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CANADIAN PROCEDURAL LAW IN AVIATION LITIGATION

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INTRODUCTION

PROBLEMS arise in the adjudication of aviation matters in Canada which were not contemplated in 1867 when the British North American Act,¹ Canada's constitution, was passed by the Imperial Parliament in England to allocate power and jurisdiction between the provincial and federal governments. Aviation was not anticipated in the Act; thus, there is no specific reference to civil aviation in the description of the legislative powers allocated to either the provinces or the federal government. In this respect, the British North American Act is not singular; the United States Constitution suffers from the same omission.

In 1919, the Dominion Government, confident that the British North America Act had granted it the authority to legislate with respect to civil aviation, enacted the Air Board Act.² The legislative competence of the Dominion Parliament was challenged by the Province of Quebec, and this challenge led to a reference to the Supreme Court of Canada for an opinion. The principle holding of the decision rendered by the Supreme Court was that the Air Board Act and the regulations promulgated thereunder were probably *ultra vires*.³ The Court noted that legislative com-

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¹ The British North America Act, 1867, 30 & 31 Vict., c. 3 (Can.) (consolidated with amendments to 1970).

² The Air Board Act, CAN. STAT. 1919 (1st Sess.) c. 11.

³ Reference re Regulation and Control of Aeronautics [1930] Can. S. Ct. 663; [1931] 1 D.L.R. 13.

petence over civil aviation was divided, with no precise boundary, between federal and provincial power. This decision obviously would have had inconvenient results if it had become law, but an appeal was taken by the Privy Council in England. In *Re Regulation and Control of Aeronautics in Canada*⁴ the Privy Council reversed the decision of the Supreme Court. The Privy Council favored the Central Government's exercising its "almost sovereign power" so that uniformity of legislation might be secured in areas such as aeronautics. These areas had "attained such dimensions as to affect the body politic of the Dominion."⁵ The Privy Council's conception of the field of aeronautics included safety and operation of aircraft and aerodromes, licensing of personnel, economic supervision of commercial air operations, intra-provincial aviation, and a related area of the private law of salvage.

The next milestone case was *Johannesson v. Rural Municipality of West St. Paul*,⁶ in which the Supreme Court of Canada held that the Parliament of Canada had exclusive power to legislate with respect to aeronautics because aeronautics had become a matter of national concern affecting the body politic of the Dominion. The effect of the *Johannesson* decision was to give the federal government jurisdiction over aeronautics based upon the residuary clause of section 91 of the British North America Act. Furthermore, the decision accepted the concept of aeronautics as defined by the Privy Council in the *Aeronautics* case, thus giving jurisdiction in areas that would normally lie within the provincial fields of property and civil rights. It is now firmly established that the Dominion Parliament has exclusive legislative competence in relation to civil aviation, based upon the federal government's general power. *Johannesson* was cited with approval in *Munro v. The National Capital Commission*,⁷ and was simply accepted as one decision illustrating the scope of the general power in *Reference Re The Anti-Inflation Act*.⁸

Notwithstanding its inchoate nature, due in part to its source,

⁴ [1932] A.C. 54, [1932] 1 D.L.R. 58.

⁵ *Id.* at 77.

⁶ [1952] 1 Can. St. Ct. 292, decided after appeals to the Privy Council were abolished.

⁷ [1966] 56 D.L.R. (2d) 753.

⁸ [1976] 68 D.L.R. (3d) 452.

legislative power in the area of aeronautics is equivalent to and has the qualities of every other enumerated power over discrete subject matter found in the British North America Act. Like other discrete powers, authority over aeronautics is given the broad construction necessary to effectuate its objectives. In particular, the federal government's exercise of jurisdiction may enter fields that would otherwise be within provincial competence or necessarily incidental thereto.⁹

The duty and power to control all aspects of aeronautics in Canada is vested in the Minister of Transport pursuant to the provisions of the Aeronautics Act.¹⁰ The duties of the Minister in this regard are stated in sections 3(a) and (1) of the Act:

It is the duty of the Minister

(a) to supervise all matters connected with aeronautics;

(1) to consider, draft and prepare for approval by the Governor in Council such regulations as may be considered necessary for the control or operation of aeronautics in Canada, including the territorial sea of Canada and all waters on the landward side thereof, and for the control or operation of aircraft registered in Canada wherever such aircraft may be.

Subject to the approval of the Governor in Council, section 6 of the Aeronautics Act and the sections which follow it vest power in the Minister to make regulations to control and regulate air navigation over Canada and the operation of Canadian registered aircraft. The Minister is also given power to make regulations with respect to the registration, identification, inspection, certification and licensing of all aircraft and aerodromes, the conditions under which aircraft may be used or operated, and the ability to en-

⁹ Questions have been raised concerning the constitutional validity of the Carriage by Air Act, CAN. REV. STAT. 1970, c. C-14, which gives effect to the Warsaw Convention in Canada. Although the Act may rest upon the general power in relation to the implementation of treaties, the Superior Court of Quebec in *Marier v. Air Canada* [1976] Que. C.S. 847, held that a portion of the Second Schedule is *ultra vires* of the Federal Parliament insofar as the attempt to limit the liability of the carrier restricts rights accruing to the individual and encroaches on the matters involving property and civil rights vested in the province. The case is presently under appeal. See also *Bensol Customs Brokers Ltd. v. Air Canada*, [1979] 2 F.C. 575, reversing T-2278-77 May 26, 1978, and *Sivaco Wire & Nail Co. v. Atlantic Lines & Navigation Co. Inc.* [1978] 2 F.C. 720, *aff'd* (Can. S. Ct.), *Tropwood, A.G. v. Sivaco Wire & Nail Nail Co.*, March 6, 1979).

¹⁰ CAN. REV. STAT., 1970, c. A-3.

ter upon the premises of any aircraft manufacturer for the purpose of determining the airworthiness of aircraft manufactured by that manufacturer. Finally, the Minister may investigate any accident involving aircraft, any alleged breach of any regulation, or any incident involving an aircraft that in the opinion of the Minister endangered the safety of persons.¹¹

JURISDICTION: CANADIAN FEDERAL VERSUS CANADIAN SUPERIOR COURTS

On March 25th, 1970, during the House of Commons debate on a bill which was later enacted as the Federal Court Act,¹² Minister of Justice John Turner described several areas of jurisdiction under the bill in which the new Trial Division of the Federal Court would exercise concurrent jurisdiction with the provincial courts. With particular reference to aeronautics and other undertakings extending beyond the limits of the province, he stated:

A member of the public will have resort to a national Court exercising a national jurisdiction when enforcing a claim involving matters which frequently involve national elements.

In this way, it will be possible for litigants who may often live in widely different parts of the country to find a common and convenient forum in which to enforce their legal rights. Consider what might happen after an unfortunate tragedy in connection with an aircraft. The passengers may reside in various provinces. Instead of being obliged to institute cases in the provinces which may have particular jurisdiction, all the claimants will be able to decide on a common forum; thus eliminating a duplication of effort, and obtain one judgment.

I should mention also that the bill will give the Trial Division of the Federal Court jurisdiction in relation to persons and claims beyond provincial boundaries.¹³

It is unfortunate that this vision of an administrative framework to handle the adjudication of aviation matters has not come to pass in the way the Minister intended. The jurisdictional problems encountered when attempting to commence or defend an aviation action in either the Federal Court or the provincial

¹¹ *Id.* at c. 6(0).

¹² Federal Court Act, 1 CAN. STAT., 1970, c. 1.

¹³ 5 PARL. DEB. H.C. 5473 (1970).

Superior Courts in Canada must, therefore, be considered.¹⁴

The Federal Court, formerly the Exchequer Court, was created by the Federal Court Act,¹⁵ pursuant to section 101 of the British North America Act which confers on the Parliament of Canada authority to establish additional courts for the better administration of the laws of Canada. Section 3 of the Federal Court Act states that the Federal Court of Canada is a Court of law, equity and admiralty, and that it is a Superior Court of Record having civil and criminal jurisdiction.

The Court is divided into two divisions: the Federal Court Appeal Division and the Federal Court Trial Division. Generally, claims against the Federal Government are brought in the Federal Court. In some actions which are within the jurisdiction of the Provincial Courts, i.e., actions in which relief is sought against the Crown with respect to aeronautics and to works or undertakings connecting or extending beyond the limits of a province, the Federal Court Act grants concurrent jurisdiction to the Trial Division.¹⁶ The Court also has jurisdiction in any case in which a remedy is sought under a federal law or where no other court in Canada has jurisdiction.¹⁷ Except where otherwise provided, this jurisdiction is "exclusive" jurisdiction, i.e., except where otherwise provided, the Trial Division is the only court that has jurisdiction to entertain claims against the government of Canada in the first instance.

It is worth emphasizing that the Superior Courts of a province

¹⁴ See discussion regarding the accident at Cranbrook British Columbia, February 11, 1978, involving Pacific Western Airlines, at notes 26-27 *infra*, and accompanying text.

¹⁵ 1 CAN. REV. STAT. 1970, c. 1.

¹⁶ *Id.* Section 23 of the Federal Court Act reads as follows:

Section 23. Bills of exchange and promissory notes, aeronautics and interprovincial works and undertakings

The Trial Division has concurrent original jurisdiction as well between subject and subject as otherwise, in all cases in which a claim for relief is made or a remedy is sought under an Act of the Parliament of Canada or otherwise in relation to any matter coming within any following class of subjects, namely bills of exchange and promissory notes where the Crown is a party to the proceedings, aeronautics, and works and undertakings connecting a province with any other province or extending beyond the limits of a province, except to the extent that jurisdiction has been otherwise specially assigned.

¹⁷ *Id.*

have jurisdiction to interpret and apply federal statutes as well as provincial statutes and common law, unlike state courts in the United States. The Superior Courts are the Courts of Record existing in each province. These Superior Courts are referred to as "Provincial Courts." The Supreme Court of Canada has original jurisdiction to determine questions posed in "references" by the federal government.

In the past four years, the Federal Court jurisdiction has been dramatically modified by decisions of the Supreme Court of Canada. The purpose for which the Federal Court should exist is the better administration of the laws of Canada. This idea suggests that the existence of the Federal Court can only be justified if, and to the extent that, an improvement is achieved in the administration of the laws of Canada beyond that which could be realized by the operation of the Superior Courts of the provinces.¹⁸ The most dramatic extension of the Federal Court's jurisdiction occurred in the area of concurrent jurisdiction in relation to aeronautics and in relation to works and undertakings extended beyond the limits of a province.

Unfortunately, the permissible jurisdiction of the Federal Court is not coextensive with the legislative competence of Parliament under section 92 of the British North America Act.¹⁹ The mere fact that Parliament has the power to legislate in a given area does not *per se* justify the exercise of jurisdiction in that area by a court created under section 101 of the British North America Act. The conferring of jurisdiction by the general words of section 23 of the Federal Court Act also necessarily fails to achieve

¹⁸ *McNamara Constr. (Western) Ltd. v. The Queen*, [1977] 75 D.L.R. (3d) 273.

In a recent article written by P.S.A. Lamek, Q.C., entitled *Jurisdiction of the Federal Courts v. The Superior Courts*, L.S.U.C. Special Lectures, 1978, "The Constitution and the Future of Canada," Richard De Boco Limited, 1978, the author stated as follows:

Again the permissible purpose for which the Federal Court can exist is the *better* administration of the laws of Canada—which suggests that the existence of the Federal Court can only be justified if—and only to the extent that—an improvement is achieved in the administration of the laws of Canada beyond that which could be realized by the operation of the Superior Courts of the provinces.

¹⁹ *Attorney General for Ontario v. Attorney General for Canada*, [1940] Can. S. Ct. 49 [1947] A.C. 127 at 151 (J.C.P.C.).

this result.²⁰ The cause of action which the Crown (person) seeks to assert in the Federal Court must itself be in the jurisdiction of that Court, falling within and arising from valid and existing federal legislation. The Supreme Court of Canada recently re-affirmed this principle in respect to paragraph 17(4)(a) of the Federal Court Act in the *McNamara* case.²¹ The apparently broad concurrent jurisdiction conferred by section 23²² has been similarly restricted.

The leading case on section 23 jurisdiction is *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*²³ In that case, the plaintiff claimed damages for the defendant's breach of contract in failing to build a rail car marine terminal at Baie Comeau in Quebec from which the plaintiff's newsprint was to be shipped to various points in the United States. The contract was expressly governed by the law of Quebec, but the action was brought in the Federal Court Trial Division. The defendant challenged the jurisdiction of the Federal Court, saying that the action should have been instituted in the Superior Court of the Province of Quebec. The Trial Division, whose decision was upheld by the Federal Court of Appeal, held that the action was properly brought in the Federal Court which had concurrent jurisdiction under section 23. The defendant's jurisdictional argument was successful on appeal to the Supreme Court of Canada.²⁴ This position has now been summed up by His Lordship Judge Dube in *Dome Petroleum Ltd. v. Hunt* as follows:

It is now being clearly established from two recent Supreme Court of Canada decisions that a pre-requisite to the exercise of jurisdiction by the Federal Court is that there be existing and applicable federal law which can be invoked to support any proceedings before it. It is not sufficient that there be federal jurisdiction, there must be an act of Parliament on which to base the action. The Federal Court cannot grant relief in contract, even if the enterprise contemplated by the agreement falls within federal jurisdiction, un-

²⁰ Consolidated Distilleries Limited v. The King, [1932] 419; [1933] A.C. 508 at 521 (J.C.P.C.).

²¹ See note 18 *supra*.

²² For text of section 23, see note 16 *supra*.

²³ [1977] 71 D.L.R. (3d) 111.

²⁴ *Id.*

less there is a specific Federal Act under which the relief sought may be claimed.²⁵

The most recent case on the issue of Federal Court jurisdiction over aviation matters arose out of the Pacific Western Airlines accident at Cranbrook, British Columbia, in 1978.²⁶ The airline sought to bring an action for recovery of its hull loss in the Federal Court Trial Division against the Crown, as employers of air traffic controllers, various aircraft and component manufacturers, and the City of Cranbrook and its various employees. All the defendants, except the Crown, were successful in challenging the jurisdiction and removing the action from the Federal Court on the ground that the actions were not based on existing federal law. The Court rejected the arguments that the Federal Court Act, the Aeronautics Act and Regulations, and the Bilateral Treaty between Canada and the United States, were "existing federal laws" on which the actions could be founded. As a result, the carrier was obliged to bring separate actions against all the above-mentioned defendants, excluding the Crown, in the Superior Court of the Province of British Columbia. Thus a situation arises where any plaintiff pursuing an aviation claim involving the Crown or its servants and employees as prospective defendants must split the case and commence separate actions; one in the Federal Court Trial Division, the other in the Superior Court of the province. This result increases the cost of the litigation and gives rise to a myriad of problems, the least of which may be inconsistent results.²⁷

An apparent inconsistency exists where accidents or incidents involve international carriage by air as defined in the Carriage by Air Act.²⁸ Recent decisions in the Supreme Court of Canada, that

²⁵ (T-1105-77, April 29, 1977).

²⁶ *Pacific Western Airlines Ltd. v. Her Majesty the Queen in Right of Canada*, (A-285-79 August 10, 1979, F.C.A.) (*affirming* T-3972-78 Collier J.).

²⁷ See Reasons for Judgment of Collier J., in the Trial Division, T3972-78. *Id.* at 18, whereas it was stated:

That conclusion creates an undesirable situation. The plaintiffs, if they wish to continue against all defendants, must pursue their remedy in more than one court. Multiplication of proceedings raises the spectre of different results in different courts The situation is lamentable. There are probably many other persons who have claims arising out of this air disaster. The jurisdictional perils must be, to all those potential litigants, mystifying and frightening. *Id.* at 18.

²⁸ Carriage by Air Act, CAN. REV. STAT. 1970, c. C-14.

such matters are technically between "subject and subject,"²⁹ and in the Federal Court of Appeal, have held that these actions are properly brought against the carrier in the Federal Court. Conflicts, therefore, exist with respect to accidents involving both domestic and international air travelers, a result not anticipated by the drafters of the Federal Court Act. Actions involving aviation matters may end up in fragmented attacks in two court systems with the possibility that differing results will be achieved. This situation does not appear likely to change in the near future given the attitude of the Federal Court of Appeal.³⁰ Thus, the wide concurrent jurisdiction in actions by the Crown and private citizens in matters involving aeronautics has a considerably more restricted ambit than is apparent from the words of sections 17(4)(a) and 23 of the Federal Court Act.

THE PRIMARY SOURCES OF EVIDENCE IN AVIATION CASES

1. *The Coroner's Inquest*

The Office of the Coroner is one of the oldest institutions known to our legal system and is said to rank in antiquity only behind the monarch and the sheriff. Every province in Canada has some type of a modified coroner's system, the prime objectives of which have been to establish the identity of the deceased and determine how, when, where, and by what means the deceased came to his death.³¹ Virtually every province has a different approach and a different system. Many have developed medical examiner systems, in which a pathologist is in charge and the post mortem examination is paramount. In many jurisdictions the coroners come from all walks of life and may be sheriffs or funeral directors. As a result, the investigations and results vary in quality and consistency.

²⁹ See *Bensol Custom Brokers Ltd. v. Air Canada*, A-264-78, March 19, 1979 FCA, reversing T-2278-77, March 26, 1978; *Tropwood, A. G. v. Sivaco Wire & Nail Co.*, March 6, 1979.

³⁰ *Pacific Western Airlines Ltd. v. Her Majesty The Queen in Right of Canada*, (A-285-79 Aug. 10, 1979, F.C.A.) at 4:

There does not exist any federal law governing the liability of their respondents in this case. That situation is not changed by the fact that Parliament might have legislated in that field or that the problems raised by the action may be related in some way to some existing federal law.

³¹ The Coroner's Act, ONT. REV. STAT. 1970, c. 87, § 25(1).

Three provinces are reorganizing their systems using the Ontario Coroner's Act³² as a model. In the Province of Quebec, coroner's inquests are still used to establish criminal liability and to determine if there is enough evidence to lay criminal charges. Newfoundland, Manitoba, and now Alberta have different types of medical examiner's systems. Nova Scotia has a Chief Coroner in every county. New Brunswick's coroner's system is under the control of the Sheriff's Office, and all the sheriffs are appointed as coroners. Saskatchewan and British Columbia have coroner's systems which are composed of medical, legal and lay investigators.

There is growing conflict between the coroner's offices and the Ministry of Transport Aircraft Accident Investigation Division as to the role or authority of each in aircraft accident investigations. The Aeronautics Act³³ vests in the Minister of Transport the authority to make regulations with respect to the investigation of any accident or incident involving an aircraft and to convene a board of inquiry to investigate the circumstances of the accident where, in the opinion of the Minister, the safety of persons was endangered. The regulations passed pursuant to the Act authorize accident investigators to enter the accident site regardless of whether it is located on private or public property and to control the access of all persons to the site. Thereafter, the scope of the authority delegated to the investigators is broad and varied, including the power to examine, preserve, remove and test any part of the wreckage or its contents; to require the performance of autopsies on flight crew members and passengers; to enter the premises of the owner, manufacturer, repairer or operator and to inspect the premises and take possession of any equipment, stock or records that will assist the investigator; and, finally, to take statements and hear and receive evidence from any person.

By section 92(14) of the British North America Act, the "administration of justice in the province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction," is made part of the exclusive legislative authority of the legislatures of the provinces. It is well established that at common law a Coroner's Court is a criminal court of

³² *Id.*

³³ Aeronautics Act, CAN. REV. STAT. 1970, c. A-3, §§ 6(1)(o), 8(1).

record.³⁴ It has been held, therefore, that the "constitution" of the Coroner's Court is a matter of provincial control, and its practice and "procedure" are matters for federal control.³⁵ The new Coroner's Act in Ontario³⁶ attempts to reestablish the Coroner's Court as a "Provincial Court," thereby bringing matters of practice and procedure within the domain of the Act. The constitutionality of this maneuver is still in doubt.³⁷

The complex coroner's system in Canada can best be explained by reference to the province where the conflict is most apparent. In Ontario, the coroner comes under the Public Safety Division of the Ministry of the Solicitor General. The coroner's office is the hub of medical legal investigations, and the coroner is responsible for final determination of cause of death. Once a coroner has claimed jurisdiction, no one may interfere with his discretion or direction. His authority includes the right to order an autopsy and to direct police forces to investigate all other aspects of the circumstances surrounding the death. In the interests of the welfare and the safety of the community, the coroner has the responsibility not only to ascertain the mode and manner of death, but also to alert and inform the community of dangers.

The coroner may inspect and extract information from any records or writings relating to the deceased or his circumstances and may seize anything which he has reasonable grounds to believe is material to the purposes of his investigation.³⁸ The coroner may also authorize a legally qualified medical practitioner or police officer to exercise all or any of his powers. No person shall knowingly hinder, obstruct or interfere with or attempt to hinder, obstruct

³⁴ *Wolfe v. Robinson*, [1961] Ont. R. 250, *aff'd*, [1962] Ont. R. 132 (C.A.).

³⁵ *Id.*

³⁶ See The Coroner's Act, ONT. REV. STAT. 1970, c. 87, § 25(1).

³⁷ See *Wolfe v. Robinson*, [1961] Ont. R. 250, *aff'd*, [1962] Ont. R. 132 (C.A.); *Re Wilson, Whitelaw v. McDonald* (1968), 66 W.W.R. 552 (B.C. Ct. App.). See also ONTARIO LAW REFORM COMM. REP. ON THE CORONER SYSTEM IN ONTARIO (1971).

³⁸ See The Coroner's Act, B.C. REV. STAT. 1975 c. 15, § 13(1).

13. (1) Where a person has met death by violence in the wreck of a building, bridge, structure, embankment, aeroplane, motor-vehicle, boat, machine, or apparatus, the coroner may take charge of all wreckage and place peace officers in charge of it so as to prevent disturbance of the wreckage until the coroner has made such examination as he considers necessary.

or interfere with, or furnish with false information or refuse or neglect to furnish information to the coroner in the performance of his duties.³⁹ The legislation clearly permits coroners to impound and inspect the wreckage of crashed aircraft. The potential for a conflict between the coroner's office and the federal aircraft accident investigators is obvious, and a serious challenge may be taken up by either side at any time.

The coroner has the right and power to order an inquest and to choose its time and place. No other Canadian court truly resembles an inquest. It is a provincial forum of public inquiry into death, not a trial. The procedure is inquisitorial, rather than accusatorial, and the investigating coroner is the presiding officer. The coroner may designate, either before or during an inquest, certain people as persons "with-standing" if he finds that they are substantially and directly interested in the issues.⁴⁰ Designation as a person with-standing permits representation by counsel or agent, and includes the right to call and examine witnesses, present arguments, and conduct cross-examination of witnesses. A person with-standing has no power to summon witnesses, however, nor is there any provision in the Act enabling him to force the coroner to do so.

The function of the crown attorney at a coroner's inquest has three separate and distinct phases, the first of which is his role as a special interrogator. It is his duty to develop the evidence sufficiently and to eliminate irrelevant details. Second, the crown attorney is counsel to the coroner on points of law and procedure. Third, and perhaps most importantly, the crown attorney directs and controls the evidence. If he is continually mindful of this function, he can emphasize the purpose of the inquiry and eliminate irrelevant details.

In general, the role of counsel representing the estates' survivors is to ascertain the parties to any potential civil suit and to persuade the coroner to require full disclosure of the facts surrounding the crash. In an aircraft accident case, counsel attempts to identify the manufacturers and their relationships, including any contracts and indemnity arrangements between them.

³⁹ The Coroner's Act, ONT. REV. STAT. 1970, c. 87, §§ 14(6), 46.

⁴⁰ *Id.* at § 33(1)-(2).

The inquest provides potentially adverse parties with the first opportunity to elicit factual information. Statements made under oath at a coroner's inquest cannot be used later at trial,⁴¹ but information obtained at such an inquest is often the basis for subsequent examination for discovery. Counsel must attempt to persuade the coroner to require the production of documents. Once produced and marked as exhibits, documents can be copied and obtained or purchased as part of the inquest record.

Of considerable importance to the inquest is the opportunity to cross-examine witnesses. The inquest procedure allows for casual proceedings; the rules of evidence are relaxed, but the coroner may exclude anything unduly repetitious or anything which he thinks does not meet "such standards of proof as are commonly relied on by reasonably prudent men in the conduct of their own affairs."⁴² Hearsay evidence is admissible and widely accepted.

2. *Obtaining Information Before Trial: Examination for Discovery*

A. *The Common Law Provinces And The Province Of Quebec*

The common law system is applied in all the provinces of Canada with the exception of Quebec, where the law is based on the civil law system. The foundation of the common law system is the theory of precedent. The approach has been different in the United States and Canada. The Supreme Court of the United States is apparently not required to follow its previous decisions when the result would be manifestly unjust. Similarly, the House of Lords in Great Britain has announced that it will no longer commit itself to follow its own decisions.⁴³ The Supreme Court of Canada, however, has not committed itself on this subject.⁴⁴

In the Province of Quebec, courts are not bound to follow previous decisions. The main source of civil and commercial law in the Province of Quebec is the Civil Code, a unified code of legal principles set out in over 2,000 articles. This compilation of

⁴¹ *Id.* at § 34(1)-(2).

⁴² *Id.* at § 36.

⁴³ [1966] W.L.R. 1.

⁴⁴ See statement by Cartwright J., in *R. v. Binus*, [1968] 1 C.C.C., 227 at 229: "I do not doubt the power of the Court to depart from a previous judgment of its own. . . . It should be noted, however, that the Court did not override itself in this case."

Quebec law was patterned after the French Napoleonic Code of 1804. The Civil Code is bilingual, with the English generally being a translation of the French. In the Province of Quebec, the rules of procedure are "intended to render effective the substantive law and to ensure that it is carried out" and are contained in the Code of Civil Procedure.⁴⁵

B. Examination for Discovery in the Common Law Provinces⁴⁶

Although the right to pretrial discovery was recognized in Chancery, the common law prior to 1854 did not grant any such right to either evidence or documents. A lengthy, complex exchange of pleadings was aimed at narrowing the dispute to a single issue which, if one of fact, was then tried before a jury. As the common law developed, the pleadings tended to become formalized within a rigid framework of classes of action. The factual allegations were replaced by statements of conclusions of law and fact, sometimes fictitious, and seldom revealing much about the controversy. There were no legal means for a determination of the nature of the opponent's case, and surprise at the trial formed no valid objection.⁴⁷ Surprise was no answer even if prior knowledge would have permitted effective rebuttal. The prevailing argument against prior availability of such evidence was the fear that perjury might be elicited if a party knew beforehand the exact evidence with which he might have to contend.

Eventually, in 1854, a change was made in England enabling a party to obtain discovery before trial of documents in the possession or power of the opposite party and to submit written interrogatories to him "upon any matter as to which discovery might be sought."⁴⁸ A party was entitled to seek discovery of those facts supportive of his own case but, at least in theory, the party was not entitled to seek out those facts upon which his opponent de-

⁴⁵ Code of Civil Procedure of the Province of Quebec c. C-25 (1977).

⁴⁶ See generally C. CHOATE, *DISCOVERY IN CANADA* (1977); P. 1 Can. Arb. (2d); CANADIAN ENCYCLOPEDIA DIGEST (Ontario) "DISCOVERY" (3d Ed.); LAW SOCIETY OF UPPER CANADA, *CIVIL LITIGATION, PRE-TRIAL DISCOVERY* (1975); FRASER & HORN, *THE CONDUCT OF CIVIL LITIGATION IN BRITISH COLUMBIA* (1978).

⁴⁷ *Bain v. White Haven & Furness Junction R.Y.*, [1850] 3 PARL. DEB, H.L. at 1.

⁴⁸ Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125.

pended.⁴⁹ After the introduction of the Common Law Procedures Acts⁵⁰ and the Judicature Acts,⁵¹ it was no longer necessary to commence suit in the Court of Chancery for the purpose of obtaining discovery between the parties to an action. Any discovery that formerly could have been obtained in the Court of Chancery could now be obtained in the High Court: "The plaintiff in every action is entitled to discovery as ancillary to the relief which he claims in the action."⁵²

In Canada, the practice and procedure respecting discovery is governed by the legislation and rules of court of the provinces.⁵³ The various provincial rules differ considerably; therefore, the cases discussed herein must be read carefully in relation to the applicable rules of the province concerned. In the Federal Court, the practices of the Canadian provinces apply only in cases not otherwise provided for by the Federal Court rules.⁵⁴ In considering the case law on discovery, the remarks of Mr. Justice Gault might be noted:

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

⁴⁹ *Combe v. London*, [1840] 4 Y. & C. Ex. 139.

⁵⁰ Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

⁵¹ Judicature Act 1873.

⁵² *Ind. Coope & Co. v. Emmerson*, [1887] 12 App. Cas. 300, 311.

⁵³ British Columbia Court Rules of Practice Act, B.C. REV. STAT. 1960, c. 83; Supreme Court Rules, 1976, Rules 26-29; Alberta Judicature Act, ALTA. REV. STAT. 1970, c. 193; Rules of Court, Part 13, Rules 186-216; Saskatchewan Queen's Bench Act, SASK. REV. STAT. 1965, c. 73; Rules of Practice and Procedure, 1961, Order XXI, Rules 212-217; Manitoba Court of Queen's Bench, MAN. REV. STAT. 1970, c. 280; Queen's Bench Rules, 1939, Sec. 285-290; Ontario Judicature Act, ONT. REV. STAT. 1970, c. 228; Rules of Practice and Procedure, 1970 Reg. 545, Rules 326-346. Quebec Civil Code of Civil Procedure, 1965, QUE. REV. STAT. c. 80 Art. 397, New Brunswick Judicature Act, N.B. REV. STAT. 1973, c. J2 Rules of Court, 1972, Order 31 and 31(a); Nova Scotia Judicature Act, 1972, N. S. REV. STAT. c. 2; Civil Procedure Rules, 1972; Prince Edward Island Judicature Act, P.E.I. REV. STAT. 1974, c. J-3; Rules of Court 1954 Order 31; New Foundland Judicature Act, NFLD. REV. STAT. 1970, c. 187; Order XXVIII Yukon Territory Judicature Ordinance, YUK. REV. ORD. 1971 c. J-1, § 14; B.C. Rules, Northwest Territories Judicature Ordinance, N.W.T. REV. ORD. 1974, c. J-1, § 12; Alberta Rules.

⁵⁴ *LaFlamme v. The Queen*, [1954] Can. Exch. 49 (Can.).

which would not run counter to one or more decided cases. . . .⁵⁵

The purpose of discovery is to obtain information as to facts and to obtain admissions which may be used in evidence against the adverse party.⁵⁶ It is desirable for each party to an action to know, so far as it properly may be known, the exact position of the opponent and the precise nature of every document likely to strengthen or weaken that position. The entire scope of production and discovery in Ontario was examined by the Court of Appeal in *Perini Ltd. v. Parking Authority of Toronto*.⁵⁷ The Court held that the archaic limitations flowing from the Old Chancery practices had no justification under the Ontario rules. Discovery and production could be had against an adverse party of any facts touching upon the matters in question. There is no basis in Ontario for an interpretation of the Rules which entitles a party to refuse production of documents relating solely to his own case.⁵⁸ Thus, a party is entitled to obtain information concerning any relevant facts tending to establish the allegations in the pleadings, but the party is not entitled to obtain the evidence offered to prove those facts.⁵⁹

Any party to an action may be examined for discovery by any party adverse in interest. The adversity of interest must be disclosed by or be apparent from the pleadings, and the discovery will be limited to matters touching on the issues to be tried in the action as disclosed by the pleadings. If an issue is raised between co-defendants, they may be adverse in interest and consequently may have the right of discovery between themselves. Thus, a defendant claiming contribution and indemnity from a co-defendant whose interest is identical with or similar to that of the plaintiff is a party adverse in interest to his co-defendant.

All jurisdictions provide for the examination for discovery purposes of a "party" except Nova Scotia, which uses the words "any person," and Newfoundland, which, in providing for interrogatories, refers to "opposite parties." The Nova Scotia refer-

⁵⁵ Examination for Discovery, 10 Can. Bar. Rev. 224.

⁵⁶ *Bank of British Columbia v. Trapp*, [1900] 7 B.C. 354 (C.A.); *Nichols & Chepherd Co. v. Skedanuk*, [1912] 6 D.L.R. 115 (C.A.).

⁵⁷ [1975] 6 Ont. 2d 363 (O.C.A.).

⁵⁸ *Id.* at 372-73.

⁵⁹ *Brennan v. J. Posluns & Co.*, [1959] Ont. R. 22.

ence to "any person" rather than "any party" has been held to permit an expert hired by the defendant to be subject to discovery.⁶⁰ This discovery is limited, however, to facts patent to the senses; matters dealing with an expert's opinion are held to be privileged. In order to obtain the examination of a person who is not a party to the action, it must be shown that the party in whose name the action is brought or defended is not the real litigant and that the action is being prosecuted or defended for the benefit of this non-party. With respect to the various Fatal Accidents Acts,⁶¹ every person named in the Statement of Claim as one for whose benefit the action is brought is a "person for whose immediate benefit an action is prosecuted," and is, therefore, subject to examination if competent.⁶²

A third party who has been notified and joined in the action by a defendant, and who has appeared and obtained leave to defend, is entitled to examine the plaintiff in the same manner as the original defendant.⁶³ The plaintiff is also entitled to examine that third party⁶⁴ with respect to any defense raised by it.⁶⁵

It is improper to join a defendant for the purpose of obtaining discovery.⁶⁶ The Alberta rules, dealing with the extent to which discovery may be obtained from a person who is not a party to the action, limit this type of discovery to production of documents. It has been stated that a fair inference may be drawn from these rules, as well as other provincial rules, that there was no intention that a person not a party to the action should be made a party for the purposes of discovery.⁶⁷

A corporation is unable to speak for itself; thus, it may only be examined for discovery through its officers or servants. A corporation may be examined for discovery on the matters in question in the action and will be bound by any admissions in the same

⁶⁰ *Bestway Lath & Plastering Co. v. McDonald Const. Co.*, [1972] 31 D.L.R. (3d) 47.

⁶¹ Note in Ontario, Part V of The Family Law Reform Act, 1978.

⁶² *Sinclair v. Canadian Pacific Ry.*, [1953] 7 W.W.R. (n.s.) 577 (Man.).

⁶³ *MacAllister v. Rochester (Bishop)*, [1880] 5 C.P.D. 194; *Eden v. Weardale Iron & Coal Co.*, [1887] 34 Ch. 223.

⁶⁴ *Bradley v. Clarke*, [1883] 9 P.R. 410.

⁶⁵ *Wieshofer v. Esau*, [1963] 2 Ont. R. 66.

⁶⁶ *Langleys Ltd. v. Martin*, [1924] 25 Ont. W.N. 596.

⁶⁷ *Abel v. Stone*, [1968] 63 W.W.R. 420 (Alta.).

manner and to the same extent as any other person. This may be done without a court order being specially made for that purpose.⁶⁸ The examining party in an action involving a corporation has the right to select the officer or servant of the corporation to be examined.⁶⁹ If the officer selected does not have the required information, the examining party may apply for leave to examine another person, but it is within the discretion of the court to determine whether or not another officer or servant should be examined.⁷⁰ One should, therefore, first take pains to select the officer or servant most intimately acquainted with the facts of the case. The issue of who is an officer is a question of fact.⁷¹ In New Brunswick it has been held that an order for examination for discovery of an officer of a company should specify whether he is to be examined as an officer acting on behalf of the corporate party or whether he is to be examined as a person who has knowledge of the questions in issue.⁷² The purpose of including servants in the group of those who might be examined was to enable an opposing litigant to obtain information from a company employee who might not be an officer but whose dealing or conduct gave rise to the litigation.⁷³ An employee may be examined as to whatever knowledge he has. The examination is not restricted to the knowledge gained in any one capacity.⁷⁴

Ontario is the only province which does not permit the examination of a former officer or servant of a corporate party.⁷⁵ An officer or servant may only be examined in Ontario if at the time of the examination he is an officer or servant of the corporation.⁷⁶ There is no power under the rules to order the examination for discovery of a person who was an employee when the cause of action arose

⁶⁸ *Robinson v. McKenzie Bros. Ltd.*, [1909] 14 B.C. 220, 10 W.L.R. 375.

⁶⁹ *Trinity College v. Levinter*, [1923] 54 Ont. L.R. 290.

⁷⁰ *Dawson v. London St. Ry. Co.*, [1898] 18 P.R. 223 (C.A.).

⁷¹ *Orpen v. St. Anthony Gold Mines Ltd.*, [1926] 29 Ont. W.N. 475.

⁷² *Wade v. Northern Rentals Ltd.*, [1972] 6 N.B.2d 573.

⁷³ *Fisher v. Pain*, [1938] Ont. W.N. 74; *Orpen v. St. Anthony Gold Mines Ltd.*, [1926] 29 Ont. W.N. 475; *Hartford Accident & Indem. Co. v. George Mills & Co.*, [1939] Ont. W.N. 115.

⁷⁴ *Wallace Neon Ltd. v. Tilden Corp.*, [1964] 47 W.W.R. 61 (B.C. Ct. App.).

⁷⁵ See *Cantin v. News Publishing Co. of Toronto*, [1904] 8 Ont. L.R. 531.

⁷⁶ *Kearney v. Ocean Accident Guar. Co.*, [1942] Ont. W.N. 166; *Scott Transp. Ltd. v. Bondy*, [1973] 2 Ont. R. 159.

but is not one at the time of the examination.⁷⁷ The Manitoba practice would permit an order for the examination for discovery of a past officer.⁷⁸ The British Columbia rules also permit the examination of a past officer or servant by order.⁷⁹ The only past officer or servant that can be examined, however, is a past officer or servant of a corporation that is a party to the proceedings and who is a resident of the province.⁸⁰ It is noteworthy that the British Columbia rules now provide that the corporation shall disclose the name of a person who is knowledgeable concerning the matters in question.⁸¹ An officer should prepare himself by obtaining full knowledge of all relevant facts so that the examining party may be in as good a position as if contending with an individual.⁸² The plaintiffs are entitled to all the information the defendants have.

Under ordinary circumstances, fairness and convenience require that when one person is required to testify at the instance of another the examination should take place where the person examined resides. This requirement is provided in the rules of some provinces. Special circumstances can be recognized, however, for ordering the examination to be held elsewhere.⁸³ The rules provide for the examination of a party resident outside the jurisdiction. The examination is to be taken at such place and in such manner as may seem both just and convenient.⁸⁴ The rule is applicable to all parties. As no two cases are quite alike, no finding in any one case can be binding upon another, although every case may afford some aid and may throw light upon the questions involved. A non-resident defendant cannot be compelled to come within the jurisdiction for discovery.⁸⁵ Where a party residing out

⁷⁷ *Rae v. Wellesly Hosp. Corp.*, [1924] 25 Ont. W.N. 550.

⁷⁸ *Great West Wire Fence Co. v. Judson*, [1916] 10 W.W.R. 926 (Man.).

⁷⁹ *Fenchurch Export Corp. v. Sitka Spruce Lumber Co.*, [1946] 2 D.L.R. 139 (B.C. Ct. App.).

⁸⁰ *River Terminals Co. v. Ruby Gen. Ins. Co. Ltd.*, [1955] 15 W.W.R. 539 (B.C.).

⁸¹ BRITISH COLUMBIA RULES OF COURT 27(b).

⁸² *Clarkson v. Bank of Hamilton*, [1904] 9 Ont. L.R. 317.

⁸³ *Duell v. Oxford Knitting Co.*, [1918] 42 Ont. L.R. 408.

⁸⁴ *Sharpe v. Price*, [1945] Ont. W.N. 710.

⁸⁵ *Lefurgey v. Great West Land Co.*, [1906] 11 Ont. L.R. 617; *Caven v. C.P.R.*, [1924] 2 D.L.R. 1112 (Alta.).

of the jurisdiction is requested to come within the jurisdiction in order to be examined for discovery, the general practice is to require the examining party to pay money or expenses and the cost of transportation.⁸⁶

Generally, the rules provide that an examination may take place at any time:

- (a) After the delivery of the Statement of Defence, or the time therefor has expired; or
- (b) After default of appearance; or
- (c) After pleadings have been noted closed; or
- (d) Of a party to an issue after the issue has been filed; or
- (e) In support of a motion, even if the foregoing times have not been arrived at.⁸⁷

In procuring attendance at the examination, each jurisdiction varies in its requirements of service; thus, the particular provincial rule must be consulted. Generally, a copy of the appointment and a subpoena, together with the proper fee, should be served on the person to be examined forty-eight hours beforehand; at the same time, a copy of the appointment should be served on the party's solicitor. Personal service on the party to be examined can be avoided in some jurisdictions by personal service on the solicitor.

The rules governing the imposition of penalties are tripartite, in that they generally provide for penalties against one who: 1) refuses or neglects to attend; 2) refuses to be sworn, or; 3) refuses to answer any proper questions put to him. If a plaintiff fails to attend an examination for discovery, his action may be dismissed, and if a defendant fails to attend, his defense may be stricken. There is a great difference between the two, for if the plaintiff's action is dismissed he can, in certain cases by paying costs, begin another action. If a defense is stricken, however, there is no relief save appeal. Thus, the penalty of striking a defense is only to be exercised in the last resort where the failure to attend is clearly without sufficient cause.⁸⁸

The scope of an examination cannot be determined in advance.⁸⁹

⁸⁶ *Spring v. Dunkelman*, [1954] Ont. W.N. 581; *Groner v. Lake Ont. Portland Cement Co.*, [1958] Ont. W.N. 469.

⁸⁷ *McClennaghan v. Buchanan*, [1859] 7 Upper Canada Chancery Grant 92.

⁸⁸ *Ontario Bank v. Sutherland*, [1886] 3 Man. L.R. 261 (C.A.).

⁸⁹ *Zubrzycki v. Zubrzycki*, [1949] Ont. W.N. 748.

Simply stated, discovery must be relevant to the issues as they are reflected in the pleadings, construed with some latitude. The examination must "touch the matters in question"⁹⁰ in the action as raised in the pleadings and particulars. The words "touching the matters in question" and "relating to" permit more latitude in discovery than is permitted by the rules of evidence at trial. The evidentiary rules use "material" and "relevant" which are narrower in scope than the language within the discovery rules.⁹¹ On the question of relevancy, the Ontario Court of Appeals stated as follows:

Though many questions may be put and many answers elicited for purposes of discovery which would not be permitted at trial and everything is relevant upon discovery which may directly or indirectly aid the party seeking discovery to maintain his own case or to combat that of his adversary, clearly irrelevant matters may not be inquired into, and relevancy must be determined by pleadings construed with fair latitude. The examining party may not in the absence of some special antecedent fiduciary relations between himself and his antagonist, "fish" for material to support a case he has not set up.⁹²

Although the Ontario and British Columbia Rules of Procedure are the same, the scope of permissible examination in British Columbia is much broader, with full cross-examination allowed except on questions of credibility.⁹³ In Ontario, it has been stated that the examination for discovery too often resolves itself into a cross-examination which is highly improper and unfair: "Examination for discovery was never intended to be cross-examination unless, perhaps, where it is evident from the examination itself that the party being examined is deliberately seeking to conceal the truth. Otherwise it cannot extend to credit."⁹⁴ Manitoba, however, permits cross-examination for the purpose of obtaining admissions to displace the other party's case.⁹⁵ Alberta clearly recog-

⁹⁰ ONTARIO RULES OF PRACTICE 326.

⁹¹ *Canadian Util. Ltd. v. Mannix Ltd.*, [1959] 27 W.W.R. 508 (Alta.).

⁹² *McKergow v. Comstock*, [1906] 11 Ont. L.R. 637, 642 (C.A.).

⁹³ *Union Bus Sales Ltd. v. Dueck on Broadway Ltd.*, [1958] 12 D.L.R. (2d) 618 (B.C.); *Graydon v. Graydon*, [1921] 67 D.L.R. 116 (Ont.); *Chote v. Rowan & Longhurst*, [1943] Ont. W.N. 434 (C.A.).

⁹⁴ *Haigh v. Britton*, [1936] Ont. W.N. 55.

⁹⁵ *Morrison v. Rutledge*, [1912] 3 W.W.R. 121 (Man. C.A.).

nizes cross-examination in an examination for discovery, and the examiner can cover the whole field.⁹⁶ Saskatchewan recognizes cross-examination on discovery, limited to the issues raised in the pleadings.⁹⁷ In New Brunswick, the propriety of the question is to be determined by whether the question would have been allowable if put to the party being examined as an interrogatory.⁹⁸

Generally, the party examined is bound to disclose anything of which he has knowledge or information relevant to the issue, but the examined party has no obligation to make inquiries from third parties over whom he has no control in order to inform himself. The party examined is bound to answer questions not only as to facts within his own knowledge but also as to information obtained from others, and he must further give his belief with reference to matters in issue and reasons for his belief. Although the examined party cannot be ordered to produce documents not in his possession or control, there is some authority to the effect that he may still be asked to describe the contents of a document not under his control and not produced by him.⁹⁹ In most jurisdictions a party must also disclose facts with which he became acquainted through a privileged document.¹⁰⁰

The general rules as to privileges of witnesses apply to examination for discovery. Oral and written communications passing between a solicitor and his client or prospective client for the purpose of giving or receiving professional advice are privileged. The privilege is that of the client and may only be waived by him. For a document to be privileged, it must have been prepared by the solicitor substantially for the purpose of advice on the contemplated litigation.¹⁰¹ Particulars of an allegation of negligence must be furnished even though such answers would reveal the contents of privileged reports.¹⁰²

The penalty for refusal to answer a proper question is, in the

⁹⁶ *Andrus v. Friedley*, [1962] 38 W.W.R. 575 (Alta.).

⁹⁷ *Regina v. W. C. Wells Constr. Co. Ltd.*, [1969] 72 W.W.R. 121 (Sask.).

⁹⁸ *See Dunn v. McClean*, [1928] 54 N.B.2d 511 (C.A.).

⁹⁹ *Ohl v. Cannito*, [1972] 2 Ont. R. 763.

¹⁰⁰ *April Inv. Ltd. v. Menat Constr. Ltd.*, [1975] 11 Ont. R. (2d) 364.

¹⁰¹ *Township of North York v. Donwood Terrace Dev.*, [1966] 2 Ont. R. 669.

¹⁰² *B.C. Forest Products Ltd. v. Yarrows Ltd.*, [1965] 52 W.W.R. 430 (B.C. Ct. App.).

case of a plaintiff, contempt with dismissal of the action,¹⁰³ or, in the case of a defendant, contempt with the defense being stricken.¹⁰⁴ The party must answer to the best of his information, belief and knowledge. He may, however, deny having any knowledge or information on the subject or any recollection of it, and he may declare himself unable to form any belief about it.¹⁰⁵

Although the rules do contemplate that there should be but one examination for discovery,¹⁰⁶ there is inherent jurisdiction in the court to make a second order for an examination where justice so requires. The position has been summarized as follows: (a) The court has a discretionary power to order a further examination for discovery where the interest of justice may so require;¹⁰⁷ (b) it would be proper to make such an order where new issues are raised to pleadings after the holding of the first examination for discovery.¹⁰⁸ Failure to produce documents in an Affidavit on Production has been held to warrant an order for a second examination.¹⁰⁹

A person examined for discovery may be further examined by his own counsel on any matter about which he has been previously examined. This is an explanatory examination and is for no other purpose than to enable a person who has been examined to clarify the matters upon which he has already been examined. The witness may, by way of explanation, add to the facts already given, even though this may result in variation or change in his evidence.¹¹⁰

The two major uses of information obtained through discovery are the following: (a) to read the examination of an opposite party into the record as evidence for the examining party, and; (b) to contradict a witness on cross-examination. The whole of the examination, or any part of it, may be read into the record of

¹⁰³ *Liberia Republic v. Imperial Bank*, [1847] 9 Ch. App. 569; *Dunn v. McLean*, [1814] 6 P.R. 156.

¹⁰⁴ *Haigh v. Haigh*, [1885] 31 Ch. D. 478.

¹⁰⁵ *Curlett v. Canadian Fire Ins. Co.*, [1939] 2 W.W.R. 527 (Alta.).

¹⁰⁶ *Johnson v. Solloway, Mills & Co. Ltd.*, [1931] 45 B.C.R. 35 (C.A.).

¹⁰⁷ *Hosie v. Hosie*, [1975] 1 W.W.R. 597 (Sask.).

¹⁰⁸ *Dhillon v. Canadian Tire Corp.*, Ont. 1978, Labrosse J.

¹⁰⁹ *Delap v. C.P.R.*, [1914] 5 Ont. W.N. 667.

¹¹⁰ *Wickens v. Livingston*, [1940] Ont. W.N. 191.

the trial as part of the examining party's case. That a question has been asked and answered on discovery does not mean, however, that the question and answer are automatically admissible at trial. A trial judge has the power to exclude inadmissible or irrelevant discovery evidence even though no objection was taken to it at the examination. A plaintiff may read the defendant's examination into the record as part of his case in chief, and he can also read it in reply if the defendant has not given evidence. A defendant may read into the record the plaintiff's examination, provided that the plaintiff has not given evidence. Once a party has testified it is usually too late to read his examination for discovery into the record. When a person gives evidence at trial in conflict with the evidence he previously gave on discovery, his examination can be used to impeach his credibility. The right to use the examination for purposes of cross-examination is not limited to an opposite party; any person adverse in interest may use the examination for such purpose.

Upon being examined for discovery, a person must produce for inspection all non-privileged documents in his possession or under his control that relate to the matters in question. The party producing the documents is bound to allow the opposite party to inspect them, take copies,¹¹¹ and have them marked as exhibits.¹¹² When a document is produced, the examinee is obliged to answer questions relating thereto.¹¹³ Where no Notice to Produce Documents is served on the party to be examined, however, there can be no complaint for failure to have such documents available at the examination.¹¹⁴

C. *Examination for Discovery in Quebec*

In the Province of Quebec, the rules governing examination for discovery are found in the Code of Civil Procedure, beginning with Article 397.¹¹⁵ The rules permit the defendant to an action to examine the plaintiff "upon all the facts relating to the demand"

¹¹¹ *Evans v. Balfour*, [1885] 3 Man. L.R. 243.

¹¹² *Hands v. Upper Canada Furniture Co.*, [1887] 12 P.R. 292.

¹¹³ *Fleishman v. Fleishman*, [1951] Ont. W.N. 150.

¹¹⁴ *Griffin v. DiGuilio*, [1956] Ont. W.N. 840; *Morrow v. Kime*, [1952] Ont. W.N. 347.

¹¹⁵ QUE. REV. STAT. (1977) c. C-25.

before the filing of the defense and within the period of delay for filing the same. Article 397 must be read in conjunction with Article 396: "The depositions taken by virtue of this chapter form part of the record. . . ."¹¹⁶ Hence, the important weapon of discovery can turn out to be both useful and dangerous.¹¹⁷ After the filing of a Statement of Defence, any party may examine any other party "upon all the facts relating to the issues between the parties."¹¹⁸ The defendant cannot, however, examine under this article any person whom he has already examined under Article 397 unless permission to do so is given by the judge.

D. Examination for Discovery in the Federal Court

With respect to examinations for discovery in Federal Court actions, each party may examine the other for discovery at any time after the defense and List of Documents have been filed as required by the Federal Rules.¹¹⁹ Where one party is the Crown, the opposing party may examine "by questioning any departmental or other officer of the Crown nominated by the Attorney General of Canada . . ."¹²⁰ unless some other person has been mutually agreed upon by the parties.¹²¹ In addition, a defendant may examine the plaintiff for discovery before filing his defense,¹²² but, if he does examine for discovery at that stage, he cannot examine for discovery at a later stage without leave of the Court.¹²³ Production of documents at the examination may be obtained by serving an appropriate notice with the appointment when it is served on the attorney or solicitor for the party being examined.¹²⁴

¹¹⁶ *Id.* at art. 396 reads as follows: "The depositions taken by virtue of this chapter form part of the record; but if the witness is in Quebec and can be produced at the trial, he may be examined again, if any party so requires."

¹¹⁷ A wise use of discovery can bring rewarding results, especially in the examination before plea. The Court of Appeal said in its formal judgment in *Charest v. Forget*, "the provisions of the said article (286(a) C.P. now 397) should be construed liberally, otherwise the subject of such preliminary examination would be frustrated, this being merely a preliminary state." [1941] 70 Que. C.B.R. 401, 403.

¹¹⁸ QUE. REV. STAT. at Art. 398.

¹¹⁹ FED. COURT RULES 465(3).

¹²⁰ FED. COURT RULES 465(1)(c).

¹²¹ FED. COURT RULES 465(1)(d).

¹²² FED. COURT RULES 465(2).

¹²³ FED. COURT RULES 465(4).

¹²⁴ FED. COURT RULES 465(10).

When a party is being examined, all questions as to any fact within the knowledge or means of knowledge of the party must be answered.¹²⁵ The scope of possible questions is limited to facts that may support or tend to support or to damage or tend to damage the case of either party. If necessary, an examination may be adjourned so that the person being examined may inform himself as to facts within the knowledge of the party.¹²⁶

3. *The Discovery of Documents*

A. *The Discovery of Documents in the Common Law Provinces*

The discovery, inspection and production of documents is provided for in the court rules of the various common law provinces, and these rules generally tend to parallel each other. Separate rules govern the production of documents in the possession of a party to the action and those in the possession of a third party. The Canadian practice, which requires an adverse party to reveal under oath the existence of documents that are or have been in his possession, custody or power relating to any matters in question in the action, is generally more effective than the American practice in which the applicant for production must specify the documents in the possession of the adverse party that he wishes to have produced.¹²⁷ This procedure is somewhat analogous to the Canadian practice for discovery of documents in the possession of persons not parties to the action. In the Canadian discovery of documents, two distinct stages or rights are involved: 1) The disclosure of all existing documents relevant to the action, coupled with any claims that any of them are privileged from production, and 2) The inspection by the opposite party of those documents that party is entitled to see.

A distinction must be noted between disclosure and production or inspection because a document falling within the first heading may still have its production successfully resisted on the ground of privilege or otherwise. The object of the production of documents is to enable either party to discover the existence and acquire a knowledge of the contents of writings relevant to the

¹²⁵ FED. COURT RULES 465(15).

¹²⁶ FED. COURT RULES 465(17).

¹²⁷ FED. COURT RULES 34(b).

case which are in the possession or control of the other party.¹²⁸

The British Columbia practice on documentary discovery is significantly broader than that in Ontario.¹²⁹ The British Columbia and Alberta practice on examination for documents favors a searching examination, and the accompanying rules compelling disclosure of the existence of documents are equally pervasive.¹³⁰ In New Brunswick, the practice is for the examining party to serve a general Notice to Produce on the party to be examined. If a party being examined admits that he has in his custody or power any unprivileged, discoverable document relating to the matters in question in the cause, he may be required by the examining party to produce the same for inspection. Upon his refusal, the examining party may apply for an order to produce.¹³¹ Basically, however, the right to production of documents in the various provinces is limited to the discovery of documents in the possession of an adverse party.¹³² The term "documents" has traditionally been given a wide definition. In *Fox v. Sleeman*,¹³³ it was stated that "[t]he word 'document' is one of a very comprehensive signification, and, having regard to the object of the rule, we ought not to strive to narrow its signification, but rather to extend it."¹³⁴ The Alberta Rules broadly define "documents" as "recordings of sound, photographs, films, charts, graphs and all records of any kind."¹³⁵

All the provinces, other than Saskatchewan and Nova Scotia, stipulate that a notice in writing shall be given to the other party requiring the production of documents. In Saskatchewan and Nova Scotia, provision is made for the filing of a statement of documents without notice. Service of the Notice to Produce presumes an adoption of the pleadings and precludes the parties serving it from attacking the pleadings.¹³⁶ The rules of the vari-

¹²⁸ *Darling v. Darling*, [1883] 10 P.R. 1.

¹²⁹ *Union Bus Sales Ltd. v. Dueck on Broadway Ltd.*, [1958] 24 W.W.R. 644 (B.C.).

¹³⁰ BRITISH COLUMBIA RULES OF COURT 26; ALBERTA RULES OF COURT 188.

¹³¹ *Anderson v. Anderson*, [1973] 6 N.B.2d 245 (C.A.).

¹³² *Rose & LaFlamme Ltd. v. Campbell, Wilson & Strathdee Ltd.*, [1923] 17 Sask. L.R. 332, 345 (C.A.); *Thompson v. T.T.C.*, [1947] Ont. W.N. 920.

¹³³ [1897] 17 P.R. 492 (C.A.)

¹³⁴ *Id.* at 495.

¹³⁵ ALBERTA RULES OF COURT 186(1).

¹³⁶ *Sharpe v. Reingold*, [1946] Ont. W.N. 730; *Fine v. Danforth Trading & Holding Co., Ltd.*, [1949] Ont. W.N. 242.

ous provinces differ in their provisions respecting the time for delivery of the Notice to Produce, but it is generally after delivery of the defense or after the close of the pleadings.

There is an implied undertaking by a party for whom documents are produced that he will not use them for any collateral or ulterior purposes. This undertaking is binding on anyone into whose hands the documents might come, if it is known that the documents were obtained by discovery. Any improper use of a document amounts to contempt of court. If the document is especially confidential, the court may require a protective undertaking.¹³⁷

Each party is entitled to production from "the other party."¹³⁸ Although there is no requirement for an adverse party to make discovery, the Saskatchewan Court of Appeal in *Rose & Laflamme Ltd. v Campbell, Wilson & Strathdee, Ltd.*¹³⁹ said that the words "any other party" should be held to mean "any other party adverse in interest."

In Ontario, a party must give an Affidavit of Documents; in other provinces, a list is sufficient in a form set out in their respective provincial rules. Generally, the list must state the following: 1) What documents relating to the matter in question in the cause are in the party's possession or power; 2) Whether there is an objection to produce any of the listed documents for inspection on the grounds of privilege; 3) What relevant documents have been in the party's possession or power but are no longer in his possession, and their whereabouts; 4) That there is no other document relating to the question at issue in the party's possession or power, nor in the possession or power or custody of any agent or of any other person on behalf of such party.

If a document is claimed to be privileged, its existence must be disclosed and the privilege claimed for it. The fact that a document is privileged is no reason for nondisclosure of its existence.¹⁴⁰ The facts upon which the privilege is claimed must be set

¹³⁷ *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*, [1975] 1 All E.R. 41.

¹³⁸ *Thompson v. T.T.C.* [1947] Ont. W.N. 920.

¹³⁹ See cases cited at note 132 *supra*.

¹⁴⁰ *Cushing Sulphite Fiber Co. v. Cushing*, [1903] 2 N.B. Eq. 472; *MacPhayden v. Employer's Liab. Assur. Corp.*, [1933] Ont. W.N. 72.

forth.¹⁴¹ A person who claims a privilege in respect of documents may still be asked questions as to their existence and whereabouts, but he cannot be asked any question as to their contents. It is clear that a court can look at the documents to decide whether the privilege is rightfully claimed, and it is not necessary that the claim of privilege first be shown to be improper before the judge can direct production for his inspection of the documents.

All documents and copies thereof prepared for the purpose, but not necessarily the sole or primary purpose, of assisting a party or his legal advisors in any actual or anticipated litigation are privileged from production.¹⁴² Documents existing before litigation was conceived and not brought into existence for the purpose of obtaining legal advice may be subject to production. A document is not privileged merely because it was handed to a solicitor for the purposes of an action. It is sometimes said that there must be a real expectation of litigation before there is a privilege from production.¹⁴³

Generally, failure to comply with Notice or an Order to Produce Documents will expose a party to attachment. In addition, a plaintiff could have his action dismissed and a defendant could have his defense stricken. The British Columbia Rules provide that a party failing to produce shall be precluded from putting the document in evidence in the proceedings without court order.¹⁴⁴ The general rule may be as follows:

Any party not complying with such notice (to produce) shall not afterwards be at liberty to put any such document in evidence on his behalf on such cause or matter, unless he shall satisfy the Court or a Judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or Judge shall deem sufficient for not complying with such notice.¹⁴⁵

The object of the production of documents is to enable either

¹⁴¹ *Gardner v. Irvin*, [1878] 4 Ex. D. 49; *Kain v. Farrer*, [1877] 37 L.T.R. (n.s.) 469; *Law Times Report*.

¹⁴² *Southwark & Vauxhall Water Co. v. Quick*, [1878] 3 Q.B. 315 (C.A.).

¹⁴³ See *Township of North York v. Danwood Terrace Dev.*, [1966] 2 Ont. R. 669.

¹⁴⁴ BRITISH COLUMBIA RULES OF COURT 26(14).

¹⁴⁵ *Roberts v. Oppenheim*, [1884] 26 Ch. D. 724, 731 (C.A.).

party to discover the existence and acquire a knowledge of the contents of the relevant documents. When that object is accomplished, the documents will go back to the custody of the producing party.

B. The Discovery of Documents in Quebec

The rules governing the production of documents in Quebec are contained in Articles 401-03 of the Civil Code of Procedure.¹⁴⁶ The Code requires the production of all "writings" in a party's possession relating to the issues between the parties. There is also provision for the discovery and inspection of documents from a person other than a party. Generally, the cases interpreting the Code have tended to follow the evolution of the practice in the other provinces.

C. The Discovery of Documents in Federal Court

In the Federal Court, the procedures for production are set forth beginning with Rule 447.¹⁴⁷ Under the rules of the Federal Court, a party is only obliged to produce documents upon which he proposes to rely at trial. One can, however, apply to the court for an order that the opponent produce all documents that might be of assistance to either side.¹⁴⁸ An Affidavit of Documents is not essential to acquire production; a list signed by the solicitor is sufficient. The right to inspect documents conferred by the Rules is, of course, subject to any proper claim of privilege, and the validity of any such claim must be determined by the court on an application to compel inspection.¹⁴⁹

In connection with claims for privilege, it should be noted that Section 41 of the Act modifies and codifies the law concerning objections to production on grounds of a public interest. That section reads as follows:

41.(1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affi-

¹⁴⁶ CODE OF CIVIL PROCEDURE OF THE PROVINCE OF QUEBEC c. C-25 (1977).

¹⁴⁷ FED. COURT RULES 447.

¹⁴⁸ FED. COURT RULES 448.

¹⁴⁹ FED. COURT RULES 455.

davit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs the importance of the public interest specified in the affidavit.

(2) When a Minister of the Crown certifies to any Court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.¹⁵⁰

There is an interesting feature of the Federal Court Rules concerning production of documents. When a party discovers a document that is not on the list which he gave pursuant to the Rules or an order made under the Rules, he must obtain his opponent's consent or leave of the court to file a supplementary list. This requirement must be considered with Rule 494(7) which prohibits use of a document, subject to certain exceptions, unless it has been included in a list or affidavit given during discovery. The requirement of consent or leave of the court for the filing of a supplementary list is designed to curb any temptation to omit deliberately a vital document with a view to filing a supplementary list just before trial.

4. *Interrogatories*

British Columbia, Manitoba, Nova Scotia, New Brunswick and Newfoundland rules still make limited provision for interrogatories, a system of fact discovery based on the English practice. The oral examination for discovery was created and developed in Ontario. In New Brunswick parties may either examine orally or by way of interrogatories,¹⁵¹ as is the case in British Columbia.¹⁵²

¹⁵⁰ Fed. Court Act, S.C. 1970 c. 1.

¹⁵¹ *Dunn v. McClean*, [1928] 54 N.B.R. 511 (C.A.).

¹⁵² *Dominion Bridge Co. Ltd. v. Royal City Iron Works Ltd.*, Sup. Ct. B.C. Vancouver Registry C772791, Feb. 13, 1978 (Berger J.) (approving the delivery of interrogatories):

It makes sense, it seems to me to have the defendants set out what it says the arrangements were between the parties, when the deliveries were made, and so on, instead of counsel for the

The British Columbia Rules permit a person answering an interrogatory to object to answering a particular question "on the ground of privilege or on the ground that it does not relate to a matter in question in the action."¹⁵³ It is clear that, in the context of discovery of documents, the party seeking the information need only show that the document sought or the answer requested may be relevant.¹⁵⁴ Where an objection to an interrogatory is not grounded on privilege or relevance, the proper response is not to take objection in the answer, but to apply to the court on the ground that the interrogatory is "not necessary for disposing fairly of the action, or that the costs of answering would be unreasonable. . . ."¹⁵⁵ On such an application, the court must take into account any offer by the objecting party "to make admissions, to produce documents, or to give oral discovery."¹⁵⁶ In British Columbia, the use of interrogatories as a preparation device for examination for discovery has been specifically endorsed.¹⁵⁷ In Manitoba, which has permitted the use of both interrogatories and oral examination for discovery for many years, the judicial latitude differs. In 1933, the Manitoba Court of Appeal stated as follows:

It is surely perfectly proper for a party to at least attempt to get his discovery by the inexpensive method of interrogatories, and

plaintiff having to pursue the matter at inordinate length on examination for discovery with the likelihood that, once the defendant has placed on record its own case, an adjournment would be required by the plaintiff to assemble its instructions to cancel as to the questions to be asked about the defendant's case.

¹⁵³ BRITISH COLUMBIA RULES OF COURT 29(5).

¹⁵⁴ *Brodie v. Campbell*, [1964] 47 W.W.R. 577; *Hopper v. Dunsmuir*, [1903] 10 B.C. 23.

¹⁵⁵ BRITISH COLUMBIA RULES OF COURT 29(7).

¹⁵⁶ *Id.*

¹⁵⁷ *Dominion Bridge Co. Ltd. v. Royal City Iron Works Ltd.*, Sup. Ct. B.C. Vancouver Registry C772791, Feb. 13, 1978 (Berger J):

In the case at bar, however, answers to interrogatories will, in my view, provide an essential foundation upon which cross-examination can then proceed when examinations for discovery are held In the case at bar the procedure the plaintiff has adopted will make the examinations for discovery a more useful and orderly proceeding than they would otherwise be.

See also Shearer v. Canadian Collieries (Dunsmuir) Ltd., [1913] 4 W.W.R. 913, in which it was held that a party is entitled to obtain discovery by either interrogatories or by examination for discovery.

by the costly procedure of a *viva voce* examination. I think it is a course to be encouraged rather than to be cramped into uselessness.

A broad adaptability was surely intended by those who introduced the practice of interrogatories here as a method additional or alternative to the *viva voce* examination procedure.¹⁵⁸

More recently, the Manitoba Court of Appeal has endorsed the use of both examination for discovery and interrogatories, and has given specific recognition to the function of interrogatories as preparation to examination for discovery.¹⁵⁹ Similarly, the Nova Scotia Court of Appeal has recently ruled that the right to deliver written interrogatories and the right to examine for discovery are "cumulative and not alternative, and merely because oral discovery is taking place, it is not in itself sufficient reason to refuse interrogatories."¹⁶⁰

As a comparison, the use of interrogatories as a preparation device for examination for discovery seems to have been recognized in the United States as a result of the introduction of the Federal Rules of Civil Procedure of the District Courts of the United States, which came into force on September 16, 1938.¹⁶¹ American attorneys have seen that interrogatories have a particular usefulness as a preparation device for the oral deposition.

CONCLUSION

It can be seen that the evolution and development of Canadian procedural law has been somewhat parallel to the evolutionary process in the United States, but always behind. The establishment of the United States National Transportation Safety Board avoided many of the procedural problems that now exist in Canada concerning aircraft accident investigation. It is to be hoped that the Commission of Inquiry on Aviation Safety, now being conducted by Mr. Justice Charles Dubin of the Supreme Court of Ontario, will produce recommendations for a Canadian equivalent of the National Transportation Safety Board that can and will be accepted

¹⁵⁸ *Grierson v. Osborne Stadium Ltd.*, [1933] 1 W.W.R. 634 (Man. C.A.).

¹⁵⁹ *Olfman v. Westfair Foods Ltd.*, [1974] 3 W.W.R. 359 (Man. C.A.).

¹⁶⁰ *O'Hearn v. Queen's Square Dev. Ltd.*, [1976] 16 N.S.R.2d 656, 659.

¹⁶¹ See Clark, *Two Decades of the Federal Civil Rules*, 58 COL. L. REV. 435, 436 n.8 (1958).

and acted upon by the new Federal Government. The area of Federal Court jurisdiction over aeronautics remains a problem, however. Unfortunately, it is more difficult to foresee or forecast a correction of these jurisdictional uncertainties.