CIVIL PROCEDURE AND PRACTICE: RECENT DEVELOPMENTS

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An on-going concern for all lawyers is staying abreast of developments affecting the practice of law in their respective jurisdictions. Within this paper, the authors review Alberta Court decisions relating to civil procedure and synthesize them so as to give the reader an outline of the trends that have developed in Alberta civil procedure over the past two years. The authors effectively provide a sense of the current legal environment.

Tous les avocats ont le souci constant de se tenir au courant de l'évolution des principes qui pourraient affecter la pratique du droit dans leur domaine de compétence respectif. Dans le présent article, les auteurs passent en revue les décisions des tribunaux albertains en matière de procédures civiles, et en font une synthèse qui dégage les tendances de ces dernières années. Les auteurs parviennent à décrire efficacement le milieu juridique actuel.

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I. INTRODUCTION

It has been considered timely to once again comment on significant developments affecting civil practice before the courts of Alberta. While a large number of cases have been considered, it has been necessary to be somewhat selective. The cases reviewed are (with very few exceptions) from the Alberta courts over a period of approximately the past two years, and concern points which tend to arise in a general civil litigation practice. A number of cases which simply reinforce well-established and generally-known principles have not been reviewed, or noted only briefly. There have also been an unusually large number of changes to the rules of practice recently, which have been summarized in an addendum.

II. THIRD PARTY PROCEEDINGS

There have been a number of cases considering the proper grounds for issuance of a third party notice. The courts have shown a willingness to strike out the notice where the tests have not been satisfied.

An attempt by an S.E.F. insurer to claim contribution and indemnity from co-defendants (who were the alleged tortfeasors) was considered in *Metz* v. *Breland*.[1] The plaintiff sued a number of defendants in respect of a motor vehicle accident, and alleged that some of the defendants were under-insured. He also named his own insurer pursuant to an S.E.F. 44 endorsement on his policy. That insurer issued a third party notice against the other defendants, relying upon the provision in the policy permitting subrogation to the plaintiff's (insured's) rights against tortfeasors. In a judgment written by Côté J.A., the third party notice was struck out.

The flaw found by the Court of Appeal in the third party notice was that the insurer, in its third party notice, sought to enforce rights as between the plaintiff and the third parties (who were also defendants). A proper third party notice enforces duties owed by the third party to the defendant. Côté J.A. expressed the point as follows:

> Third Party Notices serve to enforce duties which the Third Party owes to the defendant issuing the Third Party Notice. But here the Third Party Notice is avowedly and expressly to enforce a duty which the Third Party owes to the *plaintiff*.[2]

In short, there was no cause of action between the insurer *as insurer* and the third parties.

Of course, there would be a valid subrogated action against the co-defendant. But the third party notice was not a proper subrogated claim. The principle of subrogation allows an action to be brought in the name of the insured; the action does not normally lie in the name of the insurance company. In any event, there was no point to the insurer attempting to bring this action. If the plaintiff's action against the other defendants failed,

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1. (1990), 110 A.R. 25 (C.A.).
2. *Ibid.* at 26-27 [emphasis in original].

then the insurer would have no basis on which to recover, because liability would not lie. If, on the other hand, the plaintiff's claim against the other defendants succeeded, the claim would be perfected, and then, if the insurer became subrogated, it could enforce the judgment in the plaintiff's name.[3]

Two recent cases from the Court of Queen's Bench similarly illustrate circumstances in which a third party notice will not be allowed. They also serve as reminders that, until recently, third party notices were not restricted to claims for contribution and indemnity under rule 66; the somewhat broader provisions of section 17(3)(b) of the *Judicature Act*[4] were also to be considered. (This section has recently been repealed.[5])

In *Gutek* v. *Sunshine Village Corporation*,[6] the plaintiff had brought an action against, among others, a ski resort company, arising from injuries sustained while riding a chairlift. The defendant ski resort company issued a third party notice against the defendant provincial government, claiming contribution or indemnity on the basis that inspectors appointed pursuant to the *Elevator and Fixed Conveyances Act*[7] had failed to properly inspect, test and approve the design and installation of the chairlift. Chrumka J. determined the validity of the third party notice in the context of whether a duty was owed by the provincial government to the defendant; in his words, "the question is whether, in view of the statutory power, the Alberta Crown owed a duty to Sunshine."[8] His conclusion was that there was no duty owed to the ski resort, but rather the duty of care was owed to the public as the users of the chairlift. Furthermore, there was not sufficiently close proximity between the defendant and third party so that the provincial government might reasonably contemplate that negligence on its part might cause damage to the ski resort.

The issue, however, should not end there. One of the considerations concerning whether a third party notice is valid is whether the proposed third party, if sued by the plaintiff, would have been liable in respect of the same damage.[9] Chrumka J. appears to deal with this point, although in a less express manner, in reviewing statutory provisions which may prevent an action against an inspector acting pursuant to his statutory duties, and an action against the Crown in relation to the inspector's conduct.[10]

O'Leary J. considered an application to strike a third party notice in *Herr* v. *Herr*.[11] The plaintiff, a passenger in a motor vehicle driven by the defendant, brought an action against the defendant. The defendant did not file a statement of defence. The administrator for the Motor Vehicle Accident Claims Fund then filed a statement of

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3. *Ibid.* at 27.
4. R.S.A. 1980, c. J-1.
5. S.A. 1991, c. 21, s. 15.
6. (1990), 72 Alta. L.R. (2d) 116 (Q.B.).
7. R.S.A. 1980, c. E-7.
8. *Supra*, note 6 at 127.
9. *The Tort-Feasors Act*, R.S.A. 1980, c. T-6, s. 3(1)(c).
10. *Supra*, note 6 at 128, with reference to the *Elevator and Fixed Conveyances Act*, R.S.A. 1980, c. E-7, s. 9, and the *Proceedings Against the Crown Act*, R.S.A. 1980, c. P-18, s. 5.
11. (1991), 80 Alta. L.R. (2d) 328 (Q.B.).

defence, and issued a third party notice against the owner of the vehicle. In considering the scope of third party proceedings, O'Leary J. noted that they "are clearly permitted where the defendant is seeking contribution or indemnity in respect of all or part of the plaintiff's claim."[12] In addition, he stated that there is a broader scope for third party proceedings based upon section 17(3)(b) of the *Judicature Act*.[13] Under that statute, he found that the following criteria applied:

> The relief claimed against a third party must (i) relate to or be connected with the original subject of the proceedings (the claim by the plaintiff against the defendant), and (ii) be such as 'might properly have been granted against that person if he had been a defendant to a proceeding instituted by the same defendant for the like purpose,' that is, the relief recoverable in a separate and distinct action by the defendant against the third party.[14]

The Fund's third party notice was found improper in a number of respects. O'Leary J. referred to Côté J.A.'s judgment in *Metz* v. *Breland*, in which it was held that a third party notice must seek to enforce some duty owed by the third party to the defendant. No such duty was alleged in the instant case; the third party notice simply alleged that the vehicle owner would, if sued, be vicariously liable to the plaintiff.[15] Furthermore, there was no basis for a claim for contribution or indemnity. The owner of the vehicle, being the party vicariously liable, would in fact have a claim against the driver for indemnity (as opposed to vice versa, as the third party notice seemed to suggest). In short, O'Leary J. found:

> The third party notice does not allege a claim against [the owner] that can possibly succeed. There is no right to contribution or indemnity and no other cause of action has been pleaded.[16]

It must be questioned whether some of these cases, which emphasize the need for a duty owed by the third party to the defendant issuing the third party notice, minimize the effect of the *Tort-Feasors Act*. That statute allows claims for contribution between tortfeasors, the only requirement being whether the tortfeasor from whom contribution is sought "is or would, if sued, have been liable in respect of the same damage."[17] There is no requirement of a duty between the tortfeasors; the only requirement is that they each owe a duty to the plaintiff.[18]

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12. *Ibid.* at 331.
13. R.S.A. 1980, c. J-1.
14. *Herr* v. *Herr*, *supra*, note 11 at 331. As noted *supra*, note 5, the section of the *Judicature Act* referred to has now been repealed.
15. *Pursuant to the Highway Traffic Act*, R.S.A. 1980, c. H-7, s. 181.
16. *Supra*, note 11 at 333.
17. *Supra*, note 9.
18. See for example *Peter* v. *Anchor Transit Ltd.*, [1979] 4 W.W.R. 150 (B.C.C.A.), at 156. It is recognized that the *Tort-Feasors Act* is probably irrelevant to the results in both *Metz* v. *Breland* and *Herr* v. *Herr*. In the former, the third parties sued by the insurer were liable to the plaintiff, and had already been sued by him, but that type of liability did not give rise to a third party notice because it was not a proper subrogated claim and was duplicitous; in the latter, O'Leary J. effectively found that there was no cause of action by the plaintiff against the owner except on the basis of vicarious liability under the *Highway Traffic Act*, and that form of liability did not give rise to a contribution claim by the principal tort-feasor, but rather the contribution went the other way.

An example of this approach is found in *Petro-Canada Inc.* v. *Singer Valve.*[19] The plaintiffs were the owners of an office tower, and together with their insurers, brought an action against certain defendants because of water damage resulting from overflow of a large holding tank which was part of the cooling system for the building. The defendants issued third party notices claiming indemnity or contribution from the mechanical subcontractor, the mechanical consultants and the building manager. The third parties were insureds under the policy in respect of which the plaintiffs had been paid for some of the loss. With regard to the issues presently under consideration, the main question was whether the third party notices were valid in light of the fact that a subrogated action could not have been brought by the plaintiffs against the third parties as co-insureds under the same insurance policy.

The third parties relied upon the principles of insurance law restricting an insurer from bringing a subrogated action on behalf of one insured under the policy against another insured under the same policy.[20] The question was then whether each of the third parties was a "tort-feasor who is or would, if sued, have been liable in respect of the same damage" under the *Tort-Feasors Act.* Sulatycky J. found that the *Tort-Feasors Act* "must be construed without reference to any contract of insurance."[21] The issue must be determined on the basis of the status of the parties in their own right, and here it was clear that apart from insurance, the plaintiffs would have a valid action against the third parties. In the result, the third party notices were considered valid, and no reference was made to the question of a duty of care owed by the third parties to the defendants.

It remains to be determined whether the repeal of section 17(3)(b) of the Judicature Act will have a significant effect on the scope of third party proceedings. It is generally recognized that section 17(3)(b) was broader than rule 66. As O'Leary J. held, the *Judicature Act* allowed for a third party notice which related to or was connected with the original subject of the proceedings (that is, the statement of claim).[22] Rule 66 allows for a third party notice when the "defendant claims against any person . . . that the person is or may be liable to him for all or a part of the plaintiff's claim." It is expected that this wording would still support a third party notice under the *Tort-Feasors Act*, because it gives one joint tortfeasor a cause of action against another for damages owed to the plaintiff. However, some of these issues will no doubt be reargued, and some of the earlier, more restrictive tests for third party notices may again become relevant.[23]

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19. (1991), 118 A.R. 23 (Q.B.).

20. Reference was made to *Commonwealth Construction Company Ltd.* v. *Imperial Oil Ltd.*, [1978] 1 S.C.R. 317.

21. *Supra*, note 19 at 31.

22. *Herr* v. *Herr*, *supra*, notes 10 and 12.

23. See Stevenson and Côté, *Civil Procedure Guide* (Edmonton: Juriliber, 1989) at 208 for references to tests developed without reference to the *Judicature Act*; the decision of Forsythe J. in *Suncor Inc.* v. *Canada Wire and Cable Ltd.*, 22 July 1992, unreported, Alta. Q.B., where the question of the repeal of the *Judicature Act* provision was raised. It was not important to the result, but the *Tort-Feasors Act* was apparently used to support a liberal approach.

III. DISCOVERY: EXAMINATION OF WITNESSES

A. WHO MAY BE EXAMINED

There have been two recent decisions emphasizing the broad scope of rule 200(1), which provides as follows:

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

In *Wenzel Oil Tool Company Ltd.* v. *Province of Alberta Treasury Branches*,[24] the defendant sought an order allowing it to examine the former officer of the plaintiff company. It was apparently argued that while rule 200(1) might allow the examination for discovery of former employees, it did not apply to former officers. Perras J. disagreed with this restrictive reading of the provision. He held that the purpose of the rule was "to force pre-trial discovery, in the search for truth, of persons connected to a corporate party," and that "the connection to the corporate party must be given liberal interpretation."[25]

In making this finding, Perras J. had occasion to repeat the distinction drawn by Kerans J.A. in an earlier case[26] between the references to "officer" in rule 200 and in rule 214. The latter rule deals with the examination of the officer designated to give binding admissions on behalf of the corporate party, as well as pre-trial information, at examinations for discovery. Rule 200, on the other hand, is directed simply at giving parties the opportunity "to discover in advance the evidence to be given at trial by likely witnesses."[27] It is useful to recall that there is the right to examine officers (or former officers) other than the one designated by the opposite party pursuant to rule 214 — a right which seems to be often overlooked.

Rule 200(1) was also given broad application in *Syncrude Canada Ltd.* v. *Canadian Bechtel Limited*,[28] where a defendant sought an order compelling another defendant to produce for examination an employee of its parent company. There was evidence that the subsidiary would call upon its parent company for experience, information and personnel, and that some of the work which the subsidiary had contracted to do was subcontracted to the parent and another related company. Master Quinn referred to the *Cana Construction Co.* case[29], where it was held by Kerans J.A. that the test of a person's

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24. (1990), 74 Alta. L.R. (2d) 24 (Q.B.).
25. *Ibid.* at 25.
26. *Cana Construction Co. Ltd.* v. *Calgary Centre for Performing Arts* (1986), 46 Alta. L.R. (2d) 313 (C.A.).
27. *Wenzel Oil Tool* at 25; quoting from *Cana Construction Co.*, *supra*, note 26 at 315.
28. (1990), 77 Alta. L.R. (2d) 328 (Q.B.M.).
29. *Supra*, note 26.

connection with a company should be given a wide application. Master Quinn found that there was sufficient connection shown in the case before him.

He also adopted a secondary test from the *Cana Construction Co.* decision, namely, "whether the person sought to be examined ... is the one person connected with the company best informed of matters" at issue.[30] He found that there was no evidence of anyone with greater knowledge, and therefore ordered the employee produced.

It might be questioned whether it needs to be shown that the officer or employee sought to be examined must be the person "best informed." The test is taken from an extract from *Bell* v. *Klein*,[31] which is employed by Kerans J.A. to support his finding that the question of connection to the corporate party should be given wide application. Rule 200(1) does not limit the right of examination to one best informed person, nor does Kerans J.A. make such a finding in *Cana*. A restriction of this nature would be in contrast to the principle of giving broad discovery rights, which both Kerans J.A. and Perras J. appear to have found to be the purpose of rule 200(1).

B. SCOPE OF DISCOVERY

The need to take a broad view of relevance for discovery purposes (both oral and documentary) has been reinforced by a number of decisions. In *Metz* v. *Breland*,[32] Côté J.A. (sitting in Queen's Bench) heard an application to compel answers to questions and produce documents relating to a city police investigation of an accident in which the city was a defendant. He held that the questions and documents were "plainly relevant," and stated as follows:

> Indirect relevance suffices for oral discovery and discovery of documents. And a paper which might lead one to a relevant line of inquiry is producible.[33]

The public interest in full discovery between parties must often be balanced against the public interest in promoting settlement, where "without prejudice" communications are sought to be discovered. In *Ed Miller Sales & Rentals Ltd.* v. *Caterpillar Tractor Co.*,[34] Wachowich J. heard an application by one defendant to compel the plaintiff's officer to answer questions regarding "without prejudice" negotiations (which had been unsuccessful) between the plaintiff and another defendant. The issue was whether a "stranger" to settlement negotiations was entitled to disclosure of those negotiations.

Wachowich J. found no binding authority in Alberta on the point, and turned to conflicting authorities from other jurisdictions. He noted a variety of rationales which have been given for "without prejudice" privilege, the principal ones being irrelevance (because willingness to settle does not always indicate a belief that the opponent's position

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30. *Syncrude Canada Ltd.* at 335; quoting from *Cana Construction Co.*, *supra*, note 26 at 316.
31. (1954), 13 W.W.R. 193 (B.C.C.A.).
32. (1990), 78 Alta. L.R. (2d) 217 (Q.B.).
33. *Ibid.* at 219.
34. (1990), 72 Alta. L.R. (2d) 330 (Q.B.); affd. (1990), 74 Alta. L.R. (2d) 271 (C.A.).

is well-founded), express or implied agreement between the parties, and public policy directed at encouraging settlement of disputes.[35] There were two decisions from the British Columbia Court of Appeal which held that a stranger to negotiations was entitled to examine for discovery on the negotiations.[36] The British Columbia decisions did not refer to the public policy rationale, and there was some reference to the contractual theory. In contrast, one Ontario decision (affirmed by the Ontario Court of Appeal) and a House of Lords decision[37] both held that strangers were not entitled to discover on "without prejudice" communications, and expressly adopted public policy as the basis for "without prejudice" privilege.

Wachowich J. found that the rationale of public policy was the proper basis for understanding the privilege applying to settlement negotiations. In particular, he found that the contractual theory was too limited and failed to adequately explain all of the principles which have developed. On applying the public policy rationale to the issue of disclosure of "without prejudice" communications to a stranger, Wachowich J. held that privilege still applied. The public interest was in encouraging settlement, and "it is reasonable to conclude that permitting disclosure to parties who are strangers to the negotiations but parties to the same action would discourage negotiations for settlement to the same extent as would ordering disclosure between the parties to the negotiations themselves."[38]

C. RESPONDING TO UNDERTAKINGS

In the context of cross-examinations on affidavits, Côté J.A. briefly reviewed the purpose of giving undertakings at examinations, and the obligation to provide answers. In the case before him,[39] a number of undertakings had been given at examinations, and subsequently revoked, apparently on the basis of a plea of solicitor-client privilege.

Côté J.A. noted that undertakings are conveniences which have arisen in Canadian practice, and are unknown in other jurisdictions such as the United States. In his view, an undertaking is simply an acknowledgement by a witness that the question is proper, and one that he should answer but for the fact that he has not properly informed himself. The undertaking is given in an attempt to avoid the necessity of a reappearance.

A party may not unilaterally revoke an undertaking which has been given. The following suggestion was made where a party seeks to avoid giving an answer:

> The party can doubtless move the Court to be relieved of his undertaking, for example, on showing that

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35. *Ibid.* at 332-33.
36. *Schetky* v. *Cochrane*, [1918] 1 W.W.R. 821 (B.C.C.A.); *Derco Indust. Ltd.* v. *A.R. Grimwood Ltd.*, [1985] 2 W.W.R. 137 (B.C.C.A.).
37. *I. Waxman & Sons Ltd.* v. *Texaco Canada Ltd.* (1968), 67 D.L.R. (2d) 295 (Ont. H.C.), affd. (1968), 69 D.L.R. (2d) 543 (Ont. C.A.); *Rush & Tompkins Ltd.* v. *Greater London Council*, [1988] 3 All E.R. 737.
38. *Supra*, note 34 at 341.
39. *Psychologists Association of Alberta* v. *Schepanovich* (1991), 45 C.P.C. (2d) 108 (Alta. C.A.).

(a) it was given inadvertently,

(b) (with proper evidence) that it should not have been given, and

(c) that the other side has not been prejudiced, or offering to repair the prejudice.[40]

IV. DISCOVERY: DOCUMENTS

A. PRODUCTION OF DOCUMENTS

The effectiveness of requiring oral and documentary discovery from an opposite party is easily recognized, and these forms of discovery are frequently used. What is often neglected is the effectiveness of an affidavit of documents for the party filing and serving the affidavit. Rule 190(1) provides that a party served with an affidavit of documents is deemed to admit that the described documents were written, signed or executed as purported, that copies are true copies, and that in the case of letters, they were sent and received. These presumptions are overcome only if a notice of denial is served by the party having received the affidavit within 30 days of that receipt (rule 190(2)).

The effectiveness of these provisions is illustrated in the recent decision of *Central Trust Company* v. *Abugov*,[41] where one of the issues was whether guarantors had received demand of payment prior to the suit commenced against them. Copies of demand letters were listed in the plaintiff's affidavit of documents, for which there was proof of service on the defendants. A notice of denial had not been served, and leave of the trial judge had not been sought to dispute receipt of the originals. Hetherington J.A. held that, in the absence of a notice of denial under rule 190 or a denial of receipt of demand letters in the pleadings, the presumption of receipt of originals pursuant to rule 190(1) applied, and the defendant guarantor could not dispute that a demand of payment was made under the guarantee. The decision emphasizes the importance of promptly reviewing another party's production and, if necessary, responding with a denial or requesting an extension of time in which to consider the production.

We have commented above on the reminders from the courts that the scope of discovery is broad. The point has also been made in relation to production of documents, in the decision of Côté J.A. in *Esso Resources Canada Ltd.* v. *Stearns Catalytic Ltd.*[42] The case concerned an application that documents relating to insurance coverage be produced. In addressing the scope of production, Côté J.A. stated:

> [P]roduction of documents has always been considered to have some breadth of relevance and not to be confined in a picky way. The test is what might lead to relevant evidence, as is said in *Companie Financiere et Commerciale du Pacifique* v. *Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.).[43]

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40. *Ibid.* at 111. This case is also significant because it implicitly recognizes that undertakings are proper in cross-examinations on affidavits, a point which is sometimes disputed.
41. (1990), 74 Alta. L.R. (2d) 89 (C.A.).
42. (1991), 82 Alta. L.R. (2d) 168 (C.A.).
43. *Ibid.* at 169.

B. PRODUCTION BY NON-PARTIES

There have been a number of cases concerning applications to obtain documents from those who are not parties to the action, illustrating the different bases upon which such attempts might be made.

In *Esso Resources Canada Limited* v. *Stearns Catalytic Ltd.*,[44] the plaintiffs' claim was for damages caused by an industrial fire. The plaintiffs had received some payments from insurers, and the insurers were claiming a subrogated interest to the extent of the payments made. The action, however, was brought by the plaintiffs directly, not the insurers. The defendants sought production of the insurer's documents, on two alternative grounds. The first was that the action was brought for the benefit of the insurers within the meaning of rule 187, which would result in the insurer being regarded as a party for purposes of document discovery. Alternatively, it was argued that documents should be produced under rule 209, which authorizes production of documents in the possession of strangers to an action.

There were two judgments given by the Court of Appeal, the main one being that of Stevenson J.A. (as he then was), and another by Hetherington J.A. (Harradence J.A. concurring) which reached the same result. The reasons given by Stevenson J.A. for his finding under rule 209 were affirmed in Hetherington J.A.'s judgment. On rule 187, however, there is an important difference in the judgments.

On whether an insurer is a party for whose benefit an action is brought, both Stevenson and Hetherington JJ.A. held that the question had been decided in *Gullion* v. *Burtis*,[45] a decision involving a Workers' Compensation Board interest. The Board had been subrogated, by statute, to the claim of an injured workman. The plaintiff had the concurrence of the Board to sue, but the Board was not involved in the action except to share in the proceeds.

Stevenson J.A. emphasized the fact that "there could be no claim for subrogation in the proper sense of that word ... until the plaintiffs are fully indemnified by the insurer."[46] It is not clear what significance this point had, as he also noted that even if there was a statutory subrogation in the case before him, the position could not be distinguished from the *Gullion* case.

The mere fact that a party might benefit from the proceeds of the action was not sufficient to bring it within rule 187 (discovery of documents) or rule 201 (oral discovery) as being a party for whose benefit the action is brought. In concluding his analysis of this ground, Stevenson J.A. held:

> While there is a tendency to broaden discovery, there are countervailing considerations in not unnecessarily subjecting persons who are not party litigants to the examination process and in not

44. (1990), 74 Alta. L.R. (2d) 262 (C.A.).
45. [1945] 1 W.W.R. 242 (Alta. A.D.).
46. *Supra*, note 44 at 264.

> permitting 'fishing trips.' There is no material here to show that the insurers are the real litigants or, more significantly that they have any real part in formulating the claims.[47]

It seems implicit in Stevenson J.A.'s judgment that an insurer, if it had conduct of the action, would be a party subject to discovery of documents under rule 187 (and, presumably, oral discovery under rule 201). It is on this point which the majority seems to disagree, without stating so expressly, with Stevenson J.A. The reasons of Hetherington J.A. state, in part, as follows:

> Even if the insurers are subrogated to the rights of the respondents, which we need not and do not decide, the decision of this Court in *Gullion* v. *Burtis* ... prevents the appellants from succeeding in their application under R. 187. It cannot be distinguished, and is binding on us.[48]

It would appear, therefore, that in a fully subrogated action, the majority would not necessarily find the action to be one brought for the benefit of the insurer, for purposes of discovery of documents and witnesses.

The Court of Appeal also refused to order production of documents under rule 209. The court affirmed on this point (as on the earlier one) the finding of Moore C.J.Q.B. In the reasons given by Moore C.J.Q.B., it had been noted that the documents sought from the insurer were "broad in nature and description and lack specificity, i.e. all the files are sought of a particular person who may have been working on the project or all the documents generated by a company or all the documents arising out of a particular meeting."[49] Moore C.J.Q.B. found that the applicants seemed to be attempting to obtain "everything in the hope that some part or parts may be relevant."[50]

Stevenson J.A. took a similar approach, finding that what the applicants were seeking was in effect "document discovery of a non-party." He went on to state that "in my view this rule should not be used against a non-party unless it can be shown that the document is in existence and not available through other means; in this case, through a party."[51] He also agreed with Moore C.J.Q.B. "that this form of production should be related to specific documents of at least probable relevance and is not a form of discovery of a non-party."[52]

It is interesting to move from the *Esso Resources* v. *Stearns Catalytic* decision to a more recent case in which, as in the *Gullion* case relied upon in *Esso Resources*, production of Workers' Compensation Board documents was sought. In *Yeoman* v. *Miller*,[53] the defendant applied in a personal injury action for an order that information

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47. *Ibid.* at 265.
48. *Ibid.* at 266.
49. (1989), 98 A.R. 374 (Q.B.), at 382.
50. *Ibid.* Moore C.J.Q.B. endorsed the five criteria for use of rule 209(1) applied by Wachowich J. in *Ed Miller Sales & Rentals Ltd.* v. *Caterpillar Tractor Co.* (1988), 63 Alta. L.R. (2d) 189 (Q.B.), summarized in 28 Alta. L. Rev. 672, at 679-80.
51. *Esso Resources* v. *Stearns Catalytic*, *supra*, note 44 at 265.
52. *Ibid.*
53. (1991), 83 Alta. L.R. (2d) 24 (Q.B.).

held by the Board concerning the plaintiff's medical condition be produced. Production of the records was resisted, not on the basis that the Board was not a party, but pursuant to the privilege over Board medical and other documents given by the governing statute.[54] There was no reference to *Gullion* v. *Burtis* or *Esso Resources* v. *Stearns Catalytic*.

Instead, the judgment of Veit J. contains a review of a superior court's general jurisdiction to control the proceedings before it. She held that the statutory provisions did not create an absolute privilege; they must "be contrasted with legislation that absolutely prevents the use of information in any trial."[55] The court retained jurisdiction to determine when the document privileged under the statute should be made available in court proceedings. After concluding that the court had jurisdiction to order the documents produced, Veit J. allowed the application for production. Her reasons do not indicate why she considered it proper to exercise her discretion in favour of production at the time and on the facts before her. Indeed, the judgment could be interpreted as suggesting that in all personal injury actions where the Board's medical information is relevant, it should be produced.[56]

C. PRIVILEGE

A recurring question in the context of privilege issues is the degree of disclosure required in an affidavit of documents for those documents over which a claim for privilege is made. This question, among others, was considered by Côté J.A., sitting in Queen's Bench, in *Metz* v. *Breland*[57] where the defendants in a personal injury action claimed privilege in their affidavit of documents over a number of documents. The descriptions were "bundle of correspondence, reports, memoranda, and correspondence," with reference to the purpose of their preparation; and another entry for "documents," again with a statement of purpose. Côté J.A. found the description inadequate, and gave the following guidelines:

> These defendants need not give dates or authors or addressees if they do not want to, particularly if the papers are bulky. But they should give something which enables one to know whether a given paper is in that list or not. The bundle should be sealed and initialled, or its pages should be numbered.[58]

Later in the reasons for judgment, he made the following remarks, along similar lines:

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54. *Workers' Compensation Act*, S.A. 1981, c. W-16, ss. 29(3) and 142.

55. *Yeoman* v. *Miller*, *supra*, note 53 at 29.

56. *Ibid.* at 27-28. The same question was addressed in *Brett Estate* v. *Associated Cab (Red Deer) Ltd.* (1991), 79 Alta. L.R. (2d) 391 (Q.B.), where Moore C.J. Q.B. gave reasons confirming the inherent jurisdiction of the court to control its own process, which permitted it to overrule the Workers' Compensation Board's claim of privilege and order production of medical records, "in order for the defendants to properly prepare for trial" in a personal injury action. Coincidentally, this case was heard only several months following *Yeoman* v. *Miller*. However, in *Brett Estate*, the Board had agreed to produce the documents, but the court nevertheless issued reasons, at the request of the defendants, which confirmed that an order would have been made to produce the documents.

57. *Supra*, note 32.

58. *Ibid.* at 220 [emphasis in the original].

> [The affidavit of documents] shall identify the documents for which privilege is claimed, for example by use of initialled bundles, with each page distinctively and permanently numbered. It shall indicate which of these types of privilege is claimed for each given page. (If they are willing to indicate which documents were created before receipt of any kind of intimation of a claim or suit, and which after, that would doubtless speed proceedings and might obviate the need for some cross-examination.)[59]

The same issue was again considered, in a subsequent decision, by Picard J. in *Hamilton* v. *The Queen in Right of Alberta*,[60] where defendants applied for a further and better affidavit of documents. There is some uncertainty over what Picard J. considered the minimum disclosure requirements, because in the result, the plaintiffs (respondents in the application) agreed to make a certain degree of disclosure, which was found to be acceptable by Picard J. It may be that the plaintiffs' position exceeded the minimum requirements. Indeed, it is not clear what degree of detail was sought by the defendants in their motion.

The current position in Alberta was found by Picard J. to be summarized in 13 *Hals. Laws* (4th ed.), para. 41, cited in Stevenson and Côté's *Civil Procedure Guide*.[61] The position is also supported by *London & Midland General Insurance Company* v. *Lambert*.[62] Picard J.'s summary of the principles was as follows:

> [I]n Alberta the requirement is that the documents must be identified such that, if this court is required to make an order for production, it will be able to refer to specific, readily identifiable documents. To require more specificity would create the risk that the production [*sic*; protection?] of the privilege claimed may be effectively lost.[63]

In reaching these conclusions, she did not refer to *Metz* v. *Breland*.

Based on the references quoted approvingly by Picard J., as well as Côté J.A.'s reasons in *Metz* v. *Breland*, the Alberta position appears to be that documents over which privilege is claimed must be capable of identification by the court, in order that it is possible to make rulings on privilege and to enforce such rulings. It is not, however, necessary to describe the documents nor, apparently, to identify authors and recipients. It has been held acceptable to refer to documents as being bundled, numbered and initialled by the deponent. In addition, the grounds of privilege for each document must be stated.[64]

The Crown, as the defendant applying for further and better production, urged Picard J. to follow recent jurisprudence from other jurisdictions requiring more complete disclosure of privileged documents. These decisions generally require the affidavit to give

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59. *Ibid.* at 221.
60. (1991), 80 Alta. L.R. (2d) 169 (Q.B.), at 185-88.
61. (Edmonton: Juriliber, 1989) at 490.
62. [1972] 1 W.W.R. 224 (Alta. D.C.).
63. *Supra*, note 60 at 188.
64. *London & Midland General Insurance Co.* v. *Lambert*, *supra*, note 62 at 226-27, and cases there cited. *Metz* v. *Breland*, *supra* note 32, is the strongest recent authority for this approach.

sufficient detail of each document to enable the court to make a *prima facie* decision on whether privilege is properly claimed; the detail required includes the nature of the documents, the status of the receiver and sender, their relationships to the party and to the lawsuit, and the basis upon which privilege is claimed.[65] Picard J. expressly declined to follow "the more expansive criteria of other jurisdictions."[66]

In the application before Picard J. in *Hamilton*, the plaintiffs "agreed to provide a statement of the nature of the documents, namely correspondence, and the dates and the names of the maker and the recipient."[67] It was also agreed that the grounds of privilege would be stated. Picard J. found that "this fulfils the requirements with one exception: the plaintiffs must list each document."[68]

It would seem, in the first place, that the plaintiffs' voluntary disclosure of the names of the makers and recipients of correspondence goes beyond the requirements of disclosure. There is no indication that Picard J. would have, on the basis of the authorities considered by her, required this disclosure. However, it is unclear why she imposed the requirement to list each of the documents. There is no basis in the authorities adopted by her, in preference to the more "expansive" authorities, for such a requirement. It seems clear as well that, if *Metz* v. *Breland* were applied, it would be unnecessary to identify the makers and recipients of correspondence, and to list the documents.

There is good reason for the courts to continue to support the existing Alberta position, as set out by Côté J.A. and Picard J. For example, there may be valid tactical reasons for a party to be reluctant to disclose the experts it has retained. But there must be balanced against this position the difficulty faced by the opposing party, who is then asked to take on faith the sworn claims to privilege presented in the affidavit of documents. When presented with claims for privilege which identify only numbered bundles of documents, and grounds for privilege, a party can only assume that the claim is valid, or make an application "in the dark" and request court inspection of the documents.[69]

On a specific point of privilege, the Court of Appeal considered witness statements in *Esso Resources Canada Ltd.* v. *Stearns Catalytic Ltd.*[70] The case concerned statements or notes of interviews with ex-employees of the opposite party, all of which were made for the purpose of litigation. In the memorandum of judgment, it was confirmed that if the witnesses had been strangers, the notes would be privileged; and if they had been

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65. The authorities quoted were *Grossman* v. *Toronto General Hospital* (1983), 41 O.R. (2d) 457 (H.C.); and *Creaser* v. *Warren* (1987), 36 D.L.R. (4th) 147 (N.S.C.A.).

66. *Hamilton* v. *R.*, at 188. It is significant that in a subsequent decision in British Columbia, it was held that names of witnesses who gave statements need not be disclosed: *Brugge* v. *British Columbia W.C.B.* (1991), 50 C.P.C. 113 (B.C.S.C.).

67. *Ibid.*

68. *Ibid.*

69. Such an inspection is conducted pursuant to rule 194(2).

70. (1991), 80 Alta. L.R. (2d) 264 (C.A.).

signed statements given by the opposing party, they would not be privileged.[71] The court needed to consider "where the boundary line falls."[72]

The court noted the difficulty in extracting a clear *ratio decidendi* from the various judgments in *Strass* v. *Goldsack*. However, it wished to emphasize that the communications at issue were notes or memoranda distilling, selectively and with editorial comment, interviews with the ex-employees. Secondly, the ex-employees involved were not senior management. With regard to the second point, it was said that "these witnesses were plainly not speaking for or on behalf of their ex-employer." Given their lack of decision-making authority, "it seems safe to conclude that none of the persons involved here was ever an agent to make communications for the employer company, let alone at the time of the interviews."[73] In short, the court appears to have concluded that for purposes of the application before it, the persons interviewed were in much the same position as strangers to the parties to the lawsuit. There was accordingly no reason to overturn the claim to privilege.

Apart from the notes of interviews, there were five "sworn statements" over which privilege was claimed. These were ordered to be produced. The court noted that a sworn statement must mean, in effect, an affidavit. It is commonly recognized that taking sworn evidence without judicial or statutory authority is improper practice. The Court of Appeal affirmed this position, and refused to give its sanction to the claim for privilege over these "sworn statements." In the words of the court:

> An affidavit not intended to be used in judicial proceedings has somewhat shaky legality. Tying down someone who may later testify in court by having him privately swear to certain facts is an undesirable practice which needs no encouragement by the courts. In our view, a sworn witness statement is not something to which litigation privilege (sometimes called solicitor's brief privilege) should extend.[74]

The message, while simple, bears reinforcement. If a party wishes to secure more than a signed statement, and obtain sworn evidence, it should do so by means of an examination for discovery (where the individual is one to whom the discovery rules apply); or obtain an affidavit in support of an appropriate motion, or in limited cases, an affidavit to be used at trial.[75]

To follow up on an earlier comment, it is noted that the decision in *Hodgkinson* v. *Simms*[76] was in effect followed by three judges of the Ontario High Court of Justice, Divisional Court, on appeal from the High Court, in *Ottawa-Carlton* v. *Consumers' Gas Co.*[77] As in *Hodgkinson* v. *Simms*, the question concerned the claim to privilege over a collection of documents from public files and other sources, made by a solicitor for

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71. Relying upon *Strass* v. *Goldsack*, [1975] 6 W.W.R. 155 (Alta. C.A.).
72. *Supra*, note 70 at 265.
73. *Ibid.* at 267.
74. *Ibid.* at 265.
75. The circumstances in which affidavit evidence may be used at trial are set forth in rule 261(2).
76. [1989], 3 W.W.R. 132 (B.C.C.A.); discussed in 28 Alta. L. Rev. 672, at 678-79.
77. (1990), 74 O.R. (2d) 637 (H.C.J.).

purposes of litigation. It could not be said that any privilege would have attached to each of the original documents, but the claim for privilege was on the basis of the work done by the solicitor in selecting, collecting and organizing the materials. The *Consumers' Gas* judgment was written by O'Leary J., whose reasons are of sufficient interest to set out. In the first place, he recognized the benefits of full discovery disclosure. However, he noted that such benefits "would be gained at the expense of serious interference with our adversarial system of justice and would reduce the likelihood of full and early disclosure in future cases."[78] He elaborated as follows:

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of the privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel.[79]

It is difficult to disagree with O'Leary J.'s reasoning. Indeed, to refer to the discussion above on description of privileged documents, it is also difficult to justify a requirement that a privileged collection of such documents must be completely described in the privileged portion of an affidavit of documents. Making a disclosure by list of the documents collected would have nearly the same effect as ordering production of the documents themselves. Counsel often make attendances at government offices and other institutions as part of their investigations, but are concerned to take copies of documents, as they might then become producible and disclose the party's approach. The positions taken by the British Columbia Court of Appeal and the Ontario High Court of Justice, combined with the limited disclosure requirement in the privileged parts of affidavits of documents in Alberta, should make these practices unnecessary. However, it must be recognized that the Alberta position on both of these issues remains somewhat unclear.

V. DISCOVERY: IMPLIED UNDERTAKING

The restrictions on use of discovery evidence outside of the action in which it is taken have been reinforced in several recent decisions. It is now clearly established that in Alberta (subject to any rulings by the Court of Appeal), the courts consider there to be an implied undertaking on the part of parties and counsel that discovery evidence, whether oral or documentary, may not be used for purposes collateral to the action without leave

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78. *Ibid.* at 643.

79. *Ibid.* Further support for this position, in contrast to the argument that collections of otherwise producible documents must be produced, is found in Stevenson and Côté, *Civil Procedure Guide*, *supra*, note 61 at 39-40.

of the court. The most comprehensive consideration of the issue appears in the judgment of Lutz J. in *Wirth Ltd.* v. *Acadia Pipe & Supply Corp.*[80]

In the *Wirth* v. *Acadia* case, the plaintiff asked the defendants during discovery to confirm that information obtained on discovery would not be used for purposes collateral or ulterior to the action. The plaintiff's concern was that the defendants might intend to use evidence obtained on discoveries with regard to other actions contemplated against third parties. The defendants disputed that information obtained on discovery would be subject to an implied undertaking, and the plaintiff therefore applied for a declaration as to the existence of an implied undertaking or, alternatively, an order protecting the confidentiality of the information in the action.

In his analysis of the law, Lutz J. reviewed the position in England and other Canadian jurisdictions. The two leading English decisions upheld the existence of an implied undertaking as part of the discovery process, and found that the undertaking remained binding on solicitors even through to conclusion of the trial. In other words, documents made public during the course of a trial could not be disclosed by a lawyer if they had been obtained during the discovery process.

The position in British Columbia was noted to be different. The majority decision in the leading case[81] was written by McLachlin J.A. (as she then was). She held that there was no implied undertaking in the discovery process in British Columbia, and that this was the preferable practice. In cases where protection was required, a party could apply to the court for an appropriate order. On the other hand, the implied undertaking has been found to exist in Saskatchewan (which has a specific rule dealing with transcripts of examinations), New Brunswick, Ontario, and Manitoba. In addition, the Federal Court of Canada has upheld the existence of an implied undertaking.

In Alberta, Lutz J. (in *Wirth*) found there to be inferential support for implied undertakings in Laycraft C.J.A.'s judgment in *Ed Miller Sales & Rentals Ltd.* v. *Caterpillar Tractor Co.*[82] The existence of an implied undertaking was expressly recognized by Wachowich J. in *Canada Deposit Insurance Corp.* v. *Canadian Commercial Bank.*[83]

In discussing the merits of implied undertakings, Lutz J. raised questions about the countervailing public interests of encouraging full discovery, and restricting the use of information to protect private interests. It is, however, difficult to see any real tension in these principles. The public interest in full discovery process has been widely recognized by our courts as being more conducive to fair results and encouraging settlement. It

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80. (1991), 79 Alta. L.R. (2d) 345 (Q.B.). Other recent Alberta decisions are *Canada Deposit Insurance Corp.* v. *Canadian Commercial Bank* (1990), 68 D.L.R. (4th) 754 (Alta. Q.B.), *per* Wachowich J.; *Hamilton* v. *The Queen in Right of Alberta*, *supra*, note 60, *per* Picard J.,; and *Midas Equipment Ltd.* v. *Zellers Inc.* (1989), 100 A.R. 52 (Q.B.), *per* Virtue J.

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

82. (1988), 90 A.R. 323 (C.A.), at 326.

83. *Supra*, note 80.

would be hard to find a significant public interest which would be defeated by giving privacy to the litigants, ensuring that oral and documentary discovery is not publicly disclosed (until use at trial). Lutz J. raises the question, in the instance of a case involving allegations of fraud (which was the case before him), of whether it is contrary to public policy to allow wide discovery and then restrict the use of information for proper prosecution or legal action against a fraudulent party. It might, however, be something of a far reach to expect that information extracted in a civil discovery (where the "accused" must testify) should be made available for the criminal justice process.

The conclusions arrived at by Lutz J. form a helpful codification of the implied undertaking in this jurisdiction. He summarized the principles taken from the cases as follows:

1. The implied undertaking, which is to the court, relates to both oral and documentary discovery.

2. Where there is real risk of damage caused by disclosure, in special circumstances such as intellectual property or highly competitive industries, the court may grant a specific order to have the information sealed.

3. The court may, on application, remove evidence from the implied undertaking or sealing order for use in other proceedings. An example would be the need to test the credibility of a witness testifying in a related proceeding. Criminal investigations are not a sufficient ground to lift the implied undertaking.

4. The parties' counsel are officers of the court and have a duty not to disclose or use discovery evidence outside of the proceedings in which they are taken.

5. The duty not to disclose discovery information extends to counsel who are not directly involved in the proceedings.

6. Transcripts and copies of documents may not be made available to parties outside the proceedings, except with leave of the court.

7. The implied undertaking and non-disclosure orders continue after use in court, except with leave of the court.

The significance of these rules cannot be overstated. Parties, employees and former employees of parties, and counsel are prone to discuss discovery evidence on numerous occasions, in a variety of circumstances. In most cases, the discussions are innocuous and unlikely to cause harm. The few exceptions are sufficiently serious, in light of the sanction of a contempt of court finding, that special caution should be taken -- particularly in advising clients and witnesses, at an early stage, of the restrictions involved.

Less than a month after Lutz J.'s decision in *Wirth* v. *Acadia*, Picard J. reviewed many of the same issues in *Hamilton* v. *The Queen in Right of Alberta*.[84] She apparently did not have the benefit of the reasons in *Wirth* v. *Acadia*, but independently arrived at substantially the same position. She held that "in Alberta, a general proposition may be stated thusly: the law implies an undertaking that information acquired through the discovery process shall not be used for any purpose which is ulterior or collateral to the lawsuit."[85] Normally, the implied undertaking should be sufficient, and the court should be reluctant to make orders as to express undertakings. However, in the case before her, the documents included those relating to the formation or management of government policy, and the Crown was concerned about the ambiguity of the implied undertaking, particularly the degree to which it would be binding upon experts, witnesses, clerical staff or other employees. Picard J. found that it was an appropriate case for court supervision of the express terms and conditions to apply to some of the documents.

In light of the evolving law on implied undertakings in discoveries, it is interesting to note the decision of *Schwartz* v. *Stinchcombe*,[86] in which the defendant faced civil and criminal proceedings for alleged fraudulent acts, misrepresentations and professional negligence. In the civil proceedings, the defendant applied to stay his examination for discovery and production of documents on the ground that his right against self-incrimination would be violated should a new criminal trial be ordered. The decision of Hutchinson J. was given before *Wirth* v. *Acadia* (although after some other authorities confirming the existence of implied undertakings). The question of the implied undertaking does not appear to have arisen before Hutchinson J. His decision was based on the difficulty the Crown would have in using the evidence at the criminal trial, because of section 5 of the *Canada Evidence Act*,[87] which prohibits the use of incriminating evidence given under compulsion of provincial legislation; and the fact that the application was premature, apparently because discoveries had yet to be conducted. It would seem, if Lutz J.'s reasoning in *Wirth v. Acadia* could be applied, that the implied undertaking would afford protection to an accused person in these circumstances. If there were any concern about the information in the civil proceedings being "leaked" to the Crown, Lutz J.'s suggestion of a sealing order could be used.

VI. EVIDENCE

The following comments concern cases where procedural aspects of evidence have been addressed by the courts. The evidentiary questions considered below involve proceedings at both the pre-trial and trial stages of civil actions. (It is beyond the ambit of this article to comment on decisions relating to substantive evidentiary principles.)

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84. *Supra*, note 60.
85. *Ibid.* at 177.
86. (1990), 110 A.R. 62 (Q.B.).
87. R.S.C. 1985, c. C-5.

A. EXPERTS

One of the most important procedural rules concerning evidence is rule 218.1, requiring advance notice of the substance of evidence intended to be adduced through an expert at trial. As part of a very lengthy decision on a number of issues in *Guarantee Co. of North America* v. *Beasse*,[88] Rooke J. provided a general review of its purpose and applications. In the case before him, he found there to be a "flagrant ignoring" of the rule, which gave him opportunity to restate its purpose and comment on the standard to be applied when considering applications for leave to call expert evidence despite non-compliance with the notice provisions.

Rooke J. reviewed all of the cases addressing rule 218.1, and emphasized a number of points. Most importantly, he found that the rule serves a number of purposes, such as encouraging the settling of actions or issues, shortening trials, avoiding adjournments, saving costs and expenses, and permitting better preparation by both experts and counsel. As a result, he found that "the mere absence of prejudice to the opposite party in terms of trying to prepare cross-examination is not, in most cases, a sufficient basis for the Court to grant leave under Rule 218.1(2)." After reviewing the cases, he concluded that relief from the strict requirement of rule 218.1 "will be very sparingly granted." Finally, Rooke J. observed that the rule does not provide any authority to relieve from a failure to comply with rule 218.1(3), which states that for an expert report to be entered as evidence at trial it must be served not less than ten days before trial commences.

One of the cases noted by Rooke J. was *Alberta Motor Association Insurance Company* v. *Lenza*,[89] where the parties had exchanged expert reports earlier in the action, but one expert apparently changed his opinion just before trial, resulting in an adjournment. One month before the re-scheduled date, the defendant sought leave to call, as a rebuttal expert, a doctor. The defendant was in default of rule 218.1(1.1), which requires the statement of the substance of a rebuttal expert's opinion to be served not more than 45 days from service of the statement of the expert intended to be rebutted.

The trial judge (apparently before the trial commenced) ruled that the rebuttal witness could not testify. Several days before the jury trial was to begin, the Court of Appeal considered the matter, and expressed its view on what principles should govern a court's decision whether to grant leave for an expert witness to be called after late notice. Kerans J.A., for the court, stated as follows:

> R. 218.1 of course gives the court authority to grant leave to call a witness late. In our view, leave should be granted in a case where late notice remains adequate notice in terms of preparation. Wherever possible it is best that the trier of fact hear all relevant evidence. But that ideal must be tempered by the recognition that we must have a workable system.[90]

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88. (1992), 124 A.R. 161 (Q.B.). Rooke J. referred to and applied his reasoning again in *Kashuba* v. *Ey*, 22 June 1992, unreported, Alta. Q.B.

89. (1990), 74 Alta. L.R. (2d) 218 (C.A.).

90. *Ibid.* at 219.

It was noted that 30-day notice of the expert's testimony had been given, which in many cases would be only 15 days short of the required notice for a rebuttal witness (assuming the statement intended to be rebutted was served 90 days before trial). However, the court did not grant leave. A major factor was that the trial was to be held before a jury, and there had already been one adjournment caused by confusion over expert evidence. Furthermore, the notice of the rebuttal evidence was "very brief." It gave only the expert witness's conclusions, and no indication of how the witness had reached those conclusions. This raised the possibility that the testimony might surprise cross-examining counsel, and necessitate another adjournment, which would be particularly serious in a jury trial. (The court indicated that the notice "may or may not be in compliance with R. 218.1" because of its brevity).[91]

The court dismissed the appeal, but expressly stated that the appellant had leave to renew its application for leave before the trial judge during the trial, and suggested that if more detailed information about the evidence could be made within the next several days, the trial judge might reconsider the matter.

In an earlier case, involving less difficult circumstances, the Court of Appeal approved of a flexible exercise of the court's discretion to allow expert evidence notwithstanding failure to comply with rule 218.1. During the trial, the defendant had objected when the plaintiff tendered one of its experts, on the basis that the statement of its opinion served under rule 218.1 gave inadequate detail. The trial judge suggested that additional detail be made available, and that there be a short adjournment. It was then agreed that the defendant would have an overnight break to prepare for cross-examination. When the case came before the Court of Appeal, Stevenson J.A. (as he then was) approved of the trial judge's method of remedying the alleged deficiency by ordering particulars and an adjournment.[92] In a still earlier example of non-compliance with rule 218.1, apparently involving inadequate notice, lack of detail, and a previous adjournment, Waite J. found there to be no satisfactory reason for allowing leave, and refused to hear the expert evidence.[93]

B. DOCUMENTS

A little-used procedure to compel production of documents at trial from a non-party, was attempted in one of the numerous motions in the *Ed Miller Sales & Rentals Ltd.* v. *Caterpillar Tractor Co.*[94] case. Before the plaintiff's case had closed, the defendants served a notice to attend (presumably pursuant to rule 293) on a competing business. The notice, in the form of a *subpoena duces tecum* ("to produce documents"), sought production of financial and inventory records. The competing business, as the applicant, made a motion to set aside the notice to attend.

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91. *Ibid.* at 220.
92. *Chalinor* v. *Brown* (1989), 69 Alta. L.R. (2d) 88 (C.A.).
93. *Wilson* v. *Walton* (1987), 51 Alta. L.R. (2d) 308 (Q.B.).
94. (1991), 82 Alta. L.R. (2d) 40 (Q.B.).

Berger J. referred to the usual procedure followed where a *subpoena duces tecum* is used, namely that the individual attends at the outset of the trial and, if he has no objection, hands the requested documents to the clerk. They are then available for use by either party at the trial. In the matter before Berger J., the subpoenaed party objected to producing the documents. The basis for the objection was that the documents dealt exclusively with the applicant's business, not that of the plaintiff or defendants; and that because the applicant was in competition with the defendants, disclosure of the material would be prejudicial.

Berger J. was reluctant to decide the question at the point in the trial where the defendants sought a ruling. In his words, "I would have preferred to have been invited to assess the matter later in the trial, to determine whether the documents sought would likely have 'a direct and important place in the determination of the issues before the Court.'"[95] It was necessary to weigh the prejudice resulting from disclosure against the importance of the evidence in the matter before the court. The defendants submitted that the court would be called upon to define the "relevant market" in the case, which involved a civil action under the *Combines Investigation Act*.[96] However, the defendant's counsel conceded that they could only speculate on what the statements sought to be produced would show. Berger J. therefore was unable to conclude that the documents would "likely have a direct and important place in the determination of [the] issues." The subpoena was "grounded in speculation ... and constitutes a disguised form of discovery of a non-party."[97] Accordingly, the application to set aside the subpoena was allowed.

In another case[98] involving evidence at trial, the court considered the effect of exhibits entered by agreement. The evidentiary point concerned the degree to which a loan was "out of margin." In commenting on the effect of an exhibit entered by agreement, without express conditions governing its use, Côté J.A. held as follows:

> The receiver's report contains another inventory count which also shows inadequate margin. That report was put into evidence by consent of the parties, without calling a live witness. ABC now suggests on appeal that that may not have been done for the truth of its contents. But the transcript shows that no one suggested such a limitation when this and other exhibits went in by consent. Had anyone suggested that then, the Bank could have called the receiver or other witnesses to prove its contents. *If some report is put in as agreed evidence, the natural inference is that the report is evidence of the truth of its contents.* Rarely will the fact of (say) a receiver's or an orthopedic surgeon's merely having made some report, ever be an issue in a trial. Usually the relevance lies in the facts which the receiver or surgeon found.[99]

Côté J.A.'s comments emphasize the need for counsel to consider carefully the effect of exhibits entered by agreement. It is common practice, strongly encouraged by the courts, for books of agreed exhibits to be assembled prior to trial and introduced as

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95. *Ibid.* at 45.
96. R.S.C. 1970, c. C-23.
97. *Supra*, note 94 at 45.
98. *ABC Color & Sound Ltd.* v. *The Royal Bank of Canada* (1991), 117 A.R. 271 (C.A.).
99. *Ibid.* at 275 (emphasis added).

exhibits at commencement of trial. To avoid confusion, it is useful to prepare an agreement indicating the effect of exhibits so tendered -- for example, that they are true copies of originals, were sent and received, and are tendered for the truth of their contents except where otherwise stipulated. To preserve some flexibility, it is useful as well to include a provision that each party is entitled to lead contrary evidence as it sees fit.

VII. APPEALS

A. EXTENSION OF TIME TO APPEAL

The Court of Appeal decision in *Strach Developers Ltd. and Cree Airways Corp.* v. *Toronto-Dominion Bank*[100] provides a useful review of the factors which the court will examine on applications for an extension of time to appeal.[101] In that case, the Toronto-Dominion Bank had seized an airplane which formed security under a chattel mortgage granted by the bank's debtor, Cree Airways Corp. However, Strach Developers Ltd., who had been considered the previous owner, denied selling the aircraft, and claimed that Cree had only been the lessee of the airplane and was thus unable to grant the chattel mortgage. Strach was successful in obtaining an order in Queen's Bench which held the chattel mortgage to be invalid. Subsequently, the bank obtained from one of Cree's principals (who could not be located earlier) a copy of a bill of sale of the airplane, by Strach to Cree.

The bank was granted an extension of time within which to appeal, and leave to adduce new evidence. The following factors were taken into account:

- New evidence: The court indicated that the strength of new evidence is an important factor. In this case, there was an executed bill of sale which purported to give Cree title to the airplane, a critical factor going to ownership and validity of the chattel mortgage.

- Due diligence: The court noted that the uncontradicted affidavit evidence before it was that the bank had been unable to locate the bill of sale until after the original proceeding. Furthermore, the bank was not responsible for failure on the part of opposite parties, such as Cree or its successors in interest, to produce the document on discovery. Reference was made to two Supreme Court of Canada decisions which have held "that late admission of evidence is much easier where the party who had the evidence had a duty to produce it to the court or the party seeking to adduce it late."[102]

- Timeliness: The court reviewed the negotiations and investigations which followed the finding of the bill of sale, noting among other things that some investigation was

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100. (1990), 110 A.R. 12 (C.A.).

101. These applications are made under rule 548, the general provision for enlargements or abridgements of time.

102. *Supra*, note 100 at 15, relying upon *Brown* v. *Gentleman*, [1971] S.C.R. 501, at 513; and *Harper* v. *Harper*, [1980] 1 S.C.R. 2, at 13, 15-16.

appropriate to ensure that the new evidence could be supported. The court also made the point that in other circumstances, the periods of short delay which were involved might have been viewed more critically. However, in this case it was shown that the court in the earlier proceedings may have been misled. In finding that the delay was not fatal, the court gave the reminder that "it has often been held that civil procedure is the servant, not the master, of justice."[103]

- Intent to appeal: It was noted that usually a party seeking an extension of time to appeal must show an intent to appeal within the normal time limit. While not deciding whether that is still a firm general rule, the court pointed out that the facts before it were unusual in that during the appeal period, the bank had no knowledge beyond mere suspicions of the true facts. In citing the House of Lords decision in *Barder* v. *Caluori*,[104] the Court of Appeal commented that "sometimes time to appeal may be extended where a new unexpected event suddenly shows that a past decision is very likely wrong."[105] In such cases earlier intent to appeal is not required. Extension of time even in these circumstances is far from automatic, but the facts in *Strach Developers* were strong enough.

Accordingly, the court extended the time to appeal and granted the bank leave to adduce the bill of sale as additional evidence.

In a very brief memorandum of judgment delivered by Kerans J.A. in *Cascade Development Corp.* v. *Red Deer College*[106] the Court of Appeal extended the time for service of the appellant's notice of appeal and dismissed the respondent's application to strike out the appeal as being out of time. It appears that the delay was very short. Kerans J.A.'s comments are a useful guide to the approach taken in these cases. He held as follows:

> It is not necessary to show absence of prejudice in a case where the delay is only a day or so: we draw an inference from such a short delay that there is no prejudice. Similarly, we do not require in cases of such short delay that an arguable case be established.[107]

There are, of course, numerous instances where an extension of time to appeal will not be provided. In considering whether to hear appeals which are out of time, the court often requires demonstration of a reasonable prospect of success. For example, in *Royal Bank of Canada* v. *Lane*,[108] the plaintiffs sought an extension of time to appeal a judgment dismissing their claim against the defendant. Hetherington J.A. considered one of the rules outlined in an earlier decision, which placed the onus on the party applying for an extension of time to "show that he would have a reasonable chance of success if

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103. *Supra*, note 100.
104. [1988] A.C. 20, (H.L.) at 41.
105. *Supra*, note 100 at 16.
106. (1991), 115 A.R. 325 (C.A.).
107. *Ibid.* at 326. For a comment on this case and how it compares to earlier authorities, see W.D. Goodfellow, "Requirements for Extending Time for Appeal" (1991), 84 Alta. L.R. (2d) 23.
108. (1990), 107 A.R. 144 (C.A.).

allowed to prosecute the appeal."[109] At trial, it had been found that even if the defendant had acted unlawfully, the plaintiffs could not succeed because they had not suffered a pecuniary loss. As there was no evidence to the contrary before it, the Court of Appeal concluded that the burden of showing a reasonable chance of success had not been met.[110]

B. APPLICATIONS FOR REHEARING

In two recent decisions, the Court of Appeal has addressed the requirements which must be met for a party to obtain a rehearing of its appeal. In both cases, the application for a rehearing was denied.

In *Nova, an Alberta Corporation* v. *Guelph Engineering Co.*,[111] the appellant's appeal had been dismissed by a two-to-one majority. In hearing the application for a rehearing, Côté J.A. (who in the original judgment would have granted a retrial[112]), reviewed the reasons submitted as the basis for a rehearing. The main reasons considered were the following:

- The appellant had filed material deposing to comments made by a member of the majority of the court at a seminar following the signing and filing of judgment, but before its release. The court considered such material to be irrelevant on an application for rehearing, because reasons for judgment "must be evaluated on their express contents, which is what the rest of the court concurs in or dissents from."[113]

- The appellant submitted that it had not had full opportunity to argue. The court reviewed the opportunity of the parties to argue their cases on the main appeal, and found that this ground was without merit.

- It was submitted that the Court of Appeal had misunderstood the positions of the parties or their arguments, primarily with regard to whether a retrial was sought. Again, this submission was not accepted.

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109. Quoting from McDermid J.A. in *Royal Bank of Canada* v. *Morin* (1977), 4 Alta. L.R. (2d) 127 (C.A.), who in turn quoted with approval *Cairns* v. *Cairns*, [1931] 3 W.W.R. 335 (Alta. C.A.). Hetherington J.A. was considering one of four rules set out in the earlier authorities. The other three requirements are bona fide intention to appeal, explanation for delay and lack of serious prejudice, and not taking the benefits of the judgment appealed from.

110. Another recent example of the court finding an appeal out of time is *Bishop v. Bishop* (1990), 113 A.R. 280 (C.A.). Côté J.A. held that the time to appeal from an interlocutory order ran from the date of actual service, where that was proved to have occurred by the order being left with a solicitor's receptionist who had signed an acknowledgement, rather than from the later date on the document, which had been returned by the solicitor with a letter acknowledging service. In this case, it seems that there was no application to extend the time for appeal.

111. (1989), 71 Alta. L.R. (2d) 80 (C.A.).

112. *Nova, an Alberta Corporation* v. *Guelph Engineering Co.* (1989), 70 Alta. L.R. (2d) 97 (C.A.).

113. *Nova, An Alberta Corporation* v. *Guelph Engr. Co.* (1989), 71 Alta. L.R. (2d) 80 (C.A.), at 82.

Leave to reargue was also dismissed in *Red Deer College* v. *W.W. Construction (Lethbridge) Ltd.*[114] Nine months had elapsed from delivery of the reasons for judgment, during which interval leave to appeal to the Supreme Court of Canada had been denied. The Court of Appeal's judgment roll was still in dispute.

In dismissing the application for leave to reargue,[115] the court was critical of the delay between delivery of reasons for judgment and the application for leave to reargue. It confirmed that such application should be made without undue delay. The court also noted that leave to appeal to the Supreme Court of Canada had already been made and denied, and considered it better practice that applications for leave to reargue be made prior to seeking leave to appeal. A different practice "would lead to mischief."[116]

On a procedural point, as might be expected, it has been held that applications for a rehearing or reargument should be made to the panel of the Court of Appeal which heard the appeal in the first instance. Kerans J.A. has held that one panel of the Court of Appeal has no jurisdiction to hear what is, in effect, an appeal from another panel of the same body.[117]

C. ORDERING A NEW TRIAL

There have been a number of recent examples of the Court of Appeal ordering new trials in civil actions.[118]Typically, this occurs where evidence has been improperly admitted or excluded, or where a critical issue has not been adequately addressed. In some instances, however, there are wide-ranging and fundamental difficulties found in the trial judgment, leading to an extensive attempt to "re-try" the case on appeal.

A recent example of the latter is *Bank of Nova Scotia* v. *Dunphy Leasing Enterprises Ltd.*,[119] an action by borrowers against their bank for failing to give reasonable notice prior to appointment of a receiver and for seizing assets without authority. The trial itself was lengthy, and argument on appeal took nearly two weeks. The result is a comprehensive decision by Fraser J.A. (as she was then was), in which she reviews at length the trial issues and reasons for judgment. Stratton J.A. (Laycraft C.J.A. concurring) agreed with her reasons except on the question of what would constitute reasonable notice, preferring on that point to await "a more appropriate record."[120]

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114. (1990), 71 Alta. L.R. (2d) 396 (C.A.).

115. One of the parties made submissions by correspondence to the Court of Appeal to the effect that it should reconsider its reasons for judgment; the Court of Appeal had difficulty in classifying the submission, but decided to treat it as an application for leave to reargue.

116. *Supra*, note. 114 at 397.

117. *Canadian Superior Oil Ltd.* v. *Jacobson* (1991), 83 Alta. L.R. (2d) 278 (C.A.).

118. One of the leading cases on what constitutes reviewable errors in a trial judgment, and on considerations relevant to directing a new trial, is still *Nova, an Alberta Corporation* v. *Guelph Engineering Co.*, *supra*, note 112.

119. (1991), 83 Alta. L.R. (2d) 289 (C.A.).

120. *Ibid.* at 342.

The case involves complex issues of liability and damages (including the troublesome matters of interest calculations and compliance with the *Interest Act*,[121] which go beyond the topic at hand). It is pertinent, however, to consider the four areas in which Fraser J.A. found the trial judgment so deficient as to require a new trial.

- Fact findings: Fraser J.A. found a number of the fact findings to be "seemingly contradictory," such that the parties were unable to agree even on what findings had been made. Furthermore, some key issues of fact were not clearly resolved or were omitted. Each of these difficulties would justify a new trial.

- Causation: Many of the trial judge's damages awards appeared to presume loss arising from inadequate notice of appointment of a receiver. The bank's argument had been that even if it was liable for improper appointment, damages could only be nominal, because the main debtor had no value at the time or, even with greater notice in the demand for payment, could not have paid the loans. Fraser J.A. found that this issue of causation was not addressed.

- Expert evidence: Fraser J.A. found difficulties with the trial judge's use of expert evidence. The simple statement of having preferred one expert to another without reasons was not itself reviewable error. The difficulty was that one expert's analysis was accepted, but the conclusions of the opposing expert were adopted, without explanation. The lack of explanation, or the possibility that the evidence was misunderstood or an issue overlooked constituted reviewable error.

- Key issues: Finally, there were several important factual issues not addressed, which affected liability, causation and damages.

It will be noticed that each of the above areas is, in essence, concerned with the findings of fact made by the trial judge. This made it difficult to resolve the case on appeal. Fraser J.A. noted that she had endeavoured to make findings on the omitted issues, in an attempt to avoid a new trial, at least on liability. She was unable to do so, and consequently another trial was directed on all issues.

Interestingly, Fraser J.A. did not confine herself to noting the deficiencies in the trial judgment and assessing whether a retrial was needed. She went on to canvass at length many of the legal issues central to the case, such as determination of reasonable notice and principles of causation of damages if inadequate notice was given. In this area, at least with regard to reasonable notice, the majority did not concur, apparently considering it better to give reasons on such issues when all the necessary findings of fact are before the court.

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121. R.S.C. 1985, c. I-15.

The duty of an appellate court when it appears that an issue has been overlooked at trial was also addressed in *Lehan* v. *Gulf Canada Corp.*[122] An employee had sought damages for wrongful dismissal, claiming that he relocated from Toronto to Calgary and was promised employment for two years. The trial judge held that the employee was wrongfully dismissed and awarded damages in lieu of reasonable notice. However, the Court of Appeal considered that the trial judge failed to address the issue of the two-year employment promise, specifically whether damages should have been awarded for the remainder of that period. Accordingly, the appeal was allowed and a new trial was ordered.

In *B.S.C. Pension Fund Trustee Ltd.* v. *Cascade Development Corp. Ltd.*,[123] it was held that the trial judge wrongly excluded relevant evidence. The Court of Appeal reviewed rule 519 of the Alberta Rules of Court which allows a new trial on the grounds of, *inter alia*, the improper admission or rejection of evidence only when in the opinion of the court, "some substantial wrong or miscarriage has been thereby occasioned." The court cited with approval *Leslie* v. *Canadian Press*,[124] where Kerwin C.J.C. stated:

> I am of opinion that the preferable rule and the one that should be adopted is that it is sufficient for the complaining party to show a misdirection may have affected a verdict and not that it actually did so; and that, if an Appeal Court is in doubt as to whether it did or not, it is then for the opposite party to show that the misdirection did not in fact affect the verdict.[125]

The chief concern of the court was stated as being that justice should be done between the litigants. Any apprehension that this may not have occurred at trial gives a favourable basis for seeking a new trial.

In *Trusz* v. *Witzke*[126] the Court of Appeal considered a personal injury case where the trial judge had assessed damages for the plaintiff arising from a motor vehicle accident. A new trial was ordered on the basis that the appellant had been denied the right to call a relevant witness on the issue of causation of the loss, and because of a misdirection by the trial judge on assessment of the evidence concerning future loss. The court cited with approval its decision in *Friesen* v. *Reimer Concrete Industries Ltd.*[127] where it was held that a party is denied a fair hearing if, for an insufficient reason, the trial judge denies the trier of fact access to potentially critical evidence. In *Trusz* v. *Witzke*, it was found that both parts of that rule were established by the appellant: the evidence was potentially critical, and the trial judge did not have sufficient reason to exclude it.

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122. (1990), 105 A.R. 273 (C.A.). A more recent example of a similar case is *Trilogy Resource Corp.* v. *Dome Petroleum Ltd.* (1991), 83 Alta. L.R. (2d) 97 (C.A.), where the Court of Appeal sent the action back to Queen's Bench for re-trial because the trial judge failed to address critical evidence, and the credibility of a key witness was in issue.

123. (1990), 111 A.R 57 (C.A.).

124. (1956), 5 D.L.R. (2d) 384 (S.C.C.).

125. *Ibid.* at 387, quoted in *B.S.C. Pension Fund Trustee* v. *Cascade Development Corp.*, *supra*, note 123 at 61.

126. (1990), 111 A.R. 349 (C.A.).

127. 2 December 1987, (Alta. C.A.), unreported Doc. No. Calgary Appeal 18972.

In the same case, the court had to consider whether the appellant should be granted a new trial, when he had already taken the benefit of the trial judgment. The trial judgment awarded damages for non-pecuniary loss and loss of income through 1985, and these damages had been paid. The plaintiff's claim for income loss after 1985 and income loss after trial had been denied in the trial judgment, and it was this part of the judgment which was under appeal. The Court of Appeal found that there was no inconsistency between the position taken on appeal and the receipt of damages arising from the judgment at trial. It was therefore held that the equitable doctrines of estoppel and election did not apply to prevent prosecution of the appeal.

VIII. COSTS

There have been decisions which provide guidance on a number of different areas of the law relating to costs, such as the circumstances in which a party's conduct might lead to costs on a special scale, or even deprivation of costs; some principles on the entitlement to disbursements; and consideration of how the compromise procedures in the Alberta Rules of Court will affect orders as to costs.

A. CONDUCT AFFECTING COSTS

It is commonly recognized that there are three types, or "scales," of costs potentially applicable when costs are awarded between parties. The general rule is that costs will be based upon Schedule C to the Alberta Rules of Court, typically referred to as "party-and-party costs."[128] In special circumstances, usually related to the type of case or the conduct of the parties, the court may award "solicitor and client costs" which are intended to represent a reasonable solicitor's account to his client. In even more exceptional cases, the court may order costs "as between a solicitor and his own client" which are intended to represent full indemnity to the party for all charges of his solicitors, without regard to whether it was "reasonable" for the successful party to have instructed his lawyer to take each and every step.

One of the factors recognized in the authorities for an award of costs on a solicitor and client basis has been a finding of "positive misconduct" on the part of one of the parties. The type of misconduct involved must usually go beyond a finding, for example, of negligence or breach of contract such as would normally give rise to a judgment. In *Modern Livestock Ltd.* v. *Elgersma*,[129] Andrekson J. had occasion to consider conflicting factors relevant to a finding of costs. The case concerned a purchase of diseased hogs by the defendants (plaintiffs by counterclaim) from the auction yard of the plaintiff (defendant by counterclaim). The plaintiff succeeded in proving its claim, which was a relatively minor part of the case, and the defendants (plaintiffs by counterclaim) succeeded in their more significant counterclaim. The costs were set off, and the plaintiffs by counterclaim sought their costs on a solicitor and client basis.

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128. Rule 605(1) provides that this will be the result unless the court specifically orders otherwise.

129. (1990), 74 Alta. L.R. (2d) 392 (Q.B.).

It is apparent that Andrekson J. would normally have awarded solicitor and client costs on the basis of "positive misconduct" on the part of the defendants by counterclaim. It was found that there was a covert agreement among them not to divulge the existence of disease in the hogs which were the subject of the sale, and that there were intentional attempts to mislead the court during evidence. However, there was a countervailing consideration in that the plaintiffs by counterclaim had made certain allegations which were not borne out.

At the commencement of the trial, the plaintiffs by counterclaim alleged fraudulent misrepresentations; after commencement of trial, these allegations were amended to plead negligent misrepresentations. Near the end of the trial, the plaintiffs by counterclaim again amended to plead deceit on the part of the defendants by counterclaim. In the result, the court did not find deceit.

In exercising his discretion, Andrekson J. relied upon the "general rule in respect of allegations of fraud" as stated by Orkin, to the effect that an otherwise successful party should not receive costs where it has brought "unfounded or unsubstantiated charges of fraud, theft, forgery or improper dealings."[130] Costs were awarded to the plaintiffs by counterclaim, but on a party and party basis, at double column 6 of Schedule C in the Alberta Rules of Court.[131]

Similar principles were applied in *Sturrock* v. *Ancona Petroleums Ltd.*,[132] where the plaintiff was successful against certain defendants in an action arising out of a series of participation agreements relating to working interests in oil and gas properties subject to a farmout agreement. Lomas J. reviewed the general principles for awards of solicitor and client costs[133] and ordered solicitor and client costs in the case before him on the basis of his finding that certain defendants had been guilty of fraudulent conduct. These costs were awarded without having been specifically pleaded. Lomas J. also observed that a discharge order under the *Bankruptcy Act*[134] would not release a defendant from an obligation to pay solicitor and client costs, as they arose "out of fraud while acting in a fiduciary capacity."[135]

The possibility of awarding costs on a full indemnity basis ("costs as between his solicitor and his own client") was discussed by Moore C.J.Q.B. in *Black* v. *Law Society of Alberta*,[136] although the circumstances in that case did not merit such an award. In addressing the question of costs, Moore C.J.Q.B. stated:

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130. *Ibid.*
131. *Ibid.*
132. (1990), 75 Alta. L.R. (2d) 216 (Q.B.).
133. *Ibid.* at 255.
134. R.S.C. 1985, c. B-3, s. 178(1)(d).
135. *Sturrock* v. *Ancona Petroleums Ltd.*, at 255.
136. [1990] 2 W.W.R. 419 (Alta. Q.B.).

> Generally, costs follow the event and often are awarded on a party-and-party basis. However, the corollary of this general rule is that costs should be awarded to a successful party on an indemnity basis "only in rare and exceptional circumstances" . . . [citing authority].[137]

Moore C.J.Q.B. noted, in reviewing authority, that extreme caution would be required in departing from party-and-party costs, and that this was even more the case where the possibility of "solicitor and his own client costs," or costs on a full indemnity basis, was being considered.[138]

A novel type of award, which amounted to something of a mixture between the party-and-party and the full indemnity approaches, was made in *Pharand Ski Corporation* v. *R. in Right of Alberta*[139]. The plaintiff was successful in an action for breach of confidence, relating to the development of a ski resort. In finding that the plaintiff was "entitled to a special award of costs",[140] Mason J. carefully reviewed and set out the principles relating to the exercise of the court's discretion in costs awards.[141] He summarized the proper approach as follows:

> However, in principle, costs on a party-and-party scale are awarded on the basis of a reasonable apportioning of the litigation expenses incurred by the successful party, having regard to such factors as:
>
> (a) the difficulty and complexity of the issues;
> (b) the importance of the case between the parties and/or the community at large;
> (c) the length of the trial;
> (d) the position and relationship of the parties and their conduct prior to and during the course of the trial; and
> (e) other factors which may affect the fairness of an award of costs. [142]

The case before him "arose under unusual circumstances" and involved political complications. The law of breach of confidence was a developing area, and had similarities to breach of fiduciary obligations. It was noted that the plaintiff proceeded on a contingency fee basis, because of the serious effect the breach of confidence had on its financial condition. The provincial government had saved "many millions of dollars" as a result of the confidential information it had obtained, and had dismissed the plaintiff's claims without a careful examination. For these reasons, the fees portion of the costs award was set at triple column 6 of Schedule C, plus a gross sum of $75,000.00[143] (the

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137. *Ibid.* at 425.
138. *Ibid.* at 426.
139. (1991), 83 Alta. L.R. (2d) 152 (Q.B.).
140. *Ibid.* at 154.
141. He relied principally upon O'Leary J.'s judgment in *Petrogas Processing Ltd.* v. *Westcoast Transmission Co.* (1990), 73 Alta. L.R. (2d) 246 (Q.B.), and the judgment of Wachowich J. in *Canada Deposit Insurance Corp.* v. *Canadian Commercial Bank* (1987), 50 Alta. L.R. (2d) 1 (Q.B.).
142. *Supra*, note 139 at 154-55.
143. *Ibid.* at 155.

gross sum apparently representing a portion of the contingency fee charged by the plaintiff's solicitors).

An instance of a party paying a costs penalty despite success in the litigation arose before the Court of Appeal in *Hongkong Bank of Canada* v. *Wheeler Hldg. Ltd.*,[144] where the court ordered that parties which had been successful on certain aspects of an appeal should not receive costs. It was found that these parties had knowingly breached clear and unambiguous terms of an agreement, and despite their success in the appeal, did not have "clean hands."[145] A similar result was obtained at trial in the case of *Sara's Pyrohy Hut* v. *Brooker*,[146] an action in defamation based on a restaurant review broadcast on radio. The defendants were successful, but did not receive costs. MacLeod J.'s judgment stated that "while I am unable to find malice in the facts of the matter I do feel there was a sufficient level of insensitivity on the part of Brooker to exercise my discretion on the question of costs and I make no award of costs against Sara's."[147]

B. COST PENALTIES AT THE COURT OF APPEAL

Costs at the Court of Appeal are usually not a significant component of costs of the action in its entirety. However, it has become apparent in recent years that the Court of Appeal will use its power to award costs to enforce proper practice in the conduct of appeals. This approach has become manifest in connection with late filing of factums and improper preparation of appeal books.

There have been a series of cases in which the court has applied rule 538. An appellant's factum must, according to rule 538(1), be filed "at least 42 days before the opening of the sittings at which an appeal is to be heard." The respondent's factum must, under rule 538(2), be filed "within 15 days after service upon him of the appellant's factum." The sanction for these provisions is contained in rule 538(4), which provides as follows:

> When a factum is not filed within the time fixed by these Rules, the party in default shall not be entitled to costs for preparation of the factum unless the court otherwise orders.

There have been recent examples of both appellants[148] and respondents[149] being deprived of costs for late filing of factums. In both cases, the applicant for costs sought a ruling that rule 584(4) should not be applied, and the request was refused. It was noted

144. (1991), 78 Alta. L.R. (2d) 236 (C.A.).
145. *Ibid.* at 239.
146. [1992] 1 W.W.R. 556 (Alta. Q.B.).
147. *Ibid.* at 568.
148. *Large* v. *Favel* (1989), 68 Alta. L.R. (2d) 399 (C.A.).
149. *Timberline Haulers Ltd.* v. *City of Grande Prairie* (1990), 76 Alta. L.R. (2d) 184 (C.A.).

in one decision that the court had refused to waive rule 538(4) in five previous cases.[150] It is evident that good reason for late filing will be required if costs for a factum are to be awarded.[151]

The court has also indicated that it wishes counsel to adhere to the very specific instructions in rule 530 for preparation of appeal books. For example, exhibits must be listed separately and reproduced in chronological order, not "lumped" together in a package with an affidavit.[152] In one case, the court indicated that the appeal book was very hard to use, and disallowed the successful appellant two-thirds of the disbursements for the appeal book because of non-compliance.[153] In another case, the court warned as follows:

> We have criticized such flaws in a number of reported judgments, and in some reduced costs as a result. The time for awarding full costs for such defective appeal books may not last much longer.[154]

The Court of Appeal has also increased costs against an unsuccessful party because of non-compliance with the rules. In one case, the unsuccessful appellant had filed an 80-page factum which, in the view of the court, "did not set out a concise statement of facts, did not clearly specify the grounds of appeal, and did not specify in a concise fashion the arguments respecting them. It was a lengthy and rambling written argument."[155] It was found that "the unduly prolix factum complicated and lengthened the hearing of the appeal and must be taken in consideration in fixing costs."[156] There was also criticism of a number of arguments made at the hearing, which the Court of Appeal did not consider meritorious. The court considered the deficiencies in filed materials and argument in awarding costs of $7,500.00 for the appeal.[157]

C. RECOVERABILITY OF PARTICULAR TYPES OF DISBURSEMENTS

It is worth noting briefly the Court of Appeal's findings, arising from two cases, on certain types of disbursements which are frequently encountered in taxing a party-and-party bill of costs.

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150. *Ibid.* at 186. The cases were not cited, but a number of recent decisions are *Large v. Favel, supra*, n. 148; *C & I Insulation Distributors Ltd. v. 318648 Alberta Ltd.* (1989), 98 A.R. 305 (C.A.); *Fox v. White* (1990), 39 C.P.C. (2d) 218 (Alta. C.A.). The Court of Appeal also issued a practice direction on this point on November 15, 1991.

151. Under Schedule C of the Alberta Rules of Court, costs for "preparation for appeal, including preparation and filing of factum" range from $200.00 to $900.00, depending upon which column is applicable.

152. *McArthur* v. *Taylor's Estate* (1990), 103 A.R. 128 (C.A.), relying upon rule 530(6); and *Brown* v. *Northey and Killian's Restaurant (1987) Ltd.* (1991), 115 A.R. 321 (C.A.), invoking rules 530(4) and (6).

153. *Ibid.* at 131.

154. *Brown, supra*, note 152 at 324. As counsel are well aware, disbursements for preparation of appeal books are often the most significant component of party-and-party costs at the Court of Appeal.

155. *Canadian Superior Oil Ltd.* v. *Jacobson* (1991), 82 Alta. L.R. (2d) 250 (C.A.), at 251.

156. *Ibid.*

157. The judgment does not indicate what a normal award, based simply on Schedule C, would have been.

It has been held that charges for computer-assisted research are not recoverable as party-and-party costs. Research of law by computer "is usually more akin to legal research or other work by a lawyer" as opposed to being a disbursement of the type contemplated in rule 600. Accordingly, it is covered by the fees provided in Schedule C which, according to the court, "presumably contemplates some research." However, in some cases, depending upon the amount of research required, a party might apply for an additional fee for research.[158]

The prevalence of expert witnesses in actions before the courts has made recovery of expert fees as a disbursement particularly significant. Rule 600(1)(a)(ii) includes in costs "the charges of accountants, engineers, medical practitioners or other experts for attendance to give evidence and, if the Court so directs, the charges made by such persons for investigations and inquiries or assisting in the conduct of the file." Schedule E provides allowances to professional witnesses, "in addition to mileage and subsistence," of $75.00 per day.

It is customary for a party seeking costs to obtain a direction from the court that no limiting rule is to apply. This has been held to exclude the limitations in Schedule E. It also appears that these words will allow recovery of expert fees for preparation of a report, as well as court attendance.[159] Rule 609, which had become known as the "limiting rule" at least relating to fees, was repealed in 1991.

In light of the wording of rule 600(1)(a)(ii), it is probably still prudent to obtain a direction that expert fees for consultation before trial, preparation of reports and assistance during trial, as well as attendance to give evidence are recoverable.[160]

D. COMPROMISE PROCEDURES

It is sometimes perceived that the compromise procedures are unfairly weighted in favour of a plaintiff. Where a plaintiff recovers more than offered in its offer to settle, it receives double costs (excluding disbursements) for steps after service of the offer, unless otherwise ordered "for special reason."[161] On the other hand, where a defendant has served an offer of judgment for an amount greater than the plaintiff recovers, the defendant recovers only a single set of costs for steps after service of the offer.[162] Of course, this result can be justified on the basis that a defendant then recovers costs in

158. *Argentia Beach (Summer Village)* v. *Warshawski and Conroy* (1990), 106 A.R. 222 (C.A.).

159. *Rachansky* v. *City of Edmonton* (January 5, 1990, Alta. C.A., unreported). See also *Alberta Opportunity Co.* v. *Schinnour* (1991), 84 Alta. L.R. (2d) 198 (C.A.), where Bracco J.A., for the court, reviewed a number of matters related to the charges of professional witnesses, some of whom were not called to give opinion evidence, and one of whom had his expert status limited by the trial judge.

160. Prior to 1988, the rule required all charges of experts to be specifically allowed by the court; it now requires direction only for charges not related to attendance to give evidence.

161. Rule 174(2).

162. Rule 174(1).

circumstances where, without an offer of judgment, the plaintiff would have been entitled to costs for the entire action, on the general principle that costs follow the event.[163]

However, the rules do not provide the defendant with additional costs relief in cases where it has made an offer of judgment and then succeeds in having the plaintiff's claim dismissed in its entirety. Veit J. addressed such a case in *North American Systemshops Ltd.* v. *King & Co.*,[164] and concluded that "mutuality of treatment" required an award of double costs to a defendant in the circumstances. Her reasoning, in part, was as follows:

> In principle, it appears to me that equity requires mutuality of treatment of plaintiffs and defendants. Therefore, while even an unsuccessful defendant should get costs if it made a reasonable offer of judgment, a successful defendant should, like a successful plaintiff, get double costs. Otherwise, since the successful defendant gets costs in any event, there will be no incentive for a defendant, convinced that it is not liable but who is willing to pay something anyway to avoid litigation expense, to make offers of judgment to avoid the expense of trial.[165]

It is difficult to predict how broadly this approach will be applied. It is an important consideration to defence counsel, however, who often conclude that there is no advantage in serving an offer of judgment in an "all-or-nothing" case. Given the absence of an express provision in the rules governing such a case, it would be good practice for a defendant, when serving an offer of judgment, to place the plaintiff on notice that double costs will be sought if the plaintiff's claim is dismissed.

On the question of determining which costs are subject to the compromise procedure rules, the Court of Appeal in *Centrac Industries Ltd.* v. *Vollan Enterprises Ltd.*[166] addressed the entitlement for costs incurred between the time of a payment in and acceptance thereof. The defendants had made a payment into court, which was accepted after a number of further steps in the action were taken. The defendant then sought to recover the costs incurred following service of notice of payment in.

The defendant's application was based on rule 174(1), which directs that the defendant receive costs for subsequent steps where the plaintiff does not recover an amount greater than the payment in (or the amount contained in an offer of judgment). The court held that rule 174 applied only where the plaintiff did not accept payment in (or an offer of judgment). Reference was made to rules 167 and 172, governing acceptance of a payment into court and allowing a plaintiff to tax costs incurred to the time of payment into court.

It was concluded that under the rules, the clerk had no specific authority to award costs to a defendant having paid into court, and that the practice in the courts was that while there might be power for good cause to deprive the plaintiff of costs, there was no power

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163. See Rule 601(2), and numerous authorities, such as *Canada Deposit Corporation* v. *Canadian Commercial Bank*, *supra*, note 141.

164. (1989), 99 A.R. 138 (Q.B.).

165. *Ibid.* at 139.

166. (1989), 70 Alta. L.R. (2d) 396 (C.A.).

to order the plaintiff to pay costs following acceptance of payment into court. The plenary powers conferred by rule 601 (conferring on the court a general discretion as to costs[167]) might allow the result applied for, but there was a countervailing principle that parties should generally expect the presumptive rules governing costs to apply.

There are reminders, from time to time, that the court will not give effect to an imprecise offer made under the compromise procedures in Part 12 of the Alberta Rules of Court. A recent example is the ruling of MacLean J. in *Laframboise* v. *Billett*,[168] where the defendant had served an offer of judgment "inclusive of all claims and without limiting the generality of the foregoing inclusive of costs, interests and G.S.T." The defendant acknowledged that the offer was not intended to include the subrogated claim of Alberta Hospitals Commission. The plaintiff's counsel had been representing Alberta Hospitals Commission at the time the statement of claim was issued, but was no longer representing it in any manner at the time the offer was received. MacLean J. found that the reference in the offer to "all claims" was inaccurate, and in the circumstances the offer was ambiguous. In denying the defendant application for costs, MacLean J. emphasized the requirement of a valid offer:

> The consequences of the rules as to costs contained in Pt. 12 of the *Rules of Court* are punitive and therefore demand a very high degree of certainty and exactness. The defendant's offer of settlement does not satisfy that high degree of certainty and exactness and he is therefore not entitled to the benefit of those rules and his application in that regard is dismissed.[169]

It is evident from the reasons of MacLean J. that the defendant's offer was greater than the judgment awarded at trial, and the defendant was deprived of costs under rule 174 only because the offer was not sufficiently precise. However, MacLean J. went on to rule that the plaintiff should not be entitled to costs from the date the offer was served. It was found that the plaintiff's solicitor was not misled as to whether the offer of judgment included the Alberta Hospitals Commission claim. MacLean J. found that the plaintiff's failure to properly evaluate its claim affected the proceedings, and gave rise to the finding that costs should not be awarded. His reasoning was as follows:

> I am satisfied that because the plaintiff's assessment of damages was so much greater than the defendant's offer ... that the plaintiff gave no realistic consideration to the defendant's offer. That conduct constituted an error in judgment on the part of the plaintiff's solicitor that seriously affected the conduct of the proceedings from that point on. That error of judgment so seriously affects the conduct of the proceedings thereafter that the plaintiff must be deprived of costs from that point on.[170]

It is sometimes argued that service of an offer very shortly before trial constitutes a "special reason" for not giving effect to the compromise rules. Primarily on the basis of Court of Appeal decisions on payments into court, Murray J. rejected this argument in

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167. In addition to rule 601, the court is given a general discretion in the *Court of Queen's Bench Act*, R.S.A. 1980, c. C-29, s. 19.

168. (1991), 81 Alta. L.R. (2d) 285 (Q.B.).

169. *Ibid.* at 288.

170. *Ibid.*

Wenden v. *Trikha*.[171] The effect of the rules is to allow at least 45 days or the time remaining until commencement of trial, whichever is less. An offer on the "eve of trial" is not a special reason within the meaning of rule 174. However, in *Wenden* v. *Trikha*, the plaintiff's offer, served on a Friday, stated that it was open for acceptance until 9:45 a.m. on the following Monday morning – and the trial commenced at 1:45 p.m. on that date. It was held that this took the offer outside the scope of the compromise procedures in the Rules of Court or at least created a "special reason" within the meaning of rule 174.

Several other practice decisions on compromise procedures may be noted briefly. It has been reaffirmed that offers of judgment and offers to settle do not apply to proceedings before the Court of Appeal, unless specifically renewed for that purpose.[172] It has also been held that the compromise procedures are not applicable to interlocutory proceedings, or in particular, to an application for entitlement to funds paid into court arising out of a priority contest.[173] Finally, the 45 days for which the offer must remain outstanding may be counted as including holidays -- so that where the 45th day is a holiday the accepting party may need to serve its notice the previous day.[174]

ADDENDUM: NOTEWORTHY AMENDMENTS TO THE ALBERTA RULES OF COURT

The following is a summary of changes to the Alberta Rules of Court which have occurred since January 1, 1990.

60th Amendment

This amendment concerned changes to Schedule E (Tariff for Fees of Court Officials and Fees Under Various Statutes), and the Surrogate Court Rules. However, these changes have in turn been altered by subsequent amendment.

61st Amendment

Part 48 - Small Claims Procedure, encompassing rules 659 to 682, was repealed. However, Part 48 continues to apply in respect of actions commenced under that Part before the coming into force of this amendment. The small claims summons and dispute note forms were also taken out of Schedule A (Forms for Civil Actions).

62nd Amendment

Number 3 was added to Schedule E. This number deals with amounts payable by parties to witnesses, jurors and interpreters in civil proceedings.

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171. (1992), 1 Alta. L.R. (3d) 282.

172. *Fox* v. *White and Canada Dry Ltd.* (1990), 106 A.R. 22 (C.A.); *Brown's Estate* v. *Young* (1990), 107 A.R. 134 (C.A.); for earlier cases, see 28 Alta. L. Rev. 672, at 682.

173. *G.C.G. Engineering Partnership* v. *Royal Bank of Canada* (1990), 106 A.R. 27 (Q.B.).

174. *Santos* v. *Ham and Yellow Cab Ltd.* (1990), 104 A.R. 28 (Q.B.). This conclusion was reached even after consideration of the *Interpretation Act*, R.S.A. 1980, c. I-7.

Rule 5.1 was added. This rule provides that where a document is filed or issued pursuant to the Rules of Court, and is signed by a person or has noted on it a person's consent, the person signing the document or giving the consent shall next to that person's signature legibly print or stamp that person's name. This applies, for example, to notices of motion and orders (whether by consent or approved as to form).

Rule 11 was amended. The effect of the amendments is to make it more difficult for a defendant to be served with a statement of claim after expiry of the 12-month period for which the statement of claim is in effect.

- By virtue of rule 11(3), the necessary application for an order renewing a statement of claim must be brought within the 12-month period for which the statement of claim is in effect.

- By virtue of rule 11(4), rule 548, which allows the court to enlarge or abridge the time prescribed by any rule for doing any act or taking any proceedings, does not apply to rule 11.

- By virtue of rule 11(5), a statement of claim may be renewed only once under rule 11.

- By virtue of rule 11(6), every application to renew a statement of claim shall be supported by an affidavit stating that one or more defendants have not been served and setting forth the reasons for the lack of service.

Rule 170 was repealed and substituted. The main changes are that the plaintiff may now offer to settle his or her claim only after the defendant has served a statement of defence, and the provision which precluded use of offers to settle in actions for a debt or liquidated demand has been removed.

Rule 236 was amended to include subsection (6). This subsection provides that except by leave of the court, a party who has filed a certificate of readiness or order shall not initiate or continue any interlocutory proceedings or any form of discovery.

Rule 403, which deals with official referees, was amended. For purposes of references by the court, deputy clerks of the Court of Queen's Bench are no longer official referees, but persons appointed as official referees by the court with the consent of all parties to a lawsuit may be.

Rule 600(2) was amended so as to bring the costs of a proceeding taxed pursuant to rules 167(2), 170(4) and 226 into its parameters, and by dropping out the costs of a proceeding taxed pursuant to rule 166.

Rule 609 was repealed. This rule (often referred to as the limiting rule) provided that in any action in which the relief claimed included the payment of a sum of money, no successful party shall, unless otherwise ordered, recover against any other party or parties any taxable costs in excess of certain prescribed proportions of the amount claimed or recovered.

Schedule C was amended by including in Item 22 the costs for attendance at and preparation for pre-trial conferences in matrimonial cases.

Part 31, which consisted of rule 396 and dealt with interim alimony, was repealed.

Rules 561.1, 562(2), 562.2, 563(2), 565(2), 566, 568, 569 and 570, all relating to divorce rules, were amended. Although there were no major substantive changes as a result of these amendments, the wording of these provisions was clarified, and the rules were altered so as to conform with the new forms for use in divorce proceedings. These forms were added or altered, as the case would have it, in Schedule B.

As well, Queen's Bench practice notes respecting divorce actions, special chambers applications and family law chambers applications were released.

63rd Amendment

Rule 11 was amended to include subrule 11(9). By virtue of this rule, notwithstanding subrule (3), where a statement of claim was issued before May 15, 1991 and for sufficient reason any defendant has not been served, the statement of claim may at any time before or after its expiration, by order, be renewed for a period not exceeding three months.

64th Amendment

Numbers 1 and 2 of Schedule E (Tariff of Fees for Court Officials) were amended. This amendment increased the fees payable to clerks and registrars in respect of searches and filings.

The tariff of fees under the *Execution Creditors Act*[175] was amended to increase the fees to the clerk in respect of the filing of documents.

Schedule 2 of the Surrogate Rules was amended so as to increase the fees payable to clerks in respect of searches and filings.

65th Amendment

Part 1.1 was added, entitled "Audience Before the Court." The following provisions are contained in this Part:

- Rule 5.2 indicates that subject to Part 1.1, a person shall only be represented before the court by a solicitor.

- Rule 5.3 indicates that an individual may represent himself before the court.

175. R.S.A. 1980, c. E-14.

- Rule 5.4 states that with the permission of the court, a person may be represented before the court by an agent other than a solicitor.

Rule 298 was amended. As a result, when swearing an affidavit, a deponent must now state his "occupation" rather than his "description."

Rule 555 was amended by the addition of subrules (6) and (7).

- Subrule 555(6) states that once a solicitor has executed a certificate of readiness in respect of an action, that solicitor shall not remove himself as solicitor of record for the party without leave of the court.

- Subrule 555(7) states that the removal of a solicitor as a solicitor of record pursuant to the leave of the court shall not be construed as to affect any legal or ethical obligation of the solicitor to the solicitor's client.

Rule 627 was amended by slightly altering the definition of "taxing officer" for purposes of solicitor and client taxation. In this context, the court may order that the clerk or deputy clerk of the judicial district in which the solicitor resides is not a "taxing officer."

Rule 652.1 was added. This rule states that notwithstanding anything in these Rules of Court, a bill of costs that is consented to by a barrister and solicitor on behalf of the party responsible for payment of the costs shall be taxed and allowed without alteration or further consideration.

Rule 690 was amended by substituting "Court" for "Judge." Accordingly, where more than one tender has been filed the Clerk may, upon obtaining a fiat of a judge or master, return the deposits of the tenderers other than that of the highest tender.

Rule 694 was amended by substituting "Court" for "Judge." Accordingly, now a master as well as a judge may make an order with respect to notices of intention to advertise for sale.

Rule 704(1) was amended by increasing the maximum imprisonment for civil contempt to two years from one year, and by eliminating the set fine of $1,000.00 in favour of a fine in the discretion of the court.

Rule 712(1) was amended by removing "counsel" from the list of parties whose personal attendance is required in order for business to be transacted in any of the offices of the Court of Queen's Bench either in procuring or issuing process or in entering judgments or taking any proceeding whatever.

Part 55, which is composed of Rules 730 to 736 inclusive, was amended so that that Part could be read in accordance with the *Reciprocal Enforcement of Judgments Act*.[176] Previously the sections in this Part referred to the 1958 consolidation of the *Reciprocal Enforcement of Judgments Act*.

176. R.S.A. 1980, c. R-6.