



WELCOME TO YOUR CLIENT'S LAWSUIT

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An aged businessman was on his deathbed, reminiscing about the ups and downs of his career. He was overheard to say, "I lost my fortune twice in my life; once when I lost a lawsuit, another when I won one". He was no doubt referring to the cost and inconvenience of examinations for discovery.

A recent decision from the Alberta Court of Queen's Bench has opened the door for parties in lawsuits to compel the attendance of the other parties' accountants at examinations for discovery prior to trial. This has the potential to put a heavy burden on accountants who may have concluded their retainer with a client only to find themselves embroiled in litigation in which they have no interest and no time to participate.

The examination for discovery is a process by which witnesses are obliged to appear and be questioned under oath about any and all facts related to a particular lawsuit. The examination for discovery process is generally the lengthiest, and the most expensive step in a lawsuit. It can take one day or weeks (spanned over periods of months, if not years) depending on the issues in the lawsuit and the number of parties and lawyers involved. Discovery can be time consuming, uncomfortable, invasive, and occasionally soul destroying.

The *Rules of Court* in all Canadian jurisdictions allow for the opposite party in a lawsuit to be orally examined by a lawyer before a Court reporter. Where the party is a corporation, a corporate officer must be appointed to answer questions which are binding on that corporate entity.

Certain non-parties are also subject to examination for discovery in most Canadian jurisdictions. These include directors, officers, employees and former employees of corporate defendants and agents of parties. Most jurisdictions also allow for examination for discovery of "external auditors". Until now, the class of accountants compellable to attend at examinations had been strictly interpreted to mean an accountant conducting an audit as defined by the CICA Handbook.

In the case of *Harcap Investments et al. v. Alberta Permit Pro et al.* (2009 ABQB 643), Justice R. A. Graesser of the Court of Queen's Bench of Alberta was asked to consider an application by the Plaintiffs to examine the Defendants' accountant as there were a number of financial issues in dispute in the lawsuit. Between 2004 and 2006, the accountant had prepared review engagement financial statements for the defendant. He did not conduct an audit. Justice Graesser considered a number of sources in determining whether Mr. Panasuik should be considered an external accountant under the Alberta Rules including:

- the wording of the financial statements (the financial statements noted that "[this] review does not constitute an audit");
- the wording of the Alberta *Regulated Accounting Profession Act*;
- the *Canadian Oxford Dictionary*;



- the *Dictionary of Canadian Law*;
- the *Alberta Rules of Court*;
- the *Alberta Business Corporations Act*; and
- how the client described Mr. Panasuik.

It is interesting to note that of all of these sources Justice Graesser indicated that the only one which did not assist in interpreting the identity of an “auditor” was the definition in the Alberta *Regulated Accounting Profession Act*. (As an aside, it does not appear that the CICA Handbook was tendered as evidence before the Court by either party.)

Justice Graesser noted that there had been no previously decided cases addressing the definition of “auditor” in the Alberta *Rules of Court*. He was therefore setting a precedent as to how “auditor” should be defined for examination for discovery purposes. He found that the “subtle distinctions” between a review engagement and an audit were not important in his determination. The mere act of providing financial statements for the company brought the accountant within the ambit of an “external auditor” and therefore he was subject to examination for discovery. He ordered that the accountant appear at examinations for discovery and bring all of his relevant and material records to the examination to be reviewed by opposing counsel. Opposing counsel would then be at liberty to review these records with his client and his expert.

Justice Graesser was also asked by the Plaintiff to determine whether the accountant should be considered a “near-employee” under the Alberta *Rules of Court* and examined on that basis. Justice Graesser identified the mischief that can occur when the categories of who can be discovered in a lawsuit are expanded. He said:

“Unnecessary discovery is to be discouraged and strangers to the litigation should generally not be burdened with having to spend time on someone else’s dispute.”

Notwithstanding that the Judge recognized the problem with broadening the scope of parties to be examined, and acknowledged that the accountant’s retainer did not have the traditional hallmarks of an employee, he found that he was an “employee” under the *Rules of Court*. The underlying reasoning behind that decision was that the accountant had both financial documents in his possession and he had created documents which were relevant to the lawsuit.

There is the potential for the broad findings in this case to lead to an increased participation of chartered accountants in the examination for discovery process of their clients with concurrent increases in costs to clients. Once ordered to attend at examinations for discovery an accountant is legally bound to participate and failure to do so could result in contempt of Court proceedings. Attendance at discoveries involves production of the accountant's files, including electronic files. The examination would involve briefing by the accountant's client's lawyer, attendance at discovery for one or more days and having to follow-up with information after the discovery, if it were not readily available. Payment for the accountant's services would be a matter to be negotiated between the accountant and his client, if at all.



One issue that was not addressed in Justice Graesser's decision is whether an accountant preparing Notice to Reader financial statements would likewise be considered to be an "external auditor". The concern is that another Court would consider Justice Graesser's decision and take it one step further to say there is really only a "subtle distinction" between Review Engagement and Notice to Reader financial statements. This is not unlikely as the Justice made a very broad statement in his reasons:

“I cannot imagine that a professional accountant, described as a corporate party's “external accountant” and who prepares annual financial statements for the company, is not an “auditor” within the meaning of Rule 200(4).”

This would greatly increase the number of accountants in Canada subject to examination for discovery in their client's, or former client's litigation.

In a future application to compel an accountant to attend at discoveries, the accountant ought to have the opportunity to have legal counsel present to make submissions on his or her behalf. An accountant's lawyer may more fully bring forward evidence of the difference between the forms of financial statements and the assurances provided by each to convince the Court to not follow the decision and reasoning in this case.

The decision of *Harcap Investments v. Alberta Permit Pro* has the potential to open the door for accountants to be pulled into many lawsuits in which they have no interest. Accountants should be aware of this risk and perhaps consider an amendment to their engagement letters to ensure compensation when and if this occurs.

And as for clients? At a minimum, the potential for this increased cost should be built into the litigation budget.