing expeditions" would be permitted. She also viewed a balancing of probative value as against prejudicial value to be a proper part of the exercise.[93]

The approach she used in the case before her was as follows:

> The main issues in these proceedings are whether the appellant failed in its duty of care by failing to advise the respondent of the inherent danger of the waterslide, by failing to properly instruct and advise him as to the proper method of descending down the waterslide, and further by failing to provide a safe premises. Is the documentation requested relevant to establishing the foreseeability of such an incident occurring? Furthermore, does the prejudicial value of such a quantity of documents vastly outweigh the probative value?[94]

The test used by Johnstone J. should be applied with caution, however. The matter before her was an appeal from a Provincial Court judge pre-trial conference ruling, and part of her considerations included the special need to facilitate expedited and inexpensive litigation in that forum.

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89 (2002), 303 A.R. 25 (C.A.) [*Hirtz*].

90 *Ibid.* at para. 2.

91 In fact, in the Queen's Bench decision, Marceau J. had expressly found that while the new test was more restrictive, the same result would apply under either version of the rules: (2000), 267 A.R. 52.

92 (2000), 279 A.R. 305 (Q.B.) [*Liu*].

93 *Ibid.* at 310-11. A similar balancing of probative value against prejudicial effects was used by Master Waller in *O.W. v. W.P.* (2001), 310 A.R. 294 (Q.B.M.), where the court did not require production of the plaintiff's diary entries because they had scant probative value that was overridden by the plaintiff's right to privacy.

94 (2000), 279 A.R. 305 (Q.B.) at para. 26.

D. PRIVILEGE

The protection of privilege afforded to communications between solicitors and their clients was emphasized by Moore C.J.Q.B. in *Husky Oil Operations Ltd. v. MacKimmie Matthews*,[95] in which the plaintiffs were suing the defendant law firm for negligently drafting a renewal clause in an oil and gas contract, which had been found in earlier proceedings involving PanCanadian Petroleum Ltd. to violate the rule against perpetuities. Among other things, the defendants relied upon limitations of actions defences, and argued that because a cause of action arises when the material facts on which it is based have been discovered or ought to have been discovered, it was important to see legal opinions prepared by the plaintiff's internal counsel. Chief Justice Moore reviewed the opinions, and confirmed the plaintiff's arguments that they did not address perpetuities issues. Furthermore, he emphasized that just because a party's state of mind is put into issue, that does not automatically make solicitor and client communications producible. The privilege should be maintained, as "solicitor-client privilege is a right which must be zealously guarded."[96] In any event, regardless of the actual content of opinions, it was still open to the defendant to argue that the plaintiff ought to have been aware of the perpetuity problem.

The plaintiff in *Husky Oil* also claimed privilege over an opinion prepared by a lawyer employed as a land-man in its land department. It argued that although the land-man was not hired specifically to provide legal advice, she was qualified to do so and considered it a part of her duties. Chief Justice Moore held that solicitor-client privilege did not apply to documents that she prepared, "as she was not employed as a lawyer *per se*."[97]

The statutory protection given to statements made to police officers following motor vehicle accidents[98] was considered by Lewis J. in *Klassen v. Dachyshyn*.[99] The plaintiff had given a statement and refused to provide a copy to the defendant. A police officer's affidavit established that the statement was made pursuant to the requirements of the legislation, and Lewis J. found that the plaintiff had therefore satisfied the onus that the statement was made on a privileged occasion. Arguments of unfairness were not accepted by the Court, as it was held that for the privilege to be lost, there must be a waiver by its author. It was also noted that the goal of the privilege was to encourage candid and full disclosure by motorists involved in accidents.

The requirement that documents be prepared for the dominant purpose of litigation in order to establish litigation privilege was reviewed in the context of accident investigations and reports in two recent decisions.[100] In *Terroco Drilling Ltd. v. Almac Machine Works Ltd.*,[101] a block-and-hook assembly failed at a drilling rig, causing extensive property and production losses. The plaintiff's insurer hired an insurance expert, who prepared a report

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95 (1999), 241 A.R. 115 (Q.B.) [*Husky Oil*].

96 *Ibid.* at para. 5.

97 *Ibid.* at para. 22.

98 Pursuant to the *Motor Vehicle Administration Act*, R.S.A. 1980, c. —22, ss. 77 and 81 (now replaced by the *Traffic Safety Act*, R.S.A. 2000, c. T-6, ss. 11 and 71).

99 (1998), 217 A.R. 191 (Q.B.).

100 See also *Malik v. Alberta Motor Association Insurance* (2000), 276 A.R. 301 (Q.B.M.).

101 (2000), 259 A.R. 146 (Q.B.M.).

as to the cause of the accident. The insurance claim was subsequently settled and the insurer did not pursue any subrogation rights. The insurer's report was ultimately provided to the plaintiff. In addition, the plaintiff retained another organization to conduct interviews and prepare his own report. Master Waller found both reports to be producible for the following reasons:

- The plaintiff's report had been prepared for a number of reasons, including safety inspection requirements of the Occupational Health and Safety Board, concerns about preventing future accidents, dealing with the property insurer, and determining who was at fault with a view to imposing liability for the loss. The discovery evidence made it clear that a large consideration in the investigation was the prevention of another accident. Accordingly, the dominant purpose of assisting solicitors in litigation was not present.
- In considering the insurance report, he recognized some merit to an argument that the court should protect communications made by an insured to its insurer, as there is a duty to cooperate even to the extent of disclosing unfavourable facts.[102] However, he was unable to find any sustainable basis for litigation privilege for the following reasons:

> The documents were not prepared for the dominant purpose of this litigation. At best it could be said that it was prepared in part for potential subrogation litigation by the insurer in addition to a number of other purposes. It cannot be said that there was any expectation at *the time the report was created* that it would form part of this plaintiff's solicitor brief.[103]

"Mixed purposes" of an accident investigation report was also the basis for ordering production in *Whitehead v. Braidnor Construction Ltd.*,[104] an action by Greyhound bus passengers resulting from a collision between a Greyhound bus and a vehicle operated by a Braidnor Construction Ltd. (Braidnor) employee. Following the accident, Braidnor had instructed its corporate solicitors to carry out an investigation of the accident. The solicitors retained an investigator and produced a series of reports. Justice Burrows held, on the basis of discovery testimony and a review of the two reports, that there were a number of purposes for the reports, including prevention (identified as the main purpose in the discovery evidence) as well as possible workers' compensation, insurance, or third party claims.[105]

Where privilege clearly exists, issues sometimes arise as to whether facts which would not otherwise be privileged may be protected because they are found within a privileged document. In *Lytton v. Alberta*,[106] Wachowich A.C.J., as he then was, resisted a request that he (after reviewing a privileged report) identify non-privileged facts for disclosure:

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102 *Ibid.* at para. 10.

103 *Ibid.* at para. 35 [emphasis in original].

104 (2001), 304 A.R. 72 (Q.B.).

105 An affidavit filed by Braidnor opposing the motion for production was given little weight by Burrows J. It was based largely on hearsay information from the person who had instructed the investigations to be conducted, and accordingly, no effective cross-examination was possible. Further, it relied too heavily on giving the necessary legal conclusion without the underlying facts from which that conclusion could be drawn.

106 (1999), 245 A.R. 290 (Q.B.).

> Although there are compiled facts in the Report any one of which, taken alone, would not ground privilege, the combination and choice of those individual facts, like stars forming a constellation, could, if released, reveal patterns and privileged information to those versed in the art of reading the signs and prognosticating litigation strategies.[107]

In the result, the Court found that if so-called non-privileged facts were disclosed, much about the defendant's method, analysis, approach, or strategy would be revealed "and therefore the facts in the Report qualify, in my view, as privileged work-product given the purpose of the Report."[108]

Justice Mason made a similar finding in *Blair v. Wawanesa Mutual Insurance*,[109] in a case where he had previously ruled that the defendant insurers were entitled to solicitor-client privilege over documents and information obtained by an independent adjuster and his private investigator, who had investigated a fire loss for which the plaintiff sought indemnity.[110] The plaintiff brought a subsequent motion seeking disclosure of the material facts on which the defendants relied for their defence. Justice Mason distinguished between privileged and non-privileged facts as follows:

> Facts, not otherwise privileged, are those facts that a party knows of on its own account, in the ordinary course of affairs or from its own involvement in the event which are the subject matter of the dispute. The facts acquired by counsel or agents, acting on behalf of counsel (in this case documents and reports obtained or authored by the insurance adjuster and the private investigator and counsel) are not discoverable because they are covered by the litigation privilege, i.e., they are facts which are otherwise privileged.[111]

He further indicated that giving the plaintiff access to the requested "material facts" would effectively remove the protection of privilege. He referred to the finding in *Dorchak v. Krupka*,[112] which stated that "privilege is an important substantive rule of law, not to be frittered away."[113] In reviewing other authorities, he noted that the "solicitor's brief privilege" will often extend to collections of documents and facts which, taken individually, would not be privileged. However, together they form the result of investigation, research and preparation conducted for the purpose of litigation and are therefore protected by privilege.[114]

Following his review of the authorities, Mason J. summarized his reasons in a form which is useful for reference:

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107 *Ibid.* at para. 12.

108 *Ibid.*

109 (2000), 265 A.R. 50 (Q.B.) [*Blair*].

110 It appears that the insurer suspected arson and raised in its defence matters of misrepresentation, failure to disclose, fraudulent statements of value, and proofs of loss.

111 *Blair*, *supra* note 109 at para. 12.

112 (1997), 196 A.R. 81 (C.A.).

113 *Blair*, *supra* note 109 at para. 13.

114 Justice Mason's decision contains a useful review of a number of leading authorities and articles in the area, including the well-known decision in *Hodgkinson v. Simms*, [1989] 3 W.W.R. 132 (B.C.C.A.), which was approved by the Alberta Court of Appeal in *Dorchak v. Krupka*, *supra* note 112.

1. The documents and communications, whether oral or in writing, are otherwise privileged, that is to say, protected by litigation privilege with respect to the investigations conducted by counsel under the direction of the defendant insurers for the sole purpose of defending this action.
2. So, too, are the material facts within those documents and communications, which form the basis of the defences. Those facts material to setting out the particulars of the defence are necessary for pleading but do not provide a doorway through which the plaintiff may enter to obtain disclosure of any other facts beyond those necessary for proper pleading. All of those facts form part of the considered strategies of counsel charged with the investigation of this matter and all documents were prepared for the dominant purpose of litigation.
3. The evidence for which privilege is claimed is evidence of the actions, financial situation and other related personal matters which are fully known to Mr. and Mrs. Blair and they are thereby not prejudiced nor can they be said to be subject to ambush on the facts of this case.[115]

However, a somewhat different approach was taken in the decision of Sulyma J. in *Polansky Electronics Ltd. v. AGT Ltd.*[116] The parties had been through one trial, but an appeal was allowed and a new trial ordered. Immediately prior to the first trial, the plaintiff produced and introduced into evidence a compilation of sale invoices produced earlier by the defendants, as well as its analysis and a spreadsheet review of these documents. The defendants proceeded to seek an order from Sulyma J. granting them the right to examine the plaintiff's officer for discovery on the compilation and accompanying analysis. The plaintiff disputed the application on the basis that the materials were not ordinarily producible, as they were merely a compilation of an opposite party's own documents. In addition, the plaintiff argued that they contained an analysis and summary of information prepared in contemplation of litigation, and were therefore privileged.

Justice Sulyma found that the defendants were entitled to production of such documentation in the normal course, and that they were also entitled to oral examination for discovery thereon. Her reasons were as follows:

> In my view, although the source of the plaintiff's documents produced at trial is the defendants' own documents, they result in a compilation and analysis relied on in proving damages and are therefore "documents" that properly should be part of the plaintiff's production and subject to examination for discovery. The purpose of production and examination for discovery is to avoid surprise at trial. I further reject the plaintiff's submission that the documents are not discoverable on the basis that they were prepared in contemplation of litigation and as an analysis for evidentiary purposes. A party must disclose such material if he intends to introduce it into evidence. At trial the plaintiff did introduce the documents into evidence and relied on them in proving damages and the documents are therefore subject to examination for discovery. Indeed, had the plaintiff chosen to have an expert witness compile and rely on the documents, surprise at trial would not occur as rule 218.1 of the Rules of Court would apply. As the plaintiff chose to prepare the material itself and chose to rely on it, the documents became discoverable damage documents. The defendants shall have the right to examine the plaintiff's officer on these damage documents.[117]

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115 *Blair*, *supra* note 109 at para. 27.
116 (2002), 306 A.R. 333 (Q.B.).
117 *Ibid.* at 342.

The distinction between privileged and non-privileged information was also addressed in detail by Clackson J. in *Sovereign General Insurance v. Tanar Industries Ltd.*[118] The action involved, among many other issues, the degree to which an insurer, American Home Assurance Co. (American Home), which granted bonds for a general contractor had conducted prompt and reasonable investigations into a bond claim, which it had earlier denied. American Home's counsel (also representing it in the litigation) had conducted the investigation into the bond claim. Justice Clackson held that the *actions* of the law firm in conducting the investigation were discoverable. The *information* obtained as a result would normally be privileged, but was discoverable here because allegations of bad faith against American Home had been made. American Home had the right to defer production of this information until the basic question of coverage was decided, as only at that point would the bad faith allegations become relevant.

Finally, there have been several recent cases on various circumstances in which privilege may be lost. In one case, privileged medical reports obtained in relation to an earlier accident were found to be producible, because any privilege which existed ceased upon settlement of the first lawsuit.[119] However, in another case, "without prejudice" communications in an unsuccessful attempt to settle a dispute between PanCanadian Petroleum Ltd. (PanCanadian) and Husky Oil Operations Ltd. (Husky) over the validity of certain leases, which then went to trial and formed the basis for a subsequent claim against Husky's lawyers, remained privileged.[120] Chief Justice Moore found that the communications would have little probative value, but just as importantly, "the claim of privilege over "without prejudice" communications belongs to both parties. Husky cannot unilaterally waive the privilege without PanCanadian's consent."[121] An extensive review of when solicitor-client or litigation privilege has been waived also formed part of Clackson J.'s rulings in *Tanar*.[122] It has also been made clear, however, that waiver of solicitor-client privilege will be narrowly confined to the specific legal advice affected by the waiver; the fact that waiver may be found with respect to specific advice does not entitle an applicant "to 'fish' for evidence in the larger sea of privileged material."[123]

E. USE IN COURT

The Alberta Court of Appeal recently considered the degree to which documents listed in an affidavit of records may be used as evidence. In *Mikisew Cree First Nation v. Canada*,[124] a plaintiff had included copies of documents included in its own affidavit of records as part of materials supporting an application to amend pleadings. The Court took the occasion to give the following summary of the main governing principles:

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118 (2002), 316 A.R. 212 (Q.B.) [*Tanar*].

119 *Franco v. Hackett* (2000), 262 A.R. 127 (Q.B.M.).

120 *Husky Oil*, *supra* note 95.

121 *Ibid.* at para. 19.

122 *Supra* note 118 at 223-26.

123 *Refco Alberta v. Nipsco Energy Services* (2002), 315 A.R. 188 (Q.B.), at para. 41, aff'd., (2002), 317 A.R. 316 (C.A.). The case concerned the reliance of directors on the statutory defence of good faith reliance on legal advice (s. 123(3) of the *Business Corporations Act*, R.S.A. 2000, c. B-9). Justice Burger emphasized the importance of solicitor-client privilege, and confirmed that waiver of privilege over legal advice may be limited in scope.

124 *Mikisew Cree First Nation*, *supra* note 58.

In general, an affidavit of records does not transform any of the records (documents) listed in any of its schedules into evidence. There are only two narrow exceptions, both created by r. 192(1). It deems that both parties (sides) admit that

(a) those records "are authentic", and
(b) if copies of letters or messages appear to have been sent, the originals were sent and were received by the addressee.

We consider "authentic" to mean that the record is what it purports to be and is not a forgery. It probably also means that if it purports to be a copy, it is an accurate copy.

An affidavit of records never makes a record evidence of the truth of its contents. For example, most affidavits of records would list or identify a demand letter by the plaintiff to the defendant. That would be prima facie evidence that demand was made, but it would be no evidence whatever that the demand was well founded, or that any facts alleged in the demand letter were true.

Furthermore, there are exceptions to deemed admissions (a) and (b) above. A notice of non-admission may be given (or included in the affidavit of records: r. 192(3)). The party who is deemed to admit authenticity, despatch, and receipt of a message may still object to its admissibility in evidence (r. 192(2)(b)). And the entire rule on these deemed admissions ceases to apply at all, if the pleadings of the party deny the authenticity or receipt or despatch of a record (document) (r. 192(6)).

Of course a letter might contain an admission by the author, and so be admissible at common law against him, once there was proof (or deemed proof) of authenticity of the letter. We consider that possibility in each instance, but (as will be seen below) there are very few such admissions in the correspondence in question on this motion.[125]

In addition, assuming relevance, it is worth recalling that the deemed admissions of r. 192 may be sufficient in some cases to provide a foundation for the admission of a document into evidence without need of a witness.[126]

IV. DISCOVERY BY EXAMINATION OF WITNESSES

A. RULE CHANGES

As discussed above in reference to record production, the scope of discovery is now restricted to relevance and materiality. Rule 186 restricts oral examination to relevant and material facts, using the same definition as the one that applies to scope of record production.[127]

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125 *Ibid.* at 48-49.

126 An illustration of this is afforded by the case of *Dassen Gold Resources Ltd. v. Royal Bank of Canada* (1993), 138 A.R. 275 (Q.B.).

127 A recent affirmation of the narrower scope in the context of oral discovery is *Murphy Oil v. Predator Corp.*, (2002), 16 C.L.R. (3d) 319.

Furthermore, the 1999 amendments[128] also replaced the word "officer" with "representative" in reference to the corporate spokesperson selected by a corporate party to give evidence on its behalf under r. 214(1).[129] The new terminology avoids confusion with r. 200, which allows examination of officers (in the corporate sense of the word)[130] and employees of corporations.

B. WHO CAN BE EXAMINED

Rule 200 gives entitlement to examine for discovery where the adverse party is a corporation, officers of the corporation, and employees or former employees of the corporation who have relevant knowledge acquired by virtue of their employment. The courts have shown a willingness to use a broad definition of "officer" and "employee" in some circumstances, and Moore C.J.Q.B. had occasion to consider the scope of entitlement under this rule in *Mikisew Cree First Nation v. Canada.*[131] He began by reviewing the test for who may be examined under r. 200 as set out in *Cana Construction v. Calgary Centre for Performing Arts*,[132] where a volunteer chairperson of a committee supervising construction was found to be an "officer" within the meaning of the rule. Justice Kerans had stated in that case that the rule should be interpreted widely, because its object was "to force pre-trial disclosure of vital information which is not privileged."[133] Similarly, Moore C.J.Q.B. noted that the Court of Appeal had recently confirmed that one purpose of the rule was to give an opportunity to discover in advance evidence of persons likely to testify at trial.[134]

In *Mikisew*, the defendants wished to examine a lawyer who was alleged to have acted as a consultant or negotiator for the plaintiff during a period leading up to an agreement that was central to the issues in the lawsuit, and who had later become legal counsel for the plaintiff. The plaintiff argued that the lawyer had not played a central role in the discussions and negotiations, that other witnesses could give similar or better evidence, and that the lawyer's later role as counsel raised issues of privilege. Chief Justice Moore reviewed two earlier decisions in which attempts had been made to examine consultants.[135] In *Trizec*, the consultants had a purely contractual relationship and had largely been involved only after the problems leading to litigation had arisen. Essentially, the consultants in *Adams* had acted in a role that otherwise would have been filled by employees. In the result, Moore C.J.Q.B. concluded that the lawyer had been "in a position where he performed functions broadly equivalent to those of an employee,"[136] and found that he could be examined under r. 200.

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128 Alta. Reg. 172/99.

129 In addition, the right of a party to give notice to a corporate party opposite in interest to select its representative is now found in r. 200.1, being moved from r. 214(2). With the new terminology, the familiar "notice to select officer" should now be styled "notice to select representative."

130 Officers examined under r. 200 do not give their evidence as representatives of a corporate party, unless adopted as such.

131 (2000), 267 A.R. 338 (Q.B.) [*Mikisew*]. See also *Cardinal Estate v. 361881 Alberta* (2001), 298 A.R. 15 (Q.B.), where a non-party was ordered to answer written interrogatories.

132 (1986), 71 A.R. 158 (C.A.).

133 *Ibid.* as cited in *Mikisew*, *supra* note 131 at para. 9.

134 Referring to *Gienow Building Products Ltd. v. Tremco* (2000), 255 A.R. 273 (C.A.) [*Gienow*], considered in more detail in text accompanying *infra* note 149.

135 *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.* (1994), 154 A.R. 321 (Q.B.) [*Trizec*]; and *Adams v. Norcen Energy Resources Ltd.* (1998), 233 A.R. 174 (Q.B.) [*Adams*].

136 *Mikisew*, *supra* note 131 at para. 24.

However, he emphasized that there was no general rule allowing examination of consultants: "[c]onsultants are only subject to discovery under rule 200 if appropriate in the circumstances. I am not, in any way, establishing a blanket ruling covering all consultants to all aboriginal bands."[137] He also discounted concerns about privilege, indicating that those were best dealt with by raising points of privilege as they arose during the examination.[138]

Further application of the principles in *Mikisew* was made in *Alberta-Pacific Forest Industries v. Ingersoll-Rand Canada*,[139] where an engineer from a consulting firm working on site for a client was held to be an employee of the client for discovery purposes. He had provided additional full-time services because of a shortage of engineering staff, used client letterhead, and was seen as a representative of the client on a variety of matters.

There has also recently been consideration, at the highest level, of the degree to which individual plaintiffs can be examined in representative actions under r. 42. In *Western Canadian Shopping Centres v. Dutton*,[140] the defendants appealed the Alberta Court of Appeal's decision allowing discovery of each class member. The Court of Appeal had allowed such discovery primarily under r. 201.[141] Chief Justice McLachlin held, however, that allowing such a broad right of examination at an early stage in the proceedings would be premature, and would mitigate against one of the benefits of a class action — namely that discovery of class representatives is usually sufficient. She found that "[c]ases where individual discovery is required of all class members are the exception rather than the rule."[142] Accordingly, she directed that examination of individual class members would be available only by court order, upon showing reasonable necessity.[143] She also observed that where it seemed that individualized discovery would likely be necessary, that would be a factor weighing against the right to proceed under r. 42.[144]

Finally, it has been recognized that, in exceptional circumstances, a party may be excused from the need to submit to examinations for discovery altogether. In *R. and J. v. W.A.*,[145] Ritter J. found that the plaintiff should not be required to submit for examinations for discovery if an independent psychiatric assessment supported the position that she might suffer serious emotional injury as a result.[146] Justice Ritter held that the test is whether "the plaintiff is able to demonstrate a likelihood of serious injury if she submits to the examination for discovery, in such circumstance the party will be able to avoid the examination for

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137 *Ibid.*

138 *Klemke Mining Corp. v. Shell Canada Ltd.* (2002), C.P.C. (5th) 41 is a very similar case. Justice Clarke held that a solicitor working for Shell Canada Ltd., even though formally an independent contractor, met the common law tests to be considered an employee for discovery purposes. Further, the examination would not be directed solely at her work as a solicitor, for the plaintiff sought to inquire into what she heard and the extent to which she participated in negotiations leading towards an alleged contract. Objections could be raised to questions concerning privileged areas.

139 (2002), 326 A.R. (Q.B.).

140 [2001] 2 S.C.R. 534 [*Western Canadian Shopping*].

141 The rule provides that a member of a firm that is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for purposes of examination.

142 *Western Canadian Shopping*, *supra* note 140 at para. 59.

143 *Ibid.* at para. 60.

144 *Ibid.* at para. 59.

145 (2001), 304 A.R. 78 (Q.B.). The case involved incidents of serious and repeated sexual abuse.

146 *Ibid.* at 88.

discovery."[147] The decision was supported by extensive medical evidence put before the Court.[148]

C. EMPLOYEES

The Court of Appeal's decision in *Gienow*[149] addressed important questions concerning the ability to compel former employees to testify at examinations for discovery and the scope of questioning to which they may be subjected. The plaintiff, a window manufacturer, had sealed thousands of its windows with a sealant purchased from the defendant. The windows leaked and the plaintiff sued the defendant, alleging that the sealant was defective. After the lawsuit commenced, all of the defendant's shares were sold to an organization which had no interest in continuing to operate the sealant division. A group of the defendant's former employees established a new corporation, which then purchased the sealant division assets of the defendant. The sealant division, both before and after these transactions, was based in the United States.

The defendant produced for examinations for discovery two of its former employees who had continued with the sealant division under its new ownership, presumably because they were the most knowledgeable about the relevant issues. One of these former employees was nominated as the defendant's officer for the purposes of discovery. The employees had been involved in investigations into the sealant's failure both during their employment by the defendant, and subsequently, when the sealant division continued business under its new ownership as part of a separate corporate entity. They refused to answer any discovery questions about their investigations and knowledge relating to the sealant product acquired after their employment with the defendant had ceased. They also refused to re-attend for further examinations in Alberta, although they agreed to attend for commission evidence in the United States upon assurances that there would be no questions asked about the sealant after the defendant's sale of the division.

In an unreported decision, the case management judge ruled that a witness must answer if the information is within his personal knowledge, even if acquired while employed by a subsequent employer. He further found that a party could not call a witness at trial unless that witness had complied with all examination for discovery obligations. These findings were upheld by the Court of Appeal in *Gienow*.

The majority of the Court of Appeal agreed with the decision of the case management judge and held that a former employee being examined for discovery must answer all questions "touching the question at issue," regardless of whether the information was acquired after employment or whether the corporate party had ceased to exist. Justice Fruman took a literal approach to r. 200(1) which, at the time, read as follows:

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147 *Ibid.* at para. 18.

148 Justice Ritter also accepted limitations on the right to conduct an independent medical examination, based on the same considerations.

149 *Supra* note 134.

> [A]ny person who is or has been employed by any party to an action, and who appears to have some knowledge touching the question at issue, acquired by virtue of that employment whether the party or person is within or without the jurisdiction, may be orally examined on oath or affirmation before the trial of the action touching the matters in question by any person adverse in interest, without order.[150]

She found that the limitation of having knowledge "acquired by virtue of that employment" defined only the class of persons subject to examination. Once a person fell within that class, any question relevant to the pleadings was proper. Her decision was also based on early authorities establishing a broad scope of discovery, and a Queen's Bench decision in which it was held that the source of an employee's knowledge was not a limiting factor on areas of questioning.[151]

Justice O'Leary's dissent was largely based on what he described as a "purposive interpretation" of the rule. In his words: "[i]t is not logical to limit the former employees who may be examined on behalf of a corporate party to those who appear "to have some knowledge touching the matters in issue, acquired by virtue of that employment," and at the same time permit an examination that goes beyond that knowledge."[152]

He was also concerned that allowing questioning at large on a former employee's knowledge, which may have been acquired after cessation of employment effectively allowed broad witness depositions, as it is considered improper under our rules and authorities. He felt that doing so would allow some parties an unfair advantage, depending on whose former employees may have acquired independent knowledge after employment. In his view, the purpose of an examination for discovery was to inquire into the information of a party to the lawsuit and such inquiries should be limited to officers, employees and former employees who acquired their knowledge during the course of their employment by the party.[153]

We have noted elsewhere the various mechanisms for compelling witnesses who reside out of the jurisdiction to attend for examinations for discovery.[154] The case management judge in *Gienow* had directed "that a party could not call a witness at trial unless the witness had complied with all examinations for discovery obligations required by Alberta law, and any specific directions of the court."[155] In other words, while the court chose not to directly compel attendance of the defendant's former employees, it effectively precluded the defendant from calling them as witnesses at trial in the absence of their cooperation. Justice Fruman, with Picard J.A. concurring, also upheld this portion of the case management order.

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150 *Gienow*, *supra* note 134. The decision was based on r. 200(1) before its recent amendment. The rule now limits questioning to "relevant and material" matters, but the change is not significant to the point addressed in the case.

151 See *Chalmers v. Associated Cabs Ltd.* (1994), 152 A.R. 306 (Q.B.) [*Chalmers*].

152 *Gienow*, *supra* note 134 at para. 69.

153 *Ibid.* Justice O'Leary distinguished *Chalmers* on the basis that it concerned examination of an employee who acquired information during her employment, with the only question being whether the source of her information was strictly from employment or otherwise.

154 Glen H. Poelman & Eugene J. Bodnar, "Civil Procedure and Practice: Recent Developments" (1999) 37 Alta. L. Rev. 909 at 929 ["Civil Procedure"]; and "Discovery Procedure and Practice: Recent Developments" (1996) 34 Alta. L. Rev. 352 at 363-64 ["Discovery Procedure"].

155 *Gienow*, *supra* note 134 at para. 11.

Justice O'Leary again dissented, because the relevant practice note[156] addressed procedural steps and matters of scheduling designed to prepare a case for trial efficiently and inexpensively, consistent with fairness. However, he found nothing "expressly or impliedly giving a case management judge the power to make orders controlling the admission or exclusion of evidence that may be tendered at trial. That would usurp the function of the trial judge."[157]

D. WHO CAN ATTEND

Two recent decisions have reinforced the basic rule that examinations for discovery are private proceedings and not open to persons other than the parties or their representatives (unlike the public process of trials).

In *Foundation Group Mergers & Acquisitions Ltd. v. Norterra Inc.*,[158] Master Funduk allowed an application by a plaintiff for an order excluding two employees of a corporate defendant from attending during each other's examinations and during the examination of the defendant's officer. Given the basic rule that, absent special circumstances, only litigants were entitled to be present at examinations, he held that the defendant had the burden of establishing that the employees should be allowed to be present during each other's examinations and during the officer's examination. He was unconvinced by arguments of convenience (such as allowing employees to assist the officer during the examination), and of analogy to trials, wherein an employee could sit in on an examination after his was completed. He also noted that trials were public, in contrast to discovery proceedings.

In *Austec Electronic Systems Ltd. v. Mark IV Industries Ltd.*,[159] Burrows J. considered an application to allow internal corporate counsel for the defendant to attend to assist counsel of record in conducting examinations. There was material before the court suggesting that counsel's assistance was valuable because of her knowledge of the case, as well as an affidavit from the plaintiff's officer testifying that he found corporate counsel's presence at the first session of examinations to be distracting. Neither of these points was, however, determinative for Burrows J. He noted the basic principle that only the parties (and when corporations, through their representatives) and counsel engaged to represent them in the litigation are entitled to attend. In the result, he found that special circumstances showing a need for someone else's attendance because of the circumstances of the case or the ends of justice must be shown to allow deviation from the rule. The onus was not met in the matter before him, because while corporate counsel's attendance would be a convenience, her assistance could also be provided by associate counsel from the firm of record. Also, the anticipated benefits were solely for the defendant (in contrast, for example, to a case in which another person may assist the witness being examined).

It is common practice to request and receive permission for the attendance of other persons at examinations for discovery in a variety of circumstances. However, such practices

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156 Queen's Bench Practice Note No. 7, "The Very Long Trial" (1 September 1995).

157 *Gienow*, *supra* note 134 at para. 81.

158 246 A.R. 79 (Q.B.M.) [*Norterra*].

159 *Austec Electronic Systems Ltd. v. Mark IV Industries Ltd.* (2001), 284 A.R. 386 at 388 (Q.B.).

are largely determined by counsel's view of what is reasonable, and presumably, an expectation of reciprocity. Justice Burrows made it clear in the case before him that he was not commenting on whether the objection to corporate counsel's attendance was reasonable. In his words:

> It is not my role to judge the reasonableness of [the plaintiff's] refusal to consent and I do not do so. My role is to judge whether [the defendant's] reasons for wanting [corporate counsel] to participate are sufficient to justify deviation from the normal rule that only the parties, counsel and persons present by consent can attend at examinations for discovery.[160]

Finally, Master Funduk firmly rejected an attempt by a female defendant to have a male plaintiff excluded while the defendant was being examined for discovery.[161] It was noted that the evidence in support of the application (a letter from a psychologist attached to an affidavit by a legal assistant) was weak and indirect. Furthermore, it was noted that there are strong reasons to encourage or at least allow the presence of opposite parties during examinations for discovery, and compelling evidence would be required to direct a different result.

E. PROCEDURAL MATTERS

1. ORDER OF EXAMINATIONS

Multi-party lawsuits often involve flexible discovery scheduling, where initial examinations for discovery of a number of parties are conducted before any examinations are formally concluded. It appears, however, that a defendant is entitled to insist that the plaintiff conclude an examination for discovery of another party which has been commenced before proceeding to examine another defendant.

In *Tecon Investments Ltd. v. Ottawa Algonquin Travel,*[162] Veit J. considered a case wherein a plaintiff adjourned an examination of an individual, Greenwood,[163] "unconditionally," indicating that he could later conclude his examination "subject to the usual conditions by notifying him of the same in writing."[164] Subsequent correspondence appears to indicate that the lawyers may have had other discussions at conclusion of examinations, indicating that the plaintiff wished to review certain materials before determining whether further examinations of the individual would be required. The plaintiff later requested that another defendant, Rourke, who was also represented by Greenwood's counsel, be examined and that her evidence might determine whether further questioning of Greenwood would be required. Counsel for the defendants required that the plaintiff either confirm that he was concluded with Greenwood, or conduct any further questioning of Greenwood before proceeding to examine Rourke.

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160 *Ibid.* at para. 13.

161 *K.Y.L. v. N.O.* (2002), 315 A.R. 345 (Q.B.M.).

162 (2000), 269 A.R. 333 (Q.B.) [*Tecon*].

163 Greenwood presumably was the designated representative of a corporate defendant, although the reasons sometimes refer to him as a defendant.

164 *Tecon, supra* note 162 at para. 10.

Justice Veit held that "the defendants are entitled to insist that the plaintiffs conclude their discovery of the defendant Greenwood before moving on to the discovery of the defendant Rourke."[165] She based her reasoning on authorities which have held that second discoveries are generally not permissible in Alberta,[166] and that by proceeding to examine a second defendant while leaving open his discovery of a first defendant, the plaintiff would in effect be obtaining "a second, or even an ongoing, discovery of that party."[167] Although the relevance of the authorities on second discoveries might be questioned, Veit J. has made it clear that parties are entitled to insist upon a structured, orderly schedule of examinations. In addition, one party is not entitled to split his discovery of a party and thereby effectively give it the right to use information obtained through other examinations to assist in concluding its discovery.

2. VIDEO-CONFERENCING

The courts have shown a willingness to direct parties to use audio-visual teleconferencing technology for the convenience of parties and witnesses in appropriate circumstances. This matter was considered at length by Jones J. in *De Carvalho v. Watson*,[168] where reliance was placed upon r. 261.1 which reads as follows: "[i]n the absence of an agreement between the parties and subject to these *Rules* and *The Evidence Act* and any other enactment relating to evidence, any fact required to be proved at the trial of an action by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court." The plaintiff's claim was for medical negligence in relation to the birth of the infant plaintiff. The infant's father, as next friend, had resided partly in Alberta and partly in Brazil, but was beginning to spend the majority of his time in Brazil as required by his occupation. He was initially examined by defendants' counsel in Alberta, and subsequent discussions suggested that conclusion of the examination could likely be conducted by consent with the use of teleconferencing facilities. The defendants later took the position that the next friend was required to attend in Alberta for conclusion of the examination, primarily because this would enable the defendants to better assess his credibility.

Justice Jones noted that the defendants' position was now put forward by their senior counsel whereas the initial examinations had apparently been conducted by more junior counsel from the same firm. It was also noted that the initial examinations appeared to be very extensive, touching on the major areas in issue. Other factors included the substantial costs and inconvenience to the plaintiff if the next friend was required to personally attend for conclusion of the examinations. Justice Jones further appeared to place a great deal of emphasis on the significant improvement in the quality of teleconferencing facilities, which could even allow the presentation of documents to witnesses.

He emphasized that he was not finding that "such use of technology should be used generally as a substitute for personal appearances."[169] However, it was appropriate in the matter before him due to the witness's long distance from the jurisdiction, the costs, the

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165 *Ibid.* at para. 20.
166 *Ibid.* at para. 18.
167 *Ibid.* at para. 19.
168 (2000), 264 A.R. 83 (Q.B.).
169 *Ibid.* at para. 16.

minimal difficulty in arranging the examination, and the previous "opportunity for counsel to engage in personal cross-examination of an extensive nature."[170]

3. PROCEDURE ON QUESTIONING AND MAKING OBJECTIONS

From time to time, the courts are called upon to oversee the approach taken by counsel in questioning witnesses at examinations for discovery. In *Dunn v. Dunn*,[171] an action for damages for personal injuries, the plaintiff was asked detailed questions about whether she had undergone prior surgeries and had experienced various symptoms. Plaintiff's counsel interjected, stating that he was entitled to know the document to which the defendant's counsel was referring. Defendant's counsel was apparently basing his questioning on handwritten notes, but the suggestion was that these were taken from some other document which, in the view of the plaintiff's counsel, should be shown to the witness. Justice Lee found that plaintiff's counsel was not entitled to interject on this basis. He held that where a witness is being asked questions regarding a particular document, she or he is entitled to be shown the document. However, where the questions do not relate to a particular document, then the defendant has no obligation to identify a document, even where the questions may have arisen from his or her review of such a document. Justice Lee referred to *Drake v. Overland*[172] for the principle that counsel are not obliged to reveal the reasons or strategy for asking their questions.

Surprisingly, it is sometimes asserted that there is no requirement to state the reason for an objection to a question. In *S.D.M. v. Alberta*, Clarke J. found no Alberta authority on point, but expressed a number of reasons why good practice requires giving reasons for objections:

> There is a good deal of common sense in the suggestion that it is preferable to state all grounds at the time the objection is made. The question might well be asked in a form that is unobjectionable but still satisfies the questioner's needs, thus obviating the need to go to court to have that particular dispute settled by the court. In addition, the statement of grounds of the objection may well cause the questioner to conclude that, indeed, those reasons are valid and the question is not proper. To be clear, no suggestion is made that the Transcript should deteriorate into an argument between the questioner and counsel for the party examined. As a general rule counsel should state all of the grounds that have caused counsel to object to the particular question asked.[173]

Just as importantly, Clarke J. ruled that electing to adjourn the examination to obtain rulings on frequent objections may lead to a loss of the right to continue the discovery. He held that

> The cases make it clear that counsel who stops partway through a discovery due to frustration (as claimed by the plaintiff's counsel in this case) with opposing counsel runs a substantial risk of being denied leave to return

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170 *Ibid.*
171 (2001), 297 A.R. 365 (Q.B.).
172 (1979), 19 A.R. 472 (C.A.).
173 2002 ABQB 1132.

to the table. In those cases, aggrieved counsel were warned by opposing counsel to get their questions on the record.[174]

F. SCOPE OF EXAMINATION

1. GENERALLY

Despite the restriction in scope of discovery created by the revised *Rules*, the courts are still reluctant to determine too early which areas of questioning are off-limits. For example, it was argued in *Hepworth v. Canadian Equestrian Federation*[175] that the plaintiff, who was injured while participating in a cross-country horse-jumping event, was required to answer questions about her experience with release forms. That point was argued that, even though there were questions concerning the validity of the plaintiff's argument about not signing and reading the release and waiver form, the fact that *non est factum* had not been pled, and the fact that there were admissions at discovery that might weaken a defence of *non est factum* in any event. Justice Conrad held that the areas of questioning were nevertheless proper, and stated that "[p]art of the purpose of discovery is to help parties establish what will be in issue at trial. It would seem counterproductive to restrict the questions on discovery to those respecting "valid" issues, especially where no impartial decision maker is immediately available to determine the merit or validity of each issue raised."[176]

2. RELEVANCE AND MATERIALITY

We have noted the new provisions of r. 186 that limit record production and oral examination to "relevant and material" matters. In principle, the same test applies to both documentary and oral discovery. The Court of Appeal held in *Hirtz*[177] that "the 1999 amendments to r. 186.1, 187.1(2), and 200(1.2) narrow the scope of relevance for written and oral discovery, excluding tertiary relevance."[178] The principle, however, has been worked out more frequently in motions concerning the scope of oral discovery.

An early and thorough review of the implications of the rule change was made by Perras J. in *D'Elia v. Dansereau*.[179] The case involved two spouses suing as plaintiffs for injuries sustained by the wife in a motor vehicle accident (the husband's claim being for loss of consortium). Some of the questions put by the defendant's counsel to the husband on examinations for discovery concerned his educational background and general activities.[180]

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174 *Ibid.*, para. 17. Two points should be noted in qualifying this result. First, there were unusual facts, including an aged and upset former employee who was being examined, and possibly aggressive conduct by counsel. Second, Clarke J. expressly reserved the right of counsel to continue discovery on matters arising from objections where it was held that the questions were proper, although in the circumstances of the case, he ruled that further discovery could occur only by interrogatories.

175 (2000), 277 A.R. 138 (C.A.) [*Hepworth*].

176 *Ibid.* at para. 10.

177 *Supra* note 89.

178 *Ibid.* at 26.

179 (2000), 267 A.R. 157 (Q.B.) [*D'Elia*].

180 *Ibid.* at para. 20.

Justice Perras noted that authorities considering the earlier discovery rules, particularly *Czuy v. Mitchell*,[181] emphasized the "very broad and all encompassing" nature of oral discovery.[182] He found that the new rules limited the scope of discovery, and stated as follows:

> Clearly, the current language in the oral discovery rule has limiting parameters. In my view, it is not enough to argue that questions on discovery "touch the matters in question" but rather, the issue is are the questions relevant and material and, if so, do they advance significantly the determination of the issues raised in the pleadings.
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> Hence, any analysis to determine the propriety of disputed questions on oral discovery must start by examining the pleadings. Henceforth, the pleadings will be of considerable importance in focusing the issues which in turn will give meaning to materiality and relevance of oral discovery in terms of ascertaining the facts. So, in my view, relevant questions will be those questions having regard to the pleadings that elicit facts that are in issue or facts that make facts in issue, more probable than not. It is my view that the previous broad scope of oral examination is now significantly narrowed from the previous practice by the reformulation of parts of the discovery rules.[183]

He then noted that the husband's only claim was for loss of consortium and in construing the meaning of such a claim, he found that questions on educational background and general activities were not relevant and need not be answered.

A similar approach was taken by Johnstone J. in *750869 Alberta Ltd. v. Cambridge Shopping Centres Ltd.*,[184] where the lawsuit concerned allegations by a shopping mall tenant that it was forced to vacate its leased premises because of actions by the landlord and its manager. The defendant objected to questions about leasing activities after the plaintiff had vacated the mall. It was held that such questions need not be answered, with the analysis turning in part on the new test of "relevance and materiality." Justice Johnstone referred to an earlier decision in which she had noted that in the context of production of documents, the new rules substantially reduced the scope of documents required to be produced.[185] She quoted with approval the following statement by Master Funduk: "[T]he new terms of 'relevance' and 'materiality' eliminate the old fishing expeditions. 'There is no fishing without first evidence that there are fish in the pond and a reasonable amount of fish.'"[186]

Based on her review of the authorities, Johnstone J. considered the questions properly objectionable for examination for discovery purposes, being "satisfied from the existing jurisprudence that the intent of the amendment was to limit the scope of discoverability to

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181 (1976), 1 A.R. 434 (C.A.).

182 *D'Elia, supra* note 179 at para. 12.

183 *Ibid.* at paras. 16-17.

184 (2001), 283 A.R. 391 (Q.B.) [*750869*].

185 *Liu, supra* note 92.

186 *750869, supra* note 184 at para. 22, referring to *Franco v. Hackett* (2000), 262 A.R. 127 (Q.B.M.). See also *Finning Ltd. v. Cormack* (2000), 263 A.R. 135 (Q.B.M.); and *Hepworth, supra* note 175. In *Hepworth*, Conrad J.A. noted the new discovery rules, but did not specifically address their impact on scope of examinations. See also *Coombs (Guardian of) v. Denham Investments Ltd.*, 2001 ABCA 103 (C.A.).

that of evidence meeting the test of both relevancy and materiality based upon a consideration of all pleadings."[187]

In Master Quinn's decision in *Finning Ltd. v. Cormack*[188] (referred to by Johnstone J. in *750869*),[189] part of the analysis was based upon the definitions contained in *Black's* for the terms "relevant evidence" and "material evidence."[190] Master Quinn held that according to the *Black's* definitions, "the question must not only be relevant in a broad sense but must go to the substantial matters in dispute."[191]

It is therefore clear that the courts have recognized a narrowing of the scope of examinations for discovery. However, as a practical matter, many of the decisions either expressly or impliedly find that determining whether a question is proper will result in the same answer regardless of whether the old test of "touching the matters in issue" or the new test of "relevant and material" is used. For example, in *Hepworth v. Canadian Equestrian Federation*,[192] Conrad J.A. implied that the new rule imposed a narrower test for admissibility of questions, but nevertheless stated that "we are satisfied that 22 of the impugned questions should have been answered regardless of which version of the *Rules* applies."[193] To a similar effect, in *Inland Cement Ltd. v. Stantec Consulting Ltd.*,[194] Master Funduk found that in spite of the narrower scope of permissible questions under the new rules, the principle set out in *Drake v. Overland*[195] was "still sound law because it still meets the "relevant and material" test."[196]

As a matter of practice, it has become more important to plead specifically many issues which might otherwise have been assumed to be included within broad allegations or claims. Rule 186.1 provides that for a matter to be considered relevant and material, it must "significantly help determine one or more of the issues raised in the pleadings" or "ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings." The emphasis on issues raised in the pleadings has been noted in a number of Alberta decisions.[197] Of course, it can be said that any question of relevance, whether at trial or at discovery under the old rules, must be determined with regard to the pleadings. However, the wording of the new rule seems to have prompted courts to take a closer look at the pleadings in measuring relevance and, in particular, materiality. For the purpose of obtaining broad discovery, therefore, counsel may find it necessary to plead with more particularity.[198]

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187 *750869, ibid.* at para. 30.
188 (2000), 263 A.R. 135 (Q.B.M.).
189 *750869, supra* note 184 at para. 23.
190 *Supra* note 28, *s.v.* "relevant evidence," "material evidence."
191 *750869, supra* note 184 at para. 56.
192 *Hepworth, supra* note 175.
193 *Ibid.* at para. 3.
194 (2002), 308 A.R. 180 [*Stantec*].
195 (1979), 19 A.R. 472 (C.A.).
196 *Stantec, supra* note 194 at para. 7.
197 See *D'Elia, supra* note 179 and *750869, supra* note 184.
198 Nevertheless, indications remain: even under the new rules, the courts will interpret pleadings generously; see *Hepworth, supra* note 186.

3. MOTIVE OR SIMILAR FACT

In two decisions, the courts have identified situations where questions going beyond the facts relating to the specific incidents at issue are permitted. Both decisions were based upon the discovery rules as they existed before the amendments on "relevance and materiality" and, for that reason, care must be taken in their application, particularly having regard to the Court of Appeal's distinction between secondary and tertiary relevance (the latter no longer being examinable).[199]

In the first case, the plaintiff corporation sued former directors to recover remuneration paid to them allegedly in contravention of by-laws forbidding remuneration.[200] The statement of claim included allegations of bad faith, conflict of interest, and breach of by-laws. The discovery questions at issue concerned decisions made by the corporate plaintiff with respect to a director who was not a defendant, which involved his receiving payment (while acting as an employee and director), and being granted an indemnity. The questions were objected to on the basis that "the defendant is improperly asking why the plaintiff decided to sue those former directors and not others and how and why it chose to seek an order granting [the other director] indemnity."[201]

Justice Sulyma referred to a number of authorities establishing that the scope of examinations for discovery is very broad, questions may be considered relevant as long as they touch on the matters in question, and relevance should be determined solely by issues raised in the pleadings. She drew a distinction between cases in which questions on similar facts were not allowed, finding that these tended to deal with contractual relationships. The matter before her was distinguishable in that it involved claims founded on bad faith and for equitable relief. Therefore, she found that "the plaintiff's conduct in dealing with others in similar positions to those against whom it seeks such relief is relevant."[202]

The similar fact issue was raised again before Perras J. in a case involving injury to the plaintiff by assailants after the plaintiff and the assailants had been ejected from the corporate defendant's bar.[203] The plaintiff sought answers to questions about previous fights at the corporate defendant's premises, and the defendant objected on the basis that such evidence would be in the nature of similar facts (as going to credibility) and therefore not admissible. Perras J. compelled the questions to be answered, finding that regardless of whether they were similar facts, they were highly relevant to a material issue, namely "the Corporate defendant's knowledge (as opposed to ignorance) of potential danger to invitees." Accordingly, in his view, there was no or very little concern about acts demonstrating bad character."[204]

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199 *Hirtz, supra* note 89.

200 *CKUA Radio Foundation v. Hinchliffe* (1999), 251 A.R. 117 (Q.B.).

201 *Ibid.* at para. 5.

202 *Ibid.* at para. 13.

203 *Coombs v. Denham Investments Ltd.*, 1999 ABQB 920.

204 *Ibid.* at para. 14. The latter concern is one of the bases upon which similar fact evidence is often excluded.

4. ADVERSITY OF INTEREST

Two recent decisions have emphasized the requirement of adversity in interest between parties, and adversity of interest on the issues upon which questioning is based, in relation to the propriety of question on oral discovery. In one case,[205] the plaintiffs were mother and daughters, all occupants in a vehicle involved in a collision with the defendants' vehicle. Justice Dixon held that it was improper for the defendant to ask each plaintiff about the symptoms and activities of the other plaintiffs, because there was no direct adversity of interest between the defendant and each plaintiff with respect to the injuries of other plaintiffs.

In the other case,[206] the plaintiff wife was injured in an accident while travelling as a passenger in a vehicle driven by her husband, the defendant. The plaintiff was seeking, among other things, compensation for gratuitous services her husband had provided as a result of her injury. Justice Lee held that, while the parties were adverse in interest in the action, they were not adverse in interest with respect to this issue. Justice Lee noted some discrepancy in the authorities between cases which found that once the parties were adverse in interest generally, all questions relevant to the action were admissible,[207] and cases which found that there must be adversity in interest with respect to the issues on which questioning was based.[208] Without seeking to reconcile the two lines of authority, he found that "for the purposes of this unique situation I prefer the approach of limiting the Examination for Discovery to the issues upon which the parties are adverse in interest."[209]

The issue of whether the validity of questions should be based upon general adversity in interest, or adversity on specific issues is analogous in some ways to the issue of relevancy of areas of questioning of former employees (addressed above in our discussion of *Gienow*).[210] The majority in *Gienow* found that once the test for compellability of a former employee for examinations for discovery was met, all issues relevant to the action were examinable regardless of whether they extended beyond knowledge acquired during the course of employment. That approach would be more consistent with the view that all questions relevant to the issues in the action are proper, assuming that the parties meet the general test of being adverse in interest for purposes of the action. However, it may be questioned whether Lee J.'s approach in *Dunn* might better reflect the purpose behind the rules based on adversity and entitlement to examine former employees.

5. QUESTIONS MUST BE LIMITED TO FACTS

The courts have continued to emphasize the limitation of examinations for discovery to factual matters. In one case,[211] Moore C.J.Q.B. considered an application arising out of questions asked by defendant's counsel seeking to elicit facts on which specific allegations

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205 *Tang v. Labrocca* (1999), 75 Alta. L.R. (3d) 80 (Q.B.).
206 *Dunn v. Dunn* (2000), 80 Alta. L.R. (3d) 121 (Q.B.) [*Dunn*].
207 See *Jacobson v. Sveen* (1995), 28 Alta. L.R. (3d) 186 (Q.B.).
208 *Dunn, supra* note 206.
209 *Ibid.* at para. 52.
210 *Gienow, supra* note 134.
211 *Millott Estate v. Reinhard* (2000), 265 A.R. 350 (Q.B.) [*Millott*].

of negligence were based. The application to compel answers was denied, in part on the basis that the answers sought would disclose evidence rather than facts, in that they related to how the case would be proved.[212] A similar analysis was made by Master Funduk in another case,[213] wherein he found it was improper to ask a party what facts he relied upon, even in the context of a cross-examination on an affidavit.

The distinction between fact and law, and between fact and evidence, was not observed in a decision by Master Waller that involved an application to require defendants to disclose the identity of a witness before trial.[214] The defendant's counsel had located an independent witness who supported the defendant's version of the accident, and the defendant's counsel further provided a summary of the recollection of the witness in correspondence to plaintiff's counsel. Master Waller noted the general rule that witness names need not be disclosed, and made reference as well to distinctions between fact and evidence. Further, he was "prepared to accept that the name of the defendant's witness is not a material fact in the case."[215] However, he noted the prevalent judicial view about full disclosure through the discovery process, recommendations by a committee on changes to practice notes to allow direction of disclosure of names of witnesses, and the evolving nature of the law. In the result, he concluded: "[t]he court must be practical. The prospect of a two week trial might well be obviated by the disclosure of the name of the independent witness. A settlement is more likely to be effected with blinkers off rather than blinkers on."[216]

During oral examinations, an issue frequently arises as to the degree to which witnesses are obliged to inform themselves of relevant facts. In *Millott*[217] the defendants applied for an order compelling two of the individual plaintiffs to provide facts relevant to allegations of negligence pled in a motor vehicle accident case. The plaintiffs testified that they had no details of the accident because they had not been informed by the police and had taken no steps to personally discover the facts. Their counsel objected to questions, with respect to various particulars of negligence, posed in the following manner: "What information are you aware of, or duty-bound to disclose about the fact that Mr. Reinhard failed to keep a proper, or any lookout?"[218]

The primary issue addressed by Moore C.J.Q.B. was the degree to which the duty to inform extended to information in the possession of a party's lawyer. He found that the facts sought on examination were not known by the plaintiffs in the ordinary course or from their own involvement. Rather, they were in the nature of evidence, and would show how the plaintiffs' case was to be proved. If the plaintiffs were required to disclose their information, the line between fact and evidence would be crossed, and privileged information, namely the

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212 Chief Justice Moore based his findings largely on the case of *Can-Air Services Ltd. v. British Aviation Insurance Co.* (1988), 91 A.R. 258 (C.A.).

213 *Wilkinson v. Westfair Properties Ltd.* (2001), 290 A.R. 137 (Q.B.M.).

214 *Hailmichael v. Roodzant* (1998), 233 A.R. 335 (Q.B.M.).

215 *Ibid.* at para. 10.

216 *Ibid.* at para. 15.

217 *Supra* note 211.

218 *Ibid.* at para. 7.

results of counsel's investigations, would be disclosed. Chief Justice Moore referred with approval to Mason J.'s decision in *Blair*,[219] wherein he stated as follows:

> Facts, not otherwise privileged, are those facts that a party knows of on its own account, in the ordinary course of affairs or from its own involvement in the events which are the subject matter of the dispute. The facts acquired by counsel or agents, acting on behalf of counsel (in this case documents and reports obtained or authored by the insurance adjuster and the private investigator and counsel) are not discoverable because they are covered by the litigation privilege, i.e., they are facts which are otherwise privileged.[220]

G. USE OF DISCOVERY EVIDENCE AT TRIAL

1. BY READING IN

The primary use of examinations for discovery at trial is for one party to read into evidence, as part of its case, the evidence given at discovery by the other party's representative or employees or former employees.[221] Rule 214(1) allows reading and provides that: "[a]ny party to an action or issue may at the trial or on motion use in evidence as against any opposite party any part of the examination of that opposite party, or in case the opposite party is a corporation, of the examination of any representative thereof selected to submit to an examination to be so used." In limited cases, the party whose evidence is being read before the court may obtain a direction that passages in addition to those selected by the opposite party may be put before the court, based on r. 214(4), which provides as follows: "If part only of an examination is used, the Court may at the request of any party against whom it is so used direct that any other part of the examination be also used, if it is so connected with the part so used that the first mentioned part ought not be used without the other part".

A useful overview of the principles governing the use of discovery evidence in court (as applied to a chambers application) was given by the Court of Appeal in *Mikisew Cree First Nation*.[222] The Court gave the following summary of the principles:[223]

> the remaining question is what types of discovery material are admissible in evidence, and against whom. Alberta law on that subject is well settled. The *Rules of Court* are explicit, and have been validated several times by legislation and so have the force of a statute. We will begin with oral discovery (examination for discovery transcripts), and then go on to discovery of records.

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219 *Supra* note 109.

220 *Millot*, *supra* note 211 at para. 25, quoting *Blair*, *ibid.* at para. 12.

221 On the requirements for reading in evidence of employees and former employees, the leading case is still *Esso Resources Canada v. Stearns Catalytic* (1992), 20 Alta. L.R. (3d) 309 (Q.B.), aff'd. (1992), 20 Alta. L.R. (3d) 313 (C.A.); (1992), 20 Alta. L.R. (3d) 315 (Q.B.), (1993), 20 Alta. L.R. (3d) 320 (Q.B.), and (1993), 20 Alta. L.R. (3d) 327 (Q.B.). Excerpts from these decisions are conveniently located and reproduced by A.A. Fradsham in *Alberta Rules of Court Annotated, 2003* (Toronto: Carswell, 2002) at 474-81; and see summaries in "Discovery Procedure," *supra* note 154 at 370-73; and "Civil Procedure," *supra* note 154 at 955-57.

222 *Supra* note 58.

223 Reference was made to all of the leading authorities, which are omitted from the quotation included here.

> No one can adduce his or her own answers given on examination for discovery as evidence. All examinations for discovery in Alberta are conducted on that basic understanding.... (The only partial exception is connected answers after a read-in by an opposing party, which has not occurred here.)
>
> Employees or ex-employees can be examined for discovery, but their answers are not admissible at all.... There may be an exception where a party confirms the correctness of such answers, or adopts them as his or her own. No one suggests that that occurred here (with a few minor exceptions).
>
> An answer given by a party on examination for discovery is admissible in evidence against that party. But it is inadmissible against any other party, whether on the same side or not.... Rule 214(1) makes that plain, and the case law and practice are uniform and undoubted. An officer selected by a corporation for examination for discovery to answer for it is considered to answer for the corporation, and his or her answers are presumed to be its answers.[224]

There has also been a recent reminder of the fact that a party reading discovery evidence into the trial record must take both the benefit and the burden of the evidence so submitted.[225]

The element of "connectedness" found in r. 214(4), by which the party whose evidence is being read before the court may obtain a direction for additional passages to be put before the court, was considered by Lee J. in a series of decisions in the *Edmonton (City) v. Lovat Tunnel Equipment*[226] case. The City of Edmonton (Edmonton), as plaintiff, sued the defendants Lovat Tunnel Equipment Inc. (Lovat) and Rotek Tunnel Equipment Inc. (Rotek) for economic losses resulting from an alleged failure of a replacement bearing in a tunnelling machine. Lovat also issued a third party notice against Rotek. A "Mary Carter" settlement agreement was made between Edmonton and Lovat before trial, pursuant to which Lovat agreed to pay Edmonton a certain amount, plus additional sums that Lovat might recover in third party proceedings against Rotek. In addition, Lovat agreed not to actively defend Edmonton's claim.

In this series of decisions Lee J. found that "connectedness" does not always require "adjacency." He allowed passages separated by many pages to be read in to add context or to clarify another passage proposed by the opposite party. Justice Lee explained the purpose of the provision as follows: "The purpose of rule 214(4) is to allow the witness to add to half an answer or to clarify a passage which has been taken out of context or is otherwise misleading. The test for letting the party or parties opposite supplement or augment the read-in in any particular instance is "connectedness" with the part being read-in."[227]

He noted that "even a passage which contradicts the read-in may be regarded as 'connected' within the meaning of rule 214(4)."[228] He also cautioned that r. 214(4) must not be used as a pretext for a party to give evidence on its own behalf which should be tendered as part of its own case, and that the proper test for whether a proposed read-in is complete

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224 *Mikisew Cree First Nation, supra* note 58 at paras. 14-17.

225 *Roque v. Bane* (2002), 309 A.R. 186 (Q.B.) at para. 3.

226 (2000), 262 A.R. 221 (Q.B.), (2000), 262 A.R. 244 (Q.B.), and (2000), 265 A.R. 285 (Q.B.) [*Lovat*].

227 (2000), 262 A.R. 221 (Q.B.) at para. 20.

228 *Ibid.* at para. 23.

is one of fairness based on the specific question asked, rather than requiring everything on a given topic to be read in.

There is also a distinction between evidence read in under r. 214(1) and "connected" evidence read in at the request of the opposite party under r. 214(4). Generally, evidence under r. 214(1) constitutes admissions against the opposite party where given by its representative (or *prima facie* evidence where given by its employees or former employees), and will become evidence for and against the party submitting the read-in as well. However, with respect to evidence tendered by the opposite party under r. 214(4) from its own discovery transcript, the evidence is simply considered as trial evidence at large. In the words of Lee J.: "Additional evidence read-in at the defendant's request becomes evidence in the case generally and is available for or against any party."[229]

The unique circumstances in *Lovat* brought forward some additional issues. When Edmonton sought to read in parts of Lovat's discovery testimony, Rotek sought the right to tender additional "connected" passages under r. 214(4). Edmonton objected on the basis that the read-in evidence applied only against Lovat, and Rotek therefore had no standing for purposes of these arguments. Justice Lee allowed Rotek to tender additional connected passages, however, for two reasons:

- Rotek disputed Lovat's liability to Edmonton in its defence to the third party notice, and could only be found liable under the third party notice if Edmonton succeeded against Lovat; and
- The existence of a Mary Carter agreement between Edmonton and Lovat, even though it was made after examinations for discovery, gave rise to an additional need to monitor the manner in which evidence was presented by Edmonton and Lovat, and the court could not rely upon Lovat to exercise its rights under r. 214(4) because an adversity of interest no longer existed.

Nevertheless, Lee J. made it clear that evidence read in by Edmonton against Lovat would not be considered as evidence against Rotek.

Finally, in a related decision in the same case,[230] Lee J. considered objections by Edmonton and Lovat to certain proposed read-ins based on their argument that "Rotek failed to cross-examine the witnesses whose evidence is sought to be read-in in regard to the contents of the proposed read-ins."[231] In addressing the argument, Lee J. found that, regardless of what might be preferred practice when cross-examining (that is, whether admissions later sought to be read-in should first be put to a witness while testifying), "the defendant cannot be *precluded* from reading-in admissions given the plain wording of r. 214(1)."[232] Accordingly, he was not prepared to restrict Rotek's proposed read-ins

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229 *Ibid.* at para. 29.
230 *Lovat, supra* note 226.
231 *Ibid.* at para. 1.
232 *Ibid.* at para. 36 [emphasis in original].

according to whether there had been cross-examination on the subject of the read-ins.[233] He noted that Edmonton and Lovat would be able to add connected passages, based on the principles outlined in his previous rulings. In the result, he made the following direction:

> Rotek is entitled to read-in admissions made by the officers of the City and Lovat to the extent that those admissions do not *contradict* the evidence given by those witnesses at trial. The same would apply to admissions of employees if the officer on examinations for discovery acknowledged that the evidence of the employee is information of the City/Lovat.
>
> The City and Lovat may recall those witnesses in rebuttal and ask the witnesses to explain the admissions which have been read-in from discovery.[234]

Presumably, there should be no difficulty in applying the well-established common law rule in *Browne v. Dunn*[235] to r. 214(1). Justice Lee's ruling appears to go some distance toward accomplishing this end. He seems to have intended that evidence which was not the subject of a witness's examination-in-chief or cross-examination could be the subject of a read-in, but that contradictory evidence could not be read in, presumably unless it had been put to the witness during cross-examination.

2. BY IMPEACHMENT

The second use of examinations for discovery at trial is as a basis for cross-examining on a prior inconsistent statement under oath. This was also considered in *Lovat*,[236] wherein Lee J. summarized how the issue arose in the case before him:

> During the course of his cross-examination of the City witness ... counsel for Rotek put to the witness a passage from the transcript of the witness's examination for discovery in an effort to impeach the witness. Counsel for the City, in re-examination, attempted to read another portion of the transcript which he argued both clarified and qualified the segment read by counsel for Rotek.[237]

The re-examining counsel sought to rely upon r. 214(4). Rotek's counsel objected to this approach to re-examination, arguing that r. 214(4) is directed toward allowing the reading-in of connected discovery passages, not toward use during examination of witnesses. Justice Lee disagreed, and expressed his views as follows:

> Rule 214(4) relates to read-ins. It purpose is to allow the witness to add to half an answer, or clarify a passage which has been taken out of context or otherwise is misleading. The same principle can and should be applied

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233 See *Guaranty Co. of North America v. Beasse* (1992), 124 A.R. 161 (Q.B.) for the proposition that admissions, as well as inconsistent statements, should be put to the party or officer that testifies prior to the respondent's case, while that witness is on the stand.

234 *Lovat*, *supra* note 226 at paras. 46-47.

235 (1894), 6 R. 67 (H.L.). The rule provides that if it is intended to lead evidence to contradict and thus discredit a witness, it must be first put to him or her during cross-examination so that there is an opportunity for explanation.

236 (2000), 260 A.R. 245 (Q.B.).

237 *Ibid.* at para. 16.

to a situation such as the present one where a part of the examination for discovery has been put to a party in cross-examination.[238]

He then went on to consider whether the passage used for re-examination was sufficiently connected, using the principles outlined above.

V. INTERLOCUTORY APPLICATIONS: EVIDENTIARY ISSUES

A. CROSS-EXAMINATION ON AFFIDAVITS

An issue often debated between counsel is the scope of cross-examination on an affidavit. In *Alberta (Treasury Branches) v. Leahy*,[239] Mason J. highlighted the key differences between cross-examinations on affidavits and examinations for discovery. He indicated that in general terms, the parameters of a cross-examination on an affidavit are determined by what is relevant to the pending motion. He then went on to adopt the reasoning of an earlier Federal Court decision in stating the following of a cross-examination on affidavit:

(a) The person examined is a witness, not a party.
(b) Answers given are evidence, not admissions.
(c) Absence of knowledge is an acceptable answer — the witness cannot be required to inform him or herself.
(d) Production of documents can only be required on the same basis as for any other witness, *i.e.* if the witness has the custody or control of the documents.
(e) The rules of relevance are more limited than they are for an examination for discovery.[240]

Although Mason J. agreed that the scope of cross-examination is necessarily broadened by an inquiry into the credibility of a deponent, he indicated that an inquiry into credibility is still limited by the type of application in question. He also indicated that r. 216.1[241] and r. 255[242] set out the outer limits of cross-examination and codify the inherent discretion of a judge to determine whether further cross-examination ought to be allowed.

Several recent cases have considered refusals to answer questions on a cross-examination on affidavit. A couple of these cases bear mention:[243]

- In *Dy-Reyes v. Carina Holdings Ltd.*,[244] a deponent had refused to answer questions on the advice of counsel. Although the Court held that the deponent was not in contempt for following the advice of counsel and not answering the questions, it

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238 *Ibid.* at para. 22.
239 (1999), 254 A.R. 263 (Q.B.).
240 *Merck Frosst Canada v. Canada (Minister of Health)* (1997), 146 F.T.R. 249 at para. 4.
241 The rule allows the court to modify or waive any rights or power relating to discovery where a "party acts or threatens to act in any manner that is vexatious, evasive, abusive, oppressive, improper or prolix," or where "the expense, delay, danger or difficulty in complying fully would be grossly disproportionate to the likely benefit."
242 The rule permits a judge to disallow questions on cross-examination which appear vexatious and not properly relevant.
243 See also *Colortech Painting and Decorating Ltd. v. Toh* (2000), 276 A.R. 262 (Q.B.).
244 (2000), 267 A.R. 235 (Q.B.).

found the questions to be legitimate, and ordered the deponent to re-attend and answer them or else be found in contempt.

- In *Altaspec Communications v. Nigrin*,[245] counsel objected to many questions on the basis that the examiner could only ask questions on matters relating to the affidavit itself. The court rejected this argument, stating that the scope of cross-examination was determined by what was relevant to the motion. It also awarded costs against the party on whose behalf the affidavit had been filed due to the wasted cross-examination and unnecessary application.

B. CONTENTS OF AFFIDAVITS

The courts in recent years have reiterated the principle that affidavits should be confined to facts and should not include argument, opinions or conclusions.[246] Accordingly, the court may disregard portions of an affidavit which do not comply with this principle. However, even if portions of an affidavit are inadmissible, the rest of the affidavit may be admitted.[247]

In *Murphy Oil v. Predator Corp.*,[248] McMahon J. confirmed that documents are not admissible on an application without being exhibited to an affidavit, identified on discovery or on a cross-examination on such affidavit, or identified on *viva voce* evidence, unless the "documents in possession" doctrine applies. He also indicated that a document is not admissible on an application merely because it has been listed on an affidavit of records.

Sometimes the rules are relaxed in the case management process. In *Alberta Central Airways Ltd. v. Progressive Air Services Ltd.*,[249] the Alberta Court of Appeal indicated that while substantive issues involving rights of parties will generally require formal evidence, either *viva voce* or by affidavit, where the issue is procedural and can be truly described as a case management issue or an issue relating to the management of court time, strict compliance with rules requiring affidavit evidence is not necessary, as it would render ineffective the case management process. The courts also have continued to criticize the practice of having a legal assistant swear an affidavit of substance.[250] Parties utilizing this practice run the risk of having the affidavit disregarded or being considered as argument rather than evidence.

The Alberta Court of Appeal also has recently commented on the rule permitting the examination of witnesses in the context of an interlocutory application (r. 266). In *Dechant v. Law Society of Alberta*,[251] the Court discussed the origin and use of the rule, and indicated that on a r. 266 examination, the examining party is not at liberty to pick and choose those

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245 (2000), 272 A.R. 313 (Q.B.M.).

246 *Allen v. Alberta* (2001), 286 A.R. 132 (C.A.); *Alberta (Treasury Branches) v. Leahy* (1999), 234 A.R. 201 (Q.B.); *Matthews v. Great-West Life Assurance* (2002), 313 A.R. 86 (Q.B.) [*Matthews*].

247 *Matthews, ibid.* at para. 11.

248 (2002), 316 A.R. 1 (Q.B.).

249 (1999), 250 A.R. 160.

250 *Jervis v. Nendze* (2002), 318 A.R. 293 (Q.B.) [*Jervis*]; *Patel v. Friesen* (2002), 1 Alta. L.R. (4th) 310 ABQB 112 (Q.B.M.).

251 (2000), 266 A.R. 249 (C.A.).

parts of the examination it wishes to utilize. Rather, the totality of the evidence obtained on such an examination becomes part of the examining party's case.

On occasion, the court has been called upon to consider somewhat more esoteric issues concerning affidavits. In *Alberta Treasury Branches v. Ghermezian*,[252] the plaintiff applied for an order directing the defendant to attend for cross-examination on his statutory declaration, which was marked as an exhibit to the affidavit of another individual. The application was dismissed. Although the court found the statutory declaration to be an "affidavit" within the meaning of the *Interpretation Act*[253] and r. 314(1),[254] it found that the statutory declaration was not "filed" within the meaning of r. 314(1).

VI. EVIDENCE

A. DEFENDANT'S MEDICAL EXAMINATION

The recent amendments to r. 217[255] continue to be tested by the Alberta courts. Pursuant to r. 217, the court can order a plaintiff to submit to an examination by an expert who is not a duly qualified medical practitioner. However, the examining practitioner must state that examinations by other experts are necessary for the duly qualified practitioner to provide his or her opinion.[256] The court must assess the merits of such a request based on an analysis of a number of factors, including the degree of competence of the proposed tester, the reliability and usefulness of the test, the importance of the test to the diagnosis, the level of intrusion into the plaintiff's privacy, any health risks associated with the test, the reasonableness of the demands that the test will make upon the examinee, and a balancing of the potential expense against the good achieved.[257]

In *Baker v. Yacyshen*,[258] the plaintiff had been involved in two automobile accidents, giving rise to two separate actions that were heard concurrently. The defendant in the second action sought an order directing the plaintiff to be examined by a doctor, as well as by a psychologist. The issue was whether the plaintiff could be directed to submit to an examination by the psychologist (who was well qualified as a psychologist, but not a "qualified medical practitioner") under r. 217(1), despite the plaintiff not having put her psychological state in issue.

Justice Lee held that the proposed psychological testing could not be directed under r. 217(1), but rather under r. 217(6), which provides for various analyses and testing recognized by medical science and necessary for the examining medical practitioner's opinion. Justice Lee stated that "there is no indication either in rule 217(6) or in the authorities that the instructing physician must state that they will be unable to form an

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252 (1999), 241 A.R. 107 (Q.B.).
253 R.S.A. 2000, c. I-8.
254 The rule governs cross-examinations on affidavits.
255 Alta. Reg. 101/99.
256 *Tat v. Ellis* (1994), 21 Alta. L.R. (3d) 7 (C.A.) [*Tat*].
257 *Ibid.* at para. 15.
258 (1999), 253 A.R. 373 (Q.B.) [*Baker*].

opinion without the tests."[259] Justice Lee also referred to the decision in *Lyons v. Khamsanevongsy*,[260] which held that a defendant can obtain such an examination even when the plaintiff has not served a statement by a similar expert. Justice Lee further stated that "[w]hether an examination is proposed under the rules or under the court's inherent jurisdiction, the question which ultimately ought to determine the matter is what is fair and reasonable having the interests of all parties in mind."[261]

The plaintiff had previously been examined by a psychologist, but did not intend to call one at trial. After noting that the plaintiff had the ability to call any expert, medical or not, and after applying the factors set out in *Tat*,[262] Lee J. held that it was reasonable to order the plaintiff to be examined by a psychologist.

Justice Lee's decision in *Baker* was followed in *Stirling v. Mangembulude*,[263] wherein it was held that the Court had the inherent jurisdiction to order a party to submit to an examination by someone other than a duly qualified medical practitioner, even if that party did not intend to adduce similar evidence.

In *Andre v. Wiebe*,[264] a personal injury action in which the plaintiff had been examined by two doctors, the plaintiff applied, pursuant to r. 217(7), to produce the doctor's files concerning the examinations, including any notes, questionnaires, behavioural observations, test score summary sheets, and test protocols used by the doctors. In granting the application, Perras J. stated that:

> Rule 217(7) is a statutory exception to litigation privilege as it relates to expert reports sought by a defendant under Rule 217. The Rule mandates that such reports be disclosed to the plaintiff. The Rule also mandates that these reports contain the "findings" made by the expert. "Findings" means the factual underpinnings that support an expert's conclusions or opinions... the test protocols and the raw data of test results arising from the examination would normally be the underpinnings that support an expert's conclusions and therefore should be disclosed.[265]

Based on the plain wording of r. 217(7) and the objectives of the *Rules*, which are to avoid surprise and trial by ambush, Perras J. granted the application.

In *Jacobson v. Sveen*,[266] the plaintiff sued two groups of defendants for injuries suffered in two unrelated motor vehicle accidents. Justice Veit held as follows:

> a Rule 217 examination is not intended to be "independent" in the sense advocated by the plaintiff; the Rule 217 examination is intended to be a defence examination. As Allen, J.A., of our Court of Appeal said in *Grayson*:

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259 *Ibid.* at para. 23.
260 (1997), 207 A.R. 385 (Q.B.).
261 *Baker*, *supra* note 258 at para. 73.
262 *Supra* note 256.
263 (2000), 272 A.R. 184 (Q.B.).
264 (2000), 284 A.R. 378 (Q.B.).
265 *Ibid.* at para. 7.
266 (2000), 262 A.R. 367 (Q.B.).

> "... whereas the medical practitioner who conducts a medical examination under Rule 217 is clearly doing so on behalf of the person seeking the examination, in other words, the person against whom compensation or damages is sought."

As our Court of Appeal held in the same case, the examination that is intended to be "independent" is the one that could be ordered by the court under Rule 218.[267]

The meaning of a "like report" pursuant to r. 217(7)(b) was considered in *Naistus v. Huculak*.[268] The defendant, pursuant to r. 217(7)(b), applied for copies of reports of every examination made of the plaintiff's physical or mental condition relevant to the plaintiff's claim, in addition to the medical report previously provided pursuant to r. 217(7)(a). Master Quinn noted:

> In my opinion the words "a like report" refers to the *quality* of the written report, in the sense that the report in question be a report of an examining medical practitioner. In my opinion the words should not be restricted to a medical practitioner specializing in the same area of medical science as the medical practitioner chosen by the defendant to examine the plaintiff.[269]

In *Sichkaryk v. Futto*,[270] Murray J. stated:

> The terms "reports" and "medical practitioners" as used in Rule 217(1) to (6) have, as we have seen, been interpreted by the Courts in this province to mean reports and examinations by medical practitioners who are registered with the College of Physicians and Surgeons.[271]

In *Pohynayko v. Vries*,[272] the Court of Appeal held that the costs associated with the nomination under r. 217(5) of a medical practitioner to be present during the examination must first be borne by the party nominating the medical practitioner. If that party is successful in the litigation, it can then seek to recover those costs. The Court further stated that:

> It is to be noted that Rule 217(2) provides that the "examination" is to be at the expense of the party seeking it. It was conceded before us, and I concur, that includes all of the costs *necessary* for the examination — obtaining the independent medical examiner, the reasonable transportation costs for the attendance of the party to be examined, and any ancillary tests that are done at the request of the defendant. However, in my view, the attendance of the nominee is *not necessary* for the examination, but rather, as noted, is merely a *discretionary right that the plaintiff may exercise*.[273]

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267 *Ibid.* at para. 29. Veit J. is citing from *Grayson v. Demers*, [1975] 2 WWR 289 (C.A.).

268 (1998), 221 A.R. 52 (Q.B.M.).

269 *Ibid.* at para. 8 [emphasis in original].

270 (1999), 74 Alta. L.R. (3d) 124 (Q.B.).

271 *Ibid.* at 132.

272 (2000), 277 A.R. 72 (C.A.) [*Pohynayko*]. Additionally, the Court of Appeal agreed with the comments of Lee J. in *Garrido v. Pui* (1998), 222 A.R. 248 (Q.B.) wherein he stated that the decision in *Morales v. Seymour* (1997), 205 A.R. 151 (Q.B.), in which the defendant bore the costs of the plaintiff's nominee physician attending the defendant's medical examination, should be restricted to the particular fact situation before the court in that case. That case included the plaintiff's impecuniosity, the fact that it was an uncomplicated claim, and the fact that the plaintiff faced a significant language barrier.

273 *Pohynayko*, *ibid.* at 75 [emphasis in original].

B. NOTICE REQUIREMENTS FOR EXPERT EVIDENCE

Rule 218.1 requires that parties serve on other parties at least 120 days before trial a statement of the substance of the evidence, signed by the expert, including the expert's opinion and a copy of the expert's report. This notice requirement was tested in *Lowe v. Larue*,[274] wherein the Alberta Court of Appeal held that failure to comply with r. 218.1 does not render the evidence inadmissible. Although the plaintiff called a psychologist and a physiotherapist to testify on her behalf, she failed to tender or qualify them as expert witnesses and therefore did not serve notices pursuant to r. 218.1. The Court held that while r. 218.1 notices ought to have been served, it was within the discretion of the court to admit the evidence, and the "admission of the evidence caused no prejudice to [the] appellants that could not have been addressed in costs or by an adjournment."[275]

In *Wade v. Baxter*,[276] Slatter J., *inter alia*, reviewed numerous Alberta court decisions relating to non-compliance with r. 218.1.[277] In holding that some late expert reports should be admitted, he concluded that a proper approach to the admission of expert evidence (notwithstanding late compliance with r. 218.1) required the following analysis:

> (a) The facts should be analyzed to see if the delay or non-compliance is so egregious and inexcusable that it undermines the workability of the system. In such cases the evidence can be refused, although some balancing of prejudice based on the importance of the evidence might still be called for.
> (b) Assuming that the non-compliance does not amount to an abuse of process, and the evidence is relevant and material, there should then be a presumption in favour of having all of the evidence before the trier of fact. The issue then becomes whether there is prejudice to the opposite party that cannot be neutralized by an adjournment, costs, the calling of rebuttal evidence, or some other mechanism.
> (c) Once a decision has been made to admit the evidence, the other party should be given an opportunity to seek an adjournment. The adjournment might be immediate, or the opposing party might apply for the adjournment after the expert has testified, or after the plaintiff's case is entered, or at the conclusion of the trial. The adjournment might be short, for example an overnight adjournment to permit the preparation of cross-examination as happened in *Chalinor v. Brown* [(1988), 98 A.R. 225 (C.A.)].
> (d) Whether an adjournment is granted or not, costs and disbursements related to the late evidence may be granted or denied depending on the particular circumstances.[278]

Rule 218.12 requires that where an expert report is intended to be in rebuttal, the rebuttal report, including the substance of the evidence signed by the expert, must be served not more than 60 days after service of the expert's report. In *Wade*,[279] Slatter J. found that the jurisprudence is dominated by two cases, *Sherstone v. Westroc Industries Ltd.*[280] and

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274 (2000), 250 A.R. 220.
275 *Ibid.* at para. 29.
276 (2001), 302 A.R. 1 (Q.B.) [*Wade*].
277 See *Edmonton (City) v. Westinghouse Canada Inc.* (2000), 250 A.R. 385 (C.A.); *Lenza v. Alberta Motor Association Insurance Co.* (1990), 74 Alta. L.R. (2d) 218 (C.A.); *Lowe v. Larue*, *supra* note 274; *Schuttler v. Anderson* (1999), 243 A.R. 109 (Q.B.); and *Edmonton (City) v. Lovat Tunnel Equipment* (2000), 262 A.R. 215(Q.B.).
278 *Wade*, *supra* note 276 at 45.
279 *Ibid.*
280 (2000), 269 A.R. 278 (Q.B.).

Pocklington Foods v. Alberta (Provincial Treasurer),[281] which arrived at different results. Justice Slatter allowed the plaintiff's physician to testify on an issue that was not raised in his own report, but was suggested by the defendant's physician's report. In keeping with the decision in *Pocklington Foods*, he held that the defendant would not be surprised, and therefore not prejudiced, as it was his physician who suggested the new issue in the first instance. In so finding, Slatter J. stated: "It follows that I accept *Pocklington Foods'* conclusion that a rebuttal report is not confined to merely commenting on the primary reports. A rebuttal report can fairly comment on the theories of the primary report, and provide competing theories to explain the phenomena in issue."[282]

VII. MODES OF TRIALS

A. SUMMARY TRIAL

Since the introduction of the Summary Trial Procedure under Part 11, Division 1 of the *Rules*, the Alberta courts have had several opportunities to discuss the application and parameters of such rules. The initial decisions[283] on the application of these rules turned to the British Columbia courts (the jurisdiction from which the summary trial rules emanated) for guidance, and focused on the necessity of a factual matrix on which a summary trial decision could be based. The existence of contradictory evidence, which could not be assessed other than through the procedural safeguards governing *viva voce* evidence, was held to be a factor weighing against the appropriateness of summary trial.[284]

That being said, the Court in *Compton Petroleum v. Alberta Power*[285] clearly stated that the existence of contradictory evidence would not be a complete bar to relief in a summary trial procedure.[286] This was confirmed by the Court in *U.B.'s Autobody Ltd. v. Reid's Welding*,[287] wherein Acton J. held that, much like in an ordinary trial where there is competing evidence, the court may avail itself of documentary or other evidence in order to make a finding of fact. The difficulty (and perhaps the downfall) of the summary trial procedure is the inability of the court to assess such conflicting evidence based on the credibility of the witnesses through the presentation of *viva voce* evidence. Accordingly, in *601481 Alberta v. 697615 Alberta*,[288] the Court found that where other admissible evidence does not make it possible to make a finding of fact necessary for judgment and the court is further unable to make an assessment as to credibility, such circumstances are inappropriate for summary trial.[289]

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281 (1994), 159 A.R. 173 (Q.B.).

282 *Wade, supra* note 276 at para. 69.

283 *590988 Alberta v. 728699 Alberta* (1999), 30 C.P.C. (4th) 201 (Q.B.); *Compton Petroleum v. Alberta Power* (1999), 242 A.R. 3; and *Adams v. Norcen Energy Resources* (1999), 248 A.R. 120 [*Adams*].

284 *Adams, ibid.*

285 *Supra* note 283.

286 See also *Evans v. Stirling* (2001), 306 A.R. 120 (Q.B.).

287 (1999), 258 A.R. 325 (Q.B.).

288 (2001), 291 A.R. 334 (Q.B.).

289 See also *Jabrica v. Krueger* (2001), 306 A.R. 113 (Q.B.).

In *Samek v. Black Tusk Energy*,[290] the Court addressed the issue of conflicting evidence in this manner:

> Although the Alberta process expressly allows a judge to grant a judgment irrespective of the amounts and complexity of the issues involved, several factors, separately or in combination, may prevent a court from finding the required facts or make it unfair for the court to do so. These factors include: whether all the witnesses have been cross-examined in court; the urgency of the matter; the cost of taking the case forward to a conventional trial in relation to the amount at issue the complexity of the matter; the prejudice likely to arise as a result of delay; the course of the proceeding; and whether the defendant could likely bolster its evidence through discovery.[291]

The courts have also begun to address the possibility of severing certain issues in an action for disposition by way of summary trial. This type of severance is contemplated by the recently amended r. 158.4,[292] which provides a preliminary means of determining the suitability of any issue raised in a motion for disposition under the summary trial rules. Further, r. 158.6(2), which allows a judge to "order the trial of the proceeding generally or on an issue," appears to have opened the door for the courts to divide issues within an action and dispose of some or all by way of summary trial.[293]

The Court in *Chevron Canada Resources v. Canada (Executive Director of Indian Oil and Gas)*,[294] however, instructed that the disposition of a discrete issue by way of summary trial is not to be undertaken lightly. Applications for severance under these rules are to be made with a view to the consequences of such a disposition with respect to the costs and ultimate disposition of the remaining issues. In *Chevron*, the plaintiffs applied to proceed summarily as against only one of five defendants on a discrete issue. The Court determined that given the extent to which the defences, counterclaims, and third-party claims complicated the issues as between the parties, the disposition of a discrete issue was inappropriate. The court further stated that such a disposition by way of summary trial could ultimately "have serious implications and repercussions on the findings of the trial judge on the other issues affecting all the parties."[295]

It should be noted that, in addition to the detailed rules governing summary trials, use of this procedure requires familiarity with the Alberta Court of Queen's Bench's "Civil Practice Note No. 8, Summary Trials,"[296] as prepared by Rooke J. It contains an explanatory note on the origin and purpose of the new Alberta procedure, describes its distinction from summary judgment applications, and offers instruction on how to proceed with either a one-stage or two-stage proceeding, how to set the hearing down, the necessary filings, the procedure to follow at the trial itself (for example, the need to gown), and how to deal with expert evidence.

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290 (2000), 273 A.R. 148 (Q.B.).

291 *Ibid.* at para. 34. See also *Re: Indian Residential Schools* (2001), 286 A.R. 307 (C.A.).

292 Alta. Regs. 152/2000.

293 See *Re: Green Estate* (2001), 97 Alta. L.R. (3d) 302.

294 (2001), 295 A.R. 388 (Q.B.) [*Chevron*].

295 *Ibid.* at para. 19.

296 (Court of Queen's Bench, September 2000).

B. TRIAL BY JURY

The interplay between a litigant's substantive rights to a trial by jury, as provided by the *Jury Act*[297] and the recent amendment to r. 158.3 of the summary trial rules,[298] has been addressed in a series of recent Alberta court judgments.[299]

The issue was initially addressed prior to the amendment to r. 158.3 by McMahon J. in *Elliot v. Amante*.[300] The action in *Elliott* was based on a claim for damages for personal injury sustained in a motor vehicle accident. The defendant had earlier obtained an order allowing a trial by jury from Rooke J., who also granted leave to the plaintiff to apply for disposition of the action by way of summary trial. In hearing the motion for summary trial, McMahon J. specifically stated that, but for such leave, he would have refused the application given that, in the face of an order for a jury trial, the application was obviously inconsistent and inappropriate.

On appeal, the Court's judgment was rendered shortly after the amendment to r. 158.3 and held that motions for trial by jury and summary trial should generally be heard at the same time, as each seeks a direction which is diametrically opposed to the other. Accordingly, the Court overturned Rooke J.'s order for a trial by jury and remitted both the issue of summary trial and jury trial for rehearing. On a rehearing of the issue,[301] Rooke J. was faced with addressing the concerns raised by McMahon J. as to the legal superiority of legislative rights under the *Jury Act* over procedural rights established by the *Rules*, and was further required to address the issue in light of the intervening amendment to r. 158.3.

Justice Rooke, however, determined that there was no issue regarding conflicting provisions, as the appropriate determination before the courts was not whether the action should proceed by way of jury trial or summary trial but, rather, whether the action should proceed by way of conventional trial versus summary trial. In characterizing the issue in this manner, Rooke J. stated that the first question before the Court was whether the issue was suitable for summary trial. If the court answered in the affirmative, the mode of trial was by default to be by judge alone. If the court determined that the trial of the action ought to proceed by way of a conventional trial, the court could then consider the appropriate mode of trial — that is, by jury or by judge alone.

It should also be kept in mind that Rooke J.'s decision in *Elliott* was made in the absence of a pre-existing order for jury trial, as his earlier order for jury trial had been vacated on appeal. In *Hajjar v. Repetowski*,[302] the Court determined that in light of a pre-existing order for jury trial, it was not open to a subsequent court to order a summary trial without the jury trial order being reconsidered pursuant to the *Jury Act*. Given the Alberta Court of Appeal's

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297 R.S.A. 2000, c. J-3.

298 The rule provides that a summary trial shall be heard by judge alone even though a party may have obtained an order directing that the trial of the action be heard by a jury.

299 *Elliott v. Amante* (2000), 268 A.R. 70 (3d) 72 (Q.B.), rev'd (2000) 90 Alta. L.R. (3d) 1, and (2001), 306 A.R. 82 (Q.B.) [*Elliott*].

300 *Ibid.* at (2000), 268 A.R. 70 (Q.B.).

301 *Elliott*, *supra* note 299 at 306.

302 (2001), 319 A.R. 251 (Q.B.) [*Hajjar*].

direction that applications for jury trials and summary trials ought to be heard together, and the Court's suggestion in *Hajjar* that a summary trial ought not be directed in the face of an order for a jury trial, counsel will likely be required to address such issues contemporaneously in order to avoid precluding the use of the summary trial procedure.[303]

C. PRELIMINARY ISSUE

The courts are often called upon to consider applications for a trial of an issue pursuant to r. 221, which provides as follows:

> (1) The court may order any question or issue arising in a proceeding whether of fact or law or partly of fact and partly of law to be tried before, at or after the trial and may give direction as to the manner in which the question or issue is to be stated, and may direct any pending application to be stayed until the question in issue has been determined.
> (2) Where it appears to the court that the decision in that question or issue tried separately substantially disposes of the proceeding or renders the trial of further issues unnecessary, it may dismiss the proceeding or make such other order to give such other judgment as it considers proper.

The case law in this is area is well-established. A thorough discussion of the factors which are to be considered by the courts in respect of an application for a preliminary trial on an issue was undertaken in *Lim Estate v. Home Insurance Co.* as follows:

1. Will it end the suit, at least if decided one way?
2. Will there be a saving in time or money spent on litigation, again at least if decided one way?
3. Will it create an injustice?
4. Are the issues complex or difficult?
5. Will it result in a delay in the trial?[304]

In addition to these specific factors, Veit J., in *Vanderlee v. Doherty*[305] considered the "just and convenient test" and the "lack of resources" factor as a basis for a severance order. In this regard, Veit J. indicated that a plaintiff's lack of resources, while not in and of itself a determining factor, is properly a factor to be considered in determining whether severance should be granted. Further, although Lord Denning's "just and convenient test"[306] has not been adopted in Alberta, Veit J. pointed out that severance decisions in Alberta do not exclude justice and convenience and went on to state:

> The aspect of Lord Denning's "just and convenient" test, which I think bears revisiting here, is that part of the decision which states — in 1974 — that in the future courts should be more ready to grant separate trials than

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303 The recent decision of *Goulbourne v. Buoy*, 2003 ABQB 409, however, disagrees with Rooke J.'s approach in *Elliott*, *supra* note 299 and found that any amendments to the *Rules* following June 18, 1997, including the summary trials rules, have not been validated by the *Judicature Act*, R.S.A. 2000, c. J-2, and therefore cannot work to deprive litigants of their substantive rights. Accordingly, Wachowich C.J.Q.B. held that the direct conflict between the summary trial rules and the *Jury Act* must be resolved in favour of the statutory provisions of the *Jury Act*.

304 (1995), 168 A.R. 308 at para. 12 (Q.B.).

305 (2000), 258 A.R. 194 (Q.B.) [*Vanderlee*].

306 As stated in *Coenen v. Payne* [1974] 2 All E.R. 1109 at 1112 (C.A.).

> they have in the past. This remark is made in the context of Lord Denning's reminder that courts should not encourage the piecemeal trial of actions, acknowledging that in reality, courts must nevertheless remain open to consideration of new, or newly important, stresses in the litigation process. One of the court's legitimate concerns is access to justice. It is not unreasonable for the courts to constantly monitor whether certain of our current practices and procedures, although useful and perhaps necessary, have an impact on access to justice. Where access to justice is impeded, courts must then go on to consider whether some adjustment or modification of the practice or procedure is warranted. One fact of litigation in Alberta today is the considerable increase in the cost of personal injury litigation as a result of the substantial increase in the party and party tariff of costs. That increase was necessary; it reflects the ongoing need to keep pace with the increasing cost of legal services. However, that legitimate increase affects individuals differently than it does businesses; in commercial litigation, the cost of litigation is merely a cost of doing business. For individuals, the cost of litigation may constitute a virtually insurmountable barrier to access to civil justice - the risks of losing are just too great.[307]

Although Veit J. did not consider either factor to be individually determinative, it is now open to courts to consider the financial difficulties of a party to an action in deciding an application for severance.[308]

However, despite the seemingly growing number of factors that could support an application for severance, Clark J. in *Progas Ltd. v. AEC West Ltd.*[309] observed that the courts are reluctant to order a preliminary trial on an issue, based on concerns that the process may result in a piecemeal approach to the action and would ultimately cost the parties involved more time and money. Justice Clark cautioned, in keeping with the decision of Veit J. in *Vanderlee*, that a preliminary trial of an issue ought only be ordered in "exceptional cases."[310]

More practical aspects of the application of r. 221 were considered in *Jen-Col Construction Ltd. v. Parkland No. 31 (County)*.[311] In *Jen-Col*, Veit J. held that the Court's decision on a preliminary issue may be appealed prior to the determination of the remaining issues in accordance with r. 505,[312] and that the trial judge hearing the preliminary issue is not seized with the remaining triable issues.

VIII. COSTS AND COMPROMISE PROCEDURES

A. INTRODUCTION

In the last five years, there have been a number of changes to the *Rules* with respect to costs. In July 1998, changes were made to the *Rules* with respect to compromise procedures. In September 1998, Schedule C of the *Rules*, which sets out the tariff of fees for party-and-party costs in civil actions, was significantly revised. In January 1998 and again in August

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307 *Vanderlee, supra* note 305 at para. 18.

308 See *City Taxi Cab #1 Ltd. v. Canada Post* (2000), 276 A.R. 159 (Q.B.), wherein the court considered the undertaking of a party not to appeal a preliminary trial ruling as a factor in determining the appropriateness of a preliminary trial.

309 (2001), 295 A.R. 127 (Q.B.).

310 *Ibid.* at para. 14.

311 (2000), 269 A.R. 352 (Q.B.) [*Jen-Col*].

312 The rule governs when an appeal is available.

2000, the rules were amended with respect to the question of when costs are to be paid in interlocutory matters.

B. APPORTIONMENT AMONG PARTIES

When a plaintiff sues several defendants, only one of whom ultimately is determined to be liable, the plaintiff may be entitled to receive costs from the unsuccessful defendant, but be liable for costs to the successful defendant. In such situations, the court is called upon to exercise its discretion in determining who will be compelled to pay costs, and to whom.

One way in which the court can address this question is through the issuance of either a Bullock Order[313] or a Sanderson Order,[314] either of which may apply if a successful litigant will be adversely affected by an order against one of the other parties. Under a Bullock Order, the plaintiff pays costs to the successful defendant and the losing defendant must reimburse the plaintiff for these costs. Under a Sanderson Order, the losing defendant pays costs to the successful defendant directly. The choice between the two orders is often determined by the ability of either the plaintiff or the unsuccessful defendant to indemnify the successful defendant.

It is important to note that the unsuccessful defendant is only liable for costs on the scale of the plaintiff's actual recovery. The plaintiff, on the other hand, is liable to the successful defendant on the scale reflecting the amount that plaintiff claimed, which may be a higher scale than the plaintiff is entitled to receive from the unsuccessful defendant.[315] This affects which order is more desirable to a particular party.

In *Pettipas v. Klingbeil*,[316] a plaintiff sued two defendants, one of whom was found at trial to be solely liable. The Court was confronted with the fact that each of the plaintiff and the successful defendant were eligible for an award of costs of a different scale — Column 4 for the successful defendant and Column 2 for the plaintiff. The Court considered the application of either a Bullock Order or a Sanderson Order. Justice Hutchinson noted that there is a three-part test for the issuance of either order. For either order to issue, it must be shown that (I) it was reasonable for the plaintiff to join the successful defendant; (ii) there is no good reason to deprive the successful defendant of its costs; and (iii) the losing defendant was wholly responsible as between the co-defendents.[317]

He went on to note that with a Bullock Order, the plaintiff pays the successful defendant directly on the higher scale of costs, and is indemnified by the unsuccessful defendant on the lower scale. With a Sanderson Order, however, the unsuccessful defendant pays directly to the successful defendant the full amount of costs on the higher column, but sets off the difference between the two columns against the costs which he will be obligated to pay to the plaintiff. Those costs are to be calculated on the basis of the lower column. In either case, the successful defendant is indemnified on the basis of the higher column.

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313 See *Bullock v. London General Omnibus*, [1907] K.B. 264 (U.K.).

314 See *Sanderson v. Blyth Theatre*, [1903] 2 K.B. 533 (U.K.).

315 Based on r. 605(5).

316 (2000), 276 A.R. 24 (Q.B.) [*Pettipas*].

317 *Ibid.* at para. 32.

A Bullock Order was also issued in *Allen (Next friend of) v. University Hospitals Board*.[318] The plaintiff was ordered to pay costs to the successful defendants, and the unsuccessful defendants were to reimburse the plaintiff for the successful defendants' costs. In this case, however, the Court found that one of the successful defendants had a minimal involvement in the events giving rise to the lawsuit. The Court ordered that the unsuccessful defendant only reimburse the plaintiff for 60 per cent of that successful defendant's costs. In other words, the plaintiff was compelled to absorb 40 per cent of the successful defendant's costs. In considering the three-part test set out in *Pettipas,* Perras J. opined that the third branch of the test is not used to determine whether an order should be given, but rather, as a factor in apportioning liability and determining which form of order is appropriate. In the case of divided or mixed success, where both parties are either equally successful or unsuccessful, the principle continues to be that each party bears its own costs.[319]

C. SCALE OF COSTS

1. INTRODUCTION

Costs in actions and in interlocutory matters are normally ordered on a party-and-party scale. Schedule C of the *Rules* sets out the tariff of amounts that are normally awarded to be paid for costs on a party-and-party basis. In September 1998, Schedule C was substantially amended, and the amounts set out therein increased. As discussed below, this has forced the courts to address the problem of potential over-indemnification of a successful party.

Courts will, in some circumstances, exercise their discretion and depart from the costs in Schedule C. In *Trizec Equities Ltd. v. Ellis-Don Management Services*,[320] the Court held that awards of costs are not intended to indemnify successful litigants for their expenditures. The Court held that where it finds that it must depart from Schedule C, it makes more sense to award costs in a lump sum based upon a percentage of indemnity. The Court noted that courts in Alberta have tended to award costs in the range of 40 to 50 per cent of full indemnity.

Because the court retains discretion as to costs, parties often argue that costs should be awarded on some other scale, either higher or lower than the party-and-party scale. In this section, we will consider recent case law on the award of costs on some basis other than party-and-party.

2. COSTS ON AN INCREASED SCALE

The leading case in Alberta on the issue of awarding costs on a higher scale than the usual party-and-party scale is the Alberta Court of Appeal decision in *Jackson v. Trimac Ltd.*[321] There the Court held that costs will be awarded on an indemnity or solicitor-and-client basis only in rare and exceptional circumstances. The Court reviewed the relevant case law and

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318 (2000), 276 A.R. 345 (Q.B.), aff'd. (2002), 5 Alta. L.R. (4th) 98 (C.A.) [*Allen*].

319 *Lavoie v. Willis* (2002), 312 A.R. 373 (C.A.) [*Lavoie*].

320 (1999), 251 A.R. 101 (Q.B.).

321 (1994), 155 A.R. 42 (C.A.). See the discussion of this case in "Civil Procedure," *supra* note 154.

established a list of circumstances in which solicitor-and-client or indemnity costs may be awarded. That list includes a number of examples of objectionable conduct in the litigation.

Solicitor-and-client costs have been awarded against litigants in a number of cases, and for a variety of reasons. One of these reasons is misconduct of one of the parties in the course of the action. In *Echo Valley Farms v. Alberta*,[322] the plaintiff obtained an interlocutory injunction in an *ex parte* application. The injunction was later set aside and the defendant sought costs. Justice Veit held that because the plaintiff knew that the defendant was represented, and because the plaintiff had time to give notice of the application, solicitor-and-client costs were payable to the defendant.

Solicitor-and-client costs also have been awarded to penalize a party for its conduct prior to the litigation. In *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*,[323] the Court held that the defendant's conduct before the proceedings were commenced was fraudulent, dishonest, and deceitful. The Court found that the defendant improperly swore affidavits, refused and delayed disclosure of documents, and falsely testified. Solicitor-and-client costs were awarded against the defendant.

In *566779 Alberta v. Comac Food Group*,[324] the plaintiff proceeded to trial unrepresented by counsel. Justice Brooker ordered a mistrial, finding that the plaintiff was not ready for trial. The Court ordered that the defendant receive its thrown-away costs for trial preparation, on a solicitor-and-his-own-client (full indemnity) basis.

In *Alnashmi v. Arabi*,[325] Johnstone J. found that the plaintiff was untruthful both before and during the trial. The plaintiff's action was dismissed, and solicitor-and-client costs were awarded against him.

In *Rutherford Estate v. Swanson*,[326] the plaintiff was seriously injured in a racially-motivated attack. Justice Bielby held that "reprehensible conduct may also justify an award of solicitor-and-client costs even when it occurs prior to the commencement of the proceedings."

Solicitor-and-client costs also have been awarded against a party for the misconduct of its counsel. In *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*,[327] counsel for NOVA Corp. Ltd. (NOVA) mistakenly delivered a binder of privileged documents to opposing counsel. That counsel then used a document from the binder which was clearly marked as privileged in an affidavit. NOVA was forced to bring an application for the return of the documents and Romaine J. awarded solicitor-and-client costs.

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322 (1998), 235 A.R. 394 (Q.B.).
323 (1999), 246 A.R. 272 (Q.B.), varied (1999), 255 A.R. 329 (C.A.), aff'd [2002] 1 S.C.R. 678.
324 (2001), 288 A.R. 289 (Q.B.).
325 (2000), 80 Alta. L.R. (3d) 366 (Q.B.).
326 (1999), 245 A.R. 1 (Q.B.).
327 (1999), 242 A.R. 179 (Q.B.).

Requests for costs on a solicitor-and-client scale have also been denied in a number of cases.[328] In such cases, courts have tended to opt for costs at a multiple of the relevant column, or at a higher column than would otherwise have been used. The courts also have exercised their broad discretion to deny particular portions of costs to a successful party.

In *Coe v. Sturgeon General Hospital District No. 100*,[329] Moen J. held that solicitor-and-client costs should be ordered in interlocutory matters only in exceptional cases. She also found, however, that where the impugned conduct is not such as would justify solicitor-and-client costs, but is still deserving of sanction, increased costs can be awarded.

In *Lloyd v. Imperial Parking Ltd.*,[330] the Court found for the plaintiff in a wrongful dismissal matter and the plaintiff sought an award of solicitor-and-client costs. Justice Sanderman held that the officer of the defendant had denied any wrongdoing throughout the trial, and had "deliberately attempted to create an erroneous impression with the court."[331] The Court found that the defendant's conduct had prolonged the matter, and concluded that this warranted an increased scale of costs. The Court then awarded two-and-a-half times the relevant column against the defendant, rather than solicitor-and-client costs.

In *Collins v. Collins*,[332] the defendant, who was a lawyer, was held to have given incomplete and misleading answers, refused to produce documents, and refused to attend at examinations for discovery. Justice Marceau held that the fact that the defendant was a lawyer was a consideration in determining the scale of costs. Although the Court declined to order solicitor-and-client costs, it ordered lump sum costs on a higher scale.

In *Ted Power Realty v. Danray Alberta Ltd.*,[333] the plaintiff noted that the defendant in default obtained monies paid into court, and placed the funds beyond the reach of the defendant despite being aware that the defendant was going to defend the action. Justice Murray held that these were attempts to defeat justice, and that they justified increasing the costs from column 2 to column 4.

In *Firemaster Oilfield Services Ltd. v. Safety Boss (Canada) Ltd.*,[334] Marceau J. found that the solicitors for the defendants had engaged in positive misconduct, and awarded costs jointly and severally against the defendants and their solicitors at an increased lump sum of $50,000 plus disbursements.

Even good faith conduct can attract increased costs. In *Cobrico Developments v. Tucker Industries*,[335] Lee J. awarded costs on a higher column against a party who attended at a special chambers application without notice, without a notice of motion, and without any sworn evidence or preparation. Although Lee J. found that the party had acted in good faith

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328 See *e.g. Stearns v. Alberta Insurance Council* (2001), 297 A.R. 110 (Q.B.).
329 (2001), 96 Alta. L. R. (3d) 203 (Q.B.).
330 (1999), 242 A.R. 153 (Q.B.).
331 *Ibid.* at para. 14.
332 (1999), 256 A.R. 311 (Q.B.).
333 (2000), 268 A.R. 352 (Q.B.).
334 (2000), 285 A.R. 141 (Q.B.), aff'd (2001), 293 A.R. 366 (C.A.).
335 2000 ABQB 817 (Q.B.).

with a view to protecting its shareholders, it had nonetheless caused delays to the Court and the other parties. This justified costs on an increased scale. The same costs principles also continue to be regularly employed by the Alberta Court of Appeal to either censure or encourage particular conduct.

The Alberta Court of Appeal has reaffirmed that, in general, a party who attracts solicitor-and-client costs at trial risks paying similar costs if that party's subsequent appeal is unsuccessful.[336] This is an important factor for a party to consider when contemplating an appeal from an unfavourable decision.

In *Watts Estate v. Contact Canada Tourism Services*,[337] the Alberta Court of Appeal found that the appellant had caused "endless unnecessary procedural problems and delays"[338] in the litigation. The appellants presented voluminous material and unfocused arguments, and dragged other parties into the litigation who did not have to be there. The Court awarded lump sum costs in an amount greater than the applicable column of Schedule C.

In *Eagle Resources v. MacDonald*,[339] the respondent lost on appeal and brought a motion to reconsider. The Court dismissed the motion, holding that it was not only groundless, but was also treated by the respondent as a complete re-argument of the appeal. Costs were awarded against the respondent at a lump sum of $14,000 or taxation at one-and-a-half times the appropriate column of Schedule C, whichever was greater.

Such penalties will even be assessed against self-represented litigants, notwithstanding their unfamiliarity with court processes. In *Van Panhuis v. Lamont (Town)*,[340] the Court awarded extra costs against the self-represented appellant. This was based on a number of things, including careless allegations of dishonesty and conspiracy, attempts to bully counsel into leaving the courtroom, inconsistent and deceptive positions, tendering a doctored copy of a letter to the Court, incessant attempts to raise irrelevant and new matters, and prolix oral argument.

The Alberta Court of Appeal also has made it clear that costs will now be awarded against counsel who fail to appear to speak to the list.[341] These cases underscore the need for parties, and their counsel, to conduct themselves in a manner beyond reproach and to observe and respect the court and its processes.

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336 See *Lavoie*, *supra* note 319.

337 (2000), 266 A.R. 185 (C.A.). The Court opined at para. 4 that, "[i]t is doubtful that any Alberta appeal has ever had so much procedural difficulty."

338 *Ibid.* at para. 4.

339 (2002), 299 A.R. 395 (C.A.) [*Eagle Resources*].

340 2000 ABCA 201.

341 See *Hunter v. Preston* (2001), 277 A.R. 151 (C.A.), in which counsel for both parties were fined for failing to speak to the list.

3. COSTS ON A REDUCED SCALE

Not infrequently, parties against whom costs are to be awarded will argue in favour of a reduced scale of costs. In *S.F.P v. MacDonald*,[342] the unsuccessful plaintiff sought compassion from the Court and a lower column in Schedule C, alleging that the judgment granted against her was "disastrous."[343] Justice Veit held that compassion was not a factor that would justify departure from the usual scale of costs.

Costs to a successful party will also be reduced for undesirable or inefficient behaviour. In *Castillo v. Go*,[344] the defendant doctor, who had been sued for professional negligence, acted in an unprofessional manner during his cross-examination. Though he was successful at trial, the Court censured his conduct by disallowing one day of trial costs he otherwise would have been awarded.

In *Eagle Resources*,[345] the appellant was successful on appeal, but filed far more volumes of appeal books than were necessary for the appeal. The Court of Appeal limited the appellant to one-half of actual costs of the appeal books as a disbursement.

4. WHAT COLUMN OF SCHEDULE C?

Rule 605(6) provides that the appropriate column in matters not involving monetary relief is Column 1. Courts have found, however, that this column is not appropriate in some cases involving non-monetary claims. For example, in *Acquest/Alberta Mining v. Barry Developments*,[346] the plaintiff brought an application to discharge caveats on land and did not set out a monetary value in its pleadings. The Court held that the action was serious and did not justify the application of Column 1 costs. Instead, the Court noted that the land was worth $4.3 million, and applied costs on Column 5.

Courts in Alberta have also awarded costs on a lower column based on other factors. In *Edmonton Kenworth Ltd. v. Edmonton Cast Iron Repair*,[347] the plaintiff was unsuccessful at trial and therefore was required to pay costs to two defendants. The total amount awarded, including pre-judgment interest, exceeded the upper limit of column 1 by only $2,000. Justice Veit held that the plaintiff had caused certain delays and therefore was not entitled to full interest. Accordingly, she reduced the amount payable so as to fall within column 1. In doing so, she noted that a minor factor in the decision was the small amount by which the total amount payable exceeded the column.

5. OVER-INDEMNIFICATION

Following the revision of the Schedule C tariffs in September 1998, a new problem began to confront Alberta courts. In some cases, particularly non-complex claims, party-party costs

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342 (1999), 242 A.R. 134 (Q.B.).
343 *Ibid.* at para. 41.
344 (2000), 269 A.R. 361 (Q.B.), aff'd (2002), 317 A.R. 195 (C.A.).
345 *Supra* note 339.
346 (1999), 73 Alta. L.R. (3d) 280 (Q.B.).
347 (2001), 294 A.R. 365 (Q.B.) [*Edmonton Kenworth*].

under Schedule C exceeded the actual costs of the successful party. Such "over-indemnification" ran contrary to the general principles that costs should act as a deterrent to litigation and that all parties should bear some of the costs of their litigation.

The issue of whether the taxation officer had authority to allow over-indemnification, particularly where the court was silent on the issue, was referred to the Court of Queen's Bench in *Shillingford v. Dalbridge Group*[348] In that case, Perras J. affirmed that complete indemnification for costs should only be reserved for exceptional cases, and that the tariffs in Schedule C are the *maximum* amounts that can be allowed by the taxation officer absent some other direction from the court. He held that the taxation officer has the discretion, if not the duty, to apportion only a portion of the tariff so as to insure that an over-indemnification does not occur.

That being said, Perras J. also held that where a party is entitled to double or extra costs pursuant to the rules governing formal offers, such costs should not be limited in order to prevent over-indemnification. The rationale for this is that formal offers are designed to encourage settlement and penalize those who refuse reasonable offers. Accordingly, if costs could never exceed full indemnification, the incentive to settle would disappear in some cases.

The issue of over-indemnification was also considered by Nash J. in *Larson v. Garneau Lofts*[349] In that case, the plaintiff was entitled to double costs as a result of beating a formal offer at trial. The defendants argued that the plaintiff should not get double costs, as doing so would award the plaintiff costs that were higher than the amount of the judgment. Justice Nash rejected this argument, reiterating the principle that the cost penalties were necessary to encourage settlement and punish those who refuse reasonable offers. Accordingly, she awarded double costs to the plaintiff, with no limiting rule to apply.

D. WHEN COSTS PAYABLE

The question of whether costs in interlocutory matters should be paid forthwith or at the conclusion of the action has been both the subject of debate, as well as of changes to the rules in the past several years. In *V.A.H. v. Lynch*,[350] the Court considered r. 607 (as it then was) and held that prior to January 1998, costs of an interlocutory application, if not otherwise specified, were payable to the party that succeeded on the application.

In January 1998, r. 607 was amended to provide that, unless otherwise ordered, costs of an interlocutory application would be payable in any event of the cause. Justice Veit, in *Consolidated Gypsum Supply Ltd. v. Kondra*,[351] held that such an approach required that the costs of interlocutory applications be paid at the conclusion of the proceedings.

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348 (2000), 268 A.R. 324.
349 (2000), 275 A.R. 165.
350 (1998), 238 A.R. 201 (Q.B.) [*Lynch*].
351 (1999), 247 A.R. 16 (Q.B.).

In August 2000, r. 607 was amended once again. The rule now provides that costs in interlocutory applications are payable to the successful party, and must be paid forthwith: "Notwithstanding the final determination of an action, the costs of any interlocutory proceeding in that action, whether *ex parte* or otherwise, shall, unless otherwise ordered, be paid forthwith by the party who was unsuccessful on the interlocutory proceeding." In *Wen v. McElheran*,[352] Master Laycock indicated that the practical effect of this amendment is to put the onus on the unsuccessful party to raise the issue of costs. If there is no specific order made with respect to costs, this provision requires that costs be paid by the unsuccessful party forthwith.

Counsel should be alert to this fact during a chambers application, particularly and especially when drafting a formal order. If the order is silent on the point of costs, then the unsuccessful party must pay them forthwith. As pointed out by Master Laycock, counsel also should pay extra attention now in the case of *ex parte* orders, which are typically silent on costs. Under the amended r. 607, such an order requires costs payable to be payable forthwith, rather than in the cause.

In the subsequent case of *Caswell v. Pakulat*,[353] Master Laycock questioned the logic of having r. 607 apply to *ex parte* applications. Master Laycock indicated that where the opposing party is not present, it cannot fairly be said that it is "unsuccessful." He then held that in such circumstances, barring some obvious conduct issue that is presented by the applicant, costs will not be ordered to be paid forthwith."[354] That being said, he issued the following word of caution to attendees in chambers:

> There is a steady stream of lawyers and articling students who continue to present ex-parte orders to me with no direction as to costs. It is inevitable that at least one applicant per day will bring forward an order with no mention of costs. It is equally inevitable that the order will not be signed by me unless there is a direction as to costs. Since it is predictable that an order for substantial service or service ex-juris will inevitably direct that costs be in the cause, counsel may anticipate that direction and include such wording in their orders.[355]

This view was echoed by Veit J. in *Tymchuk v. Tymchuk*,[356] wherein she stated that as a matter of public policy, it is best to have costs determined on each interlocutory application.

Notwithstanding this new formulation of r. 607, courts have exercised the discretion afforded by the words "unless otherwise ordered" to order that costs not be paid forthwith in certain circumstances. This occurred in *Bright v. Tai*,[357] wherein Master Quinn held that the poverty of a litigant should be considered. In *Williams v. Suitor*,[358] Rooke J. ordered that costs of an interlocutory motion be paid by the defendant to the plaintiffs on the basis that should the plaintiffs be awarded costs in the action, they would be entitled to a set-off.

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352 (2002), 8 Alta. L.R. (4th) 158 (Q.B.M.)
353 (2002), 314 A.R. 243 (Q.B.M.).
354 *Ibid.* at para. 6.
355 *Ibid.* at para. 7.
356 2003 ABQB 173.
357 (2001), 287 A.R. 133 (Q.B.).
358 (2001), 287 A.R. 194 (Q.B.).

E. COMPROMISE PROCEDURES

1. INTRODUCTION

In September 1998, the *Rules* were amended to provide that either a plaintiff or a defendant would be eligible, in certain circumstances, for double costs resulting from the service of a formal offer. If a plaintiff serves an offer, and is successful in receiving judgment in an amount greater than that offer, the defendant will presumptively be liable for double costs for steps taken from the date of the offer to the date of the judgment. If a defendant serves an offer, and the plaintiff recovers an amount greater than zero but less than the amount the defendant offered, the defendant is presumptively entitled to costs from the date of the offer. If the defendant serves an offer and the plaintiff's action is dismissed entirely, the defendant is then entitled to double costs from the date of the offer.

2. DETERMINING IF AN OFFER ENGAGES THE *RULES*

Since the 1998 change in the *Rules*, the courts have had numerous occasions to determine whether the compromise rules have been engaged. Unfortunately, not all offers are worded in such a manner as to make clear whether the judgment exceeds or fails to exceed the amount of the offer.

In *Beenham v. Rigel Oil and Gas Ltd.*,[359] the defendants served a formal offer that spoke of matters not specifically raised in the pleadings. Justice McMahon held that to qualify as an offer within Part 12 of the *Rules*, an offer must relate to matters raised by the pleadings, and must be worded such that the court can determine if the judgment is greater than the offer.

In *Purich v. Purich*,[360] Veit J. held that, in evaluating a formal offer, the Court must consider the offer as a whole and not merely the specific heads of awards comprising the offer. She found that an offer of a lump sum payment was not comparable to an award of periodic payments, and did not give rise to an award of double costs.

In *Madge v. Meyer*,[361] the defendant's offer to the first plaintiff contemplated a structured settlement, required an advance ruling from Revenue Canada, and was contingent upon acceptance of settlement to the second plaintiff. Due to the offer's lack of certainty, the Court was unable to find that the doubling provision applied.[362]

The rules also will not be engaged if the court feels that the offer made is not a genuine offer of compromise. In *Re Blue Range Resources Corp.*,[363] the respondents each made offers to the appellant. Two of the offers were to allow the exact amounts that had been awarded

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359 (1998), 240 A.R. 122 (Q.B.).

360 (1999), 248 A.R. 145 (Q.B.).

361 (2000), 259 A.R. 351, 77 Alta. L.R. (3d) 391 (Q.B.), aff'd (2002), 303 A.R. 41 (C.A.) [*Madge*].

362 But see *Edmonton Kenworth, supra* note 347, where Veit J. found that an offer engaged the rules and entitled them to double costs notwithstanding that the offer did not include any sum of money.

363 (2001), 281 A.R. 351 (C.A.).

by the Chambers Judge, from whose decision the appellant was appealing. The third offer was to have the appellant abandon the appeal without costs. The appellant rejected the offers but was unsuccessful on its appeal. The Alberta Court of Appeal held that the three offers were not genuine offers of compromise and refused to grant double costs, holding that the only option effectively given to the appellant was to proceed with the appeal or not.[364]

Given the great diversity of content that a formal offer can embody, it can be difficult to compare a formal offer with a judgment in determining whether the double costs rules are engaged. Recently, in *McAteer v. Devoncroft Developments*,[365] Rooke J. held that the best approach is not to adopt a strict formula that will be used in all cases regardless of the terms of the offer. He went on to state: "[i]n order to make a correct comparison, the total value of the offer must be considered in relation to the total value of the judgment as at the date of the offer."[366]

3. SPECIAL REASONS TO DENY DOUBLE COSTS

Rule 174 expressly provides that when the extraordinary costs mechanism is triggered, double costs may nevertheless be denied for "special reasons." Numerous decisions have considered what constitute "special reasons" to deny double costs. In *Reid v. Stein*,[367] Johnstone J. held that the special reasons for denying double costs must truly be exceptional. The court held that a late offer to a mentally disabled plaintiff was not an exceptional reason where her counsel had expressly rejected the offer before trial.

In *Mitran v. Guarantee RV Centre*,[368] the plaintiff sued for constructive dismissal, and the defendant vehicle dealer counterclaimed, alleging that the plaintiff had over-valued trade-ins. The defendant made an offer of judgment less than one week before trial, offering a cash payment and a discontinuance of the counterclaim. Justice Johnstone held that the defendant's failure to withdraw allegations in the counterclaim amounting to fraud until two days into the trial amounted to a "special reason," and justified departing from the normal rule regarding double costs. In the result, the defendant received only single costs.

In *Garand v. Mutual of Omaha Insurance*,[369] the defendant issued a formal offer to an unrepresented plaintiff shortly before trial. The formal offer paraphrased the language of r. 174(1), which provides that the defendant shall receive costs for all steps taken after service of the offer if the plaintiff fails at trial to recover a sum more than the amount of the offer. However, the offer did not contain a reference to r. 174(1.1), which provides that the defendant shall be entitled to double costs in the event that the plaintiff's action is dismissed. The offer was accompanied by a letter which purported to explain that costs would be

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364 But see *Partec Lavalin Inc. v. Meyer* (2002), 303 A.R. 385 (C.A.) and *Jama v. Bobolo* (2002), 311 A.R. 362 (Q.B.). In these cases, formal offers which were in a nominal amount but provided for a waiver of costs were held to be genuine offers of compromise for the purposes of the rules.

365 2003 ABQB 425 [*McAteer*].

366 *Ibid.* at para. 60.

367 (1999), 253 A.R. 90 (Q.B.).

368 (1999), 251 A.R. 77 (Q.B.).

369 (2001), 297 A.R. 286 (Q.B.).

payable if the defendant bettered the offer at trial. The cover letter did not, however, explain that costs would be doubled if the plaintiff's action was dismissed entirely. The plaintiff's action was dismissed.

In speaking to costs, the plaintiff alleged that he had been misled by the cover letter, as it did not mention liability for costs prior to the date of the offer, and did not make reference to double costs. The Court held that "when an Offer of Judgment is made with the intent of demanding double costs, the fact of the double costs risk should be mentioned,"[370] and found that the "explanatory letter did not enable [the plaintiff] to realistically assess the consequences of total failure at trial."[371] This failure to mention double costs in the cover letter was found to be a "special reason" to deny double costs. The decision suggests that if a party makes an offer that is intended to create cost consequences, the offer must not be framed in language that may mislead the recipient as to the intended effect.

In *Greep v. Josephson*,[372] the Court used an unusual reason to deny double costs. As a result of an offer of judgment, one of the defendants would have been entitled to double costs. Such an order, however, would have had the effect of giving the defendants more than complete indemnification. The Court held that the jury's decision (outside of its jurisdiction) that the parties should be responsible for their own costs was a "special reason" to deny the defendants double costs. The Court limited costs to actual legal fees and disbursements on a solicitor-and-his-own-client basis.

The Court also retains a jurisdiction to find that a party's misconduct may be a "special reason" to deny double costs. In *K.E.M. Presentations v. Shell Canada Products*,[373] a defendant, soon after serving a formal offer, discovered that the plaintiff had failed to disclose a material fact. The defendant attempted to withdraw its offer before the expiry of 45 days for acceptance, but the plaintiff purported to accept the offer. Justice Clark held that the court has an "inherent jurisdiction to interfere with negotiated settlement where there has been a material non-disclosure."[374]

That the parties may later come to an agreement during trial is not a "special reason." In *Allen*,[375] the plaintiffs made an offer to settle and later beat that offer during trial. The defendants argued that double costs should not be awarded since the parties came to an agreement on damages partway through the trial. Justice Perras held that this reason was not sufficiently special to deny double costs to the plaintiff.

In addition, it now appears settled that double costs will be denied where the party has been awarded solicitor-and-client costs. In *McAteer*,[376] the successful party was awarded solicitor-and-client costs. She also bettered a formal offer she had made. Justice Rooke

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370 *Ibid.* at para. 52.
371 *Ibid.* at para. 55.
372 (2001), 285 A.R. 326 (Q.B.).
373 (2001), 290 A.R. 166 (Q.B.).
374 *Ibid.* at para. 18.
375 *Supra* note 318.
376 *Supra* note 365.

discussed the interaction between solicitor-and-client costs and the compromise rules, and stated as follows:

> I am of the view that an award of solicitor/client costs together with some additional reward/penalty constitutes 'special reason', justifying departure from the result otherwise dictated by Rule 147. This allows for the reward/punishment aspect of Rule 147 to be addressed, without awarding the successful litigant a windfall which would result from the strict application of Rule 147 where solicitor/client costs have been awarded.[377]

For the same general reasons, Rooke J. held that r. 147 is only intended to capture party-party costs.

4. CALDERBANK OFFERS

Very recently, in *McAteer*,[378] the Alberta Court of Queen's Bench re-addressed the issue of the Calderbank offer.[379] The availability of such offers was questioned after the British Columbia Court of Appeal held that the compromise provisions set forth in the *Court Rules Act*[380] are a complete code and that Calderbank offers no longer have any effect in that jurisdiction.

Justice Rooke held that Calderbank offers remain available for use in Alberta. He rejected the idea that the compromise provisions in Alberta's rules represent a complete code and noted that he was not bound by the British Columbia Court of Appeal. He also opined that "the Court should be slow to restrict the ways in which parties may try to settle cases with cost consequences, as those consequences encourage parties to settle litigation where a reasonable offer is made and penalizes others for proceeding with unnecessary risks."[381] In the result, Rooke J. confirmed that the double costs rules apply by analogy to Calderbank offers.

5. COMPROMISE PROCEDURES ON APPEAL

Rule 518.1 of the Court of Appeal Rules provides that: "[p]art 12 of these Rules applies with the necessary changes, to an offer or payment into court made between the filing of an appeal and the commencement of oral argument of an appeal." While this Rule does not expressly speak to the issue of offers made at the lower court and their application on appeal, the Alberta Court of Appeal in *Tanti v. Gruden*[382] held that an offer of settlement must be served again prior to an appeal in order to engage the doubling provisions of Part 12.[383]

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377 *Ibid.* at para. 78.

378 *Ibid.*

379 A Calderbank offer is where one party makes an offer to the other on a "without prejudice" basis but reserves the right to refer to the offer after trial to seek extra costs.

380 B.C. Reg. 221/90.

381 *McAteer*, *supra* note 365.

382 (1999), 75 Alta. L.R. (3d) 97.

383 See also *Century Services v. Multi-Corp.* (1998), 228 A.R. 103 (C.A.); *Davis v. Caproco Corrosion Prevention Ltd.* (1987), 50 Alta. L.R. (2d) 23 (C.A.); *Rahmath v. Louisiana Land & Exploration* (1989), 104 A.R. 246 (C.A.).

The Court of Appeal commented on the applicability of Part 12 to appeals in its split decision in the case of *Labbee v. Peters*.[384] The majority noted that while the Court had frequently held that the rules of compromise apply by analogy to appeals, this in no way derogates from the Court's discretion to award appeal costs as it sees fit. Justice Berger dissented, however, holding that by their plain wording,[385] the compromise rules are clearly not intended to apply to appeals. The Court of Appeal in *Labbee*[386] also confirmed that it will deny double costs where there is a special reason to do so.

In *Budget Rent-A-Car Edmonton v. Security National Insurance*,[387] the Alberta Court of Appeal acknowledged that it has yet to undertake a detailed analysis of the reasons why the compromise rules should apply to an appeal. In this regard, the Court acknowledged that settlement offers in appeals often do not fit snugly within the compromise rules, and stated that a specific rule dealing with offers to compromise in the context of appeals would be welcome.

6. Effect of Acceptance of Offer

In *Mar Automobile Holdings Ltd. v. Rawlusyk*,[388] the defendant served a formal offer for a cash sum "plus interest plus taxable costs."[389] The offer was accepted and the court held that "costs and pre-judgment interest stop at the time the Offer is served."[390] Accordingly, any costs associated with steps taken after the date the offer was served were not recoverable as part of the offer.

F. Other Costs Issues

1. Old or New Tariff

The provision governing transition between the old and new tariffs holds that the new tariff applies regardless of when the services were performed. This is subject to the overriding discretion of the court. However, in the recent decision of *475878 Alberta Ltd. v. Help-U-Sell*,[391] the Court suggested that it will not exercise this discretion where the party seeking the lower tariff has caused delay in bringing the action to trial.

2. Goods and Services Tax

Until recently, there has been considerable uncertainty as to the application of the federal Goods and Services Tax (GST) to awards of costs. The liability of a party for GST on taxable

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384 (2000), 261 A.R. 141 (C.A.) [*Labbee*].

385 "[A]t any time after the issuance of a statement of claim but before the commencement of the trial." Rule 170 quoted *ibid.* at para. 23.

386 *Supra* note 384.

387 (2001), 277 A.R. 305.

388 (2001), 295 A.R. 152 (Q.B.).

389 *Ibid.* at para. 5.

390 *Ibid.* at para. 20.

391 (2003), 322 A.R. 191 (Q.B.).

fees was addressed by the Alberta Court of Queen's Bench in *Madge*.[392] In that case, Brooker J. refused to allow GST on taxable fees, holding that in the absence of some specific reference to GST in the *Rules*, it must be concluded that Schedule C "is sufficiently generous in its provisions to allow one to infer that the drafters of the new schedule took GST into account in arriving at and establishing the various tariffs."[393]

On February 26, 2003, the *Rules* were amended to expressly provide that a party who is entitled to receive costs shall recover GST provided that that party provides a form of certificate deposing that the party will be liable for the GST. The effect of this provision is that a party who is ultimately responsible for GST can, upon presentation of the certificate contemplated by the Rule, recover the GST from the party responsible for costs.

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392 *Supra* note 361.

393 *Ibid.* at para. 6. But see *V.A.H. v. Lynch* (2001), 277 A.R. 104 (C.A.), wherein Wittmann J.A. awarded party-party costs plus GST, stating that "[i]n respect of legal fees paid, it is difficult to accept an argument that a lay person will not pay G.S.T. on that fee unless they are G.S.T. exempt, e.g. a government."