Evidence in Chambers.

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For:

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Weapons in Chambers Seminar.

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LAWYERS
Catastrophic Injury and Wrongful Death Claims ™

Contents

Some Basic Tips.

The Master or Justice wants to know:

1. Who are you?
2. Who is your client?
3. Who is your friend (counsel opposite), and who is their client?
4. What do you want? ("I am seeking an order for…").
5. What is the question that I have to decide (before you launch into the facts and the law)?
6. What are the admissible facts that relate to that question?
7. Why should I give you what you want based on the facts and the law? (No more than three cases if possible).
8. Why are you right and your friend is wrong?
9. Watch me to ensure I am keeping up.
10. Do a short and concise summary at the end that ties it all together in case I missed something.
11. Sit down and listen, unless you have a valid objection to make.

Chambers Evidence Generally.

Facts must not be stated in chambers by counsel unless they are in a filed affidavit, the court's own records, [1] or other admissible evidence. Failure to do so is serious professional misconduct, and likely to tarnish counsel's credibility permanently.[2] Unsworn statements of counsel are not evidence.[3]

"All too often, affidavits tendered in support of motions for interim relief are littered with impermissible evidence."[4] If so, the affidavit is subject to attack by an application to strike all or parts of it that contain "frivolous, irrelevant or improper information".[5]

The decision of Justice Topolniski in *ANC Timber Ltd. v. Alberta (Minister of Agriculture and Forestry)*, 2019 ABQB 653 is worth reading, and key paragraphs are excerpted in Appendix 1. Basically, counsel should strive, if possible and if cost effective, to present evidence that meets the trial threshold, but failure to do so does not necessarily exclude that evidence in Chambers.[6]

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[1] Stevenson & Cote, *Alberta Civil Procedure Handbook, 2020* (Edmonton: Juriliber, 2020) [Stevenson] at p. 6-59 (rule 6.11).
[2] Stevenson, *supra* note 1 at p. 6-59 (rule 6.11).
[3] Allan Fradsham, *Alberta Rules of Court Annotated 2020*, (Toronto: Thomson Reuters Canada Limited, 2019) at p. 860 [Fradsham] (rule 6.11).
[4] *ANC Timber Ltd. v. Alberta (Minister of Agriculture and Forestry)*, 2019 ABQB 653 para. 1. Justice J.E. Topolniski.
[5] Rule 3.68(4)(a).
[6] *ANC Timber Ltd. para. 27*

Sources of Evidence for Chambers Applications.

The screening questions are:

1. Was the action commenced by an Originating Notice or by a Statement of Claim?
2. Is it an Application for Judicial Review?
3. Is it an Application for a Summary Judgment or for a Summary Trial?

Actions Commenced by an Originating Application

The overarching rule for actions commenced by an Originating Application (formerly known as an Originating Notice) - other than for judicial review[7] - is Rule 3.14.[8]

> **Originating application evidence (other than judicial review)**
>
> **3.14(1)** When making a decision about an originating application, other than an originating application for judicial review, the Court may consider the following evidence only:
>
> (a) affidavit evidence, including an affidavit by an expert;
>
> (b) a transcript referred to in *rule 3.13*;
>
> (c) if Part 5 applies by agreement of the parties or order of the Court to the originating application, the transcript evidence or answers to written questions, or both, under that Part that may be used under *rule 5.31*;
>
> (d) an admissible record disclosed in an affidavit;
>
> (e) anything permitted by any other rule or by an enactment;
>
> (f) evidence taken in any other action, but only if the party proposing to submit the evidence gives each of the other parties 5 days' or more notice of that party's intention and obtains the Court's permission to submit the evidence;
>
> (g) with the Court's permission, oral evidence, which if permitted must be given in the same manner as at trial.

Actions commenced by an Originating Application must be confined to a statement of facts within the personal knowledge of the person swearing the affidavit, and any other evidence that the person swearing it could give at trial.[9]

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[7] See rule 3.22
[8] See also Rules 3.2, 3.8, 3.13
[9] Rule 3.8(2)

Applications for Judicial Review.

Evidence for a judicial review application is governed by rule 3.22.

Actions Commenced by a Statement of Claim

Affidavits filed in actions commenced by a Statement of Claim do not have the "personal knowledge restriction", unless the application could result in the final determination of the action (such as an Application for Summary Judgment or for Summary Trial).[10]

An application for Summary Judgment must be supported by an "affidavit swearing positively" (i.e. on personal knowledge of the affiant[11], and not on "information and belief") that one or more of the enumerated grounds have been met.[12]

An application for a Summary Trial[13] must be supported by an affidavit or other evidence (such as read ins from a Questioning transcript of an adverse party) that is "trial grade evidence", i.e. personal knowledge. A "Summary Trial" is a "real trial". A Summary Trial is held on affidavit evidence instead of oral evidence unless leave is given to call oral evidence. Counsel robe for a Summary Trial. Evidence on "information and belief" is excluded.[14]

On the face of it, rule 13.18 (3) (that an affidavit which is sworn in support of an application that may dispose of all or part of a claim must be sworn on the basis of personal belief) appears to exclude admissible hearsay evidence. This would be a higher standard for an application than for an oral trial. Thankfully the courts have held that evidence that is subject to an exception to the hearsay rule is admissible in an application which is subject to rule 13.18 (3).[15]

> The case law has long recognized that some flexibility is required in interpreting the rule on the use of hearsay affidavits. Too strict an interpretation would preclude summary judgment applications by large organizations…. Thus, litigants are allowed to rely on affidavits in support of final relief where the personal information in the affidavit is obtained from reviewing relevant and reliable documents.[16]

Part 5 Division 2 relating to Experts and Expert Reports (for example, the need to prepare a Form 25) and part 6 of the *Rules of Court* apply to a Summary Trial.[17]

The overarching rule for actions commenced by a Statement of Claim is Rule 6.11.

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[10] Other examples of "Final" motions can be found at Stevenson, *supra* note 1 at p. 44-39.
[11] In this paper I will use the term "affiant" for the person who swears or affirms an affidavit, although the term is used interchangeably with the term "deponent".
[12] Rule 7.3(2).
[13] Rule 7.5
[14] Rules 7.5 and 13.18 (3). Fradsham, *supra* note 3 at 1022. (Rule 7.5).
[15] Rule 13.18 commentary in Fradsham, *supra* note 3 at pp. 1599, and 1602 to 1608. (Rule 13.18).
[16] ***Goodswimmer v Canada (Attorney General),*** 2017 ABCA 365 (CanLII) at paragraph 33:
[17] Rule 7.7

Evidence at application hearings

6.11(1) When making a decision about an application the Court may consider only the following evidence:

(a) affidavit evidence, including an affidavit by an expert;

(b) a transcript of questioning under this Part;

(c) the written or oral answers, or both, to questions under Part 5 that may be used under *rule 5.31*;

(d) an admissible record disclosed in an affidavit of records under *rule 5.6*;

(e) anything permitted by any other rule or by an enactment;

(f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence;

(g) with the Court's permission, oral evidence, which, if permitted, must be given in the same manner as at trial.

Sources of Evidence to Consider.

Sources of evidence in chambers for actions commenced by a Statement of Claim include:

1. Affidavit evidence.
    a. Rules 13.13, 13.18 to 13.26,
    b. Form 49.
    c. Rule 5.34 and Form 25 if expert evidence is tendered by way of Affidavit.
2. Transcripts of questioning on an affidavit.
    a. Rule 6.20
3. Transcripts of Questioning of the opposite party, or their officer, corporate representative, litigation representative, employee, auditor, partner, or person providing services to a corporation.
    a. Rules 5.17, 5.18, 5.26, 5.31, 5.32,
    b. Use at trial, rules 5.31, 5.29 & 8.14,
    c. Rule 6.15 to 6.20, 6.38. Form 29.
4. Answers to undertakings given at Questioning by an adverse party.
    a. Rule 5.30
5. Video recording in place of transcripts.
    a. Rule 13.31
6. Transcripts of Questioning of experts before trial.
    a. Rule 5.18(3), 5.37
7. Transcripts of Questioning of non-parties.

    a. Rule 6.8,
8. Oral evidence.
    a. Rule 6.11(1)(g)
9. Written Questions (Interrogatories).
    a. Rule 5.22(b) and 5.28
10. Admissible records and admissions pursuant to the Affidavit of Records.
    a. Rule 6.11 (1)(d), 5.15 & 5.16
11. Notice to Admit Facts [Written Opinion] and a Reply to a Notice to Admit.
    a. Rule 6.37 and Form 33.
12. Evidence taken in any other action. [Counsel are cautioned to read the judicial interpretation of this rule, as it's application is much narrower than it seems].
    a. Rule 6.11 (1) (f)
13. Questioning to preserve evidence for future use:
    a. Where the person to be questioned might be unable to give evidence before the court because of accident, ill health, disability, or the possibility of death,
    b. Where the person to be questioned might move outside Alberta, or,
    c. The expense and inconvenience of bringing the person to Alberta is not warranted.
    d. Rule 6.21, 6.23.
14. Evidence taken of persons outside Alberta.
    a. Rule 6.22 and Form 31
15. Putting personal property into evidence by way of photograph.
    a. Rule 10.30
16. Preservation of property that may be evidence.
    a. Rule 6.25
17. Inspection or examination of property.
    a. Rule 6.26
18. Order to produce a prisoner for a hearing or for questioning.
    a. Rule 6.39
19. Appointment of a court expert to give evidence on a matter.
    a. Rule 6.40
20. Appointment of a Referee to answer a question or conduct an inquiry and provide a report.
    a. Rule 6.44 to 6.46
21. *Alberta Evidence Act*, RSA 2000, c. A-18
    a. The Act applies to affidavits and interrogatories (s. 2).
22. Certificates.
    a. "It is also common to file certified copies of documents such as certificates of title, where a statute makes those admissible evidence."[18]

[18] Stevenson, *supra* note 1 at p. 44-3.

This rest of this paper will focus on evidence in applications brought in chambers in actions commenced by a Statement of Claim, and on selected sources of evidence.

Affidavit Evidence in Actions Commenced by Statement of Claim.

The primary method of evidentiary proof in chambers is through the filing of affidavits and Questioning on these affidavits.

An affidavit can be sworn on the basis of personal knowledge, or, for an interlocutory (non-final) application, on the basis of "information and belief" (i.e. hearsay). If it is sworn on the basis of information and belief, the source on the information must be disclosed in the affidavit.[19]

If the affidavit is sworn "in support of" (as opposed to "in opposition to"[20]) an application that may dispose of all or part of a claim (i.e. a "final" application)[21], then that affidavit **must** be sworn on the basis of the personal belief of the affiant, and not on "information and belief".[22] This would mean that an expert would have to swear a "first person" affidavit with a Form 25 if expert evidence is sought to be tendered in such an application.[23]

The affiant must depose that he or she believes the information. Merely stating information is not enough.[24]

The practice of having a legal secretary depose to "contentious facts" is to be discouraged, as the opponent thus loses his or her ability to cross examine a person with knowledge of the contentious issues. Doing so compromises the usefulness of the affidavit.[25] One remedy would be to question someone with firsthand knowledge of the facts pursuant to rule 6.8.

Merely attaching an expert's report to an affidavit, without swearing to belief, is not admissible evidence at the application.[26]

Affidavits should contain facts, not argument, opinions, personal beliefs or conclusions.[27] Such affidavits may be given little weight or be struck.

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[19] Rule 13.18

[20] A Respondent may rely on hearsay evidence. Rule 13.18 commentary in Fradsham, *supra* note 3 at pp. 1603 ff. (Rule 13.18).

[21] For example, a Summary Trial or a Summary Judgment application.

[22] Rule 13.18(3).

[23] See also rule 6.11(1)(a).

[24] Fradsham, *supra* note 3 at pp.1608. (Rule 13.18).

[25] Fradsham, *supra* note 3 at pp. 1610. (Rule 13.18).

[26] Stevenson, *supra* note 1 at p. 6-63 (rule 6.11). See also Wittmann CJ in ***CCS Corporation v Secure Energy Services Inc.***, 2013 ABQB 34

[27] Fradsham, *supra* note 3 at pp. 1610. (Rule 13.18).
Counsel's job is to make submissions to the court, not to tell the court what they "think" or "feel".

The technical requirements for affidavits are in rule 13.19. The requirements for exhibits are in rules 13.21 and 13.26. Of note, exhibits over 25 pages must be tabbed and numbered, or the exhibit can be filed separately.

Any party to an application can use and refer to any affidavit that is filed in the action.[28]

Transcripts of Questioning on an Affidavit.

Questioning on an affidavit is governed by rule 6.20. The transcript must be filed with the court for use at the application unless the court otherwise orders.[29]

The affiant of an affidavit prepared for an application (or a person being questioned as a witness under Part 6 for use at a hearing[30]) may be questioned by any other party.[31] The transcript may be used by any party at the hearing of the application, because the affidavit and cross-examination on it are considered the same as evidence at trial.[32] Questioning by parties adverse in interest may take the form of cross-examination.[33]

The whole transcript is put before the court, and the Master or Justice can read and act on all or any part of it. Cross examining on an affidavit is as risky as cross examining at trial, and counsel run big risks if they are not sure what the answer will be or if they cannot control the answer. The witness may plug holes in their affidavit to your dismay, so cross examination (if done) should normally be brief. If the absence of evidence helps your case, don't cross examine on the affidavit,[34] and then at the application point out the absence of this evidence.

Pursuant to rule 5.25 (5), the lawyer for the party being questioned for Questioning under Part 5 can re-examine his own witness to "explain, elaborate or provide context for an answer initially given". Every time I did so under the old rules, I made things worse. I have not researched if rule 5.25 applies to a questioning on an affidavit.

Cross-examination is not limited to the four corners of the affidavit, but the affiant can be questioned on all matters relevant to the issues in the motion or to test credibility.[35]

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[28] Rule 13.25.
[29] Rule 6.20 (5)
[30] For example, reserving evidence of an ill or terminal person or a person outside the jurisdiction of the court under rule 6.21 or 6.22.
[31] The person being questioned can be questioned again on his or her answers to other counsel per rule 6.20.
[32] Fradsham, *supra* note 3 at p. 878. (Rule 6.20).
[33] Rule 6.20.
[34] Stevenson, *supra* note 1 at p. 6-79 (rule 6.20).
[35] Fradsham, *supra* note 3 at p. 876, 879. (Rule 6.20). Stevenson, *supra* note 1 at p. 6-80 (rule 6.20).

In *Dow Chemicals Canada Inc. v. Shell Chemicals Canada Ltd.,* 2008 ABQB 671, Master Prowse held that the court should be reluctant to direct that undertakings be provided by an affiant in a cross-examination on an affidavit, except in limited circumstances.[36]

> [5] After a review of the relevant case law, I have come to the conclusion that the court should be reluctant to direct that undertakings be provided by a party proffering a deponent who is unable to answer all questions put to the affiant during a cross-examination. It should be more difficult to have undertakings directed on a cross-examination than at examinations for discovery. Undertakings should only be directed on a cross-examination where:
>
> > (a) the deponent has referred to information or documents in the affidavit, or could only have made the assertions contained in the affidavit after having reviewed the information or documents being sought, or
> >
> > (b) the undertakings relate to an important issue in the application, and the provision of such information:
> >
> > > (i) would not be overly onerous, and
> > >
> > > (ii) would likely significantly help the court in the determination of the application.
>
> [6] In addition, even where the undertakings sought do concern an important issue, the court should consider the alternative of simply ruling that the refusing party has not met its onus of proof in the underlying application.

Undertakings given by an affiant are given to the court and can be enforced by any party.[37]

Counsel for an affiant often wrongly try to interrupt, coach their witness, or give evidence themselves. The standard is that Counsel, as officers of the court, should behave as if the Questioning was being heard before a Justice at trial.[38]

Use of Transcripts of Questioning of the Opposite Party.

There is a list of who may be questioned for Questioning[39] under part 5 in rules 5.17 and 5.18.

Rule 5.31 is the key rule as to who may use a Questioning transcript at an application:

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[36] Topolniski J in *San Francisco Gifts Ltd., Re,* 2004 ABQB 229 at p. 396 opined that undertakings may be given at a questioning on an affidavit under the old rules where the affiant did not readily have the information at hand.
[37] Stevenson, *supra* note 1 at p. 6-82 (rule 6.20).
[38] Fradsham, *supra* note 3 at p. 875ff. (Rule 6.20).
[39] No comment on the wisdom of changing the descriptor from "Discovery" to "Questioning".

Use of transcript and answers to written questions

5.31(1) Subject to *rule 5.29*,[Acknowledgement of corporate witness's evidence], a party may use in support of an application or proceeding or at trial as against a party adverse in interest any of the evidence of that other party in a transcript of questioning under rule 5.17 [People who can be questioned] or 5.18 [Persons providing services to a corporation] and any of the evidence in the answers of that other party to written questions under *rule 5.28* [Written questions].

(2) Evidence referred to in subrule (1) is evidence only of the questioning party who uses the transcript evidence or the answers to the written questions, and is evidence only against the party who was questioned.

(3) If only a portion of a transcript or a portion of the answers to the written questions is used, the Court may, on application, direct that all or each other portion of the transcript or answers also be used if all or any other portion is so connected with the portion used that it would or might be misleading not to use all or any other portion of the transcript or other answers. [Emphasis mine].

Thus, Questioning evidence can only be used **against** the deponent, and not **by** the deponent. It cannot be used against any other party whether on the same side or not.[40]

It is prudent that where there are multiple parties, to avoid repetitive examinations, that there be an agreement on the record "*That any party adverse in interest to the party being examined can use the transcript of the examined party pursuant to Rule 5.31 as if the adverse party had conducted the questioning*." Be aware that you should put this agreement on the record for each deponent, for if you fail to do so, counsel opposite will object at trial and argue that non-examining counsel cannot use that particular deponent's transcript at trial.

Unlike the transcript of a questioning on an affidavit, the transcript of a Questioning under Part 5, or the affidavit in answer to Written Questions (Interrogatories) under Part 5, can only be filed or put before the court as permitted "by these rules". Examples would include "read ins" under rule 5.31 or the evidence of a deceased, unavailable or unwilling witness under rule 8.14.[41]

The rules relating to Questioning a corporation should be read carefully.[42] The prudent practice is to question the Corporate Representative first, and have him or her disclose the names of all employees or officers that would have relevant evidence, and then adjourn the questioning of the Corporate Representative until after these employees or officers are questioned. After these employees or officers are questioned, the Corporate Representative would be brought back and then the questions in rule 5.29 would be put to the Corporate Representative.

A more cost effective approach, if counsel opposite agrees and assuming that there are only one or two employees or officers to be questioned that can be done in a day, is to question the employee and officer first, and have the Corporate Representative present to listen to the

[40] Fradsham, *supra* note 3 at p. 769, 773 (rule 5.31).
[41] Rule 5.32. A recent example is *Peppler Estate v. Lee*, 2019 ABQB 144 at para. 64.
[42] Rules 5.18, 5.29.

evidence of the employees and officers, and then to question the Corporate Representative pursuant to rule 5.29 immediately afterward.

If you are not concerned about counsel opposite drafting the responses to your Written Questions (Interrogatories) of the Corporate Representative (and thus trying to minimize their value), then the rule 5.29 questions can be put to the Corporate Representative by way of Written Questions under rule 5.28.

Of note, only corporate witness evidence that is acknowledged as forming some of the information of the corporation can be used against the corporation at trial.[43]

Evidence of a corporate witness that has not been acknowledged by the Corporate Representative cannot be used at an application or at trial[44]. Rule 6.11(1)(c) (Evidence at Application Hearings)[45] refers to rule 5.31, which is "subject to rule 5.29"[46], thus only corporate witness Questioning evidence that has been acknowledged by the Corporate Representative can be used at the application or at trial.

Questioning by Way of Written Questions (Interrogatories)

The relevant rules are rules 5.22(b) and 5.28.

The process is pretty simple: one party serves a list of written questions and the other party answers them by way of affidavit. Neither is filed in court: they are merely served on the other party.

The downside is that counsel opposite will re-draft and sanitize their client's answers, so written questions are only useful for non-contentious affiants or parties.

Answers to Undertakings.

The governing rule is rule 5.30. Affiants are expected to attend Questioning being reasonably prepared and informed for questioning, but if not, or if they have under their control but have not produced a "relevant and material record" that is not privileged, then the affiant must undertake to inform himself or herself and provide an answer to the question, or produce the record, within a reasonable time.

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[43] Rule 5.29(1).
[44] Fradsham, *supra* note 3 at p. 769 (rule 5.31).
[45] Rule 6.11 sets out what evidence may be used at an application, and refers to "the written or oral answers, or both, to questions under Part 5 that may be used under rule 5.31".
[46] Which requires a corporate witnesses' evidence to be acknowledged by the Corporate Representative before it can be used as evidence at trial.

It is worthwhile to re-read the definition of "relevant and material" in rule 5.2 before any Questioning,[47] as well as the caselaw relating to what records are under a affiant's "control" under rule 5.6.[48] Many undertakings are given that need not be given.

The control test is not met if it is merely "reasonable" for the affiant to request the record from a non-party absent a legal right to the document. If the record is not in the affiant's "control" then the proper remedy is for counsel opposite to bring an application under rule 5.13 (Obtaining Records from Others).[49] If counsel opposite brings a rule 5.13 application, we advise counsel opposite and the court that we request that the third party records be produced to us first, instead of to counsel opposite, so that we can vet them for relevance, materiality and privilege before we produce them to counsel opposite. It is both proper and necessary for counsel to review and redact irrelevant, immaterial or privileged portions of a record.[50]

If a party wishes to withdraw an undertaking, then absent the consent of counsel opposite, an application must be made to the court for leave to withdraw the undertaking.[51]

Pursuant to rule 5.30 (2), after the undertaking has been discharged, the person who gave the undertaking may be questioned on the answer given or record provided.

Transcripts of Questioning of Non-parties.

Rules 5.17 and 5.18 refer to the Questioning under Part 5 of a former officer, current or former employee, auditor, partner, assignor, or a service provider. An expert engaged for the purpose of the action may not be questioned under this rule.

"Rule 6.8 is most useful where a prospective witness does not want to swear an affidavit" for a pending application.[52]

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[47] **When something is relevant and material**

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

(2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.

[48] "Control" means that the affiant has a legal right to access the record or to obtain copies of it from a non-party. It goes beyond mere legal ownership or possession. Fradsham, *supra* note 3 at p. 554ff (rule 5.6); Stevenson, *supra* note 1 at p. 5-22 ff (rule 5.6).

[49] Stevenson, *supra* note 1 at p. 5-22 ff (rule 5.6).

[50] Stevenson, *supra* note 1 at p. 5-20 ff (rule 5.6).

[51] Fradsham, *supra* note 3 at p. 768 (rule 5.30).

[52] Stevenson, *supra* note 1 at p. 6-49 (rule 6.8).

An exchange between Justice Mah and counsel regarding obtaining evidence from a non-affiant[53] is referenced in *Holden (Village) v. Sen*, 2019 ABQB 472:

> [52] During the hearing, Mr. Garber and I had a disagreement as to whether there is a rule that permits cross-examination of a non-affiant. I said there was. He said there wasn't.
>
> [53] Upon review of the *Rules*, it seems there are actually two sets of rules dealing with the examination of non-affiants in pursuance of a motion.
>
> [54] First, with regard to originating applications, which this is, *Rules* 3.13 and 3.14 speak to which persons may be examined under oath for the purposes of obtaining a transcript for use in the application. *Rule* 6.7 and 6.8 are the corresponding rules for regular motions, that is, not started by originating application.
>
> [55] Both *Rules* 3.13(2) and 6.8 provide that persons other than persons who swear affidavits may be examined for the purposes of obtaining a transcript of that person's evidence for use at the application. Both sets of rules state that *Rules* 6.16 to 6.20 apply to compel their attendance at questioning.
>
> [56] Hence I conclude that there is no impediment to examining a non-affiant for the purposes of obtaining a transcript for use at an application provided that *Rules* 6.16 to 6.20 are observed. There has been no attempt to subvert the legal process here.

Rule 6.8 is broad and allows <u>any</u> person to be questioned under oath as a witness for the purpose of obtaining a transcript of that party's evidence for use at the hearing of an application.

As a side note, if you need to discover the identify of a wrongdoer, to preserve evidence for trial, or to trace or preserve assets before trial, the equitable remedy of a "bill of discovery" may be available to you under a *Norwich* order.[54]

The non-party affiant may also be questioned by any other party, and the person questioned may then be questioned again by the questioning party on that person's answers to the questions of other parties. Questions by parties adverse in interest may take the form of cross examination.[55]

Master J.T. Prowse Q.C. has drawn my attention to *Precision Drilling Canada Limited v Yangarra Resources Ltd,* 2013 ABQB 492, wherein Justice Tillman concludes at paragraph 37 that, "…Rule 6.8 is sufficiently broad to permit cross-examination of a witness by the party calling that witness without the traditional necessity of an intervening declaration of hostility." Accordingly, counsel who had subpoenaed employees of the other party to be questioned under rule 6.9 was entitled to cross examine those employees and was not restricted to non-leading questions.[56]

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[53] I.e. a person who refused to provide an affidavit but who has relevant evidence.
[54] Fradsham, *supra* note 3 at p. 847ff (rule 6.8).
[55] Rule 6.20.
[56] This clarifies the opposing viewpoints in Fradsham, *supra* note 3 at p. 850 (rule 6.8) and Stevenson, *supra* note 1 at p. 6-49 (rule 6.8).

The resulting transcript must be filed by the questioning party.[57] A rule 6.8 transcript can be dangerous, as the evidence is evidence for and against all parties.[58]

Stevenson and Cote indicate that a non-party witness need not undertake to produce more information and documents.[59]

Misuse of rule 6.8 to question trial witnesses before trial is an abuse of process.[60]

If a non-party witness wishes to challenge the Notice of Appointment for Questioning issued under rule 6.16, he or she bears the onus of establishing that he or she does not have material or relevant evidence. The party issuing the Notice to Attend bears the onus of showing that there is a basis for the Notice.[61]

A rule 6.8 examination can be used for the purpose of a Summary Judgment application.[62]

Transcripts of Questioning of Experts Before Trial.

Rule 5.37 provides that the parties may agree, or in "exceptional circumstances" the court may order, that an expert be questioned by any party adverse in interest to the party proposing to call the expert at trial. The questioning must be limited to the expert's report, and the court can impose conditions including a time restriction and payment of costs.

The evidence of the expert is to be treated as if it were the evidence of an employee of the party who intends to rely on the expert's report. Justice Phillips has interpreted this provision to mean "… that the evidence given by an expert in pre-trial questioning does not bind a party who chooses to call that expert as a witness at trial. Rather, that party would be free to introduce contrary evidence."[63]

An examination of the expert should not be allowed until the litigation privilege protecting the report has been waived, for example, by service or other indication that the expert will be called at trial.[64]

The expert may be questioned on the report and the documents reviewed by the expert in preparation of the report. Working papers such as communications, memoranda, notes, diagrams, doodles and preliminary opinions need not be produced by the expert.[65]

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[57] Rule 6.8(b).
[58] Stevenson, *supra* note 1 at p. 6.49 (rule 6.8).
[59] Stevenson, *supra* note 1 at p. 6-81 (rule 6.20).
[60] Fradsham, *supra* note 3 at p. 852 (rule 6.8).
[61] Fradsham, *supra* note 3 at p. 853 (rule 6.8).
[62] Fradsham, *supra* note 3 at p. 857 (rule 6.8).
[63] Rule 5.37 (4). *B.J.M. v. S.J.M.*, 2012 ABQB 731 at para. 40 to 44, per Fradsham, *supra* note 3 at p. 805 (rule 5.37).
[64] Stevenson, *supra* note 1 at p. 5-113 (rule 5.37).
[65] Fradsham, *supra* note 3 at p. 804 (rule 5.37).

Oral Evidence.

Pursuant to rule 6.11 (1)(g), the court can permit oral evidence to be given at an application, and if permitted, it must be given in the same manner as at trial. It is exceptional to allow oral evidence.[66]

Counsel would gown, as it is oral evidence.

Video Recording in Place of Transcripts.

Rule 13.31 provides that if the parties agree, or the court orders, then the questioning may be videotaped.

Stevenson and Cote indicate that, "This rule is important, for it removes the biggest objection to commission evidence, that the judge will not see or hear the witness. Rules 6.10 and 8.18 also allow live evidence by telephone or television."[67]

Notice to Admit Facts/ Written Opinion and a Reply to a Notice to Admit.

Rule 6.37 permits a party, by notice in Form 33, to call on any other party for the purpose of an application, originating application, summary trial or trial, to admit any fact or written opinion. The facts or opinion are presumed to be admitted unless within 20 days[68] after service of the Notice to Admit, the other party serves a Statement that complies with rule 6.37(3). The 20 days can be shortened or extended under rule 13.5 by agreement or court order.

The Notice to Admit is served, not filed.[69]

A party served with a Notice to Admit can admit the fact, deny the fact, let the presumed admission occur, move to strike the Notice, or request an extension of time.[70]

On application, the court may set aside a Notice to Admit. A party may only amend or withdraw an admission or a denial with the court's permission or by agreement of the parties.[71]

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[66] Stevenson, *supra* note 1 at p. 6-62 (rule 6.11).
[67] Stevenson, *supra* note 1 at p. 13-74 (rule 13.31).
[68] See rule 13.3 regarding counting days.
[69] Fradsham, *supra* note 3 at p. 908 (rule 6.37).
[70] Fradsham, *supra* note 3 at p. 912 (rule 6.37).
[71] Rule 6.37(6) and (8). The test for a withdrawal of an admission is set out in Fradsham, *supra* note 3 at p. 908 (rule 6.37).

An admission is not evidence against a co-party.[72]

Agreed facts are incontrovertible, even by other evidence,[73] so make them carefully.

If a party fails to admit a fact that is then proven at trial, costs beyond the ordinary party and party costs are usually (but not always) awarded. If the facts are not proven, then costs may be awarded to the responding party if it took a fair amount of labor to answer a Notice to Admit.[74]

The court is not bound by an admission by a party on a question of law or jurisdiction.[75]

Questioning to Preserve Evidence for Future Use (Commission Evidence or Evidence *De Bene Esse*).

Rules 6.21and 6.23 deal with preserving evidence for future use. An order may be made where:

a. The person to be questioned might be unable to give evidence before the court because of accident, ill health, disability, or the likelihood of death,
b. The person to be questioned might move outside Alberta,
c. The expense and inconvenience of bringing the person to Alberta is not warranted, or,
d. For any other purpose the Court considers appropriate.

"Evidence de bene esse" is the term used where it is sought to preserve the evidence of a witness who is or may become too ill to testify.[76]

Rule 13.31 allows videotaping of evidence, and this would be prudent to do in a *de bene esse* situation.

"If the witness is over 70 years of age, that is a **prima facie** ground to take his evidence ***de bene esse***, especially if his health is not good".[77]

If the ill person recovers and can testify at trial, he or she may come and testify live at trial instead of using the transcript.[78]

If an affiant is deceased after Questioning under Part 5 of the Rules, counsel are reminded of rule 8.14, and to consider if this rule can apply to a chambers application.

Stevenson & Cote, *Civil Procedure Encyclopedia*, (Edmonton: Juriliber, 2003) chapter 43 deals with commissions and perpetrating evidence.

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[72] Stevenson, *supra* note 1 at p. 6-109 (rule 6.37).
[73] Stevenson, *supra* note 1 at p. 6-109 (rule 6.37).
[74] Stevenson, *supra* note 1 at p. 6-111 (rule 6.37). Rule 10.33(2)(b).
[75] Stevenson, *supra* note 1 at p. 6-108 (rule 6.37).
[76] Stevenson, *supra* note 1 at p. 6-83 (rule 6.21).
[77] Stevenson, *supra* note 1 at p. 43-28.
[78] Stevenson, *supra* note 1 at p. 6-83 (rule 6.22).

Evidence Taken of Persons Outside Alberta.

Pursuant to Rule 6.22 and 6.23 the court may order that the evidence of a person be taken outside of Alberta. With the ease of modern air travel and testimony by videoconference, commissions to take evidence of witnesses abroad are not that common. Within Canada, the *Interprovincial Subpoena Act* makes it easier to compel live attendance at trial of witnesses. [79]

The person who takes the evidence under rule 6.23 is called the "Commissioner". The Commissioner can be the trial judge,[80] although normally it is a waste of time to use the trial judge.[81]

The parties lead the evidence, not the Commissioner.[82]

The Plaintiff, who chose the forum for the action, has a heavier onus in asking for commission evidence than does a defendant in opposing a commission.[83]

One creative suggestion is to that the rule could be used to permit an expert to testify from the site of a hydro-electric dam if needed.[84]

Evidence Taken in Any Other Action. (Rule 6.11 (1)(f), a.k.a. a rule that does not mean what it says.)

Pursuant to rule 6.11 (1) (f), on an application the court may consider evidence taken in "any other action", but only if the party proposing to submit the evidence gives every other party a minimum of 5 days written notice of that intention, and the court permits that evidence.

Stevenson and Cote state that the common law has held that an affidavit or a transcript of evidence from one lawsuit usually cannot be entered as evidence of the truth of its contents in a different lawsuit (it is likely hearsay). "This Rule only gives the mechanism where such evidence is admissible, i.e., where the parties (or their privies) in the two suits are the same." Usually an affidavit filed in one suit cannot be used in another, unless the present opponent had a chance to cross-examine on it in the other action, the issues are substantially the same, and the parties are the same.[85]

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[79] Stevenson, *supra* note 1 at p. 6-84 (rule 6.22).
[80] Stevenson, *supra* note 1 at p. 6-84 (rule 6.22).
[81] Stevenson, *supra* note 1 at p. 43-14.
[82] Fradsham, *supra* note 3 at p. 884 (rule 6.22).
[83] Fradsham, *supra* note 3 at p. 883 (rule 6.22).
[84] Stevenson, *supra* note 1 at p. 6-83 (rule 6.22).
[85] Stevenson, *supra* note 1 at p. 6-64 (rule 6.11). Stevenson, *supra* note 1 at p. 44-2.

In *Murphy v. Cahill*, 2014 ABQB 62, Mr. Cahill argued that he was too depressed to participate in an action filed in Ireland, and concurrently asked for relief of his obligation to be cross examined in an Alberta action on his Alberta affidavit. Justice Veit permitted the Plaintiff Murphy to use in an Alberta application a contested medical opinion previously provided to an Irish court about the fitness of the defendant Mr. Cahill to testify, on the basis that the issue to be decided was exactly the same: "Was Mr. Cahill medically unfit to comply with the usual requirements of litigation?" The parties were the same in both the Irish and Alberta actions, although the two lawsuits claimed different damages, were based on different causes of action, and were rooted in different facts. Nevertheless, what was common in both actions was that Mr. Cahill had raised his medical status as an argument in each proceeding to avoid a procedural obligation in the lawsuit.

Conclusion.

Most justices and masters want to "do the right thing" and try to balance a just result with a somewhat affordable legal system. It is hard work, and I am sure that they often wonder if they "got it right".

Let us make their job easier by giving them the best and most reliable evidence that we can muster for them.

Acknowledgements.

I wish to thank the following individuals:

1. Justice P.R. Jeffrey for drawing my attention to the *ANC Timber* decision.
2. Master J.T. Prowse Q.C. and Jenny McMordie who graciously provided helpful comments and corrections.
3. Greg Rodin Q.C., Brian Conway, Tara Cassidy and Peter Trieu for their comments.

Appendix 1. *ANC Timber Ltd. v. Alberta (Minister of Agriculture and Forestry)*, 2019 ABQB 653, Topolniski J.

The Overarching Principles

a. The fundamental rules of evidence apply

[17] The rules of evidence are engaged on an interim motion. In the absence of express statutory authorization or exclusionary rule, the summary and interlocutory nature of an interim motion does not relieve a litigant of compliance with the rules of evidence.

[18] At the most basic level, the rules of evidence require that evidence must be useful in tending to prove a fact relevant to the issues in the case (necessary), and reasonably reliable to be admissible (reliable). Necessity and reliability are both fluid and interrelated factors. For example, if the evidence is highly reliable, then necessity may be relaxed, and if the necessity factor is high, reliability may be relaxed: Paciocco, David and Stuesser, Lee, *The Law of Evidence, 7th ed* (Toronto: Irwin Law, 2015) (**Paciocco)** at 139. The indicia of reliability do not change whether the case is a civil or criminal case: ***Jung v Lee Estate***, 2006 BCCA 549 (CanLII).

[19] Even admissible evidence may be excluded if its probative value is outweighed by its prejudicial effect: ***Mitchell v Canada (MNR),*** 2001 SCC 33 (CanLII) at para 30. In this regard, prejudice is not restricted to evidence that works against a party's interest. It can also arise from evidence that potentially undermines an accurate result, or complicates, frustrates, or degrades the process, and includes adverse practical consequences such as the undue consumption of time, unfair surprise, the creation of distracting side issues, and a potential to confuse the trier of fact: **Paciocco** at 42-43 citing ***R v S(DG)*** (2013), 299 CCC (3rd) 454 at para 25 (MBCA).

[20] The purpose of affidavit evidence is to place the *necessary facts* before the court: ***Alberta Treasury Branches v Leahy***, 1999 ABQB 185 (CanLII) at para 84 (***ATB v Leahy***). There is, however, some flexibility for contextual purposes in that assertions of fact may be part of the narrative for the purpose of assisting the Court in understanding the relevance of a particular fact and the relationship between facts: ***ATB v Leahy*** at para 84; ***Banff Transportation & Tours Inc v Buchan***, 2002 ABQB 423 (CanLII) at para 17.

[21] Typically, affidavits must be sworn on the basis of personal information. However, the *Rules of Court* allow hearsay evidence on a motion for interim relief if it is accompanied by a statement providing the source of the evidence and the affiant's belief in its truth: *Rule* 13.18(1)(b) and 13.18(2). Notwithstanding this, the Court is not mandated to accept such evidence: ***Silver Recovery Systems of Canada Ltd v WMJ Metals Ltd*** (1989), 103 AR 252, 1989 CanLII 3352 (Master); ***Schaffhauser Kantonalbank v Chmiel***, 1988 ABCA 149 (CanLII).

b. The quest for efficacy should not override the Court's gatekeeper role

[22] Litigants are obliged to employ processes for the proportional, timely, and cost-effective resolution of claims: ***Hryniak v Mauldin***, 2014 SCC 7 (CanLII); *Rule* 1.2. The Court's task is to facilitate those ends.

[23] *Rule* 3.68(4)(a) allows litigants to seek to have offending evidence struck from affidavits. As evidenced by the unfolding of this motion, it can be a costly process - not only in terms of monetary and judicial resource costs, but also in terms of the costs to access timely relief. Nevertheless, the quest for expediency should not override a litigant's procedural remedies, or fundamental evidentiary requirements.

[24] On a striking motion, Veit J observed that although courts may not have the luxury of time to embark upon striking all offending evidence from an affidavit, "the counsel of perfection for courts would be to allow no material before a judge sitting in chambers or at trial that could not be placed before a jury": ***Bank of Montreal v Lysyk***, 2002 ABQB 837 (CanLII) at para 30 (***Lysyk***).

[25] The Court in ***Dulong v Merrill Lynch Canada Inc*** (2006), 80 OR (3d) 378, 2006 CanLII 9146 (SC) (***Dulong***) observed this on wrestling with the admission of certain expert evidence at trial, at para 9:

> ... in civil cases…the path of least resistance in matters such as these seems to be to admit the evidence and then compensate for any of its weaknesses by attaching less weight to the opinion. But such an approach is an abdication of the proper function of a trial judge and was explicitly rejected by Binnie J in *R c J (J-L)*, 2000 SCC 51 (CanLII), [2000] 2 SCR 600 at p. 613:
>
> > …The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

[26] Other Courts have expressed the contrary view. For example, when faced with an application to strike a new affidavit (permissibly) filed on an appeal of a Master's decision, Clackson J ruled that although the affidavit contained inadmissible evidence, there was nothing to be gained by striking it. Rather, the offending evidence could be ignored, thereby avoiding the pejorative connotation associated with striking: ***Sucker Creek First Nation v Canada (Attorney General)***, 2013 ABQB 199 (CanLII) at para 22.

[27] Mindful of a litigant's *right* to seek a striking Order, and the tension caused by the quest for expediency and existing burdens on the Courts, I agree with the views expressed in ***Lysyk*** and ***Dulong***.

…

1. Argumentative and/or conclusory evidence is impermissible

[32] Affidavits must not contain argument or conclusions: ***ATB v Leahy*** at paras 84-85.

…

2. Irrelevant evidence is impermissible

[35] Relevance is explained in ***R v White***, 2011 SCC 13 (CanLII) at para 36:

> … In order for evidence to satisfy the standard of relevance, it must have "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence" … [citations omitted]

[36] Evidence must pertain to a material issue in the case, however, even if it meets the fundamental requirements, it may be caught by an exclusionary rule. However, as noted above, there is some flexibility to permit evidence that provides context for assertions of fact as part of the narrative. Contextual evidence must be of assistance to the Court in understanding the relevance of a particular fact and the relationship between facts.

…

[53] Mindful that cost is always an issue (more so for some litigants than others), the practice of relying on affidavits made for another proceeding can, as is demonstrated in this case, be a time and money waster for everyone except the short-cutting party.

…

3. Hearsay Evidence

a. Compliance with Rule 13.18(2) is mandatory

…

b. There are limits to hearsay under Rule 13.18(1)(b)

…

[58] As noted, the existence of *Rule* 13.18(1)(b) does not require the Court to accept hearsay evidence on an interim motion. Indeed, simply admitting such evidence without scrutiny on the basis of facial compliance with the *Rule* impairs the fundamental notion of a fair fact-finding process.

[59] It may be helpful to begin with a review of the basic principles governing how hearsay evidence is scrutinized.

[60] The defining features of hearsay evidence are the introduction of a statement for the proof of its contents and lack of a contemporaneous opportunity to cross-examine the declarant: ***R v Khelawon***, 2006 SCC 57 (CanLII) at para 35 (***Khelawon***). The purpose of the general exclusionary rule for hearsay evidence is to address "the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination": at para 35.

[61] The assessment for admitting hearsay evidence is predicated on it being necessary and reliable: ***R v Khan***, 1990 CanLII 77 (SCC), [1990] 2 SCR 531; ***R v Smith***, 1992 CanLII 79 (SCC), [1992] 2 SCR 915. Put another way, if a statement is necessary *and* there is sufficient trustworthiness, it should be considered regardless of its hearsay form: **Paciocco** at 135, ***Khelawon*** at para 62.

[62] Threshold reliability can be met if there are adequate substitutes for traditional safeguards relied upon to test the hearsay evidence: ***R v B(KG)***, 1993 CanLII 116 (SCC), [1993] 1 SCR 740; ***Khelawon*** at para 63.

[63] The context and impact of the hearsay evidence must also be considered in assessing its admissibility. This includes the seriousness of the case, the importance of the evidence, and the consequences to the parties and costs or efforts to secure the original evidence: **Paciocco** at 130.

[64] Even if it is admissible, hearsay can be excluded if its probative value is outweighed by its prejudicial effect. Again, prejudice can arise from the evidence potentially complicating, frustrating, or degrading the process, including adverse practical consequences like the undue consumption of time, unfair surprise, the creation of distracting side issues, and potential to confuse the trier of fact.

…

[83] There is a growing trend for litigants to conduct research on the internet and attach what spews forth to an affidavit without regard to its propriety. Any notion that this is appropriate or helpful is misplaced.

…

[90] There is support for the notion that internet materials may be admissible if certain conditions are met – a well-known and disclosed source (to assess objectivity of the person posting the material), and information that is capable of verification: ***ITV Technologies Inc v WIC Television Ltd***, 2003 FC 1056 (CanLII), aff'd 2005 FCA 96 (CanLII), ***Sutton v Sutton***, 2017 ONSC 3181 (CanLII) at paras 87-88.

…

4. Opinion Evidence

[97] ANC's primary position is that neither Messrs. McCammon nor Gooding were tendered as, nor should they be considered as, giving expert opinion evidence. However, if Mr. Gooding's Affidavit is an expert's "report", ANC has substantively complied with the procedural requirements under the *Rules* for its admission.

[98] Affidavits must not contain opinions other than permissible lay opinions: ***ATB v Leahy*** at paras 84-85.

> [*Master Prowse has pointed out that ATB v. Leahy was decided under old rule 305(1), and that new rule 6.11(a) specifically permits affidavit evidence by an expert – WWK*]

[99] Presumptively, opinion evidence is inadmissible, subject to a few exceptions; the most important being expert opinion evidence on matters requiring specialized knowledge: ***White Burgess Langille Inman v Abbott and Haliburton Co***, 2015 SCC 23 (CanLII) at paras 14-5 (***White Burgess***). However, there are "opinions" that are merely compilations of ordinary observations, and they are admissible even through a lay witness: ***Graat v The Queen***, 1982 CanLII 33 (SCC), [1982] 2 SCR 819 (***Graat***).

[100] The law of evidence performs an overall cost/benefit analysis of opinion evidence, comparing the benefits to the potential harm to the trial process that may flow from the admission of the evidence: ***White Burgess*** at para. 24.

a. The evidence is not lay opinion

[101] "There is no absolute inadmissibility of lay opinions": ***Resource Well Completion Technologies Inc v Canuck Completions Ltd***, 2014 ABQB 209 (CanLII) at para 18 (Master). For example, lay opinion evidence on certain subjects such as age, emotional state, plight or condition of persons or objects, certain questions of value, estimates of speed and distance, or a person's state of intoxication are admissible: ***Dow Chemical Canada ULC v Nova Chemicals Corp***, 2015 ABQB 401 (CanLII) at para 11 (***Dow Chemical***); ***Graat*** at 835.

[102] Romaine J summarized the rules for lay opinions in ***Dow Chemical*** at para 10:

> From these basic principles, the lay opinion evidence rule has been developed:
>
> > Lay witnesses may present their relevant observations in the form of opinions where:
> >
> > > They are in a better position than the trier of fact to form the conclusion;
> > >
> > > The conclusion is one that persons of ordinary experience are able to make;
> > >
> > > The witness, although not expert, has the experiential capacity to make the conclusion; and
> > >
> > > The opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions (*Law of Evidence* at 197-198).

[103] The line between "fact" and "opinion" is not always clear, and discerning which it is can be a difficult exercise: ***Graat*** at 837, **Paciocco** at 206-207. **Paciocco** suggests that given this difficulty, courts should resort to the criteria in ***R v Mohan***, 1994 CanLII 80 (SCC), [1994] 2 SCR 9, as they offer a flexible measure of admissibility that explores credentials, probative value, and prejudice: at 207.

…

b. The evidence is not that of "a witness with expertise"

[109] In ***Kon Construction Ltd v Terranova Developments Ltd***, 2015 ABCA 249 (CanLII) the issue was whether an employee and principal of a defendant gave "expert evidence" on surveys and programs employed in designing a residential subdivision.

[110] The Court of Appeal found that the two witnesses had expertise, and while their expert opinions may have justified some of their choices, it did not render their evidence inadmissible as expert evidence. At para 35, the Court described three potential categories of "witnesses with expertise", who can in some respects be witnesses of fact, and in other respects opinion witnesses:

> (a) Independent experts who are retained to provide opinions about issues in the litigation, but were not otherwise involved in the underlying events. This is the category of expert witness contemplated by *White Burgess* and *Mohan*.
>
> (b) Witnesses with expertise who were involved in the events underlying the litigation, but are not themselves litigants. An example is the family physician in a personal injury case who is called upon to testify about his or her observations of the plaintiff, and the treatment provided.
>
> (c) Litigants (including the officers and employees of corporate litigants) who have expertise, and who were actually involved in the events underlying the litigation.

[111] The Court explained the categories at paras 36-38:

> The first category of "independent experts" must always be qualified by the trial judge under the *Mohan* procedure, and advance notice of their opinions must be given under the *Rules of Court*. External witnesses who are not so qualified are not permitted to give opinion evidence requiring specialized expertise. External expert witnesses are expected to display a basic level of independence and objectivity.
>
> It is sometimes argued that the evidence of witnesses in the second category is not "opinion" evidence: *Westerhof* at paras. 60-1. To some extent they are testifying about what they observed, and what they actually did. In that sense, they are not opinion witnesses. On the other hand, it is challenging for them to explain why they acted as they did without engaging their professional expertise. For example, the family doctor cannot explain why he or she endorsed any particular treatment without expressing a medical opinion about it. It is difficult to set the boundary between what they did and their expert opinions about what should have been done. Where witnesses with expertise (who are not litigants) are to testify about events within the scope of their expertise, it is generally prudent to have them formally qualified as expert witnesses, particularly when they propose to express opinions on collateral issues like the employment prospects of the patient. Further, the overall objective of comprehensive disclosure found in R. 5.1(1)(c & d) supports the pre-trial disclosure of the opinions of participating experts.
>
> The final category of litigant-witnesses with expertise does not fall neatly into the *White Burgess* and *Mohan* analysis. First of all, it is unnecessary to prove that such a witness is "impartial, independent, and unbiased" as discussed in *White*

Burgess. Litigants are no longer disqualified as witnesses because of their obvious interest in the case.

[112] Neither affiant here fits into the second or third category of witnesses. Although Mr. McCammon is a former ANC employee, his employment ended well before the Directive and hence, the underlying events. In the result, I must apply the ***Mohan*** criteria as refined in ***White Burgess***.

c. Expert evidence is permissible on interim motions

[113] It is trite that expert evidence is permissible on interim motions: ***Lameman*** at para 23.

[114] *Rule* 6.11 allows expert evidence in affidavit form.

d. The tendering party bears the onus of establishing admissibility

[115] The party tendering expert opinion evidence bears the onus of establishing its admissibility.

[116] An affiant's potential exposure to Questioning does not shift the onus.

e. The regime for admitting expert evidence should parallel that for trial

[117] Part 5, Division 2 of the *Rules of Court* sets out a formal regime for the admission of expert evidence at trial. In ***Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc***, 2018 ABCA 305 (CanLII), the Court discussed the procedure at para 25:

> ...The *Rules of Court* require advance notice of the qualifications of the expert, and the nature of the opinion evidence: R. 5.34. Before the witness's evidence is received, the trial judge will examine the expert's qualifications, and determine the scope of the admissible opinion. The trial judge will also determine if the necessary objectivity and impartiality are present, ensuring that the expert can discharge his or her obligations to the court. Once that threshold is crossed, the expert's report and opinion are introduced in evidence in chief, and the expert is subject to cross-examination.

[118] Alberta Courts have taken various approaches to the introduction of expert opinion evidence in applications short of trial.

[119] ***Kerich v Victoria Trail Physiotherapy Ltd***, 2017 ABQB 471 (CanLII) (Master) involved a summary dismissal motion (which is final relief) with expert evidence. Master Schlosser, Q.C. noted the following, at para 18:

> Expert evidence ought to be approached in this setting as it would at trial. In other words, the Court needs, at a minimum: the qualifications of the expert, (so that the Court can determine the admissibility and the scope of the opinion); the information and assumptions on which the opinion is based (sometimes put to the expert as a set of hypothetical facts that the litigant hopes will be proved); and, a summary of the expert opinion. It is appropriate that both the substance of the expert's opinion and the expert report itself be included. If an expert's affidavit is tendered under 6.11(1)(a), it should conform to Form 25, at a minimum.

[120] In ***McCarty v McCarty***, 2016 ABQB 91 (CanLII), Renke J noted the "slim record", which included a report authored by a well-known Edmonton chartered business valuator

(attached as an exhibit to one of the party's affidavits), on which he was to make his decision. The other party did not object to the admissibility of the report, but did challenge its conclusions.

[121] Satisfied with the expert's impartiality, and his ability to discern the foundations for her opinion, Renke J considered the report, noting at para 38:

> Regardless, my job is to come to the conclusions that I can, given the evidence provided, the constraints on fact-finding should affidavits conflict, and the urging of rule 1.2 and *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) (CanLII) to work toward the proportional, timely, and cost-effective resolution of claims.

[122] In ***DME v RDE***, 2015 ABQB 47 (CanLII), Graesser J recognized the proper way to introduce expert evidence on an interim motion, which is to have the purported expert swear an affidavit qualifying him or herself to give expert opinion evidence and then providing the opinion and the back-up for it under oath: at para 71.

[123] Ultimately deciding that there were special circumstances to allow a psychologist's report (the facts reported were not "particularly contested", the report was more focused on facts about the child's need to have someone to talk to, and his desire to live with his father), the Court cautioned, at para 76:

> My conclusion here should not be considered as precedent setting. There are cases where the court has rejected an expert report used in chambers applications because it is not properly put forward. Sometimes, it is not necessary to hold the parties to strict compliance with the *Rules of Court* or rules of evidence. This is one of those situations.

[124] The *Rules* are silent about expert evidence on motions. (Perhaps they should be amended.) However, I conclude that any expert evidence ought to be introduced as it would at trial: the proposed expert's qualifications and scope of opinion should be precisely defined, and the substance of their opinion clearly expressed. Doing so will not only avoid surprise, it will also avoid any call for judicial sleuthing or intervention.

[125] There should be no distinction between motions for interim or final relief.

f. The evidence is expert opinion

[126] Expert evidence is allowed "on matters requiring specialized knowledge": ***White Burgess*** at para 15. In ***R v Bingley***, 2017 SCC 12 (CanLII) (***Bingley***) the Supreme Court reaffirmed the purpose of the framework for admissibility noting, at para 13:

> The modern legal framework for the admissibility of expert opinion evidence was set out in *Mohan* and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII), [2015] 2 SCR 182. This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into "trial by expert" and that the trier of fact maintains the ability to critically assess the evidence: see *White Burgess*, at paras 17-18. The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.

[127] The Court in ***Bingley*** also observed that "[t]he boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized": para 17.

[128] Similarly, in ***White Burgess***, the Supreme Court explained the importance of the gatekeeper role at paras 12 and 16:

> … we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D.D.* at para. 16: *R.D.D.,* 2000 SCC 43 (CanLII), 2 S.C.R. 275, at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, flawed, forensic scientific opinion has played a prominent role in miscarriages of justice": para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.,* at para. 106; see the Right Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007)
>
> …
>
> ...The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

[129] The expert evidence analysis is divided into two stages. First, it must first meet the four ***Mohan*** factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. If it does, the Court then weighs the potential risks and benefits of admitting the evidence against the benefits: ***White Burgess*** at paras 23-24.

…

Appendix 2. Selected Rules of Court.

When something is relevant and material

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

(2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.

Obtaining records from others

5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if

(a) the record is under the control of that person,

(b) there is reason to believe that the record is relevant and material, and

(c) the person who has control of the record might be required to produce it at trial.

(2) The person requesting the record must pay the person producing the record an amount determined by the Court.

People who may be questioned

5.17(1) A party is entitled to ask the following persons questions under oath about relevant and material records and relevant and material information:

(a) each of the other parties who is adverse in interest;

(b) if the party adverse in interest is a corporation,

(i) one or more officers or former officers of the corporation who have or appear to have relevant and material information that was acquired because they are or were officers of the corporation, and

(ii) the corporate representative;

(c) if a litigation representative is appointed for a party,

(i) the litigation representative, and

(ii) with the Court's permission, the person on whose behalf the litigation representative is appointed if that person is competent to give evidence;

(d) one or more other persons who are or were employees of the party adverse in interest who have or appear to have relevant and material information that was acquired because of the employment;

(e) an auditor or former auditor engaged by a party adverse in interest, but not an auditor or former auditor engaged solely for the purpose of the action;

(f) if a partnership is a party adverse in interest, a partner or former partner of the partnership;

(g) in an action with respect to a negotiable instrument or chose in action,

(i) an assignor of the negotiable instrument or chose in action,

(ii) a prior endorser, drawer, holder or maker of the negotiable instrument, and

(iii) an employee or former employee of an assignor of the negotiable instrument or chose in action, and if the assignor is a corporation, an officer or former officer of the corporation.

(2) If a questioning party questions more than one person of a party adverse in interest under subrule (1) and the person questioned is

(a) an officer or former officer of a corporation described in subrule (1)(b)(i),

(b) an employee or former employee of the party adverse in interest described in subrule (1)(d),

(c) an auditor or former auditor described in subrule (1)(e),

(d) a partner or former partner of a partnership referred to in subrule (1)(f), or

(e) an employee, former employee, officer or former officer described in subrule (1)(g)(iii), other than a corporate representative,

the costs of questioning the second and subsequent persons are to be paid by the questioning party unless

(f) the parties otherwise agree, or

(g) the Court otherwise orders.

(3) This rule applies whether the person to be questioned is within or outside the Court's jurisdiction.

Persons providing services to corporation

5.18(1) Subject to subrules (2) and (3), if

(a) a party cannot obtain relevant and material information from an officer or employee or a former officer or former employee of a corporation that is a party adverse in interest,

(b) it would be unfair to require the party seeking the information to proceed to trial without having the opportunity to ask questions about the information sought, and

(c) the questioning will not cause undue hardship, expense or delay to, or unfairness to, any other party or to the person to be questioned,

the party may question, under oath, a person who has provided services for the corporation and who can provide the best evidence on the issue.

(2) A person described in subrule (1) may be questioned only

(a) by written agreement of the parties, or

(b) with the Court's permission.

(3) An expert engaged by a party for the purposes of the action may not be questioned under this rule.

(4) Evidence from a person questioned under this rule is to be treated as if it were evidence of an employee of the corporation.

(5) The costs related to questioning a person under this rule are to be borne by the questioning party unless

(a) the parties otherwise agree, or

(b) the Court otherwise orders.

Limit or cancellation of questioning

5.19 On application, the Court may do either or both of the following:

(a) limit the number of persons subject to questioning by a party;

(b) cancel an appointment for questioning that the Court considers unnecessary, improper or vexatious.

Acknowledgment of corporate witness's evidence

5.29(1) The evidence given by a corporate witness during questioning may not be read in as evidence at trial unless a corporate representative of the corporation, under oath, acknowledges that the evidence forms some of the information of the corporation.

(2) Subject to subrule (3), the corporate representative may refuse to acknowledge some or all of the evidence of the corporate witness and, if so, must state why, but is not entitled to refuse to acknowledge the corporate witness's information just because the corporate representative disbelieves or disagrees with it.

(3) If the corporate representative disbelieves or disagrees with some or all of the evidence of a corporate witness, the corporate representative

(a) must acknowledge the evidence as information of the corporation unless it is inadmissible under the laws of evidence, and

(b) may then qualify the acknowledgment with further evidence that is contrary to or inconsistent with the corporate witness's evidence if the further evidence is based on either or both of the following:

(i) the corporate representative's personal knowledge;

(ii) a record prepared by the corporate representative or provided to the corporate representative by a person having personal knowledge of the issue in question.

Questioning witness before hearing

6.8 A person may be questioned under oath as a witness for the purpose of obtaining a transcript of that person's evidence for use at the hearing of the application, and

(a) *rules 6.16* to *6.20* apply for the purposes of this rule, and

(b) the transcript of the questioning must be filed by the questioning party.

Form of questioning and transcript

6.20(1) A person questioned on an affidavit under this Part or a person questioned as a witness for the purpose of obtaining a transcript under this Part for use at a hearing may also be questioned by any other party, and the person questioned may then be questioned again by the questioning party on that person's answers to the questions of other parties.

(2) Questioning and questioning again under this rule by parties adverse in interest may take the form of cross-examination.

(3) The questions and answers must be recorded word for word by a person qualified to do so

(a) by a method that is capable of producing a written transcript, and

(b) in a manner agreed on by the parties or directed by the Court.

(4) The person recording the oral questioning must

(a) keep in safe custody the recorded questioning,

(b) if required to do so, honestly and accurately transcribe the recorded questioning and deliver a copy of the transcript, as required, and

(c) on or attached to any transcript

(i) state the person's name,

(ii) specify the date and place where the questioning occurred, and

(iii) certify the transcript, or the portion of the questioning transcribed, as complete and accurate.

(5) The questioning party must

(a) make necessary arrangements for the questioning to be recorded, and

(b) file the transcript unless the Court otherwise orders.

(6) A person is qualified to record and transcribe oral questioning under this Part if the person is

(a) an official court reporter,

(b) a person appointed by the Court as an examiner under the *Alberta Rules of Court* (AR 390/68), or

(c) a shorthand writer, sworn to record the questioning word for word and to impartially fulfil the duties imposed by subrule (4), who

(i) is an agent or employee of an official court reporter, or

(ii) has been approved by the parties.

Division 2
Preserving Evidence and Obtaining Evidence Outside Alberta

Preserving evidence for future use

6.21(1) The Court may order that a person be questioned, under oath,

(a) for the purpose of preserving evidence, or

(b) for any other purpose satisfactory to the Court.

(2) An order may be made under subrule (1)(a)

(a) if the person to be questioned is or might be unable to give evidence before the Court because of accident, ill health or disability, or if there is the likelihood that the person might die before being required to give evidence,

(b) if the person to be questioned is within the Court's jurisdiction when the application is filed, but will be or might be beyond the Court's jurisdiction when the person is required to give evidence,

(c) if, considering the evidence to be given, the expense and inconvenience of bringing the person to give evidence is not warranted, or

(d) for any other purpose the Court considers appropriate.

Obtaining evidence outside Alberta

6.22(1) On application, the Court may order the evidence of a person to be taken outside Alberta for the purpose of one or more of the following:

(a) questioning under *rule 5.17*;

(b) an application;

(c) an originating application;

(d) trial;

(e) any other purpose that the Court considers appropriate.

(2) In making its decision on the application, the Court must consider

(a) the convenience of the person to be questioned,

(b) whether the person is or might be unable to give evidence before the Court because of accident, ill health or disability, or if there is the likelihood that the person might die before giving evidence,

(c) whether the person might be beyond the jurisdiction of the Court when the person is required to give evidence,

(d) regarding the evidence to be given, and the expense and inconvenience of bringing the person to give evidence,

(e) whether the witness should give evidence in person, and

(f) any other sufficient reason for granting or refusing the application.

(3) The Court may determine

(a) the date, time and place of the questioning,

(b) the minimum notice to be given to the person to be questioned of the date, time and place of the questioning,

(c) the person before whom the questioning is to be conducted,

(d) the amount of the allowance to be paid to the person to be questioned, and

(e) any other matter that needs to be resolved about the questioning.

(4) An order under this rule must be in Form 31, filed and served, and may

(a) authorize the taking of evidence before a named person,

(b) give instructions to the person named to take evidence and to have a transcript of the evidence prepared,

(c) order the production of records applicable to the questioning, and

(d) authorize a letter of request in Form 30 to be sent to the judicial authority of the jurisdiction in which the person to be questioned is located, requesting the necessary order or document to be issued to require the person to be questioned to attend before the person authorized to take evidence and, if necessary, to produce records.

Types of affidavit

13.18(1) An affidavit may be sworn

(a) on the basis of personal knowledge, or

(b) on the basis of information known to the person swearing the affidavit and that person's belief.

(2) If an affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit.

(3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

Requirements for affidavits

13.19(1) In addition to complying with *rule 13.13*, an affidavit under these rules must comply with all of the following:

(a) be in Form 49,

(b) state, on the front page, the full name of the person swearing the affidavit and the date the affidavit was sworn,

(c) state the place of residence of the person swearing the affidavit,

(d) be written in the first person,

(e) be divided into consecutively numbered paragraphs, with dates and numbers expressed in numerals unless words or a combination of words and numerals makes the meaning clearer,

(f) be signed or acknowledged and sworn before a person empowered to administer oaths, whether that person prepared the affidavit or not,

(g) contain a statement of when, where and before whom the affidavit was sworn, and

(h) be signed by the person administering the oath.

(2) An affidavit is not invalid or otherwise improper just because it was sworn before a commencement document was filed.

Video recordings in place of transcripts

13.31 If the parties agree or the Court orders that a video recording be made instead of a transcript, the person operating the video recording device that records the questioning must give a certificate containing the following:

(a) the name and address of the person giving the certificate,

(b) the date, time and place of the video recording,

(c) the names of the persons questioned and the persons doing the questioning,

(d) whether the video recording is of the entire questioning or only a portion of it, and

(e) any other information required by the Court.