

INTERROGATORIES

Interrogatories are written questions asked by one party to an action to another party, before the trial of the action, which are answered by the responding party under oath and in writing. While the word interrogatory seems to derive from the word “interrogate”, interrogatories are, by their nature, not as wide in scope as an examination for discovery and are not in the nature of cross-examination.

The use of interrogatories as a tool in the discovery process began in the 15th century. Over the years, it has become evident that, at least in Alberta, interrogatories are not an effective substitute for an oral examination for discovery except in certain circumstances.

One of the circumstances where interrogatories are being used with regularity is in the case of a corporate party whose employees and former employees have testified about the matters in issue in the lawsuit. Rather than ask the corporate officer the same questions already asked of the employees and former employees, the questioning party is often well served by the use of interrogatories to have the corporate officer acknowledge that, among other things, the evidence of the employees and former employees is “some of the information of the corporation”.

In order to better understand interrogatories, we will trace the use of interrogatories and, more specifically, the evolution of their use in Alberta to the present day. In doing so, we will provide a roadmap of how to effectively use interrogatories in your practice.

A. A BRIEF HISTORICAL OVERVIEW

The right of a party to pre-trial discovery first arose in the Court of Chancery in the 15th century and it was through the Ecclesiastical and Chancery courts that interrogatories eventually became the tool by which a party would seek to discover the case of its opponent.¹

In the 15th century, a plaintiff would commence a suit by serving a bill upon the defendant. The bill consisted of two parts: the “stating” part which contained the general allegations, and the “charging” part which contained the evidence. The defendant would then respond to the bill by admitting, denying or explaining all of the allegations contained in both parts. This procedure was expanded upon in the 18th

¹ B. Cairns, *The Law of Discovery in Australia* (Sydney: The Law Book Company Limited, 1984) at page 8.

century when it became common for the plaintiff to serve the defendant not only with the bill, but also with a list of interrogatories to be answered by the defendant.²

Discovery by a party through the use of written interrogatories could be obtained in one of two ways. A plaintiff could either bring a bill of discovery alleging that it needed the Court of Chancery to order answers to interrogatories so that the plaintiff could prosecute its claim effectively, or it could file a bill in Equity which would allow the plaintiff to interrogate the defendant. The defendant could also apply for a cross bill to interrogate the plaintiff.³

This all changed in England in 1854 with the enactment of the *Common Law Procedure Act*. This Act gave the Common Law Court the power to order pre-trial discovery of documents and to compel a party to answer interrogatories. Parties no longer had to go through the Court of Chancery or Equity to put forward interrogatories.

Interrogatories could not be delivered as a right and were only allowed if leave was granted by the Court. In order to obtain leave, the party asking for discovery had to show that they would derive a material benefit through the discovery.⁴

The introduction of interrogatories into Canadian practice was first seen in Ontario in 1856, when the Ontario Common Law Courts adopted the provisions of the English *Common Law Procedure Act* of 1854 relating to discovery by interrogatories.⁵

Since that time, each of the provinces and territories have implemented their own rules and provisions in relation to discovery and interrogatories. However, it is somewhat surprising that there is very little consensus among the provincial and territorial jurisdictions of Canada concerning how interrogatories are to be used. Perhaps it was best stated by Mr. Justice Gault who commented on the law pertaining to discovery as follows:

There is no branch of our procedure more fraught with difficulty and conflicting decisions than the question of Discovery. So many fine distinctions have been

² C. Choate, *Discovery in Canada* (Toronto: The Carswell Company Limited, 1977) at pages 1-2.

³ *Ibid.* at page 2.

⁴ *The Law of Discovery in Australia*, supra, at page 12.

⁵ *Discovery in Canada*, supra, at page 3.

drawn by learned Judges, both in England and in Canada, as to what is or is not allowable, that it would be hopeless to form any opinion in all but the simplest cases which would not run counter to one or more decided case.⁶

To the extent that the procedural and substantive rules governing the use of interrogatories differ throughout the various provincial and territorial jurisdictions of Canada, practitioners are well advised to use caution in attempting to apply principles of law from other Canadian jurisdictions to the practice in Alberta.

B. THE USE OF INTERROGATORIES IN ALBERTA

In Alberta, there is no specific Rule in the *Rules of Court* that deals exclusively with interrogatories. Interrogatories are considered in a number of different Rules. For example, **Rule 158.1(3)(c)** allows a party to rely on interrogatories as evidence in support of a summary judgment motion. In addition, Queen's Bench Family Practice Note #6 allows for interrogatories to be used in order to avoid expensive oral discovery.

There are other instances where the *Rules of Court* contemplate the use of interrogatories, however, a review of these Rules makes it evident that the use of interrogatories is considered a more limited and restrictive form of discovery than an oral examination. For example, **Rule 216.1** provides that if a party is abusing the discovery process, the court can limit their right of discovery to the use of interrogatories.

The fact that there are inherent limitations to interrogatories perhaps explains why they are seldom used outside of the particular circumstance of having a corporate officer acknowledge, among other thing, that evidence given by employees and former employees in examinations for discovery constitutes some of the information of the corporation. Should counsel care to consider the use of interrogatories, or if counsel finds themselves forced to rely on interrogatories as a substitute for examinations for discovery, they ought to be mindful of the following advantages and disadvantages in using interrogatories:

ADVANTAGES⁷

1. Depending on the nature of the case, interrogatories may save time and costs. Written interrogatories allow counsel to avoid having to arrange for appointments for Examinations for Discovery, potential delays, non-attendance, having to bring parties in from long distances. By using written interrogatories the time and costs are confined to the time it takes to compose and answer the questions;

⁶ *Discovery in Canada*, supra, at page 4, citing Examination for Discovery 10 Can. Bar. Rev 224.

⁷ Found in *Cudmore, Choate on Discovery* at 4-4, 4-5

2. Written interrogatories are a way of preserving evidence until trial;
3. Written interrogatories are ideal for situations where information sought is very technical, lengthy, clerical or must be gathered from numerous different sources;
4. Written interrogatories may carry greater evidentiary weight, since it will be difficult for the responding party to claim that their answers were misunderstood since written answers allow for time for reflection, and are often drafted by opposing counsel;
5. For corporate parties an officer may have to inform himself or herself of various issues through information from employees or agents. Answering written interrogatories allows him/her time and opportunity to do so;
6. They are an inexpensive means of following up undertakings;
7. They allow a corporate officer to adopt the evidence of other employees or former employees who have been examined;
8. Admissions are a way of establishing facts which allows counsel to avoid having to do so at trial.

DISADVANTAGES⁸

1. Unable to examine party's demeanor, assess their ability as a witness, and flush out their weaknesses;
2. Can only examine in chief unlike oral discovery where you can cross examine on answers;
3. Answers are composed by counsel so they tend to be ambiguous and are not phrased in the words of the party;
4. Opposing counsel is likely to find objections to many questions which could result in time consuming and costly motions;
5. Drafting questions and answers to written interrogatories can be very time consuming.

In determining whether or not to conduct discovery through interrogatories, it is important to assess these advantages and disadvantages. Although interrogatories may, in some cases, be more expeditious and costs effective, in this day and age, oral discovery is certainly the preferred method.

If it is determined that interrogatories are going to be used as a method of discovery, care must be taken in preparing the interrogatories as the questioning counsel. The interrogatories should be set out as a series

⁸ supra, at note 7, 4-6

of numbered questions that are worded using plain language. Questions must be relevant and material and ought to flow in a logical and orderly manner.

Each question should seek to elicit one fact as opposed to questions that are long, complicated and involve numerous facts. The purpose of the interrogatories is to receive admissions from which the answering party cannot later diverge. Precise drafting is therefore of paramount importance. The Court does not have the jurisdiction to amend interrogatories.⁹ Further, if more than one party is to answer interrogatories, the interrogatories must have a note indicating which questions each person is required to answer.¹⁰

Interrogatories are to be answered by providing a separate answer to each separate question. This allows the questioning party to use some, but not all of the answers to the interrogatories as read ins at trial. If any of the interrogatories are objected to, the objection must be stated in the response with the grounds supporting those objections.

The questioning party may also seek an order from the Court compelling the answering party to provide a further reply where answers are found to be incomplete, although this is an order that is rarely granted. The questioning party may also seek to ask the answering party follow up questions, however this will not be allowed where the Court finds that the follow up questions should have been asked in the first instance.

As mentioned above, these various limitations on the use of interrogatories when compared with the more fulsome discovery that can be obtained through an oral examination for discovery has caused counsel to prefer oral discovery. The most common exception to this is in large litigation where evidence is given by employees and former employees of the corporation at examinations for discovery.

C. INTERROGATORIES AND THE CORPORATE OFFICER

Interrogatories are most commonly used to put evidence to corporate officers. It is in this area that Alberta practitioners have recognized the benefit of the use of interrogatories in the discovery process to streamline the proceedings in an efficient and cost effective fashion.

After taking evidence from employees and former employees in examinations for discovery, the questioning party may wish to provide interrogatories to the corporate officer rather than re-asking all of

⁹ *Pierre v. Canadian Broadcasting Corp.* (1993), 20 C.P.C. (3d) 337, 51 C.P.R. (3d) 471 (B.C.S.C.)

¹⁰ *Olsen v. St. Martin* [1981] A.J. No. 791

the questions put to the employees and former employees. Among other things, these interrogatories typically ask the officer to acknowledge that the evidence of the employees and former employees is “some of the evidence” of the corporation. It is in this area that the vast majority of the Alberta jurisprudence on the topic of interrogatories has recently developed.

The authority for putting interrogatories to a corporate officer on discovery is provided for in **Rule 214** of the Alberta **Rules of Court**:

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

(2) Repealed AR 68/2000 s8.

(3) If it is made to appear at or before the trial that any party has been unable after due diligence to obtain the attendance at the trial of any person examined by him for discovery, or if for any other reason it appears to be just and convenient, the Court may permit the party to use in evidence the whole or any part of the examination of that person.

(4) If part only of an examination is used, the Court may at the request of any party against whom it is so used direct that any other part of the examination be also used, if it is so connected with the part so used that the first mentioned part ought not be used without the other part.

In litigation involving a corporate party, only evidence of the corporate officer may be read in at trial or on a motion against the corporate party. Having regard to the fact that officers testifying on behalf of corporate litigants often do not have first hand information concerning the facts and circumstances at issue in the litigation, it is often preferable for the questioning party to take evidence from the employees and former employees of the corporate party. It is often the employees and former employees of the corporate party who were actually involved in the incident that gave rise to the litigation which the corporate party finds itself prosecuting or defending.

It is common practice for discovery evidence to be taken from the employees and former employees before taking the evidence of the officer of the company. This is often to gather information and evidence to be put to the officer of the corporation on examinations for discovery. It is the evidence of the officer which will bind the corporation.

Through the use of interrogatories, the questioning party can take evidence given by employees and former employees and put that evidence, or any part of it, to the officer in interrogatory form. The officer

is then obliged to consider the evidence and determine, among other things, whether the selected evidence of the employees and former employees constitutes some of the evidence of the corporation.

In order to fully understand the common law rules surrounding the use of interrogatories in this area, it is perhaps best to trace the development of the law in Alberta in relation to interrogatories. In Alberta, the body of jurisprudence on the topic of interrogatories is surprisingly sparse. However, the jurisprudence that does exist on the topic deals primarily with the examination of corporate officers, and the use of employee discovery answers at trial.

Traditionally, courts had prevented a party from using the discovery evidence of the employees and former employees at trial unless that evidence was acknowledged to be the evidence, or at least some of the evidence, of the employer corporation. The rationale behind this interpretation was that the examinations for discovery of employees and former employees were believed to be purely for discovery purposes and not for the purpose of obtaining admissions that would be read in at trial against the employer.¹¹

The Alberta Courts were of the view that an officer of a corporation was not bound to confirm or deny that the evidence of an employee was the evidence of the corporation. The governing principle was that the evidence of an employee does not bind the corporation in the same way that the evidence of the officer binds the corporation.¹²

The law in this area began to evolve somewhat in *Nova, An Alberta Corp. v. Guelph Engineering Co.* [1986] A.J. No. 1430. In that case, the defendant sought to use evidence given by employees and former employees of the plaintiff. The basis of the defendant's position was that during examinations for discovery, the plaintiff's officer was obliged to obtain and disclose the information testified to by the plaintiff's employees and former employees.

The plaintiff took the position that the answers of the employees and former employees constituted the information of the company but would go no further. The Court held that given the admission by the plaintiff that the evidence of the employees and former employees could be treated as the information of the company, the answers were properly treated as the evidence of the plaintiff's officer. Therefore, the defendant could use the evidence of the employees and former employees against the plaintiff at trial.

¹¹ *McLean v. C.P.R.* (1916), 10 W.W.R., 949 at 951

¹² *J.L. v. Alberta* [1999] A.J. No. 1568 at para 9, citing *MacGregor v. Canadian Pacific Railway Company*, [1938] 2 W.W. R. 426 (App. Div.)

However, the Court in *Nova* distinguished an earlier decision made in *Edmonton v. Hawrelak*, [1972] 2 W.W.R 561, which found that all answers given by an officer of a corporation are binding against the corporation. In *Nova*, the Court found that conclusion was wrong in the sense that the information obtained by an officer from an employee and disclosed in discovery is only binding on the corporation to the extent that it is conclusive proof that the corporation received the information. The officer is bound to disclose that the corporation received the information, but the corporation is entitled to adduce evidence to prove that the information is incorrect.

Therefore, when a corporate officer accepts and acknowledges that the evidence of employees and former employees is some of the information of the company, it is not conclusive proof of the truth of those facts related by the employees and former employees in their examination. The corporation may call further evidence to establish that the facts related by the employees and former employees was false or inaccurate.

The decision in *Nova* provided the foundation for a series of decisions in *Esso v. Stearns*,¹³ which helped formed the law today on the procedure to be used when responding to written interrogatories. The case arose out of a large fire at the Syncrude plant north of Fort McMurray.

In *Esso v. Stearns*, the defendant officer refused to admit that evidence given by employees constituted some of the information of the defendant corporation. The officer failed to give a yes or no answer to straightforward questions contained in the interrogatories. The plaintiff was forced to bring a motion on the issue because without the admission that the evidence was some of the corporation's information, the plaintiff could not read in this information at trial as an admission under **Rule 214(1)**.

The Court found that a corporate officer who is faced with transcript evidence of employees and former employees will usually be under an obligation to acknowledge that these excerpts form some of the information of the corporation. The only identified exception to this general rule is was where the corporate officer feels that the employee did not understand the question perhaps due to difficulties with language comprehension. While there may well be other exceptions, any exception to this general rule will be rare.

¹³ *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* [1992] A.J. No. 1204
Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. [1992] A.J. No. 1205
Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. [1992] A.J. No. 1046
Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. [1993] A.J. No. 1047
Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. [1993] A.J. No. 1060

The Court also implicitly accepted the principle raised in *Nova*. The Court stated that the information acknowledged by the officer as being some of the information of the company was not binding in the sense that it was incontrovertible or conclusive evidence. Further evidence could be adduced on these points to disprove the information.

As the *Esso v. Stearns* case continued, further applications were brought on the same general issue. After the Court first provided its opinion on the issue, the defendant's officer answered the interrogatories with a "yes" or a "no" answer followed by lengthy qualifications in the nature of "contra-information" to the yes or no answers. The qualified answers were given in such a fashion as to be virtually meaningless.

The Court found that the interrogatories had to be answered either "yes" or "no", so that the party submitting the interrogatories would have admissions that they could read in at trial. Qualifications to the answers may be made, however, they were to be attached at the end of the responses.

Furthermore, if qualifications are given, *Esso v. Stearns* defined the scope of any qualification as follows:

- a) The qualification must find its source in some document or information provided to the officer by someone who can speak to the matter on the basis of personal knowledge.
- b) The scope of the qualification must not go beyond a direct answer to the question asked of the employee and must be connected in substance to the admission itself.
- c) Qualifications may not be based on the officer's belief as to the true facts or his disbelief of the evidence given by the employee.

The law evolved further in a case known as *Western Canadian Place Ltd. v. Con-Force Products Ltd.*, [1996] A.J. No. 549. In this case, the Court focused on the obligation of a witness to provide general confirmatory information. The dispute over the interrogatories arose when the questioning party put these 4 questions to the corporate officer:

1. Is the evidence of the employee or former employee of Con-Force with respect to each passage individually identified, some of the evidence of Con-Force?
2. With respect to each passage identified from the evidence of the employee or former employee of Con-Force, does Con-Force have any contrary information?
3. With respect to each passage identified from the evidence of the employee or former employee of Con-Force, is the evidence in the passage all of the information of Con-Force?

4. If, with respect to each passage from the evidence of the employee or former employee of Con-Force, the evidence in the passage is not all of the information of Con-Force, what is the further information of Con-Force which:
 - (a) Finds its source in a document or in information provided to Con-Force by someone who can speak on the basis of personal knowledge; and
 - (b) Does not go beyond the subject of the passage identified?

In this decision, the responding party objected to answering the last two questions on the grounds that the questions were intended to provide not only contrary information, but confirmatory information on every subject matter.

The Court found that while an officer has an obligation to respond fully, the compendious nature of the demand for all information of the corporate party was found to be improper. While an officer was required to provide “contrary, inconsistent or supplemental information”, the Court held that the reference to supplemental information must be in the context of contrary or inconsistent information. It did not oblige the officer to supply all information on a particular topic.

As mentioned earlier, answers to interrogatories may be used as evidence at trial. The questioning party may read in any part of the answers to the interrogatories at trial or on a motion. All answers that are received need not be read in, unless the party reading in answers is directed to do so by the Court. Aside from using the answers to the interrogatories as evidence, the answers can also be used to impeach a witness, or refresh the memory of a witness.

There are certain qualifications to reading in employee extracts even where the evidence has been acknowledged to be some of information of the corporation. The *Esso v. Stearns* line of cases outlined three conditions for the admissibility of read ins of employee discovery evidence:

1. The plaintiffs may use in evidence, during this trial as against the defendants, those portions of the Examinations for Discovery of each of the defendants’ officers or the written responses provided by the defendants’ officers in lieu of Examinations of Discovery, where those officers admit that portions of the evidence given by employees and former employees of the defendants at their Examinations for Discovery constitutes some of the information of the defendants.
2. The information so read in shall be both relevant and in the personal knowledge of the employee or former employee.
3. The information so read in shall have been acquired by the employee or former employee in the normal course of service with the corporation.

This topic was more recently addressed in the decision in *Holtslag v. Alberta*, [2003] A.J. No. 1546. In *Holtslag*, the plaintiff argued that it should be allowed to read in all of the employee's discovery evidence since the defendant's officer acknowledged that the evidence constituted some of the information of the defendant.

In *Holtslag*, Justice Belzil indicated that only that information of employees and former employees which was within the personal knowledge of the employee or former employee would be excepted from the hearsay rule.

...this procedure of having officers acknowledge that evidence given by employees and former employees as some of the information of the corporation is intended to create a convenient mechanism to permit an officer whose answers do not bind the corporation to adopt as "some information of the corporation" the evidence of employees, thus obviating the need to put to the officer each and every question which was put to the employees.

Procedural convenience does not and could not make hearsay, which is inherently unreliable and untrustworthy, somehow reliable and trustworthy and worthy of consideration at trial. Repetition of hearsay does not make the evidence any stronger.

In the result, Justice Belzil found that:

The Plaintiffs may read in, as part of their prima facie case, evidence from the Examinations for Discovery of employees acknowledged to be some information of the Defendant, provided that the evidence is within the personal knowledge of the employee and not hearsay, such evidence would be admissible if provided by the employee on the witness stand at trial and the information read in shall have been acquired by the employees in the normal course of service with the Defendant.

It is therefore incumbent on questioning counsel to ensure that they confirm the source of an employee or former employee's knowledge on any particular point of interest to overcome the hearsay issue.

The law in this area is expected to continue to evolve. Today, counsel are framing their interrogatories in the same general format with a few occasional exceptions. Currently, a common form of interrogatories put to a corporate officer takes the following format:

- i. Does the officer of ABC Ltd. accept that the evidence given by [Employee] is some of the information of ABC Ltd.?
- ii. Does the officer of ABC Ltd. admit that the following passages of evidence relate to matters that involve [Employee] in the normal course and scope of his duties with ABC Ltd.?

- iii. With respect to the following passages of evidence given at Examinations for Discovery of [Employee], does ABC Ltd. have any contrary, inconsistent or supplemental information?
- iv. If the answer to Question 3 is that there is some contrary, inconsistent or supplementary information, what is the contrary, inconsistent or supplementary information of ABC Ltd. with respect to the passage or passages identified?

Interrogatories can be a useful tool especially in the area of having corporate officers acknowledge the evidence of employees and former employees as being some of the information of the corporation and having the officer supply any contrary, inconsistent or supplementary information on the point at issue. Counsel must think ahead and strategize as to what evidence to obtain from employees and former employees on examination for discovery and how to use that evidence against the opposing corporate entity.

D. A SAMPLE OF HOW OTHER JURISDICTIONS USE INTERROGATORIES

As stated above, there is no consensus in Canada as to how interrogatories ought to be used in civil litigation. However, unlike Alberta, most jurisdictions have civil procedure rules pertaining to how interrogatories ought to be used in litigation. British Columbia has perhaps the most structured set of rules and expense of case law pertaining to interrogatories. **Rule 29** of the BC **Rules of Court** deals with interrogatories and is stated as follows:

Rule 29 –Discovery by Interrogatories

Service of and answer to interrogatories

- (1) A party to an action may serve any other party, or on a director, officer, partner, agent, employee or external auditor of a party, interrogatories in Form 22 relating to a matter in question in the action, and the person to whom the interrogatories are directed shall, within 21 days, deliver an answer on affidavit to the interrogatories. The party serving the interrogatories shall notify all other parties of record.

Where a party is a body of persons

- (2) Where a party to an action is a body of persons, corporate or unincorporated, empowered to sue or to be sued, in its own name or in the name of an officer or other person, the court may, on the application of any other party, make an order allowing that other party to serve interrogatories on the officer or member of the body specified in the order.

Time for Service

- (3) The plaintiff may serve interrogatories after the expiration of time for delivery of the statement of defence of the party to be examined, and

the defendant may serve interrogatories after the defendant has delivered a statement of defence.

Where more than one person to answer interrogatories

- (4) Where interrogatories are required to be answered by more than one person who is an officer, director, partner, agent or employee of a party, the interrogatories shall state which of the interrogatories each person is required to answer.

Objection to answer interrogatory

- (5) Where a person objects to answering an interrogatory on the ground of privilege or on the ground that it does not relate to a matter in question in the action, the person may make the objection in an affidavit in answer.

Insufficient answer to interrogatory

- (6) Where a person to whom interrogatories have been directed answers any of them insufficiently, the court may require the person to make a further answer either by affidavit or on oral examination.

Application to strike out interrogatory

- (7) Where a party objects to an interrogatory on the grounds that it is not necessary for disposing fairly of the action or that the costs of answering would be unreasonable, that party may apply to the court to strike out the interrogatory, and the court shall take into account any offer by him or her to make admissions, to produce documents or to give oral discovery.

Delivery of interrogatories to solicitor

- (8) A party may, instead of serving interrogatories under subrule (1) or (2), deliver the interrogatories to the solicitor of the person to whom the interrogatories are directed.

Idem

- (9) Where a solicitor receives interrogatories under subrule (8), the solicitor shall forthwith inform the person to whom the interrogatories are directed.

Continuing obligation to answer

- (10) Where a person who has given an answer to an interrogatory later learns that the answer is inaccurate or incomplete, the person is under a continuing obligation to deliver to the party who served the interrogatory an affidavit deposing to an accurate or complete answer.

Interrogatories are also frequently used in the Northwest Territories due to geographical considerations.

NWT **Rules 263-265** deal with written interrogatories as follows:

263. (1) Where a party desires to conduct an examination for discovery by way of interrogatories, the party shall serve on the party to be examined written interrogatories in Form 16.
- (2) A party served with written interrogatories shall, within 30 days after the party is served, deliver written answers under oath in Form 17.
- (3) The provisions of this Part relating to oral examinations apply to interrogatories with such modifications as the circumstances require.
264. Interrogatories need not be filed before service but shall be filed by a party who intends to use any part of the interrogatories at the trial of the action.
265. The Court may order a further examination, either orally or by way of interrogatories, on such terms as to costs or otherwise as the Court may consider necessary.

Furthermore, NWT **Rule 236(1)** makes it clear that a party may not conduct both oral and written examination unless special leave of the court is granted.

NOTICES TO ADMIT FACTS

Rule 230 provides for the ability to use a Notice to Admit Facts. This is a very important and often overlooked Rule. However, it must be noted that **Rule 230** is not a discovery Rule but a proof Rule.¹⁴ Evidence of this is found in the fact that **Rule 230** is located under the Admissions section of the Alberta **Rules of Court**, as opposed to the section on Examinations for Discovery.

Rule 230 reads as follows:

230(1) A party may by notice in writing call on any other party to admit, for the purposes of the cause, matter or issue only, any fact mentioned in the notice, including any fact in respect of a document.

(1.1) Each of the matters for which an admission is requested is deemed to be admitted unless, within 30 days after service of the notice the other party serves on the party requesting the admission, a statement

- (a) denying specifically the matter for which an admission is requested,
- (b) setting out in detail the reasons why the other party cannot admit those matters, or
- (c) setting out objections on the ground that some or all of the requested admissions are privileged, or irrelevant, or that the request is otherwise improper in whole or in part.

(2) Rule 548 does not apply to subrule (1.1) so as to permit the Court to abridge the 30-day period.

(3) A denial by a party shall fairly meet the substance of the requested admission and when he denies only a part of a matter of which an admission is requested he shall specify so much of it as is admitted and deny only the remainder.

(4) Where a party refuses to make a requested admission and the matter of which an admission was requested is proved at the trial the cost of proving the matter shall be paid by the party who refused to make the requested admission, whatever the result of the cause, unless the court finds that the refusal was reasonable.

(5) The court may at any time allow any party to amend or withdraw any admission on such terms as may be just.

(6) Any admission pursuant to this Rule shall be deemed to be made only for the purposes of the particular cause, matter or issue, and not as an admission to

¹⁴ *Alberta River Conservation Foundation v. Alberta (Minister of Environmental Protection)* [1998] A.J. No. 44

be used against the party on any other occasion or in favour of any person other than the person giving the notice.

(7) The court may at any time set aside a notice as being improper or unnecessary and, if any notice comprises improper or unnecessary matters, the court may direct that all costs occasioned thereby shall be borne by the party giving the notice.

The purpose behind this Rule is to obviate the need (and corresponding cost) of calling evidence at trial pertaining to matters that can be readily admitted by both parties.

In *Allied Signal Inc. v. Dome Petroleum Ltd.* [1994] A.J. No. 1088 Justice O’Leary observed that:

The nature of the procedure is such that as time proceeds and the matter inches closer to trial, the ability of the parties to make admissions without risking liability or without risking placing themselves in an awkward position will crystallize and they can be made much more freely as they are often done informally as the trial approaches. I do not believe, though, that the procedure should be used as a form of discovery or as a substitute for interrogatory period. To do so, in my view, would result in a serious problem for the courts and a serious problem for counsel in attempting to sort out all of these various things on an interlocutory basis. Some of them are simple but others could be very difficult and would involve making decisions early in the pre-trial procedure on the basis of skimpy evidence and a lack of appreciation of the real issues.

While Rule 230 is often overlooked by counsel, it should form part of every litigator’s toolbox. Proper use of a Notice to Admit Facts has the following benefits:

1. Saves counsel from proving undisputed facts at trial. If the other side will not admit to facts, the proving party may receive costs against them for proving those facts;
2. Helps parties move closer to potential settlement as it forces both sides to admit to each other strong evidence and forces counsel to focus on the factual issues;
3. May provide the party with clearer admissions than those obtained from oral discovery, or evidence obtained from the disclosure of documents;
4. Reduces client costs and saves court time by reducing the overall length of a trial.

A Notice to Admit Facts can also be used where discovery evidence is unclear or awkward. If a Notice to Admit Facts is submitted, it can often clear up uncertain evidence, and clarify evidence that appears on its face to be ambiguous, or prone to alternative interpretations.

Drafting is a very important consideration when using a Notice to Admit Facts. Each statement should only include one fact to be admitted and should be simply stated, clearly and unambiguously. The purpose behind creating one fact per statement is that opposing counsel may be willing to admit one fact and not others. Furthermore, it also allows drafting counsel to submit conflicting facts as alternatives.

A Notice to Admit Facts may be served by the plaintiff anytime after the law suit has been commenced.¹⁵ However, in regard to service of a Notice to Admit Facts by the defendant, the issue has not been decided whether the Notice to Admit Facts must be served after a Statement of Defence has been filed or if it can be served beforehand.¹⁶ Regardless, it is generally accepted, as observed by Justice O’Leary above, that Notices to Admit Facts should not be served so early on in the litigation process.

Further, in *McLean v. Khaliq*, [2002] A.J. No. 1202, Master Laycock cautioned against serving a Notice to Admit Facts too early on in an action. This is due to the fact that its beneficial effect of limited time in discovery is likely not to be achieved due to the fact that counsel will often not give a qualified acceptance of the matters so early on in the litigation process.

In responding to a Notice to Admit Facts, if counsel has objections to certain requested admissions, the objections must specifically deny the matter for which an admission is requested by setting out in detail the reason why they cannot admit to those matters.

Upon being served with a Notice to Admit Facts, counsel has 30 days after service to file a Reply. If a Reply is not received within the stipulated time, the admissions are deemed to have been admitted. It must be further noted here that the 30 day reply period cannot be abridged.¹⁷

Under **Rule 230(5)**, once an admission has been made, counsel may later be permitted with leave of the court to withdraw the admission. In *Davies v. Edmonton (City)*, [1991] A.J. No. 1017, a decision by the Court of Queen’s Bench, Justice McDonald established the test for determining whether to allow the withdrawal of a deemed admission. In short, the party seeking to withdraw the admission must prove that there is a triable issue. There is often a costs penalty payable upon withdrawing an admission.

¹⁵ *Crawford v. Chorley* [1883] W.N. 198

¹⁶ *Highlander Cleaners Ltd. v. Elite Insurance Company*, 47 Alta. L.R. 2nd 189

¹⁷ Alberta *Rules of Court*, Rule 230(2)

The Alberta Court of Appeal has indicated in *Dwyer v. Fox*, [1996] A.J. No. 268, that if the defendant demonstrated by evidence that the facts in question raised triable issues, the deemed admissions could be withdrawn on payment of solicitor client costs given the failure to offer a timely denial of the facts.

As a general principle, a court will not compel admissions or order a better Reply. In *Canadian Southern Petroleum Ltd. v. Amoco Canadian Petroleum Co.*, (1994), 28 Alta. L.R. (3d) 89, Justice O’Leary stated:

The threshold issue is how far the Court should go in investigating and compelling responses to a Notice to Admit Facts when the requesting party is unhappy with the responses received, as in the case here. That raises the question of whether the Court should compel answers or compel better responses or more extensive responses than those given in respect of the requested admissions. That is particularly an issue where the response neither clearly denies nor clearly admits a fact referred to in the Notice to Admit Facts....In my view the Rule contains within its own remedy... and that is that the proper remedy is one of costs.

The cost provision in *Rule 230(1.1)* says that if at trial, facts for which admission was sought are proven, the successful party may receive costs incurred in proving the facts at trial providing that the court does not find the refusal to admit the facts to be reasonable. It must be further noted here that the Court will only grant costs actually incurred by the party in proving the facts. Costs over and above will not be granted.¹⁸

Rule 230 is not limited in its application to trials. It may also be extended and applied in judicial review applications. In *Alberta River Conservation Foundation v. Alberta (Minister of Environmental Protection)*, [1998] A.J. No. 44, the Alberta Court of Queen’s Bench found that *Rule 753(19)* specifically directs the applicability of all general rules to judicial review matters unless other provided. Justice Wilkins found that since there is no specific provision exempting *Rule 230*, a Notice to Admit may be used in judicial review applications.

The benefits of *Rule 230* can be many. While the Rule is often overlooked by counsel, its use can assist in paring down the issues by considering what can be admitted, thereby narrowing the focus of what is truly in dispute.

¹⁸ *Ellis v. Friedland* (2000), 276 A.R. 364 at pg. 367

**EFFECTIVE USE OF INTERROGATORIES
AND NOTICES TO ADMIT FACTS**

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