ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Document Discovery and Examination for Discovery

Consultation Memorandum No. 12.2

October 2002

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.

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ACKNOWLEDGMENTS

This Consultation Memorandum sets out the proposals of the Working Committee with responsibility for the topic of Discovery and Evidence. The Committee's views are communicated in this paper which was written by Cynthia L. Martens, one of the Institute's counsel. She was greatly assisted by the members of the Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the committee are:

Discovery and Evidence Committee
The Hon. Justice Scott Brooker, Court of Queen's Bench of Alberta
The Hon. Justice Keith G. Ritter, Court of Queen's Bench of Alberta
Alan D. Hunter, Q.C., Code Hunter LLP
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PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute on or before January 31, 2003.

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:

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The process of law reform is essentially public. Unless you request otherwise, ALRI assumes that all ***written comments are not confidential***. ALRI may quote from or refer to your comment in whole or in part and may attribute them to you, although usually we will discuss comments generally and without specific attributions. ***If you wish your comments to be treated as confidential, you must indicate this expressly***.

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BACKGROUND

The Rules Project

The Alberta Rules of Court govern practice and procedure in the Alberta Court of Queen's Bench and the Alberta Court of Appeal. They also apply to the Provincial Court of Alberta whenever the *Provincial Court Act* or regulations do not provide for a specific practice or procedure. The Alberta Rules of Court Project (the Rules Project) is a 3-year project which has undertaken a major review of 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. Overall leadership and direction of the Rules Project is the responsibility of the Steering Committee, whose members are:

The Hon. Justice Neil C. Wittmann (Chair), Court of Appeal of Alberta
The Hon. Judge Allan A. Fradsham, Provincial Court of Alberta
Geoff Ho, Q.C. (Observer), Secretary, Rules of Court Committee
Peter J.M. Lown, Q.C., Director, Alberta Law Reform Institute
The Hon. Justice Eric F. Macklin, Court of Queen's Bench of Alberta
Alan D. Macleod, Q.C., Macleod Dixon
June M. Ross, Q.C., Special Counsel, Alberta Law Reform Institute
Phyllis A. Smith, Q.C., Emery Jamieson LLP
The Hon. Madam Justice Joanne B. Veit, Court of Queen's Bench of Alberta

Project Objectives

The Alberta Rules of Court have not been comprehensively revised since 1968, although they have been amended on numerous occasions. The Rules Project will address the need for rewriting that has arisen over the course of this lengthy period. As well, the legal community and the public have raised concerns about timeliness, affordability and complexity of civil court proceedings.[1] Reforms have been adopted

[1] Notable recent civil justice reform projects responding to these concerns include: Ontario Civil Justice Review, *Civil Justice Review: First Report* (Toronto: Ontario Civil Justice Review, 1995) and Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996); The Right Honourable H.S. Woolf, *Access to Justice: Interim Report to the Lord*

(continued...)

in Alberta and elsewhere to address these issues. In Alberta, some of these new procedures have been included in amendments to the rules, others have been implemented by other means, such as practice directives. The Rules Project will review and assess reform measures that have been adopted and consider other possible reforms.

The Steering Committee approved four Project Objectives that address both the need for rewriting the rules and reforming, or at least rethinking, practice:

Objective # 1: Maximize the Rules' Clarity

Results will include:

- simplifying complex language
- revising unclear language
- consolidating repetitive provisions
- removing obsolete or spent provisions
- shortening rules where possible

Objective # 2: Maximize the Rules' Useability

Results will include:

- reorganizing the rules according to conceptual categories within a coherent whole
- restructuring the rules so that it is easier to locate relevant provisions on any given topic

Objective # 3: Maximize the Rules' Effectiveness

Results will include:

- updating the rules to reflect modern practices
- pragmatic reforms to enhance the courts' process of justice delivery

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[1] (...continued)
Chancellor on the Civil Justice System in England and Wales (London: Lord Chancellor's Department, 1995) [hereinafter *Woolf Interim Report*] and The Right Honourable H.S. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996) [hereinafter *Woolf Report*]; and Canadian Bar Association, Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Toronto: Canadian Bar Association, 1996).

- designing the rules so they facilitate the courts' present and future responsiveness to ongoing technological change, foreseeable systems change and user needs

Objective # 4: Maximize the Rules' Advancement of Justice System Objectives
Results will include:

- pragmatic reforms to advance justice system objectives for civil procedure such as fairness, accessibility, timeliness and cost effectiveness

Purpose Clause

In all Canadian jurisdictions other than Alberta and Saskatchewan, the rules contain a general principle to the effect that they are to be interpreted liberally to secure the just, most expeditious and least expensive determination of every proceeding on its merits. The Steering Committee views this purpose clause as consistent with the Project Objectives and proposes the inclusion of such a clause in the new rules.

Legal Community Consultation

Rules reform should address the needs and concerns of the users of the civil courts. As informed users of the system, and as representatives for public users, lawyers play a particularly essential role in reform. In conducting the Rules Project, ALRI has been looking to the legal community to provide the information and views that give the project its direction.

Consultation with the legal community commenced in the fall of 2001 with ALRI presentations to 9 local bar associations across the province. This was followed by 17 meetings with law firms and Canadian Bar Association (CBA) sections in Edmonton and 17 meetings with law firms and CBA sections in Calgary. In addition, there were meetings with three judicial groups. An Issues Paper describing the Rules Project and seeking input on a range of issues was widely distributed in paper form and made available on the ALRI website and through links on the Law Society of Alberta, Alberta Courts, Alberta Justice and Justice Canada websites. In addition to the input received through consultations with local bar associations, firms and CBA sections, ALRI received 64 letters and e-mails from the legal community with feedback on the Rules Project.

Input from the legal community, whether in the form of letters, e-mails or notes from meetings, was categorized and entered into a central ALRI database. As of September 23, 2002, this database numbered 288 pages and contained 783 comments on different aspects of the civil justice system. This input has been provided to the Rules Project working committees on an ongoing basis, and is summarized in a Report available on our website <http://law.ualberta.ca/alri/>. An excerpt from that Report is set out below.

Legal Community Comments

1. Objectives and approach of the Rules Project

There was widespread agreement among those who commented on this issue that one of the objectives of the Rules Project should be to make the existing rules shorter, more organized and generally more user friendly. Many respondents also expressed the view that some degree of flexibility and informality needed to be retained in the rules such that counsel may reach agreements as to scheduling and other matters amongst themselves. In a similar vein, while some felt that fairly detailed rules are required, others expressed the view that the rules should stay away from "micro managing" and instead provide broad directions and principles for counsel to abide by.

Another theme running through many of the responses in this area was that the Rules Project should not go too far in trying to rewrite the substance of the rules – if it is not "broke", the Project should not try to fix it. Some respondents voiced concerns about the existing rules annotation becoming redundant and procedural points needing to be re-litigated if there are too many significant changes.

Some of the responses raised the issue of implementation of the new rules – it was suggested that the educational and transitional process for the bench and bar should be an important component of the Rules Project.

2. Models from other jurisdictions

Some recommended looking to the British Columbia Rules of Court as a model – the comments reflected the view that these rules are short, effective, well-organized and generally user-friendly. Others thought that the Ontario rules are a model of good organization. Another model suggested for consideration in framing the new rules was the Code of Professional Conduct. The new rules could be fixed, kept fairly short and simple, and be amplified by commentaries and rulings which could change from time to time. Finally, some commented that the Federal Court Rules are not a good model.

3. Uniformity

A frequent comment was that it would be useful to make Alberta practice as consistent with other provinces as possible, particularly the western provinces, due to the increase in inter-provincial litigation and the relaxation of mobility rules.

4. Regional concerns

Some respondents commented that the concerns addressed by the rules don't necessarily apply in smaller centres. Sometimes the problems are "big city/big file" problems, but the "solutions" are imposed across the board. Another point raised was that judges visit from Edmonton, Calgary and elsewhere and each judge brings his or her own practice, which complicates practice in the smaller centres.

5. Application and enforcement of the rules

A frequently expressed concern was that the rules are not being consistently applied and enforced. Respondents pointed out that people need to know that the rules will be applied in a predictable manner, that they will be enforced, and that judges will not impose steps not contemplated by the standard rules. Some also commented on the differences in application by clerks in Edmonton and Calgary. There were concerns that

clerks are making policy, for example, the "docketing statement" which is required in the Calgary Court of Appeal.

Public Consultation

A Public Consultation Paper and Questionnaire was prepared and distributed to organizations with interests that relate to the civil justice system and to the general public. Despite extensive circulation of the Questionnaire, the return rate was disappointing. A total of 98 questionnaires were received by the cutoff date of June 30, 2002. A Public Consultation Paper has been prepared and is available on our website <http://law.ualberta.ca/alri/>. Copies of the Report will also be provided to Rules Project committees and other interested persons. An excerpt from the Report's Conclusions is set out below.

Public Consultation Report: Conclusions

Overall, survey respondents provided insightful feedback and suggestions on various aspects of the Alberta Rules of Court. While many areas received moderate to relatively high satisfaction scores, the purpose of this study is to focus on areas of improvement, or areas receiving relatively high dissatisfaction ratings. Aspects under study can be grouped into high, medium and low levels of respondent dissatisfaction.

Aspects with **high** levels of dissatisfaction (50% or more of respondents dissatisfied) included:

- cost of legal fees;
- time to resolve legal cases; and
- the overall legal process.

Aspects with **medium** levels of dissatisfaction (40 - 49% of respondents dissatisfied) included:

- court forms;
- information available through the court;
- ease of understanding of the legal process;
- the trial;

- the discovery stage; and
- interlocutory hearing(s).

Aspects with **lower** levels of dissatisfaction (30 - 39% of respondents dissatisfied) included:

- documentation required;
- alternatives to a full trial;
- the pleadings stage; and
- formality of the legal process.

Working Committees

Over the course of the Rules Project, working committees have been and will be established to examine particular areas of the rules. The committee structure reflects the "rewriting" and "rethinking" objectives of the Rules Project, and ensures that specialized topics will be reviewed by persons with relevant experience. To date, the General Rules Rewrite Committee and the "Rethink" Committees dealing with Early Resolution of Disputes, Management of Litigation and Discovery and Evidence have been created. At a later date, specialized areas of practice will be dealt with by committees dealing with rules relating to the Enforcement of Judgments, Appeals, Costs, Family Law and other matters. Family Law rules and practice are also the subject of a specialized legal community consultation, now underway with the issuance of an Issues Paper: Family Law Rules, available on our website <http://law.ualberta.ca/alri/>.

Process for Developing Policy Proposals

The major task for working committees is the development of policy proposals regarding the topics included in their mandates. The committees consider the project objectives and purpose clause, rules from other jurisdictions, research prepared by ALRI counsel, and information received in the consultation process. At the current stage of the Rules Project, the committees are concerned with issues of policy, dealing with civil practice and the content of the rules. Drafting issues, such as the organization and the wording of the rules, will be addressed at a later stage.

Discovery and Evidence Committee

One of the areas in the Rules of Court which has been identified as requiring a great deal of attention is the discovery process, including both document discovery and examination for discovery. To ensure that these areas receive appropriate attention, the Discovery and Evidence Committee ("the Committee") has been struck to consider specific issues concerning, *inter alia,* document discovery and examination for discovery. The Committee members are:

The Hon. Justice Scott Brooker, Court of Queen's Bench of Alberta
The Hon. Justice Keith G. Ritter, Court of Queen's Bench of Alberta
Alan D. Hunter, Q.C., Code Hunter LLP
Douglas A. McGillivray, Q.C., Burnet, Duckworth & Palmer
Robert A. Graesser, Q.C., Reynolds, Mirth, Richards & Farmer
Beverly Larbalestier, Larbalestier Stewart
Professor Christopher Levy, University of Calgary, Faculty of Law
Cynthia L. Martens, Counsel, Alberta Law Reform Institute
Doris I. Wilson, Q.C., Special Counsel, Alberta Law Reform Institute

The Committee has met on several occasions between February 2002 and June 2002, and continues to meet in the fall of 2002. During this time many issues concerning document discovery and examination for discovery were discussed at great length. The Committee considered research prepared by ALRI counsel, comments received through Rules of Court consultations or from individuals who had contacted the Institute directly, and rules from other jurisdictions both within and outside of Canada.

In some areas there are issues which overlap with those being considered by other committees in the Rules of Court project. In these instances the Discovery and Evidence Committee has considered the issues in the context of discovery and put forward proposals, but these proposals may be modified in accordance with different proposals from other committees.

Consultation Memorandum

This consultation memorandum addresses issues concerning discovery. Having considered case law, comments from the Bar and the Bench, and comparisons of the rules governing document discovery in other jurisdictions, the Committee has identified a number of discovery issues and has made preliminary proposals regarding these issues. These proposals are not final recommendations, they are merely preliminary 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 area of discovery, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other discovery issues which should be addressed.

This fall the Committee will consider issues relating to experts, independent medical examination, commission evidence, *de bene esse* evidence, and other forms of pre-trial disclosure that are not currently utilized in Alberta. It is anticipated that consultation memoranda on these topics will be provided to the legal profession in the late fall or early in 2003.

We encourage your comments on the issues and the proposals contained herein.

EXECUTIVE SUMMARY

This summary highlights only some of the issues that the Committee discussed and the proposals which it reached. The complete discussion of all issues and Committee proposals is contained in the consultation memorandum.

Highlights of Document Discovery Issues

One issue the Committee considered is that of timelines for filing and serving an affidavit of records and the penalties for failing to comply with the rules in this regard. During consultations there was mixed reaction from the Bar about the current rules which require an affidavit of records to be filed within 90 days of filing of the Statement of Defence. The Committee has attempted to address the Bar's concerns in this regard by proposing that both the Plaintiff and the Defendant must file the Affidavit of Records within 90 days of filing the Statement of Defence. However, an express provision should allow counsel to agree to other time periods which may be shorter or longer than 90 days. Alternatively a court application may be made to extend or shorten the prescribed period. The Committee proposes that there be a specific onus on the party who failed to file the affidavit of records within the prescribed time to show why they should not incur a prescribed penalty. The rule should prescribe a default penalty, such as the current 2x Item 3(1) of Schedule C. The rule should state that the court has discretion to either increase or decrease this amount in the circumstances.

Another issue concerns the appropriate scope of discovery of records. In 1999 the rules were amended to provide that only “material and relevant” documents needed to be produced (and only material and relevant questions need be answered at examination for discovery). The Committee ultimately concluded that it is not desirable to return to the former test of relevance. The most common comment heard during consultations about the "material and relevant" test was that it is being ignored; fewer people indicated that it causes problems. The Committee proposes to keep the present test for "material and relevant". In order to address the concerns expressed about the potential for non-disclosure, the Committee proposes that there be more severe consequences for failing to produce a record which ought to have been produced. Presently the primary consequence of failing to produce a record which

ought to have been produced is in Rule 197, which provides that a party may not use a record in evidence if it has not been produced previously unless the Court is satisfied that there is a good reason for the non-production. The Committee suggests that further express consequences be implemented to bring home the gravity of breaching the duty of full and proper disclosure of records.

The Committee also considered whether insurance policies should be disclosed and produced. This is a requirement in several other Canadian jurisdictions but is not required in Alberta. While it is recognized that there may be benefits to requiring disclosure of insurance policies in motor vehicle accident actions, the Committee did not favour a general requirement of disclosure of insurance policies. At this time the Committee proposes that there be no requirement that contents of insurance policies be disclosed.

An issue that many members of the Bar raised is how should records be described in the affidavit of records. The Committee suggests that the rules should require some description of producible documents. In addition to the present requirements in the rules, the Committee proposes that non-privileged documents be enumerated in a convenient order and a short description of each be included in the affidavit. While the Committee acknowledges that there are problems with the current "bundling" of producible records, bundling may be the most efficient and effective manner of describing certain types of documents. The Committee proposes that the rules specifically set out when a group of documents may be described as a bundle in an affidavit of records, similar to the requirements in the Federal Court Rules. Parties may treat a bundle of documents as a single document if

(a) the documents are all of the same nature; and
(b) the bundle is described in sufficient detail to enable another party to clearly ascertain its contents.

The Committee is of the view that records over which privilege is claimed should be described in the affidavit of records with some particularity. The description should indicate the specific reason for which privilege is claimed for each document except where such a description will risk loss of privilege. These reasons would include that the document has been prepared in anticipation of, or for the purpose of,

litigation; that the record is related to legal advice between counsel and the client, thus being subject to solicitor-client privilege; or that it is "without prejudice" communication between the parties in the course of settlement negotiations. The difference between the common practice today and the Committee's proposal is that each record must identify the ground upon which privilege is claimed, rather than having only general statements of the grounds of privilege which do not correspond with specific records.

The Committee also proposes that the implied undertaking of confidentiality of information produced or given through the discovery process, including both production of documents and information gained from examination for discovery, be stated specifically in the rules.

Examination for Discovery

The Committee considered the question of who should be subject to examination for discovery. The Committee proposes a slight extension of the present rules. There will remain a right to discover an appointed corporate representative, officers, employees and former employees. Additionally, persons who may not be actual employees, former employees or officers of a corporate party, but who have the best direct knowledge of matters in issue as a result of performing duties for the corporation (excluding experts hired for the purposes of the litigation) regardless of the legal characterization of their relationship to the corporation, should also be discovered. This last group may be discovered by consent of the parties or by leave of the court. This is consistent with the direction taken in recent case law. Permitting discovery of those who have the best knowledge of matters in issue will facilitate disclosure and exchange of relevant information, which is one of the primary purposes of discovery. This proposal also reflects the changing nature of employment in Alberta. Many "consultants" or "independent contractors" now perform services for corporations which in the past would have been performed by employees or corporate officers who would have been subject to discovery under the rules.

The Committee also proposes that the rules specify an express duty for the corporate representative to inform him/herself prior to discovery. This is in response

to many comments that appointed corporate representatives often attend at discoveries unprepared and uninformed about matters in issue.

The Committee proposes codifying the method prescribed in case law for having the corporate representative adopt the evidence of employees, former employees, officers and persons who performed services for the corporate party (discussed above) in order to be read in at trial.

One innovation which the Committee suggests is incorporating procedures for using written interrogatories as an optional method of examination for discovery. Though written interrogatories are being used currently to some extent, the Committee feels that it would be useful to have a set procedure governing their use. A proposed set of procedures for using written interrogatories is included in this memorandum.

Due to the increasing use of interpreters in cross-examinations, discovery, and at trial, the Committee is of the opinion that the rules should specifically address the use of interpreters. The Committee proposes that a party requiring an interpreter should give reasonable notice of this need to the party conducting the examination or the cross-examination. The party doing the examination shall then, at their cost, provide the interpreter. This cost would be dealt with as any other disbursement at the conclusion of the litigation.

The Committee proposes that the rules specify an ongoing duty for a person to correct answers given at discovery in writing forthwith if they determine that the answer they gave is incorrect. The Committee was unable to reach a consensus about extending this obligation to providing further information if the answer given was incomplete, and seeks further guidance from the Bar on this issue.

The Committee suggests that answering undertakings be addressed in the rules. If a person at oral examination does not know the answer to a question at the time of the examination, they may undertake to inform themselves and provide the answer. The answers to undertakings should be provided within a reasonable time after the discovery, and the witness may be further examined on those answers.

A full discussion of these and other issues is found in the consultation memorandum.

LIST OF ISSUES

CHAPTER 1. DOCUMENT DISCOVERY

A. Broad Policy Issues

[1] Document discovery is an entrenched part of the civil litigation process. Under the current Alberta rules the major portion of document discovery should take place after the close of pleadings and before the commencement of examinations for discovery.

[2] Discovery of documents serves many purposes. The predominant aim of document discovery is to narrow and define the matters in issue between the parties in an action. It assists in removing matters over which there is no real dispute at the earliest possible time. An effective document discovery process is one of the primary methods of gathering and preserving evidence prior to trial, which minimizes the potential for surprise or ambush at trial. Early disclosure of documentary evidence assists all parties in evaluating their own and their opponents' cases, thus facilitating settlement.[2]

[3] While there are many advantages to having discovery of documents in civil actions, there are also some disadvantages to the process. A common criticism of the existing document discovery process is that it can be subject to abuse. Requiring parties to produce documents of little or no relevance to the matters in issue (often referred to as "fishing expeditions") delays the progress of an action and merely acts to increase the cost of the action. There are also significant costs where extensive documents are involved, which may not outweigh the benefits of document discovery where voluminous documents are of minimal relevance to the matters in issue.[3] Parties sometimes produce vast numbers of documents with the sole intent of making it more

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[2] G.D. Cudmore, *Choate on Discovery*, 2d ed., looseleaf (Toronto: Carswell, 1993) at 1-6 to 1-12.

[3] *Ibid*. at 1-12. See also E.D.D. Tavender, Q.C. & G.L. Tarnowsky, "Reform of the Discovery Process" in Canadian Bar Association, *Issues Papers: Background Study to the Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, 1996) [hereinafter "Tavender & Tarnowsky"] at 2; *Woolf Interim Report*, *supra* note 1 at c. 21, paras. 4-8; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No. 89) (Sydney: Australian Law Reform Commission, 1999) [hereinafter *Managing Justice*] at para. 6.68.

difficult to find truly relevant documents.[4] A further criticism of the existing system is that the procedures and penalties are inadequate where parties improperly conceal or refuse to disclose documents.

[4] The Committee is of the opinion that document discovery should be maintained in some form in civil litigation actions in the Court of Queen's Bench. The Committee hopes to improve the current document discovery procedures to reduce unnecessary cost and delay while still having a system that facilitates appropriate and effective pre-trial disclosure. Thus, when formulating reforms to the rules governing document discovery, the Committee considered the above broad policy questions at the commencement of its discussions and throughout discussions of specific issues. The Committee attempted to reach proposals which balance the advantages of document discovery (defining issues; gathering evidence; evaluating the parties' positions; and facilitating settlement) with the disadvantages of document discovery (cost, delay, and excessive unnecessary production).

B. List of Records

ISSUE No. 1
Does the list of records need to be in affidavit form?

[5] Rule 187.1 currently provides that the list of records must be in affidavit form sworn by a party or a representative of a corporate party, or by another person if so directed by the Court.

[6] During consultations it was questioned whether it is necessary to have the list of records in affidavit form. Some of the points raised include that:

(i) it is counsel who ultimately drafts the affidavit of records and decides whether documents are relevant, material, or privileged, not the client;

(ii) having the client swear the affidavit is "mandatory perjury", as the affidavit states that there are no further records in the deponent's possession which

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[4] There are several studies which indicate that these perceived abuses are much more common in larger, complex litigation matters. See Tavender & Tarnowsky, *ibid*., c. 21, paras. 2-4, 7; *Woolf Interim Report*, *ibid*. at c. 21, para. 28.

are relevant to the action but in almost every examination for discovery further documents come to light;

(iii) in many cases a great deal of time is spent explaining the affidavit of records to a client who really has no real interest in the action (such as a defendant in motor vehicle accident litigation); and

(iv) it can be difficult to have the client swear the affidavit in a timely manner, particularly in light of the new 90 day time limit for filing the affidavit.

[7] Some have suggested that the "affidavit" of records be abolished and replaced by a list of documents in a prescribed form accompanied by a form of solicitor's certificate attesting that the client has been advised of the duty to provide all relevant and material documents. In addition to helping alleviate the problems listed above, it has been suggested that forms may aid junior counsel in drafting a proper list of documents. Forms for lists of records may also assist self-represented litigants in proper disclosure of documents.

[8] Others believe that the affidavit of records should be retained. Some counsel feel that it is useful to have the client swear under oath that there are no other documents, as it brings home the importance of full disclosure. It also gives an officer more "clout" when dealing with senior people in a company, in that the officer may better persuade such people to provide full and timely disclosure on the basis that the completeness of the information will be attested to in a sworn affidavit.

[9] There is also concern as to whether a mere list of documents would remove the ability to cross-examine to ensure that full disclosure has been made. A final concern is how sanctions would be applied for failing to make proper disclosure: should the client or the lawyer be responsible for failing to produce documents which ought to have been produced?

Rules in other jurisdictions

[10] Almost all of the other jurisdictions in Canada have a standard form for the list of records. Ontario, Manitoba,[5] Prince Edward Island,[6] New Brunswick[7] and the Federal Court[8] use standard form affidavits to list documents. These affidavits must be sworn by a party to an action, or by a representative of a corporate party. Saskatchewan and British Columbia use standard forms of "statements of documents" which are not sworn by a party unless the party is self-represented; the statements are signed by the party's solicitor if the party is represented by counsel. British Columbia allows a party to request an affidavit of records after receiving the list if there is doubt as to the completeness or accuracy of disclosure. Saskatchewan's rules provide that the court may permit cross-examination under oath of a party on the statement of records.[9]

[11] Manitoba, New Brunswick, Prince Edward Island, Saskatchewan, British Columbia, Newfoundland, Ontario and the Federal Court all require a "certificate of lawyer (or solicitor)" to be endorsed on the affidavit or list of documents wherein the lawyer certifies that they have explained to the client the necessity of making full disclosure of relevant documents.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[12] The Committee feels that there is great benefit in having the list of records in affidavit form for the reasons described above. In particular, personally swearing an affidavit under oath helps to bring home to the client the importance of full and frank disclosure. The Committee proposes that the requirement for an "affidavit" of records be retained. The Committee suggests that there be a standard form affidavit of records in the rules to foster uniformity.

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[5] Manitoba, *Court of Queen's Bench Rules* [hereinafter "Manitoba"], Forms 30A, 30B.

[6] Prince Edward Island, *Rules of Civil Procedure* [hereinafter "Prince Edward Island"], Forms 30A, 30B.

[7] New Brunswick, *Rules of Court of New Brunswick* [hereinafter "New Brunswick"], Form 31B.

[8] *Federal Court Rules, 1998* [hereinafter "Federal"], Form 223.

[9] Saskatchewan, *Queen's Bench Rules* [hereinafter "Saskatchewan"], r. 215(3).

[13] The Committee proposes that a certificate of counsel on the affidavit of records need not be implemented. Since counsel have a professional obligation to inform the client of the obligation to make complete disclosure, certifying that this has been done is redundant.

ISSUE No. 2
Does the affidavit of records need to be sworn by the party or may someone else swear it in certain circumstances?

[14] A related issue is whether the affidavit needs to be sworn by a party to the action or by the appointed corporate representative in all circumstances. Some have commented that it is often difficult to have a party or officer swear the affidavit, particularly in light of the strict timelines for filing the affidavit of records. An example is a personal injury action where the defendant may not be truly interested in the action. The insurance adjuster is the primary contact and the person who actually provides documents to counsel; the actual defendant rarely has any significant knowledge about records which are relevant and material to the action. It has been suggested that the rules be modified to permit someone other than the party to swear the affidavit of records in special circumstances such as these.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[15] As noted in the previous issue, the Committee is of the view that it is beneficial to have the actual party, or the appointed corporate representative, swear the affidavit of records wherever possible. However, the Committee recognizes that there are circumstances where it may be very difficult or impractical to have the party themselves swear the affidavit of records. To accommodate these situations, the Committee proposes that the present rule which requires the affidavit of records to be sworn by a party remain with a slight modification. The affidavit of records may be sworn by someone other than a party to the action by agreement between the parties or by order of the court. This amendment would allow flexibility in unusual circumstances while minimizing the potential for abuse by requiring consent of the parties or approval of the Court. Such an amendment may reduce delays caused by trying to locate parties who may be missing or unavailable and it may also negate the need to make court applications in such circumstances.

C. Timelines

ISSUE No. 3
What should trigger the obligation to file and serve an affidavit of records? What are reasonable timelines for filing and serving an affidavit of records?

[16] The discovery rules were amended on November 1, 1999 pursuant to the recommendations of a joint Bench-Bar committee, and subsequently recommended by the Rules of Court Committee. These amendments significantly changed the requirements for filing and serving affidavits of records.

[17] Under the old rules the obligation to provide an affidavit of records was not triggered until a party was served with a Notice to Produce. This could be served at any time after the close of pleadings and a party had 10 days to file and serve an affidavit of records (although this time period could be varied by agreement between counsel).

[18] The new rules make filing an affidavit of records automatic. Pursuant to Rule 187, all parties must file and serve an affidavit of records within 90 days after a statement of defence is served unless the court orders otherwise. Third parties must file and serve their affidavits within 90 days of service of their statements of defence. Under Rules 188.1 and 190 the Court may extend the time for filing an affidavit of records if the application is made prior to the expiration of the original 90 day period if it is satisfied that the case is complex, there are voluminous records, or that other sufficient reason justifying an extension exists.

[19] After the new discovery rules came into force the Law Society issued a memorandum to address certain concerns of the Bar:[10]

> At the Rules of Court Committee meeting on December 8, 1999 , issues and concerns raised by the profession concerning the new discovery Rules under Part 13 of the *Alberta Rules of Court* were addressed. The following reflects either recommended changes of the Committee to the new Rules or comments which otherwise, hopefully, address the majority of the concerns raised.

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[10] Memorandum, Law Society of Alberta, "New Discovery Rules", December 14, 1999.

> 2. There is nothing contained within the new Rules prohibiting an agreement among counsel to extend the deadlines imposed by the new Rules. While they do state that Rule 548 does not apply, there is nothing preventing the application of Rule 549. Rule 549 provides:
>
> > "The time for delivering, amending or filing any pleading, answer or other document may be enlarged by consent in writing without application to the Court".
>
> While all of the foregoing may require some amendments or fine tuning to the new discovery Rules, the spirit of the foregoing is to be effective immediately. Chief Justice Moore has also indicated that, although the new Rules contain onerous sanctions, it is fully anticipated that the Court of Queen's Bench will adopt a cautious and practical approach to their enforcement.

1. Mandatory filing within 90 days

[20] During consultations some counsel indicated that they prefer the 90 day period for filing the affidavit of records to the former Notice to Produce system for the reason that it assists in keeping the litigation moving forward on a timely basis. However, many members of the Bar expressed concern with the 90 day rule. A common concern was that 90 days is often not an adequate time period within which to locate all of a client's records, as documents are often held in different places. A frequent comment was that lawyers are simply ignoring the 90 day rule altogether.

[21] There is confusion as to whether the new rules allow counsel to agree to different deadlines for filing and serving the affidavit of records. Both counsel in favour of the 90 day period and those opposed to it expressed this concern. Despite the Law Society memorandum (of which many counsel have indicated that they are unaware) which states that nothing in the rule excludes the application of Rule 549,[11] some counsel, and apparently some judges, interpret the rules as requiring a consent order to extend the time period for filing the affidavit of records.[12] While consent orders may not seem to be an overly onerous requirement, they still cause delay and increase cost to the client. Consent orders require a court appearance, and delay results from the process of drafting the order, getting consent from the other counsel, attending court, filing the order and then serving it. Many counsel would prefer to

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[11] Alberta, *Rules of Court* [hereinafter "Alberta"], r. 549 allows counsel to modify any timelines in the Rules by consent in writing.

[12] From the comments we received through consultation it appears that this is the common practice in Edmonton, while in Calgary more people proceed by way of an informal agreement than by consent order.

have a written agreement not to comply with the 90 day period rather than going by way of a consent order.

[22] It appears that many counsel work around the rule. Some people noted that it is not uncommon for parties to file an incomplete affidavit of records in order to comply with the 90 day rule, and then follow up with supplementary affidavits once they have received all of their clients' documents. Counsel have opined that this is both a waste of time and money.

[23] Another problem with an automatic requirement that an affidavit of records be filed within 90 days is that it forces parties to incur the expense of creating the affidavit of records in cases which are likely to settle either prior to discovery or shortly after the expiration of the 90 day period. Parties are also required to file affidavits of records in matters which are likely never to proceed to discovery for other reasons. In such situations requiring parties to prepare affidavits of records only creates an unnecessary expense. It may also have an effect on the settlement itself as it is a further cost to which Schedule "C" applies, thus causing a party to increase the amount of the settlement offer.

[24] A further concern which has been raised is that in some cases the 90 day rule delays actions. Under the old rules counsel could serve a Notice to Produce, giving the other party ten days to file the affidavit of records. This meant that affidavits of records could be required soon after the close of pleadings. Under the new rule many counsel wait the full 90 days before filing their affidavit of records. Particular concern was expressed in employment law cases. In such cases a plaintiff employee has an interest in moving the matter along quickly while the employer has an interest in delaying the action. The new affidavit of records rules give the employer a statutory right to a three month delay before proceeding with the action.

[25] The Court has expressed the concern that the new rules have failed to achieve their intended purpose of expediting litigation.[13] In *Govenlock* v. *Govenlock*[14] Master Breitkreuz stated:

> I suppose the framers of Rule 190(1) thought that the gravity of the consequences of failure to comply with Rule 187 would result in the litigation process moving forward more quickly thereby resolving the dispute between the parties earlier than if the rule did not exist. My experience in applications under Rule 190(1) is that the very application accelerates the intensity of the animosity between the parties, and whatever possibilities there were of resolving the dispute short of a trial would practically cease to exist. Assuming the purpose of the rule is as I have stated, I think it has failed miserably to serve that purpose in this case.

[26] A specific concern is that the rules do not adequately address actions where it is known that third party notices will be issued. Presently the rules require that the first affidavit of records be filed within 90 days after the filing of the statement of defence, and then amended affidavits be filed as other parties file their pleadings. People have indicated that this is a waste of time and causes unnecessary confusion.

Rules in other jurisdictions

[27] The time for filing affidavits of records (or equivalent) varies from jurisdiction to jurisdiction:[15]

Jurisdiction	Time to File Affidavit of Records	Variation of time period
Ontario[16]	Time set through a schedule prepared by plaintiff or by a case management master	No ability to vary time in schedule without case management order

[13] See also *Sustrik* v. *Alberta AG-Bag Ltd.* 2001 ABQB 808 at paras. 26-28.

[14] 2001 ABQB 47 at para. 7 (Master).

[15] All of these times are based on the "standard track" timelines in the various rules. Some other jurisdictions have "fast tracks" for smaller actions which have different (and usually shorter) timelines.

[16] Ontario, *Rules of Civil Procedure* [hereinafter "Ontario"], r. 77.

Jurisdiction	Time to File Affidavit of Records	Variation of time period
British Columbia[17]	Within 21 days of receiving a demand	Time may be abridged or enlarged by consent of parties
Saskatchewan[18]	Within 10 days after filing of statement of defence	Time commonly extended by agreement between parties
Manitoba[19]	Within 10 days after close of pleadings	Time may be abridged or extended by consent in writing
New Brunswick[20]	Within 10 days of receipt of notice requiring affidavit of documents	Time may be enlarged or abridged by consent
Nova Scotia[21]	Within 60 days after close of pleadings	Time may be enlarged or abridged by consent in writing
Prince Edward Island[22]	Within 10 days after close of pleadings	Time may be enlarged or abridged by consent in writing
Newfoundland[23]	Within 10 days of close of pleadings	Time may be extended by consent in writing filed with Registrar
Federal Court[24]	Every party, within 30 days of close of pleadings	Time may be extended once for 15 days by written consent of all parties

[17] British Columbia, *Supreme Court Rules* [hereinafter "British Columbia"], r. 26(1), r. 3(3).

[18] Saskatchewan, *supra* note 9, r. 212.

[19] Manitoba, *supra* note 5, r. 30.03, r. 3.02(3).

[20] New Brunswick, *supra* note 7, r. 31.03 (1), r. 3.02(4).

[21] Nova Scotia, *Civil Procedure Rules* [hereinafter "Nova Scotia"], r. 20.01, r. 3.03.

[22] Prince Edward Island, *supra* note 6, r. 30.03 (1), r. 3.02(4).

[23] Newfoundland, *Rules of The Supreme Court, 1986* [hereinafter "Newfoundland"], r. 32.02, r. 1.05.

[24] Federal, *supra* note 8, r. 223, r. 7(1)(2) .

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[28] Although the Committee was somewhat divided on this issue, it suggests a proposal which attempts to address the concerns which the Bar has raised. The proposal is that both the Plaintiff and the Defendant must file the Affidavit of Records within 90 days of filing the Statement of Defence. There should be an express provision that counsel may agree to other time periods which may be shorter or longer than the prescribed 90 days. Alternatively a court application may be made to extend or shorten this period.[25]

[29] There are several reasons for maintaining the 90 day period as a default requirement, absent agreement or a court order:

(i) it requires counsel to review files in a timely manner, which reduces the likelihood that a file will be neglected;

(ii) if counsel is not making a legitimate attempt to move a file along in a timely manner, it provides a simple and immediate mechanism for other counsel to move a file along.

[30] Expressly allowing counsel to agree to different time periods addresses those cases in which 90 days is not an appropriate time for filing the affidavit of records, or where it is contemplated that third parties will join the action. An application to the court may be made if counsel refuses to agree to an appropriate time. If the refusal to agree to a different time is unreasonable it may be addressed by costs.

[31] This proposal would also prevent parties from incurring the costs of taking this step where it is likely that a matter will not proceed to discovery. As the parties are permitted to agree to another time period, counsel would not be required to incur an unnecessary expense of creating an affidavit of records in a prescribed time only to have the matter settle shortly thereafter. Presumably if meaningful settlement negotiations are underway, most counsel would agree not to require a strict adherence to any set timelines for filing of an affidavit of records pending the outcome of the negotiations. If a party unreasonably requires another party to prepare an affidavit of records where it is unnecessary to do so, such as where as the matter is unlikely to

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[25] This proposal is subject to the recommendations of the Management of Litigation Committee who will be addressing timelines and requirements for the conduct of actions specifically.

proceed to discovery, an application may be made to the court. If the court agrees that it is unreasonable to file the affidavit of records pending the outcome of some other event (such as negotiations), costs may be awarded against the party who had acted unreasonably.

2. Penalties pertaining to service of affidavits of records

[32] Another change in the 1999 amendments to the discovery rules was the introduction of a mandatory penalty for failing to comply with the rules for filing and serving the affidavit of records. Rule 190 mandates that a minimum penalty of costs in the amount of 2x Item 3(1) of Schedule C be imposed if a party, without sufficient cause, fails to serve the affidavit of records in accordance with the rules. These costs are payable forthwith. Rule 190.1 also allows the Court to strike out a party's pleadings or impose any other sanction for a failure to comply with the rules governing filing and service of the affidavit of records.

[33] During consultations there were many concerns about the mandatory penalty provisions for failing to file affidavits of records in time. The courts have also expressed concern with the lack of discretion in imposing costs for failing to file an affidavit of records.

[34] In *Grzybowski* v. *Fleming*[26] the Court discussed the mandatory nature of the amount of the penalty for failing to file the affidavit of records in accordance with the rules:

> The Rules pertaining to the late filing of affidavit of records are described by the plaintiff's counsel as penal. That may or may not be a proper characterization, but I can at least agree they are draconian.
>
> In my opinion they are clearly intended to be draconian. The costs imposed by Rule 190 are payable forthwith and the court has no authority to order any lesser amount – it can only order a larger amount.

[26] 2001 ABQB 259 at para. 4-5.

[35] The Court's concern about the lack of discretion in determining the amount of the penalty for failing to abide by the timelines for filing affidavit of records was enunciated clearly in *Ironside* v. *Wong*:[27]

> It is with great reluctance that I grant the cross motion of the defendants for an order requiring the plaintiff to pay costs of $2 000.00 forthwith [for failing to file the affidavit of records within 90 days].
>
> There are two reasons for this reluctance, namely:
>
> 1. I believe counsel for the plaintiff thought he would be shown lenience by counsel for the defendants in reciprocation for the lenience he had shown in the matter of the filing of the statement of defence.
>
> 2. A penalty of $2 000.00 in the circumstances of this case is in my view excessive, and to paraphrase Gilbert and Sullivan the penalty does not fit the "crime". If I was not prohibited from setting a lower penalty I would have set it at $500.00.

[36] In *Govenlock, supra,* the Court interpreted the rules in a manner which effectively ignored the mandatory costs sanctions, preferring to exercise discretion in the circumstances. This decision implies that any penalty in costs should be proportional to the breach.

[37] The concept of exercising discretion in imposing the costs penalty for failing to file the affidavit of records in accordance with the rules was dismissed in *Wagner* v. *Petryga Estate*:[28]

> I draw from the decision in *Grzybowski* that it was not incumbent upon the Respondent to show that the Respondent had been prejudiced by the delay in filing and service of the Affidavit of Records....
>
> Moreover, a key object of the Rule appears to be the larger benefit to the administration of civil justice by using sharp discipline to ensure that parties do not drag their feet. The terminology of the Rule suggests that the Court does not want to encourage parties to think waiver of that larger public interest can be assumed.
>
> ...
>
> The Appellant does not point to circumstances beyond his control as a basis of "sufficient cause". The Appellant did suggest that to apply the Rule would have a further effect in this case of increasing the level of animosity between the parties. With great respect to the decision in

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[27] (2000), 275 A.R. 302 at 304 (Q.B. Master).

[28] 2001 ABQB 690 at paras. 18, 19, 24, 26, Watson J.

> *Govenlock,* which adds support to this view, this is in my view an *in terrorem* submission. It challenges the decision to create this Rule.
>
> ...
>
> This Rule, tough as it is, was not created solely for the benefit of the parties but for the larger benefit of the administration of civil justice. There has been national attention given to civil justice through a Task Force and discussions in various jurisdictions. The Rule is not a device of the parties which should engender ill-will between them. It takes the exaction of a duty to provide an Affidavit of Documents away from the parties. It sets a rigorous requirement in that place.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[38] Though the members of the Committee had differing views on this issue, it has attempted to balance the competing interests in its proposal.

[39] There was a concern that if no penalty was prescribed, the onus would fall on the innocent party (i.e. the party bringing the application) to show why it should be entitled to costs. Another problem is that a lack of a specified penalty may also lead to inconsistent decisions as to amounts of penalties for failing to file the affidavit of records pursuant to the requirements in the rules.

[40] The Committee proposes that there be a specific onus on the party who failed to file the affidavit of records within the prescribed time to show why they should not incur a prescribed penalty. There should be a default penalty, being the current 2x Item 3(1) of Schedule C. However, the Court should retain the discretion to either increase or decrease this amount in the circumstances.

[41] The Committee believes that this proposal addresses the concerns which the Bar and the Bench have expressed. It puts a high onus on the party who committed the breach of the rules to justify their behaviour. It also sets a guideline for an appropriate penalty which should assist the Court in exercising discretion to set a penalty based on the specific circumstances.

3. Must the affidavit of records precede discovery?

[42] Presently Rule 189 requires that absent a court order made under Rule 188.1(2), an affidavit of records must be filed prior to examinations for discovery. The rationale behind this rule is to expedite discoveries by ensuring that documents are exchanged

beforehand and to prevent parties from producing documents at trial which were not previously disclosed. However, the Bar has questioned whether it should be mandatory to file an affidavit of records at all. In some cases counsel may decide that it is not necessary and wish to proceed to discovery directly. The rules now require a court order before this can be done. The suggestion is that there should be no need for a court order if counsel agree amongst themselves.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[43] The Committee was divided on the question of whether an affidavit of records should be required prior to discovery. While it was acknowledged that there is merit in the argument that discoveries will likely be more meaningful if the affidavit of records is completed first, there was also support for the proposition that counsel should be able to decide how to run their own case. If counsel determines that an affidavit of records is not necessary, and if the opposing counsel does not require one, a party should not be forced to incur the cost of preparing an affidavit of records. The Committee seeks further input from the Bar on this question.

4. Must the affidavit of records be filed with the Clerk?

[44] A related issue raised is whether the affidavit of records needs to be filed with the Court in all instances. Rarely is the affidavit of records in issue. The result of filing the affidavit is that it simply occupies scarce storage space. It has been suggested that affidavits of records need not be filed unless an issue arises over the affidavit.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[45] The Committee proposes that the affidavit of records not be filed with the court unless an issue arises as to its contents. It may then be filed by agreement between the parties or by court order. The affidavit need only be served on opposing parties.

D. Scope of Discovery

ISSUE No. 4
What is the appropriate scope of document/record discovery?

[46] The Rules which govern the scope of document discovery are 186.1 and 187.1(2)(a):

> 186.1 For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues risen in the pleadings.[29]
>
> 187.1(2) The affidavit of records must disclose relevant and material records and must also specify
>
> (a) which of those records are in the possession, custody or power of the party making the affidavit...

[47] These rules were also part of the discovery rules amendments which came into force on November 1, 1999. Prior to the amendments the rule governing contents of affidavits of documents provided:

> 186(2) At any time after the close of pleadings any party to a cause or matter may by notice in writing require any other party to the cause or matter adverse in interest, to discover by affidavit those documents which are or which have been in his possession or power relating to all matters or questions in the cause or matter, and the party so required shall within 10 days after receipt of the demand discover by affidavit the documents requested.

[48] The amendments to the scope of document discovery are in response to the concerns expressed above about document discovery. It was felt that an expansive scope of document discovery results in the production of numerous unnecessary and largely irrelevant documents which only increase costs of the action and cause delay in the progress of the action.[30] The amendments limit the scope of relevance by excluding tertiary relevance, make discovery of records automatic, increasing the penalties for non-compliance, and making the terminology a little less confusing.[31] By

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[29] The test for "material and relevant" applies to both records which must be produced and to questions which must be answered at oral discovery.

[30] *Supra* notes 2 and 3.

[31] W.A. Stevenson & J.E. Côté, *Alberta Civil Procedure Handbook 2002* (Edmonton, Alberta: Juriliber, 2002) [hereinafter *Civil Procedure Handbook 2002*] at 137; *Liu* v. *West Edmonton Mall Property Inc.,*

(continued...)

doing so these amendments were intended to shorten affidavits of records and examinations for discovery, thus minimizing the costs and delay associated with unnecessary document production.[32]

[49] There is a consensus in the case law that the new rules substantially reduce the scope of document discovery. The new test requires discovery of "documents which do not have mere tertiary relevance" and "all documents...which can reasonably shed light on the issue,"[33] which is far more limited than the old test which required production of documents that merely "related to matters or questions in issue".

[50] Master Funduk has described the new requirement of documents being "material and relevant" as eliminating the "fishing expeditions" which were permitted under the former rules. He stated that under the new rules:

> ... there is no fishing without first evidence that there are fish in the pond and a reasonable amount of fish.[34]

[51] Johnstone, J. adopted this comment in *Liu*, *supra*,[35] and further explained that under the material and relevant test, "conjecture is not sufficient to permit discovery of documents".[36]

[52] The test of whether a record "significantly help[s] determine one or more of the issues raised in the pleadings or ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings" must

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[31] (...continued)
[2000] A.J. 1274 (Q.B.) [hereinafter *Liu*] at para. 18.

[32] *Civil Procedure Handbook 2002*, *ibid*.

[33] *Berube* v. *Wingrowich* 2000 ABQB 625 at paras. 39-40.

[34] *Franco* v. *Hackett* 2000 ABQB 241 at para. 34 (Master).

[35] *Liu*, *supra* note 31 at para. 22.

[36] *Liu*, *supra* note 31 at para. 21.

be determined in relation to all of pleadings in the case, all causes of action, and all facts pleaded.[37]

[53] As there have been few cases which have commented on the effect that the new rules have on document discovery, counsel were asked during consultation how the "material and relevant" test has actually affected document production. Generally speaking, people have suggested that under the new rules:

(i) in practice nothing has changed. People continue to produce, and believe that other counsel are producing, the same documents that would have been produced under the old rule.

(ii) the "material and relevant" test is far too subjective and gives counsel too much discretion about what is to be produced. This is particularly problematic where counsel do not agree on what the issues are. This may be increasing the number of cross-examinations on affidavits of records.

(iii) the new test creates ethical dilemmas. While a document may be "pertinent", it may not be "material and relevant".While a lawyer has a duty to produce documents required by the rules, there is also a duty to the client not to produce documents which are not required. However, under the new test far more documents now fall into the "gray" area than under the old rules. Lawyers are given more latitude under this test to convince themselves that a document is not both material and relevant, though under the old test the document would have been disclosed without question.

(iv) counsel may file lengthier pleadings merely to broaden the scope of document discovery.

[54] Few people have indicated that they believe that the new test achieves its goals of shortening document discovery or lessening expense.

Rules in other jurisdictions

[55] All of the other provinces in Canada have a test that is similar to the former test in Alberta, being that a party must produce documents which "touch the matters in issue" or "relate to the matters in question". The Federal rules provide that "a document is relevant if a party intends to rely on it, or if the document tends to

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[37] *Hepworth* v. *Canadian Equestrian Federation* (2000), 277 A.R. 138 (C.A.).

adversely affect the party's case or support another party's case".[38] Alberta's narrower test is quite unique.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[56] The scope of document discovery is an issue which brings to the forefront the difficulty in balancing the benefits of the process with concerns of costs and delay.

[57] The Committee believes that there are benefits in attempting to limit document production to exclude documents which have only tertiary relevance. The Committee considered the tests from other jurisdictions as well as those expressed in certain rules reform reports. One option which the Committee also considered was having a test similar to that currently contained in the streamlined procedure, Rule 661(3) which provides:

> The affidavit of records need include only each of the following:
>
> (a) those records on which party filing the affidavit relies or may rely;
>
> (b) those records which assist or may assist the case of any adverse party;
>
> (c) those records directly relevant and material to the issues in the action.[39]

[58] The primary concern expressed with this suggestion is that it may increase the problem of counsel failing to produce documents which are in fact material and relevant on the basis of differing views of what is in issue. This would defeat some of the primary benefits of document production such as allowing parties to assess merits of both their own and their opponent's positions, defining issues at an early stage, and preventing surprise at trial.

[59] The Committee ultimately concluded that it is not desirable to return to the former definition. The most common comment about the "material and relevant" test

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[38] Federal, *supra* note 8, r. 222(2).

[39] It is interesting to note that Alberta, *supra* note 11, r. 661(3) may, in fact, require broader document production than those required in r. 187.1. Rule 187.1 requires disclosure of "relevant and material" documents. However, as noted above, a document may be "pertinent" and "relevant" but not material, and as such need not be disclosed. Presumably a party may still rely on such a document at trial, for instance, for the purposes of challenging credibility. It appears that such a document would have to be disclosed under the streamlined procedure but not under the "standard" test.

was that it is being ignored; fewer people indicated that it causes problems. Based on this, the Committee proposes to keep the present test for "material and relevant". In order to address the concerns expressed about the potential for non-disclosure, the Committee proposes that there be more severe consequences for failing to produce a record which ought to have been produced. Presently the primary consequence of failing to produce a record which ought to have been produced is in Rule 197, which provides that a party may not use a record in evidence if it has not been produced previously unless the Court is satisfied that there is a good reason for the non-production.

[60] The Committee suggests that harsher sanctions may deter abuse under the "material and relevant" test. Examples of additional sanctions are found in the rules of other provinces. In addition to prohibiting the use of the document in evidence, some jurisdictions provide that if a party fails to disclose a document which ought to have been disclosed the court may revoke or suspend the right to initiate or continue an examination for discovery;[40] dismiss the action or strike a defence;[41] and impose terms as to costs or otherwise.[42]

E. Continuing Duty

ISSUE No. 5
Should there be a continuing duty to disclose records?

[61] Rule 197(2) currently requires ongoing disclosure of records after the Affidavit of Records is filed.

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[40] New Brunswick, *supra* note 7, r. 31.08(2); Manitoba, *supra* note 5, r. 30.08(2) (for failure to serve affidavit or produce a document for inspection); Ontario, *supra* note 16, r. 30.06(2) (for failure to serve affidavit or produce a document for inspection).

[41] New Brunswick, *supra* note 7, r. 31.08(2); Newfoundland, *supra* note 23, r. 32.10; Manitoba, *supra* note 5, r. 30.08(2) (for failure to serve affidavit or produce a document for inspection); Ontario, *supra* note 16, r. 30.06(2) (for failure to serve affidavit or produce a document for inspection).

[42] New Brunswick, *supra* note 7, r. 31.08(2); Newfoundland, *supra* note 23, r. 32.10; Prince Edward Island, *supra* note , r. 30.08(1); Manitoba, *supra* note 5, r. 30.08(2) (for failure to serve affidavit or produce a document for inspection); Ontario, *supra* note 16, r. 30.06(2) (for failure to serve affidavit or produce a document for inspection).

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[62] The Committee proposes that there be a separate rule specifying that counsel has an ongoing duty to disclose forthwith relevant and material documents which have not been disclosed in the Affidavit of Records. Sanctions for failing to do so would be the same as those discussed above.

F. Technological Issues

ISSUE No. 6
Do the current document discovery rules adequately address technological issues?

[63] Several issues concerning how the present document discovery rules deal with technological issues have been raised during consultations.

Scope of production

[64] "Record" is defined in Rule 186 as including "the physical representation or record of any information, data or other thing that is or is capable of being represented or reproduced visually or by sound, or both".

[65] This definition was part of the November 1, 1999 amendments and attempts to modernize the scope of what can be discovered to include any form of electronic record.

[66] One concern is whether the current definition of record adequately describes the scope of technological information which a party must canvass for production. Apparently parties are increasingly providing some emails pursuant to the new definition of "record", but in many cases do not search deleted records to find emails or documents and records.[43] Other specific types of electronic data which may be

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[43] The *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 31.8 defines "electronic document" as

> data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data.

This is the same definition used in the U.L.C.C.'s *Uniform Electronic Evidence Act*, (Uniform Law Conference of Canada, *Proceedings of the Eightieth Annual Meeting* held at Halifax, Nova Scotia, August

(continued...)

relevant, but may not be included in the current definition of "record", are identified below.

a. Metadata

[67] There have been questions as to how far a party must go in providing details or "metadata" of electronic information outside of the standard text of a document or email. The current definition of "record" may also include not only a document in a text form itself, but also digitized information concerning details of creation, storage, amendments and history of the document which is stored in the computer. The Bar indicates that few, if any, parties are providing this information in the first instance, though there are times when this information can be important.

b. Disaster recovery tapes/databases

[68] A related issue is searching electronic databases or backup recovery tapes. In some cases these databases are huge and contain hundreds of thousands of documents, most of which are absolutely irrelevant to the action. A question has been raised about how far a party must go in searching these databases which can take a long time and can be very costly.

[69] There are methods to search these databases using key words, dates, names, etc.. It has been suggested that it may be useful in these sorts of cases for a party to outline how the search was done in the affidavit of records. If the other party is not satisfied with the search, that party may suggest an alternate search process without having to cross-examine on the affidavit.

c. Deleted files

[70] Disclosure of deleted files and emails is also a concern. In many cases (particularly emails) files may be deleted in the regular course, with no malicious

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[43] (...continued)
1998 at 164), which also provides that

> (a) "data" means representations, in any form, of information or concepts.

However, these definitions also raise questions. Photocopiers and fax machines contain information about the copying and transmittal of documents which may be relevant. Would they be considered to be a "similar device" to a computer system?

intent. Although a document may have been sent to the "trash" file, and even purged from the "trash", it is very difficult to completely erase a computer file. Erased files may be retrieved, though it may be very expensive to do so. The question which has been raised is whether parties in every action need to search all deleted files, and how far must a party go? The comment has been made that when this type of information is in issue it is difficult for another party to know how extensive a search was made. This often results in cross-examination on the affidavit of records to find out how the search was carried out.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[71] The Committee is of the opinion that the current rules (as modified pursuant to the various proposals herein) are broad enough to address the issues relating to changes in technology. After considering definitions of "document" from other jurisdictions, the Committee determined that the present definition of "record" is adequate. Further, the fact that a record may be in electronic form does not change the basic statutory obligation to produce relevant and material documents. Therefore, under the current rules a party must conduct whatever searches of electronic data necessary to fulfil this obligation. If a party believes that the record search is inadequate, they may cross-examine on the affidavit of records, and apply for a further and better affidavit of records. The issue of who bears the responsibility for costs of additional searches is in the court's discretion and thus may be apportioned based on the particular circumstances of the action.

[72] The Committee proposes that no specific changes be made to the rules to address the production of electronic records.

G. Database Programs

ISSUE No. 7
Should the rules address document database programs?

[73] One issue that has been raised is that in larger actions, many firms use document scanning and retrieval programs to organize their document production. There is a question as to whether the actual programs are, or should be, available to other parties.

Sometimes the parties agree to exchange their programs to allow for ease of discovery, but others have expressed that this should be the exception and not the rule.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[74] The Committee is of the opinion that issues concerning document production programs are too specific to be addressed in the rules. There are many problems associated with exchange of document production programs including compatibility and licencing issues which are not properly dealt with in the context of the Rules of Court. As such, the Committee proposes that document production programs not be addressed specifically in the rules.

H. Insurance Policies

ISSUE No. 8
Should insurance policies be disclosed and produced?

[75] Presently there is no requirement in Alberta that a party produce or disclose the contents of, or even the existence of, insurance policies or policy limits. Some provinces specifically require the production of insurance policies if an insurer may be liable to satisfy all or part of a judgment, or liable to indemnify or reimburse a party. Information about the policy is not admissible in evidence unless it is relevant to the issue in the action. Provinces which have this requirement include Ontario, Prince Edward Island, New Brunswick, and Manitoba.[44] The United States Federal Court Rules also require the disclosure of insurance policies.[45]

[76] The rationale for requiring disclosure and production of insurance policies is that information about insurance coverage can play a critical role in settlement discussions.[46] The argument against disclosure is that the insurance policy is not relevant to the matters in issue; it is only relevant to the defendant's ability to satisfy a

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[44] Ontario, *supra* note 16, r. 30.03(3); Prince Edward Island, *supra* note 6, r. 30.03(3); New Brunswick, *supra* note 7, r. 31.02(3); Manitoba, *supra* note 5, r. 30.02(3).

[45] Federal, *supra* note 8, r. 26(b)(2).

[46] See discussion in G.S. Holmested et al., *Holmested and Watson Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1984), v. 3 at 31-106 to 31-108.

judgment. This traditionally has not been a matter which is subject to discovery until after a judgment has been granted.

[77] During consultations some lawyers, including those who practice insurance defence, commented that insurance contracts or policy limits should be disclosed as the "cloak and dagger" approach does not help anyone. It was also noted that disclosing insurance policies may reduce the number of SEF 44 actions. Presently SEF 44 actions must be commenced if there is a possibility that the judgment may exceed policy limits. If the policy limits are not known, the practice is to assume that the policy limit is the statutory minimum. If the claim is potentially more than the statutory minimum an SEF 44 action must be commenced.

[78] There is general agreement that if the policy limits are disclosed to the other party, they should not be disclosed to the court or to a civil jury.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[79] The Committee had concerns about imposing a general requirement to produce insurance policy information. As noted above, the only relevance that an insurance policy has to proceedings (where the policy itself is not in issue) is on a party's ability to satisfy a potential judgment and perhaps on a party's ability to cover the expense of proceeding with an action. As a general proposition these matters should not influence the disposition of an action, though it is recognized that practically speaking insurance coverage may factor into some settlements, particularly where a defendant has no other means and the claim exceeds the policy limits. The Committee was also concerned about the potential effects of a broad requirement to produce insurance policy information in all actions where such policies exist. While there may be benefits in disclosing insurance information in motor vehicle accident actions, insurance policies exist for many other types of actions other than personal injury matters. At this time the effects of disclosing insurance information in other types of actions, particularly in those involving complex commercial insurance policies, are not known. The Committee proposes that there be no general requirement to disclose the contents nor the existence of insurance policies.

[80] The Committee looks forward to receiving more input from the legal community on this particular issue.

I. Description of Records

ISSUE No. 9
How should records be described in the affidavit of records?

[81] As the issues surrounding disclosure of producible documents and privileged documents differ, they will be addressed separately.

1. Description of producible documents

[82] The manner in which the records are described in the affidavit of records has been the subject of much litigation and has been a major concern raised in consultations. The only rule which gives any guidance on description of documents is Rule187.1(2). This rule requires that the affidavit of records must specify, to the best of the deponent's knowledge

(a) which of those records are in the possession, custody or power of the party making the affidavit,

(b) which of those records, if any, the party objects to produce and the grounds for the objection and

(c) which records the party has had in their possession, custody or power; the time when, and the manner in which, they ceased to be in their possession, custody or power; the present whereabouts of the records; and that the party has not and has never had any relevant and material records in their possession, custody or power; or

(d) if a party has not and has never had any relevant and material records in their possession, custody or power.

[83] While the current rules set out the general format of the requisite categories of records which must be listed in the affidavit, there is no guidance as to how records must be described. It has fallen upon the courts to set the requirements for describing documents in the affidavit of records.

[84] The leading case on describing documents is *Dorchak* v. *Krupka*.[47] The Court of Appeal held that the description of documents in the affidavit will vary depending on the number of documents or the size of the action:

> In a medium-sized suit, one often sees dozens of numbered bundles listed in the producible part of the affidavit of documents. If the affidavit gives no indication whatever of their contents, and no other finding tool is provided, that is very likely not a good enough description. It is not insufficient because it violates any particular rule of law, but simply because it is unworkable.
>
> However, an affidavit listing such numbered bundles would suffice if its producible schedule briefly explained the basic nature or course of each bundle. For example, it might say that one bundle contained the invoices and statements from the plaintiff to the defendant respecting the transactions and debts sued for. ...
>
> What is an appropriate description or arrangement for a handful of producible documents may well not be appropriate for a roomful, and vice versa [cites omitted]. What is a suitable mode of description or identification depends a good deal upon the circumstances of the individual case.[48]

[85] The Court suggested that requiring detailed descriptions of individual documents in an affidavit of records is not appropriate:

> Litigation is slow enough without inserting formalities which do little good, creating needless work. We should be streamlining litigation, not burdening it with mystic incantations and ceremonies. So an affidavit of document should not require pointless work or unnecessarily cumbersome methods.[49]

[86] Many counsel have expressed frustration with the "guidelines" set out in *Dorchak*. Most agree that the "bundling" idea simply does not work as some counsel interpret this decision as allowing the description of documents in an affidavit of records as "Binder 1: Documents numbered 1-500; Binder 2: Documents numbered 501-1000; Binder 3: Documents numbered 1001-1500" with no other description. This necessitates applications for further and better affidavits which results in increased cost and delay in the action. It also leads to cross-examinations on affidavits and prolongs examinations for discovery. In most cases lawyers prepare a list of their

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[47] (1997), 196 A.R. 81 (C.A.).

[48] *Ibid*. at 86-87.

[49] *Ibid*. at 86.

producible documents for themselves in any event, thus those who question the "bundling" idea query what hardship would be created if counsel were required to produce a descriptive list of documents in the affidavit of records.

2. Description of privileged documents

[87] The requirements for describing producible documents cannot be the same as those which apply to privileged documents. The distinction between the descriptions of producible and privileged documents was discussed in *Dorchak* v. *Krupka, supra*:

> Any system of listing or describing privileged documents which gives away privileged information is therefore unthinkable. There is considerable danger of giving away secrets by describing the individual privileged documents.
>
> ...
>
> To describe a document as a blueprint, an X-ray, a tracing or log from certain scientific apparatus, or as a videotape or a tape recording, often will give away the whole secret.
>
> The danger of giving away privileged secrets means that the description of the privileged documents need not include dates, contents, or parties to them [cites omitted].
>
> I reiterate that such individual details are not necessary to prove whether the existence of a given privileged document is revealed by the affidavit of documents. A bundle of numbered papers suffices. Indeed, because consecutive document numbers are unambiguous, they are slightly better for that purpose than word descriptions of individual documents.
>
> ...
>
> The description of the documents in the schedule need not corroborate privilege.
>
> ...
>
> Ordinarily one should be able to describe a file or bundle in some manner which will not reveal secrets.[50]

[88] Describing privileged documents is one of the major concerns which has been raised throughout consultations. There is a common consensus that the present guidelines from the case law are inadequate. The general feeling is that privileged documents must be described in a manner which adequately describes the ground upon which privilege is claimed as there is no way of knowing that a document exists if it is not disclosed. Some counsel indicated that a recent case suggests that counsel

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[50] *Ibid*. at 89-93.

may be negligent if they proceed without cross-examining on the affidavit of records to determine why privilege is claimed over specific records.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[89] The Committee believes that the rules should require some description of producible documents. In addition to the present requirements in the rules, the Committee proposes that non-privileged documents be enumerated in a convenient order and a short description of each be included in the affidavit.

[90] While the Committee acknowledges that there are problems with the current "bundling" of documents concept, bundling may be the most efficient and effective manner of describing certain types of documents. The Committee proposes that the rules specifically set out when a group of documents may be described as a bundle in an affidavit of records. The Committee proposes that the Federal Court Rules regarding bundling be adopted. The Federal Court Rules provide that parties may treat bundle of documents as a single document if

> (a) the documents are all of the same nature; and
> (b) the bundle is described in sufficient detail to enable another party to clearly ascertain its contents.

[91] The Committee is of the view that records over which privilege is claimed should be described in the affidavit of records with some particularity. The description should indicate the specific reason for which privilege is claimed for each document except where such a description will risk loss of privilege. These reasons would include that the document has been prepared in anticipation of, or for the purpose of, litigation ("litigation privilege"); that the record is related to legal advice between counsel and the client, thus being subject to solicitor-client privilege; or that it is "without prejudice" communication between the parties in the course of settlement negotiations. The difference between the common practice today and the Committee's proposal is that each record must identify the ground upon which privilege is claimed, rather than having only general statements of the grounds of privilege which do not correspond with specific records.

J. Confidentiality

ISSUE No. 10
How should the rules protect confidentiality of documents?

[92] The present rules provide little guidance on the issue of protection of confidentiality of documents produced in the course of litigation.

[93] There are two issues associated with the confidentiality of records produced in an action:

(i) the implied undertaking of confidentiality;

(ii) confidentiality orders.

1. The implied undertaking of confidentiality

[94] Records produced in an action are *prima facie* subject to an implied undertaking of confidentiality arising from English authority,[51] and this implied undertaking has been confirmed repeatedly in Alberta.[52] The implied undertaking is that any documents or information obtained through discovery may not be used outside the action for any ulterior or ancillary purpose. The rationale for the implied undertaking:

> ...is to ensure full and complete disclosure while maintaining the confidentiality of a private process. The principle driving this undertaking is that the discovery process represents an intrusion on the general right to privacy under the compulsory process of the Court. The necessary corollary is that this intrusion should not be allowed for any purpose other than that of securing justice in the proceeding in which the discovery takes place...[cite omitted][53]

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[51] *Riddick* v. *Thames Bd. Mills Ltd.*, [1977] 3 All E.R. 677 (C.A.); *Home Office* v. *Harman*, [1982] 1 All E.R. 532 (H.L.).

[52] *Ed Miller Sales and Rentals Ltd.* v. *Caterpillar Tractor Co.* (1986), 43 Alta. L.R. (2d) 299 (Q.B.); *Wirth Ltd.* v. *Acadia Pipe and Supply Corp.* (1991), 79 Alta. L.R. (2d) 345 (Q.B.) [hereinafter *Wirth*]; *Colortech Painting and Decorating Ltd.* v. *Toh* 2000 ABQB 814 [hereinafter *Colortech*] at para. 34.

[53] *Colortech*, *ibid.*; see also *Lac d'Amiante du Quebec Lteé.* v. *2858-0702 Quebec. Inc.*, [2001] 2 S.C.R. 743 [hereinafter *Lac d'Amiante*].

[95] The scope of the implied undertaking was summarized in *Wirth*[54] as:

> (1) The implied undertaking which is to the court, attaches to all discovery information whether obtained orally or in the form of documents [cite omitted].
>
> (2) Additionally, a non-disclosure order may be sought from the court in cases where there are special circumstances, such as patent processes, trademark rights, sensitive or personal information, or in highly competitive industries [cites omitted].
>
> (3) There is also a right to apply to the court to remove the document or other evidence in whole or in part from the implied undertaking or sealing order for use in other proceedings. For example, to test the credibility of a witness where that witness has testified before in a proceeding in respect of the same subject matter and it can be shown that the evidence in this proceedings is or appears to be contrary thereto; see *Alberta Evidence Act*, R.S.A. 1980, c. A-21, s.1(c), s. 26. Such application would also cover the possible situation where the discovery discloses fraudulent or criminal conduct. However, notably, "The public interest in investigating possible crimes is not *per se* a sufficient ground to relieve counsel of his or her implied undertaking to keep such information private" [cites omitted].
>
> (4) Counsel, as officers of the court, have a duty not to disclose or use oral evidence or documents outside the subject proceedings, so as to, at all times, honour the implied undertaking.
>
> (5) Counsel, as officers of the court who are not directly involved or involved at all in the proceeding have a similar obligation.
>
> (6) So as not to devalue the implied undertaking and in special circumstances, transcripts and copies of documents may be made available to parties outside the proceedings only with leave of the court. Without leave, no use shall be made of the same by any person who by the discovery or trial process comes into such information or documents.
>
> (7) The implied undertaking and non-disclosure orders continue after the use of the information in court and thereafter except with leave of the court.

[96] A party may apply to waive the confidentiality of documents or information arising from the implied undertaking and use the information in other actions.[55] The Court applies a stringent test in such applications.

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[54] *Supra* note 52 at 361-362.

[55] See *inter alia: Ochitwa* v. *Bombino* (1997), 56 Alta. L.R. (3d) 37 (Q.B.); *Alberta Treasury Branches* v. *Leahy* 2000 ABQB 575; *Schreiber* v. *Canada (Attorney General)* 2000 ABQB 536; *Law Society of Alberta* v. *Randhawa*, [1996] 7 W.W.R. 664 (Q.B.); *Colortech*, *supra* note 52.

Rules in other jurisdictions

[97] The implied undertaking of confidentiality of information obtained through the discovery process has been the subject of court decisions in almost every province in Canada as well as in the Federal Court, and it has been affirmed in each jurisdiction.[56] Though at one time the British Columbia Court of Appeal found that there was no implied undertaking of confidentiality in British Columbia,[57] it subsequently has held that the implied undertaking of confidentiality does in fact apply in British Columbia.[58]

[98] Generally there is no implied undertaking of confidentiality in the civil litigation process in the United States. Parties are free to use in any manner documents that were obtained through the discovery process unless there is an order to the contrary.[59]

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[99] The Discovery and Evidence Committee proposes that the implied undertaking of confidentiality of information produced or given through the discovery process be stated specifically in the rules.

2. Confidentiality orders

[100] In addition to the implied undertaking the court may also grant a confidentiality order,[60] presumably under Rule 199, which allows the Court to "impound" a record produced to the Court. The record may not be inspected by any person without a court order.

[101] As a general proposition, open justice is a fundamental aspect of a democratic society. Based on this principle, materials filed with the court in a civil action become

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[56] See list of case citations in *Goodman* v. *Rossi* (1995), 24 O.R. (3d) 359 (C.A.); *Lac d'Amiante., supra* note 53.

[57] *Kyuquot Logging Ltd.* v. *B.C. Forest Products Ltd.*, [1986] 5 W.W.R. 481 (B.C.C.A.).

[58] *Hunt* v. *Atlas Turner Inc.*, [1995] 5 W.W.R. 518 (B.C.C.A.).

[59] See discussion in *Goodman* v. *Rossi*, *supra* note 56.

[60] See *inter alia*: *Wirth*, *supra* note 52; *FMC Management Consultants (1977) Ltd.* v. *Siemens Transport & Service Ltd.* 1998 ABQB 790 (Master); *Tremco Inc.* v. *Gienow Building Products Ltd.* 2000 ABCA 105 [hereinafter *Tremco*].

a matter of public record. However, it has been recognized that there may be circumstances where it is desirable or necessary to limit public access to materials filed in civil litigation. The Supreme Court of Canada recently prescribed a test for granting confidentiality orders:[61]

1. The Court must be satisfied that a confidentiality order is necessary to prevent serious risk to an important interest, including commercial interests and reasonable alternatives will not prevent the risk. The risk must be substantial, well grounded in evidence. When dealing with commercial interests, the commercial interest must be capable of being expressed in terms of pubic interest in confidentiality, where a general principle is at stake. The Court must consider reasonable alternatives and must also restrict the access as little as possible while still preserving the commercial interest.
2. The salutary effects of the confidentiality order, including the effects on the litigant's right to a fair trial, outweigh its deleterious effects, including its effects on the right to freedom of expression and the public interest in open and accessible court proceedings.

[102] The Federal rules dealing with confidentiality orders specifically recognize the public interest in open court proceedings. The rules provide that the Court must be satisfied that the material should be treated as confidential "notwithstanding the public interest in open and accessible court proceedings".[62] Upon granting the order only solicitors of record or solicitors assisting in the proceedings are entitled to access the sealed materials, and even then they must give a comprehensive written undertaking not to disclose or reproduce the materials except for purposes relating to the action and to destroy any mention of the confidential material at the conclusion of the action.[63]

[103] It must be noted that the principle that the public has an interest in open court proceedings is limited to materials filed in court or produced to the court. It does not

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[61] *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] S.C.J. 42 at para. 50; 211 D.L.R. (4th) 193.

[62] Federal, *supra* note 8, r. 151.

[63] Federal, *supra* note 8, r. 152.

extend to information given in private processes which form part of the litigation system, including examinations for discovery or in interrogatories. As discussed above, information given on discovery which is not produced to the Court is subject to an implied undertaking of confidentiality in that opposing parties to an action may not make use of that information outside of the litigation. The Supreme Court of Canada had confirmed that as discovery is a private process in which the Court is not really involved, the public has no right to access information given in discovery.[64]

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[104] While there should be a provision specifically permitting the Court to seal court documents and records, at this time the Committee sees the test for obtaining a confidentiality order sealing records produced to the Court as a matter of substantive law that does not belong in the rules of procedure. While the language of the rule regarding the actual impounding of records or information produced to the Court should be modernized in a manner similar to that in the Federal rules, the Committee proposes that no actual test for obtaining such an order be inserted into the rules. This issue may be revisited if a significant portion of the Bar prefer to codify the requirements for obtaining confidentiality orders.

K. Third Party Documents

ISSUE No. 11
Are the rules for compelling documents from third parties adequate?

[105] Rule 209 permits a party to compel persons who are not parties to an action to produce records. A party may make an application to have the Court direct production of records that are in the possession, custody or power of a person who is not a party to the action if there is reason to believe that the record is relevant and material, and the person in possession custody or power of the record might be compelled to produce it at trial. The non-party is entitled to the same conduct money as the person would receive if examined for discovery. The party making the application bears the costs of the application in the first instance, but if the Court determines the production results in saving of expense the party making the application may be awarded costs.

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[64] See *Lac d'Amiante*, *supra* note 53.

[106] The case law identifies five considerations for an order under Rule 209:

(1) The rule should not be used as a fishing expedition to discover whether or not a person is in possession of a document;

(2) The documents need not necessarily be admissible in evidence at trial;

(3) The documents of which production is sought must be adequately described, but not necessarily so specifically that they can be picked out from any number of other documents;

(4) The parties' objections to production must be considered, but are not determinative;

(5) The rule cannot be used as a method of obtaining discovery of a person not a party to the action.[65]

[107] The primary issues associated with this rule are the degree of required specificity of describing the documents which are sought, and showing that the documents are relevant and material. In *Miller* v. *Miller*[66] Veit, J. held that an order under Rule 209 should be made where, *inter alia*, a party shows that a trial judge would order a document produced and then rule on relevance. However, in such a case the trial would likely have to be adjourned. Rule 209 allows the parties to obtain the basis for such a ruling in advance, thus saving an unnecessary adjournment at trial.

Rules in other jurisdictions

[108] Most other jurisdictions have some rule permitting the Court to order a non-party to produce documents if it appears that the documents are relevant and necessary to determine issues in the action.[67]

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[65] *Esso Resources Canada Ltd.* v. *Stearns Catalytic Ltd.*, [1989] A.J. No. 618; aff'd. [1990] A.J. No. 479 (C.A.); *Ed Miller Sales and Rentals Ltd.* v. *Caterpillar Tractor Co.*, [1988] A.J. No. 1005 (Q.B.); *Miller* v. *Miller* 2001 ABQB 519; *Metropolitan Trust Co. of Canada* v. *337807 Alberta Ltd.*, [1996] A.J. 291 (C.A.).

[66] *Miller* v. *Miller*, *ibid.* at para. 27.

[67] Ontario, *supra* note 16, r. 30.10; British Columbia, *supra* note 17, r. 26(11); Federal, *supra* note 8, r. 233; Newfoundland, *supra* note 23, r. 32.07; New Brunswick, *supra* note 7, r. 31.11; Prince Edward Island, *supra* note 6, r. 30.10; Nova Scotia, *supra* note 21, r. 20.06.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[109] The Committee noted that Rule 209 must balance two competing interests:

1. the desirability of complete disclosure of records; and
2. the need to minimize inconvenience to persons who are not parties to an action.

[110] The Committee proposes to retain Rule 209 in its current form. An express provision should be added requiring that notice of the application be given to the person from whom the records are sought prior to the application.

CHAPTER 2. EXAMINATION FOR DISCOVERY

A. Broad Policy Issues

[111] In the past years several reports have identified the examination for discovery process as the stage in litigation which creates the most delay and contributes significantly to the cost of the action.[68] Scheduling oral discoveries can be difficult, particularly where multiple parties are involved. Oral discovery is sometimes abused through excessive and repetitive questioning of one or many witnesses. Other complaints pertain to unnecessary questioning or requests for irrelevant information which contribute to escalating costs and delay in the litigation process. Many of these reports have suggested that the solution to these problems with discovery is to impose limits on the discovery process such as prescribing the allowable number of witnesses, the time within which discovery is to be completed, or prohibiting discovery in certain types of actions.

[112] Despite the criticisms levelled towards the discovery process, the same reports all acknowledge that examination for discovery plays an integral role in the litigation process. Examination for discovery assists in defining and eliminating issues in an action; it allows parties to obtain admissions and evidence; it allows parties to evaluate their own and each other's potential witnesses; and it minimizes the potential for surprise or ambush at trial, which can result in delays and thrown away costs. All of these functions assist parties in evaluating their cases, which increases the possibility of early settlement prior to trial.[69]

[113] When considering reforms to the rules governing examination for discovery, the Committee took these broad policy considerations into account at the commencement of its discussions and throughout the discussions of specific issues. The Committee has attempted to formulate proposals which strike an appropriate balance between the cost and delay of examination for discovery and the benefits that result from the process. One alternative the Committee considered was imposing specific limits on

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[68] Tavender & Tarnowsky, *supra* note 3 at 1-2; *Woolf Interim Report*, *supra* note 1 at c. 21, paras. 4-8; *Managing Justice*, *supra* note 3 at paras. 6.67-6.68; Cudmore, *supra* note 2 at 1-12.

[69] Cudmore, *supra* note 2 at 1-6 to 1-12; Tavender & Tarnowsky, *supra* note 3; *Managing Justice*, *supra* note 3 at para. 6.67.

oral discovery. However, the Committee was of the opinion that the overall benefits of oral discovery outweigh the problems of cost and delay of the oral discovery process. The Committee felt that imposing arbitrary limits on oral discovery was neither appropriate nor feasible as it is nearly impossible to prescribe limits which are suitable for every action, or even for classes of actions. It is probable that to do so would likely increase cost and delay through applications to modify the procedures to suit particular actions. Instead, the Committee's proposals focus more on making oral discoveries more efficient, effective and meaningful which will also reduce both delay and costs of this stage of the litigation process.

B. Scope of Discovery

ISSUE No. 12
Is the "material and relevant" test for scope of questions adequate?

[114] The present rules which govern the scope of questions at examination for discovery are 186.1 and 200(1) and (1.2):

> 186.1 For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.
>
> 200 (1.2) During the oral examination, under subrule (1), a person is required to answer only relevant and material questions.

[115] These rules were amended on November 1, 1999 pursuant to the recommendations of a joint Bench-Bar committee which were subsequently recommended by the Rules of Court Committee. Prior to the amendments, the test for the scope of examination for discovery was broader, allowing witnesses to be orally examined about things that touched the matters in question.

[116] The amendments to the scope of oral discovery were intended to respond to some of the criticisms about the discovery process. In particular, it was hoped that narrowing the scope of questioning would shorten examinations for discovery by

excluding tertiary relevance.[70] Theoretically this would assist the problems inherent in scheduling examinations for discovery as fewer days would be needed, thus reducing delay in the process. Shorter examinations for discovery should also result in lower costs of litigation.

[117] The narrower scope of oral discovery has been confirmed in case law.[71] Despite this, during consultation many counsel have indicated that in practice the new test is largely being ignored. Counsel also noted that they seldom take issue with a question in discovery on the ground that it is does not meet the new "material and relevant" test; objections made on the basis of relevancy would have also been made under the former rules. It was suggested that it simply is not worthwhile to make "niggling" objections as to relevancy, as the time and cost of doing so is usually not proportional to the harm that the objectionable question causes.

Rules in other jurisdictions

[118] All of the other provinces in Canada have a test that is similar to the former test in Alberta, being that on discovery a witness must answer questions which "touch the matters in issue in the action" or "relate to the matters in question". The Federal Court Rules provide that a person must answer questions that are "relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party".

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[119] The scope of examination for discovery is an issue which brings to the forefront the difficulty in balancing the benefits of the process with concerns of costs and delay. Allowing a broad, virtually unfettered scope of examination for discovery may ensure that any and all information is brought out, regardless of whether it is truly material or relevant to the issues in the action. However, a broad scope also increases the length of examination for discoveries, which in turn increases both the cost of the process and the time it takes to complete discoveries.

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[70] *Civil Procedure Handbook 2002*, *supra* note 31 at 137.

[71] *Liu*, *supra* note 31 at para. 18; *D'Elia* v. *Dansereau* 2000 ABQB 425 at paras. 16-17, Perras J.; adopted in *Coombs (Guardian of)* v. *Denham Investments Ltd.* 2000 ABQB 669, aff'd. 2001 ABCA 103; see also *750869 Alberta Ltd.* v. *Cambridge Shopping Centres Ltd.* 2001 ABQB 36; *Dunn* v. *Dunn* 2001 ABQB 852; *Builders Holdings* v. *Gasland Properties Ltd.* 2000 ABQB 55.

[120] The Committee concluded that it is not desirable to return to the former test for the scope of examination for discovery, as there are benefits in attempting to limit questions in examination for discovery by excluding questions which have only tertiary relevance. As counsel become more familiar with the narrower test, it is likely that examinations for discovery may be shortened, resulting in a savings of both time and money. The most common comment heard during consultations about the "material and relevant" test was that it is being ignored. There was more concern about the narrower test in document discovery than in examination for discovery. The concern expressed with the test in relation to document production was that if a document was not produced on the ground that it was not material or relevant, the other party has little ability to object as the existence of that record may not be known.[72] However, in oral discovery the question may be asked and if an issue arises over its materiality or relevancy, the matter may be decided by the court.

[121] It is recognized that the "material and relevant" test actually is more limited than the test used for admissibility of evidence at trial. To be admissible at trial, evidence need only be (i) relevant and (ii) not subject to exclusion under any other rule of law or policy.[73] There is no requirement that evidence be "material" (as defined in the present rules) in order to be admissible. For example, a document that relates to the credibility of a witness is not material under the present definition in the rules and thus need not be produced. However, such a document would be admissible at trial. The Committee recognizes that having the same test for required production of pre-trial evidence and admissibility of evidence at trial may prevent any surprises or ambushes at trial. However, the Committee feels that the present "material and relevant" test is the most effective way of minimizing pre-trial cost and delay while still permitting sufficient disclosure of evidence prior to trial.

[122] Having considered all these matters, the Committee proposes to keep the present "material and relevant" test for both document discovery and examination for discovery.

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[72] This is discussed in the issues paper concerning reforms to the document discovery process.

[73] See J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 23-26.

C. Timing of Discovery

ISSUE No. 13
When should examinations for discovery be held?

[123] Presently Rule 203 provides that a plaintiff may examine a defendant after the time for delivering the statement of defence has expired, or the party has been noted in default. A defendant may examine after the statement of defence of the defendant, employer or assignee has been served. Under Rule 189 the examination cannot take place until the affidavits of records have been filed, absent an order of the Court.

[124] An issue which has been raised is whether the rules should permit examination for discovery prior to the commencement of an action, particularly in cases where it may be necessary to examine a party to determine the identity of a defendant prior to the expiration of a limitation period. New Brunswick's rules provide that the Court may grant leave to any person to examine for discovery, before commencement of proceedings, any other person who may have information identifying an intended defendant.[74] A party seeking such an order must show that

(a) the applicant has a *prima facie* case for relief against the intended defendant,

(b) the applicant, having made reasonable inquiries, has been unable to identify the intended defendant, and

(c) the applicant has reason to believe that the person to be examined has knowledge of facts, or has in his possession, custody or control documents or things identifying the intended defendant.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[125] The Committee suggests that it is appropriate to retain the current requirements that examinations for discovery not be held until a statement of defence has been served (or the time for doing so has expired). Rule 548 gives the Court jurisdiction to allow an examination for discovery prior to the close of pleadings in extraordinary

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[74] New Brunswick, *supra* note 7, r. 32.12.

circumstances. As these cases are the exception rather than the norm, and presuming that a rule similar to that in Rule 548 is incorporated into the new rules, the Committee proposes that it is not necessary to create a rule to address this situation.

D. Persons Subject to Discovery

ISSUE No. 14
Who should be discovered?

[126] Rules 200, and 201-202 provide a *prima facie* right to examine:

(a) any other party to the proceedings who is adverse in interest,

(b) if the other adverse party is a corporation, one or more officers of the corporation, and

(c) one or more other persons who are or were employed by the other party, and who have or appear to have knowledge of a matter raised in the pleadings that was acquired by virtue of that employment,

(d) an auditor who is or has been engaged by a party,

(e) a member of a firm which is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination.

(f) where an action is brought by or against an assignee of a chose in action or by or against an endorsee or holder of a bill of exchange, the court may order an examination of

(i) any assignor of the chose in action,

(ii) any prior endorser or holder or maker of the bill of exchange,

(iii) any employee or former employee and, in the case of a corporation, any officer or former officer, of any assignor of the chose in action or of any prior endorser or holder or maker of the bill of exchange, who appears to have some knowledge that is relevant and material to the question in issue.

[127] The question of who may be orally examined for discovery raises significant policy issues, particularly with respect to corporate parties. As noted above, one of the major criticisms of the oral examination for discovery process is the delay in

completing the examinations. Clearly a broader right of examination permitting examinations of numerous people may create lengthy delays and can be very expensive. However, more thorough pre-trial disclosure of evidence results from broader rights of examination, which, as discussed above, is more likely to facilitate settlement prior to trial. The primary issue is how to balance these competing interests in a manner which facilitates an appropriate amount of pre-trial disclosure while minimizing the cost and delay of the process.

[128] Presently the Alberta rules permit discovery, without order, of the appointed corporate officer, as well as any other officer, employee or former employee of a corporate party. This is quite a broad right in comparison with most other jurisdictions in Canada where the right of examination is limited to one officer or employee of a corporate party without order.[75] Only Nova Scotia and Newfoundland permit discovery of any person who has knowledge touching the matters in issue, and the discovery evidence may be used at trial against any party adverse in interest.[76] Many American jurisdictions also give parties the right to depose virtually any witness who has relevant evidence.[77]

[129] In consultations differing opinions have been expressed on the breadth of examination for discovery. Some feel that there should be a broader right of discovery than exists presently, to include any potential witnesses. Others believe that discovery should be limited, but that other amendments should be made to ensure that the appointed officer is actually the best informed representative of the party and to allow for written interrogatories of other witnesses. A third group prefers to leave the rules the way they are.

[130] The merits and concerns of these different approaches are discussed below.

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[75] Saskatchewan, *supra* note 9, r. 223(4); Ontario, *supra* note 16, r. 31.03; British Columbia, *supra* note 17, r. 27(4)(5); Prince Edward Island, *supra* note 6, r. 31.03; New Brunswick, *supra* note 7, r. 32.02; Manitoba, *supra* note 5, r. 31.03; Federal, *supra* note 8, r. 237.

[76] Nova Scotia, *supra* note 21, r. 18; Newfoundland, *supra* note 23, r. 30.01.

[77] For example, the United States *Federal Rules of Civil Procedure*, r. 30, allows up to 10 people to be deposed orally prior to trial without leave of the Court. Leave of the Court or consent of the parties is required if a party intends to depose more than 10 witnesses in an action.

1. Limiting examination for discovery

[131] In terms of examining people who may be considered "related" to a party, the issue of who should be examined only arises in relation to corporate parties. The examination of "bare" witnesses is addressed separately below.

[132] As noted above, during consultation some people preferred the approach taken in the majority of Canadian jurisdictions,[78] where discovery as of right is limited to examination of one corporate party representative. Discovery of more than one person associated with a corporate party may only be done with leave of the court. However, there were significant concerns about limiting discovery to one corporate representative. Counsel have indicated that examining other officers or employees of the corporation greatly assists in obtaining relevant and material evidence which is a key to settling matters prior to trial. A further oft-repeated comment is that it is not uncommon for the employee evidence to differ significantly from that of the officer, which can have significant ramifications in terms of evaluating the parties' respective cases.

[133] A frequent issue with limiting discovery is the lack of knowledge of the appointed corporate representative.[79] Restricting examination to one corporate representative would likely increase the need for undertakings as the appointed representative usually does not, and often can not, be fully apprised of all of the relevant and material information about the matters in issue. People are concerned about the effectiveness of written responses to undertakings as these answers are "sanitized" by counsel rather than being the words of the witness. Forcing an increased use of undertakings may undermine the effectiveness of the examination for discovery process. The parties' ability to gather evidence and admissions and to evaluate potential witness' credibility will be greatly reduced. This is not a desirable result and is likely to decrease the possibility of early resolution of the dispute. Many suggested that the advantages of limiting discovery of persons associated with a corporate party does not outweigh the harm that would be incurred by so doing.

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[78] See, *supra* note 75.

[79] Proposals to deal with the uniformed corporate representative are discussed in detail below.

2. Broadening examination for discovery

a. Allowing examination of non-parties

[134] There are two groups of "non-parties" who potentially may be discovered:

(a) persons associated with, although not employed by, a corporate party who have the best knowledge of matters in issue; or

(b) persons who are merely witnesses.

i. Persons associated with a corporate party

[135] There are several Alberta cases wherein the Court has granted leave to examine persons who are not officers, employees or former employees of a corporation.[80] In each case the Court held that Rule 200 should be given a wide application to allow for pre-trial disclosure of vital information which is not privileged and the person sought to be examined was the person connected with the company best informed about matters which may have defined and narrowed the issues between the parties. The Court also considered whether the person performed functions that would normally be performed by an officer or employee of a company. The extension of Rule 200 has been limited to persons who were directly involved in events which gave rise to the cause of action; it has not been extended to include persons who only had second hand knowledge from others who actually had direct involvement.[81]

[136] The rationale for giving Rule 200 a wide interpretation is discussed in *Edmonton (City)* v. *Lovat Tunnel*:[82]

> ... I agree with the law that has developed on the question in this Court. The trend of the cases is that person who are most knowledgeable about the facts in issue, may, in circumstances such as this, be considered to

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[80] *Cana Construction Co. Ltd.* v. *Calgary Centre for Performing Arts* (1986), 46 Alta. L.R. (2d) 313 (C.A.) (unpaid volunteer of the corporation); cited with approval in *Mikisew Cree First National* v. *Canada* 2000 ABQB 485 (consultant to the corporation); see also *Adams* v. *Norcen Energy Resources Ltd.* (1988), 233 A.R. 174 (Q.B.) (consultants to the corporation); *Simpson's Num Ti Jah Lodge Ltd.* v. *Lange* (1991), 126 A.R. 19 (Q.B.) (lawyer acting as negotiator only); *Small Bridge Investments Ltd.* v. *Battle* (1996), 189 A.R. 101 (Q.B. Master) (consultant who performed management duties); *Edmonton (City)* v. *Lovat Tunnel Equipment Inc.*, 1999 ABQB 5 (contractor who acted as general superintendent); *Syncrude Canada Ltd.* v. *Canadian Bechtel Ltd.* (1990), 112 A.R. 131 (Q.B. Master) (employee of U.S. corporation affiliated with party corporation); *Royal Bank of Canada* v. *Teren International Inc.* (1996), 194 A.R. 345 (Q.B. Master) (independent contractor); *Alberta-Pacific Forest Industries Inc.* v. *Ingersoll-Rand Canada Inc.* 2002 ABQB 506.

[81] *Trizec Equities Ltd.* v. *Ellis-Don Management Services Ltd.* (1994), 19 Alta. L.R. (3d) 433 (Q.B.).

[82] *Supra* note 80 at para. 7.

> be employees and even as officers even though their relationship in the matter is far removed from traditional employer-employee relationships. ... This is a desirable trend in the law, and it has expanded the discovery of persons who might be examined in complex litigation.

[137] Some Queen's Bench Masters indicated that this issue comes before them from time to time. They would prefer to see the rule allow discovery of people with the best knowledge, rather than having to go through the painful process of slotting a person into a limited category such as "officer" or "employee".

ii. Witnesses not directly associated with a party

[138] As noted above, Newfoundland and Nova Scotia permit examination of any person who has knowledge relating to matters in issue. Any adverse party may use this evidence at trial against any party who attends the examination, or who had the right to attend at the examination.

[139] Several other provinces which limit the right to discovery to one representative have other rules which permit discovery of other persons, including non-parties, by order of the court.[83] The rules in these jurisdictions prescribe criteria for obtaining an order for examination of a non-party, and the test in each jurisdiction is virtually identical. In order for a court to grant an order allowing discovery of a non-party, the court must be satisfied that:

i. The applicant cannot obtain the information it seeks from a person whom it has the right to discover;
ii. It would be unfair to require the applicant to proceed to trial without having the opportunity to examine the witness;
iii. The examination will not cause undue hardship, expense or delay or unfairness to any other party or the witness.

[140] Saskatchewan, New Brunswick, Ontario, Manitoba and the Federal Court prohibit the use of evidence of a non-party at trial. Prince Edward Island allows the evidence to be read in at trial. British Columbia's rules are silent on this point. Nova

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[83] Manitoba, *supra* note 5, r. 31.10.

Scotia permits the evidence of an officer, director or manager of a corporate party to be used by any other party adverse in interest.[84]

b. If broad discovery is allowed, should there be limits on the number of people who may be discovered? If so, what should those limits be?

[141] During consultations many people suggested that it may be useful to permit examinations of persons other than employees, former employees and officers, as there are times when the person who is best informed does not fall into any of these categories. However, both supporters of extending the right of examination for discovery and those opposed to a broader discovery rule had concerns that an expanded right of discovery may be abused, creating numerous unnecessary discoveries. Unnecessary discoveries are expensive and can cause significant delay in an action.

[142] Presently Rule 200(2) provides that the court may limit the number of employees, or former employees, of any party who may be examined if a party is abusing the right of examination. It is interesting to note that several of the Masters indicated that between them, they could only recall one such application. This suggests that applications to limit discoveries are rare.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[143] The Committee does not support narrowing the rights of discovery from those which exist presently, rather, it proposes a slight extension of the present rules. The right to discover officers, employees and former employees should have been retained.[85] Additionally, persons who may not be actual employees or officers of a corporate party, but who have the best direct knowledge of matters in issue as a result of performing duties for the corporation regardless of the legal characterization of their relationship to the corporation should also be discovered. In this regard the Committee supports the direction taken in recent case law discussed above. Permitting discovery of those who have the best knowledge of matters of in issue will facilitate disclosure and exchange of relevant information, which is one of the primary purposes

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[84] Nova Scotia, *supra* note 21, r. 18.14.

[85] The Committee also proposes to retain the right to discovery the other groups of people presently listed in Alberta, *supra* note 11, r. 200(1), (4), 201 and 202.

of discovery. This proposal also reflects the changing nature of employment in Alberta. Many "consultants" or "independent contractors" now perform services for corporations which in the past would have been performed by employees or corporate officers who would have been subject to discovery under the rules.

[144] The Committee does not intend that this rule be used to discover mere witnesses; the person being examined must have some sort of connection with the corporate party akin to that of an employee or officer and have first hand knowledge of events giving rise to the issues in action. The Committee is aware of the potential for abuse of this rule, in that parties may attempt to examine inappropriate persons who are only mere witnesses rather than persons actually connected with a party. It is for this reason that the requirement to have an agreement between the parties or a court order to examine persons in this category is proposes rather than granting a *prima facie* right of examination. Requiring consent of the parties or leave of the court should minimize the potential for abuse of the expanded rule.

[145] Though there was some support during consultations for expanding discovery to mere witnesses, the Committee felt that to do so would increase significantly both the cost of litigation and the time it takes for a matter to get to trial. Allowing oral discovery of any person who is but a mere witness may increase the cost of litigation to a point where litigation is not a feasible option for the ordinary individual or small company. The Committee believes that the financial consequences of extending oral discovery to mere witnesses outweigh the benefits of such examinations. The Committee proposes that there should not be a right to oral discovery of mere witnesses.

[146] This rule would not apply to experts hired in anticipation of, or for the purposes of, litigation.[86]

[147] The Committee's specific proposal is that by agreement between the parties or with leave of the Court, a party to the proceedings may examine any person who performs or who has performed services for a party adverse in interest, whether for

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[86] A separate issues paper discussing rule reforms regarding experts, including the possibility of discovering experts, will be published at a later date.

remuneration or not. The person must also appear to have direct knowledge of material and relevant information acquired while performing those services. In order to obtain such an order, the party seeking to examine the person must satisfy the court that:

(i) the applicant cannot obtain information from other persons who may be discovered;

(ii) it would be unfair to require the applicant to go to trial without examining the person; and

(iii) the examination will not cause undue delay, expense or unfairness to any party or to the person should to be examined.

[148] The evidence of this group of witnesses would be treated in the same manner as evidence of employees and officers; it must be adopted by the corporate officer in order to be read in at trial.[87]

[149] The Court should have specific jurisdiction to limit the number of persons examined on behalf of a party.

[150] It is hoped that expanding the rules in this way will reduce the need to make applications as parties are expressly permitted to agree to have certain persons examined rather than requiring an application. Establishing guidelines under which an order may be granted should also assist in convincing counsel to agree to the examinations rather than forcing the issue before the court, if the circumstances clearly fall within the prescribed criteria.[88]

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[87] The process of having the corporate representative adopt the evidence of an employee, officer or this new group of witnesses is discussed below.

[88] While the Committee is focussing on broad policy issues rather than minor drafting issues, it should be noted that the rules should be consistent in applying the material and relevant rule. Thus, a person may be examined to ensure that the knowledge that was acquired by virtue of that employment appears to be material and relevant. The rules should also clarify that the distinction between the appointed corporate representative and an officer of a corporation.

E. Corporate Representative

ISSUE No. 15
How should the corporate representative be appointed?

[151] During consultations many people voiced concerns about delays which result from having uninformed corporate representatives presented for discovery. To a great extent this issue is related to the procedure for appointing the representative. Alberta is one of the few jurisdictions that allows the party to choose its corporate representative.[89] In most other jurisdictions the examining party chooses who will be examined on behalf of the corporation, though the corporate party has the right to make an application to have another person examined instead.[90] Saskatchewan requires both parties to agree as to who shall be examined. Failing agreement, the court appoints the officer. Members of the Bar who have practiced in Saskatchewan have indicated that this is a successful system. Most of the time parties can agree as to who the best informed person is, such that an application to court is unnecessary. They also indicate that this system generally yields productive discovery. If the officer is not informed about a particular area, counsel usually agree to further discovery of the person who is best informed about those issues.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[152] The Committee recognizes that there is a widespread problem arising from an uninformed corporate representative. Examining persons who are not properly apprised of material and relevant information relating to the matters in question often is waste of both time and money. However, there are many situations where it is not possible for one person to apprise themselves of all material and relevant information, particularly in large cases, those involving a number of different people or parties, or where there is a significant amount of technical evidence. This is one of the primary reasons why the Committee proposes to retain the *prima facie* right to examine

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[89] Alberta, *supra* note 11, r. 200.1.

[90] Ontario, *supra* note 16, r. 31.03(2); Manitoba, *supra* note 5, r. 31.03(6); British Columbia, *supra* note 17, r. 27(4); Prince Edward Island, *supra* note 6, r. 31.03(2); Newfoundland, *supra* note 23, r. 30.01(1) (allowing any person to be examined); New Brunswick, *supra* note 7, r. 32.02(2); Nova Scotia, *supra* note 21, r. 18.

officers and employees of a corporate party and to extend examinations to include persons in comparable positions who have the best knowledge of material and relevant information.

[153] If other employees and officers may be examined as of right, the Committee proposes to retain the current system of having a party appoint its own corporate representative subject to review by the Court where the nominee appears to be inappropriate. However, as discussed below, the Committee also proposes that the appointed corporate representative have an express duty to inform himself prior to the examination for discovery. It is expected that such an express duty will assist in reducing the number of instances where an appointed corporate representative attends at an examination for discovery without being appropriately and properly informed.

F. Duty to Inform

ISSUE No. 16
Should there be an express duty for a witness to inform him/herself prior to the examination for discovery?

[154] As discussed previously, a common problem identified during consultations that is seen as increasing both expense and delay is that the appointed corporate representative is not informed properly about the matters in issue. In some cases it is difficult for the officer to be properly informed, e.g., when events take place over a period of time, if several people are involved, or if the issues concern complex or technical information. In such cases examining the appointed representative can result in numerous undertakings to make inquiries.

[155] It has been suggested that there should be an express duty in the rules requiring the appointed corporate representative (or any party being examined) to inform him/herself about the matters in issue prior to the examination. Though this obligation exists at common law,[91] it is often ignored.

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[91] *MacGregor* v. *Canadian Pacific Railway Co.*, [1938] 2 W.W.R. 426 (Alta. C.A.); *Ernst & Young Inc.* v. *Central Guaranty Trust Co.*, [1998] A.J. 1050 (Q.B.).

[156] While it may be difficult to inform oneself in some cases, counsel have suggested different ways that could be incorporated into the rules that would assist the officer or witness in this task. A list of areas to be examined upon could be sent to the representative prior to the discovery. The list need not contain specific questions, it need only indicate areas upon which the representative is expected to be informed. Another suggestion is that it may be appropriate to have the appointed representative answer written interrogatories on issues which likely would be the subject of undertakings in an oral examination.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[157] The Committee felt strongly that there should be a provision which specifies that the corporate representative has a duty to inform him/herself of material and relevant information prior to the examination. However, the Committee was not enthusiastic about requiring an examining party to provide a list of areas to be examined on. The corporate representative should know from the pleadings and from the affidavits of records what the issues are and should thus should be able to prepare adequately for the examination. Requiring a list of areas to be examined on may lead to preliminary applications challenging relevance which could delay the entire examination. Such challenges may be difficult to decide at the preliminary stage, though the relevance of the area may become clear through the progression of the examination. The Committee was of the opinion that the potential problems with requiring a "will ask" list outweighed the potential benefits of such a procedure, and as such a "will ask" should not be adopted.

G. Adoption of Evidence

ISSUE No. 17
Should the rules codify the method for adopting the evidence of a corporate party?

[158] One concern raised by the Bar deals with the process which requires a corporate officer to adopt the information of the employees as evidence of the corporation. While an employee may be examined for discovery under Rule 200, the employee's evidence cannot be read in at trial as an admission of the corporate party. The

employee's evidence may only be read in at trial if it is adopted by the appointed corporate representative.

[159] The case law has defined a procedure for adopting the evidence of an employee[92] of a corporation. The rationale behind this procedure is that while the employee's evidence may be relevant, the employee has no mandate to speak for the corporation.[93] After the employee has been examined, portions of the employee's discovery are put to the appointed corporate representative, who is then asked whether the employee's evidence constitutes some of the information of the corporation. The employee's evidence must be relevant and in the personal knowledge of the employee. Despite the wording of the rules, in some cases the Court has permitted employees to be examined on relevant and material information acquired by a former employee, regardless of whether he came by the knowledge in the course of his employment with the corporate party.[94] The appointed representative then indicates whether or not the employee's information is some of the information of the company. If the corporation has knowledge of the information of its employees (which presumably it will if it is presented with evidence that the employee has been discovered) it must answer this question affirmatively.[95] The appointed representative may then qualify the admission by contributing information which is contrary or inconsistent with the employee's information. Such qualification must have a factual basis and the factual basis must be clearly identified; it is not enough merely to deny or disagree with the employee's evidence. The qualification must find its source in some document or on information provided to the officer by someone who can speak to the matter on the basis of personal knowledge; the scope of the qualification must not go beyond a direct answer to the question asked of the employee and must be connected in substance to the admission itself; and the qualification may not be based on the officer's belief as to

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[92] For the purposes of this discussion, "employee" refers to employees, former employees and officers of a corporate party. Later in the discussion it will also refer to the new group of witnesses of which the Committee proposes to allow oral discovery, being independent contractors or consultants who perform "employee-like" services for the corporate party. See discussion above.

[93] *Esso Resources Canada Ltd.* v. *Stearns Catalytic Ltd.* (1993), 156 A.R. 178 at 179 (Q.B.); *Nova, an Alberta Corporation* v. *Guelph Engineering Company*, [1988] 2 W.W.R. 665 (Q.B.) [hereinafter *Nova*].

[94] *Tremco*, *supra* note 60 at para 30.

[95] *Esso Resources Canada Ltd.* v. *Stearns Catalytic Ltd.* (1992), 20 Alta. L.R. (3d) 315 (Q.B.).

the true facts or his disbelief of the evidence given by the employee.[96] The parties may agree to an omnibus treatment of employee discovery evidence.[97]

[160] During consultations some people indicated that the process of having the corporate officer adopt the evidence of employees, former employees and officers should be codified in the rules. Others felt that the process is unnecessary, and that the evidence of employees, former employees and officers should simply be allowed to be read in at trial. It has also been suggested that this procedure may be done efficiently through written interrogatories.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[161] The Committee proposes that the present practice of adopting the evidence of an employee or former employee of a corporate party should be retained and should be codified. To do so would greatly assist less experienced counsel and self-represented litigants who may not be aware of the common law procedural requirements in this area. A party's failure to comply with the technical common law requirements could prevent them from using an employee's discovery evidence at trial. Codifying the procedure would hopefully minimize the potential for injustice in such a situation.

[162] The Committee felt that it is necessary to retain this procedure. As noted above, an employee cannot speak for a corporate party. There is a concern about the veracity of evidence, particularly in the case of former employees who may have personal issues with their former employers. The corporate party does not have the ability to cross-examine an employee at the discovery. If the employee's evidence is allowed to be read in at trial, the opposing party need not even call that employee. In such a case the corporate party would not have a right to cross-examine the employee; at best that person would have to be called as their own witness and be examined in chief. Retaining the process of having a corporate representative adopt the employee's evidence and then allowing the representative to qualify the information with contradictory information allows the corporate party an opportunity to present its own complete version of the information it has on a particular issue.

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[96] *Esso Resources Canada Ltd.* v. *Stearns Catalytic Ltd.* (1992), 20 Alta. L.R. (3d) 309 at 315 (Q.B.); *Edmonton (City)* v. *Lovat Tunnel Equipment Inc.* 1999 ABQB 864 (Master).

[97] *Nova*, *supra* note 93.

[163] The evidence given by an officer, employee, former employee or other person who has performed services for a party (as discussed above) may not be read in as evidence at trial unless the appointed corporate representative adopts the evidence under oath as some of the information of the corporation. When adopting this evidence the appointed corporate representative:

(i) may refuse to adopt all or part of the evidence of the officer, employee or person who performed services as evidence of the corporation and state the reason why the evidence does not form part of the evidence of the corporation. The representative may not refuse to adopt the evidence merely on the basis of the representative's disbelief or disagreement with the evidence.[98]

(ii) if the corporate representative disagrees with or disbelieves all or part of the evidence, the representative must adopt all or part of the evidence of the officer, employee or person who performed services as evidence of the corporation.

(iii) the representative may then qualify the admission with further information that is contrary or inconsistent with the evidence of the officer, employee, former employee, or person who performed services. The qualification must find its source in some document or on information provided to the officer by someone who can speak to the matter on the basis of personal knowledge.

H. Interrogatories

ISSUE No. 18
Should written interrogatories be an optional method of discovery?

[164] Currently in Alberta examinations for discovery are usually conducted orally. Written interrogatories are contemplated in parts of the current rules, such as in Rule

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[98] Presumably the only grounds upon which a corporate representative may refuse to adopt information of an employee, former employee, officer or persons in the proposed category of "those who performed services akin to an officer or employee" (discussed above) would be that the person was not employed by, or did not perform services for, the corporate party at the material times, or that the corporate representative is not provided with the discovery evidence of the witness. As it is unlikely that these situations would arise, a corporate representative must adopt the evidence of an employee in most cases.

216.1 as a term which the Court may impose if a party is abusing the discovery process; Rule 158.1(3)(c) lists answers to interrogatories as "some of the material which may be relied upon in a summary trial"; and Q.B. Family Law Practice Note "6" introduced a process for family law matters called "Notice to Reply to Written Interrogatories" and provides a form of Notice. The purpose of the procedure is stated as being to avoid the need for examination for discoveries through the exchange of information in writing. There is a limit of 15 questions which are to be answered in affidavit format,[99] and written interrogatories may only be used once in any action.[100] Although the rules do not provide any procedure for using interrogatories in civil cases, interrogatories are sometimes used by consent.[101]

[165] Most provinces permit written interrogatories as an alternative to oral discovery,[102] though a party may not discover by way of both written interrogatories and oral discovery. Once a party opts for either written interrogatories or oral discovery, it must obtain leave of the court in order to have both. British Columbia allows both oral discovery and written interrogatories, but the rules provide for costs if answering the written interrogatories is found to be unreasonable or unnecessary in light of oral discovery.

[166] Interrogatories may be useful in the following circumstances:[103]

(i) as "follow up" to answers to undertakings;

(ii) where the questions on discovery deal with very technical or statistical matters which need to be compiled from various sources;

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[99] *Ibid.* at s. 3.

[100] *Ibid.* at s. 6.

[101] See, *inter alia*, *Esso Resources Canada Ltd.* v. *Stearns Catalytic Ltd.*, [1993] A.J. 1046 (Q.B.); *Ferreira* v. *Canadian Pacific Hotels Corp.* 2000 ABQB 652; *Edmonton (City)* v. *Lovat Tunnel Equipment Inc.* 2000 ABQB 143; *Alberta Public School Board Ass'n.* v. *Alberta (Attorney General)*, [1995] A.J. 171; *Cardinal* v. *361881 Alberta Ltd.* 2001 ABQB 51.

[102] Ontario, *supra* note 16, r. 31.02 and 35; British Columbia, *supra* note 17, r. 29; Manitoba, *supra* note 5, r. 31.02; Prince Edward Island, *supra* note 6, r. 35; New Brunswick, *supra* note 7, r. 34; Newfoundland, *supra* note 23, r. 31; Federal, *supra* note 8, r. 88, 98. 99, 234.

[103] Found in Cudmore, *supra* note 2 at 4-4, 4-5 and also identified through consultations.

(iii) having the corporate officer adopt the evidence of other employees who have been examined;
(iv) where it is inconvenient to have the witness attend;
(v) where a corporate representative needs to obtain information from a number of employees;
(vi) where likely only a few questions are necessary and are not objectionable;
(vii) where the witness resides far away;
(viii) to preserve evidence prior to trial;
(ix) prior to discovery of a corporate officer, to obtain basic information about key employees, key documents, and key information contrary to the party's position.[104]

[167] Problems associated with interrogatories include that:[105]

(i) they are appropriate mainly where the information or admissions sought are clerical, lengthy, or technical, and where the information exists in various disconnected places;
(ii) they do not provide an opportunity to observe the opposite party or ferret out weakness, so they may not be appropriate where questions are of a general nature and take a more narrative form;
(iii) the answers will inevitably be drafted by opposing counsel and will not be the words of the party, so answers will be ambiguous;
(iv) opposing counsel may find many objections to the questions or their form, resulting in delay;
(v) the procedure is cumbersome and time consuming.[106]

[168] There has been mixed reaction from the Bar about interrogatories. While many support the use of interrogatories as an alternative, there has been no suggestion that they replace oral discovery entirely. The primary concern expressed about

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[104] Suggested by D. Tavender, Q.C., "Special Issues Arising out of Corporate Discoveries" (LESA Civil Litigation Update, Calgary, Alberta, June 7, 1999, Edmonton, Alberta, June 14, 1999) (Edmonton: Alberta Civil Trial Lawyers Association & Legal Education Society of Alberta, 1999).

[105] Cudmore, *supra* note 2 at 4-7; also recited in *Dunn* v. *Dunn* 2001 ABQB 852.

[106] Noted by Lee, J. in *Dunn* v. *Dunn*, *ibid.*, (although prior to this he noted "interrogatories would very likely quicken the pace of these seemingly interminable discoveries and reduce the costs these parties have been incurring as a result of the friction between them".)

interrogatories is that the answers are "sanitized" by counsel. This often limits the usefulness of the interrogatories and creates the need for follow up questions, either orally or with further written interrogatories. In England discoveries are conducted entirely by way of written interrogatories; there is no oral examination, but the answers to the interrogatories are not sanitized by counsel. The answers are in the witness' own words. When asked about this approach during consultations many counsel expressed the concern that counsel in Alberta may coach the witness about answers.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[169] The Committee proposes that written interrogatories should be permitted as an alternative to oral discovery. There are many situations where written interrogatories may save both time and expense. However, due to the problems identified above with written interrogatories, the Committee does not believe that they should be mandatory, rather, interrogatories should be available as an alternative to oral discovery when counsel deems appropriate. Though written interrogatories are being used currently to some extent, the Committee feels that it would be useful to have a set procedure governing their use. The Committee suggests the following procedures for written interrogatories:

1. Written interrogatories shall be treated in the same manner as oral examination for discovery for the purposes of
   (i) who may be required to answer written interrogatories;
   (ii) who may question by way of written interrogatories;
   (iii) the scope of questions which may be asked by way of written interrogatories;
   (iv) who may use the answers to written interrogatories; and
   (v) the use of answers to written interrogatories on motions and at trial.
2. A party may require anyone whom they have a right to examine orally to answer written interrogatories in lieu of oral examination. However, if more than one party has the right to orally examine that person, the examination shall be done orally rather than by written interrogatory unless all parties consent or the court orders otherwise.
3. A party may not examine a person through both oral examination and written interrogatories without consent or leave of the court.
4. The questions to be answered should be in a form set out in the rules.

5. The interrogatories must be answered under oath in an affidavit in a form set out in the rules.
6. The answers in the interrogatories shall be served on all parties who had a right to orally examine that person within a specified time or such other time as the parties may agree.
7. There should be a limited right of follow-up questions. This may be done by further written interrogatories, or by oral examination with a court order or consent of the other party.
8. The interrogatories may be used as evidence at trial in the same manner as it would have had it been given as evidence in an oral examination.
9. If the answers to the interrogatories or the follow up questions are unsatisfactory, the examining party may apply to court for such relief as the court sees fit, including the right to conduct oral examinations, have further written interrogatories, or costs sanctions.

[170] The Committee believes that these proposals address most of the perceived problems with interrogatories, and that these procedures could assist in making written interrogatories a useful and effective part of litigation practice in Alberta.

I. Limits on Examinations

ISSUE No. 19
Should there be limits on the number of times a party may be examined?

[171] Presently the Alberta rules imply that a party may only be examined once. As such, it is common practice to only "adjourn" an examination rather than conclude it for fear that the further examinations may not be allowed. Often adjournments are subject only to further examination arising out of answers to undertakings, thus limiting the examiner's right to re-examine on matters which were not raised in the initial discovery. Many other jurisdictions expressly permit a party to be examined only once without leave.[107]

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[107] Ontario, *supra* note 16, r. 31.03; Prince Edward Island, *supra* note 6, r. 31.03(1); Manitoba, *supra* note 5, r. 31.03(1).

[172] Manitoba, New Brunswick and Ontario[108] further limit oral discovery. In cases where more than one party is entitled to examine a party or person, the rules permit a person to be examined orally once without leave. The examination may be initiated by anyone entitled to examine the person. The purpose of this rule is to limit multiple examinations eliciting the same information from one party, particularly where a plaintiff has sued multiple parties. Prince Edward Island also allows only one examination of a party, but specifies that after the first party has finished his examination, each other party may examine on matters not covered during prior examinations.[109]

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[173] The Committee understands why specifically limiting the number of times a party may be examined may appear to be an attractive proposition. To do so could shorten the examination for discovery process which would cut down on the amount of time an action takes, as well as reducing cost. The Committee is of the opinion that the practice in Alberta is that there is only one examination for discovery, but the examination may be adjourned as necessary. The adjournment can be for correction of evidence given by a witness, to complete undertakings, to examine on a newly produced, relevant document, or to update information given by a witness prior to trial.

[174] The Committee does not propose rules specifying the number of times a witness may be discovered. Adjournments of a single examination may be necessary to obtain material and relevant information in an efficient and effective manner. Counsel currently has the ability to limit prolonged discovery by requiring a counsel to adjourn on certain terms, such as being subject to undertakings. There are also, and will likely continue to be, sanctions for abusing the discovery process.[110] Putting a limit on the number of times a witness may be discovered will likely cause confusion and lead to numerous court applications, which will cause more cost and delay than is occasioned by the present practice.

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[108] Ontario, *supra* note 16, r. 31.05.

[109] Prince Edward Island, *supra* note 6, r. 32.05.

[110] See discussion below of penalties for abuse of the discovery process.

[175] The Committee does not favour limiting discoveries when there are multiple parties. To do so would result in parties who have not had the chance to examine a witness being dependent on other parties' examination abilities. The Committee felt that all parties should be afforded an opportunity to ask their own questions during discovery. If a party engages in unnecessary repetitive questioning, the witness' counsel may object on the basis that the questioning is abusive and the matter may be referred to the Court. The Committee believes that this approach is preferable to *prima facie* restrictions on parties' rights to conduct examinations for discovery.

J. Appointments for Examination

ISSUE No. 20
Are the requirements for appointments for examination for discovery adequate?

[176] Currently Rule 204 sets out lengthy requirements for appointments for examination for discovery:

> 204(1) The party or person entitled to examine another party or person may procure an appointment for the examination from the clerk in whose office the proceedings are being carried on or from such other person as the court may appoint.
>
> (2) The party or person to be examined upon being served with a copy of the appointment and upon payment of the proper conduct money shall attend thereon and submit to examination.
>
> (3) The party examining shall serve a copy of the appointment upon the solicitor in the cause, at least 48 hours before the examination.
>
> ...
>
> 7) When an appointment has been served upon a solicitor pursuant to subrule (4), he
>
> > (a) shall promptly communicate the appointment to the person required to attend,
>
> ...

1. Appointment and service of appointment for examination for discovery

[177] When private court reporters started conducting examinations for discovery in Alberta they obtained orders under Rule 204(1) making them examiners and permitting them to issue appointments for examinations. In 1987 the Alberta Queen's Bench Reporters withdrew from examinations for discovery in the larger cities, and

the appointments are now issued by the private examiners, not the clerks.[111] Examiners are usually the head of the private court reporting firms.[112] The practice is that private court reporters provide a precedent appointment to a firm which is then used for future appointments. The court reporters themselves do not usually issue individual appointments.

[178] British Columbia, Ontario, and the Federal rules all contain a specific form of appointment for examinations for discovery.

[179] The timelines for serving an appointment for examination for discoveries are set out in Rule 204(3) and (4). There are two different time periods for serving an appointment for examination for discovery. The party examining shall serve a copy of the appointment upon the solicitor in the cause at least 48 hours before the examination. Alternatively, service of an appointment upon the solicitor of the party to be examined is sufficient, in lieu of personal service of appointment upon the party, if made 20 days before the day appointed for the examination.

[180] The times for serving appointments for examinations vary from province to province. Most other jurisdictions require that notice of the examination be given to all parties at some point prior to the discovery.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[181] The Committee felt that the current rules governing appointments for examinations for discovery were unduly lengthy and complex. It proposes that the rules be amended and condensed. A party may examine a person whom they are entitled to examine by serving an appointment for examination for discovery in a specific form provided in the rules. The appointment should be filed with the Court although it need not be issued by an Examiner.

[182] The Committee saw no reason to have different time periods for service on an individual or service on a solicitor. The Committee proposes that the appointment be

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[111] W.A. Stevenson & J.E. Côté, *Civil Procedure Guide, 1992*, vol. 1 (Edmonton, Alberta: Juriliber, 1992) [hereinafter *Civil Procedure Guide 1992*] at 624.

[112] Reform of the role of the "Examiner" is discussed in detail below.

served either on the person to be examined, or if that person is represented by counsel, on that person's counsel, at least 20 days prior to the date of the examination.

[183] The Committee further proposes that all parties to the action must be served with a copy of the appointment at least 20 days prior to the date of the examination. This will ensure that all parties to an action have adequate notice of an intended discovery.

2. Compelling a party to discover another party

[184] One concern raised by the profession is that while the rules allow a party to compel another party *to be examined* for discovery, there is nothing compelling a party *to examine* another party. There are situations where delay is caused because another party will neither examine another party for discovery nor waive the right to do so. The only remedy a party has is to attempt to file a Certificate of Readiness, which inevitably is opposed on the ground that discoveries are not complete. This necessitates several chambers applications and results in increased costs and delay. It was suggested that there be some form of notice to take a particular step, which specifies the step and a reasonable period of time within which it must be completed.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[185] The Committee felt that there are a significant number of cases where delay is caused by the failure of one party to examine other parties in a timely manner. There is no adequate procedure in the rules to rectify this situation in a cost effective and efficient manner. The Committee therefore proposes that there be a mechanism which compels one party to examine another party. This could be accomplished by a form of notice compelling a party to examine the party, or to arrange for the examination within a specified time. The Committee recognizes that there may be times where it is not appropriate to proceed with the examination for discovery immediately. To accommodate such situations the Committee proposes a "show cause" provision. If a party fails to commence or schedule the discovery within the requisite time, they must show cause before the court as to why it is not appropriate to examine the person at that time. The Court may then decide whether the failure is reasonable and award costs to either party accordingly.

K. Conduct Money

ISSUE No. 21
Are the rules governing conduct money adequate?

[186] Rule 5(1)(d) defines conduct money as

> ...the sum to which a person is entitled in accordance with the allowances prescribed in Schedule E hereto, and when the term is used in reference to a payment before actual attendance, means such amount as is calculated as he would be entitled to upon completion of his attendance.

Rule 204(5)-(7) requires that conduct money be provided for examinations for discovery. The amount of conduct money is found in Part 3 of Schedule E to the rules. The amount of conduct money is $10.00 per day, plus the cost of public transportation to and from the witness' ordinary residence to the place of the discovery. When conduct money is served on a party's solicitor, the solicitor must use the funds for the actual travel expenses of the witness and no other matter. If the witness fails to attend the examination, the conduct money must be returned to the party from whom it was received.

[187] Rule 314(4) provides for conduct money for cross-examinations on affidavits. There is no corresponding rule for conduct money for examination for discovery. This rule allows the Court to dispense with the need for conduct money and requires that the party filing the affidavit produce the deponent for cross-examination. Despite the fact that there is no rule specifically applying to examination for discovery which corresponds with 314(4), it is common for parties to apply for, or to agree to, the waiver of conduct money.

[188] The most common issue with conduct money arises when an appointed representative of a corporation resides in a jurisdiction other than Alberta, although the corporation carries on business in Alberta.[113] In *Richard, supra*, the Court noted a significant difference between cross-examinations and examinations for discovery. A

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[113] See, *inter alia*, *Pacific Engineering Ltd.* v. *Pine Point Investments Ltd.* (1969), 66 W.W.R. 244 (N.W.T. Terr. Ct.); *Royal Bank of Canada* v. *Parkway Country Plymouth-Chrysler Ltd.*, [1982] A.J. 35 (Q.B. Master); *Richard (c.o.b. Jermar Trucking)* v. *Bronco Rentals & Leasing Inc.*, [1995] A.J. 1143 (Q.B. Master).

defendant has no control over where the proceedings are brought, and if they have filed a defence, they believe they should not have been sued. Thus, if the person to be discovered is the most knowledgeable, he should be produced for discovery. To require this person to attend at his own expense at a place selected by the plaintiff is neither practical nor just.

[189] Ontario and Manitoba do not require conduct money to be paid if the witness resides in the province. Costs are at the discretion of the court if the witness resides outside of the province. New Brunswick and Prince Edward Island do not require an attendance fee if the person being examined is a party to the action or is being examined on behalf of a party to the action. If the person is neither, an attendance fee is paid. Prince Edward Island also requires that the examination be conducted in the county in which the person being examined resides, if that person resides in the province.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[190] The Committee considered abolishing the need for conduct money, either entirely or in certain circumstances. It was noted that examination is an intrusion into the life of a witness, often bringing them in from another jurisdiction and certainly inconveniencing them. There was great concern that rescinding the requirement for conduct money would cause further inconvenience, particularly to a witness who is not a named party in the action such as an employee. The Committee also noted that failure to tender conduct money could prejudice individual litigants who are located in remote communities. If they cannot afford to travel to a larger centre for discoveries, litigants could be forced to forfeit their actions. The Committee felt that the right to recover costs at the end of the day would not sufficiently address such situations.

[191] The Committee concluded that the current procedures and requirements in the rules relating to conduct money and the amount of conduct money should be retained. The Committee proposes that it be specified that if the proper amount of conduct money cannot be agreed upon, a party may apply to have the Court determine the amount. This addresses situations where a party alleges that an improper corporate representative has been chosen merely to increase the amount of conduct money.

L. Recording the Examination

ISSUE No. 22
How should the examination for discovery be recorded?

[192] The present rules which address the recording of an examination for discovery are rather archaic:

> 211(1) Unless taken in shorthand the deposition on an oral examination may be taken down in writing by the examiner in the form of a narrative expressed in the first person and when completed shall be read over to the person examined and shall be signed by him in the presence of the parties or those of them that attend and shall be certified by the examiner.
>
> (2) When anyone examined refuses or is unable to sign the depositions, the examiner shall so certify.
>
> (3) The examiner may, upon any examination under this Rule, in his discretion take down any particular question or answer and he shall upon request note upon the depositions any questions objected to and the ground of the objection.
>
> 212(1) The examination (unless otherwise ordered or agreed) shall be taken in shorthand by an official court reporter, if available, otherwise by a shorthand writer approved by the parties and sworn and shall be taken down by questions and answers in which case it is not necessary for the depositions to be read over to or signed by the person examined.
>
> (2) If the examination is taken by an official court reporter it is not necessary for the examiner to be present at the examination.
>
> (3) The depositions so taken, when extended and certified by the person taking them as correct, shall be deemed to be the original depositions.
>
> (4) The transcript of the examination shall not be placed on the court file and shall not be put before the Court except during an application or when used at trial.[114]

[193] In addition to being archaic this is an area where the rules are unduly lengthy. Most, if not all, examinations for discovery today are taken by a court reporter electronically and are seldom, if ever, signed by the person being examined.

[194] Sometimes examinations for discovery are videotaped, although there is nothing in Alberta's rules governing this procedure. Ontario's rules provide that examinations for discovery may be videotaped and the videotape may be filed in the same manner as

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[114] This issue is addressed below.

a written transcript if the parties consent or by order of the court. The Federal Court Rules allow an examination for discovery to be videotaped by order of the Court.

[195] The Ontario, British Columbia, and Federal rules are more modern in this respect.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[196] The Committee recognizes that the rules should be drafted in a manner which will recognize future changes in technology to avoid becoming dated. Therefore, the Committee proposes that there be a requirement that the examination be recorded verbatim in any manner agreed to between the parties which is capable of producing a written transcript.

[197] Some difficulties with read-ins from videorecordings were noted. It is easier to work with digital recordings and transcripts from those recordings. It was noted that a transcript could be prepared of the read-in portion of the videorecording. This can be difficult as the other side may want to read in qualifying material, which can be difficult to locate on a videorecording. It was noted, however, that a videorecording has the advantage of revealing to the court the manner in which the witness gave evidence.

[198] The Committee felt that it is necessary to preserve the requirement that a written transcript be produced, as a written transcript is the best means for preserving, isolating and referring to specific portions of testimony.

[199] The Committee further proposes that in addition to being recorded for the purpose of producing a written transcript, the examination may also be recorded by any other means with consent of the parties or by court order.

M. Videoconference

ISSUE No. 23
Should the rules provide a procedure for examinations for discovery via videoconference or other technology?

[200] Our current rules do not address conducting examinations for discovery via videoconference, although this is becoming a common occurrence.

[201] The Federal rules provide that the Court may order an examination by videoconference or any other electronic means. In Alberta counsel are doing examinations by videoconference despite the lack of direction for doing so in the rules. It appears that this practice is likely to become more common in the future.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[202] The Committee is of the view that it is not necessary to provide specific rules relating to examinations for discovery by videoconference. The Committee proposes that the rules be drafted in a broad manner which would permit an examination for discovery (or cross-examination) to be held with the use of any technological means as may be agreed upon by the parties or as ordered by the Court. The Committee prefers to leave the logistical details of each examination up to the discretion of the parties such that they have the flexibility to tailor such details to suit the specific circumstances of that case.

N. Interpreters

ISSUE No. 24
Should the rules address interpreters?

[203] The Alberta rules do not address the use of interpreters at examinations for discovery. On occasion an issue arises as to who is to supply the interpreter: should it be the party needing the interpreter or the examining party?

[204] Ontario's rules provide that the interpreter shall be provided by the party needing it. If that person is a non-party, it shall be provided by the examining party. The Federal rules provide that the examining party shall provide for the interpreter.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[205] Due to the increasing use of interpreters in cross-examinations, discovery and at trial, the Committee is of the opinion that the rules should specifically address the use

of interpreters. The main question discussed by the Committee was whether the interpreter should be provided by the party requiring the interpreter, or by the party doing the examination. Ultimately the Committee concluded that a party requiring an interpreter should be responsible for giving reasonable notice of this need to the party conducting the examination or the cross-examination. The party doing the examination shall then, at their cost, provide the interpreter. This cost would be dealt with as any other disbursement at the conclusion of the litigation. The rationale behind this proposal is that there are times when the party requiring an interpreter brings a friend or family member to interpret. This raises questions of bias and accuracy of the translation, and can result in delay as often a new interpreter is required. Putting the responsibility for providing the interpreter on the examining party should prevent this situation, thus reducing delay and thrown away costs.

O. Objections

ISSUE No. 25
Should the rules specifically address objections in a discovery?

[206] Presently the only rule addressing objections in examinations for discovery is Rule 213. This rule provides that the validity of any objection to any question shall be decided by the Court. Costs of the objection are in the discretion of the Court and may be ordered to be paid by the person under examination.

[207] Rule 213[115] does not require a party to state a reason for an objection. Ontario and the Federal Court require a brief reason for the objection to be stated. The Federal Court Rules specify the grounds upon which an objection can be made as being:

(i) privilege,
(ii) relevance,
(iii) the question is unreasonable or unnecessary,

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[115] Alberta, *supra* note 11, r. 213(2) provides that a party may not object solely on the ground that the answer will disclose the name of a witness. This matter will be examined and discussed thoroughly later in the Fall of 2002 when the Committee considers the issue of some form of disclosure of witnesses or "will say" statements.

(iv) it would be unduly onerous for the person to make the requested inquiry.[116]

[208] The Ontario rules specify that if a person refuses to answer a proper question on the basis of privilege, that party cannot use that information at trial unless they provide it to the other party 60 days prior to trial.[117]

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[209] The Committee is of the opinion that objections at discoveries should be specifically addressed in the rules. The Committee suggests that it may be useful to adopt a rule similar to Federal Court Rule 242. A party should be required to state a brief reason for the objection. A list of reasons for the objections may also be set out in the rule. The foundations for objections could include

(i) privilege,
(ii) question is not material and relevant,
(iii) the question is unreasonable or unnecessary, and
(iv) it would be unduly onerous for the party to inform himself in the circumstances.

These are the grounds recognized in the case law as founding reasonable objections.

[210] The Committee believes that requiring a party to state a precise reason for an objection to a question may reduce the number of unfounded objections. This should reduce both delay and expense by requiring fewer court applications to determine the reasonableness of an objection.

[211] The Committee also believed that it would be useful to include a sanction for making unfounded objections. This could be done on a reverse onus basis, where the party making the objection must show cause why costs should not be awarded against them if the objection is unfounded. Having a reverse onus would still permit the Court discretion in awarding costs if there was good reason to challenge the question, even if ultimately the objection is overruled.

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[116] Canada, *supra* note 8, r. 242.

[117] Ontario, *supra* note 16, r. 31.07(1).

P. Continuing Duty

ISSUE No. 26
Should the rules specify an ongoing duty to provide further information or corrections to answers previously given in an examination?

[212] The Alberta rules are silent on whether there is a continuing duty to provide information if, after discovery, the party who was examined discovers that the information given at discovery is inaccurate or incomplete, or if the information changes.

[213] Several other jurisdictions expressly provide for an ongoing duty in relation to answers to questions at examination for discovery. Ontario's rules[118] provide that if information given at examination is not correct or complete, or changes, the party being examined must provide information forthwith in writing. If a party fails to correct answers, that information, if favourable to them, may not be used. If the information is unfavourable, the court may make such order as is just.

[214] Similar rules are found in New Brunswick, Prince Edward Island, Manitoba, and in the Federal rules.[119]

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[215] The Committee proposes that the rules should specify that there is an ongoing duty for a person to correct answers given at discovery in writing forthwith if they determine that the answer they gave is incorrect. The Committee is less enthusiastic about extending this obligation to providing further information if the answer given was incomplete. It is up to the examiner to elicit complete information. There should not be an obligation on a witness to do the examiner's job. There was also a concern that allowing a witness to provide further information after the examination (other than by way of undertaking) may provide a witness with an opportunity to "bootstrap" answers after the discovery which may diminish the effectiveness of an admission

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[118] Ontario, *supra* note 16, r. 31.09.

[119] New Brunswick, *supra* note 7, r. 32.09; Prince Edward Island, *supra* note 6, r. 31.09; Manitoba, *supra* note 5, r. 31.09; Federal, *supra* note 8, r. 245.

gained at discovery. However, the Committee was unable to reach a consensus on this issue and is interested to receive feedback from the Bar.

Q. Undertakings

ISSUE No. 27
Should the rules prescribe procedures for undertakings and responses to undertakings?

[216] Presently the rules do not address undertakings given at discoveries. This issue has been raised many times during our consultations, wherein people have asked for some guidance in the rules as to the manner and time within which undertakings should be answered.

[217] A common concern is that undertaking responses are "sanitized" because they are drafted by counsel. There were few suggestions about how to address this problem.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[218] The Committee agreed that answers to undertakings should be addressed in the rules. The Committee proposes that if a person being orally examined does not know the answer to a question at the time of the examination, they may undertake to inform themselves and provide the answer. The answers to undertakings should be provided within a reasonable time after the discovery, and a person may be further examined on those answers.

R. Sanctions

ISSUE No. 28
Are the sanctions for failing to attend, or improper conduct, at an examination for discovery appropriate?

[219] Rule 216.1 provides remedies when a party "acts or threatens to act in a manner that is vexatious, evasive, abusive, oppressive, improper or prolix" during the

discovery process, or where "the expense, delay, danger or difficulty in complying fully would be grossly disproportionate to the likely benefit" of the discovery request. The rule also provides a long shopping list of terms which the Court may impose, including:

> (a) costs, whether on a solicitor-client or other basis;
> (b) security for costs;
> (c) an advance payment against costs;
> (d) increased or decreased interest entitlement;
> (e) production of or access to documents, whether or not they are referred to in any pleading, particular or affidavit;
> (f) whether the production or access to documents should be stayed or otherwise;
> (g) modification of conduct money;
> (h) different venue, inside or outside Alberta, for any examination to be held or for any act to be done;
> (i) schedules or time limits;
> (j) written interrogatories;
> (k) notices to admit facts or documents or to adopt answers by the other witnesses;
> (l) inspection or production of documents held by non-parties where permitted by law or with the consent of the non-parties;
> (m) disclosure of the aims of proposed further discovery;
> (n) supervision of further discovery by a judge, master, commissioner, clerk or referee;
> (o) a confidentiality order.

[220] Rule 216.1 is relatively new, coming into force on January 1, 1996.[120] There are few reported cases in which a remedy was sought under this rule.[121] In *Dunn* v. *Dunn*[122] a party sought to complete discoveries by way of interrogatories, as that party "has at various times shown great frustration and has clearly been irritated by the somewhat slow discovery process and by opposing Counsel's objections...some of [which] have been inappropriate and unfortunate". The Court found that these

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[120] Alta. Reg. 277/95.

[121] *Alberta (Treasury Branches)* v. *Leahy* 1999 ABQB 829; *Anderson Preece & Associates Inc.* v. *Dominion Appraisal Group Inc.* 2000 ABQB 254; *Dunn* v. *Dunn*, *supra* note 105; *Woldemichael* v. *Gallant*, [2000] A.J. 1233 (Taxing officer).

[122] *Supra* note 105 at para. 18.

circumstances did not meet the threshold for Court intervention set out in Rule 216.1 (1)(a) or (b),[123] and no order under Rule 216.1 was made at that time.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[221] The Committee discussed whether a specific rule such as this is necessary, or whether it would suffice to rely on a non-compliance rule (such as contempt) which would apply generally to any non-compliance with the rules. Ultimately the Committee concluded that it is appropriate to have a specific rule dealing with non-compliance or abuse of the discovery process listing specific types of remedies. The Committee felt that the Court may be more comfortable in imposing more unique forms of relief if they were specifically provided to it as an option. In many cases these specialized types of relief may be more effective in moving the action along in a timely and cost-effective manner than would a mere order for costs or an imposed schedule. The Committee believes that it should be made clear that the "laundry list" of remedies is not exclusive and that the Court may order any other relief it deems necessary and just in the circumstances.

S. The Examiner

ISSUE No. 29
Should the rules do away with, or modernize, the role of the Examiner?

[222] Currently the rules governing examinations for discovery make reference to the "Examiner" in several places and on their face give the Examiner a great deal of power over examination for discovery proceedings. Rule 203 states that the examination must take place before the Examiner, a person designated the 'the clerk' or such other person as appointed by the court, or before any other clerk by consent. Further, subject to Rule 213,[124] the clerk may rule on or make directions respecting the conduct of the examination.

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[123] Although Lee J. did comment that "This is also not to suggest that the Plaintiff's counsel has conducted himself properly at all times", which would seem to satisfy Alberta, *supra* note 11, r. 216.1(1)(a) of a party acting...improperly.

[124] Alberta, *supra* note 11, r. 213 provides that only the Court may rule on objections to questions in the examination for discovery.

[223] Rule 206 provides that the examiner may direct that any exhibit marked on an examination need not be filed with him, but that exhibits be produced at the trial of the action. Further "the Examiner shall, at the request of the examining solicitor, cause copies of the exhibits or extracts therefrom to be made by the shorthand writer and attached to the depositions and the copies or extracts may be used in every way as the originals." Rule 208 provides that the Examiner may direct that a person produce a record that has not been produced previously. Under Rule 210, any ruling or direction of the Examiner is subject to appeal to the Court and the Examiner shall upon request certify under his hand the question raised and the ruling or direction made thereon.

[224] Rules 211 and 212 are particularly archaic:

> 211(1) Unless taken in shorthand the deposition on an oral examination may be taken down in writing by the examiner in the form of a narrative expressed in the first person and when competed shall be read over to the person examined and shall be signed by him in the presence of the parties or those of them that attend and shall be certified by the examiner.
>
> (2) When anyone examined refuses or is unable to sign the depositions, the examiner shall so certify.
>
> (3) The examiner may, upon any examination under this Rule, in his discretion take down any particular question or answer and he shall upon request note upon the depositions objected to and the ground of the objection.
>
> 212 (1) The examination (unless otherwise ordered or agreed) shall be taken in shorthand by a court reporter, if available, otherwise by a shorthand writer approved by the parties and sworn and shall be taken down by questions and answers in which case it is not necessary for the depositions to be read over to or signed by the person examined.
>
> (2) If the examination is taken by an official court reporter it is not necessary for the examiner to be present at the examination.

[225] Finally, Rule 216 provides that the person taking an examination may or shall make a special report to the Court, touching the examination and the conduct or the absence of any person, and the Court make such order as is just.

History of the examiner

[226] When private court reporters started conducting examinations for discovery in Alberta they began obtaining orders under Rule 204(1) making them examiners, and

this practice continues today.[125] "Examiners are usually the head of the private court reporting firm.[126]... In practice the Clerk will never attend the examination, and the actual examiner rarely, if ever, attends."

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[227] The Committee is of the opinion that the primary role of the "examiner" today is to provide a link between the court and the discovery procedure to ensure that the court has jurisdiction over discovery proceedings. There may need to be a link between the court and the issuance of the appointment, the certification of transcripts and marking of exhibits as they become evidence in the action, and certificates of failure to attend upon which contempt orders are made.

[228] The Committee's proposal is that the rules referring to the examiner be modernized to reflect the current practice. The rules should define each of, and distinguish between, private court reporters, official court reporters, the Clerk of the Court, and the Examiner, and clearly specify the functions of each. It is likely that references to the Examiner may be abolished with a proper definition of court reporter and Clerk of the Court, and clear delineation of the separate duties of each.

[229] In respect of examination for discovery (and presumably cross-examinations on affidavits), the duties of the court reporter would include swearing in the witness; transcribing the examination verbatim subject to portions which are "off the record"; marking exhibits; noting objections; and providing certificates of non-attendance when a witness has failed to show up at the appointed time.

[230] Other than filing appointments for examinations and transcripts of cross-examinations on affidavits, it seems that the Clerk of the Court does not have any other specific duties relating to examinations for discoveries. As the role of the Examiner has been usurped by the private court reporters and the Court, there does not seem to be a need to continue with this position.

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[125] *Civil Procedure Guide 1992*, *supra* note 111 at 624.

[126] *Civil Procedure Handbook 2000*, *supra* note 31 at 166.

T. Bifurcation of Discovery

ISSUE No. 30
Should bifurcation of discovery be encouraged, or permitted?

[231] Presently Rule 223 allows the Court to bifurcate discovery until certain issues are determined. This rule is used in conjunction with Rule 221, which allows the trial of an action to be split. Stevenson & Côté note "one can scarcely split (and postpone part of) discovery, without splitting trial, if one did, a party of the suit would have trial with no discovery, and the rules do not permit that . ...In practice orders under this rule are rarely granted as splitting off issues often ends up consuming more time and money."[127]

[232] Stevenson & Côté further suggest that a preliminary issue should be tried only if it is short and simple and involves few or no facts, or facts that are finally and fully agreed upon between the parties. The issue should end the suit completely if decided one way.

[233] Manitoba and Prince Edward Island allow for divided discovery on grounds different than those in Alberta:

> 31.06(5) Where information may become relevant only after the determination of an issue in the action and the disclosure of the information before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold the information until after the issue has been determined.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[234] The Committee was of the opinion that bifurcation of discovery seldom results in saving either time or money for the same reasons as those set out by Stevenson & Côté above. However, there may be circumstances where it is appropriate to split discoveries on certain issues. The Committee proposes that the parties retain the ability to decide if bifurcation is necessary, but that this is not something which should be required.

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[127] *Civil Procedure Guide 2000*, *supra* note 31 at 189.

U. Use of Discovery at Trial

ISSUE No. 31
How should discovery evidence be used at trial?

[235] Presently Rules 212(4) and 214(1), (3)[128] and (4) govern the use of discovery transcripts at trial. Rule 212(4) prohibits filing the examination for discovery transcript and states that the transcript shall not be put before the Court except during an application or when used at trial. Rule 214(1) provides that any party may at the trial or on motion use in evidence as against any opposite party any part of the examination of that opposite party, or any part of the evidence of the corporate representative of that party. Rule 213(4) permits a party to read in portions of their own discovery if it is necessary to do so to put the examining party's read-in into proper context.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

Filing of examination for discovery transcript

[236] The Committee proposes that parties should not file discovery transcripts, nor should any form of recording of the discovery be placed on the Court file. Evidence from discovery should only be put before the Court when being used on an application or at trial.

Who may use examination for discovery evidence

[237] The Committee concluded that the present practice of allowing a party at trial or on an application to use any part of their examination of a party who is adverse in interest should continue. However, the Committee was unable to agree whether parties who are not adverse in interest may use the discovery done by each other against a party adverse in interest. Currently this may be done by agreement at the commencement of discoveries. Absent such an agreement a party does not have the right to use another party's discovery evidence. The Committee seeks input from the profession as to whether it is desirable to codify this practice.

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[128] The use of examination for discovery transcripts when a witness is unavailable at trial will be fully considered at a later date when the Committee discusses *de bene esse* and commission evidence issues.

Qualifying read-ins

[238] The Committee agreed that it is necessary to allow parties to qualify read-ins by reading in portions of their own examinations if to do so is necessary to put the original read in into proper context.