

NEW RULE CHANGE ON DOCUMENT DISCOVERY WILL AFFECT LITIGANTS' RIGHTS AND COUNSEL'S ETHICAL RESPONSIBILITY

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New Rule 7-1 will replace existing Rule 26(1) by mandating a two-step process for obtaining discovery of documents. This will, no doubt, have a significant impact on counsel's role in the discovery process and on legal ethics governing that role. It may well be that some of that impact is quite unanticipated by those who framed the new rule.

The eventual effect of the new rules and particularly of Rule 7-1 on professional responsibility is not yet known. As far as this author is aware, the substantive content of new Rule 7(1) is novel and has not previously been enacted in any other jurisdiction, although past rule changes and their interpretation in the United Kingdom may provide some guidance on the approach our courts may take in overseeing the new regime for production.

Current Rule 26(1): Production based on Relevance

The current Rule 26(1) requires production of documents that are or have been in a party's possession or control "relating to every matter in question in the action". This wording tracks the test set out in *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.) which has been applied in British Columbia subject to certain reservations imposed by McEachern CJSC (as he then was) in a series of decisions in the early 1980s.

In *Peter Kiewit Sons Co. of Canada Ltd. v. British Columbia Hydro & Power Authority* (1982) 36 B.C.L.R. 58, 134 D.L.R. (3d) 154, 26 C.P.C. 221 (S.C.) his Lordship qualified the broad *Peruvian Guano* test where the plaintiffs sought the disclosure of vast quantities of documents that were of only questionable potential relevance. His Lordship held that at para. 22:

I respectfully decline to follow the *Peruvian Guano* case, supra, or slavishly to apply R. 26(1) in a case such as this, where thousands or possibly hundreds of thousands of documents of only possible relevance are in question. I do not intend to suggest, however, that the *Peruvian Guano* case does not correctly state the law in most cases. That question does not arise for consideration here.

This approach was cited with approval by the British Columbia Court of Appeal in *Middelkamp v. Fraser Valley Real Estate Board* (1992) 71 B.C.L.R. (2d) 276, 10 C.P.C. (3d) 109, 96 D.L.R. (4th) 227 and again recently in *William v. British Columbia* 2009 BCCA 77, 266 B.C.A.C. 207.

Counsel's Role in Production under Current Rules

Until now, the role of counsel in production of her client's documents has been of utmost importance to the soundness of the litigation process.

In *Boxer v. Reesor* (1983) 43 B.C.L.R. 352 (S.C.), Mr. Justice McEachern discussed the role of counsel in connection with production (at para. 20):

The responsibility of a solicitor in connection with the preparation of a list of documents has often been stated. I regard the following extract from Fraser and Horn, *The Conduct of Civil Litigation in British Columbia* (1978), vol. 1, pp. 276-77, to be an accurate statement of the law except that in this province we do not require an order for production and lists of documents are no longer verified by affidavit:

Nowhere in civil procedure is the responsibility of the lawyer greater than in the area of discovery of documents.

This is partly because the lawyer's concept of relevancy is ordinarily more extensive than that of the client. It seems rarely to occur to a litigant that such things as cancelled cheques, receipts, birthday cards, telephone bills and the like might have a bearing on the case. A kind of documentation which a client notoriously fails to produce, unless specifically asked to do so by his lawyer, is the interoffice memo, sometimes a rich and critical source of information.

Additionally, the litigant, owing no special duty of loyalty to the integrity of the judicial system, may be unenthusiastic about disclosing the existence of documents harmful to his case. As an officer of the Court, the lawyer has the responsibility to police the conscience of his client in this area.

The process of discovery of documents tends to pinch most, as one might expect, where the party from whom discovery is sought has numerous records to go through. *The task of persuading a client to undertake this duty faithfully can be considerable.* Careful attention should be paid to -- and the client questioned about -- documents which have, either innocently or corruptly, passed out of his possession, by destruction or otherwise.
(emphasis added)

New Rule 7(1): A Two-Step Process for Production

New Rule 7-1(1)(a) appears an attempt to build and expand upon the *Peter Kiewit* limitation on producibility. Commencing July 1, 2010 production will only be immediately required of documents:

“...that could, if available, be used by any party of record at trial to *prove or disprove a material fact*” (emphasis added).

This threshold has been referred to by the Honourable Mr. Justice Macaulay, Chair of the Supreme Court Rules Revisions Committee, as that of “direct relevance”.¹

This new test will inevitably limit the classes of producible documents at this stage, particularly documents which may lead to other documents or may disclose the identity of witnesses but which, by themselves, cannot be tied to an allegation contained in the pleading.

To obtain production of such documents which could lead to a train of inquiry, or which could not be used at trial, it will be necessary to invoke the new Rule 7-1(11) which basically restates the current test, but with the onus shifted to the party seeking production:

If a party who has received a list of documents believes that the list should include documents or classes of documents that *relate to any or all matters in question* in the action but that are additional to the documents or classes of documents required under subrule (1) (a) or (9), the party, *by written demand that identifies the additional documents or classes of documents with reasonable specificity* and that indicates the reason why such additional documents or classes of documents should be disclosed, may *require* the party who prepared the list to [prepare and serve a supplementary list of documents.] (emphasis added).

Despite the apparently broad language of new Rule 7-1(11) which permits the receiving party to “require” the producing party to prepare and serve a supplementary list containing the specified documents or classes of documents which “relate to any or all matters in question in the action”, there is no positive duty on the party to produce all of these documents. It is a simple matter to refuse and to await a motion to compel production. That will, undoubtedly, become standard fare. The party seeking production will then have to make a determination whether the cost of bringing an application and the costs that may arise on losing such an application are worth the effort to acquire the documents alleged to exist, be in the other party’s possession, to be relevant and yet not to have been produced. If such an application is brought, the new rule leaves the door open for the court to continue balancing the right to obtain access to documents which may help to prove one’s case, with the cost of producing vast quantities of documents which may be only of marginal relevance.

¹ At a seminar on the new Rules at which this author and Mr. Justice Macaulay, among others, served as panellists.

While the purpose of the two-step process would appear to be the streamlining of the litigation process, a number of issues do arise for consideration. These issues are both litigation- and practice-related.

Difficulties for the Litigant Seeking Production

For the litigant seeking production, in addition to having to decide whether the cost of seeking production is worth the risk, a further potential difficulty posed by the shift in onus is that the party may not even be aware of the existence of the documents or classes of documents, let alone being in a position to identify them with reasonable specificity. Let us consider two litigation fact scenarios:

Scenario 1: Estate case – undue influence / testamentary capacity – Liability

Consider an estate case involving allegations of undue influence and lack of testamentary capacity. Anyone who had significant exposure to the deceased during the relevant time period may be an important witness at trial. The identities of those witnesses may be found on many documents other than the obvious, including family letters, emails, party invitations, paper or electronic diaries, or a hundred other kinds of documents.

Under current Rule 26, counsel for the executor acting in accordance with their duty will have explored with the client the existence of such documents and caused them to be produced if they contained the names or other information leading to the identification of such witnesses. Under new Rule 7-1 there will be no such assurance, since defense counsel's job will, in my view, be limited to questioning the client on the existence of documents which "could be used at trial to prove or disprove a material fact", excluding documents which may lead to a "train of enquiry".

Scenario 2: Breach of confidence

This scenario is a variation on the facts in *Lac Minerals v International Corona Resources Ltd.* [1989] 2 S.C.R. 574. Company A approaches company B with confidential information on a mining property, with a view to striking a collaborative business agreement. No deal is struck, and B uses the confidential information for its own benefit.

In this case, the relevant facts will include details of the "pitch" made by A; the nature and extent of information provided to B; any conditions on the use of the information applied by A when making its pitch; and the circumstances under which B received the information.

After receiving the information, B met with a number of prospective geological engineering firms to act as B's consultant. During these meetings, B advised the firms of the approach by A.

In this author's view, under current Rule 26, B would be required to produce:

- a. faxes or emails sent to the prospective consultants inviting them to meet.
- b. interoffice memos among B's representatives referencing these meetings.

Under new rule 7-1(1) (Step 1), production of these documents would not likely be required as they could not by themselves “*be used by any party of record at trial to prove or disprove a material fact*”. It is not the documents, but the meetings to which they refer, which provide evidence which at trial may be used “to prove a material fact”. However, their production could lead A’s counsel to question or subpoena the consultants’ representatives whose evidence as to what was told to them by B could be critical in proving A’s case.

Without production under Rule 7-1(1), A’s counsel would not likely have any idea of the existence of these documents and, accordingly, would not have a documentary basis upon which to ask questions relating to the meetings which occurred. Given the limits placed by the new rules on the amount of time that may be taken for examinations for discovery, that constraint, working with the document discovery constraints, may eliminate discovery of relevant evidence. Accordingly, the opportunity of the party receiving production under subrule 7-1(11) to “require” production of a supplemental list will be of little value, as it won’t be in a position to issue any “*demand that identifies the additional documents or classes of documents with reasonable specificity* and that indicates the reason why such additional documents or classes of documents should be disclosed”.

Practitioner’s Ethical Obligations

In this author’s view, the new Rule 7-1 will place greater burdens on counsel of a party *seeking* production to identify which documents *might* exist so that it can be in a position to trigger Rule 7-1(11). Counsel will have to work harder and smarter in preparing clients’ cases. Failure to do so may lead to concerns, both for counsel and for clients, as to whether an appropriate standard of care has been met.

Just as importantly, in some cases there will be uncertainty as to the role of counsel *making* production, and the role of counsel as discussed in *Boxer, supra*, will accordingly require reconsideration. Consider this key requirement from *Boxer*.

Additionally, the litigant, owing no special duty of loyalty to the integrity of the judicial system, may be unenthusiastic about disclosing the existence of documents harmful to his case. As an officer of the Court, the lawyer has the responsibility to police the conscience of his client in this area.

Under the existing rule, practitioners’ role in “policing” their clients’ conscience is straightforward. We begin by advising that all potentially relevant documents must be produced, including and especially those which the client may perceive as detrimental. We identify the key issues raised by the pleadings and discuss with our clients what classes of relevant or potentially relevant documents may exist. We then receive the documents and vet for privilege. If there is uncertainty as to relevancy, almost without exception we follow the rule “if in doubt, produce”. And in the extreme case where a client refuses to produce relevant documents, we will resign from the case.

Commencing July 1, counsel's role will change. The lawyer will advise her client that only documents which meet the new standard must be produced at the initial stage. This will make it much more tempting for clients to withhold from their own lawyer documents harmful to their case. It may lead as well to issues as between client and counsel as to which of the documents the client does provide must be listed. Inevitably, in this author's view, clients will exert pressure on counsel in circumstances where the line between production and non-production will not always be clear. In some cases they may insist that their lawyers *not* make production of documents of which counsel are aware but that the clients consider confidential or not "directly relevant." Similarly, counsel may choose to adopt an "aggressive" approach to document listing and production that undercuts the traditional role of lawyers as officers of the court. The adversarial system is premised on an assumption that if both sides to a dispute present their cases to what they see as their best advantage and are given an appropriate opportunity (through discovery and cross-examination) to test their opponent's case, it is more likely that the court will be able to find the truth and come to a just result. If any part of that equation is constrained, the risk increases that the facts will not be correctly established and the judgment in the case may therefore be different.

These scenarios have the potential to place counsel in a quandary which does not exist in today's clearer world. If they produce documents which prove not to be producible under R. 7-1(1), they may be guilty of breaching their client's confidence; yet if they decline to produce they may breach their duty as officer of the court. Less scrupulous counsel may argue, "well, they can ask for it under the second step". If questioned later on, such counsel may assert that "reasonable people" may differ on whether production under R. 7-1(1) was mandated or whether the documents could be left for R. 7-1(11). What comes from this is an understanding that the new rules appear likely to increase the prospect of games being played and the truth suffering. How to counteract that will be for each counsel to assess in each case, based on such factors as the reputation of opposing counsel and an assessment of the opposing party and its inclination to try to use the rules to subvert the discovery process.

The English Experience

In England, the courts in civil cases routinely make an order for document discovery, now called "disclosure". English rule Civil Procedure Rule ("CPR") 31.5(1) provides that an order of the court to give disclosure is an order to give "standard disclosure", unless the court directs otherwise. CPR 31.6 identifies what documents are to be disclosed by way of standard disclosure, which are: (a) the documents on which he relies; (b) documents which adversely affect his own case or adversely affect another party's case or support another party's case; and (c) documents required to be disclosed by a relevant Practice Direction. The concept of "standard disclosure" has been in place since 1999.

CPR 31.7 limits "standard disclosure" by providing that, when giving it, a party is required to make a "reasonable search for documents falling within rule 31.6(b) or (c)".

In turn, factors relevant in deciding the reasonableness of a search include the following (a) the number of documents involved; (b) the nature and complexity of the proceedings; (c) the ease and expense of retrieval of any particular document ; and (d) the significance of any document which is likely to be located during the search. These factors are similar to the proportionality tests which are the basis of the new British Columbia Rules of Court. Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, she must state this in her disclosure statement and identify the category or class of document. By rule 31.10 the list of documents must include a disclosure statement, which is in turn defined as a statement setting out the extent of the search that has been made to locate documents required to be disclosed and certifying that the maker of the statement understands the duty to disclose documents and that to the best of her knowledge she has carried out that duty.

A party who is dissatisfied with the extent of "standard disclosure" it has received may apply under CPR 31.12 for an order for "specific disclosure", namely, an order that a party must do one or more of the following things: (a) disclose documents or classes of documents specified in the order; (b) carry out a search to the extent stated in the order; or (c) disclose any documents located as a result of that search.

Decisions of the English courts demonstrate that concerns over the extent of production are often outweighed by the proportionality concept. In *Nichia Corporation v. Argus Limited* [2007] EWCA Civ 741 (C.A.), Jacob L.J. confirmed how fundamentally the new CPRs have changed the traditional *Peruvian Guano* test:

I start with ... the introduction of "standard disclosure". Prior to the CPR the test under the rules was that any document "relating to any matter in question" was discoverable. The courts took a very wide view of what was covered by this. The test was laid down a long time ago when no-one had the quantities of paper they have now. In the very well-known *Peruvian Guano* case ... Brett L.J. said:

...

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, *it is reasonable to suppose, contains information which may--not which must--either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.* I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

It is manifest that this is a much wider test than that for "standard disclosure." *I have a feeling that the legal profession has been slow to appreciate this. What is now required is that, following only a "reasonable*

search" (CPR 31.7(1)), the disclosing party should, before making disclosure, consider each document to see whether it adversely affects his own or another party's case or supports another party's case.

(emphasis added, except in the words "may" and "must" which are italicized in the original)

It is to be noted that although Jacob L.J.'s was in the minority as to the outcome of the appeal, his outline of the principles guiding interpretation of the CPRs was wholeheartedly endorsed by the majority.

Counsel's role in making disclosure was considered by the Chancery Division in *Digicel (St. Lucia) Limited et al v. Cable & Wireless Plc et al*, [2008] EWHC 2522 (Ch.), where the application was for a more extensive electronic search to include specified keyword searches of the respondent's documents database. The court contrasted the respective roles of the solicitor and of the court, at para. 51:

It is right that the decision as to what is a reasonable search rests in the first instance with the solicitor in charge of the disclosure exercise. However, the Practice Direction makes clear that some parts at least of the process ought to be discussed with the opposing solicitor with a view to achieving agreement so as to eliminate, or at any rate reduce, the risk of later dispute... However, even if the Court can, in a proper case, be favourably influenced by the diligence and conscientiousness of an individual solicitor, in my judgment, the task of deciding what is required by a reasonable search is a task given to the Court by the wording of the Rules. This task can be carried out by the Court either in advance of the search being done or with hindsight, where a search has been carried out and its extent is challenged by the other party. I do not find any warrant in the language of the Rules or Practice Direction for Mr Nourse's suggestion that the standard of review should be a judicial review standard of irrationality or the standard adopted by an appellate court reviewing the exercise of a discretion... [T]he solicitor in the first instance has the job of deciding what the extent of the search should be. That comment does not limit the scope of review by the Court in a case where the decision is challenged.

(emphasis added)

In carrying out that initial search, the Court of Appeal in *Nichia Corporation* cautioned in paras 46-7 *against overdisclosure*. This caution was based on two objectives usually considered contradictory, saving money and getting at the truth:

It is wrong just to disclose a mass of background documents which do not really take the case one way or another. And there is a real vice in doing so: it compels the mass reading by the lawyers on the other side, and is followed usually by the importation of the documents into the whole case thereafter – hence trial bundles most of which are never looked at.

Now it might be suggested that it is cheaper to make this sort of mass disclosure than to consider the documents with some care to decide whether they should be disclosed. And at that stage it might be cheaper – just run it all through the photocopier or CD maker – especially since doing so is an allowable cost. But that is not the point. *For it is the downstream costs caused by overdisclosure which so often are so substantial and so pointless. It can even be said, in cases of massive overdisclosure, that there is a real risk that the really important documents will get overlooked – where does a wise man hide a leaf?* (emphasis added)

It is possible under CPR 31.12 not only to apply for an order that the search be expanded, but also where the “applicant satisfies the court that such disclosure is “inadequate” or that the case is one where something more than standard disclosure is called for, *for example, disclosure of documents which may lead to a train of inquiry with the consequence of producing documents which advance the applicant's case or damage the respondent's case*”: *Digicel*, para. 36. The profession is aided by a series of Practice Directions which form part of the CPRs and shed further light on the availability of such orders, the circumstances under which they may be granted, and the conduct of counsel. For example, Practice Direction 5.5 provides as follows:

An order for specific disclosure may in an appropriate case direct a party to –

- (1) carry out a search for any documents which it is reasonable to suppose may contain information which may –
 - a) enable the party applying for disclosure either to advance his own case or to damage that of the party giving disclosure; or
 - b) lead to a train of enquiry which has either of those consequences; and
- (2) disclose any documents found as a result of that search.

In summary, although at first glance the English system appears directed at restricting the *search* rather than the *documents* themselves, its courts have interpreted the CPRs as providing for limited initial production followed by expanded secondary production where warranted by the principle of proportionality. This direction, and the admonition to counsel to avoid overdisclosure, provide greater opportunity for parties and their counsel to succumb to pressures against disclosure and to avoid responsibility for failure to produce relevant documents. This risk was acknowledged by Lord Justice Rix in *Nichia*, at para. 72:

[It] would be against the interests of justice if documents known to exist, or easily revealed, which would harm a party's own case or assist another party's case need not be disclosed because of a blanket prima facie rule against any standard disclosure. *Once such a principle of disclosure were*

known to hold sway, dishonest or cavalier litigants would reap an unmerited advantage, contrary to the interests of justice.

Furthermore, in this author's view the directive that counsel vet all documents individually for relevance, when coupled with continuing disclosure requirements, could prove a crushing burden on B.C. practitioners if applied here.

Ensuring Completeness of Document Discovery

There are several key reasons why counsel will have to work harder in obtaining document discovery. First, as noted earlier in this paper, the diminished breadth of the initial list means counsel can place less reliance than ever on opposing counsel's duties in respect of production.

Second, the time limits on examinations will prevent counsel, in many cases, from conducting an oral fishing expedition. Consider the examination of a bank officer with a view to determining what policy documents existed at the time that loans were granted to a party to the action. An examination of the officer may take many hours, and require interim adjournments, to ascertain the existence of documents; and by the time they are produced, the time allotted for examination of the bank may have expired thereby preventing counsel from effective discovery on key issues of the case.

Third, there is no longer an automatic right to seek information by way of Interrogatories without consent or order.

In this author's view, counsel should therefore:

1. *Be critical* of the production received by opposing party.
2. In appropriate cases, *consult with an expert* to ascertain what documents may be absent which are either directly relevant or may lead to a train of inquiry.
3. *Seek out other information* from any available external sources as to what may have occurred in your action. This may or may not require an application under Rule 7-1(18), similar to the current R. 26(11), and could involve a Freedom of Information request, a review of public registries and internet sites. Discovery from third party sources will often shed light on what might be missing in the opponent's production.
4. After taking these steps, consider *invoking the new Rule 7-1(11)* to seek production of "documents or classes of documents that relate to any or all matters in question in the action but that are additional to the documents or classes of documents required under" subrule 7-1(1)(a). In making this demand, you must "identif[y] the additional documents or classes of documents with reasonable specificity and indicate the reason why" they should be disclosed.
5. *Diarize and follow up 35 days later* pursuant to R. 7-1(12). This will involve a close assessment of any responsive supplemental list as well as objections to any questions not properly answered and the reasons therefore.
6. Keep in mind that the discovery obligation continues and hold your opponent's feet to the fire as the issues evolve and new documents become producible.

It is always a judgment call to determine how much documentary discovery to obtain before commencing examinations which can themselves be a rich source of information

on the existence of documents not yet produced. Under the new Rules, counsel will have to carefully balance the quest for further production against the need to use limited discovery time effectively as effectively as possible.

There will therefore be increased motivation for counsel to use alternative means to maximize the opposing party's disclosure. This author expects a resurgence in the use of Notices to Admit which are permitted as of right and avert the need to examine on non-contentious issues and to obtain admissions of authenticity for documents not emanating from the examinee's own production. Traditionally, Notices to Admit have been served after the main examinations for discovery have been conducted. Counsel seeking to effectively target their examinations to contentious issues and to ensure completeness of document production should consider delivering a Notice to Admit early. If no response has been received within 14 days the recipient will be deemed to have admitted the facts and the authenticity of documents listed therein. Counsel should consider seeking admissions on the existence of different classes of documents which may appear missing from the initial production.

Interrogatories may also prove a valuable tool in identifying missing documents, although not traditionally used for this purpose. Under new Rule 7-3, Interrogatories require either consent or order of the Court. However, it is reasonable to expect courts will consider a party's cooperativeness in responding to Interrogatories in their willingness to grant other case management orders such as an application to extend discovery time. Restricting the Interrogatories to factual matters will increase the prospect of obtaining consent. If you have delivered reasonable Interrogatories or Notices to Admit and they have not been answered responsively, or at all, you will have laid groundwork for an application to extend discovery time under new Rule 7-2(3).

Conclusion

For the reasons herein, parties seeking production under the new Rules will no longer be able to rely on their opponents' duty to produce all potentially relevant documents. Clients and their counsel will have to work harder to identify documents or classes of documents, and to assert entitlement to have them produced.

In this author's view, to uphold the integrity of our document production system, it is incumbent on our profession to consider the impact of the new Rule 7-1 on the obligations of counsel set out in the *Boxer* case and it would be regrettable if one of the consequences of rules aiming to increase efficiency and reduce cost was to reduce professional ethical standards and the confidence in courts correctly finding the facts in each case and applying the law to them.