ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Discovery and Evidence Issues: Commission Evidence, Admissions, Pierringer Agreements and Innovative Procedures

Consultation Memorandum No. 12.7

July 2003

THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Expert Evidence and "Independent" Medical Examinations	February 2003	May 16, 2003
12.4	Parties	February 2003	June 2, 2003
12.5	Management of Litigation	March 2003	June 30, 2003
12.6	Promoting Early Resolutions of Disputes by Settlement	July 2003	November 14, 2003
12.7	Discovery and Evidence Issues: Commission Evidence, Admissions, Pierringer Agreements and Innovative Procedures	July 2003	November 14, 2003

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ALBERTA LAW REFORM INSTITUTE

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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 Appeal of Alberta
Alan D. Hunter, Q.C., Code Hunter LLP
Douglas A. McGillivray, Q.C., Burnet, Duckworth & Palmer
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PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by November 14, 2003.

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

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

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

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BACKGROUND

A. 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 may 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. Mr. 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

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

C. 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.

D. 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, including both lawyers and judges, 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 Queen's Bench justices and masters, and Provincial Court judges. 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/>. Excerpts from the Report are set out under the subheadings below.

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 broken, 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 do not 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.

E. 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 describing the responses has been prepared and is available on our website: <http://law.ualberta.ca/alri/>. Some of the respondents indicated a willingness to participate in focus groups about rules reform. In the fall of 2002, focus groups were conducted in Edmonton and Calgary. A Report on the Focus Groups has been prepared and is also available on the website.

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.

F. 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. The General Rules Rewrite Committee and the "Rethink" Committees dealing with Early

Resolution of Disputes, Management of Litigation, and Discovery and Evidence were the first to commence. Specialized areas of practice are now being reviewed by committees dealing with rules relating to the Enforcement of Judgments, Appeals, Costs and other matters.

G. 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.

H. 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. To ensure that all issues in this area receive appropriate attention, the Discovery and Evidence Committee ("the Committee") has been struck to consider specific issues concerning 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 2003. 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.

I. Consultation Memorandum

The Discovery and Evidence Committee has previously published two other consultation memoranda: Document Discovery and Examination for Discovery (No. 12.2), and Expert Evidence and "Independent" Medical Examinations (No. 12.3). While these memoranda address the majority of issues relating to discovery and evidence, there are a number of discrete topics which must also be addressed. This consultation memorandum addresses these remaining topics.

EXECUTIVE SUMMARY

A. Introduction

The Discovery and Evidence Committee ("the Committee") has been struck to consider specific issues in the areas of discovery and evidence. This consultation memorandum deals with a number of matters, including commission evidence and *de bene esse* evidence, admissions, discovery issues arising from the use of Pierringer agreements, and innovative discovery procedures.

B. Commission and *De Bene Esse* Evidence

The rules governing the procedure for taking evidence out of court to be used at trial are found in Part 26 of the Rules of Court, in Rules 270-291 and 297. These rules primarily concern commission evidence, the procedure to take evidence of a witness either inside or outside of Alberta if it appears that the witness will not be in the jurisdiction at the time of trial. They also give the court jurisdiction to order trial evidence to be taken *de bene esse* in situations where it appears that the witness may not be able to appear at trial due to death, or future physical or mental disabilities.

We received few comments from the profession about the commission evidence procedure. The comments we did receive concurred that the rules were outdated and poorly organized. In particular, it was noted that as the commission evidence rules are not very useful, parties often agree to their own procedures for taking commission evidence.

The Committee proposes that the commission evidence rules follow the Ontario model. The rules should set out the circumstances in which evidence can be taken by commission and the factors the court should take into account, including:

(a) the convenience of the person sought to be examined;
(b) the possibility that the person will be unable to testify at trial due to death, infirmity or sickness;
(c) the possibility that the person will be beyond the jurisdiction of the court at the time of trial;
(d) expense;

(e) whether the witness should give evidence in person at trial; and
(f) any other relevant consideration.

The Committee agrees that the existing procedures for obtaining commission evidence are too complicated, and should be simplified. The order for commission evidence, and, if necessary, for a letter of request (currently referred to as *letters rogatory*) may be done by way of standard forms written in plain language. The order should attach a standard form summons to the witness, commission, and letter of request.

The summons to the witness should give clear information about the time, date, and place of the examination, as well as outlining what the witness must bring to the examination and the consequences of non-attendance. It should also set out the amount of conduct money and how it is calculated.

The commission should set out the responsibilities of the Commissioner, details about the commission, and the oaths to be taken by the different participants.

The letter of request[2] should include:
(i) details of the style of cause and jurisdiction of the action;
(ii) a statement that the court is convinced that it is necessary to examine a witness in the recipient court's jurisdiction;
(iii) details of the commission;
(iv) the specific request that the court cause the witness to attend the examination by whatever means are used in that jurisdiction; and
(v) a request that the commissioner be permitted to carry out the examination in accordance with the Alberta rules of civil procedure and evidence.

Rather than creating a "stand-alone" procedure as they now do, the commission evidence rules should incorporate examination for discovery procedure with necessary modifications. This would eliminate duplication and inconsistency in the rules.

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[2] The Committee believes that the term “letter of request” is preferable to “letters rogatory”.

In addition to trial evidence, the Committee proposes that the rules expressly provide for examinations for discovery out of the jurisdiction.

C. Use of Discovery Transcripts at Trial When A Witness is Unavailable

Currently Rule 214(3) provides that an examining party may apply to use discovery transcripts, either in whole or in part, at trial if the witness is unavailable. This rule may be relied on when a person who has been examined for discovery dies unexpectedly prior to trial.[3] But it may only be relied on by the examining party, not by the party on whose behalf the unavailable witness was examined. The rationale for this limitation is that the purpose and procedure for an examination for discovery are very different as compared with other cross-examinations. Since the examiner is normally entitled to choose what parts, if any, of the transcript to read in, the examiner may pose questions that would never be posed in cross-examination at trial. The examiner may also choose not to pose questions in certain areas so as not to reveal trial tactics, with the result that the examination transcript presents an incomplete version of the case.

Despite this, there is also a compelling argument that the discovery evidence may be the best or even the only available evidence, and that justice may be served by permitting its use. Therefore the rules in several other provinces provide that the court has the discretion to allow any party to read in some or all portions of the discovery of a witness in certain circumstances. These rules often prescribe factors that the court should take into account when exercising this discretion.

The Committee recognizes it may be desirable in certain circumstances to permit a non-examining party to use a discovery transcript at trial. However, it also had serious concerns that this could prejudice the examining party. The Committee proposes that the rules be amended to permit any party to read in a discovery transcript if the witness is unavailable, provided that the procedure is strictly limited and only used when necessary. The rule should make it clear that a high threshold must be met before a non-examining party may use the transcript.

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[3] *Paquin v. Gainers Inc.* (1989), 101 A.R. 290, 71 Alta. L.R. (2d) 74 (C.A.) [*Paquin*].

D. Admissions

Under Rule 230 a party can request another party to make certain admissions of fact (Notice to Admit Facts). Rule 230.1 permits a party to call on another party to admit that a written opinion (usually an expert opinion) is correct (Notice to Admit Opinion). These rules are designed to save both time and cost. The requested admissions are deemed to be admitted unless, within 30 days after service of the Notice to Admit, the responding party denies specifically the matter for which an admission is requested with reasons for the denial. The responding party may also object on the ground that some or all of the requested admissions are privileged or irrelevant, or that the request is otherwise improper. Where a party refuses to make a requested admission that is subsequently proven at the trial, the cost of proving the matter is paid by the party who refused to make the admission, unless the court finds that the refusal was reasonable. The court may at any time allow any party to amend or withdraw any admission on such terms as may be just.

The Committee agreed that the objectives of the Notice to Admit are very important. Notwithstanding concerns about the perceived ineffectiveness of the current rule, the Committee believes that the Notice to Admit has the potential to be an effective tool. The Committee supports retaining the Notice to Admit, and making changes (addressed below) to increase its effectiveness.

The Committee proposes that parties should continue to be able to withdraw admissions, either by consent or by court order, as there may be good reason for doing so. The court's discretion to allow or deny a withdrawal should remain uncodified and flexible, to enable the court to deal with particular facts on a case by case basis.

The Committee considered whether all parties to an action should be served with the Notice to Admit and response. The Committee does not intend that all parties so served need respond; only the party to whom the Notice is directed need respond, and the admissions made or refused would be effective only as between the party who served the Notice and the responding party (absent any agreement to the contrary). Nonetheless, a majority of the Committee thought that all parties should receive a copy of any Notice and response for informational purposes. The Committee seeks comments from the legal profession on this point.

There was a concern with the current Rule 230(4) that directs the court to award costs of proving the fact for which an admission was sought and was not forthcoming. It can be very difficult to assess the cost of proving a particular fact. The Committee proposes that the rule be amended. Rather than imposing costs relating only to the proof of the subject fact, the rules should provide that the court can take the undue denial(s) into account generally when awarding costs (as is the present practice under Alberta's Rule 192).

The Committee also addressed admissions under Rule 192, which provides that once an affidavit of records is served, both the party on whose behalf the affidavit is made and the party upon whom the affidavit is served are deemed to admit that the records specified or referred to in the affidavit are authentic. Further, if a copy of a letter, memorandum or other message was sent, both parties are deemed to admit that the original was sent and received by the addressee. There is no deemed admission under the rule if the party upon whom the affidavit is served replies with a notice of objection or denies the matter in his or her pleadings. As noted above, the court may take a party's wrongful denial into account when awarding costs.

The Committee was concerned by the lack of a definition of "authenticity" of a record, particularly with respect to electronic records. The Committee was of the view that the elements comprising "authenticity" as set out in the rules of several other provinces (and that were in the Alberta rules prior to amendments in 1999) are appropriate with some minor modifications. The definition of "authenticity" in the Rules for the purposes of deemed admissions regarding records should include the facts that:

(i) a record that is said to be an original was printed, written, signed or executed as it purports to have been;
(ii) a record that is said to be a copy is a true copy of the original, and that original was printed, written, signed or executed as it purports to have been; and
(iii) where the record is a copy of a letter, telegram, telecommunication, or other electronic communication, that the original in its entirety was sent as it purports to have been sent and received in its entirety by the person to whom it is addressed.

The Committee considered whether a deemed admissions rule regarding records should be retained. The alternative would be to remove the automatic admission after the service of the Affidavit of Records and require service of some form of Notice to Admit. The approach in some other jurisdictions is that admissions regarding documents come into effect only after service of a Notice to Admit Documents. Giving counsel the opportunity to review each record for which the admission is sought allows the lawyer to make meaningful decisions regarding the authenticity of a record. Having parties inspect records prior to deeming admissions also minimizes problems regarding electronic records. Parties can review versions of produced records, and confirm that particular emails and attachments were received. It may be that the courts would be more likely to enforce deemed admissions following a Notice to Admit, as the admissions are less likely to arise from inadvertence. The majority of the Committee supports amending the rules to include a form of "Notice to Admit Records".

E. Pierringer Agreements

Pierringer agreements permit some defendants to withdraw from an action leaving the remaining defendants responsible for only the loss they actually caused, with no joint liability. Common elements in Pierringer agreements include:

1. The plaintiff receives a payment from the settling defendant in full satisfaction of the plaintiff's claim against that defendant.
2. The settling defendant receives from the plaintiff a promise to discontinue proceedings, effectively removing the defendant from the action.
3. Subsequent amendments to the pleadings formally remove the settling defendant from the suit.
4. The plaintiff continues the action against the remaining defendants, who are only responsible for their several liability.

Pierringer agreements give rise to the following issues regarding the discovery process:

1. *If Pierringer agreements are entered into before document discovery or examination for discovery have been concluded, should there be some mechanism for permitting the non-settling parties to complete discovery?*

Prior to the decision in *Amoco Canada Petroleum Company Ltd. v. Propak Systems Ltd.*,[4] the accepted practice in Alberta was that the court would decide whether to keep settling defendants in an action by determining whether doing so would prejudice the non-settling defendants. In *Amoco*,[5] the Alberta Court of Appeal noted that it is difficult to balance the competing interests of encouraging early settlement and minimizing potential prejudice to non-settling parties. The Court commented that this balance is made even more difficult due to the lack of tools in the Rules of Court that could assist in balancing the competing interests, particularly in that the Rules do not permit discovery of non-parties. The problem is alleviated in jurisdictions where rules give the court discretion to order discovery of non-parties so as to address the potential prejudice to non-settling parties without rejecting the proposed settlement agreement.

In Consultation Memorandum 12.2 this Committee proposed that the rules should not permit discovery of non-parties who are mere witnesses. However, parties removed from an action by way of Pierringer agreements are different from mere witnesses as they are not strangers to the litigation. The Committee agrees with the suggestion made in *Amoco*,[6] that the rules should give the court jurisdiction to make any order it sees fit regarding procedure when one or more parties is removed from an action by way of settlement, including an order permitting discovery of former parties.

2. *If Pierringer agreements are entered into after examinations for discovery, what use may be made of the settling parties' discovery transcripts?*

Another issue arises if a Pierringer agreement is entered into after the completion of some or all of the examination for discovery of the settling defendant. As noted above, a common provision in a Pierringer agreement requires the settling defendant to be removed from the action. Once removed from the action, the settling defendant will no longer be an "opposite party". Presumably Rule 214 would no longer apply; a settling defendant who had examined the non-settling party loses the right to use the

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[4] (2001), 281 A.R. 185, 2001 ABCA 110 [*Amoco*].

[5] *Ibid*.

[6] *Ibid*.

settling defendant's discovery evidence at trial. The argument is that the non-settling defendants may be prejudiced in the defence of their case if they are denied the opportunity to use admissions in discovery which may assist the court in apportioning liability.

The Committee was of the view that the possible situations may be too varied and too complex to be dealt with specifically in the rules. A better solution is to deal with the situations on a case by case basis, pursuant to a general rule that gives the court discretion following a partial settlement to make procedural rulings that will do justice between the parties. A "shopping list" of options for the court may be included, such as examinations of former parties, reading in the discovery transcript of a settling party, costs orders, or any other relief that the Court deems fit.

F. Innovative Procedures

Witness lists and "will say" or witness statements

Several jurisdictions require parties to provide lists containing the names of witnesses as well as contact information. This is also a requirement in Rule 661(4) of Alberta's Streamlined Procedure. Comments received in our consultation suggest that the days of the surprise witness are past. If a surprise witness is tendered at trial, adjournments are commonly granted to allow the party taken by surprise to address the situation. Disclosing witness names ahead of trial may avoid such delays, and help to focus issues and facilitate settlement.

The idea of imposing a requirement to serve "will say" or witness statements was also explored. Such statements would contain a summary of the evidence that a witness is expected to give at trial. Witness statements are now used in other jurisdictions, including the Northwest Territories.

There was substantial agreement in the Committee that some witness information should be provided pre-trial. The Committee discussed the extent and timing of such information. One possibility is to require the provision of witnesses' names or statements at an early stage. A number of concerns were raised regarding such a requirement. Incomplete information prior to discoveries can make it difficult to know who potential witnesses are; disclosure may be perceived as or lead to an

invasion of witnesses' privacy; and early disclosure "front-end loads" the litigation process, and in so doing may create costs that are ultimately unnecessary, and/or needlessly abrogate litigation privilege. Due to these concerns, the Committee does not support pre-discovery witness statements or witness lists.

The Committee proposes that a summary of the witness' expected evidence be served no less than 10 days prior to trial. The summary should contain names and contact information for all witnesses expected to be called, together with a brief summary of the evidence the witness is expected to give.

"Will ask" statements

As it may be difficult for a witness who is to be discovered to inform him/herself in some cases, counsel have suggested a method to assist a corporate officer or other witness that may be incorporated in the rules. A list of areas to be examined upon could be sent to the representative prior to discovery. The list need not contain specific questions; it need only indicate areas upon which the witness is expected to be informed. The purpose would be to make discoveries more efficient. If the witness comes prepared to answer questions, undertakings could be minimized and further discoveries avoided.

While recognizing the potential value of this process, the Committee also recognized that it is not always necessary, and, if required in all cases, could add to the cost of litigation. Therefore the Committee reached a consensus that "will ask" statements should not be required. If counsel wish to use them they may be used by agreement or perhaps by order of the court in case management.

LIST OF ISSUES

CHAPTER 1. EVIDENCE TAKEN OUT OF COURT - COMMISSION EVIDENCE AND *DE BENE ESSE* EVIDENCE

A. Introduction

[1] The Rules governing the procedure for taking evidence out of court to be used at trial are found in Part 26 of the *Rules of Court*, in Rules 270-291 and 297. These rules primarily concern commission evidence, the procedure to take evidence of a witness either inside or outside of Alberta if it appears that the witness will not be in the jurisdiction at the time of trial. They also give the court jurisdiction to order trial evidence to be taken *de bene esse* in situations where it appears that the witness may not be able to appear at trial due to death, or future physical or mental disabilities.

[2] We received few comments from the profession about the commission evidence procedure. The comments we did receive concurred that these rules were outdated and poorly organized. In particular, it was noted that as the commission evidence rules are not very useful, parties often agree to their own procedures for taking commission evidence. It was also suggested that there be an attempt to create procedures for commission evidence and letters rogatory[7] that are accepted internationally.

B. Discussion of Issues

ISSUE No. 1
When should evidence be taken out of Court?

1. Commission evidence

[3] Presently Rule 270(1) and (2) gives only a general guideline for granting an order for taking evidence out of court. Where it appears necessary for the purposes of justice, the court may order a person to be examined at any place whether within or outside Alberta. Where the testimony is required of a person who is resident outside of

[7] Letters rogatory is the process used to compel a witness who is outside of the jurisdiction to give testimony. As an order of the presiding court is not effective outside of the jurisdiction, a formal request is made from the presiding court to the appropriate court in the jurisdiction where the witness is located, wherein the presiding court asks the other court to issue an order compelling the witness to testify pursuant to the commission.

Alberta, the court may order the issuance of a commission for the examination of the person.

[4] Rule 270 is used in two circumstances:

(i) when a witness resides outside of the jurisdiction or will be out of the jurisdiction at the time set for trial, and it would be inconvenient for them to attend the trial in Alberta; or

(ii) if it is likely a witness will be unable to testify at trial due to death or for medical reasons (*de bene esse* testimony).

[5] The case law has set out several factors for the court to consider in an application for an order to take evidence by way of commission. There is a heavy onus on the person seeking the commission. The court is less likely to grant an order for commission evidence where the plaintiff seeks to either examine or be examined by way of commission, as the plaintiff has chosen the jurisdiction.[8] The evidence sought must be material and not merely corroborative. There must be good reason shown why the witness cannot attend personally at trial or why the witness cannot be compelled to attend at trial.[9]

2. *De bene esse* evidence

[6] As noted above, Rule 270(1) is also the authority for taking evidence *de bene esse*. This type of testimony is used in situations where a witness will likely be unable to testify at trial, usually due to death or for medical reasons.

[7] Rule 297 also addresses preserving testimony for trial in specific circumstances:

> 297(1) Any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of that event, may apply to the court by originating notice for an order to perpetuate any testimony which may be material for establishing his right or claim.

No reported cases within the last 100 years were located in which Rule 297 has been applied.

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[8] *Kennett v. Gill* (1969), 71 W.W.R. 1, 8 D.L.R. (3d) 386 (Alta. C.A.).

[9] *WIC Premium Television Ltd. v. General Instrument Corp.* (1999), 243 A.R. 324, 1999 ABQB 335.

[8] The main criterion for obtaining an order for *de bene esse* evidence is that the party seeking the order must demonstrate that it is likely that the witness will be too ill to attend at trial, or may not be alive at the date of the trial.

ISSUE No. 2
How should the order for commission evidence be obtained?

[9] The present Alberta Rules governing procedures for obtaining commission evidence outside of Alberta are Rules 272, 273, and Form E. The general comment heard during consultations was that these rules are archaic and cumbersome. For instance, Rule 273 requires that a notice of intention to take the examination shall be given to the opposite party if that person gives the name and address of a person resident within five miles of the place of the examination upon whom the notice is to be served. This requirement makes little sense. Form E is also written in archaic and outdated language which makes it hard to understand.

[10] It should be noted an order to take evidence of a witness outside of Alberta by way of a commission is effective only when that witness is willing to be examined. The commission alone cannot compel an unwilling witness to give testimony. While witnesses within Canada may be compelled to testify at trial under the *Interprovincial Subpoena Act*,[10] a party must go through the letters rogatory procedure to attempt to compel persons outside of Canada to testify. There is nothing currently in the Alberta Rules governing the letters rogatory procedure, other than Rule 290 which merely states that the court may issue a request to examine witnesses in lieu of a commission.

ISSUE No. 3
How should the rules address the procedures for taking commission evidence?

[11] Rules 271, 274-289, and 291 govern the procedure to be followed at the examination. The problems with these rules are twofold: they are somewhat outdated; and they attempt to codify a separate procedure for taking commission evidence which

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[10] R.S.A. 2000, c. I-9.

differs in some, though not all, respects from the procedure used in examinations for discovery.[11] The comment has been made that having two procedures for taking evidence prior to trial, be it discovery or by way of commission, is cumbersome and generally unnecessary.

ISSUE No. 4
Should the commission evidence procedures apply to discovery evidence?

[12] The courts have held that the commission rules may be used for cross-examination on affidavits as well as for evidence to be used at trial, but they may not be used to obtain discovery evidence.[12] However, under Rule 200(5) the court may order a commission for the examination for discovery of a person resident outside of the jurisdiction, though this rule does not specifically refer to the commission evidence procedures in Rules 270-291.

[13] The current Alberta Rules governing the procedures for taking evidence out of court are rather lengthy, detailed and complex. They apply to both commission evidence and *de bene esse* evidence. To a great extent these rules merely repeat the rules governing the procedures for examination for discovery, though the commission evidence rules specifically address interpreters and interrogatories.[13]

[14] The Alberta Rules were amended recently to permit videotaping of commission evidence. Allowing videotaping of commission evidence overcomes what was once a significant objection to commission evidence, being that the trial judge is at a disadvantage by not being able to see the manner in which the witness gave evidence.

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[11] Some specific aspects of the commission evidence procedure which differ from the examination for discovery procedure are discussed below.

[12] *WIC Premium Television Ltd. v. General Instrument Corp.*, *supra* note 9.

[13] Both interpreters and interrogatories are addressed in the context of examination for discovery in Consultation Memorandum 12.2.

Rules in Other Jurisdictions

Commission evidence generally

[15] Many of the rules in other provinces combine the procedures for *de bene esse* testimony, commission evidence and letters rogatory into one rule or section. Most other jurisdictions have one general provision setting out circumstances in which any evidence may be taken out of court.[14]

[16] The rules in Ontario, Prince Edward Island and Manitoba[15] provide that evidence may be taken out of court by order or with consent of the parties. The factors that the court must consider when deciding whether to grant an order that evidence be taken out of court are:

> (a) the convenience of the person sought to be examined;
> (b) the possibility that the person will be unable to testify at trial due to death, infirmity or sickness;
> (c) possibility that the person will be beyond the jurisdiction of the court at the time of trial;
> (d) expense;
> (e) whether the witness should give evidence in person at trial; and
> (f) any other relevant consideration.

Procedure for obtaining order for commission evidence

[17] Other jurisdictions in Canada have more simple and clear procedures for obtaining commissions both inside and outside of Canada. Many jurisdictions have

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[14] R. 38 in British Columbia, *Supreme Court Rules* [British Columbia] is identical to Ontario, *Rules of Civil Procedure* [Ontario] except that they do not include items (e) and (f). The rules in New Brunswick, *Rules of Court*, r. 53.01 [New Brunswick] and the Federal Court, *Federal Court Rules, 1998*, r. 271(2) [Federal] provide that evidence may be taken out of court by order, and the court shall consider (a) the expected absence of any person at trial; (b) the age or infirmity of any person; (c) distance the person resides from the place of trial; and (d) the expense of having the person attend at trial. In addition to giving the Court a general power to order an examination of any person who may not be available for trial due to illness or who is leaving the jurisdiction, the rules in Nova Scotia, *Civil Procedure Rules*, r. 32.01(3) [Nova Scotia] allow parties to dispense with the need to obtain an order for commission evidence if the witness is within the jurisdiction if given five days' notice of the examination. Saskatchewan, *Queen's Bench Rules*, r. 289 [Saskatchewan] and Newfoundland, *Supreme Court Rules*, r. 47.01 [Newfoundland] rules regarding the circumstances when commission evidence or *de bene esse* evidence will be allowed are identical to the existing Alberta Rules.

[15] Ontario, r. 36.01; Prince Edward Island, *Rules of Civil Procedure* [Prince Edward Island], r. 36.01; Manitoba, *Court of Queen's Bench Rules* [Manitoba], r. 36.01.

simplified their procedures by relying primarily upon forms.[16] The commission rules in other jurisdictions specifically include both circumstances where a witness will be outside the jurisdiction at the time of trial, as well as circumstances which traditionally necessitate the taking of evidence *de bene esse*. Only Saskatchewan and British Columbia retain a rule identical to Alberta's Rule 297.[17]

[18] The procedures for taking the evidence apply regardless of the reason for the witness' expected non-attendance at trial.

[19] The Ontario Rules provide a good example of how the commission evidence procedure can be simplified. The procedure to obtain the commission is found in Rule 34.07, which relies to a great extent upon forms.[18] Commission evidence may also be taken by consent of the parties.[19]

[20] Rule 34.07(1) sets out the requirements for the order for the commission for an examination of a witness who resides outside of Ontario. The order must address where the examination is to take place; the notice period; the identity of the commissioner; the required attendance money; and any other matter respecting the examination.

[21] The forms are in plain language. A summons is served on the witness pursuant to the terms of the order, and clearly sets out:

(i) the type of examination;
(ii) the date, time and location of the examination;
(iii) materials that the witness must bring to the examination;
(iv) the amount of attendance money and how it is calculated;
(v) the potential consequences of failing to attend (costs and contempt); and
(vi) the examining counsel's contact information.

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[16] Ontario, Manitoba, and Prince Edward Island; rr. 36.03, 34.07. New Brunswick, r. 53.02.

[17] Saskatchewan, r. 309; British Columbia, r. 38(14).

[18] Ontario, Forms 34B, 34C.

[19] Ontario, r. 34.06.

[22] The commission is also in plain language. The order for the commission is attached. The commission sets out:

(i) the commissioner's responsibilities;
(ii) the oath that the commissioner must take;
(iii) the time for service of the summons;
(v) the manner in which the examination is to be recorded and the oath that the court reporter must take;
(vi) the oath that the witness must take;
(vii) the oath that interpreters must take;
(viii) the procedure for returning the transcript of the examination; and
(ix) a certificate certifying that all procedures were properly carried out.

The commissioner's responsibilities are also outlined in Rules 34.07(5) and (6).

[23] Other jurisdictions also specifically address the letters rogatory procedure. Generally they provide that a letter of request in a prescribed form may also be required to be served on the appropriate government official if the witness is unwilling to testify.[20]

[24] Again, the Ontario Rules appear to be quite efficient in this regard.[21] There is a standard form order for the commission and the letter of request. Though it is a standard form, the order may contain particulars of any directions of the court relating to the examination. The standard form letter of request is issued by the Clerk of the Court pursuant to the order and is directed to the judicial authorities of the applicable jurisdiction. It contains:

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[20] Nova Scotia, rr. 32.01 and 32.02; Newfoundland, r. 47.02. Saskatchewan, rr. 284-304 are also virtually identical to Alberta, rr. 272, 273, 288-291. British Columbia has additional requirements if the assistance of a foreign court is necessary to compel the witness' testimony. The rules provide that the letter of request for the foreign court's assistance must be sent to the Under Secretary of State for External Affairs of Canada, along with copies of interrogatories (translated into the witness' native language if necessary) and information about counsel involved in the action, along with an undertaking to be responsible for any expenses which the Under Secretary may incur in relation to the proceedings. R. 271(3) of the Federal Court Rules give little guidance, stating only that the court may give directions regarding the time, place, manner and costs of examination, notice and production of materials.

[21] Ontario, Forms 34D, 34E.

(i) details of the style of cause and jurisdiction of the action;
(ii) a statement that the Ontario Court is convinced that it is necessary to examine a witness in recipient court's jurisdiction;
(iii) details of the commission which has been issued;
(iv) the specific request that the court cause the witness to attend the examination by whatever means are used in that jurisdiction;
(v) a request that the Commissioner be permitted to carry out the examination in accordance with the Ontario rules of civil procedure and evidence.

3. Whether commission procedure applies to discovery evidence

[25] Ontario, Manitoba and Prince Edward Island[22] allow parties to obtain commissions for discovery evidence outside of the province. New Brunswick, Saskatchewan, Nova Scotia, British Columbia and Newfoundland[23] have specific provisions that allow the court to direct examinations for discovery outside province.

4. Procedures for taking commission evidence

[26] Most other jurisdictions in Canada (with the exception of Saskatchewan, whose rules mirror Alberta's Rules in this regard) have greatly simplified the procedures for taking commission evidence. Most other jurisdictions simply state that the rules for taking oral evidence at discovery apply to commission evidence. However, they specifically state that witnesses being examined under the commission rules may be examined, cross-examined and then re-examined in the same manner as a witness at trial.[24]

[27] Virtually all other jurisdictions permit videotaping of commission evidence.[25]

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[22] Ontario, Manitoba, and Prince Edward Island, r. 34.07 in each province.

[23] New Brunswick, r. 33.07; Saskatchewan, r. 229; Nova Scotia, r. 18.06; British Columbia, r. 27(26); Newfoundland, r. 30.05.

[24] Ontario, r. 36.02; Manitoba, r. 36.02; Prince Edward Island, r. 36.02; Nova Scotia, r. 32.05; New Brunswick, r. 53.02. British Columbia, r. 38(11) does not even refer to the procedure for oral examination, it simply states "The examining party shall examine the witness, who shall be subject to cross-examination and re-examination".

[25] New Brunswick, r. 53.02(4); Manitoba, r. 34.18 and 36.02; Ontario, rr. 34.19 and 36.02; Prince Edward Island, rr. 34.19 and 36.02; British Columbia, r. 38.(13); Saskatchewan, r. 284A.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

Issue 1 - When should evidence be taken out of Court?

[28] The Committee proposes that the commission evidence rules follow the models in other Canadian jurisdictions. There should be a rule setting out the circumstances in which evidence can be taken by commission and the factors the court should take into account, which include:

(a) the convenience of the person sought to be examined;
(b) the possibility that the person will be unable to testify at trial due to death, infirmity or sickness;
(c) possibility that the person will be beyond the jurisdiction of the court at the time of trial;
(d) expense;
(e) whether the witness should give evidence in person at trial; and
(f) any other relevant consideration.

These considerations would then negate the need for retaining Rule 297, as the matters addressed therein would be subsumed into this analysis.

Issue 2 - How should the order for commission evidence be obtained?

[29] The Committee feels that the procedures for obtaining commission evidence are too complicated. The Committee prefers the approach taken by the rules in Ontario, which provides a much simpler and likely more effective commission evidence procedure.

[30] The order for commission evidence, and for a letter of request if necessary, may be done by way of a standard form written in plain language. It should specifically address the time for service of the summons. The order should be attached to the summons to the witness, the commission, and the letter of request.

[31] The summons to the witness should be in a standard form, giving clear information about the time, date, and place of the examination, as well as outlining what the witness must bring to the examination and the consequences of non-attendance. It should also clearly set out the amount of conduct money and how it is calculated.

[32] The commission should also be a standard form in plain language. It should set out the responsibilities of the commissioner, details about the commission, and the forms of the oaths to be taken by the different participants.

[33] The term "letter of request" is preferable to "letters rogatory". The standard form should again be in plain language and address the following matters:

(i) details of the style of cause and jurisdiction of the action;
(ii) a statement that the Alberta Court is convinced that it is necessary to examine a witness in recipient court's jurisdiction;
(iii) details of the commission which has been issued;
(iv) the specific request that the court cause the witness to attend the examination by whatever means are used in that jurisdiction; and
(v) a request that the commissioner be permitted to carry out the examination in accordance with the Alberta Rules of civil procedure and evidence.

[34] The Committee noted that inherent problems in compelling testimony, either for discovery or at trial, from an unwilling witness who resides outside of Alberta result from a lack of jurisdiction over witnesses outside of Alberta. While standard form commissions and letters of request may assist counsel in the procedural aspects of compelling such testimony, there will still be problems compelling trial testimony of witnesses outside of Canada and discovery evidence from witnesses outside of Alberta. Although it is likely outside of the jurisdiction of the Province and the Committee to deal with in the Rules of Court, the Committee suggests that inter-provincial agreements for reciprocal recognition of orders compelling witnesses to appear for discovery would be useful, as would international agreements governing testimony of witnesses in foreign proceedings.

Issue 3 - How should the rules address the procedures for taking commission evidence?

[35] The Committee supports modernizing the procedures for taking evidence out of court. It would be preferable to simply incorporate the rules governing the examination for discovery process wherever possible. However, there are specific aspects of the commission evidence procedure that may differ from the examination for discovery process to be addressed, such as the need to include a provision that the witness may be examined in the same manner as at trial. Other specific issues are dealt with below.

Issue 4 - Should the commission evidence procedures apply to discovery evidence?

[36] The Committee is of the view that the commission evidence procedures should apply to discovery evidence.

ISSUE No. 5
How should the Rules deal with objections to questions during commission evidence?

[37] Rule 284 specifically addresses objections taken to questions asked when evidence is being taken by commission. It provides that the question to which there is an objection must be recorded and the validity of the objection shall be decided by the court. The examination may continue on other matters despite the objection. The parties may agree to have the witness answer the question at the time of the objection, though the admissibility of the answer will depend on the court's ruling.

Rules in Other Jurisdictions

[38] As in Alberta, Manitoba, New Brunswick, Prince Edward Island, the Federal Rules and Ontario all deal with objections during commission evidence in the same manner as objections at examinations for discovery. The question and the objection shall be recorded, and the witness may answer pending a ruling by the court or may wait to answer until after the court ruling. However, Nova Scotia and Newfoundland[26] require the witness to answer the question prior to the court's ruling on the validity of the objection.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[39] As it can be inconvenient to have questions answered after the commission examination, there should be an effective and convenient method for dealing with questions to which there are objections. Likely the most efficient method is to allow the question to be answered pending the ruling, but the Committee had reservations about this. The obvious concern is that once questions are answered it is not realistic to have lawyers subsequently "disabuse" their minds of the answer. The downfall in not having the question answered at the time of the examination is that it precludes any follow up questions which may result from the answer. Following up with

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[26] Nova Scotia, r. 32.07; Newfoundland, r. 47.07.

interrogatories may not always be adequate and having further examinations may be inefficient and costly. The Committee seeks input from the legal community on this issue.

ISSUE No. 6
Should discovery transcripts be used in the event that a witness is unavailable at trial? If so, by whom?

[40] Currently Rule 214(3) provides that an examining party may apply to use discovery transcripts, either in whole or in part, at trial if the witness is unavailable. This rule is most commonly relied on when a person who has been examined for discovery dies unexpectedly prior to trial.[27]

[41] It is clear from case law in Alberta that only the examining party may use this rule; it cannot be used by the party on whose behalf the unavailable witness was examined. The rationale for this limitation is that the purpose and procedure of examination for discovery are very different as compared with other cross-examinations. Since the examiner is normally entitled to choose what parts, if any, of the transcript to read in,[28] the examiner may pose questions which would never be posed in cross-examination at trial. The examiner may also choose not to pose questions in certain areas so as not to reveal trial tactics, with the result that the examination transcript presents an incomplete version of the case.[29] The Court of Appeal in *Paquin*[30] concluded that any changes to the Rule to allow other parties to use discovery transcripts at trial would have to be done through legislative action rather than by the courts.

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[27] *Paquin*, *supra* note 3.

[28] Subject to r. 214(4) which allows the other party to read in portions of the examination to put other read ins in proper context.

[29] *Paquin*, *supra* note 3.

[30] *Ibid*.

Rules in Other Jurisdictions

[42] Alberta is unusual in that it does not have a provision giving court discretion to allow any party to use some or all of the evidence given on discovery when a person is unavailable to attend trial. The rules in Ontario, Manitoba, Saskatchewan and Prince Edward Island[31] specifically provide that the court has the discretion to allow any party to read in some or all portions of the discovery of a witness in certain circumstances. These rules prescribe factors that the court should take into account when exercising its discretion, which includes such matters as:

(a) the extent to which the person was cross-examined on the examination for discovery;
(b) the importance of the evidence in the proceeding;
(c) the general principle that evidence should be presented orally in court; and
(d) any other relevant factor.

[43] Manitoba further requires that the order may only be granted where:

(a) the facts sought to be proved through the discovery are essential to the party's case, which would fail without proof of those facts;
(b) the facts cannot be proved in any other manner; and
(c) the leave is restricted to the portion of the discovery which relates to those facts.

[44] Newfoundland, Nova Scotia and New Brunswick[32] also provide that in certain circumstances the Court may permit any party to read into evidence at trial the discovery of any person, though there are no specific factors to guide the court's discretion.[33]

[45] Some jurisdictions require that it be shown that the person cannot be compelled to testify, that the witness' evidence may not be obtained in any other way, or that the applicant demonstrate that reasonable efforts to obtain the witness' attendance have

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[31] Ontario and Prince Edward Island, r. 31.11(6)(7); Manitoba, r. 31.11(7)-(9); Saskatchewan, r. 239A; Nova Scotia, r. 18.14.

[32] Newfoundland, r. 30.13; Nova Scotia, r. 18.14(1)(c); and New Brunswick, r. 32.11.

[33] Saskatchewan, r. 239A is virtually identical to these rules, although only an actual party's evidence may be read in, not the evidence of other witnesses who may have been discovered.

been made, without success. Others simply require that it be shown that the witness is not available due to death, illness, infirmity, or other sufficient reason.[34]

[46] Ontario amended its rules to include the right for any party to rely on examination for discovery evidence in 1985. It was felt that it was not appropriate to limit the use of discovery transcripts to areas of cross-examination (which presumably means using leading questions), as the purposes of examination for discovery are not the same as those in a cross-examination and an examining party may not want to cross-examine at the discovery. Requiring parties to have cross-examined in order to use that portion of the transcript may have the undesirable effect of turning every examination for discovery into a cross-examination.[35]

[47] The Ontario Rules addressed the concerns raised in *Paquin*[36] by including factors to guide the court's discretion (set out above). These factors seek to illuminate the extraordinary nature of this procedure and set a high threshold for reading in an entire discovery transcript as evidence. The Manitoba Rules have gone further in limiting this procedure to only material facts, with an express requirement to show necessity. Presumably this is intended to limit the introduction of self-serving evidence from the discovery by the party on whose behalf the witness was examined.

Discussion of Case Law

[48] The case law interpreting the rule permitting use of discovery transcripts by any party at trial suggests two things: (1) that it is only in rare or unusual circumstances that applications are made by either party to have discovery evidence read in, in the place of oral testimony; and (2) that the factors have a significant influence on the courts' decisions in these matters. The former is suggested in *Aujla v. Hayes*,[37] as the Court notes that between the time that the new Rule came into force in 1985 and the time of that decision in 1997, there were only 15 recorded cases of parties seeking

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[34] G.S. Holmested et al., *Holmested and Watson Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1984) v. 3 at 31-163 to 31-165 [Holmested and Watson].

[35] Holmested and Watson, *ibid.* at 31-174.

[36] *Supra* note 3.

[37] (1997), 100 O.A.C. 129, 10 C.P.C. (4th) 167 (C.A.).

orders under Ontario Rule 31.11(6) and (7). In the majority of these cases the courts specifically referred to the prescribed factors in their decisions.

[49] It may be questioned why other jurisdictions allow a party upon whose behalf a witness has been discovered to then use that discovery transcript as evidence at trial, in light of the policy and practical concerns enunciated in *Paquin*.[38] It appears that this practice has its genesis in the common law exception to the hearsay rule that testimony given under oath from prior proceedings may be read into subsequent proceedings if the witness has become unavailable. The applicant in such cases must show that:

(i) the adverse party had the opportunity to cross examine the witness in the prior proceeding;
(ii) the question in issue is substantially the same in the two proceedings; and
(iii) the subsequent proceeding is between the same parties or someone claiming under them.[39]

This common law exception to the hearsay rule did not allow discovery evidence to be read in, as there was no right to cross-examine a witness in discovery.[40] Many jurisdictions have included expressly the right to cross-examine during discovery[41] (on matters other than those going solely to credibility). Alberta has no such express provision presently, though the ability to cross-examine at discovery on matters other than pure credibility issues has been recognized at common law.[42]

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[50] The Committee recognizes it may be desirable to allow some limited flexibility to permit any party to use a discovery transcript at trial. However, it had serious concerns about allowing this, as the purpose of examination for discovery is very different from that of examination and cross-examination at trial and thus could seriously prejudice the examining party. If the rules are amended to permit any party to read in a discovery transcript if the witness is unavailable, this procedure should be

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[38] *Supra* note 3.

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

[40] *Cartwright v. Toronto* (1913), 29 O.L.R. 73 (C.A.), aff'd (1914), 50 S.C.R. 215.

[41] See Ontario, Manitoba, Prince Edward Island, r. 31.06(1)(b).

[42] *Czuy v. Mitchell* (1976), 1 A.R. 434, 1 Alta. L.R. (2d) 97 (S.C.A.D.).

limited strictly and only used where absolutely necessary. The rule should make it clear that a high threshold must be met before a non-examining party may use the transcript.

[51] The Committee seeks the input of the legal community on this issue.

CHAPTER 2. ADMISSIONS

A. Notices to Admit Generally

[52] Under Rule 230 a party can request another party to make certain admissions of fact (Notice to Admit Facts). Rule 230.1 permits a party to call on another party to admit that a written opinion (usually an expert opinion) is correct (Notice to Admit Opinion). The requested admissions are deemed to be admitted unless, within 30 days after service of the Notice to Admit, the responding party denies specifically the matter for which an admission is requested with reasons for the denial. The responding party may also object on the ground that some or all of the requested admissions are privileged or irrelevant, or that the request is otherwise improper.

[53] Where a party refuses to make a requested admission that is subsequently proven at the trial, the rules provide that the cost of proving the matter shall be paid by the party who refused to make the requested admission, unless the court finds that the refusal was reasonable.

[54] The court may at any time allow any party to amend or withdraw any admission on such terms as may be just.

[55] These Rules are designed to save both time and cost. Admissions may reduce or eliminate issues in an action and reduce the time it takes to try a case.[43] The Notice to Admit is not designed to discover facts in the discovery process, but rather to obviate the necessity and expense of proving certain facts at trial.[44] The admissions procedure should not be used as a substitute for discovery, nor as a substitute for interrogatories:

> To do so, in my view, would result in a serious problem for the courts and a serious problem for counsel in attempting to sort out all these various things on an interlocutory basis. Some of them are simple but others could be very difficult and would involve making decisions early in

[43] Holmested and Watson, *supra* note 34, v. 4 at 51-8.

[44] *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1994), 168 A.R. 126, 28 Alta. L.R. (3d) 89 (Q.B.) at 94-95.

> the pretrial procedure on the basis of skimpy evidence and a lack of appreciation of the real issues.[45]

B. Discussion of Issues

ISSUE No. 7
Should the Notice to Admit be retained?

[56] During consultations many lawyers opined that while the Notice to Admit has the potential to be a valuable tool, it is somewhat ineffective. The primary complaint is that the court often fails to award costs against a party who has denied the request for admissions despite the provisions. It appears that the court is reluctant to award costs if the fact as stated in the Notice to Admit Facts is not precisely that which is proven in court. Some counsel commented that they no longer use Notices to Admit due to the lack of enforcement and lack of consequences when facts are denied.

[57] Similar comments were made about the Notice to Admit Opinion.

Rules in Other Jurisdictions

[58] All other jurisdictions in Canada have rules dealing with admissions.[46] The significant distinctions between Alberta's rules and those in other provinces are discussed below.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[59] The Committee agreed that the objectives of the Notice to Admit are very important. Notwithstanding concerns about the perceived ineffectiveness of the Notice to Admit, it has the potential to be an effective tool. Used and enforced properly, it should require all parties to address seriously what can be admitted prior to trial. The Committee supports retaining the Notice to Admit, and making changes (addressed below) to increase its effectiveness.

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[45] *Ibid.* at para. 22.

[46] Ontario, r. 51; Manitoba, r. 51; British Columbia, r. 31; Nova Scotia, r. 21; Saskatchewan, rr. 241-249; Prince Edward Island, r. 51; New Brunswick, r. 51; Newfoundland, r. 33; Federal, rr. 255-256.

[60] The Committee questioned whether it was useful to have a separate Notice to Admit Facts and Notice to Admit Opinions, or whether the two may be combined into one "Notice to Admit" without distinguishing between the type of matters to be admitted. The general opinion of the Committee is that it would be useful to maintain this distinction.

ISSUE No. 8
If so, should any changes be made to the Notice to Admit procedure?

1. Withdrawal of admissions

[61] The rules presently permit a party to withdraw an admission with leave of the court. Presumably parties may also withdraw admissions by consent, though this is not stated. The issue of when the court should permit a party to withdraw admissions has been the subject of a great deal of case law.[47]

[62] In *Dwyer v. Fox*[48] the Alberta Court of Appeal reviewed the various thresholds for permitting withdrawal of admissions, eventually approving of the approach in *Davies v. Edmonton*.[49] Regardless of whether the admission is conscious or deemed as a result of inadvertence in responding, withdrawal of an admission should be permitted:

> ...where the person who has made an admission, whether explicit or deemed, has demonstrated to the satisfaction of the judge that the evidence available about the fact in question is such that a determination of the truth at a trial is the only satisfactory means to settle the issue. ... the pursuit of the truth should take priority over the discipline of imprudence.[50]

[63] The Court added certain corollaries to this general test:

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[47] See cases *infra*; see also, *inter alia*, *Assaly v. Drever*, 2002 ABQB 103 (Master); *Kaboni v. Domes*, (1994), 150 A.R. 161 (Q.B. Master); *Jigolyk v. Jigolyk*, (2000) 27 R.F.L. (5th) 134 (Q.B.).

[48] (1996) 181 A.R. 223 (C.A.) [*Dwyer*].

[49] (1991), 126 A.R. 109 (Q.B.).

[50] *Dwyer*, *supra* note 48 at para. 16.

(1) the person seeking to withdraw the admission must show that the withdrawal would not cause substantial prejudice to the party opposite that cannot be compensated for in costs;
(2) with respect to penalties for seeking a withdrawal, the Court drew a distinction between deemed admissions (when a party fails to respond to a Notice to Admit) and conscious admissions (when a party has specifically denied matters in a Notice to Admit):
    (a) where the failure to deny is not merely inadvertent, the party must be subject to a substantial and exemplary penalty;
    (b) where the failure to deny is inadvertent, the other side should receive its thrown away costs.

The penalties only apply to the failure to deny in a timely fashion; further sanctions are called for if it is ultimately found at trial that the fact should not have been denied.

[64] The Court noted that permitting withdrawals of admissions undermines the purpose of the rule and may be abused if a party first makes the admission and then seeks to withdraw it later. It is to dissuade this type of abuse that significant sanctions must be in place if a party seeks to withdraw an admission.

Rules in Other Jurisdictions

[65] There are competing approaches which have been adopted in other provinces. In Ontario a tripartite test has developed in the case law. The party seeking to withdraw the admission must show that:

(1) the proposed amendment or withdrawal raises a triable issue;
(2) the admission was inadvertent or the solicitor was wrongly instructed; and
(3) the withdrawal will not result in prejudice to another party which cannot be compensated in costs.[51]

[66] British Columbia has adopted a more flexible test: the courts will permit admissions to be withdrawn where to do so is in the interests of justice.

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[51] *Szelazek Investments Ltd. v. Orzech* (1996), 44 C.P.C. (3d) 102 (Ont. C.A.); Holmested and Gale, *supra* note 34, v. 4 at 51-22.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[67] The Committee proposes that parties should be able to withdraw admissions as there may be good reason for doing so. It considered whether it is desirable to incorporate one or more of the tests used in the case law to guide the court's discretion in permitting the withdrawal of an admission. The consensus was that it is not necessary to codify the factors that guide the court's discretion as these are well established by case law, and the factors should remain flexible to enable the court to deal with the particular facts on a case by case basis.

[68] Presently the rules provide that the court may permit a party to withdraw admissions "on such terms as may be just". The present practice is that even where there is a good reason for withdrawing admissions, the court will usually award some amount of costs against the party seeking to withdraw the admission. Generally costs take into account the time elapsed between the making of the admission and the application to withdraw it, and the reasons for the withdrawal.

[69] The Committee considered whether it should be specified that the applicant attempting to withdraw admissions should never be granted costs of the application. To do so may underline the importance and seriousness of making an admission, emphasize the reliance of the other side on the admission and highlight the necessity of dealing with matters in a timely way. However, the Committee ultimately felt that the matter of costs should be left entirely in the court's discretion as now the case. The factors to consider are well established in the common law and provide sufficient guidance to the court in the exercise of its discretion.

[70] The Committee considered whether counsel should be able to withdraw admissions by consent. The Committee agreed that withdrawals of admissions should be permitted by consent. However, rather than dealing with this specifically in the admissions rules, the Committee would prefer that there be an omnibus rule stating that certain matters in the rules may be done by consent, similar to present Rule 548 dealing with the extension of time.

[71] In light of these considerations, the Committee proposes that Rule 230 be retained, with the modifications suggested above.

2. Service of the Notice to Admit

[72] Questions regarding service of the Notice to Admit have been raised. The Rules do not require that all parties to an action must be provided with copies of a Notice to Admit or the subsequent admissions or denials. Presumably there is no obligation on the two parties involved in the request and response procedure to inform any other party in the action about facts or opinions which are admitted or denied. Though the Notice to Admit and the response are filed with the court, it is unlikely that other parties to an action examine the court record on a regular basis to check for Notices to Admit.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[73] The Committee considered whether all parties to the action should be served or provided with the Notice to Admit and response. When considering service of the Notice in this context the Committee does not intend that all parties to an action served with a Notice to Admit need respond; only the party to whom the Notice to Admit is directed need respond. The Notice to Admit and response would be effective only as between the party who served the Notice to Admit and the responding party, absent any agreement to the contrary.

[74] The Committee noted that requiring Notices to Admit to be served on all parties may create extra paperwork in cases with multiple parties, particularly where many of the facts admitted may not be relevant to all of the parties. However, many members of the Committee felt that providing copies of the Notice to Admit and response to all parties would allow all parties to the action to know what facts or opinions are admitted. Providing the Notice to Admit to all parties may shorten examinations for discovery. It may also reveal information that would assist the other party's case, and would keep all parties to the action apprised of all steps taken in the action and who was admitting which facts, without having to obtain a court record.

[75] While the majority of the Committee supported a requirement that Notices to Admit be provided to all parties, we are seeking comments from the legal profession as to whether all parties to an action should be provided with a copy of a Notice to Admit and the corresponding response for informational purposes only (recognizing of course, that the Notice to Admit is only effective as against the party named therein).

3. Consequences of failing to admit facts or opinions pursuant to Notice to Admit

[76] Rule 230(4) provides that if a party fails to admit something contained in the Notice to Admit that is subsequently proven at trial, that party shall pay the costs of having that fact proven. As noted above, a significant concern expressed throughout the consultation was the lack of enforcement of the costs sanction for denying facts in a Notice to Admit that were subsequently proven at trial.

[77] It should be noted that the penalty specified in Rule 230(4) is not consistent with the penalty imposed in Rule 192(5)[52] (the rule deeming certain admissions with respect to the authenticity and receipt of documents). That rule states that if a party denies the authenticity or receipt of documents which is later proven at trial, "the Court must take into account the denial in exercising its discretion as to costs". It is not limited to the costs of proving the fact at trial. One would think that the penalties for withdrawing all deemed admissions should be consistent.

[78] During consultation some members of the Bar took issue with the reverse onus aspect of having to pay costs if a matter was not admitted. A significant burden is imposed in that the lawyer must respond to the Notice to Admit in a short period of time. There is no provision taking into account such factors as the timing of the Notice to Admit; the number of admissions sought; nor the nature or complexity of the requested admissions. A lawyer may simply not be in a position to make an informed decision about admitting certain matters in a thirty day period. This view must then be balanced against the opposing argument also heard during consultations that the court is not consistent in enforcing the costs penalties in the admissions rules which undermines the utility and effectiveness of these rules.

Rules in Other Jurisdictions

[79] In Ontario, Manitoba, Prince Edward Island and Newfoundland the consequences of a party refusing to admit a fact in a Notice to Admit are broader than in Alberta. The court may take the refusal into account in its discretion in awarding costs generally; there is no *prima facie* limitation to the costs of proving the fact.[53] In

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[52] The deemed authenticity rules are discussed later in this memorandum.

[53] Ontario, Manitoba, Prince Edward Island, all r. 51.04; Newfoundland, r. 33.04.

British Columbia, the rules provide that the court may order the cost of proving the fact, along with an additional costs penalty.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[80] The Committee is of the opinion that the legal profession must understand the importance and serious nature of the admissions process and there must be some penalty for failing to admit a fact which is later proven at trial or an opinion which is found by the court to be correct. There was a concern with the current Rule 230(4) which directs the court to award costs of proving that particular fact. It is very difficult for the court to assess the cost of proving a specific fact. The Committee suggests that the rule be amended. Rather than imposing costs relating only to the proof of the specific fact that was denied, the rules should provide the court can take the undue denial(s) into account generally when awarding costs (as is the present practice under Alberta's Rule 192).

ISSUE No. 9
Are the deemed authenticity of records rules adequate?

[81] Rule 192 provides that once an affidavit of records is served, both the party on whose behalf the affidavit is made and the party upon whom the affidavit is served are deemed to admit that the records specified or referred to in the affidavit are authentic.[54] Further, if a copy of a letter, memorandum or other message was sent, both parties are deemed to admit that the original was sent and received by the addressee. There will be no deemed admission if the party upon whom the affidavit is served serves a notice of objection contesting these admissions within 30 days of receipt of the affidavit of records, or if the denial is made in the pleadings. The court may take a party's wrongful denial of the admission into account when awarding costs.

[82] As with admissions generally, the purpose of the rules is to save time and expense by minimizing matters that must be proven at trial.

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[54] There is no definition of "authentic" in the Rules. The meaning of authenticity is discussed below.

[83] Few cases have discussed the purpose and effect of the deemed authenticity rule[55] which may suggest that it is seldom relied upon or enforced. However, this rule has the potential for serious consequences arising from the inadvertence of an unsuspecting counsel, in that significant admissions may be deemed to be made before counsel has even received copies of the documents in the affidavit of records.[56]

[84] It has been held that the deemed authenticity only goes to the authenticity of the document itself and to the fact that it was sent or received; it does not apply to the truth of its contents. In *Murphy Oil Co. Ltd. v. The Predator Corporation Ltd.*[57] the Court noted:

> Under R.193 and R.192(2)(c), any party may object to the admission into evidence of a record. This is logical because the purpose of R.192 (1)'s deemed admissions is not to mandate that the contents of the documents be taken as true.

[85] The deemed authenticity rule must be questioned in light of the increase in electronic documentation. During consultations, some counsel suggested that the deemed authenticity rule is not appropriate for electronic documents. Many documents that are communicated electronically are very easy to alter. There may be more than one version of a document in existence and a particular draft of a document may not be evident from the description in the affidavit of records. There are no reported cases in Alberta considering the specific issue of deemed authenticity of electronic documents.

[86] In light of the problems with both paper documents and electronic records, it has been suggested that it may be more appropriate to have the deemed admission period run from the time the documents are produced, rather than from the date of service of the affidavit of records.

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[55] *First National Bank of Oregon v. A.H. Watson Ranching Ltd.* (1984), 57 A.R. 169, 34 Alta. L.R. (2d) 110 (Q.B.); *Central Trust Co. v. Abugov* (1990), 107 A.R. 226, 74 Alta. L.R. (2d) 89 (C.A.).

[56] Simon Johnson, "Evidential and Practical Issues with Electronic Evidence" (Paper prepared for the Canadian Bar Association Mid-Winter Meeting, January 2002) [unpublished] at 12.

[57] (2002) 316 A.R. 1, 2002 ABQB 403 at para. 32.

a. What is meant by authenticity?

[87] The Alberta Rules do not define "authenticity", so it is not known exactly what is being deemed by referring merely to the "authenticity" of a record, particularly in respect of electronic records. Without a definition, "authenticity" could refer to the "integrity" of the record, being the reliability of the record in the sense that it has not been altered or tampered with. This is the approach taken in the *Alberta Evidence Act*[58] with respect to electronic records:

> 41.3 A person seeking to introduce an electronic record as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.[59]

Rules in Other Jurisdictions

[88] The rules in several other jurisdictions[60] provide that "authenticity" means:

(i) a document that is said to be an original was printed, written, signed or executed as it purports to have been;

(ii) a document that is said to be copy is a true copy of the original; and

(iii) where the document is a copy of a letter, telegram or telecommunication, the original was sent as it purports to have been sent and received by the person to whom it is addressed.

The first admission is similar to the meaning of "authenticity" in the *Alberta Evidence Act*.

b. Should the deemed admissions be automatic after service of the affidavit of records?

[89] Having admissions deemed automatically 30 days after service of the affidavit of records can create serious problems. In practice, actual copies of the records disclosed in the affidavit of records usually are not provided to the receiving party until after the 30 day time period has passed. It can be difficult, if not impossible, for counsel to

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

[59] It should be noted that recently significant reforms were made to the *Alberta Evidence Act* regarding admissibility of electronic evidence or information originally found in electronic form. In particular these amendments address how the "integrity" of electronic information is proven. These amendments show that there is a real concern about the reliability of electronic evidence and its "supposed vulnerability to tampering". See also Johnson, *supra* note 56 at 12.

[60] Ontario, Manitoba, Prince Edward Island: r. 51.01; Saskatchewan, r. 243, Form 18. These rules are virtually identical to Alberta's former r. 190 which was in force prior to the 1999 amendments to the Alberta discovery rules.

judge from a vague description in the affidavit of records whether the records referred to therein are "authentic"(regardless of what "authentic" means). This a particular concern with electronic information, as questions can arise concerning which drafts are referred to or alterations to electronic records. There are also likely to be more issues concerning email records in the future such as whether they have indeed been received by the intended recipient along with all referenced attachments.[61]

Rules in Other Jurisdictions

[90] Alberta is unusual in deeming admissions automatically after service of the affidavit of records. In most other jurisdictions, the rules governing deemed authenticity of documents and the deemed admission that documents were sent and received are part of the Notice to Admit rules. In Ontario, Manitoba, Prince Edward Island, Nova Scotia, Saskatchewan, Newfoundland, New Brunswick and British Columbia[62] a party must serve a Notice to Admit Documents to trigger both the deemed admission regarding the authenticity of particular documents, and the admission that documents have been sent and received. Copies of the records for which these admissions are sought must be sent with the Notice to Admit unless the other side is already in possession of them.

[91] A similar approach is used in the United States Federal Rules of Civil Procedure[63] providing that the "genuineness" of a document may be sought to be admitted by serving a written request that must either be served along with the documents or the documents must be made available for inspection unless they have already been provided to the other side.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[92] The Committee is of the view that there should continue to be a process whereby certain admissions regarding records may be either deemed or requested. This is a useful procedure which helps to limit the issues at trial, thereby decreasing both time and cost associated with calling evidence at trial.

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[61] Johnson, *supra* note 56 at 12.

[62] Ontario, Manitoba, Prince Edward Island, r. 51.02; New Brunswick, r. 31.10; British Columbia, r. 31(1); Newfoundland, r. 33.02; Nova Scotia, r. 21.02; Saskatchewan, r. 242.

[63] United States, *Federal Rules of Civil Procedure* [United States], r. 36.

Definition of Authenticity

[93] The Committee was concerned by the lack of a definition of "authenticity" in Rule 192, particularly with respect to electronic records. The Committee feels that the elements comprising "authenticity" as set out in the Ontario, Manitoba, Prince Edward Island and Saskatchewan Rules (and which were in the Alberta Rules prior to the 1999 amendments) are appropriate with some minor modifications. The Committee suggests that the definition of "authenticity" for the purposes of deemed admissions regarding records should include the facts that:

(i) a record that is said to be an original was printed, written, signed or executed as it purports to have been;

(ii) a record that is said to be copy is a true copy of the original, and that original was printed, written, signed or executed as it purports to have been; and

(iii) where the record is a copy of a letter, telegram, telecommunication, or other electronic communication, that the original in its entirety was sent as it purports to have been sent and received in its entirety by the person to whom it is addressed.

The Committee is of the opinion that these are appropriate admissions for records and adequately address concerns relating to the integrity of electronic records.

Incorporating a Notice to Admit Records

[94] The Committee considered whether the deemed admissions rule regarding records should be retained. The alternative is to remove the automatic effect of the admissions after the service of the affidavit of records and require a positive step to be taken by serving some form of a Notice to Admit Records. The approach in other jurisdictions, that admissions are deemed only after service of a Notice to Admit Documents with the documents attached, alleviates the problems discussed above with Alberta's Rule 192. Giving counsel the opportunity to review each record for which the admission is sought will allow the lawyer to make meaningful decisions regarding the authenticity (however it is defined) of a record. Having parties inspect records prior to deeming admissions also minimizes the problems associated with electronic evidence. Parties can review versions of produced records, and confirm that particular emails and attachments have been received. It may be that the courts would be more likely to enforce the deemed admissions following a Notice to Admit, as the admissions are less likely to arise from inadvertence.

[95] The Committee noted that Rule 192 provides the benefits of dispensing with proof at trial and ensures that reliable records will be provided at examinations for discovery. Currently this rule works such that the party producing the document is responsible for its authenticity, as other parties may not be in a position to determine authenticity. A concern voiced by a member of the Committee with changing the practice is whether it would act to relieve the party (or counsel) producing the record of the duty to provide authentic records.

[96] Some concerns with the automatic nature of the rule which remain for other members of the Committee include:

- there is a potential for serious consequences caused by the inadvertence of an unsuspecting counsel;
- there can be difficulty determining the "authenticity" or "integrity" of electronic records that is not apparent in an affidavit of records and may only be discovered upon examination of the actual record in question;
- Rule 192 provides that the deemed admissions are effective 30 days after the service of the affidavit of records rather than upon production of records. Counsel may not even have received the records for review at the time the admission arises and thus may not be able to determine whether there are issues about authenticity or receipt;
- most other jurisdictions use a Notice to Admit Documents which requires an active step by the party seeking the admissions; and
- the fact that the admission may be inadvertent rather than a considered decision by counsel may be a factor in lack of enforcement of this rule by the courts.

[97] The majority of the Committee supports amending the rules to include a form of "Notice to Admit Records". The views of the legal community on this issue would be appreciated.

CHAPTER 3. PIERRINGER AGREEMENTS

A. Introduction

[98] Pierringer agreements permit some defendants to withdraw from an action leaving the remaining defendants responsible for only the loss they actually caused, with no joint liability. Common elements in Pierringer agreements include:

1. The plaintiff receives a payment from the settling defendant in full satisfaction of the plaintiff's claim against that defendant.
2. The settling defendant receives from the plaintiff a promise to discontinue proceedings, effectively removing the defendant from the action.
3. Subsequent amendments to the pleadings formally remove the settling defendants from the suit.
4. The plaintiff continues the action against the remaining defendants, who are only responsible for their several liability.

[99] The Court is statutorily mandated to determine the relative degrees of fault of all persons responsible for the plaintiff's damages pursuant to section 2(1) of the *Contributory Negligence Act*:[64]

> 2(1) When damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault.

The Act does not require that persons must be parties to an action for the court to attribute to them a degree of fault.

[100] Pierringer agreements create problems when third party notices or notices to co-defendants have been filed, wherein the non-settling defendants seek contribution or indemnity from the settling defendants. These claims may be addressed in one of two ways before the settling defendants may be released from the action: (i) the plaintiff may agree to indemnify the settling defendants for any amount of damages that the court determines is attributable to them and for which the non-settling defendants would otherwise be liable on the basis of joint and several liability; or (ii) the plaintiff may agree to seek only the portion of damages owed by the non-settling defendants on

[64] R.S.A. 2000, c. C-27.

the basis of their several liability, such that no claim for contribution or indemnity remains as between the non-settling and settling defendants.

[101] Regardless of the arrangement between the plaintiff and the defendant, Pierringer agreements create issues relating to discovery.

B. Discussion of Issues

ISSUE No. 10
If Pierringer agreements are entered into before document discovery or examination for discovery have been concluded, should there be some mechanism for permitting the non-settling parties to complete discovery?

[102] Prior to the decision in *Amoco Canada Petroleum Company Ltd. v. Propak Systems Ltd.*,[65] the accepted practice in Alberta was that the court would decide whether to keep settling defendants in an action by determining whether doing so would prejudice the non-settling defendants. The courts considered such things as the stage of the pleadings, the extent of either document or oral discovery that had been completed, and whether parties had been diligent in moving the action along. This differed from the British Columbia approach in *British Columbia Ferry Corp. et al. v. T & N plc. et al.*[66] The British Columbia Court of Appeal dismissed the non-settling defendants' claims for contribution and indemnity against the settling defendants, but allowed the non-settling defendants to maintain a claim for a declaration to determine the degree of fault attributable to the settling defendants. This kept the settling defendants in the action for procedural discovery purposes. The Court found that the non-settling defendants would be prejudiced in their ability to defend if they did not retain the benefit of full pre-trial procedural rights against the settling parties.

[103] In *Amoco*[67] the Alberta Court of Appeal rejected the British Columbia approach on the basis that it undervalues the importance of settlement. The Court noted that it is

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[65] *Supra* note 4.

[66] [1996] 4 W.W.R. 161, (1995), 27 C.C.L.T. (2d) 287 (B.C.C.A.).

[67] *Supra* note 4.

difficult to balance the competing interests of encouraging early settlement and minimizing potential prejudice to non-settling parties. The Court specifically commented that this balance is made even more difficult due to the lack of tools in the Rules of Court that could assist in balancing the competing interests, particularly in that the Rules do not permit discovery of non-parties. This problem is alleviated in jurisdictions where rules give the court discretion to order discovery of non-parties so as to address the potential prejudice to non-settling parties without rejecting the proposed settlement agreement. The Court opined that:

> Alberta judges do not enjoy this type of flexibility. Because they can do little to remedy potential prejudice, the so-called balance they are supposed to achieve is no balance at all: to uphold a settlement agreement, a judge must conclude that there is little or no potential for prejudice. But in reality, curtailing pre-trial disclosure rights will almost always result in possible procedural disadvantage to the non-settling defendant. In most cases the disadvantage does not stem from the fact of settlement, but from the pre-trial disclosure regime which exists in this province. ...
>
> A better solution is to introduce some form of third party discovery in Alberta, to address the type of procedural complaints levied in this case. The fact that non-settling defendants are confined to a statutory disclosure regime constrained by the Alberta Rules of Court is not a proper basis for refusing to give effect to proportionate share settlement agreements.[68]

[104] A similar sentiment was expressed in *Wright Estate v. Via Rail Canada Inc. et al.*[69] The plaintiff and the settling defendants applied to amend the Statement of Claim to remove all allegations against the settling parties, and to strike the non-settling defendant's Third Party Notice. The non-settling defendant alleged that to do so would cause considerable prejudice to their ability to defend the action as discovery was not completed. They also argued that removing the settling defendants and precluding full discovery would impede the court's ability to allocate fault properly.

[105] The Court stated that it would have preferred to impose a "fair and just procedural remedy creatively crafted by an innovative court that is flexible and exercises its inherent jurisdiction to meet the needs of the administration of justice and

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[68] *Supra* note 4 at paras. 37-38.

[69] (2000), 256 A.R. 148, 2000 ABQB 8 [*Wright*].

still accommodate and balance the needs of [all parties]".[70] The Court would have permitted the non-settling defendants to discover the settling defendants if the non-settling defendants gave an undertaking in writing to be liable for all of the settling defendants' reasonable solicitor-client and internal costs in remaining in the litigation, provided that the non-settling defendants waive all rights to claim these costs against the plaintiff in the future. However, the Court found that it did not have jurisdiction to make such an order. In light of the limited remedies available, the only options were to (i) disregard the settlement agreement and keep the settling defendants in the litigation for procedural purposes, or (ii) give full effect to the settlement agreement, amend the pleadings to remove the settling defendants and strike the Third Party Notice, which would deprive the non-settling defendants of further pre-trial procedures. The Court chose to give effect to the Pierringer Agreement and remove the settling parties from the action on the basis that the desirability of encouraging settlement outweighed the prejudice to the non-settling defendants.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[106] In Consultation Memorandum 12.2 this Committee proposed that the Rules should not permit discovery of mere witnesses. However, parties removed from an action by way of Pierringer agreements are different from mere witnesses as these parties are not strangers to the litigation. The Courts in both *Amoco*[71] and *Wright*[72] suggest that the best way to achieve justice to all parties where parties have been removed from actions prior to the completion of all procedural requirements is to give the court discretion to permit discovery on appropriate terms of parties who have settled out of an action. The Committee agrees with this proposition and suggests that the rules expressly give the court the jurisdiction to make any order it sees fit regarding procedure when one or more parties is removed from an action by way of settlement, including an order permitting discovery of former parties.

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[70] *Ibid.* at para. 1.

[71] *Supra* note 4.

[72] *Supra* note 69.

ISSUE No. 11
If Pierringer agreements are entered into after examinations for discovery, what use may be made of the settling parties' discovery transcripts?

[107] An issue arises if a Pierringer agreement is entered into after the completion of some or all of the examination for discovery of the settling defendant.

[108] Rule 214 of the Rules of Court provides:

> 214(1) Any party to an action or issue may at the trial or on motion use in evidence as against any opposite party any part of the examination of that opposite party, or in case the opposite party is a corporation, of the examination of any representative thereof selected to submit to an examination to be so used.

As noted above, a common provision in a Pierringer agreement requires the settling defendant to be removed from the action. Once removed from the action, the settling defendant will no longer be an "opposite party". Presumably Rule 214 would no longer apply; a settling defendant who had examined the non-settling party loses the right to use the settling defendant's discovery evidence at trial.

[109] This issue was flagged in *Amoco*,[73] and mentioned in *Bucknor v. Ryder*,[74] but neither case discussed it in any detail. In *Bucknor*,[75] the Court ordered that the settling defendant appear as a witness at trial and gave both the plaintiff and the non-settling defendant the right to cross-examine. On the issue of the use of the settling defendant's discovery evidence, the Court merely commented that "presumably [the witness'] evidence at trial will accord with the discovery evidence". This is not a satisfactory answer to the problem. The decision does not indicate whether the discovery evidence may be read in as evidence, which is different from using the statements to impeach credibility.

[110] The argument again is that the non-settling defendants may be prejudiced in the defence of their case if they are denied the opportunity to use admissions in discovery

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[73] *Amoco*, *supra* note 4.

[74] (2001), 313 A.R. 352, 2001 ABQB 1008 [*Bucknor*].

[75] *Ibid*.

which may assist the court in apportioning liability. If the evidence was given prior to the Pierringer agreement, the settling defendant was still a party adverse in interest to both the plaintiff and the non-settling parties at the time the evidence was given.

[111] While there may be little harm and some benefit to allowing a settling defendant's discovery evidence to be read in by a party who was adverse in interest at the time of the discovery, a problem arises if discoveries were not completed at the time the Pierringer agreement was entered into. If some but not all parties had discovered the settling defendant, it may be that the party who had not yet discovered the party may object on the ground that particular questions may not have been asked which could explain an admission used by another party. It may be that this could be remedied by calling the settling party as a witness, but this raises further questions of whether the party calling the witness is permitted to cross-examine the witness, and that the party is at a disadvantage as they may not know what the witness will say.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[112] Whether the discovery evidence of a co-defendant may be used at trial currently depends upon the agreement about the use of the examinations of parties adverse in interest.[76] The courts have held that the overriding consideration should be to encourage settlement. However, there can be a great disadvantage to another defendant who was not part of the settlement but who has now lost the admissions which a co-defendant made in discovery which could affect the several liability attributable to the non-settling defendant.

[113] The Committee was of the view that these types of situations may be too complex to be dealt with specifically in the rules. A better solution would be to deal with the situations on a case by case basis, pursuant to a general rule that gives the court discretion following a partial settlement to make procedural rulings that will do justice between the parties. A "shopping list" of options for the court may be included, such as examinations of former parties, reading in the discovery transcript of a settling party, costs orders, or any other relief that the Court deems fit.

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[76] In Consultation Memorandum 12.2 "Document Discovery and Examination for Discovery" the Committee has proposed that the rules codify the ability of a party to read in discovery transcripts of other parties who are similarly adverse in interest to the party being examined.

[114] The Committee seeks feedback from the legal community on this issue.

CHAPTER 4. INNOVATIVE PROCEDURES FOR DISCOVERY

[115] The Committee has focussed primarily on modifying and improving procedures already found in the present Rules, or those that are being used in practice. It has also considered other procedures for exchanging information or gathering evidence that are not currently used in Alberta. Some of the innovative procedures discussed below are used in other jurisdictions while others are suggestions from members of the Bench and Bar.

A. Witness Lists

[116] Several jurisdictions require parties to provide lists containing the names of witnesses as well as contact information. This is also a requirement in Rule 661(4) of Alberta's Streamlined Procedure, which requires that the affidavit of records contain a list of persons:

> ...who, at the relevant time, might reasonably have some connection with the person filing the affidavit of records and be expected to know about any of the following:
> (a) matters on which the party filing the affidavit relies or may rely;
> (b) matters which assist or may assist the case of any adverse party;
> (c) matters directly relevant and material to the issues in the action.

[117] Rule 213 (2) of the Alberta Rules provides that a party cannot object to any question in a discovery solely upon the ground that the answer will disclose the name of a witness. It stands to reason that if it is possible to obtain the names of witnesses during examination for discovery, there would be no harm in disclosing the names of witnesses by other means. The benefits of disclosing witness information include:

(i) identifying witnesses prior to discovery may shorten the discovery;

(ii) interviewing witnesses who are not subject to discovery prior to discovery of other persons may help to focus the discovery and eliminate the need for follow up discovery or undertakings; and

(iii) assisting in scheduling examinations at an earlier stage if it is known who will be subject to discovery, rather than having to postpone scheduling until the witnesses' identities are ascertained at discovery.

[118] Comments received in our consultation suggest that the days of the surprise witness are past. If a surprise witness is tendered at trial, adjournments are commonly

granted to allow the party taken by surprise to address the situation. Disclosing witness names ahead of time may avoid such delays, and help to focus issues and facilitate settlement.

[119] However, there are several issues which must be addressed if a requirement to provide witness lists is imposed:

(ii) Should there be any sanctions for failing to identify a witness whom the party ought to have disclosed?

(ii) Do parties have to identify witnesses as they are discovered, or only at certain points in an action?

(iii) Should there be a brief statement about the witness' knowledge or the matters upon which that witness has information in a witness statement?[77]

[120] One comment from a member of the profession is that information regarding potential witnesses may be sought by way of examination or interrogatories, putting the onus on the party seeking the information to request it. It was suggested that this was preferable to a blanket provision requiring automatic disclosure, as it would limit the step to situations where such disclosure is necessary and useful, rather than simply adding a step to all actions.

B. "Will Say" Statements/ Witness Statements

[121] The idea of imposing a requirement to serve "will say" or witness statements has been suggested.[78] Such statements would contain a summary of the evidence that a witness is expected to give at trial.

[122] Witness statements are now used in some jurisdictions. Currently witness statements are a post-discovery tool used to minimize the need for oral evidence in examination in chief at trial rather than a pre-discovery disclosure tool.

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[77] There is further discussion of this issue below under "Will Say/Witness Statements".

[78] These terms will be used interchangeable for the purposes of this discussion.

1. The use of witness statements in foreign jurisdictions

a. The United Kingdom

[123] In England witness statements go beyond the substance of a witness' expected evidence; they are served prior to trial and are used in the place of oral examination in chief. Para. 20.1 of Practice Direction 32[79] provides:

> 20.1 A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence; it must include a statement by the intended witness that he believes the facts in it are true.

[124] It is intended that the witness statement be in the words of the witness rather than the lawyer.[80] If a party does not file a witness statement or witness summary (discussed below) as directed by the court, that witness may not be called to give oral evidence unless the court gives leave.[81]

[125] The primary purpose of the witness statement is to dispense with or minimize the need for oral evidence at trial. The witness may be called, but the witness statement stands as evidence in chief unless the court orders otherwise. With leave of the court the witness may amplify the witness statement or give evidence in relation to new matters which have arisen since the witness statement was served. If the party who has served the witness statement does not call the witness or put the statement in as evidence, any other party may put the witness statement in as hearsay evidence.[82] Even if the witness statement was not referred to during examination in chief, the witness may be cross-examined on the witness statement.

[126] If a party is required to serve a witness statement but is unable to obtain one from the witness, the court may grant leave to allow the party to serve a "witness summary". This includes the evidence, if known, that would have been included in the

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[79] United Kingdom, *Civil Procedure Rules*, r. 32, Practice Direction 32, para. 20.1 [United Kingdom].

[80] United Kingdom, r. 32, Practice Direction 32, para. 18.1.

[81] United Kingdom, r. 32.10.

[82] United Kingdom, r. 32.5.

witness statement. If the evidence is not known, the summary will include the matters on which the party calling the witness proposes to question the witness.[83]

b. New South Wales

[127] The New South Wales *Supreme Court Rules, 1970* provides a procedure similar to that in the United Kingdom. The primary difference is that the witness statement does not prima facie replace oral examination in chief, although this can be ordered by the court. However, the party serving the witness statement cannot adduce evidence from the witness which is not included in the substance of the witness statement unless it relates to a new matter which has arisen at trial. The witness statements are not filed unless the court directs, and then they are filed during the trial and directly with the judge. The rules specify that the witness statement does not abrogate privilege, nor does it render admissible any evidence that would otherwise be inadmissible.

c. United States

[128] The U.S. Federal Rules require that parties provide, without the need for a discovery request, names and contact information of persons likely to have discoverable information prior to discoveries.[84]

d. Northwest Territories

[129] A form of "will say" statement is also required under the rules of the Northwest Territories,[85] called an "evidence summary". At least 10 days prior to trial all parties are required to serve on every other party a summary of the evidence of each witness whom the parties intend to call at trial. The witness is to sign the evidence summary to verify the truth of its contents. If a witness is unavailable, the solicitor shall prepare the summary and indicate what it is expected that the witness will say, and the solicitor shall sign and verify that to best of the solicitor's knowledge the summary is

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[83] United Kingdom, r. 32.9.

[84] United States, r. 26(1) (a). There was significant opposition to this rule when it was passed. Only 47 Federal District Jurisdictions have adopted r. 26, while 47 Federal District Jurisdiction have opted out of this particular reform. See L. Stuesser, "Report to The Canadian Bar Association Systems of Civil Justice Implementation Committee's Working Group on Will-Say Statements" (Recommendation #15), June 1998 at 12-13 [Stuesser Report].

[85] Northwest Territories, *Rules of the Supreme Court*, r. 326 [Northwest Territories].

true. If a party, without reasonable explanation, calls a witness for whom no evidence summary has been provided, or if the evidence summary did not fairly set out the evidence given by that witness, the court may adjourn the trial. The witness statements do not replace oral evidence.

2. Considerations Regarding Witness Statements

[130] The Canadian Bar Association Task Force on Civil Justice established a committee to consider witness statements. That Committee made the following recommendations and observations:[86]

- witness statements should be served prior to discovery;
- witness statements may be of great use prior to discovery. They may assist lawyers in preparing for discovery and may help to focus examinations for discovery;
- witness statements should be very informal, listing in a short, summary fashion the information of the witness;
- witness statements should be on a without prejudice basis;
- witness statements should be closely tied to case management;
- parties should not have to disclose adverse witnesses;
- any reference to matters in a witness statement be disclosed only if there has been a clear abuse of the system; and
- witness statements should be tested through pilot projects prior to being adopted as a mandatory procedure.[87]

[131] However, concerns about "will say" statements have also been expressed. There are serious concerns about imposing onerous requirements regarding witness statements early in an action, including:

- increasing costs of proceedings;
- whether witness statements would be considered to be admissions;
- imposing liability on lawyers if the testimony at trial does not accord with the substance of the statement;

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[86] Stuesser Report, *supra* note 84.

[87] Despite the recommendation that witness statements be tested through pilot projects, no Canadian jurisdictions to date have implemented such a pilot project.

- significantly abrogating litigation privilege, thus impeding a party's ability to prepare its case; and
- using witness statements as a substitute for evidence at trial as they are used in England would likely result in evidence being drafted by the lawyer rather than being the words of the witness.

[132] An additional concern expressed by a member of the profession is how a pre-discovery witness statement would impact a situation with a less than honest witness at discovery. If a witness who is prone to be dishonest at discovery is advised of the opposing party's evidence, they may have the opportunity to tailor their evidence accordingly rather than give the answer they would have had they not been informed of the information in the other side's possession. This could negatively impact a party's ability to confirm a witness' credibility. This is also an area in which witness statements could greatly abrogate litigation privilege.

[133] Caution must be used when considering whether to adopt the approaches taken in the United States or the United Kingdom with respect to witness statements, as there are significant differences between the litigation systems in these jurisdictions and Canada. As England does not have oral discovery, more detailed witness statements are necessary. Conversely, the reforms in the United States were necessitated by excessive and sometimes abusive discovery practices.[88]

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[134] The Committee discussed witness lists and "will say"/witness statements together as they are interrelated.

[135] There was substantial agreement in the Committee that some witness information should be provided pre-trial. The Committee then discussed the extent and timing of this information.

[136] The Committee considered the feasibility of importing a system similar to the current approach in the streamlined procedure of providing witness information prior to discovery. A number of concerns were raised regarding such a requirement.

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[88] Stuesser Report, *supra* note 84 at 2.

Incomplete information prior to discoveries can make it difficult to know who potential witnesses are; disclosure may be perceived as or lead to an invasion of witnesses' privacy; and early disclosure "front-end loads" litigation process, and in so doing may create costs that are ultimately unnecessary, and/or needlessly abrogate litigation privilege.

[137] Due to these concerns, the Committee does not support pre-discovery witness statements or witness lists.

[138] The Committee also does not support the practice of using witness statements in lieu of oral evidence for numerous reasons. A primary concern is that counsel would draft evidence rather than the witness. This practice would also limit the court's ability to assess the witness' credibility. There would be limited opportunity to observe the demeanour of the witness when giving evidence. Further, it is not uncommon for a witness in examination in chief to give testimony which differs from that discussed with counsel prior to the hearing.

[139] The Committee discussed the issue of providing some witness information prior to trial. The main purpose of witness lists and witness statements prior to trial is to give advance notice to the other party and avoid "ambush" at trial. The Committee considered whether it would be appropriate to file witness statements or lists at the time the Certificate of Readiness is filed. This would have the advantage of not adding an extra step to the process as presently counsel has to provide information indicating the number of ordinary and expert witnesses who will be called, and the expected time of their testimony. There was a concern about true "surprise" witnesses who are not known to the party calling them until just before the trial; and about the inadvertent failure of counsel to advise the other side of the existence of a witness. However, it is likely such witnesses could be accommodated by a brief adjournment, a costs order or other sanctions. If there was a deliberate failure to disclose a witness without a valid reason, sanctions should be imposed by the court. Another concern related to "credibility witnesses", such as surveillance witnesses. It is not desirable to disclose the existence of these witnesses, as a party who is aware of the credibility witness may then tailor his or her testimony accordingly, negating the effectiveness of the witness.

[140] Overall there was support for recommending that a summary of the witness' expected evidence be provided shortly before the trial of a matter, similar to the practice in the Northwest Territories. In the many cases that settle the information would not have to be disclosed at all, which minimizes concerns about intruding on witness' privacy. Disclosing the witnesses' information closer to trial would minimally abrogate litigation privilege, as that privilege in relation to those witnesses would have be waived at trial in any event. In cases which do go to trial, there will be no ambush and justice will be served by full disclosure. The Committee has concerns about giving notice and an evidence summary of pure credibility witnesses (such as surveillance experts) and seeks the legal profession's comments in this regard.

[141] A consensus was reached that witness lists should be provided to other parties in an action, no less than 10 days prior to trial, containing the names and contact information for all witnesses expected to be called in the trial, together with a brief summary of the evidence the witness is expected to give. The Committee also supports inserting a preamble to this rule setting out its purpose and the principles upon which it is based.

C. "Will Ask" Statements

[142] As it may be difficult for a witness who is to be discovered to inform him/herself in some cases, counsel have suggested a method to assist a corporate officer or other witness in this task which may be incorporated in the rules. 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 witness is expected to be informed. The purpose would be to make discoveries more efficient. If the witness comes prepared to answer questions, undertakings could be minimized and further discoveries avoided.

[143] This type of procedure would be most useful in complex situations where many people are examined about numerous issues. It may also be useful where a corporate representative is examined in a situation involving many issues, or technical issues.

[144] However, mandatory "will ask" statements raise several concerns:

1. Where there are few witnesses, the pleadings should suffice to define the areas of examination. Would imposing a requirement to forward a "will ask" statement in those cases only increase costs with minimal corresponding benefit?
2. If a mandatory "will ask" statement is adopted, should the examining party be limited to the areas listed therein? Such a limit may create problems, as one of the primary purposes of oral discovery is to find information. Often during an examination of discovery a line of inquiry may lead to new areas of information of which the examiner was unaware. The purpose of a "will ask" statement is to facilitate the witness coming prepared, rather than to impose a limitation on the scope of discovery. Questions are already limited under the rules to matters which are material and relevant (and the Discovery and Evidence Committee has proposed to keep these limitations). If "will ask" statements are adopted, should it be made clear in the rule that the examiner is not limited to questioning on the matters contained therein? It is foreseeable that omitting such a caveat will create litigation as to whether the examiner can indeed question on areas outside those listed in the "will ask" statement.
3. A "will ask" statement would have to be served well in advance of the examination to permit the person to become informed prior to discovery. To have an effective "will ask" statement would require the examining party to have done a thorough discovery preparation so that most, if not all, areas to be examined on are included in the statement. If the preparation is done too far in advance of the discovery, it may be that the examiner will have to prepare twice to refresh themselves about the details of the action immediately prior to discovery. This may increase the cost of litigation.

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[145] The Committee discussed the purpose and practical considerations of using "will ask" statements. Some of the Committee's concerns included:

(i) needlessly increasing cost and complexity of the litigation process;

(ii) whether this procedure is necessary for non-corporate parties or even smaller corporate parties;

(iii) whether "will ask" statements would add any benefit to the conduct of an action, particularly if it is a requirement rather than done by agreement between counsel who think it is useful; and

(iv) whether introducing this procedure would lead to more litigation than it would resolve.

[146] The Committee reached a consensus that “will ask” statements should not be required in all actions prior to discovery. If counsel wish to use them they may be used by agreement or perhaps by order of the court in case management.