CIVIL PROCEDURE AND PRACTICE: RECENT DEVELOPMENTS

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This article provides a comprehensive and detailed review of recent changes to civil procedure and practice, and particularly how these changes are affecting the way in which civil litigation is conducted. The authors' commentary is focused on the practice and procedure of civil litigation within the province of Alberta as well as emerging trends. With the rapid rate of change to the rules respecting civil actions that has been experienced in the recent past, and with prospective changes in the immediate future, the authors have amalgamated both into their summary.

The article looks at how recent changes to the Alberta Rules of Court *have been examined and given judicial treatment by the courts in Alberta. By means of a review of recent cases, a multitude of elements of the civil litigation process, including pleadings, interlocutory applications, evidence, costs, and the new summary trial rules, are examined in respect to these recent changes. Included is also a review of the proposed new rules relating to discovery of documents that are soon expected to be in force.*

Le présents article propose un examen global détaillé de modifications apportées récemment aux règles de pratique et de procédure civile; et note leur incidence sur la procédure au civil. À cet égard, les commentaires des auteurs sont axés sur la pratique et la procédure en Alberta, ainsi que sur les nouvelles tendances. Compte tenu de l'évolution rapide des règles tout dernièrement, et des changements à venir dans un avenir proche, les auteurs ont intégré leurs remarques dans leur synthèse.

En passant en revue les procès récents, de nombreux éléments du procès civil – y compris les conclusions, les demandes de décision interlocutoire, les preuves, les frais, et les règles nouvelles régissant les procès sommaires, l'article étudie la façon dont les tribunaux de la province examinent et traitent les changements récents apportés aux Règles de la Cour du Banc de la Reine de l'Alberta. *L'article se termine par une étude des nouvelles règles qui devraient bientôt régir la divulgation de documents.*

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I. INTRODUCTION

The rules and procedures governing civil actions continue to change at a rapid pace and increase in complexity. The last several years have witnessed large-scale changes to the *Alberta Rules of Court* and the practice guidelines issued by the courts, as well as numerous decisions on points of practice. The following review is an attempt to provide an overview to assist the practitioner in keeping abreast of recent developments, and to notice some of the trends which seem to emerge. It will be apparent that no effort has been made to comment on all Alberta cases on the conduct of civil actions (which would, indeed, be fruitless and nearly impossible). Rather, attention has been given to those cases considered to be of particular interest to practitioners of civil litigation.

Those who follow developments in this area may notice a number of gradual shifts in the way litigation is governed in this jurisdiction. In the first place, the practice rules become more detailed, complex, and code-like with each amendment. This is easily seen in the very detailed rules now governing matters such as expert evidence, compromise procedures, and summary trials, and in the proposed new rules for

document production. Furthermore, the courts have been given increased authority in pre-trial management of actions and by their own practice guidelines seem inclined to exercise it vigorously. In a related development, some of the court's powers to control its own process (for example, in determining when expert evidence should be tendered entirely *viva voce*, as opposed to through reports) are supported by the authority to impose heavy costs sanctions where a party, who seeks to adduce and challenge evidence under the traditional procedures, is considered to be "unreasonable." Finally, there is the recognition that for some types of actions, shorter and less expensive paths to judgment are needed, as shown by the new rules for summary trials and streamlined procedures.

In short, there is an increased movement away from "old style" litigation, in which the court did not take an active role in managing an action but rather simply adjudicated on the cases brought to its bar, and in which the prescribed rules for conducting litigation and calling evidence were relatively few and parties more simply (if not always expeditiously) moved their case through the pre-trial procedures towards the courtroom. It has become increasingly rare, as well as increasingly expensive, for an action to proceed through all of the pre-trial steps to a trial in court with *viva voce* evidence. Of course, these developments must be seen in the context of an increasing reliance on alternative dispute mechanisms, made available through the court and other professionals trained in dispute resolution.

In this context of a rapidly-changing system of civil litigation, the following overview of recent developments is offered.

II. PLEADINGS

A. SERVICE

The courts in Alberta have, in recent years, considered a number of cases involving issues relating to service of statements of claim within the time required by rule 11.[1] While in some cases the facts have allowed the courts to avoid declaring a statement of claim expired, in other cases the courts have had little choice but to do so.

An example of the former type of case is *Oberg* v. *Foothills Provincial Hospital*,[2] where the statement of claim was renewed and served within the three-month renewal

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1 All rules cited hereinafter refer to the *Alberta Rules of Court*. Rule 11 was amended in 1997 to clarify the exact date upon which a statement of claim expires. Formerly, it provided that "a statement of claim is in force for a period of twelve months commencing on the day that the statement of claim is issued." There was confusion on whether to include the anniversary date within the twelve-month period, which was resolved in favour of inclusion in *Fortier* v. *Peerani* (1999), 232 A.R. 156 (C.A.). Rule 11(1) now expressly states that the expiry occurs "at the end of the day of the first anniversary of the day that the statement of claim is issued."

2 (1999), 171 D.L.R. (4th) 752 (Alta. C.A.) [hereinafter *Oberg*]. See also *O'Neill* v. *Dimmick Estate* (1994), 149 A.R. 47 (C.A.); *Marois* v. *Hervieux Estate* (1997), 55 Alta. L.R. (3d) 58 (C.A.); *MacNeil* v. *Hodgin* (1998), 58 Alta. L.R. (3d) 22 (Q.B.); and *Eveleigh* v. *Royal Alexandra Hospital and Murray* (1994), 163 A.R. 142 (Q.B.M.).

period, but was not endorsed by the clerk as required by the rules. The defendants asked the plaintiffs to take no further steps, and three of the four defendants filed statements of defence. The defendants then successfully applied to strike out the statement of claim.

On appeal, the Court of Appeal noted that three major changes to rule 11 were made as part of the 1992 amendments to the *Alberta Rules of Court*:

1) Under the old rule, a statement of claim could be renewed after the date for service had expired. Under the current rule, a statement of claim must be renewed before the expiry date.

2) The old rule permitted several renewals while the current rule permits only one renewal.

3) The old rule required that sufficient reasons be given in the affidavit for the lack of service. The current rule only requires that reasons be given and does not expressly include a sufficiency requirement.

The Court of Appeal reviewed the plaintiff's affidavit and held that it supported the inference that an extension was necessary. As for the fact that the renewed statement of claim had not been endorsed by the clerk, the court held that this did not render the statement of claim a nullity but rather a curable irregularity. That irregularity was waived by the defendants when they asked the plaintiffs to take no further steps and filed statements of defence. In the result, the statement of claim was reinstated.

For all the cases like *Oberg*, however, there are also cases where the court simply cannot find any facts which would allow the statement of claim to be salvaged. An example is *Martinez* v. *Hogeweide*,[3] where the plaintiff's statement of claim was served almost fifteen months after it was issued. The defendants claimed there had been a "standstill agreement" which operated to add seven months to the end of the twelve-month period for service prescribed by rule 11. However, the court noted that not all agreements or waivers stop the clock so that the intervening time will be added on to the end of the usual time limits; each case depends on its own facts. After reviewing the correspondence and discussions relating to the purported waiver, the Court of Appeal found that there had not been a true standstill agreement which would automatically add the waived time to the end of the twelve months.[4] Accordingly, the court set aside service of the statement of claim and declared it expired, stating that it "firmly reject[s] any suggestion that rule 11 is optional or discretionary, or that the court can cure failure to serve under it."[5]

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3 (1998), 156 D.L.R. (4th) 757 (C.A.).

4 For a case in which the court found a true standstill agreement which allowed the plaintiff to amend and renew the statement of claim some seventeen months after it had been issued, see *Brennan* v. *Morris* (1994), 16 Alta. L.R. (3d) 278 (Q.B.).

5 *Supra* note 3 at 761. See also *Sweatman* v. *Chahal* (1993), 9 Alta. L.R. (3d) 177 (Q.B.), where Perras J. held that the twelve month period prescribed by rule 11 for serving or renewing the statement of claim cannot be enlarged under rule 548.

B. AMENDMENT OF PLEADINGS GENERALLY

The amendment of pleadings with leave of the court is governed by rule 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 applying rule 132 the approach of the courts has, generally speaking, been quite liberal. For example, in the recent case of *Milfive Investments* v. *Sefel*,[6] the chambers judge allowed the plaintiffs to make significant amendments to their statement of claim. In dismissing the defendants' appeal, the Court of Appeal stated that:

> We see no reason to doubt the often-stated presumption that any amendment, however late or careless, should be allowed if there is no prejudice which cannot be compensated in costs.[7]

However, questions still arise as to the propriety of proposed amendments. In a number of cases the contentious issue is one of timeliness. In recent years, the courts generally have disapproved of attempts to amend pleadings during or after trial. That trend is illustrated by the following cases:

- In *Milano's Dining Room & Lounge (1989)* v. *CTDC #1 Alberta*,[8] the defendant applied to amend its statement of defence after the matter had proceeded to trial and the evidence was completed. McBain J. dismissed the application, holding that the proposed amendments were entirely inappropriate at that late stage of the proceedings.

- In *St. Michael's Extended Care Centre Society and Shulakewych* v. *Frost*,[9] the defendant also applied to amend his statement of defence at the conclusion of his case. Cawsey J. dismissed the application, holding that it was too late in the day to make such an amendment and, in effect, reopen the case for the calling of further evidence.

- In *Lenco* v. *Grabler*,[10] the action went to trial some twelve years after the statement of claim was filed. After the evidence was heard, the plaintiffs realized that their statement of claim was without foundation and applied to make amendments. Dixon J. dismissed the application, stating that to allow the requested amendments so late in the trial process would result in great prejudice to the defendant, who would not have had the opportunity to conduct an examination for discovery on the new issues or call rebuttal witnesses.

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6 (1998), 216 A.R. 196 (C.A.) [hereinafter *Milfive Investments*].
7 *Ibid.* at 197.
8 (1994), 19 Alta. L.R. (3d) 171 (Q.B.).
9 (1994), 153 A.R. 326 (Q.B.).
10 (1993), 14 Alta. L.R. (3d) 414 (Q.B.).

In cases where a party seeks to amend its pleadings during or after trial, prejudice is often self-evident. However, this is not necessarily the case where the delay is less significant. In such cases, evidence may be necessary to successfully oppose an application to amend.

As indicated above, in *Milfive Investments*,[11] the Court of Appeal dismissed an appeal from an order allowing the plaintiffs to amend their statement of claim, stating that evidence would have been required for the defendants' appeal to have succeeded. It noted that, although the plaintiffs' affidavit evidence on the initial motion accounted for only part of the delay, the defendants had filed no evidence at all and had not cross-examined on the plaintiffs' affidavit. Rather, they had chosen to argue that prejudice should be inferred from the mere fact of the delay. In the view of the Court of Appeal, the length of the delay and the nature of the allegations which the plaintiffs sought to add by way of amendment were not strong enough to compel such an inference.

The case of *Kaup* v. *Weir*[12] provides a reminder that an application for amendment may also have to be supported by evidence showing that there is some factual basis for the new allegations. The plaintiff sued her doctor and a hospital and then applied to amend her statement of claim to add allegations of fraudulent concealment and misdiagnosis. A master allowed the plaintiff to add those allegations in a reply to the statement of defence, but that decision was reversed on appeal. The amendments were disallowed by Lefsrud J. as the plaintiff had failed to provide any facts to support the allegations of fraudulent concealment and misdiagnosis. Although the defendants did not argue that they would be prejudiced by the amendments, the court noted that prejudice is just one of the hurdles that must be cleared; the party seeking to make the amendments must adduce evidence to establish some basis upon which the allegations are founded, as clearly spurious amendments will not be allowed.

C. AFTER EXPIRY OF LIMITATION PERIOD

Although the courts in Alberta have been quite liberal in allowing the amendment of pleadings in the ordinary course, potentially troublesome issues arise when a party seeks by amendment to raise a new cause of action after expiry of a limitation period. In Alberta, there has historically been a lack of consensus in the courts as to which of two approaches is appropriate in dealing with this issue.

The first is the traditional "analytical" or "special circumstances" approach,[13] which prohibits the amendment of a statement of claim which raises a new cause of action after the expiration of the limitation period, except in special circumstances. The second is the "functional" approach,[14] which inquires into whether the defendant will suffer

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11 *Supra* note 6.

12 (1998), 224 A.R. 347 (Q.B.).

13 This approach arises out of *Weldon* v. *Neal* (1887), 19 Q.B.D. 394 (Eng.C.A.), as modified by the Supreme Court of Canada in *Basarsky* v. *Quinlan*, [1972] S.C.R. 380.

14 This approach originates from the article by Professor Garry D. Watson entitled "The Amendment of Proceedings after Expiry of Limitation Periods" (1975) 53 Can. Bar Rev. 237. Its application in Alberta appears to have originated in the case of *Dumaine* v. *Kerry* (1988), 87 A.R. 70 (Q.B.).

actual prejudice if the amendment is allowed after the expiration of the limitation period. In recent years, both the Court of Queen's Bench[15] and the Court of Appeal[16] have had occasion to consider the issue of which approach should govern. That question was not answered with a great degree of certainty until very recently.

In *Madill* v. *Alexander Consulting Group*,[17] the Court of Appeal determined that the "special circumstances" approach is the proper approach for courts in Alberta to take when considering an application for amendments to a statement of claim which raise new causes of action after the expiry of a limitation period. It is now clear that the party applying to make the amendments must show that "special circumstances" exist so as to permit an exception to the general rule that amendments after the expiry of a limitation periods are not allowed.

In arriving at its decision, the Court of Appeal in *Madill* explicitly rejected the "functional" approach[18] as well as the "hybrid" approach which had been employed by the chambers judge in the case at bar. As for the question of prejudice which often arises on applications of this type (and which is so central to the "functional" approach), the court held that although there is no onus upon the party resisting the amendments to show prejudice, the absence of any prejudice will assist the party applying for the amendments in establishing its argument.[19] It remains to be seen whether the court's comments on prejudice may allow the "functional" approach to resurface, in whole or in part.

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15 Cases in which the "analytical" or "special circumstances" approach has been applied include *Lee* v. *Tremblay* (1993), 13 Alta. L.R. (3d) 213 (Q.B.); *Smith* v. *Mohammed* (1995), 168 A.R. 398 (Q.B.M.); *Canadian Imperial Bank of Commerce* v. *Hilz* (1998), 64 Alta. L.R. (3d) 380 (Q.B.); and *Desjarlais* v. *Black* (1995), 28 Alta. L.R. (3d) 300 (Q.B.M.). Cases in which the "functional" approach has been applied include *Davidson Partners Ltd.* v. *Del Rio International* (1995), 26 Alta. L.R. (3d) 438 (Q.B.), aff'd (1995), 36 Alta. L.R. (3d) 141 (C.A.); and *Pike* v. *Pemberton Securities* (1997), 53 Alta. L.R. (3d) 58 (Q.B.) [hereinafter *Pike*]. Cases in which the courts have sought to merge the two approaches, or take something of a hybrid approach, include *Bank of Nova Scotia* v. *Lennie* (1995), 167 A.R. 45 (Q.B.); *Tkachuk* v. *Janzen Estate* (1997), 204 A.R. 386 (Q.B.); *Cunningham* v. *Irvine-Adams*, [1999] A.J. No. 792 (Q.B.), online: QL (A.J.); and *Madill* v. *Alexander Consulting Group* (1998), 59 Alta. L.R. (3d) 7 (Q.B.), rev'd [1999] A.J. No. 865 (C.A.), online: QL (A.J.).

16 In *Allen* v. *Western Union Insurance* (1994), 19 Alta. L.R. (3d) 189 (C.A.), *Davidson Partners* v. *Del Rio International* (1995), 36 Alta. L.R. (3d) 141 (C.A.), and *Korte* v. *Cormie* (1996), 36 Alta. L.R. (3d) 431 (C.A.) [hereinafter *Cormie*], the Court of Appeal had occasion to consider this issue, but chose not to decide which of the two approaches should govern as a general rule.

17 [1999] A.J. No. 865 (C.A.) [hereinafter *Madill*].

18 The court noted that in provinces where the functional approach is applied, there is a statutory basis for departing from the "special circumstances" test which does not exist in Alberta.

19 One of the arguments most frequently made by defendants in opposing applications to amend a statement of claim after the expiry of a limitation period is that they will be prejudiced by the loss of the limitations defence. The court often has addressed this argument by allowing the amendments on the condition that the defendants retain the right to raise any limitations defences at trial. See for example *Cormie*, *supra* note 16; *Pike*, *supra* note 15; and *Western Canadian Place* v. *Con-Force Products* (1997), 53 Alta. L.R. (3d) 341 (Q.B.). Of course, this does not avoid the prejudice of being required to defend the claim.

D. STRIKING OUT PLEADINGS

The test for striking out pleadings continues to be onerous and, perhaps, has become more so over the past years. In *Korte* v. *Deloitte, Haskins & Sells*,[20] the defendants applied to strike out a statement of claim as disclosing no cause of action. The application was dismissed, and the defendants appealed. In dismissing the appeal, the Court of Appeal laid down the following general guidelines for the striking of a statement of claim:

> In considering the attacks made by Deloitte and Cormie the court should not strike out the statement of claim unless it is plain and obvious or beyond a reasonable doubt that Korte cannot succeed. Further, the court must assume that the allegations in the statement of claim are true and capable of proof at trial. The court should also allow for some generosity in assessing whether the statement of claim discloses a cause of action, and it is not always necessary to plead specific words or specific legal conclusions providing that the essence of the action is outlined in the pleadings.[21]

The *Korte* test was applied by the Court of Appeal in *Peterson* v. *Highwood Distillers*[22] in allowing an appeal of an order striking out allegations of conspiracy in a statement of claim.

In *Olivares* v. *Lethbridge Handibus Association*,[23] the Court of Appeal refused to strike out a paragraph of the statement of claim which the defendant claimed disclosed "without prejudice" communications and therefore was embarrassing and improper. The Court of Appeal stated that a pleading cannot be struck out if there is doubt, even doubt as to whether it is embarrassing.

E. THIRD PARTY PROCEEDINGS

1. SUBSTANTIVE ISSUES

For a time, the 1990 Court of Appeal decision in *Metz* v. *Breland*[24] was thought to have clarified the law with respect to the circumstances in which a third party notice was proper. In that case, the court stated that third party notices serve to enforce duties which the third party owes to the defendant issuing the third party notice, not duties which the third party owes to the plaintiff. In recent years, the courts have been called upon to consider this proposition in a number of different fact situations. This has led to a number of developments and refinements in the case law.

One issue which has been considered by the courts since *Metz* was decided is the issue of whether a third party notice is proper where the third party may not owe a common law duty to the defendant, but the defendant has a statutory right of

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20 (1993), 8 Alta. L.R. (3d) 337 (C.A.) [hereinafter *Korte*].
21 *Ibid.* at 340.
22 (1998), 61 Alta. L.R. (3d) 365 (C.A.).
23 (1997), 196 A.R. 133 (C.A.).
24 (1990), 110 A.R. 25 (C.A.) [hereinafter *Metz*].

contribution as against the third party under the *Tortfeasors Act*[25] or the *Contributory Negligence Act*.[26] Three significant cases on this point are as follows:

- In *Hughes* v. *Meters*,[27] the plaintiff sued the defendant for injuries suffered in a motor vehicle accident. In another action, the plaintiff sued the doctors who treated him for those injuries. In the first action, the defendant sought to third party the doctors. The Master allowed the application but was reversed on appeal. On further appeal, the Court of Appeal held that the defendant had the right in law to issue the proposed third party proceedings as the defendant and the doctors could be jointly or concurrently liable for the plaintiff's injuries under the *Tortfeasors Act*.[28]

- In *Vrolson* v. *Souvie*,[29] the infant plaintiff was injured when a vehicle driven by her father collided with the defendants' vehicle. The infant plaintiff sued the defendants, who third partied the infant's father. The third party obtained an order striking out the third party notice, but on appeal the third party notice was restored. The Court of Appeal pointed out that under the *Contributory Negligence Act*,[30] the third party owed a duty of contribution to the defendants with respect to the injuries suffered by the infant plaintiff.

- In *Syniuga* v. *309566 Alberta*,[31] the plaintiffs sued the defendants on a mortgage. The defendants counterclaimed against the plaintiffs as well as the bank. The bank issued a third party notice against the defendants' lawyer. The Master dismissed the lawyer's application to strike the third party notice. The lawyer appealed, but the appeal was dismissed. The third party notice was allowed to stand on the basis that the defendant had a statutory right of contribution against the third party under the *Tortfeasors Act*[32] and the *Contributory Negligence Act*.[33]

Third party notices have also been allowed to stand on other grounds, as exemplified by the following cases:

- In *Dilcon Constructors* v. *ANC Developments*,[34] the Court of Appeal restored a third party notice which had been struck out. In so doing, the court noted that the words "contribution" and "indemnity" do not appear in rule 66(1), and held that a purposive interpretation of the rule would not require it to be read down so as to authorize third party proceedings only in cases of indemnity. In the course of its reasons, the court also noted that the purpose of the rule is to avoid the extra

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25 R.S.A. 1980, c. T-6.
26 R.S.A. 1980, c. C-23.
27 (1993), 200 A.R. 335 (C.A.), rev'g (1992), 201 A.R. 299 (Q.B.), rev'g (1992), 201 A.R. 297 (Q.B.M.).
28 *Supra* note 25.
29 (1995), 27 Alta. L.R. (3d) 271 (C.A.).
30 *Supra* note 26.
31 (1994), 160 A.R. 67 (Q.B.).
32 *Supra* note 25.
33 *Supra* note 26.
34 (1994), 155 A.R. 314 (C.A.) [hereinafter *Dilcon Constructors*].

expense of duplicate lawsuits, an end which would be achieved by allowing the third party notice to stand in the case at bar.

- In *Petro-Canada* v. *Singer Valve*,[35] the Court of Appeal applied the reasoning in *Dilcon* in allowing a fourth party notice to stand on the basis of a contractual indemnification.

- In *Burnco Rock Products* v. *Schomburg Industries (Canada)*,[36] the chambers judge struck out the third party notice on the grounds that it was logically impossible that the third party could have contributed to the plaintiff's damages. However, the Court of Appeal reinstated the third party notice, as it could not say that it was plain and obvious that none of the diverse liability scenarios could ever occur.

The courts have, accordingly, indicated a healthy reluctance to strike out third party notices, except in the clearest cases. The main policy objective, as expressed in the *Dilcon Constructors* decision, is to ensure that as many issues as possible be resolved in one proceeding, subject to concerns about prejudice. Of course, in the proper circumstances, third party notices will be struck out, as occurred in the following cases:

- In *Jorgensen* v. *Mutual of Omaha Insurance*,[37] the plaintiff commenced action against her employer and her disability insurer. The employer filed a third party notice against the disability insurer, which in turn filed a fourth party notice against the broker and agent. Fraser J. struck out the fourth party notice on the basis that there was no duty owed by the broker and agent to the disability insurer, and the *Tortfeasors Act*[38] did not apply.

- In *Mikisew Cree First Nation* v. *Canada*,[39] the plaintiff brought an action against Alberta and Canada advancing claims under a treaty land entitlement agreement. Canada issued a third party notice against two lawyers and a law firm which had represented the plaintiff in negotiations leading up to the treaty land entitlement agreement. Moore J. allowed the application to set aside the third party notice, holding that the *Tortfeasors Act* did not apply and the matter fell squarely within the rule set forth in *Metz*.

- In *Northland Bank (Liquidation)* v. *Willson*,[40] the plaintiff had settled with the third parties, covenanted not to sue them, and agreed to indemnify them for any judgment and costs which could be rendered against them in third party proceedings by any defendant. Furthermore, the plaintiff claimed only the defendant's proportionate share of the damages and did not seek to recover from the defendant any portion of the damages that the third parties might have caused. Moore C.J.Q.B. struck out the third

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35 (1994), 22 Alta. L.R. (3d) 218 (C.A.).
36 (1998), 228 A.R. 163 (C.A.).
37 [1999] A.J. No. 125 (Q.B.), online: QL (A.J.).
38 *Supra* note 25.
39 (1998), 235 A.R. 121 (Q.B.).
40 (1998), 233 A.R. 341 (Q.B.).

party notices on the basis that the third parties were not tortfeasors who, if sued, could be liable to the plaintiffs pursuant to the *Tortfeasors Act*.

Concern about prejudice is the main reason for disallowing third party notices, even though in theory they are properly part of the action. In *Burak's Lakeside Diner* v. *Rensaa*,[41] Veit J. allowed the plaintiff's application to sever a third party notice in light of the advanced stage of the proceedings, the fact that the plaintiff would be prejudiced by having the trial delayed, and most importantly, the fact that the claims in the main action and those in the third party proceedings were of a very different character.

2. LATE ISSUANCE OF THIRD PARTY NOTICES

In *Penn West Petroleum* v. *Koch Oil*,[42] Hunt J. (as she then was) affirmed the proposition that on an application to extend the time for filing a third party notice, the court should consider whether there has been inordinate delay, whether a credible excuse for the delay has been provided, and whether there will be prejudice to the plaintiff or a third party if the time is extended.

On the evidence necessary to justify a time extension for the filing of a third party notice, the Court of Appeal stated the following in *Lister* v. *Calgary (City)*:[43]

> Where a party seeks a significant time extension, it is expected to give evidence to explain the delay, i.e. why prompt compliance did not occur. Maybe it would be different if the extension sought was slight, but here the delay was over four and one half years. Evidence must be proper admissible evidence such as an affidavit, not mere allegations by counsel. The cases on time extensions generally, and those on later third party notices, seem to agree on those points.[44]

The Court of Appeal in that case struck out the third party notice on the grounds that there was no proper admissible evidence to explain the delay or justify the time extension sought.

In *Canada Deposit Insurance* v. *Prisco*,[45] a defendant filed third party notices more than six years after the plaintiff's cause of action as against the defendant had arisen. The third party notices were struck out on the basis that a defendant in a tort action was bound by the same limitation period as the plaintiff, and, in the case at bar, the time for suit by the plaintiff expired long before the third party notices were filed.

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41 (1997), 215 A.R. 157 (Q.B.).

42 (1993), 142 A.R. 168 (Q.B.). See also *Principal Group (Bankrupt)* v. *Alberta* (1997), 198 A.R. 238 (Q.B.).

43 (1997), 193 A.R. 218 (C.A.).

44 *Ibid.* at 220.

45 (1996), 38 Alta. L.R. (3d) 97 (C.A.).

III. DISCOVERY BY PRODUCTION OF DOCUMENTS

A. AFFIDAVIT OF DOCUMENTS

From time to time the question arises as to how much detail an affidavit of documents must give about the individual documents which it discloses. In the case of *Dorchak* v. *Krupka*[46], the Court of Appeal canvassed the authorities and gave detailed and extensive guidelines for listing and describing documents. Master Quinn has referred, quite accurately, to this significant case in the following terms:

> It is the *locus classicus* on the subject of how documents should be described in an Affidavit of Documents. It is especially illuminating on how documents upon which privilege is claimed should be described. It should be required reading for anyone drawing an Affidavit of Documents. If it is read and followed, there will be a significant reduction in applications for further and better Affidavits of Documents.[47]

As noted by Master Quinn, the Court of Appeal in *Dorchak* set down guidelines for listing and describing both producible and privileged documents. With respect to producible documents, Côté J.A., writing for the court, held that the overriding principle is that the affidavit of documents must show unambiguously what documents' existence are disclosed. The actual manner by which unambiguous identification is achieved is governed by mechanics, convenience, and common sense. It is not necessary to individually list the documents or provide a detailed description in order to let the other side see if all relevant documents have been produced.

A distinction was drawn between large and small lawsuits in the context of the level of description required. Where there are a large number of producible documents, Côté J.A. indicated that it is permissible to group them into bundles with common characteristics and to describe the bundles without itemizing individual documents. However, in lawsuits where there are less than about 100 producible documents, he stated that a failure to describe the documents becomes a trivial issue. Accordingly, he refused to order a further and better affidavit of documents in the case at bar, where the producible documents had been described as documents mechanically numbered 000001 to 000020.

Côté J.A. stated that the governing principles for description of privileged documents are unambiguous identification and protection of privileged information. With respect to unambiguous identification, the principle is the same as for producible documents. However, the principle of protection is paramount for privileged documents, and any system of listing or describing privileged documents which gives away privileged information is unthinkable.

Côté J.A. considered authorities holding that the description of individual privileged documents must be sufficient for the court or opposite party to assess whether privilege

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[46] (1997), 196 A.R. 81 (C.A.) [hereinafter *Dorchak*].

[47] *Gano* v. *Alberta Motor Association Insurance* (1998), 213 A.R. 144 at 147 (Q.B.M.).

is properly claimed in respect of each document, and found that they were in error. In his view, the principle of protection permits privileged documents to be listed and described merely as numbered bundles without adding details such as dates, contents, or parties. A proper claim to privilege is made in an affidavit of documents where the individual categories of privilege are segregated and the affidavit discloses which numbered documents come within each category of privilege.

B. PRIVILEGE

The validity of claims to privilege is an issue which is often considered by Alberta courts.[48] The guiding principles governing the issue of litigation privilege have been clarified in two recent Court of Appeal decisions.

In *Moseley* v. *Spray Lakes Sawmills (1980)*,[49] a statement made by an insured to his insurance adjuster following a serious motor vehicle accident was held to be privileged. However, that decision was reversed on appeal. The parties agreed that the applicable test for determining whether the statement fell within the scope of litigation privilege was the "dominant purpose" test established by the Court of Appeal in *Nova* v. *Guelph Engineering*[50] They differed, however, as to the meaning of that test and its application to the facts of the case at bar. After commenting on the "dominant purpose" test and considering the case law, including *Nova*, the Court of Appeal stated the following:

> The key is, and has been since the court adopted the dominant purpose test in *Nova*, that statements and documents will only fall within the protection of the litigation privilege where the *dominant purpose for their creation* was, at the time they were made, for use in contemplated or pending litigation. While a lawsuit need not have been initiated, and while a lawyer need not have been retained at the time the statement or document was made, the party claiming privilege must establish that at the time of creation the dominant purpose was use in litigation. The words "by reason of an intention to provide information to solicitors" are not superfluous. The test is a strict one. As has often been stated, it is not enough that contemplated litigation is one of the purposes.[51]

The court then considered authorities from other jurisdictions on whether investigation reports produced in the ordinary course could be considered privileged, and concluded that the statement in issue was producible.

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48 See *e.g. Sherbanuk* v. *Reikie* (1996), 46 Alta. L.R. (3d) 287 (Q.B.); *Polansky Electronics* v. *AGT* (1997), 205 A.R. 43 (Q.B.); *549029 Alberta* v. *First City Trust* (1997), 205 A.R. 40 (Q.B.); *A.* v. *L.* (1998), 58 Alta. L.R. (3d) 280 (Q.B.); *College of Physicians & Surgeons (Alberta)* v. *Cooper* (1994), 38 Alta. L.R. (3d) 71 (Q.B.); *Olson (Stuart) Construction* v. *Sawridge Plaza* (1995), 176 A.R. 120 (Q.B.); *Owen* v. *Westfair Properties* (1996), 39 Alta. L.R. (3d) 135 (Q.B.M.). See also *White* v. *Lafreniere* (1997), 46 Alta. L.R. (3d) 184 (Q.B.); *Vokes* v. *Backer* (1996), 194 A.R. 343 (Q.B.); *Robinson* v. *MacWilliam and Lesveque* (1997), 197 A.R. 394 (Q.B.); *Witwicky* v. *Seabord Life Insurance*, [1998] A.J. No. 1468, online: QL (Q.B.); *Lytton* v. *Alberta*, [1999] A.J. No. 457 and 629, online: QL (Q.B.); *Blair* v. *Wawanesa Mutual Insurance* (1998), 235 A.R. 100 (Q.B.); and *Western Canadian Place* v. *Con-Force Products* (1998), 233 A.R. 190 (Q.B.).

49 (1996), 184 A.R. 101 (C.A.) [hereinafter *Moseley*].

50 (1984), 30 Alta. L.R. (2d) 183 (C.A.) [hereinafter *Nova*].

51 *Supra* note 49 at 107-108 [emphasis in original].

The same issue came before the Court of Appeal in *Specialty Steels* v. *Suncor*,[52] which applied the same test as it had in *Moseley* but with a different result. The defendant's plant was destroyed by fire, and the defendant's manager was instructed to investigate and report on the cause of the fire. The defendant purchased replacement fittings from the plaintiff to make repairs and subsequently discovered that some of the fittings had hardness ratings exceeding specifications. The defendant's manager was then asked to investigate and report on the extent and cause of the hardness problem as well. At that time, no litigation was in process, threatened, or contemplated. However, before the report was completed, the plaintiff commenced proceedings against the defendant to recover the price of the fittings. The defendant's manager completed and delivered his report on the hardness problem shortly thereafter. The plaintiff's application to compel the defendant to disclose the report was dismissed on the basis that the report was privileged. The plaintiff appealed, but the appeal was dismissed.

O'Leary J.A., writing for the majority, agreed with the chambers judge that the relevant time for judging the dominant purpose of the report was when the document was physically created or brought into existence as a tangible object, rather than when it was requested or at some point during of the investigation. Accordingly, even though use in contemplated litigation was not the dominant purpose for requesting the investigation and report, that was the dominant purpose at the time the report was created. The fact that litigation was commenced while the report was in the process of being drafted gave the report a different character than it originally had.

A strong and lengthy dissent was written by Conrad J.A. (who had written the court's decision in *Moseley*). Although she acknowledged that the dominant purpose of the report was initially to investigate the fire, and then to investigate the hardness problem as well, in her view the evidence did not show that there had been a change in dominant purpose by the time the report was created. Moreover, she disagreed with the notion suggested by the chambers judge that the time of delivery was the appropriate time to assess the dominant purpose of the report. Accordingly, she would have ordered the document produced, as she did in *Moseley*.

The dissent in *Specialty Steels* raises an important question: what evidence is needed to establish dominant purpose? In the words of Conrad J.A.,

> [t]he onus lies on the party seeking protection of the document to prove that it was privileged as at the date of *creation* of its content, and they cannot avoid production by merely collating the documents into a report at a later point in time.[53]

Therefore, where an issue arises as to whether the dominant purpose of a document has changed, evidence would likely be required as to the nature and timing of such change in relation to the commencement of litigation.

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[52] (1997), 54 Alta. L.R. (3d) 246 (C.A.) [hereinafter *Specialty Steels*].

[53] *Ibid.* at 251 [emphasis in original].

In the case of *Ernst & Young* v. *Central Guaranty Trust*,[54] an issue arose as to whether three memoranda prepared by the defendant's employee were subject to either litigation privilege or solicitor-client privilege. Clarke J. held that the documents were not privileged and should be produced. From the authorities, including *Nova*, *Moseley*, and *Specialty Steels*, he distilled the following principles:

1. The litigation privilege is completely separate from the privilege from communications to or from a lawyer to get or receive legal advice. One does not need both situation [*sic*] to claim the privilege; either one will suffice.

2. While precedents are useful to establish the legal principles, each case is fact specific.

3. The rationale for litigation privilege provides an essential guide for determining the scope of its application. Its purpose is to protect from disclosure the statements and documents which are obtained or created particularly to prepare ones case for litigation or anticipated litigation. It is intended to permit a party to freely investigate the facts at issue and determine the optimum manner in which to prepare and present the case for litigation.... *Thus at the time of creation* preparation for litigation must be the dominant purpose.

4. The concept of dominant purpose assumes that creation of a document may be motivated by more than one intention. There is no reason in principle by [*sic*] servient purpose of use in litigation cannot mature into the dominant purpose as the underlying investigation progresses and external events change.

5. The party claiming privilege must establish that at the time of creation the dominant was used [*sic*] in litigation. The test is a strict one.

6. The onus of proving that the privilege applies rests squarely on the person claiming the privilege.

7. The dominant purpose at the time of creation should not be determined from subsequent events which might indicate that the statement becomes useful for litigation.[55]

This list of principles is a useful set of guidelines to consider in determining whether litigation or solicitor-client privilege may be claimed for a statement or report.

C. WAIVER

Even where privilege has existed, there sometimes is a claim for production on the basis that it has been waived.[56] Three recent cases are of particular interest in that they

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54 (1998), 227 A.R. 300 (Q.B).

55 *Ibid.* at 306-307 [emphasis in original; citations omitted].

56 See *e.g. Ernst & Young* v. *Central Guaranty Trust* (1998), 58 Alta. L.R. (3d) 7 (Q.B.) and *Johnson* v. *Wilson* (1997), 52 Alta. L.R. (3d) 120 (Q.B.M.), both of which involved issues of waiver in the context of solicitor-client privilege. See also *Olson (Stuart) Construction* v. *Sawridge Plaza*, (1996), 195 A.R. 94 (Q.B.), which involved an issue of waiver in the context of litigation privilege.

consider the concept of "common interest" privilege. Those cases are *Western Canadian Place* v. *Con-Force Products*,[57] *Archean Energy* v. *Minister of National Revenue*,[58] and *Anderson Exploration* v. *Pan-Alberta Gas*.[59] In *Western Canadian Place*, certain expert reports and legal opinions were referred to in cross-examinations on affidavits, the transcripts of which were filed in court. In *Archean Energy*, legal opinions had been provided by one party to the other. In *Anderson Exploration*, confidential documents were inadvertently disclosed. In all of these cases, the court found that the documents in question were protected by "common interest" privilege, and the parties seeking to negate the privilege did not establish a waiver of that privilege.

In *Western Canadian Place*, McMahon J. noted that "common interest" privilege protects against production in cases where documents are shared between persons having a common interest in the litigation. He went on to state that because waiver depends upon intention, the court must attempt to ascertain whether the party that released the documentation intended the privilege to be waived. In all three of these cases such intention was not found.

D. IMPLIED UNDERTAKING

The proposition that there is an implied undertaking on the part of parties and counsel that discovery evidence, whether oral or documentary, may not be used for purposes collateral to the action without leave of the court has been accepted in Alberta since at least as early as 1991, when Lutz J. gave reasons in *Wirth Ltd.* v. *Acadia Pipe and Supply*.[60] The implied undertaking has been confirmed, refined, and perhaps strengthened by Alberta courts in recent years.

In *Ochitwa* v. *Bombino*,[61] Coutu J. applied *Wirth* in holding that the implied undertaking applied to the facts at bar. She also canvassed the authorities from other Canadian provinces, many of them written since *Wirth*.

In *Law Society of Alberta* v. *Randhawa*,[62] LoVecchio J. approved of the decision in *Wirth*, but chose not to apply the implied undertaking rule to the unique facts before him. In this case, examination for discovery transcripts were being sought not by one of the parties to the litigation for a collateral or ulterior purpose, but rather by the Law Society of Alberta for an investigation into the conduct of one of its members. LoVecchio J. cited appellate decisions from British Columbia and Saskatchewan holding that the implied undertaking does not supercede all other legal, social, or moral duties, and should not be construed rigidly.

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57 (1997), 50 Alta. L.R. (3d) 131 (Q.B.) [hereinafter *Western Canadian Place*].

58 (1997), 202 A.R. 198 (Q.B.) [hereinafter *Archeon Energy*].

59 (1998), 61 Alta. L.R. (3d) 38 (Q.B.) [hereinafter *Anderson Exploration*].

60 (1991), 79 Alta. L.R. (2d) 345 (Q.B.) [hereinafter *Wirth*].

61 (1997), 153 D.L.R. (4th) 555 (Q.B.).

62 (1996), 185 A.R. 220 (Q.B.) [hereinafter *Randhawa*].

LoVecchio J. noted that the matter has only been considered incidentally by the Alberta Court of Appeal. While that remains true, only three days after the decision in *Randhawa* was delivered, the Court of Appeal had occasion to consider the implied undertaking in *United Nurses of Alberta* v. *Alberta Children's Hospital*.[63] The issue was whether the implied undertaking applied to a party giving information on discovery, as opposed to the typical case of a party receiving information. The Court of Appeal stated as follows:

> The first issue is whether the implied undertaking binds or affects the grievor. We know of no authority which says that the implied undertaking applies to her. It is customarily expressed as an undertaking by a party to litigation who *receives* documents or information by the discovery process not to use what he or she receives for collateral purposes, without leave of the Court. Nor would the usual rationale expressed for the undertaking apply to a party who *gives* information on discovery as the grievor did.[64]

Accordingly, it was held that the implied undertaking rule did not apply to the party giving information on discovery. However, the court emphasized that its finding should not be taken as a general proposition. It did not wish to foreclose the question of whether, in the appropriate case, there might be an implied undertaking governing the actions of a party giving information on discovery.

E. PROPOSED NEW RULES

The rules governing discovery of documents in Alberta may change significantly in the very near future[65] as a result of draft amendments proposed by the Rules of Court Committee. Rules 186 through 199 will be repealed in their entirety and replaced with a much more stringent set of rules in an effort to further streamline and expedite the litigation process. The new rules are currently in the process of being finalized by the rules of court committee, and it is expected that they will take effect on 1 November 1999.

Under the new rules, an affidavit of documents will be known as an "affidavit of records." The affidavit of records must be filed and served within ninety days of service of the statement of defence, unless leave of the court to file late is obtained.[66] A party who fails to comply with this deadline will be liable to pay a penalty in costs to the party adverse in interest of two times item 3(1) of Schedule C (which deals with document discovery), or such larger amount as the court may determine, irrespective of the final outcome of the proceedings. Such costs will be taxable and payable forthwith. The court may also, on application, strike out the pleadings of the party in default or impose any other sanction, including an additional penalty under rule 599.1.

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63 (1996), 184 A.R. 310 (C.A.).

64 *Ibid.* at 311 [emphasis in original].

65 Our comments are based on "Alberta Rules of Court (Discovery Rules) Amendment Regulation" draft circulated with *Benchers' Advisory* 60 (June 1999). The rules governing examination for discovery will also be amended to the extent necessary in order to reflect the significant changes in the rules governing discovery of documents.

66 The new rules expressly provide that rule 548 will not apply to enlarge or abridge this time limit.

Given the fact that there is no flexibility with respect to the ninety day period outside of seeking leave of the court, these sanctions are severe, even draconian.[67]

Another significant change in the new rules relating to discovery of documents is that relevance has been redefined. Under the new rules, only documents which are "relevant and material" are to be produced. A record is only "relevant and material" if it could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, or to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.[68] The objective of narrowing the definition of relevance for purposes of production is to discourage production of the marginally relevant documents, which presently are too often produced in great numbers.

IV. DISCOVERY BY EXAMINATION OF WITNESSES

A. WHO MAY BE EXAMINED

There is ample authority for the principle that a corporate party has very wide discretion in selecting the "officer" who will give evidence for it at examinations for discovery, and that its choice of an officer will seldom be overruled by the court.[69] The authorities are based on rule 214(2), which provides that the corporation shall make the selection of its officer, and the court will make a selection only if the corporation refuses to designate an officer or if the court considers that a proper officer has not been selected "having regard to the question that is involved."

The right of a corporation to select its officer under rule 214 extends even to changing an officer before examinations are concluded, where "there is a good and honest reason." This principle appears from *Western Canadian Place* v. *Con-Force Products*,[70] where the plaintiff was a corporation formed to be the nominal owner of an office building, while the ultimate beneficial owner and all of the employees of the plaintiff company were two other corporations. An employee of one of the corporate parties was designated as the officer for discovery purposes, but partway through the lengthy series of examinations, the other corporate party acquired sole control of the plaintiff corporation. The controlling party then put forward one of its employees as a replacement officer for the continuing examinations. It was recognized that the officer who had been testifying knew more about the issues than the person put forward as a

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67 This is particularly so when it is considered that exchange of production is usually accomplished consensually between counsel without formalities, and affidavits are often initially exchanged on a draft basis pending initial examinations for discovery and further production which almost inevitably results therefrom. Of course, it must be remembered that the present rule 186 requires an affidavit of documents to be filed and served within ten days of demand — a rule which has been overtaken by actual practice at the bar.

68 This narrow definition of relevance will also be applicable to questions asked on examination for discovery.

69 See *e.g. Damiani* v. *Anderson* (1977), 2 Alta. L.R. (2d) 373 (S.C.(A.D.)); and *Cana Construction* v. *Calgary Centre for Performing Arts*, [1986] 6 W.W.R. 74 (Alta. C.A.).

70 (1998), 224 A.R. 1 at para. 5 (Q.B.).

replacement, but the court also recognized that the plaintiff company wanted representation by an officer with a continuing interest in the litigation, even though that interest was indirect through his employer.

McMahon J. referred to authority "for the proposition that the corporation's selection should not be interfered with if made honestly and reasonably."[71] Drawing from that basic principle, he found that a corporation could also change its selection of an officer, with "good and honest reason." Obvious justification would exist in the case of illness, incapacity, or death. Displeasure with answers given by an officer would not be justification for a change. He noted that the existing officer's employer had no further interest in the litigation, and the officer's involvement would continue to be lengthy and require significant time. The party having the remaining interest in the nominal building owner was "entitled, as a corporate party to litigation, to select an officer to speak for it in whom it has confidence." [72]

McMahon J. also recognized that there might be some evidentiary issues arising from the fact that the corporate officer was now a different person. His observations on this point were as follows:

> There is no doubt that the evidence given by [the previous officer] does not change its character or weight merely because he has now been replaced as corporate officer. Nor, is there any doubt that a litigant including a corporate litigant has the right, if not the obligation, to correct an incorrect answer. It is also true that when an answer has been given based upon information received rather than personal knowledge, as is common through a corporate officer, the corporation can adduce confirming, contrary or inconsistent information which comes into its possession.[73]

There is some uncertainty about the implications of these observations. Normally, the discovery evidence of an officer will be binding upon the corporate party as an admission.[74] Accordingly, it may be presumed that the right to adduce "confirming, contrary or inconsistent information" referred to by McMahon J. refers to a party's ability to tender other evidence at trial, which would be weighed by the court along with other evidence, including discovery testimony. Alternatively, the corporate officer could be examined on the corporation's own behalf under rule 207, although this would be in the nature of a redirect examination and would be required to proceed immediately following the opposite party's examination, without additional briefing of the witness.

There has also been further consideration of the meaning of the word "officer" in rule 200(1), the general provision allowing parties the right to conduct examinations for discovery of "a party to an action, and the officer of a corporate party and any person who is or has been employed by any party to an action...." It is well established that

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71 *Ibid.*, referring to *McDougall & Secord* v. *Merchants Bank of Canada*, [1919] 1 W.W.R. 830 (Alta. S.C.).

72 *Ibid.*

73 *Ibid.* at para. 8.

74 *McDougall & Secord* v. *Merchants Bank of Canada* (1919), 46 D.L.R. 672 (Alta. S.C.).

the reference to "officer" in this rule has an entirely different meaning from rule 214, which simply allows a corporate party to select its spokesperson to give evidence.

In two recent masters' decisions, it was found that persons performing functions broadly equivalent to those performed by traditional officers could be examined under rule 200.[75] In one case, a consulting company performed management services for a group of plaintiff companies, and its employee was designated a "managing director of operations." This was sufficient to entitle the opposite party to conduct an examination of him as an officer or former officer under rule 200, even though he may not have been either an officer or employee in a strict legal sense. Similarly, it was found that where a bank contracted with an individual to do functions which would otherwise have been done by an officer or an employee, that person became the individual best informed about the matters at issue and subject to examination under rule 200. Reference was made to the leading decision of *Cana Construction* v. *Calgary Centre for Performing Arts,*[76] where Kerans J.A. (quoting MacDonald J. in an earlier decision) found that rule 200 "is not limited to the higher or governing officers only." Because the object of the rule is to force pre-trial disclosure of vital, non-privileged information, the requirement that the person being examined have some connection with the party as officer or employee "should be given a wide application," or, in other words, the reference to officer and employee should not be read restrictively.[77]

It may be noticed that there is some tension between elements of these decisions and Moore C.J.Q.B.'s decision in *Trizec Equities* v. *Ellis-Don Management Services.*[78] However, Moore C.J.Q.B. was dealing with a case where the consultants sought to be examined were a geotechnical engineer and accountants who were arm's length parties engaged to provide professional services after the fact. They were not performing services which might be characterized as those typically carried out by traditional officers and employees.

Moore C.J.Q.B. had occasion to consider the issue again in *Adams* v. *Norcen Energy Resources.*[79] In that case the plaintiff employees, who were claiming that the defendants had wrongly deprived them of pension benefits, sought to examine consultants who had been retained by the defendant employer for the conversion of the pension plan and the termination of the employees. This time, Moore C.J.Q.B. directed that the consultants be produced for discovery, holding as follows:

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75 *Small Bridge Investments* v. *Battle* (1996), 41 Alta. L.R. (3d) 129 (Q.B.M.); and *Royal Bank of Canada* v. *Teren International* (1996), 194 A.R. 345 (Q.B.M.). The approach taken by the Masters in these decisions was approved and applied to an individual hired by an engineering firm acting as project manager for the City of Edmonton, where Wilson J. held the individual to be an employee for discovery purposes of the City: *City of Edmonton* v. *Lovat Tunnel Equipment*, [1999] A.J. No. 11 (Q.B.), online: QL (A.J.).

76 [1986] 6 W.W.R. 74 at 77 (Alta. C.A.).

77 *Ibid.* at 76-79.

78 (1994), 19 Alta. L.R. (3d) 433 (Q.B.) [hereinafter *Trizec*], discussed in G.H. Poelman, "Discovery Procedure and Practice: Recent Developments" (1996) 34 Alta. L. Rev. 352 at 352-63.

79 (1998), 24 C.P.C. (4th) 188 (Alta. Q.B.).

> Consultants should not always be characterized as employees and subject to discovery. However, as stated in *Trizec* v. *Ellis-Don, supra* a consultant may be discovered if there is more than "simply a contractor arms length relationship". Whether a specific consultant has such a relationship must be determined on a case by case basis.[80]

In the case at bar, Moore C.J.Q.B. noted that the consultants in question had been directly involved in the events which gave rise to the plaintiffs' cause of action, as opposed to the consultants in *Trizec*, who had been engaged after the fact to calculate damages and explain the problems which gave rise to the cause of action.

B. COMPELLING ATTENDANCE

The authorities have reached different conclusions on whether the *Interprovincial Subpoena Act*[81] may be used to compel the attendance of witnesses for pre-trial examinations.[82] Belzil J. recently agreed with authorities to the effect that subpoenas cannot be issued for out-of-province witnesses, in refusing an application to compel a defendant who had been noted in default and resided in Saskatchewan to attend examinations for discovery in Alberta.[83] However, another alternative was made available several years ago by the introduction of the new rule 200(5):

> Where the examination of a person who is a resident outside of Alberta is required, the court may order the issue of a commission for the examination of the person.[84]

This provision is not likely to entitle a party to compel attendance of a witness in Alberta, but nevertheless makes it clear that obtaining commission evidence for discovery purposes is authorized (which does not seem to be the case, at least expressly, under the general rule for taking evidence by commission, rule 270).

C. INFORMATION OF CORPORATE OFFICER

The case of *Ernst & Young* v. *Central Guaranty Trust*[85] concerned the requirement of a corporate party's designated officer to inform himself for discovery purposes. The defendant had produced substantial documents, and two former employees who had knowledge of the matters in issue were examined. The officer designated under rule 214 had no personal knowledge of the matters in issue and responded to questions by the third party at examinations by advising that the defendant's information, to the extent it existed, was contained in the discovery evidence of its former employees and its production of documents. Clark J. found that the defendant's approach was inadequate. He observed that the purpose of discovery was twofold, namely to obtain

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80 *Ibid.* at 195.

81 R.S.A. 1980, c. I-8.1.

82 *Suncor* v. *Canada Wire & Cable* (1993), 15 C.P.C. (3d) 214 (Alta. Q.B.), applying the statute; and *Cambridge (next friend of)* v. *Traff* (1994), 19 Alta. L.R. (3d) 248 (Q.B.), finding that the statute applied only to court proceedings.

83 *Mathes-Porter* v. *Forden* (1998), 67 Alta. L.R. (3d) 132 (Q.B.).

84 Alta. Reg. 166/94.

85 (1998), 230 A.R. 375 (Q.B.).

information and admissions. He was concerned that the second purpose would be thwarted:

> [The third party] is entitled to know the case that it has to meet and is entitled to have responsive answers to questions that will permit [it] to know what information the defendant has relevant to the claims made by the defendant against the third party.[86]

While the foregoing case concerned the obligation of an officer to answer questions on specific aspects of the claim, an effort to require the officer to give comprehensive answers on the total information available to the corporate party was at issue in *Western Canadian Place* v. *Con-Force Products*.[87] Relying upon the series of decisions in *Esso Resources Canada* v. *Stearns Catalytic*,[88] the plaintiff sought an order directing the defendant's officer to answer a series of questions from hundreds of specifically identified passages from transcripts of the evidence of employees and former employees. The questions may be paraphrased as follows:

1. Is the evidence some of the evidence of the corporate party?

2. Does the corporate party have any contrary information with respect to each passage?

3. Is the evidence in the passage all of the corporate party's information?

4. If the corporate party has additional information, then with respect to each passage, what further information, which is restricted to the subject matter of the passage, does the corporate party have?

There was apparently no objection to the first and second questions, and accordingly it was only necessary to address the last two. McMahon J. properly observed that the *Esso Resources* line of cases were not directly applicable, as they did not concern the obligation of an officer to provide additional information, but rather concerned attempts by the officer to add qualifying remarks to certain answers. In ruling on the matter before him, McMahon J. found that "the compendious nature of the demand for all information of the corporate party on each subject matter" made it an improper inquiry. It might be permissible to ask specific questions which would draw out confirmatory or contradictory information, but the manner in which these questions were posed made them unreasonable. In his words, "a broad request that the officer being examined inform himself and disclose all information on a particular subject and in the corporate party's possession, whether contrary to another employee's answers or not, places an unreasonable burden on the witness."[89]

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[86] *Ibid.* at para. 7. Clark J. made reference to *MacGregor* v. *Canadian Pacific Railway*, [1938] 2 W.W.R. 426 (Alta. C.A.), where it was held that an officer must inform himself of all of the facts within the knowledge of the company.

[87] (1996), 188 A.R. 73 (Q.B.).

[88] Discussed below under the topic "Evidence of Employees and Former Employees."

[89] *Supra* note 87 at 75.

D. ROLE OF COUNSEL

There are widely varying styles followed by counsel when representing a witness being examined for discovery. The temptation to interfere in the examination is often strong, particularly given the absence of a presiding judicial official. The courts have repeatedly expressed strong disapproval of interventions by counsel for a witness,[90] and the point was recently reinforced by Power J. in *Landes* v. *Royal Bank of Canada*.[91] The plaintiff's counsel, during examination of the plaintiff, frequently intervened, with some objections being considered proper by the court, and many others being considered improper. Some interventions considered by Power J. to be improper were the following:

- "The answer is obvious."
- "Just before you answer, ... , if you don't remember, okay, because it's 13 years ago; if you don't remember, that's all you have to say."
- "I don't understand the question. If I don't understand the question, I advise you not to answer it."

Power J. referred to the decision of Master Funduk in *Canalta Concrete Contractors* v. *Camrose*[92] as setting out "some fairly substantial guidelines to counsel."[93] Some of Power J.'s comments, which may be of guidance to counsel, were as follows:

> Counsel should allow cross-examination of his client to be carried out without undue interruption. It is inappropriate for counsel to object to a question on the ground that he does not understand it. Questions are directed at the witness, not at counsel. It is up to the witness to state whether he understands a question or not. Counsel should never, in whatever manner, attempt to feed an answer to a witness. Counsel should not give answers to questions asked of the witness, and those guidelines are set out in *Canalta Concrete Contractors* v. *Camrose* ... [quoting Master Funduk's statements in that case].[94]

There are of course situations where objections are proper, and examining counsel may need to consider whether to continue with the discovery or adjourn pending an application. The usual practice is to continue with the examination on the understanding (which at some stage should be put on the record) that after conclusion of the initial examinations, the adjournment will be subject to the right of examining counsel to reconvene to examine on matters objected to, in the event that the court does not sustain the objections. In the case of *Reich* v. *Dewitz*,[95] counsel for the plaintiffs took umbrage at the objections of opposing counsel and refused to continue his examination

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90 *Cominco* v. *Westinghouse Canada* (1979), 13 C.P.C. 358 (B.C.S.C.) and *Canalta Concrete Contractors* v. *Camrose* (1985), 38 Alta. L.R. (2d) 153 (Q.B.M.), being some colourful examples.

91 [1997] A.J. No. 1312 (Q.B.), online: QL (A.J.).

92 *Supra* note 90.

93 *Supra* note 91.

94 *Ibid.* at para. 34.

95 (1995), 171 A.R. 238 (Q.B.M.).

for discovery after only thirteen minutes. Master Quinn dismissed the plaintiffs' application for an order that the defendant attend for further discovery, on the basis that the objections were proper and there was no basis for ordering a further examination for discovery. He indicated that, while there may be some cases where the conduct of opposing counsel is so obstructive that examining counsel would be justified in refusing to continue and obtaining an order for a further examination, the case at bar was not such a case.

V. INTERLOCUTORY APPLICATIONS

There are, of course, a myriad of different issues which can and do arise in the course of taking an action from the pleadings stage to the trial stage. Many of those issues are addressed elsewhere in this paper. Of the remaining issues, those which are more commonly encountered by today's litigation practitioners are dealt with below.

A. DELAY IN PROSECUTION OF ACTION

The rules relating to delay in prosecution of actions were substantially amended effective 1 September 1994.[96] Under rule 244(1), the court on application *may* dismiss an action where there has been a delay. Under rule 244.1, the court on application *shall* dismiss an action where five or more years have expired from the time that the last thing was done that materially advanced the action.

In *Young (next friend of)* v. *Dei-Baning (A.) Professional Corporation*,[97] the Court of Appeal confirmed that, in applications under rule 244(1), the court will still look to see whether there has been inordinate and inexcusable delay which will likely cause serious prejudice. Although rule 244(4) makes an applicant's task somewhat easier in setting forth a rebuttable presumption of serious prejudice from the mere fact of inordinate or inexcusable delay, the fact remains that the onus still rests on the applicant to prove that the prejudice is such that a dismissal is warranted. The Court of Appeal stated the following in this regard in *Volk* v. *331323 Alta.*:[98]

> The new rule does, however, create a form of presumption of serious prejudice to the applying party where the other party has been guilty of inordinate and inexcusable delay. By subrule (4) such delay "is prima facie evidence of serious prejudice." This does not shift the overall burden of proof. The applicant must still establish a likelihood of serious prejudice before the action will be struck under this rule. The presumption may lead to dismissal unless there is evidence that at least raises a legitimate doubt about the existence of serious prejudice to the applicant attributable to the delay. In the absence of such evidence, the delay alone is sufficient proof of serious prejudice to warrant dismissal for want of prosecution.[99]

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96 Alta. Reg. 234/94.

97 (1996), 39 Alta. L.R. (3d) 93 (C.A.).

98 (1998), 212 A.R. 64 (C.A.) [hereinafter *Volk*].

99 *Ibid.* at para. 21.

Where an application for dismissal for want of prosecution is denied, rule 244(2) requires the court to impose terms or directions to remedy the effects of past delay and prevent further delay. Rule 244.4 contains a lengthy list of options available to the court in granting an order for terms or directions in this regard. It would appear that the courts have preferred to impose terms relating to the expeditious future conduct of the action rather than dismiss the action for want of prosecution.[100]

Rule 244.1, otherwise known as the "drop dead rule," obligates the court to dismiss the action if nothing has materially advanced it within five years.[101] For purposes of rule 244.1, the court is entitled to consider delay incurred both before and after the rule came into effect.[102] The test under rule 244.1 is simply whether or not a "thing" has been done that has materially advanced the action within the previous five years. In considering this test, the Court of Appeal in *Bishop* v. *Grotrian*[103] stated as follows:

> This introduces the concept of a "thing" that "materially advances the action." Before this change, r. 243 required parties to obtain leave if they desired to take a new step after the expiration of one year from the time they were entitled to take that step. Accordingly, there is a change in the wording from requiring a "step" to requiring a "thing." The use of a different word presumes a different meaning [citation omitted]. The use of the word "thing" arguably indicates an intention to broaden the scope of the type of activity that will keep the action alive. Since the rule is mandatory, interpretation of what constitutes a "thing" and whether that "thing" materially advances the action are the only areas open for consideration by the court.[104]

Examples of what has and has not been held to be a "thing" in the context of rule 244.1 include the following:

- In *Volk*,[105] the Court of Appeal held that an examination for discovery and independent medical examinations were "things" materially advancing the action. In so doing, the court noted that things done by the complaining party that materially advance the action should not be excluded from consideration.

- In *Peterka* v. *Nieman*,[106] the Court of Appeal held that the provision by the plaintiff to the defendant of a consent to release certain important evidence to which

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100 See *e.g.*, *Volk*, *supra* note 98; *Pasko* v. *Pemberton Securities* (1998), 221 A.R. 38 (Q.B.); and *Crowfoot Recreational Assn. (Receiver and Administrator of)* v. *Mackin*, [1999] A.J. No. 454 (Q.B.M.). See also *Peking Gardens Restaurant* v. *Callidor Holdings* (1994), 31 C.P.C. (3d) 59 (Alta. C.A.) at 61, where the court prescribed a great number of terms and conditions for the future conduct of the action.

101 *Petersen* v. *Kupnicki* (1996), 44 Alta. L.R. (3d) 68 (C.A.).

102 *Hnatiuk* v. *Shaw* (1996), 46 Alta. L.R. (3d) 13 (C.A.); *Honeywell* v. *Richardson*, [1994] A.J. No. 1013 (C.A.), online: QL (A.J.). The decisions in *Plas-Tex Canada* v. *Dow Chemical of Canada* (1995), 36 Alta. L.R. (3d) 300 (C.A.) and *Petersen* v. *Kupnicki* (1996), 44 Alta. L.R. (3d) 68 (C.A.) are distinguishable as in those cases the five years of delay was prior to rule 244.1 coming into force and the court found it appropriate to apply the old delay rules.

103 (1998), 228 A.R. 73 (C.A.) [hereinafter *Bishop*].

104 *Ibid.* at 75-76.

105 *Supra* note 98.

106 [1998] A.J. No. 55 (Q.B.), online: QL (A.J.).

the defendant otherwise had no access was a "thing" which materially advanced the action.

- In *Bishop*,[107] the Court of Appeal held that a consent order for leave to take the next step was a "thing" which materially advanced the action.

- In *Appleyard* v. *Reed*,[108] Hart J. held that correspondence between counsel whereby an agreement was achieved with respect to the exchange of expert reports, and the subsequent exchange of those reports, constituted important steps which had advanced the action in a material way.

- In *Cooperators Life Insurance* v. *Rollheiser*,[109] Kent J. stated that "the thing which is done must be shown as something which moves the lawsuit closer to trial and does so in a meaningful way."[110] On this test, she held that while filing a statement of defence would have materially advanced the action, merely setting a date for examinations for discovery did not.

B. SECURITY FOR COSTS

There have not been a great many decisions of significance in recent years relating to security for costs. The well-established principles continue to be applied, and there have not been many new developments. The most significant cases of recent vintage are as follows:

- In *Pocklington Foods* v. *Alberta (Provincial Treasurer)*,[111] D.C. McDonald J. held that an order for security for costs may be granted even when the impecuniosity of the plaintiff allegedly results from the defendant's actions of which the plaintiff complains. He also considered the issue of delay, holding that, while the general rule is that a defendant seeking security for costs should apply promptly, where there has been delay on the part of the defendant but security for costs should otherwise be ordered, the order should be granted unless the plaintiff shows that it suffered some prejudice from the delay or was induced into believing that it was safe in incurring costs without risking facing an order for security for costs.

- In *Jorgensen* v. *San Francisco Gifts*,[112] Lee J. also was faced with an allegedly impecunious plaintiff. He held that impecuniosity does not mean total destitution, and there is no requirement that family and friends must be contacted with respect to securing funds for a security for costs situation. What is relevant is whether the plaintiff has the financial means to borrow or repay an arm's length loan.

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107 *Supra* note 103.
108 (1997), 208 A.R. 236 (Q.B.).
109 (1998), 231 A.R. 98 (Q.B.).
110 *Ibid.* at 100.
111 (1994), 153 A.R. 288 (Q.B.).
112 (1997), 207 A.R. 135 (Q.B.).

- In *Specialty Steels, a Division of Pechiney Metal Service (Canada)* v. *Suncor*,[113] Fraser J. denied security for costs where the defendant had a counterclaim arising out of the same facts as those which gave rise to the main claim, noting that in those circumstances, an order for security for costs would indirectly require the plaintiff to provide security as a condition of being allowed to defend the counterclaim.

C. CROSS-EXAMINATION ON AFFIDAVIT

The Alberta courts have had a number of occasions in recent years to deal with issues relating to cross-examinations on affidavits. The two issues which have arisen most frequently in this context are conduct money and refusal to answer questions.

Under rule 314, the court has the discretion to fix conduct money for cross-examinations on affidavits. This discretion has been exercised with widely differing results, depending on the facts of each individual case.[114] In deciding whether to order conduct money in these circumstances, the courts have considered a variety of factors, including the purpose for which the affidavit was sworn, the place of residence of the affiant, and in the case of companies, where the head office was located and whether the affidavit might have been more appropriately sworn by someone other than the affiant.

As for refusal to answer questions, Wachowich A.C.J.Q.B. had occasion to address that issue in *CRC-Evans Pipeline International* v. *O.J. Pipelines*.[115] In that case the defendant had produced a number of voluntary affiants from a number of non-parties in opposition to the plaintiff's application. On cross-examination, a number of undertakings were requested and refused. The court held that such refusal was proper, in that non-party affiants are not required to undertake to provide documents which are not in their power or possession or to undertake to answer questions outside their personal knowledge. In this regard the scope of a cross-examination of non-party affiants is narrower than that of a litigant.[116]

In *Alberta Mortgage and Housing* v. *Klapstein*,[117] the defendant's cross-examination on an affidavit filed in support of the plaintiff's application had gone on intermittently for nearly a year. The Court of Appeal agreed with the chambers judge that the questions to which the defendant sought answers did not have to be answered

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113 (1997), 202 A.R. 51 (Q.B.).

114 In *Parwinn Developments* v. *375069 Alberta* (1998), 228 A.R. 348 (C.A.), *Peckford Consulting* v. *Akademia Enterprises* (1997), 205 A.R. 239 (Q.B.M.), and *Total Client Recovery (ALB)* v. *Oxford Development Group*, [1999] A.J. No. 41 (Q.B.M.), online: QL (A.J.), full conduct money was ordered. In *Gone Hollywood Video* v. *Skrabek* (1997), 205 A.R. 144 (Q.B.), a witness fee was ordered. In *Canada (Attorney General)* v. *Sandford* (1995), 34 Alta. L.R. (3d) 170 (Q.B.) and *Nickol* v. *McKay Bros. Farm Implements* (1995), 26 Alta. L.R. (3d) 355 (Q.B.M.), less than full conduct money was ordered.

115 (1996), 46 Alta. L.R. (2d) 81 (Q.B.).

116 This proposition was accepted and applied by Master Funduk in *B.N.* v. *Canada (Attorney General)* (1998), 230 A.R. 390 (Q.B.M.).

117 (1998), 216 A.R. 335 (C.A.).

by the affiant, noting that cross-examination on an affidavit cannot be carried to an excessive or abusive extent.

VI. TRIALS

A. MODE OF TRIAL

1. TRIAL BY JURY

It has become so common to try civil cases by judge alone that consideration of the possibility of trial by jury seldom arises. Of course, in the absence of an election to proceed by jury, the trial will be automatically conducted by judge alone.[118] However, subsection 16(1) of the *Jury Act*[119] provides for a *prima facie* right to trial by jury in most types of cases, namely defamation, false imprisonment, malicious prosecution, seduction, or breach of promise for marriage, and tort, contract or recovery of property actions where the amount or value in question exceeds $10,000.00. For these types of actions, on application by a party there *shall* be a trial by jury, subject to subsection 16(2). A judge is given discretion in subsection 16(2) to direct that a proceeding be tried without a jury where it appears that there might be "...a prolonged examination of documents or accounts, or ... a scientific or long investigation, that in the opinion of a judge cannot conveniently be made by a jury."

The structure of the *Jury Act*[120] might, then, be taken as a mandate to provide for jury trials whenever possible. However, subsection 16(2) has been given a generous judicial interpretation. In effect, it often seems that the onus has fallen on the party seeking trial by jury. There have been a number of written decisions in Alberta recently on whether jury trials should be held, regarding different types of actions. In nearly all of these cases, the party opposing trial by jury has been successful.

Five of these cases involve claims for damages for personal injuries caused by motor vehicle accidents. They are of particular interest in assessing the courts' approach to jury trials, because personal injury cases involve incidents within the personal knowledge and experience of most people. They concern matters of fault (which ultimately depend upon application of the "reasonable person" standard), causation, placing a value on non-pecuniary losses such as loss or damage to limb or ability, and compensation for past and future financial losses. A contrast might be drawn between the personal trauma often involved in such instances and the more abstract and specialized disputes arising out of, for example, commercial transactions.

Moore C.J.Q.B. has over the past several years considered a number of applications for jury trials made by defendants. The main facts may be summarized as follows:

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118 Rule 234.

119 R.S.A. 1980, c. J-2.1.

120 *Ibid.*

- In *Ralph* v. *Robertson*,[121] a 76-year-old woman claimed damages arising from a motor vehicle accident. The most significant ailments were "post-traumatic deep venous thrombosis in the right leg and peripheral neuropathy,"[122] and a primary issue at trial would be determining which ailments were caused by the accident. Expert evidence from various medical specialities would be involved, some of which might be contradictory.

- *Sharma* v. *Smook*,[123] another personal injury action, was likely to involve more than ten medical experts, and some discrepancy "as to the causal relationship between [the] injuries and the persistent physical pain and discomfort complained of by the plaintiff since the accident."[124] There was apparently some consensus on the nature of the injuries, but there was a dispute over whether present symptoms resulted from post-traumatic stress disorder or intentional exaggeration.

- In *Music* v. *Irwin*,[125] the plaintiff had tendered an expert report assessing loss of income and future replacement cost of household services, which involved terms and associated tables and graphs on "discount rates," "earnings growth," and "real discount rates."[126]

- In *Favel* v. *Shepherd*,[127] the plaintiff's vehicle had been struck from behind, and expert reports were tendered from several medical experts in different specialties, with again the prospect of some difference of views. In addition, engineers in biomechanics and accident reconstruction would give evidence.

In all of these cases, it was held that the plaintiffs had discharged their onus of showing that the case would involve a "scientific investigation" which could not "conveniently be made by a jury," even though a right to trial by jury was not to be lightly taken away.[128] It does not appear from the reports that these cases involved unusual features. Very few personal injury actions do not involve testimony from medical specialists and economists addressing income loss and future care and services costs. (With respect to the latter, the technical aspects of the report are usually less in controversy than the factual assumptions which underlie them.)

Similarly, where liability remains in issue, engineering evidence is not uncommon. Despite the efforts of counsel and witnesses to make the process appear scientific, the

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121 (1995), 32 Alta. L.R. (3d) 329 (Q.B.).

122 *Ibid.* at 332.

123 (1996), 177 A.R. 353 (Q.B.).

124 *Ibid.* at 354.

125 (1996), 192 A.R. 79 (Q.B.).

126 *Ibid.* at 80.

127 (1997), 202 A.R. 220 (Q.B.).

128 For the latter proposition, see the references to *Couillard* v. *Smoky River No. 30 (Municipal District)* (13 May 1980) Edmonton 13431 (Alta. C.A.), cited by Moore C.J.Q.B. in *Ralph* v. *Robertson*, *supra* note 121, and *Favel* v. *Shepherd*, *supra* note 127. Wachowich A.C.J.Q.B. followed this decision in *Dietz* v. *Ramsey*, [1999] A.J. No. 448 (Q.B.), on facts which he found to be "indistinguishable."

court is seldom in a position to do more than make rough estimates of likely eventualities and liberally apply contingencies. The process, then, is seldom very "scientific," and it would be unfortunate if a desire for a jury trial could be trumped by the simple expedient of tendering reports of medical specialists or economists estimating the present value of future losses, or engineers attempting to reconstruct an accident.

In contrast, Moore C.J.Q.B. allowed the defendant's application for a jury trial in *Sandhawalia* v. *McGurk*.[129] Injuries resulted from a "low impact" collision, and the plaintiff had suffered from some pre-existing back problems. The application for a jury trial was opposed on the basis that there would be issues of apportionment, presumably relating to the pre-accident and post-accident symptoms. In granting the application for a jury trial, Moore C.J.Q.B. stated, in part, as follows:

> Although the case is one involving medical opinions, the issue will be apportioning the damages to a pre-existing injury and any injury arising out of the accident. The two medical reports submitted are straightforward. The doctors agree that there is evidence of a pre-existing injury.... To that end, there is unlikely to be conflicting medical evidence presented to the jury. In the event a discrepancy arises, the jury will have the task of assessing the credibility of the evidence, and determine what weight to attach to divergent conclusions.[130]

It is difficult to understand how there would not be some controversy in the medical evidence relating to the apportionment of the symptoms, but it does not appear that such evidence was before the court on the application. In any event, Moore C.J.Q.B. appeared to recognize that some onus rested on the party opposing a jury trial, for he stated that "complexity alone is not sufficient to displace the right to a jury trial,"[131] and also expressed the view that "the medical evidence is not so complex as to inconvenience a jury from resolving the issues."[132]

More recent decisions by Wachowich A.C.J.Q.B. have also allowed jury trials in personal injury actions. In *Barry* v. *Phillips*,[133] an application for a jury trial was allowed. There was apparently some possibility of a neuropsychological assessment report being introduced, but even in that event, Wachowich A.C.J.Q.B.'s view was that even though the methods and analysis supporting the assessment were complex, the conclusions were clear and could be easily explained to a layperson. Similarly, in *Singh* v. *Malhi*,[134] the plaintiff in a personal injury action intended to call a number of medical experts relating to extent of injuries, causation, and quantum, and there would be the need for interpreters at trial. Wachowich A.C.J.Q.B. nevertheless expressed confidence in a jury's ability to deal with the evidence, holding it faultless:

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129 (1997), 215 A.R. 138 (Q.B.) [hereinafter *Sandhawalia*]. This case was followed by Wachowich A.C.J.Q.B. in *Peterson* v. *Bischoff*, [1998] A.J. No. 93 (Q.B.), online: QL (A.J.).

130 *Sandhawalia*, *ibid.* at 140.

131 *Ibid.* at 141.

132 *Ibid.*

133 [1998], A.J. No. 1440 (Q.B.), online: QL (A.J.).

134 [1999], A.J. No. 199 (Q.B.), online: QL (A.J.).

> Although there are six separate reports dealing with dental, medical, psychological and economic issues, the reports themselves do not appear to be out of the ordinary. Further, I do not believe a jury would have any difficulty in understanding the data and tests upon which these opinions are based. I am also of the opinion that the potential need for interpreters at trial does not impede the jury's ability to hear and understand this case.... As a result, I do not see the six extra witnesses or the use of interpreters as impeding the jury from conveniently hearing this case.[135]

The more recent cases may perhaps indicate that, despite what appeared to be a trend in earlier cases, the courts will be receptive to jury trials in personal injury actions, even where there are complex medical issues to be resolved. Perhaps there is a recognition that the courts should resist the frequent tendency in modern litigation to defer to experts on issues which, at root, can only be resolved by sound judgment and credibility assessments. Judges must themselves resist the tendency to defer to experts on findings of fact which are solely within the province of the court, and it is likely that juries with proper caution can perform the same function. It would be regrettable if juries could not be trusted with what are essentially very "everyday" questions, such as fault in an automobile accident, seriousness of injuries resulting therefrom, and determination of a fair amount of compensation to be awarded.

A less everyday type of case was considered for trial by jury in *381916 Alberta* v. *Royal Insurance Co. of Canada*,[136] where the defendant had denied an insurance claim for a hotel destroyed by fire, alleging that the plaintiffs had deliberately set the fire. There was no dispute that the fire had been deliberately set; at issue was whether the plaintiffs' officers were responsible. Similarly, damages were not at issue, having been decided by appraisal. However, the question of motive would be central and would necessitate a financial analysis of an interrelated group of companies associated with the destroyed business. Experts from the opposing parties took significantly different approaches to the financial analysis, and the jury would likely be required to examine a large number of documents, including reports, appraisals, and financial statements spanning a period of eight years. There would, depending on the methodology approved for the financial statements, be adjustments to the statements, requiring sophisticated accounting analysis and an understanding of the interrelationship of the companies within the corporate group.[137]

Based on these concerns, and on affidavit evidence to the effect that someone without a business and financial background would have difficulty understanding the

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135 *Ibid.* at para. 6.

136 (1997), 197 A.R. 228 (Q.B.).

137 Another example of a case somewhat out of the mainstream is *Greenwood* v. *Syncrude Canada* (1998), 24 C.P.C. (4th) 103 (Alta. Q.B.), which involved an alleged wrongful dismissal, complicated by questions of Workers' Compensation Board claims and issues of causation concerning the effect of hazardous and toxic chemicals in the workplace on the plaintiff's health. Multiple layers of legal and factual issues led Wachowich A.C.J.Q.B. to refuse a jury trial. The case contains a useful list of factors, based on section 16(2) of the *Jury Act*, *supra* note 119, which have also been applied by Wachowich A.C.J.Q.B. in other cases. The case also refers to *Chaba* v. *Greschuk* (1992), 127 A.R. 133 (C.A.), where the likelihood of detailed jury charges on various legal issues and a prolonged trial were sufficient to deny an application for trial by jury.

issues, Belzil J. concluded that the plaintiffs had demonstrated that the trial would "involve a prolonged examination of documents or accounts, or a scientific or long investigation which cannot conveniently be made by a jury" and dismissed the application.[138] It would seem that this case represents a good example of the type of complex, involved dispute outside of the ordinary experience of most citizens which was contemplated in the *Jury Act*[139] by the provision allowing removal of a trial from a jury.

The practice of the court in considering applications for trial by jury in civil actions is governed by the "Civil Jury Practice Note,"[140] which prescribes the time within which such applications must be made and sets forth requirements for supporting affidavits, deposits, and ongoing management by the court to ensure that the trial proceeds in an orderly fashion.

2. SUMMARY TRIAL

A significant new mode of trial has been made available in Part 11, Division 1 of the *Alberta Rules of Court* (rules 158.1 to 158.7). Any party may apply to a judge for judgment, "either on an issue or generally" (rule 158.1(1)). The rules contain what purports to be a comprehensive procedure for summary trial, including time lines for service of motions and evidence. Some of the more significant points of interest are the following:

- Rule 158.1(3) and (4) seem to require the applicant for judgment to file all material on which it intends to rely with its notice of motion, together with a notice of other material intended to be relied upon at the hearing. There is an express prohibition upon filing subsequent evidence, except by rebuttal, in reply to another motion, or with leave of a judge. It is accordingly very important to ensure that an applicant covers all of its evidence in its original filing, subject to these limited exceptions.

- Before the summary trial is heard, a judge may adjourn it or dismiss it on the basis that the matter is not appropriate for resolution by this procedure (rule 158.4).

- Rule 158.4(2) provides for certain evidentiary rulings, on or before the hearing date. Of particular interest is that the rule seems to contemplate a judge ordering that a deponent attend for cross-examination. This is a notable contrast from rule 314, which provides that "a person who has made an affidavit ... may be cross-examined on the affidavit without order." It remains to be determined whether there is a conflict between the rules which will be resolved by the usual practice of cross-examination as of right prevailing, or whether rule 158.4(2) indicates an intention that in the summary trial procedure there is no cross-examination as of right, and a party must demonstrate the need for the examination.

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138 *Supra* note 136 at 233.

139 *Supra* note 119.

140 Q.B. Civil Practice Note 2, 1 April 1995.

- Rule 158.6 gives the judge hearing the summary trial wide discretion in making a determination, either on the merits of the application, or as to procedures to be followed if a decision on the merits is not possible. Of particular note is the statement that judgment may be granted "irrespective of the amounts involved, the complexity of the issues and the existence of conflicting evidence" (rule 158.6(1)), if the judge is "satisfied that there is sufficient evidence for adjudication." The ability to grant judgment on an application in the face of conflicting evidence is a new departure for Alberta procedure.

There are many complexities within the new summary trial procedures which must be resolved by the courts, and it remains to be determined how receptive the Alberta courts will be to resolving actions with complexities or contradictory evidence by the summary trial procedure. It is likely that much guidance will be obtained from similar procedures in British Columbia, the authorities on which have already been consulted for guidance by Alberta courts.[141] In *590988 Alberta* v. *728699 Alberta*,[142] Belzil J. found that he could not resolve the matter before him on the basis of a summary trial. Some of his reasons, which are instructive in understanding how the courts may approach this procedure, were as follows:

> It seems to me that the British Columbia authorities dealing with British Columbia Rule 18A essentially stand for the proposition that a summary trial disposition ought not to be granted unless there is essentially a factual matrix within which a judge can prefer one set of facts over the other and come to factual findings. In the case before me, it is apparent, when I examine the Affidavits and the Discovery transcripts that the parties are not in agreement factually as to what transpired other than the fact that discussions took place.
>
> It seems to me, accordingly, that it would be premature to make a finding on this evidence, and, moreover, it becomes apparent when one examines the nature of this dispute, that credibility will play a key part in ultimately deciding liability. Moreover, other witnesses ... may have important evidence to give to the Court, and for the purposes of the summary trial, nothing was presented from them. As such, the evidence before me is not complete in material respects.
>
> There are a number of significant issues to be decided in this litigation including whether there was an agreement, and if so, what were the terms, whether the Statute of Frauds applies, and if so, whether the doctrine of part performance applies. In addition, there are damages issues to be addressed which cannot be resolved on this evidence.
>
> Given that I am unable, on the evidence before me, to find the facts necessary to decide the issues of fact or law, and in view of the fact that it would be unjust to decide the issues on the summary trial without hearing the testimony of the parties and other witnesses, the application is dismissed and the claim and counterclaim are ordered to proceed to trial.[143]

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[141] See *590988 Alberta* v. *728699 Alberta*, [1999] A.J. No. 329 (Q.B.), online: QL (A.J.); and *Compton Petroleum* v. *Alberta Power*, [1999] A.J. No. 218 (Q.B.), online: QL (A.J.).

[142] *Ibid.*

[143] *Ibid.* at paras. 22-25.

Moore C.J.Q.B. also found, in *Adams* v. *Norcen Energy Resources*,[144] that complex factual and legal issues, conflicting affidavit evidence on fundamental points, and disagreement between the parties even on the issues which could be heard at summary trial, made the issues proposed unsuitable for summary trial. He expressed the view that "this case requires the procedural safeguards of a full trial to find the necessary facts to decide issues of fact and law."[145]

However, it should not be assumed that the courts will refuse to give a judgment in a summary trial procedure simply because of the existence of contradictory evidence. Moore C.J.Q.B. and Belzil J. recognized this in the course of their decisions referenced above, as did Paperny J. in *Compton Petroleum* v. *Alberta Power*,[146] where she found some of the evidence before her to be contradictory, but held that it was unnecessary to resolve the conflicting evidence in order to adjudicate the claim on its merits.

B. EXPERT EVIDENCE

1. DEFENDANT'S MEDICAL EXAMINATION

The new amendments to rule 217 act as a codification of the relatively recent developments in the law surrounding court-ordered medical examinations. The general object of rule 217 remains as stated by Kerans J. in *Tat* v. *Ellis*:[147]

> The object of [rule 217], of course, is to permit the defendant to make an effective medical assessment of any aspect of the plaintiff's health relevant to the claim.[148]

Prior to the recent amendments, rule 217 only authorized the defendant to make an effective medical assessment of the plaintiff's health through the use of a duly qualified medical practitioner, who was someone registered or entitled to be registered under the *Medical Professions Act*.[149] The authorities nevertheless came to allow court-ordered medical examinations or assessments by health care professionals who did not fit the definition of "duly qualified medical practitioner," where it could be shown that such an examination or assessment was necessary to assist a medical practitioner in rendering an opinion.

The developments which allowed examinations by other health professionals were based on the court's inherent power to ensure fairness in the trial process, which meant that the defendant should not be unfairly prevented from being able to meet the

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144 [1999] A.J. No. 814 (Q.B.), online: QL (A.J.).

145 *Ibid.* at para. 36. It is of interest that Moore C.J.Q.B.'s judgment was rendered in the context of a preliminary application to determine whether the matter was suitable for summary trial.

146 [1999] A.J. No. 218 (Q.B.), online: QL (A.J.).

147 (1994), 21 Alta. L.R. (3d) 7 (C.A.) at 8.

148 *Ibid.* at 9.

149 R.S.A. 1980, c. M-12. See *Carifelle* v. *Griep* (1989), 35 C.P.C. (2d) (Alta. C.A.); *Blackburn* v. *Kochs Trucking* (1988), 58 Alta. L.R. (2d) 358 (Q.B.).

plaintiff's case.[150] In addition to consideration of the request made by a defendant's medical practitioner for involvement by another expert to assist in preparation of the medical practitioner's opinion, Kerans J.A. in *Tat* v. *Ellis* determined that judicial consideration should be given to the following factors:

- the degree of competence of the proposed tester;
- the reliability and usefulness of the test;
- the importance of the test for the diagnosis;
- the degree of relevance of that aspect of the diagnosis to the suit;
- the degree of intrusion into the privacy of the plaintiff;
- any health risks involved in the test;
- the reasonableness, in terms of time and effort, of the demands the proposed test will make upon the plaintiff; and
- a balancing of the potential expense against the good achieved.[151]

Rule 217(10) permits the court to order that the plaintiff be examined or assessed by one or more health care professionals of the defendant's choice. Rule 217(11) provides a definition of health care professional that is consistent with the decision rendered by D.C. McDonald J. in *Blackburn* v. *Kochs Trucking*.[152] The factors set out by Kerans J.A. in *Tat* v. *Ellis* will guide the court in its consideration of applications brought pursuant to rule 217(10).

A condition of an application brought pursuant to rule 217(10) would appear to be that the plaintiff be previously examined or assessed by a health care professional of the plaintiff's choice who will or may be offered as an expert at trial. In this respect, rule 217(10) is merely a codification of the pronouncement that the overall object of the rule is to allow the defendant access to the plaintiff to examine and assess the plaintiff's physical or mental health in order to meet the case put forward by the plaintiff.

A number of decisions have considered the connection between the request for an independent medical examination and the claims raised in the statement of claim. Rule 217(10) affirms that a defendant will only be provided access to a plaintiff for the purpose of performing examinations or assessments provided that the plaintiff is offering like medical evidence in support of a claim. For example, in *Stewart* v.

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150 *Hamza* v. *Dzeryk* (1998), 217 A.R. 164 (Q.B.); *Lyons* v. *Khamsanevongsy* (1997), 13 C.P.C. (4th) 81 (Alta. Q.B.); *Tat* v. *Ellis*, *supra* note 147.

151 *Supra* note 147 at 10-11.

152 (1988), 58 Alta. L.R. (2d) 358 (Q.B.).

Ebrahim,[153] Master Breitkreuz stated that while there was no claim for emotional stress advanced by the plaintiff, the defence was not prevented from raising the issue that a psychiatric examination was relevant. The defence argued that the examination was relevant having regard to the fact that treatment notes and charts contained the doctor's observations that the plaintiff was depressed, and further, that the plaintiff had been prescribed an anti-depressant medication. The defence was denied the requested examination after the plaintiff countered that she had never been diagnosed with depression and would not be calling psychiatric evidence at the trial.

The decision in *Stewart*, and the wording of the new rule 217(10), indicates that where there is no claim raised in the statement of claim that justifies the requested medical intervention, there is no need to "level the playing field" so as to allow the defence to meet the case of the plaintiff. Similarly, in *Parenteau* v. *Courtesy Corner Tourist Service*,[154] the court determined that an independent occupational therapist assessment or a home economist assessment was not warranted to enable the defence to meet the evidence of the plaintiff regarding diminished housekeeping capacity. In *Flores* v. *Sabiston*,[155] the Court of Appeal held that an order for an independent medical examination to be performed by a psychologist was not supportable where the plaintiff made no claim of psychological damage.[156]

The new amendments to rule 217 also provide in subrule (9) that the court may make an order or give any direction that it considers necessary to limit or curtail an examination that the court considers excessive. The decisions in *Palma* v. *Juchli*[157] and *Walters* v. *Zurich Life Insurance*[158] will perhaps guide interpretation of the new rule 217(9).

In *Palma*, the defendant applied under rule 217 for an order that the plaintiff attend to be examined by a neurologist. The plaintiff had already undergone six medical examinations, two of which had been at the request of the defendant, including an examination conducted by a psychologist pursuant to court order. However, the defendant's expert suggested that a neuropsychological examination would assist him in rendering his opinion. Prior to the defence expert having made that request, the plaintiff had suggested a neuropsychological examination, but counsel for the defendant had declined, insisting instead on an examination by a psychiatrist. The court dismissed the application, stating that the defendant had obtained the examination it wanted and

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153 (1997), 210 A.R. 154 (Q.B.M.) [hereinafter *Stewart*].

154 (1994), 146 A.R. 241 (Q.B.).

155 (1998), 64 Alta L.R. (3d) 7 (C.A.).

156 See also Master Laycock's decision in *Heighes* v. *Stoutenburg* (1998), 234 A.R. 195 (Q.B.M.), where an application for a psychiatric examination under the old rule 217 was denied because the defendants' medical practitioner had been able to complete his report and opinion without a psychiatrist's assessment, although he strongly recommended a psychiatric opinion; and the plaintiff was not alleging injuries which would require the treatment of a psychiatrist and had not obtained a psychiatric assessment. However, the action was stayed until the plaintiff submitted to a psychological examination, because the plaintiff had obtained her own psychological assessment for purposes of trial.

157 (1996), 180 A.R. 229 (Q.B.M.) [hereinafter *Palma*].

158 (1996), 180 A.R. 308 (Q.B.M.) [hereinafter *Walters*].

had rejected the examination which might have been more useful. In the result, the plaintiff was not required to undergo any further examinations.

In *Walters*, Master Funduk considered an application for an order that the plaintiff attend for a functional capacity assessment. The defendant supported its request for that order by stating that the defendant's medical practitioner had indicated as part of the assessment that he would benefit from a functional capacity assessment performed prior to his examination. Master Funduk reminded the defendant of the rule in *Tat* v. *Ellis* that such a request requires judicial consideration of the merits, and that it is not enough that a medical practitioner request the preliminary examination or assessment. Master Funduk determined that the test in *Tat* v. *Ellis* had not been met, noting that the plaintiff had not obtained any reports of any occupational therapist to support her case and would not be calling any occupational therapists at trial. In the result, there was no sound reason to require the plaintiff to attend before an occupational therapist, as she would not be tendering like evidence herself.

The new rule 217(2) makes it clear that the party seeking the examination is to be responsible for the costs of that examination. The recent amendments do not address the issue of costs associated with a plaintiff-nominated medical practitioner attending an examination.

That issue has, however, been considered in two recent decisions. In *Morales* v. *Seymour*,[159] the plaintiff, who was impecunious, claimed personal injury damages as a result of a motor vehicle accident. She consented to a psychiatric examination on the condition that her psychiatrist also attend. Veit J. held that in the circumstances, the defendant was to bear the costs of the nominee physician. Although she confirmed the general rule that a litigant must pay for his own case, she held that independent medical examinations were different. As the purpose of an independent medical examination is to advance the defendant's case rather than that of the plaintiff, it is up to the defendant to pay all of the expenses associated with the examination.

In *Garrido* v. *Pui*,[160] Lee J. held that the *Morales* decision should be restricted to the unique facts it presented. Lee J. considered the differences between the matter before him and the *Morales* case, and noted that in the case at bar the plaintiff was not impecunious, the claim involved relatively uncomplicated soft tissue injuries, plaintiff's counsel could offer no evidence as to what role the nominee played within the examination, and the plaintiff did not have a language barrier such as that experienced in *Morales*.

2. NOTICE: RULE 218.1

The most significant changes relevant to adducing expert evidence at trial have occurred through amendments and additions to the *Alberta Rules of Court*. There are now two sets of rules potentially applicable. Part 15 contains rules 218 through 218.16,

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[159] (1997), 52 Alta. L.R. (3d) 112 (Q.B.) [hereinafter *Morales*].

[160] (1998), 222 A.R. 248 (Q.B.).

most of which became effective as new provisions or substantial amendments as of 1 September 1998.[161] Part 15.1 applies to "very long trial actions," and most of its provisions became effective on 1 January 1996.[162] The new rules add many more detailed requirements to be satisfied before expert evidence will be received by the court. They also encourage adverse parties to agree to the uncontested admission of all or part of the expert evidence, with heavy costs sanctions for unreasonable objections. The provisions applicable to most actions, which are contained in Part 15, may be summarized as follows:

Time for service of reports: Parties must 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, the expert's name and qualifications, and a statement from counsel setting out the proposed area of expertise for which qualification as an expert will be sought," together with a copy of the expert's report (rule 218.1(1)). Where an expert report is intended to be in rebuttal, a statement of the substance of rebuttal evidence signed by the expert and a copy of the rebuttal report must be served not more than sixty days after service of the expert report intended to be rebutted (rule 218.12(1)). Rule 218.13 precludes the introduction of expert evidence unless such notice is given or the court grants leave. The new provisions are significant in lengthening the notice periods and in requiring that the expert's report be served immediately, rather than shortly before trial.[163]

It may not be fatal if some of the formalities for notice of expert evidence are not observed. Under the previous expert rules, it was determined by Wilkins J. in *Clark* v. *Rocky View No. 44 (Municipal District)*[164] that the absence of a covering letter formally advising that service of documents was made pursuant to rule 218.1 was not sufficient to disqualify the proposed tendering of expert evidence. The plaintiff had provided to the defendants all medical information received from three physicians, with the exception of some *curricula vitae* and two reports which represented updates of medical information previously provided. Wilkins J. summarized the purpose of the rules as follows:

> Surely the rule is designed to provide the defendant with access to the relevant medical information for the purpose of knowing the case the defendant faces. If the defendant has, by means of discovery and undertakings given, received the medical evidence including correspondences and opinion letters between the doctors, with supporting test results, and copies of medical legal reports directed to counsel within the time period provided in the rule, I do not believe the rule requires a further encapsulated statement expressly delivered with reference to the rule.[165]

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161 Alta. Reg. 152/98.

162 Alta. Reg. 277/95.

163 The rules do not expressly prohibit the introduction of a report which has not been served with the expert's other material, but such a result is likely implicit in the new procedures. This seems to have been assumed by Lee J. in *Schuttler* v. *Anderson*, [1999] A.J. No. 481 at paras. 73-78 (Q.B.), online: QL (A.J.).

164 (1995), 37 C.P.C. (3d) 1 (Alta. Q.B.) [hereinafter *Clark* v. *Rocky View*].

165 *Ibid.* at 3-4.

Wilkins J. exercised his judicial discretion to allow the expert evidence relating to the updated reports, observing that "[t]he rule does not require provision of the complete medical evidence that will be given at trial by the experts but attempts to alert the other party in a timely fashion of the 'substance' of that expert evidence."[166]

However, merely supplying treatment notes and correspondence from a physician's file may not be sufficient to constitute advice on the "substance of opinion." In *Hennig* v. *Cox*,[167] Nash J. reviewed the standard authorities[168] and held that "the opinion and the facts upon which the opinion is based should be clearly stated and capable of discernment from a reading of the R. 218.1(1) Statement."[169] There was apparently some suggestion that many of the physicians would simply testify about tests conducted and observations made rather than give opinions on causation and the standard of care, and that where no opinion was contained in the medical reports or the letters on the files, no opinion would be elicited from the witness during the trial. However, Nash J. indicated if a rule 218.1 statement is tendered, there is an inference that the witness will be tendered to give expert evidence, and proper disclosure should be made. She elaborated on the requirements as follows:

> If there are several opinions, then those should be readily ascertainable, together with the facts upon which the opinions are based. I do not think that it is incumbent upon counsel for the Applicants to have to guess whether there is an opinion contained in the materials submitted and then have to try to determine the facts upon which the opinion is based.... R. 218.1 requires that the expert state his opinion and the factual basis for the opinion. That, in my view, is not an onerous or difficult requirement. If the medical reports, test results, medical records and letters to the referring physicians do not contain that information, then a further document is required wherein the expert states his opinion and the factual basis for that opinion. The cases establish that the rule should be interpreted so as to promote pre-trial disclosure and not to frustrate it.[170]

As noted above, however, the rules allow the court to grant leave to tender expert evidence even where the disclosure provisions are not satisfied. The Court of Appeal recently approved the trial judge's exercise of discretion to receive such evidence where no statements, summaries, or reports of a witness on damages had been tendered.[171] The witness's evidence was of some significance in the judgment ultimately granted. It was noted that the proceedings involved a very large sum of damages, and the trial judge was "free to assume that an exhaustive discovery of the amount plead would have been made by [the parties] long before trial,"[172] and, if there was any type of "ambush," it was not of the type intended to be prevented by the rule.

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166 *Ibid.* at 5.

167 (1998), 227 A.R. 345 (Q.B.).

168 The major references relied upon in this case and in *Clark* v. *Rocky View* are *Commonwealth Construction* v. *Syncrude Canada* (1985), 40 Alta. L.R. (2d) 89 (Q.B.); *Guaranty Co. of North America* v. *Beasse* (1992), 124 A.R. 161 (Q.B.); and *Kashuba* v. *Ey* (1992), 4 Alta. L.R. (3d) 1 (Q.B.).

169 *Supra* note 167 at para. 20.

170 *Ibid.*

171 *Colborne Capital* v. *542775 Alberta* (1999), 228 A.R. 201 (C.A.).

172 *Ibid.* at para. 250.

In *Schuttler* v. *Anderson*,[173] leave was also granted to allow introduction of a medical expert's second report, even though it had been provided to the opposite party only five days before commencement of trial. Lee J. observed that the onus was upon the plaintiff to explain why the report could not have been available 120 days before trial, and held that in the absence of a satisfactory explanation, the report should be excluded.[174] The major considerations which convinced him to allow introduction of the second report were that the expert's initial report had outlined all of the basic medical issues, no new factual issues were raised, the defendant had adequate time to prepare for cross-examination, there was no request for adjournment to engage rebuttal expert evidence, and the defendant's counsel had acknowledged that there was no "real prejudice." The evidence was relevant and useful to the plaintiff, and Lee J. noted that non-compliance with the rule does not invariably mean the report becomes inadmissible if the breach is not prejudicial or otherwise remediable.

Introduction of report without testimony: A party may now serve, at the same time as its other expert materials, a notice of intention to introduce an expert report without calling the expert as a witness (rule 218.1(2)). A party on whom such a notice is served must then reply within sixty days, or such other time as may be allowed, with a statement, identifying which parts of the report it objects to being entered without evidence, and with reasons (rule 218.1(3)). An agreement in response to a notice of intention does not, by itself, amount to an admission "of the truth or correctness of the evidence submitted" (rule 218.1(4)).

Attendance for cross-examination: In response to a notice under rule 218.1(3), a party may agree to the introduction of the report, but demand attendance of the expert for cross-examination (rule 218.11(1)). However, exercising such a right will result in the party which conducts the cross-examination paying the costs of the expert attendance unless the court considers the cross-examination to have been "of assistance" and orders otherwise. Where an expert witness appears only in response to a demand for cross-examination, the party tendering the report may also conduct a direct examination (rule 218.11(4)).[175]

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173 *Supra* note 163.

174 Referring to *Wilson* v. *Walton* (1987), 79 A.R. 97 (Q.B.).

175 While recent changes to the rules and practice notes clearly indicate an intention to expedite the trial process, there has been some recognition that the courts should not prevent a party from leading the evidence in the manner it chooses. In *McWhan* v. *Suzuki Canada* (1995), 174 A.R. 155 (C.A.), a case management order, made at the initiative of the case management judge without application, stipulated that expert reports would not be the subject of examinations-in-chief. The decision was apparently influenced by Civil Practice Note No. 7, which was contemplated but not yet issued at the time of the order. The Court of Appeal, *per* O'Leary J.A., overruled the case management order, noting that the reports had been prepared and filed with a view to proceeding at the trial in the traditional manner, and that, regardless of whether the case management judge had inherent jurisdiction to make such an order, in the circumstances, it amounted to an unreasonable exercise of discretion. O'Leary J.A. further noted that the new practice note contemplated that there would be consent to orders restricting the types of examinations to which experts might be subjected.

Objection to admissibility: On being served with an expert report or rebuttal expert report, a party objecting to the admissibility of the opinion must serve a notice of such objection and the reasons, failing which the court will not permit the objection at trial without leave (rule 218.14). The only guideline on the time within which an objection must be given is that it be "reasonable." The rule does not indicate what types of objections are contemplated, but presumably it relates to objections as to timeliness and whether a report is truly rebuttal, and concerns about qualifications or relevancy.[176] Rule 218.15 provides that a party objecting to the admission of expert evidence will be required to pay all of the costs of calling the expert, whatever the result of the action, unless otherwise ordered.[177]

Unless otherwise ordered, the rules in Part 15 summarized above do not apply to very long trial actions.[178] The provisions for expert evidence in very long trial actions are set out in some detail in Part 15.1, and may be summarized as follows:

Number of experts: Each party may call only one expert per subject, except by leave of the court (rule 218.4). If leave is granted to call additional experts on a particular subject, and the trial judge later concludes that the additional evidence was unnecessary, then, unless it has also concluded that "unusual circumstances exist," costs "unnecessarily incurred" shall be paid to the other parties on a solicitor and client basis (rule 218.5).

Expert's Document: Rule 218.6 sets out the information which must be served as notice upon opposite parties regarding expert evidence intended to be adduced at trial. The notifications are contained in an "Expert's Document," to be delivered at a time directed by the case management judge. The expert's document, which must be signed by the expert, is required to contain the name and qualifications of the expert, the area of expertise, and the report, or in the absence of a report, a detailed statement of the evidence proposed to be given.

Parties served with the expert's document must reply within sixty days, advising whether they agree with the qualifications and any of the evidence intended to be given, and giving reasons for any areas of disagreement. If the trial judge concludes that any of the disagreements contained in a reply to an expert's document were unreasonable,

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176 In a note circulated to members of the bar on 11 March 1997, Ritter J., Chair of the Expert Evidence Committee of the Court of Queen's Bench, commented on an earlier draft version of this rule, stating that "it is intended to deal with situations where a party has an objection on the basis of timeliness of the report, whether the report is really a rebuttal report, whether the correct person is being called if the report was the work of more than one person, and so on."

177 The rule is ambiguous on whether it applies to objections only to the *report* being entered without supporting testimony, or objections of a more general nature to the expert evidence being tendered. It directly follows rule 218.14, which deals with general objections to admissibility of expert evidence, and therefore might be interpreted as being limited to those circumstances. However, unless rule 218.15 is more broadly interpreted, there is no rule providing an express costs sanction for the refusal to allow into evidence an expert report, as rule 218.11 addresses only the case of a party agreeing to introduction of a report by requiring attendance of the expert for cross-examination.

178 Rule 218.16.

the party refusing to agree to the qualifications or evidence shall, *prima facie*, pay costs unnecessarily incurred to other parties on a solicitor and client basis.

Rebuttal Evidence: Rule 218.91 allows a party, with leave of the court, to call an expert in rebuttal. Once again solicitor and client costs are *prima facie* payable by a party calling rebuttal evidence if the trial judge considers it to have been unnecessary.

Pre-Trial Examinations: For the first time, our procedures now contemplate pre-trial examination of expert witnesses. This may be done with leave of the case management judge in very long trial actions. Rule 218.8 provides that such an examination will be conducted as if it were an examination for discovery of an employee of a party under rule 200, and conditions may be imposed by the case management judge regarding such matters as length, location, and costs of the examination. The examination is to be limited to "matters touching the contents of the Expert's Document."

A pre-trial examination of experts was allowed by Marshall J., as case management judge, in *McCormac* v. *Elsasser*,[179] where infant plaintiffs sought to have trial of their claims severed from the balance of an action scheduled as a "very long trial" for the following year. An affidavit by a law firm employee attached as exhibits letters from experts, alleging that assessment of the damages should be delayed until the infants were older. Marshall J. relied primarily on rule 218.8(1) and paragraph 23(d) of Practice Note No. 7. He observed that rule 218.8(1) was intended to permit examinations on experts' documents; while the letters attached to the affidavit might contain opinions similar to those in experts' documents, they were not the same and the examination being requested was at an earlier stage than contemplated by rule 218.8. However, the rule demonstrated a change in procedure by allowing pre-trial examinations of experts, and helped him to conclude that it would be appropriate to use the extraordinary measures contemplated for case management under Practice Note No. 7 to permit an expert examination as part of the interlocutory application for severance.

Experts Conference: The case management judge may at any time prior to trial order experts to "consult on a without prejudice basis to determine any matters on which agreement can be reached" (rule 218.9(1)). The judge also has the authority to set an agenda and prescribe other terms that may be considered appropriate. The procedures allow for a form of agreement to be made if some issues in dispute are resolved. Subject to such agreement being made, however, no evidence on the consultations is receivable at the trial.

C. SELECTED PROCEDURAL EVIDENTIARY ISSUES

1. ADMISSIONS

Recent changes to Part 20 of the *Alberta Rules of Court*, on "admissions" concern primarily extending the time to reply to a notice to admit to thirty days, instead of fifteen days (rule 230(1.1)); and the expansion of the procedure to allow for a notice

[179] [1998] A.J. No. 728 (Q.B.), online: QL (A.J.).

to admit a written opinion as correct (rule 230.1). Whether the notice is served pursuant to rule 230, dealing with facts, or 230.1, dealing with opinions, the admissions will be deemed unless a response is received within thirty days or such further time as may be allowed on consent or by the court. The party responding to the notice is required to deal specifically with the matters on which admissions are sought, giving reasons for admissions which cannot be made and objections, with grounds, where the request for admission is considered to be improper. Inadequate or unreasonable responses may result in sanctions by way of costs at conclusion of the action.

Rule 230(1.1) requires that a response to a notice to admit either admit the matters contained in the notice or make specific denial. Such denial must set out the reasons why an admission cannot be made, and pursuant to rule 230(3), fairly meet the substance of the requested admission. There are occasionally disputes over whether the matters on which admissions are requested are fairly and reasonably put to the other party, and whether the responses are adequate. The court dealt with an unusually extensive notice to admit in *Canada Southern Petroleum* v. *Amoco Canada Petroleum*,[180] where the defendant served a notice to admit over 100 pages in length and containing 1200 requests for admissions. The notice was served after extensive examinations for discovery, but before examination of the plaintiff's officer. In dealing with the defendant's application to compel the plaintiff to either admit or deny certain facts, and to determine the validity of the plaintiff's objections, O'Leary J. (as he then was) held that the court should not become involved in disputes over the validity of responses to notices to admit. The *Alberta Rules of Court* contain a remedy of costs to be imposed at conclusion of the action, and "it would be a bad practice to permit proceedings to be bogged down in this kind of inquiry in any lawsuit no matter how simple."[181] Of course, O'Leary J. recognized the discretionary nature of his decision and emphasized that there might well be situations in which an order compelling a party to make a better response would be appropriate.

It also appears from *Canada Southern* that notices to admit are considered primarily a means to assist in the proof of facts at trial and have less applicability as a discovery tool. It was recognized that, as an action approaches trial, parties are often in a better position to assess their positions and make appropriate admissions (which in fact are often done informally). There appears to be a word of caution against those who would use notices to admit in an effort to expedite the discovery process. As O'Leary J. said:

> I do not believe, though, that the procedure should be used as a form of discovery or as a substitute for interrogatories. To do so, in my view, would result in a serious problem for the courts and a serious problem for counsel in attempting to sort out all these various things on an interlocutory basis. Some of them are simple but others could be very difficult and would involve making decisions early in the pretrial procedure on the basis of skimpy evidence and a lack of appreciation of the real issues.[182]

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[180] (1994), 28 Alta. L.R. (3d) 89 (Q.B.) [hereinafter *Canada Southern*].

[181] *Ibid.* at 93.

[182] *Ibid.* at 94-95.

In *Schuttler* v. *Anderson*,[183] Burrows J. also had to rule on a pre-trial application concerning whether a response to a notice to admit was adequate, this time in the context of the new provisions for expert evidence. The plaintiff had served a notice of intention under rule 218.1(2) to enter reports of experts without the necessity of having them testify; the defendant had responded to the notice, agreeing to the entry of the reports into evidence, but not admitting the truth or correctness thereof (such denial being permitted by rule 218.1(4), even in the absence of including it in the reply). The plaintiff subsequently served a notice under rule 230.1, a new rule made effective on 22 July 1998,[184] which allows a party to "call on any other party to admit as correct any written opinion included in or attached to the notice." The defendant refused the requested admission, relying upon a certificate of readiness and alleged lack of specificity in the notice and the earlier notice given under rule 218.1(2). Burrows J. found that the appropriateness of the reply was properly determined after the trial:

> Rule 230.1 does not call for a judicial determination prior to trial of the merits of the reasons for denying the admissions given by the party upon whom a request is served. If the admission is refused it stands refused whether or not the reasons have merit.[185]

He found that the party refusing the requested admission must simply accept the risk that if the court finds the opinion to be correct, costs approving the correctness of the opinion will be imposed in any event of the cause.

Finally, the case of *Dwyer* v. *Fox*[186] serves as a reminder of the importance of filing replies to notices to admit within the required time or obtaining an extension. The defendant had not responded to a notice to admit facts within the fifteen days required under the old rule 230(2), and subsequently moved under rule 230(5) which provides that "the court may at any time allow any party to amend or withdraw any admission on such terms as may be just." In Queen's Bench chambers, it was concluded that the decision not to respond was intentional and not a matter of mere inadvertence, mistake, or unintentional conduct, and accordingly the application was denied.

In the Court of Appeal, based on transcript evidence of a cross-examination of the defendant's first counsel, Kerans J.A. concluded that there had never been a decision to admit the facts. Nevertheless, the case did not involve mere inadvertence or accident, but a failure to perform a professional duty. In these circumstances, Kerans J.A. held that admissions should not be easily withdrawn, but that some allowance should still be given for exceptions. He expressed his views as follows:

> Even if the admission was one consciously and deliberately made, a judge should permit withdrawal in any case where the person who made an admission, whether explicit or deemed, has demonstrated to the satisfaction of the judge that the evidence available about the fact in question is such that a

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183 [1999] A.J. No. 255 (Q.B.), online: QL (A.J.).

184 Alta. Reg. 152/98.

185 *Schuttler* v. *Anderson*, *supra* note 183 at para. 12.

186 (1996), 181 A.R. 223 (C.A.).

> determination of the truth at trial is the only satisfactory means to settle the issue. In other words, the pursuit of truth should take priority over the discipline of imprudence.[187]

Kerans J. was, however, concerned about there being any inference that counsel could safely defer decisions on notices to admit facts if withdrawals became too easy. The solution was that "in every case where the failure to deny is not merely inadvertent, the party must be subject to a substantial and exemplary penalty. Even when the error is inadvertent, the other side should have thrown-away costs. When it is more serious, the penalty must bite, and bite hard."[188] In the case before him, he required the defendant to pay on a solicitor-client basis all costs related to the notice to admit and the applications and appeal relating to it.

2. TRIAL EVIDENCE GIVEN OUT OF COURT

The normal presumption is that facts will be proved at trial through examination of witnesses orally and in open court, unless agreed between the parties or otherwise provided by the *Alberta Rules of Court* or the *Alberta Evidence Act*.[189] One of the little-used exceptions to this presumption is rule 261(2), which contemplates in very limited circumstances the proof of facts at trial by affidavit. The court was required to consider the circumstances under which this rule may be used in *Heritage Freehold Specialists & Co.* v. *Montreal Trust*.[190]

Rule 261(2) contemplates affidavit evidence being used where ordered by the court, and Hawco J. found that the proper practice is to apply for leave before trial.[191] In the matter before him, the plaintiff sought to read in affidavits filed as part of land transfer documentation at the Land Titles Office; one of the deponents was deceased, and the other was elderly. Hawco J. found that rule 261 was not intended to allow admissibility of affidavit evidence where the affidavits were not taken in the action before the court, but in another matter altogether. Accordingly, rule 261(2) was inapplicable in the proceeding before him.

Nevertheless, he found that another mechanism for allowing trial evidence out of court could be used, namely examination and cross-examination by way of commission evidence for the elderly witness.[192] (The affidavit of the deceased deponent was

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187 *Ibid.* at 228.

188 *Ibid.*

189 R.S.A. 1980, c. A-21; *Alberta Rules of Court*, r. 261(1).

190 (1997), 52 Alta. L.R. (3d) 354 (Q.B.).

191 *Ibid.* at 357.

192 The applicable rule, not cited by Hawco J., is rule 270. A recent judicial consideration of rule 270(1) appears in *Berlando* v. *Ross* (1998), 229 A.R. 396 (Q.B.) where, at the pleading stage, an application was made for commission evidence of an elderly witness who had signed a transfer of land. The application was dismissed, primarily because the material before the court did not establish that the testimony was material to determination of the issues and therefore necessary for justice.

admitted as an exception to the hearsay rule on the basis that it was reasonably necessary and sufficiently reliable.[193])

3. USE OF DISCOVERY EVIDENCE AT TRIAL

a. Effect of Discovery Evidence Introduced at Trial

The danger of reading in evidence at trial from an opposite party's discovery evidence was highlighted in *Johannessen* v. *First Canadian Insurance*,[194] where the plaintiff argued that the effect of the defendant reading in discovery evidence was that it had adopted and was bound by the answers of the plaintiff, some of which were apparently unfavourable to the defendant's case. The plaintiff's argument was based on some authorities which appear to support the proposition that a party reading in discovery evidence must be taken to have adopted such evidence as part of its case.[195] However, Wilson J. noted that other authorities tend to indicate that discovery evidence must be weighed along with other evidence and is not necessarily binding. He found the discovery evidence not determinative in the case before him, but noted that it had complicated some of the issues requiring resolution. He suggested "that all lawyers would be well advised to put at the top of their briefs, the comment of the authors of the *Civil Procedure Guide*: 'But whether or not bad answers bind one, why read them in the first place.'"[196]

b. Discovery Evidence from other Actions

The question of whether discovery evidence given by a party or its representative, now deceased, can be read in on behalf of that party (rather than the examining party) at trial is periodically revisited by the courts, and the decisions are repeatedly to the effect that, as provided in rule 214, the evidence may be used only by a party who examined an opposite party.[197] It has recently been confirmed that the evidence of a party given at examinations for discovery in one action may not be read in on behalf of that party in another action, even applying the more liberal "principled approach" to hearsay which relies upon necessity and circumstantial guarantees of trustworthiness.[198] It was found that the courts should not make sweeping changes to the practice rules and, in any event, the nature under which an examination for discovery transcript is prepared does not necessarily support a guarantee of trustworthiness.[199]

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193 He relied on the principles from *R.* v. *Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.); and *R.* v. *Smith* (1992), 94 D.L.R. (4th) 590 (S.C.C.).

194 [1997] 4 W.W.R. 133 (Q.B.).

195 The leading authority on this point is *Hayhurst* v. *Innisfail Motors*, [1935] 1 W.W.R. 385 (Alta. S.C.(A.D.)).

196 *Infra* note 210 at para. 16.

197 The leading case remains *Paquin* v. *Gainers* (1989), 101 A.R. 290 (C.A.).

198 Based on *R.* v. *Khan*, *supra* note 193.

199 *Continental Stress Relieving Services* v. *Canada West Insurance Co. of Canada* (1997), 215 A.R. 232 at 240-42 (Q.B.).

c. Evidence of Employees and Former Employees

The principles and procedures for reading in evidence of former employees, developed mainly in the *Esso Resources Canada* v. *Stearns Catalytic*[200] decisions, were tested in the unusual circumstances of the *Lytton* v. *Alberta*[201] case. The claims were made on behalf of seventeen representative plaintiffs against the Province of Alberta based on alleged wrongful institutionalizations and sterilizations dating back as early as the 1940s. The plaintiffs sought an order requiring the defendant's officer to confirm that excerpts from the examinations for discovery of a number of former employees and one current employee constituted "some information" of the defendant. Forty-two former employees had been examined, and there was no suggestion that the officer had any personal knowledge of the circumstances in the actions.

Belzil J., as trial judge ruling on the matter in a pre-trial application, began by reviewing the development of the law concerning use of evidence given by employees and former employees at discovery. After reviewing the traditional position which gave very limited right to use employees' discovery evidence,[202] he described at length the developments in *Esso Resources* v. *Stearns Catalytic* and summarized the procedure resulting therefrom as follows:

> It is clear, accordingly, that what is being contemplated by this procedure is not that evidence becomes binding on a party but rather facilitates a process whereby excerpts from the Examinations for Discovery of employees and former employees can be put to an officer as to whether or not the information of the employees and former employees constitutes some information of the corporation.
>
> The information becomes part of a *prima facie* case and is clearly rebuttable.[203]

The plaintiffs argued that the procedures in *Esso Resources* v. *Stearns Catalytic* were applicable and were particularly compelling for the sake of efficiency in what was expected to be a very lengthy and costly trial. The defendants argued that those procedures could not be applied to the matter at bar because of the death of a number of important witnesses, the loss of documents, and the fact that some former employees might be hostile to the defendant's position. The practical ability of the defendant to rebut the *prima facie* evidence was therefore hampered, and, if the application of the plaintiff was granted, the defendant's position would be prejudiced.

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200 The relevant decisions are reported at: (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.) [hereinafter *Esso Resources* v. *Stearns Catalytic*]. Excerpts from these decisions are conveniently collected and reproduced by A.A. Fradsham in *Alberta Rules of Court Annotated, 1999* (Calgary: Carswell, 1998) at 365-73, and are summarized in Poelman, *supra* note 78 at 370-73.

201 (1999), A.J. No. 629 (Q.B.), online: QL (A.J.) [hereinafter *Lytton* v. *Alberta*].

202 Established in *MacGregor* v. *Canadian Pacific Railway*, [1938] 2 W.W.R. 426 (Alta. S.C. (A.D.)).

203 *Supra* note 201 at paras. 16 and 17.

Belzil J. found that "the so-called Syncrude discovery procedures should be utilized but modified to reflect the particular circumstances of these cases."[204] He recognized that, unlike the *Syncrude* action, the matter at bar likely involved a large number of former employees who were no longer available and the absence of documentary evidence, such that there would be difficulty in rebutting evidence of former employees in some instances. He recognized that the authorities "make it clear that there is a right on the part of a Defendant to rebut this type of evidence."[205]

Belzil J.'s directions were as follows:

> If the Defendant in these actions is able to show specific material prejudice to proposed excerpted Examinations for Discovery of employees or portions thereof, then the Defendant may argue that such particular excerpts should not be admissible.
>
> I wish to make it clear that in stating this it would not be sufficient for the Defendant to argue generally that documents are missing or former employees are deceased.
>
> Rather, the Defendant will bear the burden of establishing specific material prejudice relating to specific portions of excerpts of the read-ins of employees in order to justify its position that the Discovery or portions thereof of employees should not be admissible at trial.
>
> In my view, this balances the interests of both parties and allows for the efficient administration of justice in these cases without unfairness being created towards the Defendant.
>
> In the result, accordingly, the Defendant is obligated to confirm within 30 days of the receipt by counsel for the Defendant of a demand to acknowledge that information from employees of the Defendant is part of the information of the Defendant, and if the Defendant is not willing to make such an admission, it must specify which portions of the Examination for Discovery evidence it is not willing to admit as being part of the information of the Defendant. The portions of the Examinations for Discovery of employees acknowledged as being part of the information of the Defendant can then be read in at trial as part of the *prima facie* case for the Plaintiffs.[206]

Belzil J.'s ruling will be of particular interest in cases where, as in *Lytton* v. *Alberta,* a corporate party may have grounds for concern that it cannot adequately rebut at trial evidence of former employees read in by an opposite party as *prima facie* evidence against it. The order reflects a useful attempt to achieve efficiency and allow a party adverse in interest to a corporation to obtain direct evidence (rather than evidence on information from an officer) which will be admissible at trial. However, there remains the difficulty that a defendant in the circumstances such as *Lytton* v. *Alberta* may, with missing witnesses and documents, find it difficult even to determine which evidence could have been effectively rebutted but for the absence of critical evidence. In any event, it may be presumed that the type of exception to the *Syncrude* procedure allowed

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[204] *Ibid.* at para. 22. "Syncrude" is a reference to the *Esso Resources* v. *Stearns Catalytic* action, *supra* note 200.

[205] *Ibid.* at para. 28.

[206] *Ibid.* at paras. 29-33.

by Belzil J. will be very rare, as it was crafted primarily in response to the challenges faced by an action involving events which occurred many decades before trial.

The Alberta Court of Appeal has not yet ruled on the principles and procedures for reading in evidence of former employees developed in the *Syncrude* decisions. In fact, in *Export Coking Coal of Alberta* v. *Smoky River Holdings*,[207] O'Leary J.A. made it clear that it remains to be determined whether this approach will be accepted:

> We understand that the rule is that a party may use as binding against a corporation the discovery evidence of present and former officers and employees simply by having the evidence acknowledged as 'information of the corporation,' without any admission or adoption by the selected officer on behalf of the corporation. *It should not be assumed that we agree with that proposition.*[208]

(As of the time of writing of this article, an appeal of Belzil J.'s decision in *Lytton* v. *Alberta* has been argued at the Alberta Court of Appeal, but judgment has not yet been delivered.)

VII. STREAMLINED PROCEDURE

As of September 1998, the *Alberta Rules of Court* has included a new "Streamlined Procedure" in Part 48. Rule 659 provides that Part 48 applies to actions where the amount claimed is less than $75,000, not including costs and interest, when a court considers it appropriate or when the parties so agree. Part 48 does not apply to an action commenced before 1 September 1998 unless ordered by the court or agreed to by the parties. In two decisions, Master Quinn has considered when it would be appropriate to apply the streamlined procedure to an action commenced before 1 September 1998. In both cases, he indicated that in his opinion it is desirable that all actions of $75,000 or less, regardless of when they were commenced, be dealt with under the streamlined procedure unless it is shown that someone with an interest in the litigation would be prejudiced. He further stated that he did not think the provisions of Part 48 could, without more, be treated as prejudicial.[209]

The streamlined procedure set out in Part 48 is designed to abridge the discovery process and bring a matter to trial more expeditiously. Some of the more significant provisions (subject to the court's discretion to depart from the procedures where considered necessary) are as follows:

1. Within thirty days after service of a statement of defence, each party to the action must file and serve an affidavit of documents. However, the affidavit of documents need only include those documents on which the party intends to rely, those documents which may assist the case of any adverse party, and documents directly relevant to the issues in the action.

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207 (1997), 206 A.R. 318 (C.A.).

208 *Ibid.* at para. 4 [emphasis added].

209 *Killips* v. *Canmax Marketing*, [1999] A.J. No. 100 (Q.B.M.), online: QL (A.J.); and *Belsher* v. *Keirle*, [1999] A.J. No. 285 (Q.B.M.), online: QL (A.J.).

2. Rule 662 limits examination for discovery to a total of six hours of actual examination time for each party or representative to be examined.

3. The evidence of a witness may be given at trial by way of affidavit, together with any cross-examination on that affidavit. (There are provisions for objection to evidence being received in this matter, in which case leave of the court will be required for it to be so received.)

4. At least seven days before the commencement of trial, each of the parties must file and serve a statement of factual and legal theory not more than five pages in length.

5. No motions may be made without leave of the court and the party making an unnecessary or ill-founded motion, or failing to comply with the deadline fixed by the rules, shall be ordered to pay costs in any event and forthwith, except for special reason.

VIII. APPEALS: STAYS OF EXECUTION

There have been a significant number of cases in the past several years on stays of execution pending appeal. Applications for stays are made under rule 508, which provides as follows:

> An appeal does not operate as a stay of enforcement or of proceedings under the decision appealed from except so far as a judge of the Court of Queen's Bench or the Court of Appeal may order and no intermediate act or proceeding is invalidated except so far as the court appealed from may direct.

The rule thus allows an application for a stay to be made in Queen's Bench or directly to the Court of Appeal. The practice in Calgary is for the application to be made to the Court of Appeal, while in Edmonton the initial application is usually made in Queen's Bench, followed by a further application to the Court of Appeal if unsuccessful.[210]

It seems well established that an application for stay of execution is similar to the tripartite test used for interim injunction applications.[211] The test was summarized by Russell J.A. as follows:

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[210] W.A. Stevenson & J.E. Côté, *Alberta Civil Procedure Handbook, 1999* (Edmonton: Juriliber, 1999) at 337.

[211] *Triple Five* v. *United Western Communications* (1994), 19 Alta. L.R. (3d) 153 (C.A.); *Frost* v. *Alberta Association of Architects* (1995), 169 A.R. 148 (C.A.); *Gainers* v. *Pocklington Holdings* (1995), 169 A.R. 288 (C.A.); *Sidorsky* v. *CFCN Communications* (1995), 31 Alta. L.R. (3d) 215 (Q.B.); *Deloitte Haskins & Sells* v. *Coopers & Lybrand* (1996), 37 Alta. L.R. (3d) 64 (C.A.); *City of Edmonton* v. *Westinghouse Canada* (1996), 42 Alta. L.R. (3d) 356 (C.A.); *Leth Farms* v. *Alberta Turkey Growers Marketing Board* (1998), 228 A.R. 181 (C.A.); and *RJR-MacDonald* v. *Canada (Attorney-General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.), are some of the numerous decisions issued on the point over the last several years.

> In considering a stay application, the court must be satisfied on a preliminary assessment that there is a serious issue to be tried, that if the stay is not granted the applicant would suffer harm irreparable in damages, and that the balance of convenience favours the stay.[212]

Stay applications seldom turn on arguments over whether there is a serious issue to be considered on appeal. Counsel often concede this point for purposes of the application, or in many cases it is passed over quickly by the court.[213] Applications are most often decided on the issue of irreparable harm. Frequently, there is little independent consideration given to the balance of convenience issue, as it may be seen to be largely connected with the irreparable harm considerations.[214]

The tripartite test is most readily applicable in cases not involving primarily money judgments,[215] as these are most analogous to the typical injunction cases where damages will not afford an adequate remedy. It is perhaps for this reason that there has been some uncertainty concerning the test to be used in deciding an application to stay execution of a money judgment.

It seems that, until recently in Alberta, there may have been almost a presumption that a money judgment should be stayed. In *City of Calgary* v. *Costello*,[216] the plaintiffs, who were individuals, obtained a substantial money judgment against the City of Calgary, which as defendant and appellant applied for a stay of execution. The plaintiffs apparently had a long history in Alberta and owned substantial assets including real estate worth several million dollars. In the course of his judgment granting a stay of execution, Kerans J.A. stated the following:

> The meaning of "irreparable" turns on the nature of the application. In the case of a stay of money judgment, it seems to me, without more, there is always irreparable harm if a money judgment under appeal must be paid. I say that because, not only is it the long practice of this Court to stay such judgments, but also it seems to me the sense of the matter in an application for a stay of execution of a money judgment.[217]

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212 *Deloitte Haskins & Sells* v. *Coopers & Lybrand*, *ibid.* at 67.

213 See for example *Colborne Capital* v. *542775 Alberta* (1995), 37 Alta. L.R. (3d) 5 at 7 (C.A.); *Sidorsky* v. *CFCN Communications*, *supra* note 211 at 217; *City of Calgary* v. *Costello* (1995), 31 Alta. L.R. (3d) 159 at 160 (C.A.) [hereinafter *Costello*]; *CVD Financial* v. *Beta Well Service* (1996), 187 A.R. 142 at 144 (C.A.); and *Stoney Tribal Council* v. *PanCanadian Petroleum* (1998), 223 A.R. 118 (C.A.).

214 For example, see *Alberta (Treasury Branches)* v. *Pocklington Financial* (1998), 228 A.R. 115 at para. 8 (C.A.).

215 An example is *Leth Farms* v. *Alberta Turkey Growers Marketing Board*, *supra* note 211, where the plaintiffs were successful in obtaining a declaratory judgment to the effect that certain levies on turkey products were unenforceable. O'Leary J.A. applied the tripartite test in granting a stay, recognizing that it was important to maintain the status quo represented by the impugned regulatory system until the appeal was concluded — an approach quite analogous to considerations involved in an interim injunction application.

216 *Costello*, *supra* note 213.

217 *Ibid.* at 161.

The availability of substantial assets, including real estate, was not sufficient to address Kerans J.A.'s concerns, as he noted that there were many uncertainties, such as value and marketability, in executing on land. He recognized that there might be cases where "the wealth of the respondent is so substantial and the liquid nature of the assets of the respondent so immense that these kinds of considerations pale into insignificance,"[218] but in the case before him he would not consider refusing the stay without a letter of credit or similar security. It appears, then, that Kerans J.A. effectively placed the onus on a money judgment creditor who opposed a stay application.

It is relatively clear from more recent authorities, however, that a different approach now prevails. In *City of Edmonton* v. *Westinghouse Canada*,[219] Russell J.A. stated that "the presumption is that successful parties are entitled *prima facie* to the fruits of their successful litigation."[220] She found that the applicant for a stay must bring to the court evidence to support a reasonable concern that the judgment will not be repaid if overturned on appeal, dealing with the irreparable harm test as follows:

> Rule 508 places an onus on the applicant to justify a stay. The tripartite test to be met to discharge that onus requires the City to demonstrate irreparable harm. In the case of a money judgment that will require some evidence of reasonable prospect that Westinghouse will not repay the judgment in the event that it is paid out. That test may be met where the amount of the judgment exceeds the ability of an ordinary citizen to repay as in both *Evans* and *Costello*, but a higher standard of proof may be required in the case of a major corporation. Only then does the onus shift to Westinghouse to establish both an ability and a dependability to repay, which may necessitate terms such as depositing with the Clerk a letter of credit or some other form of security that the opinion of the Court would justify the judgment.[221]

In effect, she interpreted the *Costello* approach as resulting from a situation where individuals sought to execute on a very large judgment, beyond the capacity of many to repay.

Doubt about whether the tripartite test is applicable to stay applications involving money judgments was expressed by Côté J.A. in *Jager Industries* v. *County of Leduc No. 25*.[222] He found it difficult to apply the irreparable harm and balance of convenience tests to the question of which party should hold the money, and seemed to resist the suggestion that there should be presumption in favour of staying money judgments. His summary of the proper approach was as follows:

> This case illustrates the soundness of the traditional approach in Alberta. If both parties are good for this sum and will remain so, there should be no stay of a money judgment barring some unusual circumstances.[223]

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218 *Ibid.* at 162.

219 (1996), 42 Alta. L.R. (3d) 356 (C.A.).

220 *Ibid.* at 359.

221 *Ibid.*

222 (1997), 206 A.R. 303 (C.A.).

223 *Ibid.* at para. 14. It will be noticed that Côté J.A. seemed to have a different understanding of the "long practice" in Alberta than was expressed by Kerans J.A. in the *Costello* case, *supra* note 213.

In any event, regardless of whether it is strictly applicable to money judgments, the tripartite test is nominally applied in virtually all stay applications. The approach of Russell J.A. in *City of Edmonton* v. *Westinghouse Canada* seems workable. Practically, the degree or onus to be met by an applicant on a stay application in raising a concern about repayment of a judgment paid before a successful appeal will vary according to the size of the judgment and the financial resources of the party collecting on the judgment. These types of considerations will normally need to be established by evidence of at least a presumptive nature, but will sometimes be recognized by the court based on its own knowledge of the strength of a party's financial resources.

Finally, it should be remembered that decisions on stays of execution are often not "all or nothing" in favour of either party. In *MacCabe* v. *Westlock Roman Catholic Separate School District No. 110*,[224] Johnstone J. carefully reviewed criteria for stay of a money judgment under both the tripartite test and what she referred to as the two-part "money judgment" test used by Côté J.A. in some decisions.[225] While she preferred Côté J.A.'s approach (which was to simply ask which side should have the money pending appeal and what risk existed that ultimate payment would not occur or would be made more doubtful by the delay), under both approaches she concluded that the plaintiff should receive some money in the form of a loan pending appeal, which could be drawn at a certain rate per month to defray her living expenses. This substantially minimized the risk of non-recovery which would exist in the case before her if a large money judgment was paid pending appeal and the appeal was successful. Conditions for expediting the appeal were also imposed.

IX. COSTS AND COMPROMISE PROCEDURES

A. REVISION OF SCHEDULE C

Schedule C to the *Alberta Rules of Court* (the tariff under which party-and-party costs are awarded in civil actions) was revised significantly effective 1 September 1998.[226] The amount of costs the court will award for the various steps in an action has increased dramatically, and the various categories of items for which costs will be awarded have been combined and simplified. The main difference that will be noticed is that an award of costs will now cover a greater portion of the actual costs involved in bringing (or defending against) the action. This will make the monetary burden borne by the successful party considerably less than it previously was, and greatly increase the risks associated with an unsuccessful claim or defence.

Prior to the overhaul of Schedule C, the courts had often sought to compensate for the fact that the Schedule seemed to undercompensate the successful party to a civil action, particularly in cases which were complex or involved large sums of money.[227]

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224 [1999] A.J. No. 499 (Q.B.), online: QL (A.J.).

225 She referred to *155569 Canada* v. *248524 Alberta* (1995), 37 Alta. L.R. (3d) 58 (C.A.), *per* Côté J.A.

226 Alta. Reg. 152/98.

227 The Schedule first came into effect in 1984 and was not adjusted to take into account inflation.

The Court of Appeal in *Miller (Ed) Sales & Rentals* v. *Caterpillar Tractor*[228] had the following to say about the variety of approaches which were used to compensate for the inadequacy of the Schedule:

> There are different ways to adjust Schedule C when its product seems inadequate: higher column, multiples of a column, a multiplier for inflation or otherwise, extra lump sums, some fraction of solicitor-client costs, and so forth. Several modes of adjustment may be reasonable; indeed several different modes may amount to much the same thing. The ultimate question is whether the final total is reasonable or not.[229]

Although the new Schedule C will not, in most cases, provide for full indemnity of legal costs, it does reflect a significant general increase and should, at least in the short term, make it unnecessary for courts to compensate by other measures as they have routinely done in recent years. Presumably it remains part of our legal system's policy to expect even successful parties to bear some portion of their legal costs, except in exceptional cases, as a deterrent to litigation.

One of the first issues which has arisen in the context of the new Schedule C is whether the new Schedule or the old Schedule should apply to actions outstanding as at 1 September 1998. The transitional provision is embodied in rule 601.1, which reads as follows:

> 601.1 Schedule C and Rule 605(6), (7) and (8) are effective on and after September 1, 1998 and apply whether the services described in Schedule C were performed before, on or after September 1, 1998.

In a number of cases, the court has been asked to exercise its overriding discretion with respect to costs to limit the retroactivity of the new Schedule C. In some cases, where all of the substance of the action occurred prior to 1 September 1998, the court has held that it would be unjust to apply the new Schedule C.[230] In other cases, the court has arrived at a bit of a compromise, applying the old Schedule C to steps taken prior to 1 September 1998 and the new Schedule C to steps taken thereafter.[231] In the majority of cases, however, the court has refused to exercise its discretion to modify the effect of rule 601.1, holding that the new Schedule C should apply even where everything but costs has been dealt with prior to 1 September 1998.[232]

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228 (1999), 216 A.R. 304 (C.A.).

229 *Ibid.* at 305.

230 See *Markdale* v. *Ducharme*, [1998] A.J. No. 1014 (Q.B.), online: QL (A.J.) and *Huet* v. *Lynch*, [1998] A.J. No. 1298 (Q.B.), online: QL (A.J.).

231 See *Larson* v. *Curvin*, [1999] A.J. No. 112 (Q.B.), online: QL (A.J.) and *Bruneau* v. *Caseley*, [1998] A.J. No. 1271 (Q.B.), online: QL (A.J.).

232 See *Noel* v. *Dawson*, [1999] A.J. No. 176 (Q.B.), online: QL (A.J.); *Alberta* v. *Alberta (Labour Relations Board)*, [1998] A.J. No. 1310 (Q.B.), online: QL (A.J.); *Broumas* v. *Broumas* (1998), 230 A.R. 357 (Q.B.); *Re R.H.J.*, [1998] A.J. No. 1043 (Q.B.), online: QL (A.J.); *Beenham* v. *Rigel Oil & Gas*, [1998] A.J. No. 1451 (Q.B.), online: QL (A.J.); *Berube* v. *Bobier*, [1999] A.J. No. 22 (Q.B.), online: QL (A.J.); and *26561 Alberta* v. *King*, [1999] A.J. No. 35 (C.A.), online: QL (A.J.).

B. CONDUCT RELEVANT TO COSTS

Although costs are normally awarded to a successful party on a party-and-party basis, the court has a wide discretion with respect to costs, which must be exercised under the parameters established by the *Alberta Rules of Court*, relevant statutes, and the authorities. A recent decision of the Court of Appeal has provided some useful guidelines on the extent to which conduct of the parties should be taken into account for purposes of costs.

In *Sidorsky* v. *CFCN Communications*,[233] the plaintiffs' defamation action was dismissed at trial. The trial judge found that the conduct of the plaintiffs included misrepresentation, deceit, and intimidation, and that they had generally sought to harass and punish the defendants without regard to the merits of the plaintiffs' claim. The plaintiffs forced litigation where there was no serious factual issue to be tried, tried to induce false testimony to deceive the court, prolonged the trial by refusing to acknowledge facts established on discovery, and threatened litigation against witnesses and other media companies.

The trial judge found that this conduct justified solicitor-and-client costs. However, in order to avoid further protracted litigation from taxation of the account, the court assessed costs at six times column six of Schedule C, including third and fourth counsel fees, $50,000 for written argument, investigation costs for persons called as witnesses at trial, and the costs of paying witnesses' lost wages rather than the daily witness fee.

Although the plaintiffs' appeal as to liability in the action was dismissed, their appeal on costs was allowed. The Court of Appeal disallowed the fee for third and fourth counsel, reduced the award for written submissions from $50,000 to $10,000, reduced the investigation fee from $200,000 to $10,000, and reduced the costs from six times column six to triple column six.

In arriving at its decision, the Court of Appeal discussed the "rare and exceptional circumstances" in which a departure from party-and-party costs should occur and adopted the following list of examples compiled by Hutchinson J. in *Jackson and Parkview Holdings* v. *Trimac Industries*[234] from the Alberta authorities:

1. circumstances constituting blameworthiness in the conduct of the litigation by that party;

2. cases in which justice can only be done by a complete indemnification for costs;

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[233] (1997), 206 A.R. 382 (C.A.); leave to rehear denied (1998), 216 A.R. 151 (C.A.) [hereinafter *Sidorsky*].

[234] (1993), 138 A.R. 161 (Q.B.); rev'd in part (1994), 20 Alta. L.R. (3d) 117 (C.A.). While the appeal as to liability and damages was allowed in part, the appeal as to costs was dismissed.

3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;

4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion;

5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs;

6. defendants found to be acting fraudulently and in breach of trust;

7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial;

8. fraudulent conduct;

9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges.[235]

In the circumstances of the case at bar, the Court of Appeal held that the plaintiffs' conduct, while often inappropriate, was not such as to warrant an award of solicitor-and-client costs.

The court in *Sidorsky* cautioned against confusing conduct relevant to costs and conduct relevant to punitive damages. It made a distinction between conduct occurring in the course of the litigation (which is relevant to costs) and conduct preceding or precipitating the litigation (which is relevant to punitive damages).

The list of examples enumerated by Hutchinson J. in *Jackson* and referred to by the Court of Appeal in *Sidorsky* is a useful list in terms of outlining the types of "rare and exceptional circumstances" in which the usual award of party-party costs should be varied. A review of the cases which have been decided since Hutchinson J. formulated his list in *Jackson* indicates that the courts have continued to be reluctant to award

[235] *Ibid.* at 172-73 (citations omitted).

solicitor-client costs even in cases of misconduct, and have instead preferred to increase or otherwise modify the normal scale of costs.[236]

A couple of decisions relating to the impact of conduct on the question of costs highlight the importance of discretion in one's dealings with opposing counsel and integrity in presenting a case to the court.

In *Kirkeby* v. *Waddell*,[237] the matter was settled and the plaintiff's counsel applied for a taxation of costs. During that hearing, counsel for the plaintiffs alleged that counsel for the defendants had violated the *Code of Professional Conduct*. The court found the allegations of misconduct and inappropriate behaviour to be groundless, and accepted the suggestion of counsel for the defendants that costs of the taxation application be paid by counsel for the plaintiffs personally.

In *Laube* v. *Juchli*,[238] the plaintiff sued the defendants for damages suffered in a motor vehicle accident. The court assessed damages accordingly and awarded the plaintiff costs. On appeal, the Court of Appeal refused to interfere with the award of damages but awarded the defendants the costs of trial and appeal in an amount equal to the plaintiff's damages award, as the defendants' surveillance evidence clearly showed that the plaintiff had been exaggerating her injuries. Although the defendants did not ask for solicitor-client costs, the Court of Appeal indicated that it would have considered such a request very seriously had it been made.

C. COSTS OF APPEALS

The Court of Appeal in recent years has given a number of useful rulings with respect to costs of appeals.

In *West Edmonton Mall* v. *McDonald's Restaurants of Canada*,[239] the court indicated that an award of costs to the successful appellant does not automatically include a reversal of a costs award at trial. Costs of the trial must be sought in the factum and at the oral hearing, or they might be refused on that ground alone.

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[236] Cases where the courts have awarded solicitor-client costs as a result of the conduct of a party include *S.R. Petroleum Sales* v. *Canadian Turbo* (1995), 179 A.R. 138 (Q.B.); *Wilson* v. *K.P. Manufacturers (Calgary)* (1998), 225 A.R. 205 (Q.B.); and *Rutherford Estate* v. *Swanson*, [1999] A.J. No. 429 (Q.B.), online: QL (A.J.). Cases where the courts have declined to award solicitor-client costs and have chosen instead to award additional lump sum amounts or multiples of the usual column of Schedule C include *Citadel General Assurance* v. *Lloyds Bank Canada* (1993), 12 Alta. L.R. (3d) 114 (Q.B.); *Royal Bank* v. *W. Got & Associates Electric* (1994), 152 A.R. 277 (Q.B.); *Fitzpatrick* v. *Industrial Incomes* (1994), 164 A.R. 139 (Q.B.); *Dassen Gold Resources* v. *Royal Bank of Canada* (1994), 161 A.R. 238 (Q.B.); *383618 Alberta* v. *National Quick Freeze & Produce* (1995), 31 Alta. L.R. (3d) 412 (Q.B.); *Massey* v. *Brost* (1997), 202 A.R. 30 (Q.B.); *Michel* v. *Lafrentz* (1997), 199 A.R. 81 (Q.B.); *Lloyd* v. *Imperial Parking*, [1999] A.J. No. 461 (Q.B.), online: QL (A.J.); and *Duke Energy* v. *Duke/Lewis Dreyfus Canada* (1998), 66 Alta. L.R. (3d) 273 (Q.B.).

[237] (1996), 183 A.R. 350 (Q.B.).

[238] (1998), 228 A.R. 81 (C.A.).

[239] (1993), 145 A.R. 76 (C.A.).

In *Colborne Capital* v. *542775 Alberta*,[240] the court held that when the whole of a trial judgment is appealed, the respondent does not require leave to cross-appeal on the question of costs,[241] as that issue is already before the court in the main appeal.

In *Gunderson* v. *Jenkins*,[242] the Court of Appeal strongly emphasized that it requires transcribed reasons for oral chambers judgments whenever possible, or a costs sanction is likely to result:

> We are all of the view that the appellant should have his costs of this appeal, with the exception of any costs in connection with the appeal book. We are specifically excluding costs connected to the appeal book because, although the reasons of the chambers judge were recorded, they were not transcribed and included in the appeal book. It has taken some considerable effort on our part to obtain them from counsel. The bar cannot continue to ignore the fact that reasons are usually recorded in chambers in the Court of Queen's Bench, at least in special chambers. They can be transcribed, and they should be transcribed and included in the appeal book. It is important that we have the reasons of the chambers judge before us when we consider an appeal.[243]

In *Century Services* v. *Multi-Corp. and Lobsinger*,[244] the court made two important statements. First, it stated that on an interlocutory appeal, costs which are said to "follow the event" go forever to the winner of the appeal, not to the winner of the later trial. Second, it stated that a formal offer to settle made before trial does not affect appellate costs unless the offer is renewed before appeal.

D. PARTICULAR ITEMS OF DISBURSEMENTS

There have been some cases of note in the last few years which have considered the recoverability of the following particular items of disbursements:

- *Expert fees*: In *Anderson* v. *Ball*,[245] an issue arose on recoverability for certain expert reports. The court noted that the rules provide that the unsuccessful party will pay the reasonable costs of experts reports, and found that it was reasonable for the plaintiff in the case at bar to retain the experts in question. However, the court found that the plaintiff failed to prove the amounts charged by two of the experts were reasonable.

- *Witness fees*: In *Lalli* v. *Chawla*,[246] the court determined that counsel must meet with the witnesses for purpose of briefing in order for witness fees to be recoverable. In *Begro Construction* v. *St. Mary River Irrigation District*,[247] the plaintiff's action

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240 (1996), 38 Alta. L.R. (3d) 127 (C.A.).
241 As otherwise would be required under rule 505(3).
242 (1998), 216 A.R. 344 (C.A.).
243 *Ibid.* at 345-46.
244 (1998), 228 A.R. 103 (C.A.).
245 (1997), 214 A.R. 332 (Q.B.).
246 (1997), 203 A.R. 27 (Q.B.).
247 (1995), 167 A.R. 144 (Q.B.).

was allowed at trial, and the court held that the defendants were obligated to pay all reasonable and proper expenses incurred by an out-of-town representative of the plaintiff for the purpose of his attendance at trial.

- *Computer research*: In *Lalli* v. *Chawla*,[248] *Dornan Petroleum* v. *Petro-Canada*,[249] *Atkinson* v. *McGregor*,[250] and *Reid* v. *Stein*,[251] the courts applied the generally-accepted view that computer research is not recoverable as a separate disbursement.

- *Facsimile and delivery charges*: There is still conflicting authority on the question of whether these items are recoverable as part of a costs award. In *Gainers* v. *Pocklington Holdings*,[252] Clarke J. held that the use of both faxes and deliveries has become an ordinary and accepted part of the practice of litigation and can no longer be said to be simple luxuries. However, in *Dornan Petroleum* v. *Petro-Canada*,[253] Murray J. expressly chose not to follow *Gainers*, holding that facsimiles and delivery charges are luxuries rather than necessities and are therefore not taxable except in exceptional circumstances.

E. COMPROMISE PROCEDURES

Aside from the revision to Schedule C, the most significant recent change to the cost rules has been the addition of rule 174(1.1), which came into effect in July, 1998. The compromise procedures formerly had some imbalance as between plaintiffs' and defendants' offers. If a plaintiff recovered a judgment greater than its formal offer, it was presumptively entitled to party and party fees double what would have been recovered in the absence of the offer. This recognized the fact that a plaintiff is normally entitled to single costs on recovering a judgment, and so would receive no additional advantage from the offer if increased costs were not awarded on recovering the judgment larger than an amount for which it was earlier prepared to settle. There was, however, no corresponding rule for defendants. If a plaintiff recovered a judgment for less than what a defendant had offered to settle, it was presumptively required to pay the defendant's costs from the date of the offer — a useful mechanism, for in the absence of such an offer, the plaintiff would have still recovered costs because it received some form of judgment. However, if the defendant was successful in defending the claim entirely, the defendant would still only recover single costs, the same result as if it had made no offer but succeeded on liability.[254] The new rule

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248 *Supra* note 246.

249 (1997), 199 A.R. 334 (Q.B.).

250 (1998), 66 Alta. L.R. (3d) 289 (Q.B.).

251 [1999] A.J. No. 533 (Q.B.), online: QL (A.J.).

252 (1996), 182 A.R. 78 (Q.B.) [hereinafter *Gainers*].

253 *Supra* note 249. See also *MacCabe* v. *Westlock Roman Catholic Separate School District No. 110*, *supra* note 224 at para. 148, where Johnstone J. stated that in her view "the use of the facsimile services has now become an integral part of practicing law," but "the use of delivery charges has not become so entrenched in one's daily legal practice."

254 Prior to rule 174(1.1) coming into force, defendants who had served the plaintiffs with formal offers and then were completely successful in defending against the plaintiff's claim at trial were typically refused double costs, as there was nothing in the rules which would allow them: see *Seal* v. *Ketza* (1993), 12 Alta. L.R. (3d) 41 (Q.B.); *Duncan Estate* v. *Baddeley* (1995), 26 Alta. L.R.

provides that, in such circumstances, defendants will recover double costs, thereby creating a much greater incentive to make the offer and for the plaintiff to give it serious consideration.

With the changes to Schedule C and the addition of rule 174(1.1), it is likely that the compromise procedures provided for by the *Alberta Rules of Court* will be utilized more frequently. The significance of costs to both parties, in assessing possible recovery and the risk of losing entirely or failing to achieve a better result than offered by the other party in a formal offer, has increased significantly, and costs will therefore play a much greater prominence in litigation strategies. It is therefore particularly useful to view the guidelines established by the courts over the past few years for application of the compromise procedures.

Where a plaintiff recovers less than the amount offered by a defendant by way of formal offer, rule 174(1) obligates the court to award costs to the defendant for all steps in relation to that claim after service of the formal offer "unless for special reason" it decides that such an award would not be appropriate. The same wording is used in rule 174(2), where a plaintiff recovers more than the amount specified in its own formal offer. While the courts have not formulated a list of what might constitute "special reason" for purposes of these rules, they have on a number of occasions determined what does not constitute "special reason." Examples are as follows:

- In *Mackie* v. *Wolfe*,[255] the trial judge found that there was "special reason" to depart from the presumption in rule 174(1). Although the trial judge did not specifically articulate her views for the departure, it appears that the major reasons were that the case dealt with a medical condition which had not been extensively considered in previous cases, and there was a great deal of psychiatric evidence as well. In reversing the trial judge on this point, the Court of Appeal found that the factors taken into account by the trial judge did not constitute "special reason" to depart from the presumption.

- In *Ness* v. *Leveridge*,[256] the trial judge found that the offer of judgment was ambiguous, and this was a "special reason" for declining to award the defendant costs for all steps after service of the offer. The Court of Appeal reversed the trial judge on this point, holding that the offer was not ambiguous, and there was no "special reason" for not imposing the cost sanction provided by rule 174(1). (The court did not consider whether a truly ambiguous offer might in fact constitute "special reason.")

(3d) 403 (Q.B.); and *Lawler* v. *Ron's Coach and Bus Repairs* (1998), 68 Alta. L.R. (3d) 107 (Q.B.). The result, then, in getting single costs was the same as if no offer had been served, because a successful defendant is usually awarded costs. However, there has been some contrary authority, for example, *North American Systemshops* v. *King & Co.* (1989), 99 A.R. 138 (Q.B.), which allowed costs to a defendant in these circumstances.

255 (1994), 21 Alta. L.R. (3d) 11 (Q.B.), additional reasons (1994), 23 Alta. L.R. (3d) 400 (Q.B.), varied (1996) 41 Alta. L.R. (3d) 28 (C.A.).

256 (1995), 34 Alta. L.R. (3d) 407 (C.A.).

- In *Steve's Contracting* v. *Williams*,[257] the court rejected the plaintiff's contention that the fact that the amount recovered was very close to the amount offered constituted a "special reason" to depart from the rule.

- In *Hilliard* v. *Grabinski*,[258] the plaintiff argued that the fact that the offer had not been broken down into the various heads of damages constituted a "special reason" to depart from the rule. This argument was rejected by the court.

- In *Waterous Investments* v. *Liberton Holdings*,[259] a plaintiff obtained judgment in excess of its formal offer of settlement. The court rejected the defendant's argument that in light of certain issues arising from the terms of the contract in issue, the lawsuit was necessary, and this constituted a "special reason" not to award double costs.

- In *Jando* v. *Kung*,[260] *Atkinson* v. *McGregor*,[261] *Hilliard* v. *Grabinski*,[262] and *Reid* v. *Stein*,[263] the defendants served the plaintiffs with formal offers immediately prior to the commencement of trial. The offers were not accepted, and the plaintiffs recovered less at trial. The plaintiffs then applied for relief from the application of rule 174(1)(b) on the grounds that the offers had been made too late to be considered in a timely manner. In all four cases, the court rejected this argument, holding that the late delivery of the offer did not constitute "special reason" for not applying the rule, as an adjournment of the trial could have been requested in order to consider the offer.

The following cases have considered timing and procedural issues which arose in the context of formal offers:

- In *Damar (J.C.) Developments* v. *Ecec and Ecal*,[264] the plaintiff made a formal offer to settle pursuant to rule 170. The offer stated that it would automatically lapse after forty-five days. On the eve of trial, long after the forty-five days had elapsed, the defendant purported to accept the offer, claiming that under rule 170(5), the offer only lapsed when there was a formal notice of withdrawal. The court held that the offer had not lapsed and that a settlement had been reached. However, this finding was reversed on appeal. The Court of Appeal indicated that imposing a requirement to serve a separate written notice of withdrawal would unduly complicate the summary scheme underlying the rule itself.

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257 (1997), 214 A.R. 318 (Q.B.).
258 (1998), 221 A.R. 201 (Q.B.).
259 (1996), 183 A.R. 229 (Q.B.).
260 (1995), 26 Alta. L.R. (3d) 416 (Q.B.).
261 *Supra* note 250.
262 *Supra* note 258.
263 *Supra* note 251.
264 (1994), 157 A.R. 259 (C.A.).

- In *Collins* v. *National Life Assurance Co. of Canada*,[265] the defendant served a formal offer on the plaintiff. The plaintiff, in a "without prejudice" counteroffer, offered to settle for a higher sum. The defendant rejected the counteroffer and the plaintiff then accepted the defendant's formal offer, which had not been withdrawn in writing. The chambers judge dismissed the plaintiff's application for judgment in accordance with the formal offer, but the plaintiff's appeal was allowed. The Court of Appeal held that unless the terms of the offer are clear that it will expire after the 45-day minimum period, rule 169 requires a written notice of withdrawal. This varies the common law rule that a rejected counteroffer brings the original offer to an end. Accordingly, parties deciding to pursue the possible cost advantages of invoking the formal settlement procedures under the rules are obliged to follow those rules as they relate to withdrawal.

- In *Jacobs* v. *Innisfail Transfer*,[266] the plaintiff was awarded damages of $11,656.96 and interest of $1,633.54 at trial. Prior to the commencement of trial, the plaintiff had made an offer to the defendant to settle for the sum of $11,967.94. Hutchinson J. awarded double costs, holding that pre-judgment interest counted as part of the judgment in the determination of whether the plaintiff's offer had been exceeded.

- In *Arrotta* v. *Avva Light*,[267] the plaintiff successfully sued the defendants for relief on the grounds of oppression or unfairness under section 234 of the *Business Corporations Act*.[268] Although the plaintiffs were not, strictly speaking, seeking damages in their action, they did make a formal offer to settle. Sullivan J. granted summary judgment and awarded the plaintiffs double costs from the point of the formal offer forward, indicating that rule 174(2) should be construed as broadly as possible and should not be strictly applied only to circumstances where the claim is for a sum of money. On the whole of the terms of the offer to settle, the plaintiffs in the case at bar had received value equal to or greater than the settlement offer. Accordingly, they were entitled to double costs.[269]

The Court of Appeal has considered the application of the formal offer provisions in two separate cases which underscore the benefits of making formal offers on appeal. In *Redlick-Lynn (Next friend of)* v. *Halfe*[270] and *Jones* v. *TransAmerica Life Insurance Co. of Canada*,[271] the defendants appealed to the Court of Appeal and the plaintiffs served the defendants with formal offers for the amount of the full trial judgment plus interest and costs. The defendants rejected the offers and their appeals were dismissed.

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265 (1995), 33 Alta. L.R. (3d) 403 (C.A.).

266 (1995), 28 Alta. L.R. (3d) 191 (Q.B.).

267 (1995), 36 Alta. L.R. (3d) 134 (Q.B.).

268 R.S.A. 1980, c. B-15.

269 Although the Court of Appeal, in a decision reported at (1995), 36 Alta. L.R. (3d) 139, overturned Sullivan J.'s order granting summary judgment and his subsequent order awarding costs, this was done on the basis that the matter raised complicated issues of fact and law which could not be disposed of on the basis of summary judgment. Accordingly, the Court of Appeal did not specifically address the issue of whether rule 174 could apply in this type of situation.

270 (1996), 37 Alta. L.R. (3d) 360 (C.A.) [hereinafter *Redlick-Lynn*].

271 (1996), 39 Alta. L.R. (3d) 1 (C.A.) [hereinafter *Jones*].

In both cases the Court of Appeal held that the plaintiffs were entitled to double costs from the date of service of the offer. In *Redlick-Lynn*, the court held that the offer reflected a compromise in that there was a live notice of intention to vary. In *Jones*, the court stated that there was nothing in the *Alberta Rules of Court* confining formal offers to concessions or reductions in claims, and, in any event, the plaintiff's offer was in fact a compromise as it only covered costs and interest up to the date of the offer.

F. OTHER COSTS ISSUES

Finally, there have been a number of cases of some significance in recent years relating to other issues falling within the rubric of costs. Some of the more significant cases in this regard are as follows:

- In *Nyquvest* v. *Rutkowski*,[272] *Orleski* v. *North American Property Group*[273] and *Spiridakis* v. *729113 Alberta*,[274] the court departed from the general rule that costs of an interlocutory proceeding should be in the cause, holding that it was appropriate for the court to exercise its discretion and order the payment of costs forthwith where the interlocutory proceedings were discrete or extraordinary.

- In *Jivraj* v. *Fischer*,[275] Rooke J. held that for the purpose of determining the appropriate column of costs, pre-judgment interest was included in the "amount involved" under rule 605.

- In *MacCabe* v. *Westlock Roman Catholic Separate School District No. 110*,[276] Johnstone J. declined to award interest on disbursements, stating that "without further legal foundation, I see no reason to expand the law in this area."[277]

- In *Simpson* v. *Bender*[278] and *A.T.U.* v. *I.C.T.U.*,[279] the courts confirmed that GST should be payable on taxable party and party costs. In *A.T.U.*, however, Lutz J. pointed out that an award of GST on costs was not mandatory but discretionary, and that the parties must speak to such costs at the appropriate time.[280]

- In *Lines* v. *Brink*,[281] Veit J. indicated that unless special circumstances exist, the costs for a mini-trial should be awarded on the same scale as the general costs in an action.

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272 (1994), 163 A.R. 307 (Q.B.).

273 (1995), 27 Alta. L.R. (3d) 255 (Q.B.).

274 [1999] A.J. No. 23 (Q.B.), online: QL (A.J.).

275 (1992), 128 A.R. 360 (Q.B.).

276 *Supra* note 224.

277 *Ibid.* at para. 155.

278 (1996), 37 Alta. L.R. (3d) 191 (Q.B.).

279 (1998), 59 Alta. L.R. (3d) 1 (Q.B.) [hereinafter *A.T.U.*].

280 See also *MacCabe* v. *Westlock Roman Catholic Separate School District No. 110*, *supra* note 224, where Johnstone J. indicated that the court retains the discretion to award GST on fees notwithstanding the advent of the new Schedule C.

281 (1994), 160 A.R. 341 (Q.B.).

- In *Guarantee Co. of North America* v. *Beasse*,[282] Rooke J. considered the distinction between solicitor-client costs and solicitor-and-his-own-client costs. He confirmed that solicitor-client costs consist of all matters necessary for the proper presentation of the case, and include measures that fell within the four corners of the litigation, while solicitor-and-his-own-client costs are the costs actually paid by the client, including all of the things done on the clients instructions even where arguably unnecessary for the proper presentation of the case.

- In *Stringam Denecky* v. *Butkiewiecz*,[283] a lawyer estimated his fee, and the final account exceeded that estimate. The court limited the account payable to the estimate, as the lawyer failed to keep his client advised of anticipated increases in the estimate.

[282] (1993), 139 A.R. 241 (Q.B.).
[283] (1993), 147 A.R. 321 (Q.B.).