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Obtaining Leave for Non-Parties to Attend Questioning

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A number of decisions affirm the principle that questioning or examination on discovery is not open to the public, and therefore the right to attend is normally limited to the parties and their counsel. However, the case law also clearly recognizes that courts have discretion to make orders permitting a non-party to attend, where the circumstances make that appropriate and in keeping with the ends of justice.

The case law is not entirely consistent in identifying criteria to be satisfied in permitting attendance by a non-party. In some cases, the courts have taken a fairly narrow view and insisted that permission should be limited to circumstances where the non-party's attendance would serve the overall ends of justice, and not merely the interests of one party. However, most decisions show more flexibility, and have been willing to allow a non-party to attend where the person will be of assistance to counsel, will not interfere with the orderly conduct of the questioning, and is not him or herself anticipated to be called as a witness.

In the cases where non-party attendance was sought for medical reasons, the courts appeared to be influenced by affidavit evidence attesting to the medical condition of the party and the need for support during questioning, as well as letters or other relevant documentation from appropriate medical professionals. The case law also indicates that the burden to demonstrate a reasonable basis for permitting a non-party to attend questioning lies with the party seeking their attendance. If that demonstration is made, the opposing party then has a burden to demonstrate reasons to the contrary, including any prejudice likely to arise.

Alberta Authorities

The *Alberta Rules of Court,* Alta Reg 124/2010 ("Rules") provide that courts retain discretion and general oversight in relation to questioning, which gives them a general power to modify or waive rights arising under Part 5:

> 5.3(1) The Court **may modify or waive any right or power under a rule in this Part or make any order warranted in the circumstances if**
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> [. . .]
>
> (b) the **expense, delay, danger or difficulty in complying with a rule would be grossly disproportionate to the likely benefit.**
>
> [. . .]
>
> (2) In addition to making a procedural order, the Court may do any one or more of the following:
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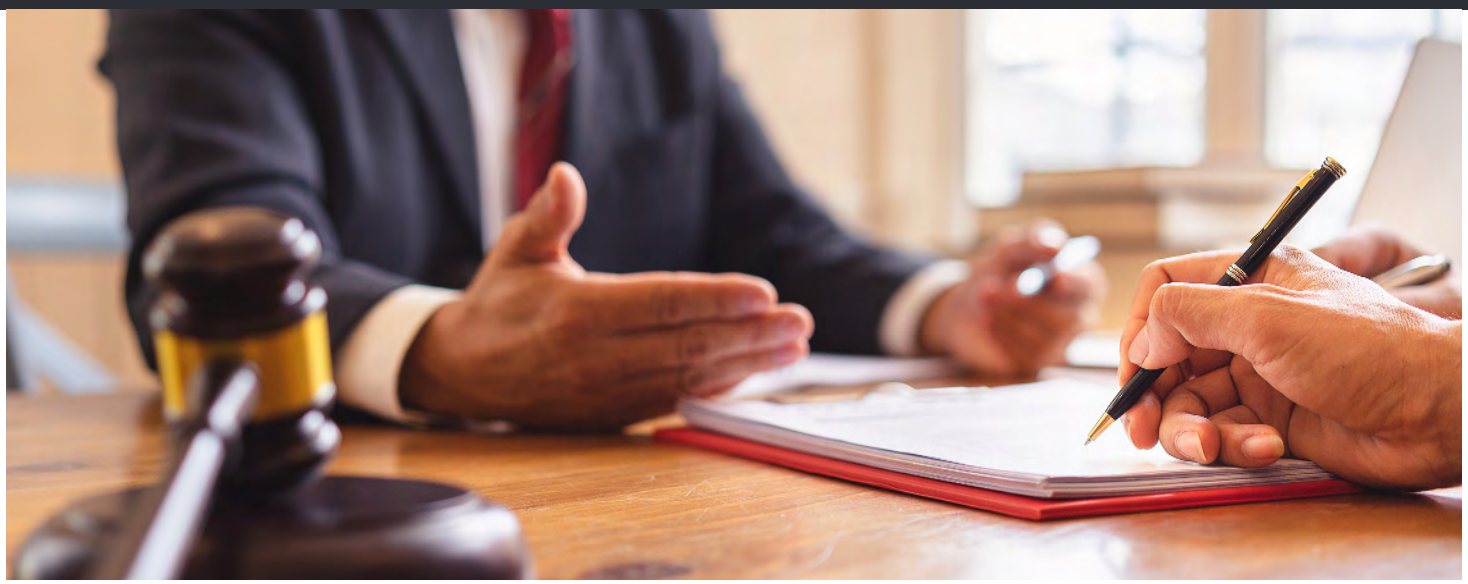
> [. . .]
>
> (d) **make any other order respecting the action or an application or proceeding the Court considers necessary in the circumstances.** [Emphasis added]



Although the Rules do not specifically address the question of who may be present during questioning, there is some guidance in the case law. An early decision on the point is ***Lynn v Toronto General Trusts Corp,*** [1945] 3 WWR 361, [1945] AJ No 45 (SC). In that case, the question was whether an elderly defendant, who wished to attend during examination of the plaintiff, could be accompanied by her son. The Court held that it was appropriate to permit the son to attend, as it would help calm the mother, both during the examination of the defendant and during her own examination which was expected to be required in the future. The Court identified two guiding principles: (i) examination for discovery is not open to the public; but (ii) there is a discretion to admit or exclude persons, according to circumstances and to secure the ends of justice:

> 1. The plaintiff herein is being examined for discovery by Mr. S.J. Helman, K.C., of the defendants' solicitors on the record. Mrs. Georgieanna Cuddie, one of the defendants, is attending on the examination, as is her right. She is a very old woman, said to be over 80 years of age, and wishes to be accompanied by her son, Frank Cuddie. […] Mr. Helman […] **urges that the son should be allowed to attend because his presence is likely to have a tranquillizing and composing effect on his aged mother, so that she will probably be better able to grasp the proceedings and appreciate the evidence to be given. This is a view with which I entirely agree, and it therefore remains to consider whether I have power to permit his attendance.**
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> 2. I am not aware of any Alberta cases on the subject. There have been a number of cases, however, in the Ontario Courts, […] which I have read, and which are doubtless applicable to cases under the Alberta Rules of Court. They hold two principles to be firmly established:
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> > (1) That an **examination for discovery is not open to the public** (in fact one case goes so far as to hold that the examiner has no discretion to admit the public): In re Western of Canada Oil, Land and Works Co. (1877) 6 Ch. D. 109, at 110, 46 L.J. Ch. 683;
> >
> > (2) That the examiner has a discretion to admit or exclude persons desiring to be present according to the circumstances of the case and to what he considers calculated to secure the ends of justice.
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> 3. I am firmly of the opinion that **it will secure the ends of justice to admit Frank Cuddie to this examination, for the reasons advanced by Mr. Helman, and for two others that occur to me. One is that this defendant, Georgieanna Cuddie, will doubtless require to, herself, submit to examination for discovery in the near future, and she will likely acquit herself more creditably thereon if she is induced to maintain a cool and composed attitude on this examination.** The other is that Frank Cuddie himself may be considered to have an indirect but very real interest in this action. For all these reasons, I shall permit the said Frank Cuddie to attend. [Emphasis added]

Other cases in Alberta that cite ***Lynn*** have arisen in circumstances that did not involve a party with a health issue. For example, in ***Austec Electronic Systems Ltd v Mark IV Industries Ltd,*** 2001 ABQB 99, 284 AR 386, the defendant sought permission for its Ontario corporate counsel to attend during examination on discovery in order to assist defendant's counsel of record. Although agreeing with the principles from ***Lynn***, Burrows J refused the request, finding that in the case before him, the benefits of allowing corporate counsel to attend would apply to the defendant only, and would not have any benefit to the ends of justice overall:

> 12. Mark IV submits that though Ms. Bevan is not counsel of record she is counsel for Mark IV and is therefore entitled to attend by right. I reject the submission. **The persons entitled by right to attend are the parties to the litigation and the counsel they have engaged to represent them in the litigation. If other persons, including lawyers retained by the party for purposes other than to be counsel of record are to be permitted to attend, it can only be by consent or by leave of the examiner (the clerk) or the court**: *Abulnar v. Varity Corp.*

13. Austec does not consent to Ms. Bevan's participation. It is not my role to judge the reasonableness of its refusal to consent and I do not do so. **My role is to judge whether Mark IV's reasons for wanting Ms. Bevan to participate are sufficient to justify deviation from the normal rule** - that only the parties, counsel and persons present by consent can attend at examinations for discovery.

> 14. In my view deviation from the normal rule is not justified in these circumstances. From Mark IV's point of view Ms. Bevan would no doubt perform a useful function and her participation would be efficient and economical. It is not, however, a service that can only be provided by Ms. Bevan. McCarthy Tétrault certainly has the resources to provide lead counsel with assistance if that is required. Furthermore, **the anticipated benefits of Ms. Bevan's attendance are one sided - they enure to Mark IV alone. I cannot see that the ends of justice would be advanced in any respect by Mark IV being allowed to enjoy those benefits over Austec's objection.** [Emphasis added]

The ***Lynn*** decision was also referred to in ***Brown v La France***, [1995] AJ No 1371. Master Quinn took the view that a non-party might be allowed to attend examination for discovery where his/her presence would be helpful to examining counsel. In ***Brown***, the defendants sought permission to have the adjuster for their insurers attend examinations for discovery of both the plaintiffs and the defendants. Master Quinn held that he could not attend the defendants' examinations, since in that situation he would be merely an observer. However, Master Quinn took a more generous view than in the ***Austec*** decision, and granted permission for the adjuster to attend the examination of the plaintiffs, since his purpose in that case he would be to provide assistance to defence counsel:

> 1. Counsel for the plaintiff objects to the adjuster for the defendants' insurers being present when he conducts his examination of the defendants. **If the adjuster can attend at that examination he would be there essentially as an observer. He obviously would not be there to assist counsel for the plaintiff. Nor would he be there to assist or coach the defendants in answering questions put to them by counsel for the plaintiff.** It may be true that certain questions might be asked that the defendants could not answer but could answer if the adjuster was there to provide them with information. That might be of some assistance to examining counsel, **but it would not be sufficient reason to allow the adjuster to be present when the examining counsel did not want him to be there.**
>
> 2. There is no compelling reason why Marty Schmidt should be present at the examination for discovery of the defendants and I accordingly order he is not entitled to attend.
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> 3. […] I take it that he wants to be in attendance when counsel for the defendants conducts an examination for discovery of the plaintiffs.
>
> […]
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> 6. Some of the cases seem to say that if a non party can be helpful to examining counsel such non party should be allowed to attend to assist counsel. Other cases seem to say that unless it can be shown that the presence of a non party is necessary for the assistance of examining counsel such non party should not be allowed to attend.
>
> 7. There is not much Alberta law on this subject, but what there is **appears to favour what may be helpful to examining counsel rather than the more draconian view that it is only what is necessary for examining counsel.** The main case in point is L*ynn v. Toronto General Trust Corp. and Luddie,* [1945] 3 W.W.R. 361.
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> 8. **I would therefore hold that the insurance adjuster Schmidt be allowed to attend with counsel for the defendants when the plaintiffs are being examined for discovery.** [Emphasis added]

In ***Foundation Group Mergers & Acquisitions Ltd v Norterra Inc,*** 1999 ABQB 442, 246 AR 79, Master Funduk did not refer to ***Lynn,*** but provided some indication concerning the reasons that may justify attendance by a non-party, and the burdens that apply in determining whether permission should be granted. Master Funduk indicated that the initial burden was on the party seeking permission to show why the non-party should attend, and then the burden would shift to the party opposing permission, who might object on grounds of prejudice. In the case before him, the initial burden was not satisfied:

> 23. […] I do not accept Brown's view that the discretion by the court to let a non-party be present at the officer's examination is to be decided by whether there will be prejudice if the non-party is allowed to be present. That is a wrong test. It is a right test, or part of a right test, when

exclusion of a litigant is sought. It is the wrong test to apply when the issue is whether a non-party should be present. Because there is no basic right for a non-party to be present the test enunciated by Brown converts the "no right" to a "right".

24. **If the Defendant makes out a case for Burnett and Russell being present at Anderson's examination for discovery the burden then shifts to the Plaintiff to show why that should not be so and, if it wants, it can argue prejudice.** But the Plaintiff need not show prejudice unless the Defendant first makes out a case for attendance.

[…]

26. The Defendant has not satisfied me that it would be appropriate to let Burnett and Russell be present at Anderson's examination for discovery. **Convenience is not a sufficient reason.** […].

27. **It is not suggested, and more important there is no evidence to support it, that Burnett and Russell are "experts" or would be present at Anderson's examination for discovery to assist him** in "very technical matters", a phrase used in our *Civil Procedure Guide* previously referred to. [Emphasis added]

A more recent Alberta case indirectly indicating the possibility to have a non-party attend questioning for medical reasons is ***Bourque v Tensfeldt***, 2017 ABCA 356, [2017] AJ No 1130. The decision making the order to permit attendance of the non-party does not appear to be reported; however, the above decision refers to the existence of that order:

3. On December 8, 2016 the appellant was ordered to attend for questioning. On May 18, 2017 the appellant was found to be in contempt by another chambers judge for failing to attend. That chambers judge, however, created an opportunity for the appellant to purge her contempt. He directed that counsel for the respondent should be accompanied at questioning by a female colleague, **and that the appellant could have somebody accompany her as well.** The appellant appealed that order, which is the appeal that the respondent now applies to strike. The appellant's application for a stay of that order was dismissed: *Bourque v Tensfeldt*, 2017 ABCA 236. […].

In the subsequent decision dismissing the application for a stay of the order to attend questioning (***Bourque v Tensfeldt***, 2017 ABCA 236, [2017] AJ No 901), the Court confirmed that the original order arose after the plaintiff failed to attend for questioning, allegedly for reasons related to her state of health:

[10] Ms. Bourque argues that Ackerl J erred by finding her in civil contempt for failing to attend questioning because she had a reasonable excuse for not attending: she suffers from various medical conditions (including osteoarthritis, scoliosis and angina) and attending questioning in person would pose a significant risk to her health.

While these Alberta authorities are limited in number, they do provide support for the general proposition that courts may grant permission for non-parties to attend questioning over the objection of opposing counsel. Further, they may also suggest that an order permitting attendance may be appropriate where doing so would serve the ends of justice.

Decisions from Courts Outside Alberta

Decisions from courts outside Alberta also provide support for allowing a non-party to be present during questioning.

In ***Ormiston v Matrix Financial Corp***, 2002 SKQB 257, [2002] 9 WWR 374, the Court criticized the Austec decision, discussed above, as a being overly restrictive and "inconsistent with the majority of non-Alberta authorities prescribing the requirements for allowing a non-party to attend at a discovery" (at para 15). ***Ormiston*** dealt with an application by the plaintiff for an order allowing a financial planning expert to assist her counsel at examinations for discovery, and the analysis was therefore focused on the presence of experts at questioning. The Court provided a list of principles derived from case law that described circumstances where attendance of a non-party might be admissible, and the burden borne by each party:

16. From the aforementioned and other authorities reviewed, I have extracted the following general principles

applicable to the presence of nonparties at examinations for discovery:

> 1. Only the parties and their respective counsel, or in the case of the corporation, its agent, may attend an examination for discovery unless the parties have consented to the presence of a non-party, **or the examining officer has granted the non-party leave to be present.** In this jurisdiction, the local registrar or deputy registrar would normally be the examining officer, and failing them, a judge of this Court.
>
> 2.The examining officer and/or judge **may exercise his or her discretion by granting leave for a non-party to assist at an examination in any of the following circumstances, which are not intended to constitute an exclusive list or to limit the discretion of aforementioned persons:**
>
> (a) where the level of expert knowledge, technical, scientific or otherwise, relevant to the issues in an action is **beyond the level of skill and knowledge normally expected of legal counsel and therefore legal counsel may be unable to conduct a proper examination** without the assistance of an expert, specialist or technician. […].
>
> (b) a non-party who is not a professional expert concerning a particular complex issue before the court but **who has the knowledge or abilities that will make the discovery process run smoothly and expeditiously**, usually will be allowed to attend an examination for discovery in the capacity of an expert assistant. The ability to manage documents in an action involving a substantial number of documents, or familiarity with financial records, may be sufficient to warrant such person being given leave to assist at an examination;
>
> (c) **where a party requires the assistance of a non-party in special circumstances; for example, an aged mother might be accompanied by her son or daughter.**
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> 3. The burden of establishing that a specific non-party should be allowed to attend at an examination for discovery rests with the party seeking the non-party's assistance. In most circumstances an **affidavit setting out the applicant's needs, counsel's concerns and how the non-party can assist will be essential.**
>
> 4. Where the applying party has met the requirements set forth in paragraphs 2 and 3, **the burden of proving prejudice or other ground for excluding the non-party rests with the party opposing his or her inclusion** from the examination for discovery process.
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> 17 What constitutes prejudice will vary from case to case. […]

The decision in ***Benson Construction Management Corp v Great Canadian Casinos Inc,*** 2003 BCSC 1406, [2003] BCJ No 2141 provided support for allowing a non-party to be present for reasons related to the health or well-being of a party in attendance. The Court granted permission for the daughter of a person, Bell, who was described as the "moving force" of the corporate plaintiff, to attend the examination on discovery of the defendant's representatives. Bell was 73 years old, obese and in ill health, and his daughter wished to be present in order to attend to Bell's medical needs. The Court noted the affidavit evidence attesting to Bell's medical condition, and granted permission, on condition that the daughter give an undertaking that she would not herself testify as a witness in the proceedings:

> 13. Filed in support of the application is the affidavit of a paralegal from Mr. Rubin's office. **She said that she was advised by Ms. McLeod that she was fearful of leaving Mr. Bell alone. Secondly, she noted Mr. Bell is 73 years of age and that he is some 400 pounds in weight and that he has difficulties moving around their office. Appended to her affidavit is a letter from a Dr. Alexandrious** who says Mr. Bell has been his patient for the past five years. **Mr. Bell's health has deteriorated recently, and he requires assistance with supplemental oxygen, pharmaceuticals and respiratory treatments and he has a list of various problems including congestive heart failure and obesity.** The doctor feels with the severity and fragility of Mr. Bell's health **it is advisable to have a family member available to assist him in the discovery.**
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> […]
>
> 16. It is further said that Ms. McLeod is not going to be a witness at trial. Is Ms. McLeod going to be called as a witness?
>
> 17. THE COURT: That is my concern here. I think that is, in my view, rather key in the picture. **If Ms. McLeod will provide an undertaking that she is not going to be a witness at the trial then, she may sit in and be discrete**

> **and quiet in the examination room.** Should there to be any misconduct on her behalf, that would mean a different picture for Mr. Butler. If she does not give that undertaking then I see no reason why she cannot sit outside the room and be close at hand. [Emphasis added]

Ozerdinc Family Trust v Gowling Lafleur Henderson LLP, 2015 ONSC 2366, [2015] OJ No 1873 dealt with an application by the defendant to be examined by written interrogatories rather than oral questioning. The defendant's evidence indicated he was on long-term disability due to a debilitating medical condition that caused him chronic pain, skeletal muscle spasms and loss of control. He submitted that he could not tolerate an oral examination for discovery. The Court emphasized the presumptive right of a party to oral discovery, and insisted that the defendant participate in oral questioning, but allowed for some accommodations. In particular, the Court ordered that the examination could take place at the defendant's home or some other location where he felt comfortable, that frequent breaks should be permitted, and he should be entitled to have his physician or psychologist present:

> 32 I do not agree with the plaintiff that the evidence shows the defendant is improperly trying to evade discovery. I do not doubt that the advice he is receiving from his physicians is that it would be preferable to avoid the stress of oral discovery and to answer questions in writing. But the evidence does not persuade me that oral discovery properly managed would likely produce physical or psychological harm.
>
> […]
>
> 34. I am of the view that similar safeguards may be appropriate in this case. The evidence is that the defendant may need to take frequent lengthy breaks and that he is stressed by worrying about when he will have to take such breaks, keeping people waiting, and that he can be distracted by pain and involuntary muscle contractions. T**he discovery should therefore take place in an environment in which the plaintiff is comfortable, either at his home or at his lawyer's office. The discovery is also to be conducted in several short sessions with provision for breaks as necessary. The defendant may have his physician or psychologist present if he wishes.** [Emphasis added]

Similarly, in ***McLaughlin v. McLaughlin,*** 2020 ONSC 5666, [2020] OJ No 4680, the Court denied a request by a 93-year-old woman who sought to be examined through written interrogatories instead of oral questioning. However, the Court did allow similar accommodations to those that were adopted in ***Ozerdinc:***

> 66. Patricia is 93 years old. She suffers from edema in her legs, atrial fibrillation, and as of April is recovering from a Staphylococcus infection. She recently had a health scare when she was tested for Covid-19. She suffers from chronic

high blood pressure. She continues to live in the home that she and her husband owned, with assistance from her long-time caregiver. Patricia also relies on private nursing services who visit her at her home twice daily to take vital signs and report to her physician.

67. Patricia has been under the care of a cardiologist since 1995.

68. Patricia says that an oral cross-examination would put an enormous amount of stress on her, which can aggravate her atrial fibrillation and blood pressure problems with potentially deadly consequences. Furthermore, her edema makes getting and staying comfortable for extended periods of time extremely difficult. Her age, recent infections, and other health issues limit Patricia's energy and her ability to focus. Finally, her need for regular health monitoring would require interruption of cross-examination. Patricia, however, is willing to submit to cross-examination via written interrogatories.

[…]

84. In order to accommodate Patricia's medical or health conditions, I impose the following conditions:

(a) her examination will be held, remotely, with Patricia participating from her home or other place she feels comfortable;

(b) Patricia will be under oath or solemn affirmation;

(c) she may have present with her a support person and/or medical person;

(d) **she may have present with her counsel or another legal representative to assist her with documents**;

[…]

(f) the cross-examination will be **limited to four hours for all parties, over two days.** Each day shall comprise a one hour cross-examination followed by a 30 minute rest break, followed by another hour cross-examination. [Emphasis added]

In ***Haida Helicopters Ltd v Deltaire Industries Ltd***, [1978] BCJ No 1235, 87 DLR (3d) 758, the Court allowed in-house counsel for the defendant to be present during questioning of a representative for the defendant, finding that the request was reasonable and did not interfere with the fair conduct of the discovery:

9. **There is no basis for any suggestion that Mr. Dashfield's presence conflicts with the fair and proper judicial conduct of the discovery proceedings**. Although counsel for the plaintiff at the discovery stated that in his opinion the only reason for Mr. Dashfield's attendance was to permit Mr. Dashfield to go back and brief other Bell employees and other Bell officers on the matters in question, I do not consider that a sufficient reason to exclude Mr. Dashfield. Bell Helicopter is entitled to know what one of its officers says on the occasion of an examination for discovery and to take such proper subsequent steps to prepare its defence as it may be advised.

[…]

11. In my opinion **the position taken by Bell Helicopter in wishing to have one of its head office attorneys present upon an examination for discovery of one of its officers is a reasonable position.** That attorney is not going to be a witness at the trial or on the discovery and there is no suggestion that his presence will interfere with the fair conduct of the discovery. The assertion that his presence would inhibit the cross-examination of Mr. Brindley is not supported by any affidavit or other evidence. [Emphasis added]

In keeping with the Alberta case law, these decisions affirm the general power for courts to order that a non-party may attend questioning in appropriate circumstances, which may include circumstances related to the health or well-being of a party or witness, or where the non-party has particular skill and expertise that will be of assistance to counsel.