ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Trial and Evidence Rules
Parts 25 and 26

Consultation Memorandum No. 12.16
November 2004

Deadline for Comments: January 15, 2005

ALBERTA RULES OF COURT PROJECT

The Alberta Rules of Court Project is a 3-year project which has undertaken a major review of the *Alberta Rules of Court* [The Rules] with a view to producing recommendations for a new set of rules by 2004. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI.

This Consultation Memorandum is issued as part of the Project. It has been prepared with the assistance of the members of the Rules Project General Rewrite Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the committee are:

The Hon. Justice Brian R. Burrows (Co-Chair), Court of Queen's Bench of Alberta
The Hon. Justice Terrence F. McMahon (Co-Chair), Court of Queen's Bench of Alberta
The Hon. Judge Allan A. Fradsham, Provincial Court of Alberta
The Hon. Justice Eric F. Macklin, Court of Queen's Bench of Alberta
The Hon. Justice June M. Ross, Court of Queen's Bench of Alberta
James T. Eamon, Code Hunter LLP
Alan D. Fielding, Q.C., Fielding Syed Smith & Throndson
Debra W. Hathaway, Counsel, Alberta Law Reform Institute
William H. Hurlburt, Q.C., Alberta Law Reform Institute
Alan D. Macleod, Q.C., Macleod Dixon
Sheryl Pearson, Counsel, Alberta Law Reform Institute
Wayne Samis, Deputy Clerk, Court of Queen's Bench of Alberta

This consultation memorandum was written by Hilary Stout.

A reader who wishes to have more information about the Alberta Rules of Court Project may consult the background material included in each of the Consultation Memoranda 12.1 to 12.9. More complete information, including reports about the Project and particulars of previous Consultation Memoranda, may also be found at, and downloaded from, the ALRI website: http://www.law.ualberta.ca/alri.

The Institute's office is located at:

402 Law Centre
University of Alberta
Edmonton AB T6G 2H5
Phone: (780) 492-5291
Fax: (780) 492-1790

The Institute's electronic mail address is:

reform@alri.ualberta.ca

THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Expert Evidence and "Independent" Medical Examinations	February 2003	May 16, 2003
12.4	Parties	February 2003	June 2, 2003
12.5	Management of Litigation	March 2003	June 30, 2003
12.6	Promoting Early Resolution of Disputes by Settlement	July 2003	November 14, 2003
12.7	Discovery and Evidence Issues: Commission Evidence, Admissions, Pierrringer Agreements and Innovative Procedures	July 2003	November 14, 2003
12.8	Pleadings	October 2003	January 31, 2004
12.9	Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions	February 2004	April 30, 2004
12.10	Motions and Orders	July 2004	September 30, 2004
12.11	Enforcement of Judgments and Orders	August 2004	October 31, 2004
12.12	Summary Disposition of Actions	August 2004	October 31, 2004
12.13	Judicial Review	August 2004	October 31, 2004
12.14	Miscellaneous Issues	October 2004	November 30, 2004
12.15	Non-disclosure Order Application Procedures in Criminal Cases	November 2004	January 15, 2005

No.	Title	Date of Issue	Date for Comments
12.16	Trial and Evidence Rules Parts 25 and 26	November 2004	January 15, 2005

Available to view or download at the ALRI website: *http://www.law.ualberta.ca/alri/*

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The members of the Institute's Board are A. de Villars, Q.C.; A.D. Fielding, Q.C.; The Hon. Judge N.A. Flatters; P.M. Hartman, Q.C.; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); A.D. Macleod, Q.C.; The Hon. Madam Justice B.L. Rawlins; W.N. Renke; D.R. Stollery, Q.C.; The Hon. Mr. Justice N.C. Wittmann (Chairman) and K.D. Yamauchi.

The Institute's legal staff consists of P.J.M. Lown, Q.C. (Director); D.W. Hathaway; S. Pearson; S. Petersson; M.A. Shone, Q.C. and H.L. Stout. C.R.B. Dunlop; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; D.I. Wilson, Q.C. and W.N. Renke are consultants to the Institute.

PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by January 15, 2005 .

This consultation memorandum addresses the rules relating specifically to trial evidence and procedure, comprising Part 25 (Rules 245-260) and some of Part 26 (Rules 261 - 265; 292 - 296.1) of The Rules.

Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the General Rewrite Committee has identified a number of issues arising from these procedures and has made preliminary proposals. These proposals are not final recommendations, but proposals which are being put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas covered, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

We encourage your comments on the issues and the proposals contained herein. You may respond to one, a few or many of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum or the Rules Project on our website, by fax, mail or e-mail to:

Alberta Law Reform Institute
402 Law Centre
University of Alberta
Edmonton AB T6G 2H5
Phone: (780) 492-5291
Fax: (780) 492-1790

E-mail: *reform@alri.ualberta.ca*
Website: http://www.law.ualberta.ca./alri/

The process of law reform is essentially public. Even so, you may provide anonymous written comments, if you prefer. Or you may identify yourself, but request that your comments be treated confidentially (i.e., your name will not be publicly linked to your comments). Unless you choose anonymity, or request confidentiality by indicating this in your response, ALRI assumes that all ***written comments are not confidential***, in which case ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although usually we will discuss comments generally and without specific attributions.

Table of Contents

EXECUTIVE SUMMARY

A. Introduction

The General Rewrite Committee ("the Committee") was struck to consider a wide range of issues that fell outside the scope of the various other Committees. This consultation memorandum deals with one of those issues, the Trial and Trial Evidence Rules, which are currently found in Part 25 (Rules 245-260) and Part 26 (Rules 261-265 and 292-296.1).

B. Trial Rules

Part 25 of the Rules deals exclusively with Trial Rules. Part 26 deals with Evidence, both in and out of Court. This consultation memorandum deals only with those Rules under Part 26 that relate exclusively to evidence at trial. The remaining rules in Part 26 were addressed by the Discovery & Evidence Committee in their Consultation Memorandum 12.7.

The rules discussed in this consultation memorandum are disparate and were, accordingly, dealt with almost on an individual basis, except where rules dealing with a particular subject area (jury trials, or witnesses, for example) could be meaningfully grouped together for analysis.

The rules in issue were felt to fall into one of three broad categories, dealing with either procedural, evidential or (arguably) substantive matters. Overall, the Committee felt that the rules in the latter were useful, but that several of them amounted to little more than statements of certain aspects of the court's inherent jurisdiction to control its own processes. Recommendations are made herein to remove those Rules, on the clear understanding that in doing so, the Committee is in no way attempting to change the law or negate or limit existing principles of the Court's inherent jurisdiction as a result.

C. Procedural Rules

Rules 245 and 246, both of which deal with the non-appearance of parties at trial, were felt to be necessary but repetitive. It was agreed that their substance should be carried forward but that the two rules should be merged into a single rule.

Rules 252 and 253, which deal with views, were dealt with in a similar fashion: they are to be retained, but merged.

Rules 251, 155 and 256 were felt to be mere expressions of the Court's existing inherent jurisdiction to control its own process. As one of the objectives of the Rules project is to streamline the Rules in their entirety, the Committee has recommended removal of these Rules.

Research showed that Rule 255.1 was added to the rules as part of a bundle of new rules intended to address issues relating to very long trials. As of the date of its review by the Committee, there had been no judicial consideration of Rule 255.1. Only one other province (Saskatchewan) has an analogous rule and it has not received any judicial consideration, either. The Committee agreed that inherent jurisdiction and the Cost process were already in place and well-suited to dealing with the issue of unreasonably long trials, such that Rule 255.1 is unnecessary.

Rule 260, the non-suit rule, was felt to be necessary and useful and its retention was recommended.

Rule 247 was felt to go too far in allowing for exclusion of a party from trial, and might even constitute a Charter breach if applied. The Committee felt that the analogous Ontario provision, which does not allow the judge to exclude a party but does allow the judge to order that a party give evidence before the other witnesses are heard, was more appropriate.

Rule 248 has been criticized as forbidding the Court to allow a defendant to make an early opening statement in jury trials, thus constituting a fetter on the Court's discretion to control its own process. It was agreed that the rule should be amended to allow for such a change in the ordering of opening addresses in civil jury trials, on application by a defendant.

Rules 258 and 259 deal with the procedures to be followed in the event of disagreement by a jury (leading to a declaration of a mistrial, in essence). Examination of similar rules from Ontario and British Columbia revealed the existence of an option

not currently available in Alberta, the option of choosing to proceed before the presiding judge alone rather than wait for a new trial. It was felt that this could have a very desirable effect of reducing delays and trial time in the event of a mistrial, and adoption of a similar provision is recommended.

D. Substantive Rules

Rule 250 codifies an exception to the archaic, but still operating, common-law principle that damages are assessed as at the date an action is commenced, rather than the date of judgement. It was felt that the rule should accordingly be retained.

Rule 254 was considered and discussed at length. The rule is written such that it can be interpreted in one of two ways. The narrower interpretation is that it provides a procedural mechanism for giving notice in a situation where a defendant who has not pleaded justification in a defamation action intends to adduce general evidence of the character of the plaintiff in mitigation of damages. This interpretation is consistent with the common law but adds some specificity as regards how notice is to be given. The broader interpretation, which is allowed by the wording of the rule, is that it allows such a defendant, upon giving notice in accordance with the Rule, to give evidence of particular instances of wrongdoing in mitigation of damages. This has never been allowed under the common law. The Committee felt the Rule should be retained but rewritten so as to ensure the only possible interpretation was that the rule provides a procedural mechanism for giving notice where a defendant intends to adduce general evidence of character, as allowed by the law.

E. Evidentiary Rules

Rule 249, although currently located in Part 25 rather than in Part 26, was felt to be an evidentiary rule, as it relates to the re-opening of a trial to introduce additional evidence. The Committee recommended retaining it, subject to revision for clarity.

No issues were identified with regard to Rules 261 and 261.1 and it was recommended they be retained.

Rule 262 was criticized as being, perhaps, unnecessary. It appeared to the Committee that there was no issue that evidence from trial should be available in

subsequent proceedings, such as costs hearings or appeal. It was felt, however, that this point is not so obvious as to warrant removal of Rule 262.

Rule 263 was the subject of considerable discussion. It, like Rule 254, was felt to be worded so as to suggest an alteration to the common law. In this case, the rule seems to suggest that evidence from one proceeding may be used without limit in any other proceeding. This is, of course, contrary to the hearsay rules of evidence. Analysis of the case law, and the ways in which Alberta Courts have applied the Rule, indicated that Rule 263 has been read down such that applications under it are only allowed where the person against whom such evidence is to be given had the opportunity to cross-examine the declarant when that declarant was examine, when the same parties were involved in both matters, and where the same matters were in issue in both proceedings. That is, in short, already the common law in this matter, as set out over a century ago by the Supreme Court of Canada in the Town of Walkerton v. Erdman (1894), 23 S.C.R. 352. Accordingly, the Committee felt the Rule should be removed as it appears not to have codified this long-established exception to the hearsay rule but, rather, to have created confusion surrounding it.

Rule 264 and 265 were reviewed and the Committee agreed that, although they differed in some respects from sections 33 and 41(2) of the Alberta Evidence Act, they were to a considerable degree redundant. Accordingly, their removal was recommended.

Rules 292 - 296.1 deal with the calling of witnesses. The only issues identified in respect of the witness rules had to do with Rules 292 and 293, which appear to be somewhat redundant. Review of witness rules from other jurisdictions revealed that where there was more than one rule relating to the calling of witnesses, one such rule was a “hostile witness” rule. The Alberta rule cannot reasonably be interpreted as a hostile witness rule. Accordingly, there was considerable discussion as to whether or not Alberta should have such a rule. At the end of the day, it was agreed that it was unnecessary. Rule 293 allows one party to call any witness and, should that witness prove hostile once in Court, a simple application to the judge to treat the witness accordingly is all that is required. The Committee recommended, therefore, that Rule 292 be subsumed into Rule 293.

LIST OF ISSUES

PART 25: TRIAL RULES

PART 26: TRIAL EVIDENCE RULES

CHAPTER 1. PART 25: TRIAL RULES

[1] The trial rules in Part 25 of The Rules (Rules 245- 260) number among the most often-applied, but least-considered of the rules. This part does not provide an outline of trial procedures but, rather, consists of a collection of extremely specific rules relating to various aspects of trial procedure.

[2] In the initial consultation phase, no comments were received with regard to any of the individual rules in Part 25.

[3] Review of the rules in Part 25 indicated that many appear to be mere statements of well-established aspects of the court's inherent jurisdiction and, as such, they are probably not necessary. Certain of the rules in the Part appear to be more substantive than procedural, which raises the issue of whether or not they are appropriate for inclusion in the the rules in the first instance. Some of the rules contained in Part 25 deal more with trial evidence than trial procedure.

A. Procedural Rules

ISSUE No. 1
Should Rules 245 and 246, both of which deal with the non-appearance of parties, be merged?

> 245. Non-appearance of defendant — If, when an action is called for trial, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim as far as the burden of proof lies upon him.
>
> 246. Non-appearance of plaintiff — If, when an action is called for trial, the defendant appears and the plaintiff does not, the defendant, if he has no counterclaim, is entitled to judgment dismissing the action; but if he has a counterclaim he may prove his counterclaim as far as the burden of proof lies upon him.

POSITION OF THE GENERAL REWRITE COMMITTEE

[4] These two rules were felt to be related and, to some extent, repetitive. While it was agreed that the substance of the two rules should be carried forward, a suggestion should be made, to the drafter of the new rules, to try to combine the two rules into one, if feasible, or otherwise to simply update the language. An example of a more simplified approach is seen in the analogous British Columbia Rule:

> (33) Failure of one party to appear at trial — If a party is not in attendance when the trial of an action is called, the court may proceed with the trial, including hearing a counterclaim, in the absence of that party.[1]

ISSUE No. 2
Does Rule 247 go too far in allowing for the exclusion of a party and, if so, should it be amended or removed?

> 247. Exclusion of witness — The judge at the trial may order a witness, whether he is a party or not, to be excluded from the court until he is called to give evidence and after he has given evidence not to communicate with other witnesses before they give evidence, and the judge may in his discretion if there is improper communication exclude the testimony of any witness or party.

[5] The Committee noted that it is not necessary for the rules to specify how a judge is to run a trial - that is a matter of inherent jurisdiction. On the other hand, the rule was felt to go a bit too far in providing for the possibility of excluding a party from trial, which could be considered a *Charter* breach.

[6] Comparison was made to the analogous Ontario provision, which reads:

> 52.06 Exclusion Of Witnesses — Order for Exclusion
>
> (1) The trial judge may, at the request of any party, order that a witness be excluded from the courtroom until called to give evidence, subject to subrule (2).
>
> Order not to Apply to Party or Witness Instructing Counsel
>
> (2) An order under subrule (1) may not be made in respect of a party to the action or a witness whose presence is essential to instruct counsel for the party calling the witness, but the trial judge may

---

[1] British Columbia, *Supreme Court Rules* [British Columbia].

> require any such party or witness to give evidence before any other witnesses are called to give evidence on behalf of that party.
>
> No Communication with Excluded Witnesses
>
> (3) Where an order is made excluding a witness from the courtroom, there shall be no communication to the witness of any evidence given during his or her absence from the courtroom, except with leave of the trial judge, until after the witness has been called and has given evidence.
>
> Exclusion of Persons Interfering with Trial
>
> (4) Nothing in this rule prevents the trial judge from excluding from the courtroom any person who is interfering with the proper conduct of the trial.[2]

[7] Concern was also expressed with regard to the provision relating to the possible exclusion of testimony in the case of "improper communications." It was agreed that this should go to weight, rather than admissibility.

POSITION OF THE GENERAL REWRITE COMMITTEE

[8] The Committee was of the opinion that the Ontario model appropriately addressed the key concerns of exclusion of parties and the effect of "improper communication." It was agreed that Rule 247 should be replaced with a provision similar to Ontario Rule 52.06.

ISSUE No. 3
Should Rule 248 be amended to allow the Court greater discretion in setting the order of addresses to the jury?

> 248. Address to jury —
>
> (1) Upon a trial with a jury the addresses to the jury shall be regulated as follows
>
> (a) the party who begins shall be allowed to open his case to the jury and at the close of his case (if his opponent announces his intention not to adduce further evidence) to address the jury a second time for the purpose of summing up the evidence, and his opponent has the right to reply, but

---

[2] Ontario, *Rules of Civil Procedure* [Ontario].

> (b) if his opponent announces his intention to adduce further evidence, the opponent has the right to open his case and then to adduce such evidence as he sees fit and thereafter to sum up the evidence, and the party who begins has the right to reply.
>
> (2) When a defendant claims a remedy over against a co-defendant, he has the right to address the jury after the co-defendant.
>
> (3) When a party is represented by counsel, the right conferred by this Rule shall be exercised by his counsel.
>
> (4) Unless the court otherwise orders, in non-jury cases the counsel for the party on whom lies the onus of proof shall first address the court and he has the right to reply.

[9] According to Madame Justice Veit in *Hamblin v. Ben*,[3] the current wording of Rule 248 operates as a fetter on the court's discretion to control proceedings in trial. As she noted at paragraph 2 of her reasons:

> Rule 248 does not authorize the court to modify the order of opening addresses in a civil jury trial; the only modification courts can make is in the order of addresses for non-jury trials. Rules should be enforced.

[10] Justice Veit went on to find, at paragraphs 19-27:

> *If Alberta Rules gave me the power to do so, I would have allowed the defendants to make one, early, opening statement because: the defendants are undertaking to call evidence, the jury's attention could usefully be drawn before the calling of any evidence to the areas of evidence on which the expert evidence will defend, and there is a growing trend, presumably based on current information concerning jury dynamics, to allow defendants to open immediately after plaintiffs and prosecutors.*
>
> The fact that there is no legal principle which bars an early defendants' opening statement has been recognized by our Court of Appeal in ***Marthaller*** where the court stated:
>
> > The law imposes no such absolute bar to an early defendant's opening statement, still less other submissions where there is no jury: Mauet, Fundamentals of Trial Techniques 36 (Cdn. ed., Carswell, 1984); cf. Williston and Rolls, Conduct of an Action 34-35 (1982).
>
> A similar general principle as it relates to criminal process was recognized by our Court of Appeal in ***Paetsch***. However, despite some general similarities between civil and criminal jury trials, it is important when reviewing decisions relating to opening addresses in criminal jury trials that in Alberta there are no practice rules applying to the ordering

---

[3] (2003), 344 A.R. 282, 2003 ABQB 459 [cited to neutral citation].

> of addresses in such trials; section 651 of the Criminal Code, for its part, restricts itself to an ordering of the closing addresses.
>
> As the ***Brophy*** decision, and the Ontario decisions cited above and the Ontario Rules establish, there is a growing trend to allowing the defendants, both in civil and in criminal trials, to open immediately after either the plaintiff or the prosecutor, whether or not the defendant undertakes to call evidence. This trend is presumably based on current received wisdom concerning the psychology and dynamics of juries.
>
> Indeed, in this case, had I had the discretion to do so, I would have exercised my discretion in favour of the defendants not only because of what I understand to be fair in terms of influence on a jury, but also because the defendants here are committed to calling evidence, the defendants are calling expert evidence, and there is no likely harm from an early opening address.
>
> Where expert evidence is being called, it is useful for a jury to be alerted in advance to the areas of substantive evidence on which the experts will eventually be called to give opinion evidence.
>
> There are some situations in which an early defence opening statement could lead to problems that may even be so serious as to require the declaration of a mistrial. For example, reference to bad character evidence that was more prejudicial than probative before a ruling was made about the admissibility of the evidence could, in a situation of serious prejudice, lead to a mistrial. In cases where there is real risk of mistrial as a result of an early opening address, the court may not exercise its discretion in favour of such early opening. In this case, however, there is no counter-indication to an early opening address.
>
> Had I been able to allow the defendants to make an early opening statement, it would, of course, have been on the condition that they were not allowed to make a second opening statement when they began to call evidence.
>
> I have indicated earlier that existing rules that are unambiguous should be applied. That does not necessarily mean, however, that a clear existing rule reflects current consensus on best practice. The Alberta Law Reform Institute's current Rules Project may have the opportunity of exploring the issue of the ordering of opening addresses to juries; its advice on this issue would be of great assistance to the bench and bar of Alberta.

[11] The Committee agreed with Justice Veit's reasoning about determining the appropriate order of addresses, with some provisos. There was some concern that a defendant might make an early opening statement, then choose not to call evidence. Reference was made to the Ontario rule, which adopts the more current trend with regard to the order of presentation to juries:

52.07 Order Of Presentation In Jury Trials —

(1) On the trial of an action with a jury, the order of presentation shall be regulated as follows, unless the trial judge directs otherwise:

1. The plaintiff may make an opening address and, subject to paragraph 2, shall then adduce evidence.
2. A defendant may, with leave of the trial judge, make an opening address immediately after the opening address of the plaintiff, and before the plaintiff adduces any evidence.
3. When the plaintiff's evidence is concluded, the defendant may make an opening address, unless he or she has already done so, and shall then adduce evidence.
4. When the defendant's evidence is concluded, the plaintiff may adduce any proper reply evidence and the defendant shall then make a closing address, followed by the closing address of the plaintiff.
5. Where a defendant adduces no evidence after the conclusion of the plaintiff's evidence, the plaintiff shall make a closing address, followed by the closing address of the defendant.

(2) Where the burden of proof in respect of all matters in issue in the action lies on the defendant, the trial judge may reverse the order of presentation.

(3) Where there are two or more defendants separately represented, the order of presentation shall be as directed by the trial judge.

(4) Where a party is represented by counsel, the right to address the jury shall be exercised by counsel.

POSITION OF THE GENERAL REWRITE COMMITTEE

[12] The Committee agreed that the rule should allow for the defendant to make an opening address earlier, but that leave of the court should be required before the defendant can do so. The Committee also agreed to recommend that the new Alberta rule follow the format of Ontario Rule 52.07.

ISSUE No. 4
Are Rules 251, 255 and 256 necessary, or do they merely state aspects of the Court's inherent jurisdiction?

251. Adjournment of trial — A judge may postpone or adjourn a trial to such time and place and upon such terms as he thinks fit.

> 255. Vexatious or irrelevant questions — A judge may in all cases disallow any questions put in cross-examination of any party or other witness which appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter.
>
> 256. Judgment at or after trial — A judge may adjourn a case for further consideration and at or after trial may direct judgment to be entered without a motion for judgment.

[13] Each of the above-noted rules appears to be little more than a statement of the court's inherent jurisdiction to control its own process, particularly in court. Rule 255 is the only one of the three that has received any judicial consideration from Alberta courts in recent years,[4] primarily as regards its application to the scope of cross-examination on affidavits, rather than at trial. In *R. v. Tremblay*,[5] however, the Court of Appeal noted generally that "Canadian law gives no right to cross-examine forever, nor on every conceivable topic."

[14] *In K. (S.D.) v. O. (D.C.)* the Court noted that:

> The scope of cross-examination is determined not only by relevance ... it is also subject to discretion of the Court as to whether a question ought to be answered. This discretion is within a judge's inherent jurisdiction to control the process of proceedings and it is also found in Rule 255 ....[6]

[15] British Columbia has no analogues to Alberta Rules 251 or 255. Examination of case law in the area indicates that it is settled law that the powers set out in our rules are considered to be part and parcel of the Court's inherent jurisdiction.[7]

---

[4] *Luo v. Wang* (2003), 335 A.R. 376, 2 C.P.C. (5th) 81 (Q.B.); *K. (S.D.) v. O. (D.C.)*, 2001 ABQB 907; *Potter v. Graham*, 2001 ABQB 736; *Alberta Treasury Branches v. Leahy* (1999), 254 A.R. 263, 1999 ABQB 829; *Klapstein v. Alberta Mortgage & Housing Corp.* (1998), 216 A.R. 335, 1998 ABCA 185; *R. v. Tremblay* (2003), 320 A.R. 251, 2003 ABCA 33 [*Tremblay*].

[5] *Tremblay*, *ibid.* at para. 13.

[6] *Supra*, note 4 at para. 10.

[7] See, for example: *Lange v. Carlow*, [1984] B.C.J. No. 1639 (C.A.); *Cannaday v. Tod Mountain Development Ltd.* (1997), 29 B.C.L.R. (3d) 97 (C.A.); *Canada Photofax Ltd. v. Cuddeback*, [2003] B.C.J. No. 56 (S.C.) regarding adjournment of trial; *R v. McLaughlin* (1974), 2 O.R. (2d) 514, 15 C.C.C. (2d) 562 (C.A.) and *R. v. Young* (1981), 32 B.C.L.R. 228 (C.A.) regarding vexatious or irrelevant questioning.

[16] Only Newfoundland, Nova Scotia and Saskatchewan have rules analogous to Alberta's Rule 256. Case law regarding the entry of judgment at trial focuses on situations where a judge is invited to decline to enter judgement in accordance with a jury's verdict (see discussion under Issue No. 7, below), or where a judge refuses to enter any judgment at all.[8]

POSITION OF THE GENERAL REWRITE COMMITTEE

[17] The Committee felt these rules were self-evident, and would necessarily form part of the Court's inherent jurisdiction. As such, it was agreed that they need not continue to form part of the rules and should be deleted from the Part.

ISSUE No. 5
Is Rule 255.1 necessary and, if so, are its present terms appropriate?

> 255.1 Exceeding estimated time — Following any pre-trial procedure where counsel has at the request of a case management judge or pursuant to a practice note given an estimate of the time necessary for an examination or cross-examination of a witness, the trial judge may disallow any questions put in examination or cross-examination of the witness where the counsel has, in the opinion of the trial judge, unreasonably exceeded the estimated amount of time with respect to that examination or cross-examination.

[18] Rule 255.1 was added in 1995 as part of the "bundle" of rules dealing with Very Long Trials. The Committee was concerned at the somewhat draconian nature of the rule, again feeling there might be a *Charter* issue in application. Research indicated that the only province with a similar (indeed, identical) provision is Saskatchewan. Further research indicated that Rule 255.1, and its Saskatchewan counterpart, have never been judicially considered and no one on the Committee was aware of its having been applied at any time since its institution. It was felt that, on the whole, the issue of taking an unreasonable amount of time at trial should be dealt with as part of costs.

---

[8] *Gavin v. Kettle River Valley Railway Co.*, [1921] 1 W.W.R. 488, 56 D.L.R. 572 (B.C.C.A.).

POSITION OF THE GENERAL REWRITE COMMITTEE

[19] Rule 255.1 should be removed from the rules.

ISSUE No. 6
Should Rules 252 & 253, both of which deal with views, be merged?

252. View by jury — A party to an action may apply to the court for an order for the inspection by the jury of any real or personal property, inspection of which may be material to the proper determination of the question in dispute.

253. View by judge — The judge by whom any action is tried with or without a jury or before whom any action is brought by way of appeal, may inspect any property or thing concerning which any question arises in the action.

POSITION OF THE GENERAL REWRITE COMMITTEE

[20] As with Rules 245 and 246, the Committee felt these rules could probably be combined and updated as to language. It was felt that the terms "real or personal property" from Rule 252 and "any property or thing" from Rule 253 should be coordinated and, overall, the simpler "any property or thing" was preferred.

ISSUE No. 7
Should Rules 258 and 259, which set out the procedures to be followed in the case of a disagreement or conflict of a jury, be amended and, if so, in what manner?

258. Disagreement of jury — Where the jury disagrees, the action may be re-tried at the same sittings or at any subsequent sittings as may be directed.

259. Jury's answers conflicting —

(1) Where a jury is directed to answer questions and answers some but not all, or where the answers are conflicting so that judgment cannot be entered upon those findings, the action shall be re-tried as in the case of a disagreement.

(2) If the answers entitle either party to judgment as to some but not all the causes of action, the judge may direct judgment to be entered on the causes of action as to which the answers are sufficient, and the issues upon the

> remaining causes of action shall then be re-tried as upon a disagreement.

[21] In *Palpal-Latoc v. Berstad*,[9] Justice Brooker considered the circumstances under which a trial judge might refuse to accept a jury's verdict. He concluded that:

> ... a trial judge may only refuse to accept a jury's verdict when there is no evidence to support the verdict or where the verdict is contrary to law **or in the limited and special circumstances set out in the Rules of Court earlier quoted**. Further, I conclude that in those rare circumstances where the trial judge is entitled to refuse to accept a jury's verdict, the trial judge's options are limited. [emphasis added]

[22] The "Rules of Court earlier quoted" are, of course, Rules 258 and 259.

[23] Judging from the case law relating to these rules and their counterparts from British Columbia[10] and Ontario,[11] these rules are frequently misunderstood by counsel. They are often cited as grounds for an application requesting a judge to replace the verdict of a jury with his own findings.[12] Their application is strictly limited, however, and the provisions are rarely applied, except in certain limited circumstances such as where a jury makes an award for general damages which is greater than the so-called "cap" (in which case, the judge may only order that the cap amount itself be paid)[13] or, in British Columbia, where the parties may consent to have the matter dealt with by the trial judge.[14]

POSITION OF THE GENERAL REWRITE COMMITTEE

[24] The Committee felt that the rules were substantially acceptable "as is," but that the drafter should consider consolidating them and updating the language for greater clarity, as has recently been done in British Columbia and Ontario. The Committee

---

[9] (2003), 15 Alta. L.R. (4th) 187, 7 W.W.R. 443 at para. 33 (Q.B.) [*Palpal-Latoc*].

[10] British Columbia, rr. 41(2); 41(3)-(7).

[11] Ontario, rr. 52.08(1), (2).

[12] As discussed, and as was the case in *Palpal-Latoc*, *supra* note 9.

[13] *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at para 114.

[14] British Columbia, rr. 41(6), 41(7).

also discussed the desirability of incorporating provisions similar to British Columbia Rules 41(6) and (7), which would allow the parties in a mistrial situation to agree to proceed with a judge alone, as follows:

> (6) Continuing trial without jury — Where, for any reason other than the misconduct of a party or the party's counsel, a trial with a jury would be retried, the court, with the consent of the party who required a jury trial, may continue the trial without a jury.
>
> (7) Idem — Where, by reason of the misconduct of a party or the party's counsel, a trial with a jury would be retried, the court, with the consent of all parties adverse in interest to the party whose conduct, or whose counsel's conduct is complained of, may continue the trial without a jury.

[25] Introducing the option of continuing before a judge alone was generally felt to be desirable, as it could lead to completion of matters that might otherwise have to be retried. Concerns were raised with regard to the question of who must give the consent. It was agreed that in cases where the jury could not agree, all parties should consent. Some concerns were expressed, particularly with regard to the "misconduct" provisions as seen in British Columbia Rule 41(7), that a party might deliberately create a situation in which the rule came into play, thus giving themselves a chance to re-try the action. This was felt to be so unlikely, as to be of no concern. However, maintaining the provision that the parties adverse in interest to the party guilty of the misconduct should make the decision as to whether the trial should be continued should have the effect of avoiding even the slight possibility of deliberate misuse of the rule.

ISSUE No. 8
Should Rule 260, the "non-suit" rule, be amended in any way?

> 260. Motion for dismissal at close of plaintiff's case — At the close of the plaintiff's case, the defendant may, without being called upon to elect whether he will call evidence, move for dismissal of the action on the ground that upon the facts and the law no case has been made out.

[26] At common law, a defendant was required to elect to call no evidence before making a non-suit application. This was amended by the introduction, in most Canadian jurisdictions, of a rule analogous to Rule 260.[15]

POSITION OF THE GENERAL REWRITE COMMITTEE

[27] No issues having been raised with regard to Rule 260, the Committee was of the opinion that its removal would result in a change in the law and, in essence, a reversion to a common-law rule which has not been in effect in Alberta for many years. Accordingly, it is recommended that Rule 260 be retained.

B. Evidentiary Rules

ISSUE No. 9
Does Rule 249 require amendment?

> 249. Omission to prove a fact or document — Where through accident or mistake or other cause, any party omits or fails to prove some fact or document material to his case,
>
> (a) the court may proceed with the trial subject to the fact or document being afterwards proved at such time and subject to such conditions as to costs or otherwise as the court directs, and
>
> (b) if the case is being tried by a jury,
>
> (i) the judge may adjourn the jury sittings and require the attendance of the jury trying the case upon a date to be fixed by him upon such terms as to costs as he considers just under the circumstances, or
>
> (ii) the judge may, if satisfied that the fact or document is one, formal proof of which could not be seriously controverted, direct the jury to find a verdict as if the fact or document had been proved before him, and the verdict takes effect on the fact or document being afterwards proved before him; and, if not so proved, judgment shall be entered for the opposite party, unless the court otherwise directs.

---

[15] Ontario, for example, has no analogous rule. As noted in *Meditrust Healthcare Inc. v. Shoppers Drug Mart a Division of Imasco Retail Inc.*, [2000] O.J. No. 3762 at para. 11 (S.C.J.), "in Ontario a party at trial seeking to non-suit the other, is put to his election as to whether or not he will call evidence."

[28] Rule 249 has its counterparts in all other jurisdictions. It has not been considered in any great detail in Alberta, but the Ontario and British Columbia jurisprudence is fairly extensive. In British Columbia, Rule 40(7) provides:

> 40(7) Failure to prove a material fact — Where a party omits or fails to prove some fact material to the party's case, the court may proceed with the trial, subject to that fact being afterwards proved as the court shall direct, and,
>
> (a) if the case is being tried by a jury, the court may direct the jury to find a verdict as if that fact had been proved, and,
>
> (b) unless the court otherwise orders, judgment shall be entered according to whether or not that fact is or is not afterwards proved as directed.

[29] In Ontario, Rule 52.10 is similarly worded:

> 52.10 Failure To Prove A Fact Or Document — Where, through accident, mistake or other cause, a party fails to prove some fact or document material to the party's case,
>
> (a) the judge may proceed with the trial subject to proof of the fact or document afterwards at such time and on such terms as the judge directs; or
>
> (b) where the case is being tried by a jury, the judge may direct the jury to find a verdict as if the fact or document had been proved, and the verdict shall take effect on proof of the fact or document afterwards as directed, and, if it is not so proved, judgment shall be granted to the opposite party, unless the judge directs otherwise.

[30] In practice, this rule and its counterparts are used to re-open evidence, both before a judgment has been given and after judgement has been given but before judgement is entered (thus rendering the trial judge functus). Its application differs significantly from the rules governing the circumstances under which the Court of Appeal may admit "new" evidence. This was discussed at length in *Clayton v. British American Securities Ltd.*,[16] as follows:

> My view has always been that the trial judge might resume the hearing of an action apart from rules until entry of judgment but as it was vigorously combatted I have given it careful consideration. The point, as far as I know, has not been squarely decided; at least by any cases binding upon us. It is, I think, a salutary rule to leave unfettered discretion to the trial judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb

---

[16] [1935] 1 D.L.R. 432, [1934] 3 W.W.R. 257 at paras. 99-100 (C.A.), Macdonald J.A. (B.C.C.A.).

> the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur. If, e.g., a document should be discovered after pronouncement of judgment – but before entry, showing that the judgment was wrong and the trial judge was convinced of its authenticity no lack of diligence by a solicitor in producing it earlier should serve to perpetuate an injustice. The prudent course is to permit the trial judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur.
>
> There are reasons for rules governing the admission of evidence by an Appellate Court, not applicable to a trial judge. Hearing new evidence is a departure from its usual procedure and it is fitting that departures in ordinary practice should be limited by rules to prevent abuse. Entry of judgment may be merely a formality but it is necessary that at some arbitrary point the jurisdiction of the trial judge should end. A vested right to a judgment is then obtained subject to a right to appeal and should not be lightly jeopardized. Before the gate is closed by entry a trial judge is in a better position to exercise discretion apart from rules than an Appellate Court. He knows the factors in the case that influenced his decision and can more readily determine the weight that should be given to new evidence offered. I may add that he might well be guided, although not bound by the rules referred to.

[31] This passage was considered persuasive by the Ontario courts in *Castlerigg Investments Inc. v. Lam*[17], with the additional comment that Justice McDonald:

> ... concluded that there was no basis in the English authorities for fettering a trial judge who has not yet become functus with the same rules which applied to courts of appeal. In particular, there was no basis for a requirement of proof that the evidence could not have been obtained for the trial with the exercise of reasonable diligence. He acknowledged that a trial judge should proceed with caution and should inquire into the circumstances of the discovery of the evidence, but that, having done so, his discretion was untrammelled by the rules that applied to courts of appeal.

POSITION OF THE GENERAL REWRITE COMMITTEE

[32] The utility of Rule 249 is made clear by the jurisprudence from British Columbia and Ontario. Accordingly, it was felt that Rule 249 should be maintained, subject to revision for clarity and brevity.

---

[17] [1991] 2 O.R. (3d) 216, 47 C.P.C. (2d) 270 at para. 9 (Gen. Div.).

C. Substantive Rules

ISSUE No. 10
Is Rule 250, which alters the common law as regards when damages are to be assessed in a continuing cause of action, still necessary?

> 250. Assessing damages — Damages in respect of any continuing cause of action shall be assessed down to the time of the assessment.

[33] Rule 250 codifies an exception to the general, albeit rather archaic, principle that damages are to be assessed as at the date an action to recover those damages is commenced. Without such an exception to the common law, the wronged party would continue to have an ongoing cause of action while the wrong continues, but must bring subsequent actions to recover damages sustained after issuance of the statement of claim. The practical (or, rather, impractical) effect of this was discussed by the Federal Court (which has no analogous rule) in *Watts v. Doolan*:[18]

> I would accept the appraiser's calculation of damages as it stands, were the relevant period 1 July 1985 to the date of the Report ... However the Statement of Claim was issued in September of 1996, thereby cutting off the present claim as of September, 1996. Here I would note that Mr. Watts, whose land is still encumbered with the Kincolith Band's building and radio antenna, is suffering a continuing wrong, yet has a remedy which is currently incomplete. To elaborate, McGregor on Damages, 16th Edition, 1997, Sweet & Maxwell, touches upon the inconvenience, from a plaintiff's view point, of suing on a cause of action which is a continuing wrong. For Mr. Watts there will always be, until all the appurtenances belonging to the Kincolith Band are removed, the possibility of actions to recover damages. McGregor points out that:
>
> > The rule here is that where a single act constitutes a continuing wrong, damages at common law can only be awarded in respect of loss accruing before the commencement of the action by issue of the writ. [(Page 273]
>
> Here the reference is Battishill v. Reed [1856] 18 C.B. 696, 139 E.R. 1544, involving overflow, from eaves and gutter, overhanging the plaintiff's wall. The Court held that only the loss, to the commencement of the action, might be awarded. Thus, each time the wronged plaintiff is harmed enough to make it worth while to try to deter the wrongdoer, he or she must sue to recover for damage which has accumulated since the

---

[18] (2000), 187 F.T.R. 83 at paras. 10-11.

> last writ or statement of claim was issued. McGregor characterizes this as an inconvenient result. I would go further and point out that litigation is a luxury, for all concerned, including the taxpayer who must pay for the use of scarce judicial resources. Indeed, in some jurisdictions this has long been recognized.
>
> In England the Rules of Court, at least as early as Hole v. Chard Union [1894] 1 Ch. 293 (C.A.), provided for an award of damages, for a continuing cause of action, right up to the time of assessment. There is a similar rule in Ontario. However there is no such provision in the Federal Court Act. There is no such provision in the British Columbia Supreme Court Rules which I might usefully import, by way of analogy, pursuant to Federal Court Rule 4, the gap rule.

POSITION OF THE GENERAL REWRITE COMMITTEE

[34] The Committee agreed that the utility of Rule 250 is significant, and recommends that it be retained.

ISSUE No. 11
Should Rule 254 be removed or rewritten?

> 254. Defamation of character of plaintiff — In actions for defamation in which the defendant does not by his defence assert the truth of the statement complained of, the defendant is not entitled on the trial to give evidence in chief (with a view to mitigation of damages) as to the character of the plaintiff without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.

[35] Rule 254 proved particularly problematic for the Committee. It can be read as either a procedural or a substantive rule, depending on the approach taken. The background of the rule is unclear, however, the common law on this point is of long-standing. Essentially, when defamation is proven, damages will be awarded even if there has been no pecuniary loss. The quantum of damages depends on a variety of factors but it has long been a principle that where a person claims damage to their reputation as the result of a defamatory statement, their claim can be reduced where the defendant is able to show that the claimant had a poor reputation prior to the defamation. In other words, the loss of reputation to a person of ill-repute is less than that suffered by a pillar of the community. Where a defendant has not pleaded justification (that is, the truth of the allegedly defamatory statements), however, there

are stringent limitations on the type of evidence a defendant can adduce in order to mitigate damages.

[36] In *Redmond v. Stacey*,[19] Justice Middleton stated:

> Scott v. Sampson (1882) 8 Q.B.D. 491, must be regarded as finally settling the law upon the question as to what may be shown by the defendant in mitigation of damages.
>
> In the article upon LIBEL and SLANDER in Halsbury, vol. 18, pp. 724, 725, Lord Justice Vaughan Williams thus sums up the matter: "the defendant is entitled by the common law to give general evidence in such an action of the plaintiff's bad reputation. But the defendant is not entitled to adduce evidence of particular facts as tending to shew the character and disposition of the plaintiff".

[37] *Scott v. Sampson* was cited approvingly by Lord Denning in *Plato Films Ltd. v. Speidel*[20] at p. 887:

> Scott sued for libel. Sampson pleaded justification and failed. The jury found for Scott with fifteen hundred pounds damages. But, in the course of the trial, Lord Colleridge, C.J., rejected certain evidence which Sampson sought to adduce; and Sampson appealed on the ground that it ought to have been admitted. Most of the rejected evidence related to particular instances of misconduct ... This evidence was clearly inadmissible. Such evidence of particular misconduct has never been allowed in any of the cases save one - Knobell v. Fuller (1797) Peake Add. Cas. 139 ... [which] was so severely handled by Mr. Starkie that no one has taken any note of it since: See Starkie on Slander and Libel (2d) pages 93 to 97....

[38] Lord Denning again cited Starkie at p. 886:

> "The principle on which such general evidence is admitted, whilst evidence of particular facts is excluded, has been frequently recognised ... the party may be prepared with general evidence in support of character though he cannot be supposed to be prepared with evidence to justify his conduct through life."[21]

---

[19] (1917), 13 O.W.N. 206 at paras. 8-9 (H.C.).

[20] [1961] 1 All E.R. 876 (H.L.) [*Plato Films*].

[21] *Ibid*.

[39] How the party may come prepared is explained by Lord Cave in *Scott v. Sampson*[22] itself:

> [A] plaintiff who has notice that general evidence of bad character will be adduced against him, can have no difficulty whatever, if he is a man of good character, in coming prepared with friends who have known him to prove that his reputation has been good. On principle, therefore, it would seem that general evidence of reputation should be admitted....

[40] In short, at common law evidence of general reputation is admissible in mitigation of damages either where justification has been pleaded or where notice has been given. Evidence of specific instances of misconduct, which are not relevant to the actual defamation (and, accordingly, have not been pleaded), are not admissible under any circumstances.

[41] Given this backdrop, the wording of Rule 254 is such that it can be interpreted in one of two quite different ways. Read as a procedural rule, it does not alter the common law but merely provides a mechanism for giving notice of an intention to adduce evidence of reputation in mitigation of damages where justification has not been pleaded. Read as a substantive rule, however, it can be interpreted as adding to the common law by allowing evidence of particular misconduct to be adduced in mitigation of damages so long as the notice provisions are complied with.

[42] Provisions worded much like Rule 254 can be found in the rules of Saskatchewan[23] and Manitoba,[24] and in 21 of Ontario's *Libel and Slander Act*.[25] Each of these other statutory enactments, however, also forbid the leading of evidence regarding the circumstances under which the libel or slander was published. The Ontario provision, for example, reads as follows:

> **Plaintiff's character or circumstances of publication**
>
> **21.** In an action for libel or slander, where the statement of defence does not assert the truth of the statement complained of, the defendant may not give evidence in chief at trial, in mitigation of

---

[22] [1881-85] All E.R. 628, (1882), 8 Q.B.A. 491 at para. 17.

[23] *Saskatchewan Queen's Bench Rules*, r. 276 [Saskatchewan].

[24] Manitoba, *Court of Queen's Bench Rules*, rr. 53.08, 53.09.

[25] R.S.O. 1990, c. L-12, s. 21.

> damages, concerning the plaintiff's character or the circumstances of publication of the statement, except,
>
> (a) where the defendant provides particulars to the plaintiff of the matters on which the defendant intends to give evidence, in the statement of defence or in a notice served at least seven days before trial; or
>
> (b) with leave of the court.

[43] Precursors of the Ontario Statute have been interpreted as providing a mechanism for giving notice that the defendant intends to attack the plaintiff's general reputation, in mitigation of damages, where justification has not been pleaded.[26] This is consistent with the words of Lord Denning in *Plato Films*, where he said that:

> ... when justification was pleaded, as it was in Scott v. Sampson, that case made it clear that, if the defendant intended to give evidence in mitigation of damages, he had to include the material facts in his defence. See what Mathew, J. said and Cave, J. Then in order to cover cases where justification was not pleaded, Ord. 36 R.37, was passed so as to require the defendant to give particulars.[27]

[44] The rule (Ord. 26 R. 37) referred to by Lord Denning appears to have been quite similar to our Rule 254.

[45] Rule 254 has not been given much judicial consideration in Alberta. In *Amalgamated Transit Union v. Independent Canadian Transit Union*, Justice Lutz found that where justification had not been pleaded and where Rule 254 had not been complied with, evidence of the truth of the allegedly defamatory statement could be admissible in evidence in support of the defence of fair comment, but not in mitigation of damages:

> The Plaintiffs argue that the Defendants did not provide them with the mandated particulars, and therefore cannot give evidence on the Plaintiffs' reputation that goes to mitigate damages. I agree with this submission and consider myself bound by Rule 254.[28]

---

[26] *DePalma v. Collier & Son Ltd.*, [1946] O.J. No. 61 (H.C.J.); *Kelly v. Ross*, [1909] O.J. No. 480 (H.C.J.).

[27] *Supra* note 20 at 890.

[28] (1997), 195 A.R. 161, 49 Alta. L.R. (3d) 1, [1997] 5 W.W.R. 662 at para. 62 (Q.B).

[46] In short, it appears that Rule 254 was intended as being merely procedural. Where notice of an intent to adduce evidence of poor character is not given in the pleadings, as would be the case where justification is raised, then notice must be given by compliance with Rule 254. Consultation on this point with Alberta lawyers practising in the area of defamation law indicates that this is how Rule 254 has been understood. Some doubts as to this were, however, raised by certain *obiter* comments in *Capitanescu v. Universal Weld Overlays Inc.*, when Justice McMahon in refusing to admit evidence of particular misconduct of the plaintiffs that the defendants sought to adduce, stated that:

> ... The defendants sought to introduce evidence from several witnesses to show that the plaintiffs, or one of them, engaged in disreputable business conduct by, inter alia, altering quality control records provided routinely to customers.
>
> The plaintiffs objected on two grounds:
>
> 1. Rule 254 was not complied with.
> 2. The defendants did not fairly give to the plaintiffs' primary witness on cross-examination (Teodor Capitanescu) an opportunity to deny or explain the allegations of particular misconduct....
>
> Truth was not asserted in the Statement of Defence and Rule 254 was not complied with as to the furnishing of particulars 7 days before trial....
>
> I concluded that the primary purpose of the evidence of alleged misconduct by the plaintiffs, Capitan Welding and Capitanescu, was to impeach their character with a view to mitigation of damages of any claim by Capitan Overlay. The rule precluded the evidence and I decline to give leave. **General evidence of bad character is admissible in mitigation of damages. Evidence of particular misconduct is not, in the absence of particulars as required by Rule 254. The reason is that no one can be prepared to justify the actions of an entire lifetime — or business career — without notice.**... That has been the case in England since earliest times. See Lord Denning's review of this law in Plato Films v. Speidel ....[29] [emphasis added]

[47] Taken out of context, the comments from *Capitanescu* would have the effect of changing the common law as summarized in *Plato Films*. It is clear that it was never Justice McMahon's intention to do so as, indeed, he specifically referred to *Plato Films* as setting out the state of the law.

---

[29] (1997), 204 A.R. 81, 75 C.P.R. (3d) 145 at 31-34 (Q.B.), rev'd in part on other grounds at (1999), 232 A.R. 334 at paras. 31-34 (C.A.) [*Capitanescu*].

POSITION OF THE GENERAL REWRITE COMMITTEE

[48] The Committee was of the opinion that Rule 254 as currently framed is, at best, confusing and at worst, misleading. The common law already allows a defendant, upon giving notice, to adduce evidence of reputation in mitigation of damages. It does not, however, specify how, or when, such notice is to be given. The language of Rule 254 does not make it clear that it deals only with "general evidence of bad character," as opposed to "evidence of particular misconduct." It was noted that Ontario's similarly-worded enactment had been interpreted as a procedural rule, however the only Alberta law directly on point seemed to indicate otherwise.

[49] The Committee agreed that the intent of the rule could never have been to create a substantive change in the law of defamation. After discussion of a number of alternatives, the Committee agreed that Rule 254 should be retained but rewritten so as to make it clear that it merely establishes a time-frame for the notice period already required by common law before general evidence of reputation can be adduced.

CHAPTER 2. PART 26: TRIAL EVIDENCE RULES

[50] Part 26 of The Rules, Evidence, contains a number of provisions relating to evidence outside of court, all of which have been dealt with elsewhere in the Rules of Court Project. In this part of the Project, the Committee is dealing only with the specific rules relating to evidence. In the consultation process, again, very few comments on the trial evidence rules were received.

ISSUE No. 12
Are Rules 261 - 261.1 appropriate in their current form?

261. (1) Oral examination in court — In the absence of an agreement between the parties and subject to these Rules and the *Evidence Act* and any other enactment relating to evidence, any fact required to be proved at the trial of an action by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court.

(2) Proof by affidavit — The court may, at or before the trial, order

(a) that any fact or facts may be proven by affidavit, or

(b) that the affidavit of any witness may be read at the trial, or

(c) that any witnesses whose attendance, for some sufficient cause, ought to be dispensed with, be examined before an examiner to be appointed by the court,

but where the other party bona fide desires the production of a witness for cross-examination and the witness can be produced, an order shall not be made authorizing his evidence to be given by affidavit.

(3) In any case or matter begun by originating notice or petition and upon any application or motion evidence may be given by affidavit unless these Rules otherwise provide or the court otherwise directs.

261.1 Evidence by telephone, audio-visually or otherwise — On application to the Court and on showing good reason for doing so, the Court may permit evidence to be admitted by telephone, audio-visually or by other means satisfactory to the Court.

POSITION OF THE GENERAL REWRITE COMMITTEE

[51] No problems were identified during the consultation process with either Rule 261 or 261.1. As noted above, several respondents in the early consultation process mentioned the desirability of increased use of electronic communications - particularly video-conferencing - in trial. A number of the comments noted that this could significantly reduce costs for examination of witnesses who reside or work outside of the trial jurisdiction. The Committee agreed, but noted that Rule 261.1 already provides for the use of modern communications technology.

ISSUE No. 13
Is Rule 262 necessary?

> 262. Evidence in subsequent hearings — Any evidence taken at the trial may be used in any subsequent proceedings in that cause or matter.

[52] Newfoundland, the Northwest Territories and Nova Scotia all have rules analogous to Rule 262. It applies to allow for the use of trial evidence at such "subsequent proceedings in that cause or matter" as costs hearings[30] and on appeal.[31]

[53] This rule also reflects Rule 313, which provides:

> 313. Use after filing — Any affidavit which has been made and filed in any cause or matter may be referred to and used at any stage of the proceedings in any application in chambers.

POSITION OF THE GENERAL REWRITE COMMITTEE

[54] While it seemed obvious that evidence at trial could be used in subsequent proceedings – such as costs hearings, taxations and, of course, appeals – it was felt that this rule should be retained to avoid confusion. Also, in light of the Committee's recommendations regarding Rule 263 (see Issue No. 14, below), it was felt that confusion would be avoided if Rule 262 was retained.

---

[30] *Mitran v. Guarantee RV Centre Inc.* (1999), 251 A.R. 77, 72 Alta. L.R. (3d) 54 (Q.B.).

[31] As does r. 513: *General Scrap Iron & Metals Ltd. v. Woloshin* (1995), 174 A.R. 2, 30 Alta. L.R. (3d) 13 (C.A.).

ISSUE No. 14
Is Rule 263 necessary, or does it merely create confusion?

> 263. Read former evidence — An order to read evidence taken in another cause or matter is not necessary; but that evidence may, with all just exceptions, be read
>
> (a) on ex parte applications by leave of the court to be obtained at the time of making the application, and
>
> (b) in any other case, upon the party desiring to use such evidence, giving two days' previous notice to the other parties of his intention to read the evidence.

[55] As a general rule of law, evidence taken or used in one matter is inadmissible for the purpose of another matter, as it constitutes hearsay. Of course, where such evidence has been taken under oath, reliability concerns are considerably lessened and exceptions for such evidence have long been established at common law.[32]

[56] Rule 263 is quite broadly worded, such that at first glance it appears to be a broad derogation from the general rule. However, it has been interpreted very narrowly by Alberta courts. In *Ellis Don Management v. Rae Dawn Construction Ltd.*, Mr. Justice Côté overturned a pre-trial order that evidence from one set of related suits be used in another set, as follows:

> A large feature of trial together would presumably the use of common evidence, rather than its segregation. In any event, that was ordered here. The evidence in the insurance suit is automatically to apply in the construction suits. How that would work is not entirely clear.
>
> And we see some grave objections to that. First, the subcontractor who settled with the insurer (long before the motions in question were launched) would not take any part in the insurance suit. It could not object to the admissibility of evidence, nor cross-examine. That violates natural justice. Nor would it make sense to make that subcontractor again a party for that purpose, for its quarrel is with its former co-plaintiffs, not with the insurers who are the only defendants. Those insurers strenuously and correctly object to having to fight afresh in any respect with someone whom they have paid to go away and drop his claim.
>
> Second, it is most unusual to tell a trial judge in advance what evidence he can and cannot admit. What evidence is proper often depends on the course of trial, and what evidence has preceded. No one

---

[32] *Walkerton (Town) v. Erdman Estate* (1894), 23 S.C.R. 352 [*Erdman*].

> can foresee all the twists and turns of a long trial. Ever since the Judicature Acts, civil trials have been before one trial judge who decides all the issues, factual, procedural and legal, and decides those issues in whatever order to him seems most fit.
>
> Therefore, the order that the evidence in one trial apply maybe years later in a different trial with somewhat different players, appears to us to be unjust and unworkable.[33]

[57] In *Stobbe v. Westfair Foods Ltd.*, Master Funduk responded to an application under Rule 263 as follows:

> Mr. Lister relies on Owen v. Westfair Properties, (1996) 39 Alta. L.R. (3d) 135 (M) and Hewstan v. Westfair Foods Ltd., (Q.B. 9403-06686, Sept. 26, 1997, Master), where it is the same defendant as in the lawsuit before me.
>
> It is not proper to use the evidence given by the Defendant in Owen and Hewstan in this lawsuit. Those are different lawsuits, with different plaintiffs, different accidents, different reports and different witnesses. Ms. Bloomfield was not the Defendant's witness in either Owen or Hewstan. The evidence of the Defendant in Owen and Hewstan cannot be used to impeach the Defendant's evidence in this lawsuit. **The scope of Rule 263 is limited.** See the comments on it in our Civil Procedure Guide 1996, vol. 1, pp. 1161-62. I decline to use the evidence in Owen and Hewstan in this lawsuit.[34] [emphases added]

[58] In *Kroll Associates Inc. v. Calvi*, Justice Kenny set out the appropriate test for the use of Rule 263:

> ...Before evidence from a prior proceeding will be admitted, three criteria must be satisfied. These three criteria were discussed and applied by the Supreme Court of Canada in The Corporation of the Town of Walkerton v. Erdman (1894), 23 S.C.R. 352 at 365-367. The evidence of the witness from a prior proceeding is relevant if:
>
> (1) the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness;
>
> (2) that the questions in issue were substantially the same in the first as in the second proceeding; and
>
> (3) that the proceeding, if civil, was between the same parties, or their representatives in interest. (Stephen's Dig. Law of Evidence, p. 44 as cited in Erdman at 365)

---

[33] (1992), 131 A.R. 190 at paras. 13-16 (C.A.).

[34] (1998), 220 A.R. 241, 1998 ABQB 267 at paras. 10-11.

> The question of the admissibility of evidence from a prior proceeding arose in Erdman (supra). The widow and children of the deceased were claiming in his name for injuries and death suffered through negligence. They sought to have the deceased's evidence taken de bene esse admitted.
>
> King J. applied the facts to the above three part test to determine if the evidence was relevant and therefore admissible. As to the second criteria, King J. stated, at 367:
>
> > It is sufficient that material issues to which the evidence is relevant, and for proof of which it is in each case adduced, are substantially the same in both proceedings.
>
> In Erdman, the material issues in the two actions were held to be substantially the same. [35]

[59] It is of note that in *Erdman*, no rule of court was at issue. Instead, the evidence de benne esse of the deceased was allowed as an exception to the hearsay rule. Coupled with the application of a test from that 1894 decision, this suggests that Rule 263 merely codifies a long-existing principle of common law.

[60] Some other Canadian jurisdictions have rules analogous to Rule 263,[36] and to the extent these rules have been judicially considered, they have been interpreted[37] in much the same fashion as has Rule 263. In British Columbia, the most analogous rule is Rule 40(4), which provides as follows:

> (4) Use of transcript of other proceedings — Where a witness is dead, or is unable to attend and testify because of age, infirmity, sickness or imprisonment or is out of the jurisdiction or his or her attendance cannot be secured by subpoena, the court may permit a transcript of any evidence of that witness taken in any proceeding, hearing or inquiry at which the evidence was taken under oath, whether or not involving the same parties to be put in as evidence, but reasonable notice shall be given of the intention to give that evidence.

---

[35] (1998), 225 A.R. 37, 1998 ABQB 164 at paras. 39-42.

[36] Saskatchewan, r. 285; *Rules of the Supreme Court of the Northwest Territories*, r. 384 [Northwest Territories].

[37] No judicial consideration of Northwest Territories, r. 384 can be found. The sole case found applying Saskatchewan, r. 285 is *Kingfisher Inns Ltd. v. Nipawin (Town)* (2000), 192 Sask. R. 200, 11 M.P.L.R. (3d) 195, 2000 SKQB 122, in which affidavits from two prior actions involving the same parties were entered into evidence to avoid duplication of materials.

Rule 40(4) has been interpreted as having "removed the common law requirement that the same parties be involved in the other proceedings and that the opportunity to cross-examine be present."[38]

[61] In short, it appears as though Rule 263 addresses a point of existing common law as regards a particular type of hearsay evidence, the relevance and admissibility of which is still dealt with a in *Walkerton v. Erdman*. Canadian jurisdictions without an analogous rule seem to have no difficulty in dealing with this particular exception to the hearsay rule by simply applying the *Walkerton* test.[39]

POSITION OF THE GENERAL REWRITE COMMITTEE

[62] The Committee agreed that Rule 263 is confusingly phrased and, to the extent that it has been interpreted as applying in accordance with the common law as stated over a hundred years ago in *Walkerton v. Erdman,* it is unnecessary. Accordingly, its removal from the rules is recommended.

ISSUE No. 15
Do Rules 264 and 265 merely repeat provisions already made in the *Alberta Evidence Act*?

> 264. Copies of filed documents — Whenever any person wishes to produce to the court any pleading or other proceeding filed in any office of the court he may produce a copy certified by the officer in whose custody the pleading or other proceeding is, and the copy is admissible in evidence to the same extent as the original would be admissible.
>
> 265. Certificate of money paid into bank — Where money is directed to be paid into a bank, the certificate of the manager, agent, accountant or other like officer of the bank at the place where the money is made payable of the payment or default in making the payment is sufficient proof of the payment or default.

---

[38] *Sjerven v. Port Alberni Friendship Center* (1999), 67 B.C.L.R. (3d) 379 (S.C.); *Van Osselaer v. Thomas*, [1996] B.C.J. No. 793 (S.C.).

[39] See, for example, *Ayangma v. Canada* (2002), 221 F.T.R. 81, 2002 FCT 707 (T.D.); *Piacente v. Zeppieri & Associates*, [2002] O.J. No. 1110 (S.C.J.).

[63] Both of these matters appear to be dealt with (albeit with much more complex wording) under the *Alberta Evidence Act*,[40] as follows:

> Copies of documents as evidence
>
> 33 When the original record could be received in evidence, a copy
>
> (a) of an official or public document in Alberta purporting to be certified under the hand of the proper officer or the person in whose custody the official or public document is placed ...
>
> is receivable in evidence without proof of the seal of the corporation or of the signature or official character of the person or persons appearing to have signed it and without further proof.

And

> Bank records as evidence
>
> ...
>
> 41(2) Subject to this section, a copy of an entry in a book or record kept in a bank shall in all legal proceedings be received in evidence as proof, in the absence of evidence to the contrary, of the entry and of the matters, transactions and accounts therein.
>
> (3) A copy of an entry in the book or record shall not be received in evidence under this section unless it is first proved
>
> (a) that the book or record was at the time of the making of the entry one of the ordinary books or records of the bank,
>
> (b) that the entry was made in the usual and ordinary course of business,
>
> (c) that the book or record is in the custody or control of the bank, and
>
> (d) that the copy is a true copy thereof.
>
> (4) Evidence to prove the matters required by subsection (3) to be proved may be given by the manager or accountant of the bank and may be given orally or by affidavit sworn before a commissioner for taking affidavits or other competent authority of the like nature.

[64] The only issues identified in this regard were:

1) whether or not a "pleading or other proceeding filed in any office of the court" was also an "official or public document in Alberta" for the purposes of Section 33 of the *Evidence Act*; and
2) whether Rule 265 should be retained as it offered a simpler means of introducing bank records into evidence than that set out in Section 41 of the *Evidence Act*.

---

[40] R.S.A. 2000, c. A-18.

POSITION OF THE GENERAL REWRITE COMMITTEE

[65] The Committee agreed that a pleading held on a court file was indeed a "public document", and that therefore Rule 264 was redundant. As to Rule 265, while it does offer a simpler procedure, it is limited to situations in which the court has directed a payment be made to a bank. The procedure outlined in Section 41 of the *Evidence Act* would, however, suffice and is not complicated, so it was felt that the rule is, therefore, not necessary. Thus, to avoid duplication, the Committee determined that both rules should be removed.

ISSUE No. 16
Are the Witness Rules sufficient?

292. Other party — A party who desires to call as a witness at the trial an opposite party may give him or his solicitor at least five days' notice of the intention to examine him as a witness in the cause, paying at the same time the amount proper for conduct money, and, if the opposite party does not attend on the notice, judgment may be pronounced against him or the trial of the action may be postponed.

293. Witness — Whenever a party desires to call any person as a witness at the hearing or trial of any action or proceeding he may serve him with a notice requiring him to attend thereon, stating the time and place at which he is required to attend and the documents, if any, which he is required to produce, but the notice is not effective unless at the time of service or prior thereto or within a reasonable time prior to the time at which he is required to attend, he is paid the proper amount of conduct money.

294. Failure to attend — (1) Where the Court is satisfied that

(a) a notice to attend has been served on a witness,

(b) the witness has failed to attend or remain in attendance in accordance with the notice,

(c) the witness has been paid the proper conduct money or the proper conduct money has been tendered to the witness, and

(d) the presence of the witness is material to the ends of justice,

the Court may by its warrant direct any peace officer to cause the witness to be apprehended from any place in Alberta.

(2) In issuing a warrant under subrule (1), the Court may direct any one or more of the following:

(a) that the witness be brought forthwith before the Court;

(b) that the witness be detained in custody as the Court may order until the presence of the witness is no longer required by the Court;

(c) that the witness be released on a recognizance, with or without sureties, on the condition of the appearance of the witness to give evidence.

(3) The service on a witness of the notice and the payment or tendering to the witness of conduct money may be proved by an affidavit.

295. Conduct money — Any person required to attend for the purpose of being examined or of producing any document is entitled to the like conduct money as upon attendance at a trial in court.

296. Order to produce prisoner — The court may order the gaoler or other officer having the custody of any prisoner to produce him for any examination authorized by these Rules.

296.1 Rebutting an adverse inference by not calling a witness —

(1) When, in law, an adverse inference might be drawn from the failure of a party to call a witness, that party may serve on any other party a notice of persons not to be called.

(2) A notice under this Rule shall be served no less than 30 days before the trial commences.

(3) The party on whom the notice is served shall, within 15 days of service of the notice, serve on the other party a statement setting out any objection to the intention not to call a person.

(4) If the party on whom the notice is served does not respond to the notice of intention not to call a person, the failure to call that person is not to be found to be adverse to the case of the party serving the notice.

(5) When a party objects to the intention not to call a person, the cost of calling that person shall be paid by the party who objected, whatever the result of the cause, matter or issue unless the Court determines that the objection was reasonable.

(6) Rule 548 does not apply so as to allow the Court to abridge the time mentioned in subrules (2) and (3).

[66] The only issues raised with regard to the "witness rules" had to do with Rules 292 and 293, which appeared to the Committee to be both repetitive and inconsistent with each other.

[67] Rule 292 allows a party to call any person as a witness, subject to notice and conduct money requirements. Rule 293 differs somewhat in that it purports to provide a mechanism for calling an "other party" as a witness. Procedurally, both kinds of witnesses are called in similar fashion.

[68] Review of the rules from other jurisdictions suggests that there are no analogues to Alberta Rule 292 but several other provinces have, instead, "hostile witness" rules. These "hostile witness" rules allow the party properly calling a witness under them to treat the witness as hostile - in other words, to cross-examine that witness as if he or she had been called by the adverse party.[41] No "actual" hostility is required in order to gain the right to cross-examine.

[69] There are a number of other key differences between Rule 292 and the hostile witness rules from British Columbia[42] and Ontario.[43] A chart setting out the three rules is appended to this memorandum for comparative purposes.

[70] One of the key differences between the Alberta rule and the others is that Rule 292 does not in any way purport to give that party calling the opposite party under it an automatic right to cross-examine the witness. Another key distinction is the use of the term "adverse", as opposed to "opposite", parties as set out in Rule 292. Also, Rule 292 mentions only "parties", whereas the other rules specifically include "a director, officer, partner, employee or agent of an adverse party"[44] or an "officer,

---

[41] *Roberts v. R.* (1995), 99 F.T.R. 1 (T.D.); *Redlack v. Vekved* (1996), 82 B.C.A.C. 313 (C.A.).

[42] British Columbia, r. 40(17).

[43] Ontario, r. 53.07.

[44] British Columbia, r. 40(17.1).

director, employee or sole proprietor ... [or] ... partner of a partnership that is an adverse party."[45]

[71] Judicial consideration of the hostile witness rules in other jurisdictions is fairly voluminous. To summarize:

- the application is limited to parties who have not "already testified", and that means testified at trial, as opposed to having given testimony by other means, such as discovery.[46]
- Can include a Minister, even though he is not strictly an employee, officer or director of the Crown.[47].
- Should not be used to allow two cross-examinations of witnesses (who are going to be called by their own counsel).[48]
- ICBC, as third party under statute, cannot use the rule to examine its own insured.[49]
- The definition of an officer under the rule is broader than at discovery.[50]
- However, a plaintiff can use the rule to call a defendant's insurance adjuster.[51]
- But this does not allow the party who could have called the witness (defendant) to cross-examine.[52]
- Probably can't be used by a defendant to cross-examine a plaintiff's independent adjuster.[53]

---

[45] Ontario, r. 53.07(1).

[46] *Townsgate 1 Ltd. v. Klein* (1998), 107 O.A.C. 58 at para. 15 (C.A.).

[47] *Granitile Inc. v. Canada* (1998), 41 C.L.R. (2d) 115 (Ont. Gen. Div.).

[48] *3464920 Canada Inc. v. Strother* (2002), 26 B.L.R. (3d) 235, 2002 BCSC 1179.

[49] *Dyk v. Protec Automotive Repairs* (1997), 38 B.C.L.R. (3d) 153, 12 C.P.C. (4th) 118 (S.C.).

[50] *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1997), 35 O.R. (3d) 369, 14 C.P.C. (4th) 353 (Gen. Div.).

[51] *Whiten v. Pilot Insurance Co.* (1996), 27 O.R. (3d) 479, 132 D.L.R. (4th) 568 (Gen.Div.).

[52] *Ibid*.

[53] *Young Men's Christian Assn. of Hamilton-Wentworth v. 331783 Ontario Ltd.* (2001), 16 C.P.C. (5th) 192 (Ont. S.C.).

- A party can call the same party under the regular witness subpoena rules if notice provisions are not met, but cannot cross-examine as of right. If the witness appears hostile at the time of giving testimony, that can be dealt with.[54]
- The rule doesn't necessarily apply to former agents.[55]
- Failure to make use of the rule can, but does not necessarily, affect a party's right to call for an adverse inference where that party could have called the witness himself under the rule.[56]

[72] No cases were located which directly addressed the issues of whether notice of a specific period (in Alberta, 5 days before the proposed examination, as opposed to "a reasonable time prior" to that). However, the decision in *Eco-Zone* arose when a party attempted to use the rule without having first complied with the notice requirements. That party was then required to call the witness as an ordinary witness, but was not given advance leave to cross-examine the witness. The court found that if the witness proved hostile at the time, other rules could be used to address the situation.

[73] Finally, no cases were found which dealt with the issue of paying conduct money when the witness in question is already in attendance at trial, largely because both British Columbia and Ontario's rules contain provisions that such is not necessary in those circumstances. Presumably, the requirement for paying conduct money is used as a pre-requisite for situations where the witness, having been properly served with notice and conduct money, fails to appear. It seems likely that, in a situation where the proposed witness is already in attendance, the parties might consent (or the court order) that conduct money be waived.

---

[54] *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)* (2002),219 Nfld. & P.E.I.R. 224 (Nfld. S.C.) [*Eco-Zone*].

[55] *Mooney v. Orr Jr.* (1994), 96 B.C.L.R. (2d) 131 (S.C.).

[56] *Prism Hospital Software Inc. v. Hospital Medical Records Institute* (1994), 97 B.C.L.R. (2d) 201, 10 W.W.R. 305 (S.C.).

POSITION OF THE GENERAL REWRITE COMMITTEE

[74] The Committee took note of the result in the Eco-Zone Engineering[57] case and agreed that, unless 292 was to be amended so as to become a "hostile witness rule", only one rule would be required. The Committee felt that a hostile witness rule was unnecessary, as any party could use Rule 293 to call an opposite party if necessary, and the court could rule that witness hostile if necessary.

[75] The Committee then agreed that, in the combined rule, the relevant notice period should be "a reasonable time", rather than 5 (or any other specified number) days' notice.

[76] The Committee also noted that the service provisions in the rule were somewhat inconsistent, a problem which would be magnified if the rules were to be combined. It was agreed that where a potential witness was represented - as would be the case with an adverse party, or the officer, agent, employee, etc. of an adverse party - personal service should still be required but the solicitor should also be served.

[77] Finally, the Committee felt that the requirement for a witness fee should be kept, even in situations where the witness in issue is already in court. The parties would be in a position to agree to waive the fees, or not, but formal tender and formal waiver should be maintained in light of the fact that, should the witness refuse, consequences could flow under Rule 294.

---

[57] *Supra*, note 54.

APPENDIX

RULE 292 AND COUNTERPARTS

Alberta	British Columbia	Ontario
292. Other party — A party who desires to call as a witness at the trial an opposite party may give him or his solicitor at least five days' notice of the intention to examine him as a witness in the cause, paying at the same time the amount proper for conduct money, and, if the opposite party does not attend on the notice, judgment may be pronounced against him or the trial of the action may be postponed.	40(17) Adverse party as witness — Subrules (17.1) to (17.4) apply where a party wishes to call as a witness at the trial (a) an adverse party, or (b) a person who, at the time the notice referred to in subrule (17.1) is delivered, is a director, officer, partner, employee or agent of an adverse party. (17.1) Notice to call adverse party as witness — If a party wishes to call as a witness a person referred to in subrule (17), the party may deliver to the adverse party a notice in Form 40 together with proper witness fees at least 7 days before the day on which the attendance of the intended witness is required. (17.2) Exceptions — Notwithstanding subrule (17.1), a party may (a) call as a witness, without payment of witness fees or previous notice, an adverse party or a current director, officer, partner, employee or agent of an adverse party if the person called is in attendance at the trial, or (b) subpoena an adverse party or a current director, officer, partner, employee or agent of an adverse party. (17.3) Application to set notice aside — The court may set aside a notice delivered under subrule (17.1) on the grounds that (a)the adverse party is unable to procure the attendance of the person named in the notice, (b) the evidence of the person is unnecessary,	53.07 Calling Adverse Party As Witness - Persons to Whom Rule Applies (1) Subrules (2) to (7) apply in respect of the following persons: 1. An adverse party. 2. An officer, director, employee or sole proprietor of an adverse party. 3. A partner of a partnership that is an adverse party. Securing Attendance (2) A party may secure the attendance of a person referred to in subrule (1) as a witness at a trial, (a) by serving the person with a summons to witness, or by serving on the adverse party or the solicitor for the adverse party, at least 10 days before the commencement of the trial, a notice of intention to call the person as a witness; and (b) by paying or tendering attendance money calculated in accordance with Tariff A at the same time. (3) If a person referred to in subrule (1) is in attendance at the trial, it is unnecessary to serve the person with a summons or to pay attendance money to call the person as a witness. When Adverse Party may be Called (4) A party may call a person referred to in subrule (1) as a witness unless, (a) the person has already testified; or (b) the adverse party or the adverse party's counsel undertakes to call the person as a witness.

Alberta	British Columbia	Ontario
	(c) it would work a hardship on the person or the adverse party to require the person to attend the trial, or (d) the person is not a person referred to in subrule (17)(a) or (b). (17.4) Court may make order — On an application under subrule (17.3), the court may make any order it thinks just including, without limitation, an order adjourning the trial. (18) "Adverse party" defined — For the purpose of subrules (17) to (17.3), "adverse party" means a party who is adverse in interest. (19) Refusal to comply with notice — If a person or party called as a witness in accordance with subrule (17.1) or (17.2) refuses or neglects to attend at the trial, to be sworn or to affirm, to answer a proper question put to the person or to produce a document that the person is required to produce, the court may do one or more of the following: (a) pronounce judgment in favour of the party who called the witness; (b) adjourn the trial; (c) make an order as to costs; (d) make any other order it thinks just. (20) Adverse party as witness may be cross-examined — A party calling a witness in accordance with subrule (17.1) or (17.2) is entitled to cross-examine the witness generally on one or more issues. Cross-examination of the witness by counsel for the adverse party shall be confined to explanation of matters brought out in the examination-in-chief. Cross-examination of the witness by other parties may be general or limited, as the court may direct. Re-examination shall be confined to new matters brought out in cross-examination.	Cross-examination (5) A person referred to in subrule (1) may be cross-examined by the party who called him or her as a witness and by any other party who is adverse in interest to that person. Re-examination (6) After a cross-examination under subrule (5), the person may be re-examined by any party who is not entitled to cross-examine under that subrule. Failure to testify (7) The court may grant judgment in favour of the party calling the witness, adjourn the trial or make such other order as is just where a person required to testify under this rule, (a) refuses or neglects to attend at the trial or to remain in attendance at the trial; (b) refuses to be sworn; or (c) refuses to answer any proper question put to him or her or to produce any document or other thing that he or she is required to produce. O. Reg. 536/96, s. 4