The Law Society of Manitoba

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CIVIL PROCEDURE

Chapter 2

The Discovery Process

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A. INTRODUCTION

Discovery has long been an extremely important part of the litigation process. Its importance has been steadily increasing in recent years, particularly since the last major revision of the *Queen's Bench Rules* in 1989. The discovery process occurs through the disclosure of documents and the oral examination for discovery.

Generally speaking, the rules provide for extensive disclosure of both documents and facts between parties. Much of that disclosure is to occur at the discovery stage of the litigation. It should be noted here that substantial changes were recently made to the *Expedited Actions procedure (Rule 20A)*. These changes significantly limit the nature and scope of discovery. The new rules apply to actions under $100,000. See below for a detailed review of these changes.

The general purpose of the discovery rules is to ensure that counsel should possess all of the relevant facts of their own client's case, and those of the other parties, by the time the discovery process is complete. Counsel should be in a position to identify and narrow the contentious factual and legal issues in the case in advance of trial, and to prepare for trial accordingly. Completed discovery enables counsel on all sides to offer informed advice to assist clients in making decisions about settlement of an individual issue, several issues, or the entire case.

Three specific important purposes of discovery are:

1) To enable counsel to obtain the opposing party's version of the facts relevant to the issues raised by the pleadings in order that counsel may know the case to be put forward by the other side;

2) To enable counsel to elicit admissions on oath from the opposing party that are either helpful to that counsel's case, or damaging to the opposing party's case; and

3) To enable counsel to assess the credibility, demeanor and skill of the other party as a witness in advance of trial.

Reading Resources:

- G. D. Cudmore, *Choate on Discovery*, 2nd ed. (Toronto: Carswell, looseleaf).
- W. B. Williston & R. J. Rolls, *The Law of Civil Procedure* (Toronto: Butterworths, 1970) at 743-970.
- G. D. Watson, Q.C. & M. McGowan, *Ontario Civil Practice 2016* (Toronto: Carswell, 2016). There is also G.D. Watson & M. McGowan, *Ontario Civil Practice Transition Guide 2009/2010* (Toronto: Carswell, 2009).
- G. Watson, *Holmested & Watson*: Ontario Civil Procedure (Toronto: Carswell, looseleaf). [Note: The Ontario Rules of Civil Procedure were substantially changed effective January 1, 2010, especially with respect to discovery.]

B. DISCOVERY OF DOCUMENTS (RULE 30)

1. The Scope of Documentary Discovery

a) What is a Document?

> *A "document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and information recorded or stored by means of any device. (Rule 30.01(1)(a)).*

The Ontario Superior Court of Justice has repeatedly held that social media postings are documents within the meaning of the rules of civil procedure of Ontario. For example, a party must produce any of his or her Facebook postings that relate to any matter in issue in an action (*Leduc v. Roman*, [2009] O.J. No. 681, 2009 CanLII 6838 (ONSC); *Papamichalopoulos v. Greenwood*, 2018 ONSC 2743). Privacy settings do not defeat the obligation to produce relevant social media material.

b) What is a Relevant Document?

> *A "relevant document" is one which relates to any matter in issue in an action. (Rule 30.01(1)(c))*

The Manitoba Queen's Bench has commented "that the spirit of the discovery rules requires even marginally relevant information to be provided" (Master Cooper in *Ben-Ron Farms v. Canadian Wheat Board* 2008 CarswellMan 136, 2008 MBQB 53 commenting on the decision of Clearwater J in *Verwey Potatoes Ltd. v. Siemens Seed Potatoes*, 2002 MBQB 195, [2002] M.J. No. 538 (QL) (*not available on CanLII*).

In *Berscheid v Federated Co-operatives et al*, 2018 MBCA 27, Justice Steel stated (at para. 25):The threshold for determining relevancy at the discovery stage of an action is very low and differs from the more stringent application of the relevancy test at a trial. Relevancy at the discovery stage of an action is not determined by what a party considers necessary or helpful in the proof of its claim or defence, but rather by the issues raised in the pleadings (see *Williams v Arnold Bros Transport Ltd*, 2012 MBQB 143).

Master J.M. Cooper in *Callinan Mines Ltd. v. Hudson Bay Mining & Smelting Co.*, 2010 MBQB 22, echoed this thought stating:

> *Any document is relevant if it can directly or indirectly assist either party to advance or defend the claim. For the purposes of production and discovery, the relevance of the documents sought to be disclosed and produced must be decided in the context of the action as set out in the pleadings.*

Similarly, Brett, L. J. in Compagnie Financiere v. Peruvian Guano, [1882] 11 L.R. 55, (Q.B.) at 63 stated:

> *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.*

Nonetheless, when dealing with production of documents a very broad approach to relevance should be taken for "Everything which will throw light on the case is *prima facie* subject to inspection" per Blackburn, J. in *Hutchinson* v. *Glover*, [1875] 1 L.R. 138, (Q.B.) at 141.

c) Disclosure

A document may be inadmissible at trial, but still discoverable because it is a document which might lead to the discovery of another document, or body of evidence which would be relevant.

See *Rule 30.05* - "disclosure or production of a document shall not be taken as an admission of its admissibility."

Every relevant document in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in this rule, whether or not privilege is claimed in respect of the document. (*Rule 30.02(1)*) Also note *Rule 30.01(1)(b)*) "The rule is, therefore, that a party must candidly describe in an affidavit on production not only documents for which no privilege is claimed but also

those for which a privilege is claimed. It is not enough to do the one but not the other" – Reid J in *Grossman v. Toronto General Hospital* (1983),146 DLR (3d) 280, 1983 CanLII 1975 (ON SC).

In certain circumstances some documents which are not, in a strict sense, in the possession of the party may be required to be disclosed. In *Lund v. Health Sciences Centre* 1993 CanLII 14788 (MB CA), (1993), 83 Man. R. (2d) 307 (C.A.) it was held that, while hospital department heads may not be employees or officers in a strict sense, they are responsible to the hospital's board of governors for what goes on in their department. Accordingly, documents in the possession of a medical department are within a hospital's power to produce.

d) Subsidiary Corporation

The court may order a party to disclose all relevant documents in the possession, control or power of the party's subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by the party and to produce for inspection all such documents that are not privileged. (*Rule 30.02(4)* Also note *Rule 30.02(2)*)

e) Insurance Policies

Rule 30.02(3) provides that:

> *A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,*
>
> *a) to satisfy all or part of a judgment in the action; or*
>
> *b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment:*
>
> *but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.*

Rule 30.02(3) deals with the obligation of a party, at the discovery of documents stage, to make disclosure regarding insurance policies, as set out in the rule. The rule should be read together with *Rule 31.06(4)* that deals with the right of a party, at examinations for discovery, to obtain disclosure of the existence and contents of insurance policies. *Rule 31.06(4)* permits the additional disclosure of information as to the amount of money available under the policy, and any conditions affecting its availability.

Although on its face the wording of *Rule 30.02(3)* may suggest that the extent of disclosure is more limited at the discovery of documents stage, the more probable interpretation is that the disclosure of insurance policies under *Rule 30.02(3)* would necessarily include the further particulars articulated in *Rule 31.06(4)*. It will certainly be open to counsel seeking disclosure under *Rule 30.02(3)* to argue that disclosure of

policy limits and conditions affecting availability ought, on a practical level, to be made at the earlier stage given the right to disclosure later on.

The rules with respect to insurance policies are a marked departure from past practice, and arguably demonstrate a departure from the concept of "relevancy to an issue in the action" determining whether a document ought to be disclosed. Insurance policies are generally not relevant to an issue in the action, but rather relate to whether a party will have the means to satisfy a judgment if a judgment is ultimately obtained against that party.

In *Pye Bros. Fuels Ltd. v. Imperial Oil Limited*, 2012 ONCA 153 leave to appeal dismissed *2012 CanLII 53276* (SCC), the Ontario Court of Appeal stated that (at para. 9):

> *Rule 30.02(3) is not intended to provide a means to obtain discovery of documents in advance of commencing a separate action relating to coverage or contractual obligations. The purpose of the Rule is to provide a specific and limited exception to the general rule that only relevant documents need be produced. It is to assist the making of informed and sensible decisions by parties involved in litigation in circumstances where recourse may be had to any available insurance money: Sabatino v. Gunning, 1985 CanLII 2013 (ON CA), 50 O.R. (2d) 171 (C.A.).*

Inasmuch as the rules require disclosure of a policy under which an insurer "may be liable" and particularly given the reference to "conditions affecting its availability" in *Rule 31.06(4)*, it is arguable that policies ought to be disclosed even where insurers have denied coverage, or where they are defending pursuant to a non-waiver agreement.

Where a plaintiff's claim is being advanced on a subrogated basis, it is likely that the defendant will be able to obtain copies of the relevant policy of insurance because the plaintiff would be liable for costs if unsuccessful in prosecuting the action (see *DGW Electronics Corporation* v. *Crystal Craft Industries Inc.* (1986), 15 C.P.C. (2d) 205 (Ont. H.C.)).

2. The Affidavit of Documents

a) Automatic Obligation

The rules provide that a party to an action shall serve on every other party an affidavit of documents, in the prescribed form, within ten days after the close of pleadings. (*Rule 30.03(1)*)

b) Information to be Included Within Affidavit

See *Form 30A Affidavit of Documents (Individual)* and *Form 30B Affidavit of Documents (Corporation or Partnership)* found online and in the precedents to the chapter.

Note: The affidavit is to disclose all documents relating to any matter in issue in the action that are, or have been in the possession, control or power of the party.

It is also important to note that the affidavit shall sufficiently identify the document. The provision for the sufficient identification of a document is particularly important with respect to those documents listed in Schedule "B", namely those over which a privilege is claimed. A general description of privileged documents is not sufficient for the purposes of Schedule "B". Instead, each document over which privilege is claimed must be specifically listed, sufficiently identified and the grounds for the claim of privilege specifically stated and related to the individual document.

Temoin v. Stanley (1986), 12 C.P.C. (2d) 69 (Ont. Dist. Ct.) (reversed in part on other grounds) held that the author of a document over which privilege is claimed must be named in the affidavit of documents. (But see Waxman v. Waxman (1990), 42 C.P.C. (2d) 296 (Ont. Master) which held that the deponent is not required to disclose the names of every expert, investigator, adjuster, witness and potential witness, whose reports or interviews are the subject of a claim for privilege, before a ruling on the validity of such claim is made.)

With respect to expert opinions over which privilege is claimed, those opinions must be set out in Schedule B of a party's affidavit. If the party is not relying upon the expert and the expert is not being called to testify, the name of the expert does not need to be provided in the affidavit. In that case, the party may simply identify the party as Expert "A", "B", etc. and provide the date of any report, findings and/or opinions received from the expert. In addition to what is set out in the affidavit in Schedule B, the party must provide an undertaking not to call that expert as a witness at the trial (see *Lyne v. McClarty* (1996), 108 Man. R. (2d) 303 (Q.B. Master)). If the party complies with these conditions, no disclosure need be given as to the actual content of the report or findings (see *Chmara v. Nguyen* (1993), 85 Man. R. (2d) 227 (C.A.)).

Other aspects of "sufficient identification" may vary from case to case, but would include the date and time on which the document was prepared, the title or heading of the document, if available, and an indication of the subject matter of the document.

c) By Whom the Affidavit is to be Made

The affidavit of documents shall be made by the party, or in the case of a corporation, by an officer, director or employee. (*Rule 30.03(2)*)

In *King v. Walsh Micay & Co.* (1992), 4 C.P.C. (3d) 213 (Man. Q.B.) it was held that in complicated commercial litigation involving 230 plaintiffs with similar but not identical interests, the plaintiffs' counsel may prepare a list of all documents in the possession of the plaintiffs showing which plaintiffs had or have possession of each document. The list was to be treated as if it were the affidavit of each of the plaintiffs.

d) Lawyer's Certificate

Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent the necessity of making full disclosure of all relevant documents in issue in the action. (*Rule 30.03(3)*)

The rule relating to the lawyer's certificate places an obligation on the lawyer where none existed before. It is designed to emphasize to the lawyer that there is an obligation to explain to the client the requirements of documentary disclosure as part of the litigation process. In practical terms, this means the lawyer must emphasize to the client that the client must make disclosure of all relevant documents, including those that are damaging to the client's case.

In *Bie Health Products v The Attorney General of Canada et al.*, 2015 ONSC 3418, Justice Fred Myers of the Ontario Superior Court of Justice stated at para. 10 that "The lawyer's certificate is an important circumstantial guarantee of full and fair disclosure of documents in our self-reporting system."

e) Rule 30.03(4) Privilege

An affidavit of documents is not to be filed with the Court unless it is relevant to an issue on a pending motion (such as a motion seeking further documentary production) or at trial: *Rule 30.03(4)*

i. Generally

A party will not be required to answer relevant questions or produce relevant documents on discovery if a privilege arises to protect a particular matter from disclosure. Note that *Rule 34.10*, which sets out the documents a person must bring to the exam for discovery and produce for inspection, specifically excludes privileged documents. There are, however, a limited number of circumstances in which a true claim for privilege arises.

The Supreme Court of Canada in *Slavutych v. Baker* (1975), [1976] 1 S.C.R. 254 quoted approvingly the statement by Wigmore (McNaughton, ed., *Wigmore on Evidence*, 3d ed., vol. 8 (Boston: Little, Brown, 1961) para. 2285), outlining the four fundamental conditions necessary for the establishment of a privilege against the disclosure of communications:

1) The communications must originate in a confidence that they will not be disclosed;

2) The element of confidentiality must be essential to the full and satisfactory maintenance of a relation between the parties;

3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and

4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Note, as well, the following decisions of the Supreme Court of Canada: *M. (A.) v. Ryan,* [1997] 1 S.C.R. 157; and *R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 SCR 445 These cases provide good discussions on the law of privilege in general, and on the importance of solicitor-client privilege in the justice system, respectively. Both these decisions have been referred to by Associate Chief Justice Oliphant (as he then was) in *Kleysen et al v. The Attorney General of Canada et al*, 2001 MBQB 68 (CanLII).

Whether privilege attaches to a document depends on the purpose for which the document was created not on the contents of that document. Just because a document, for example, contains something which is unfavourable to your client is not a reason at law to justify a claim of privilege.

In *Man-Shield Construction Inc. et al. v. Renaissance Station Inc. et al*., 2014 MBQB 101, Associate Chief Justice Perlmutter comprehensively reviews the defining principles of four different privileges: solicitor-client, litigation, common interest and settlement (*paras. 8* to *21*).

For a document to fall within the definition of litigation privilege, the dominant purpose for the preparation of that document must be that it was prepared in contemplation of or for use in litigation.

Solicitor-client privilege relates to all communications between solicitor and client which are considered to be of a confidential nature. For solicitor-client privilege to apply, the communication must be made in the context of the existence of a solicitor-client relationship and the communication between the parties must regard the giving of legal advice.

Litigation privilege on the other hand applies to communications even of a non-confidential nature between the solicitor and, for example, third parties if the purpose of the communication was for use in litigation, anticipated or actual.

The distinction between solicitor-client privilege and litigation privilege is thoroughly canvassed in *General Accident Assurance Co. v. Chrusz* 1999 CanLII 7320 (ON CA), (1999), 180 D.L.R. 4th 241 (Ont. C.A.) at pp.330-31:

> *... First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.*
>
> *Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).*

This case was cited with approval by the Supreme Court of Canada in the leading case on production and inspection of documents and claims for privilege: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39. In that case the court gives an excellent discussion of the different rationales behind litigation privilege and solicitor-client privilege. In particular, it points out that the

purpose of litigation privilege was to create a zone of privacy in relation to pending or apprehended litigation. Therefore, absent closely related proceedings, litigation privilege comes to an end upon the termination of the litigation that gave rise to the privilege. Unlike solicitor-client privilege, it is neither absolute in scope nor permanent in duration.

Confidentiality, the *sine qua non* of the solicitor-client privilege is not an essential component of the litigation privilege. For example, in preparing for trial, lawyers as a matter of course obtain information from third parties who have no need, nor any expectation, of confidentiality; yet litigation privilege attaches nonetheless. The court articulated that the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

ii. Litigation Privilege and the Dominant Purpose Test

Over the last several years, there have been many reported decisions relating to the law of privilege with respect to documents prepared for the use of counsel in anticipation of litigation. Canadian courts in most provinces over the years, have abandoned the rule that privilege can be claimed for a document if contemplated litigation was a substantial reason for its preparation.

Instead, Canadian courts have generally approved of the House of Lords decision in *Waugh* v. *British Railways Board* (1979), [1980] A.C. 521. The *Waugh* decision stipulated that for documents to be privileged, it must be demonstrated that anticipated litigation was the "**dominant purpose**" behind their creation and the onus is on the party who claims the privilege to establish the right to refuse production to the other party.

The Manitoba Court of Appeal has expressly adopted the dominant purpose test (see *Levin v. Boyce* 1985 CanLII 3075, 34 Man. R. (2d) 1 (C.A.)).

The Supreme Court of Canada in the *Blank* decision, *supra*, has confirmed that the dominant purpose test is the one to be applied in determining whether litigation privilege should attach to documents. The court in its decision stated that although the test provides narrower protection than would a substantial purpose test, the dominant purpose standard appears consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test, the court noted, is more compatible with a contemporary trend favouring increased disclosure.

The court specifically articulated that while the solicitor-client privilege has been strengthened over the years, on the contrary litigation privilege has had to weather the trend toward mutual and reciprocal disclosure that is the hallmark of the judicial process.

Most of the recently reported decisions in this area deal with a claim for privilege over reports or statements prepared by, or given to, insurance investigators. It must be remembered that there are, generally, two types of insurance - one that insures against loss to property, and the other that insures against liability.

An interesting judgment which applies the dominant purpose test to a claim for privilege over documents generated by an insurance adjuster, but which also recognizes some of the practicalities of investigating and adjusting loss claims, is the decision of *Shaughnessy Golf and Country Club v. Uniguard Services Ltd* (1986), 1 B.C.L.R. (2d) 309 (C.A.).*sub nom Shaughnessy Golf & Country Club v. Drake International Inc., 1986 CanLII 163 (BC CA).*

In that case, insurers dealing with a major fire loss, had an investigator on the scene within hours. The investigator thereupon produced a series of investigation reports directed to the insurance company. At the trial level, the reports were held to be privileged on the basis that the work of insurance investigators and adjusters following a fire is routinely in anticipation of litigation, and to rule otherwise would unduly impede the efficient adjustment and resolution of claims.

On appeal, the court stated that it was adopting the dominant purpose test, and that one of the rationales of that test was to encourage full and open discovery. It accordingly held that the reports prepared during the first two weeks after the fire, and prior to the formal retention of counsel, belonged to a general investigation of the loss, and were not privileged. Later reports, however, were prepared primarily for litigation and were, therefore, privileged.

In the Manitoba decision of *Cross v. Assuras* (1996), 113 Man. R. (2d) 28 (C.A.), 1996 CanLII 12435 (MB CA), the Court of Appeal dealt with the issue of whether litigation privilege attached to a report ordered by the defendant Health Sciences Centre on the advice of its insurance adjuster, prior to the commencement of litigation. The court stated that the question to be answered was "what was the dominant purpose for which the report was requested?" If the answer to that question was that the Health Sciences Centre requested the report for the purpose of assisting counsel in the preparation and conduct of litigation, then the report would have been privileged. The court found that there was no evidence that the dominant reason for seeking the report was contemplation of litigation or assisting counsel whom it anticipated retaining. Further, the evidence did not establish that the

dominant reason for the insurance adjuster providing the advice to the Health Sciences Centre was real anticipation of litigation. The court also stated that the potential for litigation had to be more than a mere possibility.

Although the majority of recent cases dealing with the dominant purpose test deal with insurance reports, the test applies equally to other types of documents over which this type of privilege may be claimed. Accordingly, experts' reports will normally qualify as being privileged under the dominant purpose test (note, however, experts' reports are generally disclosable at a later stage of the litigation if they are to be relied upon). Similarly, witness statements will normally be held to be privileged under the dominant purpose test. As a practical matter, if you are relying on an expert's report you may wish to produce it for inspection prior to discovery.

The courts have also had to decide whether a document contained in a solicitor's brief which was obtained by the solicitor for the purposes of litigation, but which did not originate for that reason, was privileged. The British Columbia Court of Appeal held in *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577, 1988 CanLII 181 (BC CA) that the dominant purpose rule applies to copies of documents, which copies are made for the dominant purpose of being used in litigation. The court stated that it is highly desirable to maintain the sanctity of a solicitor's brief. Privilege enables a solicitor to prepare for litigation knowing that the information gathered and advice given will not be disclosed without the client's consent. While not everything a solicitor does or collects is privileged, in this instance the documents were privileged because they had been obtained for the dominant purpose of advising on or conducting litigation.

The Manitoba Court of Queen's Bench came to the opposite conclusion in *Polk v. Royal Trust Corp. of Canada*, [1990] 1 W.W.R. 78, 1989 CanLII 7282 (MB QB), The plaintiff sought a declaration and interest as the potential beneficiaries of a Manitoba trust. The defendants denied the plaintiffs' entitlement to the trust benefits claiming, *inter alia*, that one of the plaintiffs had murdered the original beneficiary of the trust. Most of the parties to the litigation and the evidence to be heard in the litigation originated in Fort Lauderdale, Florida. The plaintiffs learned that the Fort Lauderdale police had delivered certain documents from their criminal investigation file to the defendants. The documents had been forwarded to the defendants on trust that no further disclosure of the evidence would take place and that the documents would be returned immediately. The defendants complied with the trust, returned the documents, and claimed that they were not subject to production. One of the grounds was that the documents were subject to privilege as they had been obtained for the purpose of forming part of the counsel's brief.

Ferg J. held that documents which formed part of the counsel's brief are subject to the claims of privilege, but that privilege is extremely limited in scope. In order for such a claim of privilege to succeed, the dominant purpose of the creation of the documents must be specifically for pending litigation. In this case the bulk of the items the defendant sought to suppress were in existence before litigation was ever contemplated and accordingly no privilege could attach to them on this basis.

The *Polk* case was recently followed in *Chezick v. Klaprat,* 2012 MBQB 285 (Master), where production of documents that had been given to one defendant's lawyer as particulars in a related criminal proceeding was ordered. Master Berthaudin found that the documents were not privileged as they were not created for the dominant purpose of litigation, and therefore were required to be produced.

It should be noted that it has been held in a number of Ontario cases that where photocopies of public documents have been obtained for the dominant purpose of use in litigation, those photocopies, but not the originals, are privileged. An example of one such case is *Ottawa-Carlton (Regional Municipality) v. Consumers' Gas Co.* (1990), 74 O.R. (2d) 637 (Div. Ct.), 1990 CanLII 6937. The principle stated therein was also reaffirmed by the Ontario Court of Appeal in *General Accident Assurance Company v. Chrusz* (1998), 37 O.R. (3d) 790 (C.A.), 1999 CanLII 7320 (ON CA).

In *Apotex Fermentation Inc. v. Novopharm Ltd.*, [1994] 5 W.W.R. 49, 1994 CanLII 16651 (MB QB) aff'd [1994] 7 W.W.R. 429 (Man. C.A.), *1994 CanLII 16680 (MB CA)*, the court ruled that notes taken by a solicitor when interviewing potential witnesses with litigation as the dominant purpose are privileged. "In my view, counsel must be able to fully prepare for litigation comfortable in the knowledge that opposing counsel will not be permitted access to notes taken of interviews with witnesses or potential witnesses." (5 WWR at p. 58) Oliphant A.C.J. went further to say that the privilege attaching to the notes is not waived if that potential witness subsequently gives evidence by affidavit or any other way. The right to cross-examine does not extend to what was said to counsel in preparation for litigation.

However, in *R. v. Sachkiw*, 2014 ONCJ 287, Dawson J. held that where a witness uses notes to refresh memory those notes should be provided to opposing counsel, as they can be used to test the reliability of the witness' evidence and credibility. Dawson J. found that the onus is on the defence to establish, on a balance of probabilities, that the document or note in question is subject to litigation privilege. The defence must establish that the dominant purpose of the document was, per *R. v. Abeyewardene, [2008] O.J. No. 5749 (S.C.J.)* "for the purpose of either preparing for trial or facilitating conversations with a lawyer in anticipation of litigation."

R v. Sachiw was referred to in *Bradley v. Eastern Platinum Ltd.*, 2015 ONSC 108. Justice Rady states:

> [53] The law relating to the production of notes was recently summarized in R. v. Sachkiw, 2014 ONCJ 287 (CanLII):
>
> ...it is a general principle of law that when a witness refreshes their memory from notes and testifies having done so that opposing party is entitled to see those notes. This is an implied waiver of litigation privilege. The reliability of the witness' evidence is one of the considerations the court must take into account. The opposing party is entitled to test that reliability through cross examination, and where the witness has refreshed their memory from notes, to explore the impact of those notes on the witnesses recall.
>
> If the creation of a document has as its dominant purpose a view to potential litigation, the document can in the proper circumstances still be protected by litigation privilege even if litigation has not actually been initiated or even authorized. See: *Manitoba Crop Insurance Corp. v. Wiebe*, 2006 MBCA 143.

Note: *Rule 30.04(6)* expressly states that where privilege is being claimed for a document, the court may inspect the document to determine the validity of the claim.

iii. Solicitor-Client Privilege

The establishment of solicitor-client privilege with respect to a particular document is fact specific and will vary from case to case. A good discussion of the law in this area can be found in a decision from the Manitoba Court of Appeal: *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11. In that case, the court refers to the Supreme Court of Canada's statement that whether or not the solicitor-client privilege attaches, depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. Thus, the onus is on the person seeking to claim the privilege to establish three factors in connection with any particular document:

1. that the document was the giving or obtaining of legal advice;
2. the presence of a solicitor and the presence of a client;
3. the existence of the solicitor-client relationship.

Two more decisions to read in this area are the Supreme Court of Canada's decisions in *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 [Goodis]and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* 2008 SCC 44.

In *Goodis*, the Ontario Information and Privacy Commissioner granted access to government records notwithstanding a claim of solicitor-client privilege made by the Ministry of Correctional Services. The Supreme Court overturned that decision stating that an order disclosing records which are subject to a claim of solicitor-client privilege should be made only where absolutely necessary – a test just short of absolute prohibition. The fact that this was an access to information case did not change the test.

In the *Blood Tribe* decision, the Supreme Court essentially told the Privacy Commissioner that she could not expand her mandate to include the review of documents over which solicitor-client privilege had been claimed. The court upheld the Federal Court of Appeal's decision to vacate an order by the Privacy Commissioner which compelled the production of purportedly privileged material so as to assess the privilege claim. The ruling reaffirms the sanctity of solicitor-client privilege and the Canadian judiciary's willingness to protect the doctrine from unnecessary or unfounded legislative erosion. It also represents a significant hurdle for administrative and regulatory bodies which seek to compel documentary production of privileged materials in the context of investigations or other administrative undertakings.

See also *Federation of Law Societies of Canada v. Canada (Attorney General*), 2015 SCC 7.

iv. Settlement Privilege

In *Man-Shield Construction* Inc., supra, Associate Chief Justice Perlmutter states at para. 21:

> *[21] The principles of settlement privilege were recently canvassed in Sable Offshore Energy Inc. v. Ameron International Corp., 2013 SCC 37, [2013] 2 S.C.R. 623, and include the following:*
>
> - *The purpose of settlement privilege is to promote settlement. Promoting settlement is a "sound judicial policy" that contributes to the effective administration of justice. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible. What matters is the intent of the parties to settle the action. Any negotiations undertaken with this purpose are inadmissible. (paras. 2, 11, 12, 14)*

- *The public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. This is a "blanket, prima facie, common law, or class" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour. This privilege protects documents and communications created for such purposes both from production to the other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. (para. 16)*
- *The privilege applies not only to failed negotiations, but also to the content of successful negotiations, so long as the existence or interpretation of the agreement itself is not in issue in the subsequent proceedings and none of the exceptions are applicable. (para. 17)*
- *As with other class privileges, while there is a prima facie presumption of inadmissibility, exceptions will be found "when the justice of the case requires it." To come within the exceptions, it must be shown that, on balance, "a competing public interest outweighs the public interest in encouraging settlement." (paras. 12, 19)*

In *Leonardis v. Leonardis*, 2003 ABQB 577, Justice Slatter (prior to being elevated to the Alberta Court of Appeal) stated at para. 6:

> *... it is the contents of the communication that determine if it is privileged, not the way it is labelled. If the contents of a communication are truly in furtherance of settlement and therefore privileged, it makes no difference whether the communication is marked "Without Prejudice" or not. A communication that is not in substance privileged does not become so just because one party places "Without Prejudice" on it. Likewise, the absence of the words "Without Prejudice" means nothing if the communication is truly privileged.*

f) Waiver of Privilege

The inadvertent release of a document does not necessarily mean that the document is no longer subject to privilege. See *Nicol v. Nicol* (1998), 132 Man. R. (2d) (Q.B., Master), 1998 CanLII 28126 (MB QB).

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege:

a) knows of the existence of the privilege; and

b) voluntarily indicates an intention to waive that privilege.

Waiver will not be considered voluntary if the disclosure of information that would be subject to solicitor-client privilege is disclosed in response to questions on cross-examination or by way of interrogatories.

See:

Gower v. Tolko Manitoba Inc., 2001 MBCA 11;

Kleysen v. Canada (A.G.), [2001] M. J. No. 111 (Man. Q.B.), online: QL (MJ) and

J & R Livestock Consultants Ltd. et al v. Prychun et al, 2005 MBQB 73 (CanLII),(Master Cooper) affirmed in *J & R Livestock Consultants Ltd. et al v. Prychun et al*, 2005 MBQB 237 (CanLII),

Greater Vancouver (Regional District) and GVRDEU (McGregor), Re, 2015, CarswellBC 3844.

However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require (see *Brooks Equipment Ltd. et al. v. La Salle Credit Union Ltd. et al*., 2016 MBQB 98). Further, a party cannot be allowed, after disclosing a certain amount of a document for one purpose, to withhold the remainder. A party may elect to withhold or to disclose a document, but after a certain point the election to waive privilege must remain final. See the Manitoba Queen's Bench decision *St. Vital School Division No. 6 v. Trnka,* 1998 CanLII 28135 (MB QB), [1998] M.J. No. 563, online: QL (MJ).

g) Where Affidavit Incomplete or Privilege Improperly Claimed

Rule 30.06 sets out the powers that a court can exercise when faced with a contest over the relevancy of a document, the omission of a document from a party's affidavit, or a claim for privilege.

Pursuant to that rule, where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from or inadequately described in the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may:

a) order cross-examination on the affidavit of documents;

b) order service of a further and better affidavit of documents;

c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and

d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

In *Grenkow v. Marlatt,* 2006 MBQB 108, former Associate Chief Justice Oliphant held at para. 26 that "Despite the low threshold test for relevance when disclosure is in issue, the test is much more rigorous when further disclosure is sought".

h) Continuing Obligation to Disclose

Rule 30.07(1) imposes an obligation on parties to disclose any new relevant documents obtained after executing the affidavit of documents. Parties must serve a supplementary affidavit disclosing the document and state whether or not privilege is claimed for it.

Rule 30.07(2) imposes an obligation on parties to disclose any errors or omissions discovered after execution of the affidavit of documents. Parties must serve a supplementary affidavit and state whether or not privilege is claimed for it.

In *Dola v. Stark*, 2012 MBQB 8 Senior Master Lee comments at para. 15 on the practice of counsel to follow the spirit of *Rule 30.07* when there are only a small number of additional documents:

I believe the general practice accepted among counsel is to simply advise opposing counsel by letter as to the discovery of additional relevant documents. On the other hand, in a situation where a substantial number of documents are discovered after the affidavit of documents had been executed, it may well be that strict compliance with this rule is warranted. ...

3. Inspection of Documents (Rule 30.04)

Rule 30.04(1) provides for a formal procedure which entitles a party to serve a request to inspect documents on another party. The serving party is then entitled to inspect any document that is not privileged and is referred to in the other party's affidavit of documents as being in the other party's possession, control or power. Under *Rule 30.04(2)*, the request can also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in any originating process, pleading or other affidavit served by the other party.

Once a request to inspect documents is served, the party receiving the request shall advise the party making the request of a date, within ten days after the service of the request, when the documents may be inspected at the office of the lawyer receiving the request.

All of these provisions are found in *Rules 30.04(1), (2) and (3)*. They provide a formal process whereby the actual documents in another party's power may be inspected.

Rule 30.04(7) provides that the party inspecting the document is entitled to make a copy of it at his or her own expense, unless the party having possession of the document agrees to make the copy, in which case the person shall be reimbursed for making the copy.

As a practical matter, parties will usually provide photocopies of documents in their possession after service of the affidavit of documents. Charges for photocopying are usually agreed to by the parties.

The formality of the rule is necessary to deal with situations where a party wishes to actually inspect the original or the copy of the document in another party's possession, and will not be satisfied with receiving a photocopy. The rule also applies to documents which may not be capable of being adequately or legibly reproduced.

Rule 30.04(5) also makes it clear that, notwithstanding the other provisions of *Rule 30.04*, the court may at any time order production for inspection of relevant documents that are not privileged, and that are in the possession, control or power of a party.

Rule 30.04(4) stipulates that all documents listed in a party's affidavit that are not privileged, and all documents previously produced for inspection shall, without any form of notice, subpoena or order, be taken to and produced at the examination for discovery of the party or of a person on behalf of or in addition to the party, and the trial of the action, unless the parties agree or the court otherwise orders.

The purpose of this rule is to ensure that all relevant documents are readily available, to both the court and the parties, both at discovery and at trial. In cases where the documents are voluminous, or in cases where only narrow issues are being examined upon, the rule specifically contemplates that counsel can agree that the rule will not apply.

4. Timely Disclosure

The rules contain express provisions penalizing parties for failure to disclose relevant documents, and for failure to prepare and serve an appropriate affidavit of documents. The rules also make it clear that a successful claim for privilege carries certain consequences with respect to the admissibility of that document at trial.

The purpose of these rules is twofold:

1) To encourage timely and complete disclosure of all documents relevant to the matters at issue so as to dispense with the old "trial by ambush" approach to civil advocacy.

2) To provide guidance to both practitioners and the bench as to the type of orders that are to be considered appropriate and reasonable in the majority of cases when timely disclosure is not made.

For the most part the rules speak for themselves:

> ***Failure to disclose or produce document***
>
> ***30.08(1)*** *Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules or an order of the court,*
>
> *a) if the document is favourable to the party's case, the party may not use the document at the trial, except with leave of the trial judge; or*
>
> *b) if the document is not favourable to the party's case, the court may make such order as is just.*
>
> ***Failure to serve affidavit or produce document***
>
> ***30.08(2)*** *Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under rules 30.02 to 30.11, the court may,*
>
> *a) revoke or suspend the party's right, if any, to initiate or continue an examination for discovery;*
>
> *b) dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant; and*
>
> *c) make such other order, including a contempt order, as is just.*
>
> ***Privileged document not to be used without leave***
>
> ***30.09*** *Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection not later than 10 days after the action is set down for trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of a judge.*

Note, however, in *Machado v. Berlet* 1986 CanLII 2600 (ON SC), (1986), 32 D.L.R. (4th), 634 (Ont. H.C.), the defendant counsel was able to use surveillance photos of the plaintiff, which had not been previously disclosed, to impeach the credibility of the plaintiff. The plaintiff was in turn afforded a full opportunity to describe the content of the photographs, and to attempt to explain how they could be consistent with the plaintiff's earlier testimony

Therefore, the provisions of *Rule 53.09* as follows:

Evidence admissible only with leave

53.09 Where evidence is admissible only with leave of the trial judge under,

(a) *subrule 30.08(1)* (failure to disclose document);

(b) *rule 30.09* (failure to abandon claim of privilege);

(c) *rule 31.07* (refusal to disclose information on discovery);

(d) *subrule 31.09(3)* (failure to correct answers on discovery);

(e) *subrule 53.03(3)* (failure to serve expert's report); or

(f) *rule 53.08* (libel or slander);

leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.

Leave is mandatory in the absence of non-compensable prejudice (see *Marchand v. The Public General Hospital Society of Chatham*, 2000 CanLII 16946 (Ont. C.A.) at para. 81).

5. Divided Disclosure or Production of Documents (Rule 30.04(8)), (also see Divided Discovery (Rule 31.06(5))

Rule 30.04(8) provides that where a document may become relevant only after the determination of an issue in an action, and disclosure or production of the document before the issue is determined would seriously prejudice a party, the court on that party's motion may grant leave to withhold disclosure or production until after the issue has been determined.

Rule 31.06(5) and other rules as to divided disclosure and divided discovery are intended to have limited application. Their wording makes it clear that they are to apply only where the disclosure or production of the document or fact would seriously prejudice a party. Even if that pre-condition is met, the court still has the discretion to require production. Moreover, courts are not inclined to divide cases in any way, and that attitude will likely prompt the courts to require disclosure of documents and facts unless the prejudice is clear and substantial. A useful summary of authorities is found in *Reyher v. Rempel* (1994 CanLII 16713 (MB QB) 1994), 99 Man. R. (2d) 105 (Q.B.). See, as well, *Smith v. Bolton Lodge Inc 1994 CanLII 16784 (MB QB),* (1994), 96 Man. R. (2d) 238 (Q.B.) for the proposition that in most cases, it is reasonable to have concurrent discovery on damages and liability. For an example of a matter where divided discovery was ordered, see *Bartmanovich et al. v. Manitoba Crop Insurance Corp. et al.*, *1998 CanLII 27797 (MB QB),* (1998), 127 Man. R. (2d) 86 (Q.B.).

6. Documents or Errors Subsequently Discovered (Rule 30.07

For *Rule 30.07*, see the discussion in the section above on the continuing obligation to disclose.

7. Documents Deposited with the Court for Safekeeping (Rule 30.11)

Under *Rule 30.11*, the court may order that a document be deposited for safekeeping with the registrar, and thereafter the document shall not be inspected by any person except with leave of the court.

It is also expected that this rule will be of limited application, and will deal with documents of a highly sensitive nature, such as those containing industrial secrets. In such instances, the documents may be deposited with the court, and the court would be in a position to make an order with specific conditions with respect to access to, or inspection of the documents by opposing parties, so as to protect the sensitivity of the contents of the document.

An example is *Amer-Can Development Corp.* v. *Tele Time Saver Inc.* (1976), 1 C.P.C. 230 (Ont. H.C.) and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.

8. Confidentiality of Documents Disclosed and the Deemed Undertaking Rule (Rule 30.1)

Queen's Bench Rule 30.1 is entitled "Deemed Undertaking" and applies to evidence obtained under *Rule 30* (Discovery of Documents), *Rule 31* (Examination for Discovery), *Rule 32* (Inspection of Property), *Rule 33* (Physical and Mental Examination of Parties), and *Rule 35* (Procedure on Interrogatories).

Sub-Rule 30.1(3) sets out the essence of the rule. It reads as follows:

All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

The Manitoba Court of Appeal has stated that the rule is judge-made procedural law arising from the inherent jurisdiction of the court to control its own process. (See *Penner v. P. Quintaine & Son Ltd., 2007 MBCA 159 (CanLII),*leave to appeal dismissed *Boyd Penner and Southeast Marketing Ltd. v. P. Quintaine & Son Ltd.*, 2008 CanLII 18951 (SCC). The Court of Appeal cites *J-Sons Inc. v. N.M. Paterson & Sons Limited,* 2003 MBCA 156 about the implied undertaking rule.)

Essentially, absent the mandatory civil process, no one is obliged to answer questions or produce documents to anyone else. That is, we are all entitled to our privacy. The discovery process, however, significantly interferes with this right of privacy. Therefore, the common law restricted the use that could be made of information obtained through the discovery process whether through discovery of documents or oral examination of discovery.

Rule 30.1 essentially reflects the common law subject to some exceptions. At common law, a party obtaining production of documents is under an implied undertaking to keep any such

documents confidential, whether or not they disclose confidential or private material. If a party wishes to make use of the documents for some purpose other than for use in the proceedings in which they were produced, the owner's permission or the court's leave would have to be obtained. (See *Hunt* v. *T & N plc,* [1995] 5 W.W.R. 518 (B.C.C.A.)sub nom *Hunt v. Atlas Turner Inc.*, 1995 CanLII 1800 (BC CA), , distinguished in *Glenayre Manufacturing Ltd. v. Pilot Pacific Properties Inc.* 2004 BCSC 864, in which it is noted that the court in Hunt states that the obligation to obtain permission should not be construed rigidly).

In *Blake v. Hudson's Bay Co., 1987 CanLII 6903 (MB QB)*, [1988] 1 W.W.R. 176, Master Cantlie held that documents are produced on an implied undertaking that they will be used solely for the purpose of the action, and a breach would be punishable by contempt of court proceedings. Quoting from Home Office v Harman, [1983] 1 A.C. 280, [1982] 2 W.L.R. 338, [1982] 1 All E.R. 532 (H.L.), Master Cantlie made clear that the documents produced on discovery, or copies of them, will not be used by the lawyer for any purpose other than the conduct of the action and that the lawyer will not allow his client or any other person to use the documents, or copies of the documents, for any purpose other than assisting the lawyer in the conduct of the action. *Blake v. Hudson's Bay Co* has been applied by courts across most of the Canadian provinces as a statement of the implied undertaking rule. See *Hanson v. Keystone Ford Sales Ltd., 1996 CanLII 12468 (MB CA),* (1996), 113 Man. R. (2d) 163 (C.A.) where the court affirms the decision in *Hanson v. Keystone Ford Sales Ltd.* (1996), *1996 CanLII 12423 (MB QB)* and states:

> *[2] ... Thus, as Master Cantlie noted in Blake (at p. 181):*
>
> *... an express undertaking serves no purpose. It can add nothing to the implied undertaking given in every instance. To require one is therefore counter-productive, for it implies that it does add something and therefore suggests that a solicitor or party who has not given one does have some freedom in his use of the documents, which is not the case.*
>
> *[3] ...Therefore, absent highly unusual circumstances, no formal order is necessary or desirable.*

The implied undertaking exists without the need for counsel to apply to the court for an express order to that effect. See also the decision of Oliphant, A.C.J.Q.B. in *Apotex Fermentation Inc. v. Novopharm Ltd.*, 2001 MBQB 316 CanLII at paragraph 19 "the implied undertaking requires no such formal expression to be effective and binding.".

There is also an implied undertaking by a party conducting an oral examination for discovery that the information so obtained will not be used for collateral or ulterior purposes; any such use being a contempt of court. See J. Laskin, *The Implied Undertaking in Ontario* (1989-90) 11 Advocates' Q. 298 at 298-299.

The implied obligation is not to the owner of the documents, but is to the court and is afforded in the interests of the proper administration of justice. See *Home Office* v. *Harman*, [1983] 1 A.C. 280 (H. L.). In *Glenwood Label & Box Manufacturing Ltd. v. Brunswick Label Systems Inc.*, 2011 MBQB 33 the defendant sought leave to amend its pleading to allege the plaintiff made improper use of documents produced at discovery. The master refused leave and the defendant appealed that decision. In dismissing the appeal the court stated at paragraph 7,"The only way a litigant can deal with breach of a court order or breach of an undertaking given to the court is by initiating a contempt proceeding" and at paragraph 11, "The law is clear that when a court makes an order or a person gives an undertaking, express or implied, a duty is created to the court only, and the order and undertaking can only be enforced in a contempt proceeding."

As stated above, *Rule 30.1* allows for exceptions including, for example, where the parties consent to the use of the evidence (*30.1(4)*), where the evidence has been filed with the court or is given or referred to in a hearing (*30.1(5)*), or for the purpose of impeaching the testimony of a witness (*30.1(6)*).

The rule was amended as of June 14, 2007 to make it applicable not only to information obtained pursuant to the rules relating to discovery but also to those which apply to the production of expert reports. Accordingly the rule now applies to reports of expert witnesses referred to in *Queen's Bench Rule 53.03* that are filed or deposited with the court in a "B" file under *Queen's Bench Rule 4.09(1)*.

The Supreme Court of Canada has outlined the principles relating to the implied undertaking rule in *Juman v. Doucette* 2008 SCC 8, *sub nom Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.* In that case the court stated:

> *The root of the implied undertaking is the statutory compulsion to participate fully in pre-trial oral and documentary discovery. If the opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed even if it tends to self-incrimination. (para.20)*

As a matter of every day practice, it has been suggested that clients, who cannot be expected to know about the deemed undertaking rule, should be advised in writing of their confidentiality obligations, both at the beginning and at the end of a proceeding.

9. Production from Non-Parties with Leave (Rule 30.10)

Under *Rule 30.10* the court may, on motion by a party, order production for inspection of a relevant document that is in the possession, control or power of a person not a party and that is not privileged, where it would be unfair to require the moving party to proceed to trial without having discovery of the document. However, this rule is not applicable where a more

particularized statutory regime governs disclosure: *S.L.E. v. C.J.E.,* 2003 MBQB 277 (CanLII) (Master Harrison).

For a list of factors a judge should consider when deciding whether to order production, see *Ontario (Attorney General) v. Stavro*, 1995 CanLII 3509 (ON CA), and *Callinan Mines Ltd. v. Hudson Bay Mining & Smelting Co*., 2011 MBQB 159.

The previous rule provided that an order could be granted requiring production when the document might be compelled at trial. The current rule simply provides that the court may grant an order requiring production provided the document is not privileged where it would be "unfair" to require the moving party to proceed without discovery of the document.

In *Ministic Air Ltd. v. Canadian Broadcasting Corp.* 1995 CanLII 16128 (MB QB) (1995), 103 Man. R. (2d) 296 (Q.B.), the defence to a defamation action was that the statements were true, the subject of fair comment, and made during an occasion of qualified privilege. During an examination for discovery, the president of the plaintiff stated the company had no invoices for medevac flights undertaken for the Department of Health and Welfare. The central issue for determination was whether or not the individual defendants were entitled to an order compelling the Department of Health and Welfare (Canada) to produce for inspection its files concerning medevac flights operated by Ministic for the department during the relevant time period. The judge considered the limits on examination for discovery and production and inspection of documents in defamation cases.

> *37. I agree that in an action for defamation, a defendant cannot plead facts in a general way, whether in the statement of defence, the particulars provided or both, and then attempt to elicit, upon an examination for discovery or a production and inspection of documents, facts which will justify statements made by that defendant.*
>
> *38. However, I am not able to accede to the submission of counsel for the plaintiffs that facts must be pled in minute detail, for example, by giving specific dates of events, before a defendant is entitled to the production and inspection of relevant documents. If, as is the case here, the issue has been properly particularized by a defendant, any relevant document is subject to production and inspection even though it is in the hands of a person not a party. It would be unfair to require the party seeking production to proceed to trial without having discovery of the documents. That, of course, is the gist of Queen's Bench r. 30.10(1).*

Further, he commented that the new Q.B. Rules, adopted in 1992, brought a more open approach to pre-trial discovery and the test for relevancy in *Queen's Bench Rule 30.10(1)* is a low threshold. A document is relevant if it is evidence on an issue or if it "could reasonably contain information which might enable the party seeking production to advance that party's case or damage the opposing party's case."

The impact of this open approach to pre-trial discovery and the test of relevancy was evident in *Imperial Oil v. Jacques, 2014 SCC 66 (CanLII)*, where the Supreme Court of Canada upheld a motion in a civil proceeding to disclose private communications intercepted by the state in the course of a criminal investigation.

Although a lowered test of relevancy exists, the burden of relevancy remains with the plaintiff and must be discharged. In *Smith v. Palmer et al., 2014 MBQB 63 (CanLII)*, the plaintiff failed to pass the test of relevancy. The plaintiff made a request for an order compelling police to produce records pertaining to fraud charges. The plaintiff did not explain how the documents related to her case. At paragraph 33 the court stated: "The plaintiff here did not articulate any theory as to relevance in relation to the issues raised in the pleadings. The plaintiff merely asserted a nexus and relevance." Simply put, the plaintiff failed to explain how the police records would help advance her case or damage the opposing party's case.

Typical types of cases where the issue of production from non-parties arise include hospital and clinical records in personal injury or medical negligence actions, insurance documents in personal injury actions, workers' compensation documents in personal injury actions, and banking records in various types of commercial litigation.

Note: Even in cases where some form of production is ordered, the court will often limit the scope of production, or impose certain conditions on it to protect the interests of the party in possession of the documents, or the sensitivity of the contents of the document.

The court also has the power, pursuant to *Rule 30.10(3),* to inspect a document in the control of a non-party over which privilege is claimed, or where there is an issue as to whether or not the document is relevant or necessary for proper discovery purposes.

10. E-Discovery

E-discovery relates to the production and disclosure of information which has been stored electronically. Electronic documents exist in a variety of formats, including: CD-ROM disks; floppy disks; backup tapes; personal digital devices; hard drives; server files; and voice mail systems.

Electronic documents are included in the definition of "document" in *Rule 30.01(1)(a);* however, *Rule 30* relating to discovery and inspection of documents does not contemplate an e-discovery process. In order to address this rapidly developing and important area of the discovery process, the Manitoba Court of Queen's Bench has developed a *Practice Direction – Guidelines Regarding Discovery of Electronic Documents* . It sets out the guidelines regarding

discovery of electronic documents. The Manitoba Court of Queen's Bench posts all procedure rules and forms and notices and practice directions on its *website*.

Note: This Practice Direction is intended to provide guidelines to lawyers, parties and the judiciary in the e-discovery process. It is not intended to be enforceable directly as are the rules.

Electronic discovery provides access to:

- active data, which would include e-mails;
- replicant data where, for example, manufacturers of software have incorporated automatic backup features into the software;
- meta data, which is "data about the data" including information relating to the date of creation and the author of the data;
- residual data; and
- archival data.

The reason that e-discovery is different than what has been traditionally thought of as discovery of documents is because of the volume of production of electronic data and because of the vulnerability of the data. The data is volatile because its format can be easily altered or deleted entirely.

As indicated in the Practice Direction, parties in actions which involve e-discovery should consult and have regard to the PDF document, *The Sedona Canada Principles Addressing Electronic Discovery* which was published in January 2008 and it is available as *The Sedona Canada Principles Addressing Electronic Discovery (Nov. 2015)* 2008 CanLIIDocs 1.

The Sedona Principles advocate a balanced approach to determining which documents should be preserved and produced while taking into account technological limitations, the nature of the litigation itself, the amount in issue and associated costs. They provide that as soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information. The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden. But absent agreement or a court order based on demonstrated need and relevance, a party should not be required to search for or collect electronically stored information which is residual or has been deleted.

In what is a rapidly developing area, some of the key factors to keep in mind in dealing with the issue of electronic discovery include:

- capturing information without contaminating it;
- evaluating information in a cost-effective way; and
- examining how the courts are reacting when documents are deliberately or negligently eliminated.

In *Thompson v Arcadia Labs Inc.,* 2016 ONSC 3745, Master MacLeod considered the difficulties of complying with documentary disclosure obligations when large numbers of electronic documents are involved at paras. 14 and 15:

> *This is not a new problem. But it is a problem that is greatly compounded when dealing with any significant amount of electronically stored information. In such cases, listing and describing all relevant documents is virtually impossible and threatens to become a hugely expensive make work project of little practical utility. What is required instead is to unearth the important and probative documents that will be necessary to prove or disprove facts that are in issue.*
>
> *Under the Sedona Canada Principles incorporated into the rules, counsel are to actively co-operate in formulating a practical discovery plan. Counsel are required to seek agreement on the subset of potentially important relevant information and how it is to be located, preserved, exchanged, organized, described and retrieved. Some form of mutually acceptable electronic indexing that permits rapid identification and retrieval of each document should be adopted for purposes of production, discovery and trial. It is for this reason that the parties are now expected to engage in a collaborative discovery planning exercise in which they are to robustly apply the principle of proportionality.*

With respect to documents which are deliberately eliminated, the issue may become one of spoliation. Spoliation refers to the intentional destruction of relevant evidence (see *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353, as cited in *Commonwealth Marketing Group Ltd. et al. v. The Manitoba Securities Commission et al.,* 2009 MBCA 33).

See, as well, *Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc.*, 2006 MBQB 90 in which the plaintiff destroyed computer hardware and a network operating system before producing the system disks and documentation which had been requested by the other party. Under the circumstances the court determined it was appropriate to dismiss the plaintiff's claim pursuant to *Rule 34.14(1)(b)* (which is discussed in further detail later in this chapter), even while acknowledging that to do so was a severe remedy, exercised only in the most extreme cases of non-compliance with the rules.

These are only a few of the issues which arise in this emerging area. Given the speed at which technological developments take place, however, it is important to be alert to these issues.

The Practice Direction, "Guidelines Regarding Discovery of Electronic Documents" sets out 10 principles and commentary on each principle. The principles and commentary are reproduced in their entirety here:

PRINCIPLE #1:

In general, and subject to the following principles, electronic documents that are relevant to any matter in question in the action must be disclosed in accordance with *Queen's Bench Rule 30*.

Commentary:

Electronic documents are included in the definition of "document" contained in *Queen's Bench Rule 30.01(1) (a)* and must therefore be disclosed in accordance with *Queen's Bench Rule 30*.

PRINCIPLE #2:

The obligations of the parties with respect to discovery and inspection of electronic documents, including the cost associated with locating electronic documents, should be proportionate to the importance and complexity of the issues, and to the amount involved, in the action.

Commentary:

The concept of proportionality is a central tenet of *The Sedona Canada Principles Addressing Electronic Discovery*, which is intended to address delays and costs impeding access to justice. This principle is consistent with *Queen's Bench Rule 1.04(1)*, and the objective of securing the just, most expeditious and least expensive disposition of litigation on its merits.

The application of this principle of proportionality depends, in the first instance, on the parties who should confer about the concept of proportionality and attempt to agree upon its application to an action. If the parties are unable to agree, and a party can demonstrate that the likely probative value of a document is outweighed by the cost associated with locating the document, the party should not be obliged to locate the document at issue.

PRINCIPLE #3:

In most cases, the primary location in which to search for electronic documents should be the parties' active data and any other information that was stored in a manner that anticipated future business use, and that still permits efficient searching and retrieval.

Commentary:

The scope of searches required for relevant electronic documents must be reasonable. It is neither reasonable nor feasible to require that litigants immediately or always canvass all potential sources of electronic documents in the course of locating, preserving and producing them in the discovery process.

For most litigation, the relevant electronic documents will be those which are available to or viewed by computer users and those which are exchanged between parties in the ordinary course of business (active data). This principle also includes archival data (electronic documents organized and maintained for long-term storage and record keeping purposes) that is still readily accessible.

PRINCIPLE #4:

A party should not be required to search for, review or produce documents that are deleted or hidden, or residual data such as fragmented or overwritten files, absent agreement or an order based on demonstrated need and relevance. In certain actions, a party may satisfy its obligations relating to discovery and inspection of electronic documents by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify the documents that are most likely to contain relevant data or information.

Commentary:

Only exceptional cases will turn on deleted or discarded electronic documents. As such, residual or replicant data need not be preserved or produced absent agreement or an order of the Court. In an action where deleted or residual electronic documents may be relevant, the parties should communicate this information to one another early in the process to avoid unnecessary preservation, inadvertent deletion and/or claims of spoliation.

Large computer systems contain vast amounts of information, much of which is likely to be irrelevant. In some actions, it may therefore be impractical or too expensive to review all of the information for relevance. In such circumstances, it is reasonable for parties to use targeted electronic techniques to search within electronic document sources, in collecting

the materials that will be subject to detailed review for relevance. The objective should be to identify a subset or subsets of the available electronic documents for detailed review that are most likely to be relevant.

The application of this principle depends, in the first instance, on the parties who should confer about and attempt to agree upon the use of targeted electronic search techniques, including search criteria to be used to extract relevant electronic documents.

Preservation

PRINCIPLE #5:

As soon as litigation is contemplated or threatened, parties should immediately take reasonable and good faith steps to preserve relevant electronic documents.

Parties should discuss the need to preserve metadata as early as possible. If a party considers metadata relevant, it should notify the other party immediately.

Commentary:

The obligation to preserve relevant electronic documents applies to both parties as soon as litigation is contemplated or threatened; however, the obligation is not unlimited. The scope of what is to be preserved and the steps considered reasonable may vary widely depending upon the nature of the claims and documents at issue. A reasonable inquiry based on good faith to identify and preserve active and archival data should be sufficient.

"Metadata" is electronic information that is recorded by the system about a particular document, concerning its format, and how, when, and by whom it was created, saved, accessed, or modified. Parties should confer about and attempt to agree upon the need to preserve metadata as early as possible.

Depending on the circumstances of the case, particular metadata may be critical or it may be completely irrelevant. For example, there will be situations where metadata is necessary to authenticate a document or establish facts material to a dispute. In most cases, however the metadata will have no material evidentiary value; for instance, it does not usually matter when a document was printed or who typed the revisions.

PRINCIPLE #6:

Because of the nature of electronic documents, parties should consider whether third parties may be in possession of relevant electronic documents and may wish to consider placing any such third parties on notice with respect to preserving electronic documents as early in the process as possible, as electronic documents may be lost in the ordinary course of business.

Commentary:

Where a party anticipates that a specific electronic document does or may exist in the possession of a third party that is relevant to an action and that is liable to be deleted or modified in the ordinary course of business, the party may wish to consider notifying the third party of that fact and requesting that appropriate steps be taken to preserve the electronic document.

Production

PRINCIPLE #7:

Where an electronic document has been preserved in electronic form, it may be producible in electronic form where this would (i) provide more complete relevant information, (ii) facilitate access to the information in the document, by means of electronic techniques to review, search, or otherwise use the document in the litigation process, (iii) minimize the costs to the producing party, or (iv) preserve the integrity and security of the data.

Commentary:

Parties should confer about and attempt to agree as early as possible on issues relating to production of electronic documents.

Parties must produce an electronic document in electronic format if, for any reason related to the litigation, it is not sufficient to produce a printout or scanned version of the document.

Parties are encouraged to agree to the production of documents in electronic format whenever it might lead to the more efficient conduct of the litigation, including where:

(a) a substantial portion of the discoverable documents consists of electronic documents; or

(b) the total number of discoverable documents exceeds 1,000 documents or 3,000 pages.

For guidance about formats and standards for the production of documents in electronic format, parties should refer to the Practice Direction entitled "*Guidelines for the Use of Technology in Civil Litigation*" which can be located at the *Court's website*.

Costs

PRINCIPLE #8:

In general, the interim costs of preservation, retrieval, review, and production of electronic documents will be borne by the party producing them. The other party will be required to incur the interim cost of making a copy, for its own use, of the resulting productions. In special circumstances, it may be appropriate for the parties to agree and/or for the Court to order a different allocation of costs on an interim basis.

Commentary:

This principle accords with the existing practice followed in Manitoba in relation to the costs associated with the disclosure and production of documents. The special circumstances referred to in this principle could include situations where disclosure involves extraordinary cost for the producing party such as disclosure requiring forensic searches, disclosure requiring extensive backup restoration work or disclosure requiring the creation of subsets of data that do not exist in the normal business environment.

Confer

PRINCIPLE #9:

Parties should confer as soon as practicable and on an ongoing basis and, in any event, prior to examinations for discovery, regarding the location, preservation, review and production of electronic documents (including measures to protect privilege and confidentiality and other objections to production of electronic documents) and should seek to agree on the substance of each party's rights and obligations with respect to e-discovery, and on procedures required to give effect to those rights and obligations

Commentary:

Conferring early is one of the keys to effective e-discovery for all parties. By identifying and attempting to resolve disputes about e-discovery issues at an early stage in an action, parties can avoid costly collateral litigation relating to these disputes.

In recognition of the central importance of this principle, the obligation to confer is referenced throughout the commentaries to the other principles set out above. Parties should confer and attempt to agree on all substantive and procedural issues relating to e-discovery, including but not limited to (i) the concept of proportionality and its application to an action, (ii) the relevance of and the need to preserve deleted or residual electronic documents and metadata and the need to preserve and/or produce specific electronic documents in electronic format, (iii) the use of targeted electronic search techniques, (iv) issues relating to production of electronic documents including the format for document numbering and production, and (v) any proposed change to the normal allocation of costs.

Parties should also confer and attempt to agree on issues surrounding the use of technology for the preparation and management of civil litigation in the Court. In so doing, they should again refer to the court's Practice Direction entitled "Guidelines for the Use of Technology in Civil Litigation" referred to in the Commentary to Principle 7 above**.**

Any agreement reached should be reduced to writing for future reference.

PRINCIPLE #10:

Where parties are unable to agree on the substance of each party's rights and obligations with respect to e-discovery and on procedures required to give effect to those rights and obligations, the parties may, on motion, seek an order or direction from the court to address these issues. Such motions should be heard by the master in the first instance in accordance with *Queen's Bench Rule 37.02(2)*.

Commentary:

The parties' obligation to confer on issues relating to e-discovery is a real obligation. Parties are expected to actually confer and to genuinely attempt to agree on substantive and procedural issues relating to e-discovery before bringing a motion as described in this principle.

11. Limits on Production – Major Litigation

Rules on the scope of documentary discovery are intentionally broad to help ensure all relevant documents are disclosed in the affidavit of documents. However, in major or complex litigation cases, such rules capture vast amounts information which – if produced – can drastically increase the expense of litigation.

The Supreme Court of British Columbia has recognised that requiring a party "to incur enormous expense in what may be a futile search for something which may not exist" may not be reasonable in certain circumstances. On the facts, plaintiffs sought an order to produce over 30,000 documents. The court found such a request was unreasonable and required the plaintiffs to "define a more manageable area for enquiry" (*Peter Kiewit Sons Co. of Canada Ltd. (c.o.b. Kiewit-Ceco) v. British Columbia Hydro & Power Authority (1982),* 1982 CanLII 575 (BC SC) , 134 D.L.R. (3d) 154.

The Court in *Murphy et al v. Bank of Nova Scotia et al*, 2013 NBQB 316 (CanLII) applied the principle of proportionality to deny a motion request for the production of emails. The motion was denied due to the prohibitively high cost of retrieval which was estimated at $1.2 million for 13 bank employees and $3.4 million for 33 bank employees. Instead, an order for a better affidavit of documents limited to four employees was issued by the court. The New Brunswick court relied on their Rule 1.02.1 which states "the court shall make orders and give directions that are proportionate to what is at stake in the proceeding and the importance and complexity of the issues."

In Manitoba, production is limited by the general rules of relevancy (see *Rule 30* above) and proportionality. The concept of proportionality applies to all actions: see *subrule 1.04(1.1*). In *City of Ottawa v. Suncor Energy Inc.*, 2019 ONSC 1340, at para. 29 Justice Corthorn held that "[p]articipation in discovery planning is one element of counsel's duty as an officer of the court. In fulfilling that aspect of their duty, counsel is required to apply the principles of proportionality while seeking maximum procedural efficiency."

12. Failure to Disclose

Where a party fails to disclose or produce a document, Rule 30.08(1)(a) stipulates that the document may not be used by the party if favourable to their case (see Burke v. Gauthier (1987), 24 CPC (2d) 281 (Ont. HC)). If the document is not favourable to the party's case, Rule 30.08(1)(b) provides the court with discretion to make any such order it deems just. In Leslie v. Sterling Land Development Corp. (9 March 1994) CI-92-01-64983 (Q.B.), a plaintiff's claim in a $2.5 million suit was dismissed for failing to file their affidavit of documents and for canceling or failing to attend the examination for discovery on four occasions.

Solicitors can be held personally liable for failing to disclose. Costs may be awarded against a solicitor who:

i. deliberately refuses to disclose;

ii. fails to produce; or

iii. is aware their client has sworn a false affidavit

See Grossman v. Toronto General Hospital (1983), 146 DLR (3d) 280 (Ont HC),

Fiege v. Cornwall General Hospital et al. (1980), 30 OR (2d) 691, 117 DLR (3d) 152,

Myers v. Elman, [1940] AC 282, [1939] 4 All ER 484 (HL)).

C. ORAL EXAMINATION FOR DISCOVERY (RULES 31 AND 34)

It is important to note the inter-relationship between *Rule 31* and *Rule 34. Rule 31* is the specific rule dealing with oral examinations for discovery. *Rule 34* is a general rule dealing with procedures on all oral, out-of-court examinations. These examinations include: oral examinations for discovery; cross-examinations on affidavits; the taking of evidence before trial under *Rule 36*; examinations out of court of witnesses with respect to pending motions; and examinations in aid of execution.

Therefore, when considering the rules which apply to oral examinations for discovery, reference should be made to the provisions of both *Rule 34* and *Rule 31*.

1. Rules Governing Examinations for Discovery Generally

a) Form of Examination (Rule 31.02)

Rule 31.02 continues the former Manitoba practice of permitting an examination for discovery to take the form of an oral examination, or written interrogatories (see later discussion) or both.

b) Before Whom to be Held (Rule 34.02)

Rule 34.02 provides that an oral examination for discovery shall be held before an official examiner, or before any person agreed on by the parties. A party who wishes to hold the examination before a master must first obtain a court order, after a hearing. It is expected that in the vast majority of cases, oral examinations for discovery will be held, as is the current practice, before an official examiner. See, for example: *Wilson v. City of Winnipeg,* 2006 MBQB 203.

c) Time and Place of Examination

Where the person to be examined resides in Manitoba, the examination shall take place in the judicial centre nearest the place where the person resides, unless the court orders otherwise, or the person to be examined and all parties agree otherwise (*Rule 34.03*). The time of the examination is to be fixed by the person before whom the examination is to be held (*Rule 34.02*).

Rule 34.07(b) provides that the court may determine the time and place of the examination if the person to be examined resides outside of Manitoba.

In cases where the person resides outside of Manitoba, *Rule 53.05* provides for a subpoena to a witness outside of Manitoba to secure the attendance of that witness, and the person required to attend shall be paid attendance money in accordance with *The Interprovincial Subpoena Act,* R.S.M. 1987, c.S212.

d) Requiring Attendance

Rules 34.04(1) through *34.04(9)* set out the different procedures for requiring a witness to attend for examination.

In normal circumstances, all that is required is service of a notice of examination on the party's lawyer of record, or where the party acts in person, on the party.

Where the person to be examined is a former director of one of the parties, that person is to be served with a subpoena to witness (*Form 34B*), served personally on that person, with a copy of the subpoena to be served on the lawyer for the party on whose behalf the former director or officer is to be examined.

Where the person to be examined does not reside in the judicial centre where the examination is to take place, attendance money is to be paid to the witness in accordance with *Tariff B*.

e) Notices to be Given (Rule 34.05)

Rule 34.05 - Where the person to be examined resides in Manitoba, not less than ten days' notice of the time and place of the examination is to be given, unless the court orders otherwise. Furthermore, every party to the proceeding other than the examining party shall also be given not less than ten days' notice, unless the court orders otherwise.

f) Examinee to be Sworn (Rule 34.08)

Rule 34.08 -The person to be examined is to take an oath or an affirmation. Where the examination is conducted in Manitoba, the oath or affirmation shall be administered by a person authorized to administer oaths in Manitoba. Where the examination is conducted outside Manitoba, the oath or affirmation may be administered by the person before whom the examination is conducted, a person authorized to administer oaths in Manitoba or a person authorized to take affidavits or administer oaths or affirmations in the jurisdiction of the examination.

g) Recording of the Examination and Provision of a Typewritten Transcript (Rules 34.15 and 34.16)

Every examination shall be recorded in its entirety in question and answer form in a manner permitting the preparation of a typewritten transcript. Where a party requests, the court reporter recording the examination shall prepare a typewritten transcript which shall be certified as accurate.

The court reporter is obliged to send one copy of the transcript to each party who has ordered and paid for the transcript, and if a party requests and pays for it, the reporter shall provide an additional copy of the transcript to that party. A lawyer will want to acquire an additional copy of the transcript of the party or parties he or she has examined in order to have a copy for filing purposes at trial.

Rule 34 also contains a number of other important and useful provisions. *Rule 34.09* provides for the use of interpreters on discoveries where necessary and stipulates that the interpreter must take an oath or affirmation to accurately interpret the evidence being given. The rule also stipulates that where a party requires an interpreter in order to be examined, the party is responsible for providing (and presumably paying for) the interpreter. Where a person being examined is not a party, or is not being examined on behalf of a party, and that person requires an interpreter, the examining party shall then be responsible for providing the interpreter. Litigants are entitled, free of charge, to interpretive services between French and English for oral discovery. Requests for these services must be forwarded to the *French Language Services Court Coordinator*.

h) "Virtual" Examinations

On consent of the parties, or by order of the court, an examination for discovery may be recorded by video tape (*Rule 34.18*). Similarly, on consent of the parties, an examination for discovery may be conducted by telephone conference or other electronic means (*Rule 34.19*).

As early as twenty years ago, courts began authorizing examinations for discovery to take place via videoconference (see *De Carvalho v. Watson*, 2000 CanLII 28217 (ABQB). In *Jaypat Investments Ltd. v Denny's of Canada Ltd. et al*, 2006 MBQB 132, Justice Schulman held that the inherent jurisdiction of the Manitoba Court of Queen's Bench permits the ordering of videoconference discoveries. It is expected that an increasing number of examinations for discovery (as well as other pre-trial examinations) occur using videoconference to ensure that matters continue to move expeditiously towards trial while honouring societal precautions required to combat COVID-19 and similarly dire zoonotic diseases.

2. When Oral Examinations May be Initiated and Their Sequence

Rule 31.04(1) provides that a party who seeks to examine a plaintiff may serve a notice of examination only after that party has filed and served a statement of defence to the plaintiff's claim, and unless the parties agree otherwise, only after serving an affidavit of documents.

Rule 31.04(2) provides that a party desiring to examine a defendant for discovery may serve a notice of examination only after:

a) the defendant has filed and served a statement of defence and, unless the parties agree otherwise, after the party seeking to examine the defendant has served an affidavit of documents; or,

b) the defendant has been noted in default.

Rule 31.04(3) provides that the party who first serves the other party with a notice of examination shall be entitled to examine first, before being examined by the other party, unless the court orders or the parties agree otherwise.

The combined effect of these provisions is to confer a slight advantage upon a defendant in terms of managing the sequence of the examinations. A defendant who considers it advantageous to examine first can take steps to file and serve a defence, an affidavit of documents, and a notice of examination, virtually simultaneously, and before the plaintiff has had an opportunity to serve a notice of examination. If the matter involves an issue of credibility, it is usually preferable to tie down the opposing party before your client has given evidence. This will eliminate any temptation on the part of the opposing party to tailor its evidence and will avoid allowing your client to "educate" the other party.

3. Three Simple Questions

a) Who May Examine? [Rule 31.03(1)]

Rule 31.03(1) - A party may examine for discovery any other party adverse in interest, but may only examine that party once unless leave of the court is obtained for more than one examination.

The concept of adversity of interest therefore determines whether a party has a right to examine another party.

The plaintiff and defendant will almost invariably be adverse in interest and so will have the right to examine each other.

Third parties will normally be adverse in interest to both plaintiff and defendant, and will have the right to examine both, and will normally have to submit to being examined by both the plaintiff and defendant.

A more troublesome issue is whether co-defendants are adverse in interest; no hard and fast rule can be applied. Where the co-defendants adopt a common position with respect to all of the material allegations against them, they are not adverse in interest to each other. However, where they adopt inconsistent positions, they may be adverse in interest, though they make no claim against each other.

In *Bejzyk* v. *Bejzyk* (26 January, 1990) FD 88-01-16676 (Man.Q.B.), and *Bejzyk* v. *Bejzyk*, CI 85-01-04582, per Senior Master Goldberg, one of the defendants had permitted default to be noted (and therefore was deemed to have admitted the allegations in the statement of claim), but the other defendant was denying the claim. The two defendants were considered to be adverse in interest. Accordingly, the defending defendant could examine the defendant in default.

The pleadings in the action can often be looked to in order to determine adversity, but it is possible for an adversity to exist even though it is not apparent on the face of the pleadings.

The term "adverse in interest" should be given a liberal construction to permit discovery, especially when the various interests of the parties are inter-related. For example, where a third party files a defence and the defendant then cross-claims against a co-defendant, the third party and co-defendant can be considered adverse in interest (*North American Life Assurance Co.* v. *Pitblado & Hoskin*, [1997] 5 W.W.R. 211 (Q.B.)).

Rule 31.05 provides that where a person is to be examined for discovery by more than one party, there shall be only one examination, in which any adverse party may participate. Any adverse party may initiate the examination.

The reference in *Rules 31.03* and *31.05* to there being only one examination without leave of the court, is to make it clear that a party is required to submit to examination once only. A party will not be required to re-attend on several examinations in order to be examined on issues already examined upon, or on issues which could have been examined upon, by either the same adverse party, or a different adverse party.

However, the wording is not meant to imply that the examinee need only submit to examination on one occasion, because if the matters at issue are lengthy and complex, multiple attendances will be required even though only one examination is being conducted. In the event undertakings are given on an examination and are subsequently fulfilled, the examinee can be required to re-attend to be asked questions on those undertakings, as part of the one examination to which the examinee is obliged to submit.

Nonetheless, it is extremely important for the examining counsel to be fully prepared to examine comprehensively on all issues because once that examination is completed, counsel will not be permitted to require the re-attendance of the party being examined, without leave of the court.

b) Who May be Examined?

i. Individual Parties

Parties who are individual persons can be examined on their own behalf. An individual who is a party under a disability (as defined by *Rule 7*), but who is competent to give evidence, may be examined on his or her own behalf. If the person under a disability is not competent to give evidence, the litigation guardian, committee, or substitute decision maker (see *Rule 7.01(d))* may be examined on behalf of that person (*Rule 31.03(7)*). A person is competent if his or her delusion does not affect perception, memory or articulation of the events in question. (*Buchanan* v. *Buchanan* (1990), 68 Man.R. (2d) 265 (Q.B.)).

ii. Corporations

Where a corporation is to be examined for discovery, the examining party may examine any person who is or has been an officer, director or employee on behalf of the corporation (*Rule 31.03(2)*).

Under *Rule 31.03(6),* the examining party may choose the person to be examined on behalf of a corporation, partnership or sole proprietorship. In *McVey v. Crescent Fort Rouge United Church et al.,* 1996 CanLII 18036 (MB CA) (1996), 110 Man. R. (2d) 193 (C.A.), the individual the plaintiff sought to examine as a representative of the defendant church was a personal friend of the plaintiff. Although this was alleged to be an abuse of process, the Court of Appeal held that it was not unreasonable. The court held that if the party makes admissions which favour the plaintiff in too generous a fashion, or if he should set forth the facts inaccurately, it was then open to the defendant to impeach that evidence at trial.

The right to choose who shall be examined on behalf of a party which is a corporation, however, is not unfettered. Under *Rule 31.03(2),* the examining party may examine any person who is or has been an officer, director or employee of the corporation. However, in *Merchants Consolidated Ltd. v. Henderson-McIvor Foods Ltd.* 1991 CanLII 11787 (MB CA), 73 Man. R. (2d) 120 (C.A.), where the plaintiffs opposed the defendant's desire to examine the former president and chief executive officer of the company, the court ruled that although the right to choose cannot be restricted solely on the ground that there is a more suitable officer available, usually it will not be appropriate for a corporation to have its former officer, director or employee examined on its behalf. This is because, pursuant to *Rule 34.14(1),* a party's case may be struck out if its representative fails to attend an examination for discovery. The court recognized that a corporation has little control over the acts of a former officer, director or employee and is therefore vulnerable to the particular sanctions of *Rule 34.14*.

There are important ramifications to consider if one designates a past officer, director or employee as the examinee. Firstly, the court, on motion of the corporation to be examined, may order the examining party to examine another officer, director or employee. In that regard, the case law under the old rule, which also provided that a past officer or employee could be designated, is relevant. See, for example, *Bank of Nova Scotia v. Wesplain Insurance Management Inc., 1983 CanLII 3666 (*MB CA) and *General Motors Acceptance Corporation of Canada Limited v. Bank of Montreal, 1984 CanLII 3722 (MB QB),*

Both of these cases acknowledge that in appropriate circumstances, a former officer or employee of a corporation can be examined for discovery. Nonetheless, in both of these cases, the courts were not convinced that the attendance of that former employee or officer was essential for the purposes of conducting a proper discovery. It appeared that another current employee, who was knowledgeable, had access to the background records, and was willing and able to inform himself, was available for examination purposes. Accordingly, in both cases, the court directed that the current employee be

examined, but indicated that if that discovery could be demonstrated to be inadequate, a further application for the examination of the former officer would be entertained. Secondly, *Rule 31.03(3)* provides that if a former, officer, director or employee is examined, no other person may be examined without leave of the court.

One obvious abuse which the rule seeks to prevent is to have a party designate a past officer or employee of a corporation when that party is aware that the past officer left the corporation on bad terms, and is likely to give biased evidence against the corporation. The rule protects the corporation's rights by permitting it to obtain the permission of the court to produce another officer or employee to be examined. The rule also specifies that once an officer, director or employee has been examined, no other officer, director or employee may be examined without leave of the court. It is, therefore, important for counsel when designating the representative to be produced to do so carefully, because if a former officer or employee is designated, and that officer is not entirely knowledgeable, the examination may be less than satisfactory, and counsel will likely be precluded from examining another representative.

Equally significant, *Rule 31.11(6)* also stipulates that the evidence of a former officer, director or employee may be read into, or used in evidence at the trial only with leave of a judge. In certain circumstances, a court may also grant leave to a party to examine a second corporate representative. To do so successfully, however, moving counsel must satisfy the judge that the witness who was examined could not satisfactorily inform himself or herself about the subject of the examination for discovery.

The general rule is that an order for a second examination should only be granted where the first examination did not provide the party the full and complete discovery to which he or she was entitled. See *Thomas v. Winnipeg (City) et al., 1998 CanLII 28107 (MB QB)*. This should not, however, be used as a substitute for obtaining further and better answers to undertakings. Those answers must be obtained by a motion to compel further and better answers or by reconvening an examination to ask follow-up questions. See *Thomas, supra.*

iii. Partnerships

Insofar as partnerships or sole proprietorships are concerned, each person who was, or is alleged to have been a partner or sole proprietor, may be examined on behalf of the partnership or sole proprietorship, and alternatively anyone having the control or management of the partnership or proprietorship at a material time may be examined. Corporations, partnerships and sole proprietorships to be examined are required upon the request of the examining party to disclose the name of a person to be

examined who is knowledgeable concerning the relevant issues. In cases where the examining party does not designate the person to be examined, the corporation, partnership or sole proprietorship to be examined is obliged to produce a person who is knowledgeable concerning the relevant issues (*Rules 31.03(5)* and *31.03(6)*). These rules will operate when the examining party has little knowledge of the opposing party's organizational framework, its lines of authority, or the individuals within the corporation or partnership who had the decision making power with respect to certain issues.

iv. The Crown

At common law, Crown privilege operated to make the Crown immune from any obligation to produce documents or to submit to examination for discovery. The privilege has now been modified to a considerable extent by *The Proceedings Against the Crown Act*, R.S.M. 1987, c.P140.

Section 9(1) of the Act stipulates that the rules as to discovery and inspection of documents apply in the same manner as if the Crown were a corporation. The Crown is, however, able to refuse to produce documents or to answer questions on discovery on the ground that the production or answer would be injurious to the public interest. Further, the person who is to attend at the examination for discovery shall be an officer or employee of the Crown designated by the Attorney-General.

Section 9(2) of the *Act* stipulates that where the Attorney-General designates an officer or employee to be examined, and the examining party is dissatisfied with that designation, the examining party may apply to court for an order directing that another officer or employee attend to be examined.

Counsel should be mindful that various entities, provincially funded organizations or corporations may qualify as Crown agents under *The Proceedings Against the Crown Act*, and in any litigation involving such entities, consideration should be given to whether the provisions of the Act apply.

v. Assignees

The rules are explicit in providing that where an action is brought by or against an assignee, both the assignor and assignee may be examined. (*Rule 31.03(8)).*

vi. Bankrupts

The rules are also explicit in stating that where an action is brought by or against a trustee of the estate of the bankrupt, the bankrupt may be examined in addition to the trustee. (*Rule 31.03(9)*).

c) Who May Attend?

Parties to litigation, including corporate parties have an inherent right to be present at the examination for discovery of parties adverse in interest to themselves. Your client's presence during your examination of the opposing party is not required, but it is almost always preferred. Usually the client has a better, or at least as good, grasp of the facts (if not the issues) and he or she can assist with reminders or checks on accuracy. The degree and timing of your own client's involvement are a personal preference, as some counsel prefer not to be disturbed, or put off track. Overall, however, don't dismiss your client's willingness and ability to assist.

In Manitoba, all parties are usually permitted to be present at the examination for discovery of all other parties to the litigation, even those with a common interest. Note, however, there are instances where parties with a common interest may be excluded from the examination of each other, particularly where there are important issues of credibility in the action, and where it would be an advantage to one party to hear the evidence being given by another party with a common interest.

The case of *Wotton v. Wallace, 1980 CanLII 2997 (MB QB),* is illustrative. In that case the defendant moved successfully that each of the plaintiffs be excluded from the examination of the other. The plaintiffs were husband and wife and had a common interest in attempting to prove by evidence a variation in a written agreement for the purchase of land.

In granting the order of exclusion, Mr. Justice Ferg stated at the end of the decision as follows:

> *Accordingly, exercising my discretion in the circumstances of this case, because the plaintiffs have a similar and identical interest both in advancing their claim and in defending the defendant's counterclaim for extensive damages claimed, and are in no way adverse to each other, and because the examination of each will essentially cover the same ground, and neither will be in any way prejudiced, and if it was otherwise having regard to the issues to be decided at trial, an injustice to the defendant might well result, it is ordered that each plaintiff is to be examined separate and apart from the other…*

The rules provide that where no specific rule addresses a situation, one should proceed by analogy to the procedure found in other rules. Although the rules do not specifically address the issue of who may attend an examination for discovery, reference can be made to the rules relating to who may be present at trial. Those rules provide that parties are not to be excluded from trial, save in exceptional circumstances (*Rule 52.06(1) and (2)*). These rules demonstrate that the onus upon an applicant to justify exclusion of a co-party on an examination for discovery of another co-party, is greater now than was previously recognized. See, *Dignazio (Litigation*

Guardian of) v. Weizman, 2005 MBQB 61; *Chalmers v. Chalmers Estate*, 1991 CanLII 11786 (MB CA). See as well *Cardona v. Ospreay, 1994 CanLII 10567 (ON SC)* which held that while, *prima facie*, parties are entitled to be present at the discovery of other parties, particularly those adverse in interest, where co-parties have common interests it may be necessary to exclude each from the other's examination for discovery to prevent the possibility of tailoring of evidence.

Factors to consider include:

a) whether parties have common or indeed identical defences;

b) whether considerable harm might be suffered by the other side if the parties were allowed to be present when each was examined; and

c) whether there would be any prejudice to the co-parties if they were excluded from each other's examinations.

The Manitoba Court of Appeal has ordered that examinations for discovery of co-parties be scheduled not only in isolation, but also in immediate succession, one to the other. The reason behind this precaution is to ensure that there is no colouring of the evidence. See *Chalmers*, supra.

Practice Tip:

If you are acting for one or both co-parties and the other side does not raise the issue of exclusion but you think that credibility might become an issue, you may want to offer to have the witnesses excluded from each other's examinations. In this way, the opposing party cannot argue, at a later date, that your clients patterned or tailored their evidence.

The special examiner or other person before whom the examination is to be held has discretion with respect to permitting "strangers" to attend examinations. An issue will sometimes arise in cases of a technical nature as to whether experts engaged by a party are able to attend examinations. Such experts will be permitted to attend in order to assist examining counsel if the issues are sufficiently complex and technical to warrant the expert being in attendance.

It will not normally be permissible for an expert to be in attendance to assist the witness being examined to answer questions on that witness's examination, unless opposing counsel consents.

4. Preparation for Examination

a) By Counsel

IMPORTANT

It is difficult to over emphasize the importance of counsel thoroughly preparing for an examination for discovery. The process should be viewed by counsel as one of the most important parts of the litigation process.

To properly prepare for the conduct of an examination for discovery the file material should be organized and referenced. The pleadings should be separated from the other documents relating to the case, and the pleadings should be thoroughly reviewed inasmuch as they will identify the contentious issues in a lawsuit.

The method of organizing the documentary material will vary from counsel to counsel or from case to case. However, it is usually helpful to have your own client's documents separated from those of the other party, and the documents of each of the other parties separated from each other. Within those categories, documents will normally be further organized, either chronologically or by subject matter.

Most counsel separate the documents over which they claim privilege from their non-privileged documentation. Some counsel will even go to the extent of never taking their privileged documentation with them to examinations in order to avoid inadvertently giving documents to the other side. Although the rules specifically require that non-privileged documents be taken to both discovery and trial, it is still possible to refrain from taking privileged documents to discovery. Whatever form of organization counsel adopts, some form of documentary organization is imperative if a discovery is to proceed smoothly and efficiently.

It is difficult to generalize as to one correct method of preparing questions to be put to an examinee. Clearly counsel must be absolutely familiar with the contentious factual issues in the case, and the factual background as described by his or her client and as set forth in the documents of all parties.

When preparing for examination, counsel should identify his or her objective when dealing with a particular subject area. For example, if counsel is merely seeking information from the witness being examined with a view to determining what that party's position is on particular issues, the questions can, to a certain extent, be general. However, if counsel is intent on eliciting admissions from the other side, the questions will necessarily have to be specific and narrow in their focus.

When preparing questions for an examination, counsel should remain aware that he or she is attempting to create a transcript which will be useable at trial. It is, therefore, advisable to separate questions of a general nature which are intended to elicit background information from questions of a narrow focus that are intended to elicit admissions. The general informational responses will almost certainly contain some information which is harmful to the examining party's position, and which will not be appropriate to be read in as part of that party's case at trial. Admissions, on the other hand, ought to be clear and stand on their own so that they can be read in without having to include evidence which is potentially harmful to that party's position. Rather than writing out questions in detail, specific points and issues to be covered should be noted. Counsel should be prepared to move away from written notes as new issues and evidence arise.

b) Preparing Your Client

Counsel also has an important role to play in preparing a client for examination purposes.

When meeting with the client, it is important to calm any fears the client may have, and to explain the setting and the format. Most people believe, wrongly, that this is a procedure before a judge. Satisfying them that it is an informal procedure, and setting out the physical circumstances, can go a long way towards reducing anxiety and nervousness, and will result in a more productive, yet controlled, discovery.

Particular instructions to the client include the following:

- answer only the questions that are put to you by the lawyer;
- do not volunteer information that is not requested;
- answer the questions truthfully and in a straightforward manner, and do not try to second guess the lawyer;
- if you do not understand the question, ask the lawyer to rephrase it or to put it in another fashion;
- you may have access to all of the disclosed documents to refresh your memory, or to assist you in understanding a question;
- be alert to your lawyer's objections, and do not answer a question to which an objection has been taken; and
- do not voluntarily undertake to provide information that you do not have readily available at the discovery; wait for counsel to request an undertaking, and it can then be given.

Remember:

Counsel should always remember to review the pleadings in the case in some detail with the client. When being examined, the client will often be referred to particular allegations in a pleading, and a client will be better able to respond to such questions if aware of the contents of the pleading, and if familiar with the facts and documents intended to support that portion of the pleading.

Counsel should also be sure that the client has reviewed all of the documents that have been produced, and understands the significance of each of the documents as it relates to the position of each of the parties in the lawsuit.

Finally, prior to the examination, counsel should have reviewed with the client that client's recollection of all of the relevant factual background relating it, where possible, to the contents of documents or memos made at the time of the occurrences.

In *Verwey Potatoes Ltd. v. Siemens Seed Potatoes,* 2002 MBQB 195, [2002] M.J. No. 538 (QL), Master Clearwater held at para. 8 that "the party being examined for discovery must take reasonable steps to inform himself in advance of the discovery".

Examinees must be conscientious in preparing themselves for examinations. Examinees being produced on behalf of corporations, partnerships, and the Crown have a duty to inform themselves of all of the facts and matters relevant to the lawsuit that are within the knowledge of the party that they are representing on the examination. Counsel should be sure that the examinee is aware of that duty. This will typically mean that the representative to be produced should have reviewed and become familiar with the contents of all documentation produced by that party in the litigation. The representative should also have met with other directors, officers, and employees who have personal knowledge of the matters at issue, in order that the examinee can give evidence on discovery of all of those matters.

5. Conduct and Scope of Examination (Rule 31.06)

a) What May be Covered?

Rule 31.06 - The examining lawyer is generally entitled to ask any question which relates to any matter in issue in the action. The matters in issue are defined by the pleadings.

Over the years, discovery has become progressively broader in scope, and it is expected that the current rules will continue this broadening process. The scope of questions allowed on discovery is wider than the scope of questions permissible at

trial. Nonetheless, there is a distinction to be drawn between broad discovery and a "fishing expedition."

Questions which have nothing to do with the case as pled, or those which are prompted by a speculative hope of obtaining a relevant answer, but without any relevant foundation being established, are not permissible.

Mr. Justice Kroft made the following statement in his reasons for judgment in *Investors Syndicate v. Pro-fund et al* 1980 CanLII 3138 (MB QB), 12 Man. R (2d) 104 (Q.B.) at 117:

> *The purpose of discovery is to secure admissions and to obtain information regarding facts so that a party will not be taken by surprise at trial. While examination at the discovery stage is subject to the test of relevance, the scope of questions allowed on discovery is wider than at trial. Questions may be put and answers required on discovery which would not be permitted at trial, since 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. Needless to say, clearly irrelevant matters may not be pursued, nor will a fishing expedition be allowed. What is relevant will be determined by the pleadings as reasonably construed.*

The appeal of that case was dismissed *Investors Syndicate Limited v. Pro-Fund Distributors Ltd*. 1981 CanLII 3537 (MB CA)

The same type of concept can be expressed in a different way, by stating that questions on discovery will be permissible if they fall within one of the following categories:

- Questions as to material facts as defined by the pleadings;
- Questions to support the party's own case;
- Questions to destroy the adversary's case;
- Questions enabling the examining party to know the case to be met;
- Questions to obtain admissions;
- Questions as to the truth of allegations in the pleadings; or
- Questions as to the extent of the relief claimed and the basis for that relief.

Referring to the above noted categories, an issue often arises as to how far an examiner can go in pressing the examinee for information as to the case to be met. It is generally true that the examinee is to give responses as to facts, and is not obliged to testify as to the legal position or consequences that flow from those facts.

Questions are not permissible that are, in effect, questions of law. See, *Macklem v. Macklem*, 1996 CanLII 18105 (MB QB), Situations arise, however, where the factual position is clear, but there is some doubt as to the legal position to be taken by the party based on those facts. The examiner will often insist on discovery that the examinee, or the examinee's lawyer put his or her legal position on the record so the examining party will fully understand the case to be met at trial. Frequently, the examinee's lawyer will object stating that the examinee is only obliged to testify as to facts, and the legal consequences that flow from those facts will be determined in court. This appears to be an unsettled area of the law, and the decisions cited in various practice cases seem to vary depending on the type of case and the type of question put. Moreover, under the current practice the legal positions to be adopted at trial will normally be clarified at pre-trial.

Rule 31.06(1) does resolve certain issues that have been controversial with respect to the types of questions that could be put on discovery. Formerly, on examinations, questions were frequently objected to on the basis that they constituted cross-examination. Similarly, questions were often objected to because they sought evidence by which facts were to be proved, rather than the facts themselves.

Rule 31.06(1) is now explicit in stating that questions cannot be objected to on the ground that (a) the information sought is evidence, or (b) that the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness: Bank of Montreal v. Northguard Holdings (12 September 1990), CI 84-01-01255 (Man.Q.B.).

The express stipulation that evidence is now generally discoverable is the most significant of these changes. There will now be no question that once a party testifies as to a fact on discovery which is in support of that party's position, the examining counsel will be entitled to explore the evidence which may be brought forward to establish that fact. It is now clear, by operation of *Rule 31.06(1)(a)* and *Rule 31.06(2),* that examining counsel will have the right to obtain the identity of individuals who may be called as witnesses to establish the facts that the examinee will be relying on at trial. A witness may not refuse to answer a question on the ground that it is not relevant to that party's position, so long as the question is relevant to a matter in issue raised by the opposing party. See Laufer v. Bucklaschuk (14 February 1994) CI 87-01-17127 (Man. Q.B., Master). The Laufer decision also indicates that in cases involving disputes over relevance and the proper scope of questions on oral discovery, the court will examine the pleadings first, and then the relevant law in reaching its decision.

b) The Form of Questioning

Even before the implementation of the current rules, the authorities made it clear that an examination for discovery in Manitoba could take the form of a cross-examination, except that questions would not be permitted that were solely a cross-examination on credibility.

As indicated earlier, *Rule 31.06(1)(b)* allows cross-examination on discovery, except as to credibility. In practical terms, this means that:

- Leading questions are permitted, even on material and contentious issues.
- An examinee can be challenged and contradicted on the basis that the evidence being given is in conflict with evidence that the examinee gave earlier, or is inconsistent with evidence contained in some of the documents in the case, or with the evidence of other parties or witnesses.

Whether an examiner chooses to cross-examine a witness for all or part of the discovery is a matter for the judgment of the examiner. Clearly, cross-examination is an effective way of obtaining admissions from a party being examined. Accordingly, counsel may choose to cross-examine an examinee at least in those portions of the examination where admissions are being sought. On the other hand, where counsel wishes to obtain as much information as possible from the examinee, in order to fully inform himself or herself as to the other side's case, a more general method of inquiry might be preferred.

Further, counsel may not want to alert the examinee to all of his or her intended cross-examination because the examinee will then be well prepared to meet that cross-examination at trial. It is often more useful on discovery to obtain a series of answers which, in effect, commit the witness to a certain position, and to reserve a series of other questions on that issue which might be used during a cross-examination at trial.

It is important, however, to emphasize that whatever style of examination is chosen by the examiner, questions on discovery should be succinct, clear, and unequivocal. In that way, the witness can be required to give a responsive answer to the question, which should also be clear and unequivocal. Those types of responses are of great use to the examining counsel, both in terms of understanding the other side's position, preparing for trial, and also in creating a useable transcript for trial.

When posing questions remember that you are making a record. The record should be as clear as possible. Someone reading the transcript should be able to understand exactly what the witness is talking about. If a specific document is being referred to, make sure it is either marked as an exhibit or otherwise identified so that when the transcript is reviewed many months later, everyone knows to what the witness was referring. Clarify words and references such as "over here" or "this" and "that."

Keep in mind, as well, that you do not have property in the transcript of an examination of your client conducted by the other side. There is no point, therefore, in putting lengthy arguments on the record since, for the most part, you have no control over the use that the examining party will make of the transcript.

Counsel should be careful not to limit the examination for discovery to the obtaining of neat answers in connection with admissions sought. For the most part, counsel should keep in mind that the discovery is relatively risk free as compared to a trial,

where one would not want to ask a question to which one does not know the answer. If a witness is going to say something harmful to the case, the examination for discovery would be a better time to hear it. Therefore, counsel should not try to control the record too much, at the expense of being surprised by evidence at trial.

Caution:

One mistake to watch for is continuing to question on a matter where a witness has already given a favourable answer. If you get a good answer, move on. It is important to close off the witness' answer properly so that you can use it effectively at trial. This is in keeping with being conscious of the record for use at trial. Do not allow a witness to leave an answer in such a way that it will be possible to embellish the evidence in a self-serving manner at trial.

It is also useful to note that *Rule 34.12(1)* provides that a person being examined for discovery may be re-examined by his or her own lawyer. This re-examination should be confined to clarifying matters that were raised on the examination for discovery, but on which the evidence of the examinee was not clear. Re-examination on discovery is not intended to enable counsel to, in effect, conduct an examination-in-chief of his or her own client at the conclusion of the other side's examination.

Experienced counsel are generally reluctant to re-examine their own client because the risks generally outweigh the benefits. Counsel will always have an opportunity to conduct an examination-in-chief at trial, and if they ask questions on re-examination which elicit answers that are harmful to their position, those answers can be used by the other side at trial and may be doubly damaging.

c) General Information Obtainable

i. Information from Non-Parties

The party being examined may be required to provide information from non-parties. For example, the plaintiff in a personal injury suit may be required to attempt to obtain medical records from hospitals or clinics relating to that party's treatment rather than requiring the examining party to obtain them in the more formal way. Similarly, a client may be required to obtain accounting or banking documents if those matters are relevant to the case being presented. On the other hand, a party will generally not be required to obtain information from non-parties, when the examining party would have an equal or superior right to make the direct inquiry from the non-party.

The cases cited in G. D. Watson, Q.C. & M. McGowan, *Ontario Civil Practice 2016* (Toronto: Carswell, 2016). under the subject heading "Scope of Examination -

Information from Non-Parties" provide many further examples of the types of cases where a party being examined may be obliged to seek and provide information from non-parties.

ii. Privileged Information

A party will not be required to provide information on discovery which is privileged. See the commentary in this chapter with respect to the production of documents.

Crown privilege can, of course, be claimed by the government or Crown agencies. See *Winnipeg Videon Incorporated v. Manitoba Telephone System and Manitoba (Attorney General*), 1986 CanLII 4895 (MB QB), and *Somerville Belkin Industries Ltd. v. Manitoba*, 1988 CanLII 1371 (MB CA). However, where the Crown seeks to avoid providing information on the basis that disclosure may prove injurious to the public interest, some evidence of the injury or the potential injury must be provided.

In the absence of statutory protections such as *section 39.1* of the *Canada Evidence Act*, reporters can only protect the identity of their sources from disclosure by satisfying the *Wigmore* critertia: *Denis v. Côté,* 2019 SCC 44 at paras. 29 – 31.

iii. Examinee's Opinion

Generally, a question requiring an answer to be based on the opinion of the examinee is improper. However, a witness may be asked questions of opinion within common experience, such as whether or not he or she considered an individual to be intoxicated. Similarly, professional parties may be asked questions which elicit their opinion if the opinion is within their professional competence, and the opinion is relevant to an issue in the lawsuit.

Generally, a witness cannot be compelled to answer questions on discovery that call for an expert opinion. The rationale for this rule is that one is entitled to elicit admissions of fact, but not to elicit answers that the witness could only obtain by consulting an expert and repeating the expert's opinion. See W.B. Williston and R.J. Rolls, *Law of Civil Procedure*, (Toronto: Butterworths, 1970) at pp.818-820 as cited in J.A. Olah, *The Art and Science of Advocacy* (Agincourt, Ontario: Carswell, 1990) at 5-31.

iv. Hearsay

It is permissible to ask a witness a question which requires an answer based on hearsay. A witness may be examined not only on his or her own knowledge, but on what the witness has heard others say. Indeed, since an examinee has a duty to inform himself or herself with respect to matters germane to that party's position, it is understood that some of the evidence to be given on an examination will be hearsay evidence.

d) Specific Information Obtainable

i. Names of Persons Having Knowledge

As indicated earlier, *Rule 31.06(2)* specifically entitles a party on examination for discovery to obtain disclosure of the names and addresses of persons having knowledge, or who might reasonably be expected to have knowledge, of transactions or occurrences in issue in the action, unless the court orders otherwise.

In *Saskatchewan (Workers'* Compensation *Board) v. Kokorudz, [1990] M.J. No. 537* Master Bolton held that information obtained from interviews of possible witnesses does not have to be disclosed on a discovery, although names and addresses must.

In contrast, Justice Lauwers (prior to his elevation to the Ontario Court of Appeal) held at para. 26 of *Davies v. Corporation of the Municipality of Clarington, et al.,* 2010 ONSC 6103 that:

> *I revert to Rule 31.06(2) and the case law to hold that the defendants must be provided with "the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action" known to the plaintiff and from whom the witnesses giving evidence at the trial on the plaintiff's behalf will be drawn, summaries of what the information that they possess, and copies of any relevant documents that they have in their possession. In the circumstances, this material must be provided well before the continuation of the examination for discovery. As to content, any such summary must contain a fair degree of detail addressing the normal journalistic questions related to the person and the relevant knowledge that he or she possesses, being: "who, what, where, when, why and how". If the level of detail is inadequate in the opinion of the defendants, I may be spoken to. A summary need not be sworn or signed.*

It is clear, however, that a party is obliged to give details of the name and address of anybody having knowledge of a relevant occurrence even if the party is not intending to call that person as a witness. It also appears that the party need not specify which of the persons having knowledge of the relevant occurrences will be called as witnesses. A party need not make a search for witnesses whose addresses are not known to them but must disclose that information if and when it becomes available to the party. See *2245647 Manitoba Ltd.* v. *Economical Mutual Insurance Co.*, [1991] M.J. No. 271 (QL) (.Q.B., Senior Master Goldberg)

ii. Expert Opinion

Rule 31.06(3) entitles a party on examination for discovery to obtain disclosure of the "findings, opinions and conclusions" of an expert engaged by or on behalf of the party being examined that relate to a matter in issue, but the party being examined is not obliged to disclose the information or the identity of the expert where the findings, opinions and conclusions of the expert were formed in preparation for or in contemplation of the pending litigation, and the party being examined undertakes not to call the expert as a witness at the trial. Some counsel may choose to produce an expert's report they intend to rely on at the discovery stage.

A party has no obligation to disclose its intentions regarding the hiring of experts. However, it does have an obligation to disclose any relevant experts' findings, opinions and conclusions it has or subsequently obtains, unless it can establish all of the criteria for non-disclosure set out in sub-paragraphs (a) and (b) of *Rule 31.06(3).* See the decision of Senior Master Goldberg in *Hogue* v. *Manitoba Hydro-Electric Board*, [1998] M.J. No. 165 (QL).

Note as well that the requirement for disclosure applies to reports in existence when the affidavit of documents is executed and also those reports which come into a party's possession, control or power after the affidavit of documents is executed: (*Queen's Bench Rule 30.07(1)* regarding continuing discovery). See *Hogue, supra.*

It appears clear that at the discovery stage, the expert's report need not be produced, but that only the findings, opinions and conclusions of the expert need be given. Note that a party is still required to identify the existence of any expert reports or opinions, even where privilege is being claimed. If the expert is not to be called at trial, he or she need not be named. In that case, the party may simply identify the expert as Expert "A," "B," "C," etc., and provide the date of any report, findings, and/or opinions received by oral or written communication, along with an undertaking not to call that expert as a witness at the trial. See *Lyne v. McCarty et al., 1996 CanLII 18087 (MB QB), (*Master). If a party complies with these conditions, no disclosure need be given as to the actual content of the report or findings. See *Chmara v. Nguyen, 1993 CanLII 3367 (MB CA).*

Arguments could develop as to how broad the disclosure must be at discovery on the basis that the phrase "findings, opinions and conclusions" contemplates something more than a mere summary of the expert's conclusions. The issue, however, may not be particularly controversial since the full report becomes subject to production prior to the pre-trial conference in any event.

In *Telephoto Technologies Inc. v. Manitoba Jockey Club Inc.,* 2007 MBQB 207, the master noted that the jurisprudence has given a broad interpretation to "findings, opinions and conclusions" so that the scope of the required disclosure includes the expert's grounds and reasons for his or her opinion, as well as the data or factual underpinnings of his or her findings, opinions and conclusions. Accordingly, a party must be prepared to disclose such items as the raw data and records made and used by an expert; information and data obtained by an expert contained in documents or obtained through interviews; anything such as a surveillance videotape shown to an expert and in general the research, documents and factual data relied on by the expert.

Having said that, the court went on to point out that questions which go to the credibility and qualifications of the expert are not properly the subject of discovery.

Keep in mind that ultimately, the admissibility of expert evidence at trial is governed primarily by *Rules 53.03(1)* and *53.03(3)*. *Rule 53.03(1)* requires the party who intends to call an expert witness at trial to include, as part of the party's pre-trial brief, a copy of a report, signed by the expert, setting out the expert's name, address and qualifications and the substance of the proposed testimony. *Rule 53.03(3)* provides that if a party does not comply with *Rule 53.03(1),* the proposed expert evidence will only be admissible with leave of the trial judge.

iii. Insurance Policies

See commentary on Privilege discussed earlier in this chapter.

e) Undertakings

It will frequently occur that an examinee may be unable to answer a proper question put on examination, notwithstanding the examinee's efforts to properly prepare for the examination. It is appropriate in those circumstances for an undertaking to be given by the examinee to make reasonable efforts to obtain the information and to provide it to the examining party. It is undoubtedly advantageous for the examinee to provide answers by way of undertaking because the examinee then has an opportunity to reflect on the answer, and to provide a written response, drafted by the examinee's lawyer. Although undertakings are a useful and unavoidable part of the examination process, it is not appropriate for an examinee to use undertakings as a device to temporarily avoid the examiner's questions, and to provide carefully crafted answers at a later date.

When faced with a witness who has failed to properly prepare for the examination and who is "undertaking" to answer many material questions, it will often be advisable for examining counsel to adjourn the examination, and to reconvene the examination after the examinee has become properly informed.

Counsel should be careful not to provide unqualified undertakings to provide evidence that the client is not, in fact, able to provide. For example, the Manitoba Court of Queen's Bench has recently confirmed that when an undertaking to produce documents is given on an examination for discovery, the relevance of the documents is acknowledged. A party may not resile from that undertaking even if he or she later forms the belief that the document is not relevant to a matter in issue in the case. (*Penner et al. v. P. Quintaine & Son Ltd., 2008 MBQB 216*.)

f) Effect of Counsel Answering (Rule 31.08)

This *Rule 31.08* states that questions on an oral discovery shall be answered by the person being examined. However, the rule also provides that where there is no objection the question may be answered by that person's counsel, and the answer shall be deemed to be the answer of the person being examined unless the person repudiates, contradicts or qualifies the answer.

The rule makes it clear that examining counsel is entitled to have an answer from the person being examined. However, in circumstances where the examining counsel allows the person's lawyer to answer the question put on examination, there is no need for examining counsel to have the examinee specifically adopt the answer given by counsel because that answer will clearly bind the examinee, unless the examinee specifically repudiates, contradicts or qualifies the answer.

The rules do not authorize the court to make orders directing counsel for the parties to refrain from interfering with an examination for discovery and, in particular, from suggesting answers to questions. The question of whether counsel is interfering or improperly assisting is to be made after the fact. If difficulties persist, a party may apply to have an examination for discovery before the master (*Boziun* v. *Solobodian* (20 March 1991), CI 89-01-41736 (Man. Q.B.) [unreported]).

g) Objections and Rulings (Rule 34.13)

Rule 34.13(1) stipulates that where a question is objected to, the objector shall state briefly the reason for the objection, and the questioner shall state briefly the justification for the question, and both the reasons for the objection and justification shall be recorded on the transcript.

Rule 34.13(3) provides that a ruling on the propriety of the question may be obtained on motion to the court, and in adjudicating on the propriety of the question, the court will not be limited to considering only the reasons given for the objection at the time of the examination.

Rule 34.13(2) provides that where a question is objected to, it can be answered with the objector's consent. However, before the evidence can be used at a hearing, a formal ruling on the admissibility of the answer is to be obtained.

Finally, *Rule 34.13(4)* is explicit in stating that at any hearing, a party may object to the admissibility of a question and answer made on examination, although no objection was taken on the examination.

Formerly, in Manitoba, an objection to a question could be taken, and the objector was not obliged to state the reasons for the objection. Objecting counsel would often simply instruct the examinee not to answer the question, and examining counsel would be obliged to proceed without the matter being dealt with. The objective of the new wording is to require that reasons for the objection be recorded, both as a means of facilitating the resolution of the dispute at the examination, and as an aid to the court if it is called upon to resolve the dispute.

Similarly, the concept of answering the question, but subject to objection, is a device to allow examinations to proceed without undue disruption, while at the same time protecting the procedural rights of the party being examined.

Rule 34.13 also recognizes that realistically rulings as to the propriety of an objection will ultimately be given by the court, and not the court reporter recording the examination.

Objectionable questions may include the following:

1) a question which asks for information which is not relevant to the issues as set out in the pleadings; remember, however, courts generally take a generous approach to relevance on examination for discovery;

2) a question which is unclear: object and insist on clarification even if your witness begins to answer;

3) more than one question is included: beware of several questions strung together;

4) a question calling for opinion evidence which can only be answered by an expert: except where a professional is being sued for negligence and is asked for an opinion as to the appropriate standard of care;

5) a question involving an assumption of fact which has not yet been established; or

6) questions relating solely to the issue of credibility: except where credibility is in fact the issue at stake.

Note: The ground of self-incrimination does not form an appropriate ground for objection.

h) Conduct of Counsel During Discovery

For the most part, the only occasion upon which counsel for the party being examined should say anything on the record during the examination, is when it is necessary to make an objection or to acknowledge a request for additional documentation or information. In general, the role of counsel attending discoveries should be one of a non-interventionist. Counsel should assist his or her client with documents and make sure that the client is being given every opportunity to fully understand and answer the question posed.

Counsel's function at the examination is to protect his or her client's rights by assessing the propriety of a particular question. Counsel cannot have a private conference with the client before the client responds to a particular question. Nor can counsel assist the client in framing answers by means of either oral or written communication. It is permissible, however, for counsel to communicate with a client during his or her examination for discovery. For example, *Rule 31.09 (1)* of the *Queen's Bench Rules* imposes an obligation to correct answers provided in the course of a discovery that are incorrect or incomplete. Matters of settlement may also be discussed during discovery.

i) Closing the Examination

There is no rule specifically dealing with the closing of an examination. However, the closing of an examination is significant because once an examination is closed, the party being examined may not be examined again without leave of the court.

When counsel has finished asking questions of the witness, the discovery should be concluded and that fact should be put on the record. It is important for counsel to be careful to ask all questions that they intend to ask before formally closing the examination. Note, however, that often counsel will not be able to completely finish because of a number of undertakings given or requests for additional information or documents that have not been produced at the discovery. In any of the above situations, it should be indicated on the record that counsel is concluding the discovery subject to any questions which might arise out of the information and documents requested.

j) "Follow up" After the Examination

Note: It is important for both the examining counsel and counsel for the examinee to accurately note the undertakings made on the examination, and to follow up in order that those undertakings are complied with as expeditiously as possible.

It is incumbent upon counsel receiving the answers to undertakings to review them to determine if further questions arise from the responses.

Counsel is often lax in answering undertakings. This laxity often causes further delay and expense at the next stage of the litigation process. Complying with undertakings is an integral part of the discovery process and should be dealt with accordingly.

The transcripts should also be reviewed to assess whether any questions which were objected to need to be answered and whether it will be necessary to bring a motion to compel those answers.

k) Information Subsequently Obtained (Rule 31.09)

Rule 31.09 falls under the heading Information Subsequently Obtained. The heading is somewhat misleading because the rule is intended to deal with two situations:

- Where new information is discovered after the examination which affects an answer, or answers given on examination; and
- Where the party simply realizes that an answer was incomplete or incorrect.

In either event, *Rule 31.09* places upon the party who has been examined a duty to provide the information which corrects or completes the answers previously given. The rule also stipulates that the information is to be provided in writing, and where it is so provided, the writing is to be treated as if it forms part of the original examination of the person being examined.

Finally, the rule stipulates that where such information is provided the receiving party may require that it be verified by an affidavit of the party giving the information, or may become the subject of a further examination.

The rule makes it clear that the discovery process, and the obligation of a party being examined, is an ongoing and continuing one, even after the formal oral examination has been concluded. The obligation to disclose is a continuing one. Even though the examination itself has been closed, the obligation to disclose does not end. See 2245647 Manitoba Ltd., supra.

In *Bachalo v. Robson et al*., 1995 CanLII 16399 (MB QB), De Graves J. made it clear that *Rule 31.09(1)* was not to be used to permit a party to change his answers and "in effect create a new discovery." Although the Court of Appeal disagreed with the trial judge as to the evidentiary effect of the discovery evidence, it agreed with the trial judge that as the discovery evidence was "clear and unambiguous," *Rule 31.09(1)* did not apply to permit a letter of clarification to be admitted into evidence: (30 June 1998), AI 97-30-03355 (Man. C.A.).

For another decision on this rule see *Capital Distributing Co. v. Blakey*, 1997 CanLII 12173 (ON SC).

l) Interrogatories (Rule 35)

Rule 35 is a brief rule outlining the procedure for examining a party by way of interrogatories. Interrogatories are simply a list of questions which are to be answered under oath in the form of an affidavit. As indicated earlier, *Rule 31.02* states that an examination for discovery may take the form of an oral examination, or the form of interrogatories, or both.

An examination by written question will usually be far less desirable than an oral examination, because the answers will be drafted by opposing counsel. Further, there will not be an immediate opportunity for the examining counsel to ask follow up questions arising out of the responses. However, there will be circumstances where interrogatories will be appropriate, such as where the witness is located in a remote vicinity, or where the factual issues are relatively straightforward, and the assessment of the party's demeanor is unimportant.

Rule 31.02 permits an examining counsel to proceed both by way of interrogatories, and by oral examination. Note that the Ontario rules do not. In Manitoba, this practice was permitted under the previous rules and it is being maintained in the current rules because permitting both types of examination without a court order has proven to be practical.

It is expected, however, that the practice will persist whereby most examinations proceed in an oral form without recourse to interrogatories.

It is hoped that the American system of a two stage examination process, the first consisting of an extensive list of written questions, and the second of an oral examination, will be avoided.

m) Sanctions for Improper Conduct or Omission on Examination [Rules 34.14, 31.07(1), 31.09(3) and 35.04]

The rules are explicit in providing for sanctions against improper conduct at oral examinations generally, and at examinations for discovery in particular. The sanctions can be severe.

The explicit provision of sanctions, and the severity of the sanctions, demonstrate the importance of the discovery process, and the intention that the disclosure provided by the discovery rules actually takes place. The general sanction provision for all oral examinations is *Rule 34.14(1).* It provides as follows:

> *Where a person fails to attend at the time and place fixed for an examination in the notice of examination or subpoena to witness or at the time and place agreed on by the parties, or refuses to take an oath, to make an affirmation, to answer any proper question, to produce a document or thing that the person is required to produce or to comply with an order under* Rule 34.13*, the court may,*
>
> *a) where an objection to a question is held to be improper, order or permit the person being examined to reattend at the person's own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer;*
>
> *b) where the person is a party or, on an examination for discovery, a person examined on behalf of a party, dismiss the party's proceeding or strike out the party's defence;*
>
> *c) strike out all or part of the person's evidence, including any affidavit made by the person; and*
>
> *d) make such other order as is just.*

Rule 34.14(2) further provides that:

> *Where a person does not comply with an order under* rule 34.13 *or* subrule (1)*, a judge may make a contempt order against the person.*

It should be noted, however, the court will not impose the most severe sanctions lightly. In determining whether to strike a claim for non-compliance with discovery, the court will look at whether the applicant has suffered prejudice that cannot be compensated by costs. Striking a pleading is an exceptional remedy which should be reserved for the most extreme cases of non-compliance with the rules. See *Cobbe's Plumbing & Heating Ltd. v. Westfair Properties Ltd.,* 2004 MBQB 31.

See, as well, the reasons of Justice Scurfield in *Zelenski v. Jamz et al.; Zelenski v. Houston, 2004 MBQB 256 (CanLII),*in which he states *at para. 30* that in considering the availability of alternative sanctions the following questions arise:

Can the prejudice experienced by the opposing party be addressed by an order for costs, or by further specific orders as to the ongoing process? Will a sanction other than dismissal be effective?

In that case, Justice Scurfield considered whether, even if the defendants could be substantially compensated for the prejudice they had experienced to date by an order for costs, an order of the court other than dismissal would deter the plaintiff from future breaches of the rules or abusive conduct.

He stated that when considering whether a lesser sanction will be effective, that an analogy to progressive discipline is useful. That is, the court should consider whether the offending party has received prior warnings or has otherwise received notice of the possible consequences of its actions. In that case, given the history of the conduct of the plaintiff and his failure to be deterred by lesser sanctions, Justice Scurfield determined that any consequence short of dismissing the statement of claim was unlikely to succeed. Justice Scurfield confirmed that motions to dismiss for breach of the discovery rules or abuse of process should only be granted when there is a high degree of probability that no other sanction will be effective and that this was one of those rare cases.

Specific sanctions which apply to examinations for discovery are found in *Rule 31.07* and *Rule 31.09(3)*.

Rule 31.07(1) states:

> *Where a party, or a person examined for discovery on behalf of a party, has refused to answer a proper question or to answer a question on the ground of privilege, and has failed to furnish the information in writing not later than ten days after the action is set down for trial, the party may not introduce at the trial the information refused on discovery, except with leave of the trial judge.*

Rule 31.07(2) further provides that:

> *The sanction provided by subrule (1) is in addition to the sanctions provided by* Rule 34.14 *(sanctions for default in examination).*

Rule 31.09(3) - **Sanction for Failing to Correct Answers** states:

> *Where a party has failed to comply with subrule (1) or a requirement under clause (2)(b), and the information subsequently discovered is,*
>
> *a) favourable to the party's case, the party may not introduce the information at the trial, except with leave of the trial judge; or*
>
> *b) not favourable to the party's case, the court may make such order as is just.*

Keep in mind, notwithstanding the rules relating to the consequences for failure to comply with discovery obligations pursuant to the rules, the following rule:

EVIDENCE ADMISSIBLE ONLY WITH LEAVE

53.09 *Where evidence is admissible only with leave of the trial judge under,*

(a) subrule 30.08(1) *(failure to disclose document);*

(b) rule 30.09 *(failure to abandon claim of privilege);*

(c) rule 31.07 *(refusal to disclose information on discovery);*

(d) subrule 31.09(3) *(failure to correct answers on discovery);*

(e) subrule 53.03(3) *(failure to serve expert's report); or*

(f) rule 53.08 *(libel or slander);*

leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.

Specific sanctions for failure to properly answer questions on interrogatories are set out in *Rules 35.04 (2)* and *(3).*

Rule 35.04(2) states:

> *Where the person being examined refuses or fails to answer a proper question or where the answer to a question is unresponsive or incomplete, the court may order the person to answer or give a further answer to the question or to answer any other question either by affidavit or on oral examination.*

Rule 35.04(3) further states:

> *Where a person refuses or fails to answer a proper question on interrogatories or to produce a document that is required to be produced, the court may, in addition to imposing the sanctions provided in subrule (2),*
>
> *a) if the person is a party or a person examined on behalf of a party, dismiss the party's action or strike out the party's defence;*
>
> *b) strike out all or part of the person's evidence; and*
>
> *c) make such other order including a contempt order as is just.*

Because interrogatories are simply another form of discovery, and the sanctions for interrogatories are very similar to those under *Rule 34.14*, the court will refer to the same principles considered when applying sanctions under *Rule 34.14*, as set out in *Cobbe's Plumbing*, supra, when considering sanctions under this rule *(Schultz v. Schultz*, 2012 MBQB 140.)

n) Discovery Before Commencement of Proceedings (Rule 31.12)

Rule 31.12 permits a party to examine a person for discovery before any action has been commenced, for the purpose of ascertaining the identity of a potential defendant or defendants. However, the rule contains a number of limitations, including the necessity of obtaining leave of the court before conducting such an examination, and the fulfillment of three prerequisites before such leave will be granted. Specifically, the rule provides as follows:

> 31.12(1) *On such* terms as may be just, the court on application may grant leave to any person to examine for discovery*, before commencement of proceedings, any other person who may have information identifying an intended defendant.*

Rule 31.12(2) states:

> *An application under subrule (1) shall show that,*
>
> *a) the applicant may have a cause of action against the intended defendant;*
>
> *b) the applicant, having made reasonable inquiries, has been unable to identify the intended defendant; and*
>
> *c) the applicant has reason to believe that the person to be examined has knowledge of facts, or has possession, custody or control of documents or things identifying the intended defendant.*

The rule is intended to deal with circumstances where a plaintiff may have a legitimate cause of action against a defendant, or defendants, but because of the peculiarities of the facts giving rise to the claim, may be unable to identify one or more of the potential defendants. By way of example, an individual who intends to claim damages as a result of errors or omissions during surgery, may not know the identity of the anesthetist, or members of the surgical team, or nursing staff, any or all of whom may have committed the breaches giving rise to the damage claim.

A fact situation similar to that exhibited in the case of *Pochuk v. Winnipeg (City),* 1984 CanLII 3639 (MB QB), could also warrant the use of the rule. In that case, a diabetic in insulin shock was taken into custody by police and detained by correction officers in the belief that he was intoxicated. As a result, he was denied medical treatment and became seriously ill. At the time of the commencement of his action, he did not know the identity of the individual police officers or correction officers involved.

See also *Melnyk v. Daly,* 2015 MBQB 169. *Rule 31.12* represents a partial codification of the equitable discovery available in certain circumstances pursuant to so-called "Norwich orders": see *GEA Group AG v. Flex-N-Gate Corporation*, 2009 ONCA 619 wherein Justice Cronk explained at para. 41:

> *The remedy of pre-action discovery derives from the ancient bill of discovery in equity. Contemporary consideration of this type of equitable relief began with the 1974 decision of the House of Lords in Norwich Pharmacal, a case of suspected patent infringement. Norwich Pharmacal holds that, in certain circumstances, an action for discovery may be allowed against an "involved" third party who has information that the claimant alleges would allow it to identify a wrongdoer, so as to enable the claimant to bring an action against the wrongdoer where the claimant would otherwise not be able to do so.*

6. Discovery of Non-Parties with Leave (Rule 31.10)

Rule 31.10(1) provides that:

> *The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.*

Test for Granting Leave (*Rule 31.10(2)*)

An order under *subrule 31.10(1)*) shall not be made unless the court is satisfied that,

a) *the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the moving party seeks to examine;*

b) *it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and*

c) *the examination will not,*

   i. *unduly delay the commencement of the trial of the action,*

   ii. *entail unreasonable expense for other parties, or*

   iii. *result in unfairness to the person the moving party seeks to examine.*

This rule establishes a number of pre-conditions in order that the rule not be abused. The pre-conditions are cumulative, and they must all be satisfied in order for the rule to operate. In *Culbertson v. The Assiniboine Credit Union et al*, 2016 MBQB 46, Chief Justice Joyal stated at para. 28:

> *... a moving party must exhaust its normal discovery rights and demonstrate that the necessary evidence cannot otherwise be obtained in the course of such discovery. Such a requirement will usually apply to a party prior to its seeking leave to examine either a second representative of the corporation or a non-party. The moving party must demonstrate that it has been unable to obtain information from the adverse party despite having asked all appropriate questions. ...*

Furthermore, in the Ontario case of *D'Amore Construction (Windsor) Ltd. v. The Queen in right of Ontario et al*., (1986) 12 C.P.C. (2d) 178 (ONSC) the court stated that where a plaintiff had undertaken to make inquiries of a non-party, it must be given an opportunity to complete those inquiries before the defendant will be permitted to bring a motion to examine the non-party.

Leave has been denied where the non-party to be examined was an expert retained by the plaintiff (*Snively* v. *Schachner* (1986), 10 C.P.C. (2d) 38 (Ont.S.C.)). However, the court granted leave to examine an insurance adjuster employed by a private adjusting firm where the main issue at trial would be the effect of releases obtained by that adjuster from the plaintiffs, when the information was not obtained at the discovery from the defendant insurance company (*Nelson* v. *McDonald* (1987), 19 C.P.C. (2d) 115 (Ont.Dist.Ct.)). It is also important to note that the evidence of a person examined under the rule may not be read into evidence at trial. (*Rule 31.10(3)*)

7. Use of Transcripts of Examinations for Discovery

a) Formulating a Settlement Position

In cases where the examination transcripts are ordered, counsel should review both the transcripts from the client's examination, and the transcript of the opposing party. Such a review should enable counsel to appreciate the strengths and the weaknesses of both his or her own case, and that of the adversary. The points favourable to counsel's own case, and damaging to that of the adversary should be kept in mind in assessing settlement positions, and where appropriate, should be emphasized in attempting to negotiate an advantageous settlement, both in discussions between counsel, and when matters are being reviewed at the pre-trial conference.

b) Trial Preparation

Clearly, the transcripts of the examinations are an invaluable tool in preparing for trial. The transcript will enable counsel to familiarize themselves with the adversary's case, and the opposing party's evidence in support of that case. The transcript will enable a party to be familiar with the evidence given on discovery.

Further, a review of the transcript of the opposing party will enable counsel to determine what admissions have been obtained from the other party, which can be used at trial. The extent and form of those admissions will also assist counsel in determining what further evidence will be required in order to prove the essential point of that counsel's own case.

Finally, the transcripts ought to be used by counsel in preparing for the cross-examination of the opposing party so that counsel is aware of the admissions that will likely be given, which may be of value themselves, or which may be used to obtain further concessions or admissions from the opposing party at trial.

Counsel should be very familiar with the evidence given by the other party on discovery so that if the evidence given at trial is inconsistent therewith, the inconsistency can be referred to at trial. Further, the evidence on discovery should be exhaustively reviewed so that counsel has handy reference to documents which are inconsistent with that evidence, which can be referred to during the cross-examination at trial.

c) Use of Examination for Discovery at Trial (Rule 31.11)

The most important aspects of *Rule 31.11* are as follows:

> ***Reading in examination of party***
>
> *31.11(1) At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given on the examination for discovery of,*
>
> *(a) the adverse party; or*
>
> *(b) a person examined for discovery on behalf of, or in addition to the adverse party, unless the trial judge orders otherwise,*
>
> *if the evidence is otherwise admissible, whether the party or person has already given evidence or not.*

Remember:

By reading-in from the discovery of the other party you are adopting those questions and answers as part of your own case. The danger is that in doing so you may put before the court two diametrically opposed versions of an incident as part of your own case and therefore not discharge the burden of proof required to find liability.

See *O'Sullivan v. Turk*, 1947 CanLII 310 (MB QB[sic]) [1947] 1 W.W.R. 673 (Man.K.B.), confirmed as being applicable to the current Queen's Bench Rules by the Manitoba Court of Queen's Bench in *Tangocci v. Beesley*, 1999 CanLII 14106 (MB QB),); *Lebedynski v. Westfair Foods Ltd., 2000 MBQB 144 (CanLII)*); and *Dillabough v. Johnson*, 2014 MBQB 186.

Impeachment

31.11(2) The evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness.

Qualifying Answers

31.11(3) Where only part of the evidence given on an examination for discovery is read into or used in evidence, at the request of an adverse party the trial judge may direct the introduction of any other part of the evidence that qualifies or explains the part first introduced.

Rebuttal

31.11(4) A party who reads into evidence as part of the party's own case evidence given on an examination for discovery of an adverse party, or a person examined for discovery on behalf of or in addition to an adverse party, may rebut that evidence by introducing any other admissible evidence.

d) Evidence Admissible Only with Leave (Rule 53.09)

Again, with respect to the sanctions and penalties discussed earlier in connection with *rules 30.08(1), 30.09*, *31.07*, and *31.09(3),* keep in mind the following rule:

EVIDENCE ADMISSIBLE ONLY WITH LEAVE

53.09 Where evidence is admissible only with leave of the trial judge under,

a) *subrule 30.08(1)* (failure to disclose document);

b) *rule 30.09* (failure to abandon claim of privilege);

c) *rule 31.07* (refusal to disclose information on discovery);

d) *subrule 31.09(3)* (failure to correct answers on discovery);

e) *subrule 53.03(3)* (failure to serve expert's report); or

f) *rule 53.08* (libel or slander);

leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.

e) Unavailability of the Person Examined

Rule 31.11(7) stipulates that where a person who has been examined for discovery has died, is unable to testify because of illness, cannot be compelled to attend at the trial, refuses to take an oath or affirmation, or to answer any proper question, that person may have all or part of his or her evidence given at discovery, read in as evidence at the trial. In those circumstances, the evidence given on examination can be used by any party, with leave of the trial judge, to the extent that the evidence would be admissible if that person were actually testifying in court.

In deciding whether to grant leave, the judge is obliged to consider the general principle that evidence should preferably be presented orally in court, and the extent to which the person was cross-examined on discovery and any other relevant factor (*Rule 31.11(8)*). Furthermore, leave is only to be granted where the facts sought to be proved are essential to the applying party's case, and where the fact or facts cannot be proved in any other manner. Further, any leave granted is to be restricted to the portion, or portions of the examination which relate to those essential facts (*Rule 31.11(9)*).

Again, this rule is meant to provide a practical vehicle to counsel and to the court for introducing important and material evidence, when the evidence has been given at discovery, but where the witness is unavailable at trial. In *Bachalo v. Robson et al., 1995 CanLII 16399 (MB QB),*the defendant surgeon had, between discovery and trial, suffered a stroke which resulted in the impairment of his language and comprehension. The trial judge allowed his counsel's application, pursuant to *Rule 31.11(7),* to have his examination for discovery read into evidence at trial. Although the decision was ultimately reversed on appeal, the trial judge's ruling on this point was not disturbed (30 June 1998), AI 97-30-03355 (Man. C.A.). See also *Albionex (Overseas) Limited et al. v. Conagra Limited et al*., 2009 MBQB 200 (CanLII).

On the other hand, the factors to be considered by the judge, and the pre-conditions to be met, are intended to limit the rule's application to narrow circumstances so as to prevent abuse.

D. DISCOVERY AND RULE 20A

Rule 20A is the Expedited Actions Rule. The rule is intended to provide a simplified procedure.

Rule 20A was first introduced in 1996 and the current version of the rule of the rule was enacted in 2012. For historical information on the evolution of *Rule 20A*, see *National Concrete Accessories Canada Inc v AAA-Zaid*, 2017 MBCA 28 at paras. 18 – 23. In 2017, further and significant changes were made to the rule.

Rule 20A(1) states that the rule applies to all actions where the relief claimed is a liquidated or unliquidated amount not exceeding $100,000, exclusive of interest and costs. The rule applies even if the plaintiff claims related relief in the action.

Rule 20A(16) to *Rule 20A(18)* explain the limitations on examinations for discovery and interrogatories in expedited actions.

1. Actions Under $50,000

Rule 20A places significant limits on the availability and conduct of an examination for discovery. For actions that involve claims for less than $50,000 no party to the action may conduct an examination for discovery without leave of the court. This is a radical departure from a former version of the rule which did not limit examinations for discovery (thus leading to additional expense in the conduct of relatively minor actions).

Rule 20A(17)(b) states that leave will not be granted unless the party seeking to conduct the examination can demonstrate that there are exceptional circumstances that make it just, less expensive and more expeditious to conduct an examination for discovery.

Where the court grants leave, the discovery cannot be more than three hours. The court may extend the time if satisfied that the party being examined unduly frustrated or obstructed the examination. *Rule 20A(17)(e)* states that no interrogatories may be delivered without leave of the court.

By limiting examinations for discovery in this way it is hoped that the costs of litigation for these actions will be significantly reduced for the parties. It will be interesting to see in what circumstances the court will be prepared to allow oral examinations for discovery to occur. Certainly, a party seeking leave will have to frame its motion in the context of the principle of proportionality set out in *Rule 1.04(1.1)*.

2. Actions for $50,000 or More

Rule 20A(18) addresses actions where the relief claimed is $50,000 or more. For these actions each party may conduct an examination for discovery limited to three hours, unless extended by an order of the court. The court may extend the time where the party being examined has unduly frustrated or obstructed the examination for discovery or the court or pre-trial judge is satisfied that there are exceptional circumstances that make it just, less expensive and more expeditious to conduct an extended examination for discovery. Interrogatories are not permitted without leave.

3. Relevant Documents

Under *Rule 20A(7)* the description of "relevant documents" in *Rule 30.01(1)(c)* does not apply and a "relevant document" means (a) a document referred to in the party's pleading; (b) a document to which a party intends to refer at the trial; or (c) a document in a party's control or possession or that once was in a party's control or possession that could be used by any party at trial to prove or disprove a material fact, including a document that may show that a party is advancing a position that is not credible.

4. Disclosure

The disclosure process is also significantly different than the process for a non-expedited action. *Rule 20A(8)* requires that within 30 days after the close of pleadings, each party must: (a) prepare and serve on every other party, an affidavit (i) attaching a list of all relevant documents, and (ii) identifying those relevant documents over which the party claims privilege; and, (b) at the request of the other party, serve on every other party (i) a paper copy of each of the listed relevant documents, except those over which privilege is claimed, or (ii) an electronic copy of the document, if producing an electronic copy is necessary to comply with the principle of proportionality set out in *Rule 1.04(1.1)* or if the requesting party consents. The timelines in the rule are intended to 'expedite' the litigation.

When a party who has prepared and served an affidavit attaching a list of relevant documents later learns that the list is inaccurate or incomplete there is a continuing obligation to add to the list any additional relevant documents and as soon as possible to serve on each party the revised affidavit and a copy of each newly-listed document (see *Rule 20A(10)*).

Rule 20A(12) specifically allows for the court, on motion, to make an order for inspection of any electronic equipment on which documents are or may be electronically recorded or to make any other order relating to inspection of the electronic equipment or relating to electronically stored documents, except those over which privilege is claimed.

Rule 20A(13) provides that if a party who has received another party's list of relevant documents believes that the list omits relevant documents the party may, by written demands require the party to: (a) add the documents referred to in the demand to the list of relevant documents; (b) serve on the demanding party a revised affidavit with the revised list and copies of the newly-listed documents (except those over which privilege is claimed); and

(c) make the originals of the newly-listed documents available for inspection. *Rule 20A(14)* provides that, if a party who receives a demand under *subrule 20A(13)* does not fully comply with it, the party making the demand may make a motion to the court requiring compliance.

5. Undertakings Limited

No party is obliged to undertake to provide information at an examination for discovery, unless the production of information sought is consistent with the principle of proportionality set out in *Rule 1.04(1.1)*.

6. Disclosure of Witnesses and Experts

Rule 20A(20) addresses disclosure of witnesses including experts. Each party to an expedited action must file with the court and serve on every other party: (a) a list of the names of witnesses, and, unless exceptional circumstances exist, the addresses of the witnesses that the party serving the list proposes to call at the trial. The list of witnesses must include any expert witnesses permitted by *Rule 20A(26)*; (b) In addition to the list of witnesses, each party must provide a list of the names and, unless exceptional circumstances exist, the addresses of all other persons who the party serving the list reasonably believes to have relevant knowledge of the matters at issue, but who the party does not intend to call as witnesses; (c) a summary of the material evidence of each proposed witness, other than an expert witness; and (d) a summary of the party's material evidence which must be signed by the party.

There is no particular form prescribed for how the disclosure under *Rule 20A(20)* is to be filed and served. At a March 14, 2012 Law Society of Manitoba education program entitled, Expedited Actions: The New QBR 20(A), Madam Justice Karen Simonsen and Mr. Justice Shane Perlmutter indicated that the registry would be listing these documents as "Disclosure Under Subrule 20A(43)" (*now subrule 20A(20*)) and that this would be an appropriate title for this document. Similarly, an expert report filed under this subsection could be filed as "Report of Expert Under Subrule 20A(43)" (*now subrule 20A(20)*).

The information required to be filed and served pursuant to *Rule 20A(20)* must be served on each party within the latest of (a) 60 days after the close of pleadings; or (b) 60 days after any examinations for discovery permitted under the rule have been completed (*Rule 20A(23)*). Failure to disclose may result in the party not being permitted to call a person as a witness, or the trial judge ordering that the witness's testimony be limited (see *Rules 20A(24)* and *20A(25)*).

The summary of a party's material evidence may be used in the same manner as an examination for discovery is used at trial (see *Rule 20A(22)*).

7. Sanctions

The Court of Queen's Bench released a practice direction on November 17, 2015 in relation to subrule 20A(52) (now subrule 20A (30)). *Rule 20A(30)* reads as follows:

Sanctions

20A(30) *The Court must*

a) make an order for costs against a party; or

b) strike out the claim or defence of a party;

c) when the party, without reasonable excuse,

d) fails to comply with a time limit imposed by this Rule; or

e) fails to abide by an order or direction made under the Rule.

In the practice direction the court reminded that judges must enforce the sanction provisions set out in Rule 20A(52) (now *Rule 20A(30)*) in order to best achieve consistency and to properly respect the rule. Therefore, when a party, without reasonable excuse, fails to comply with a time limit imposed by Rule 20A or fails to abide by an order or direction, it should be expected that the court will impose one of the prescribed sanctions. Where all parties are in agreement that an otherwise applicable time limit will be extended by consent, they are still required to obtain leave to extend this time limit.

E. INSPECTION OF PROPERTY (RULE 32)

Rule 32 provides that the court may make an order for the inspection of either real or personal property where it appears necessary for the proper determination of an issue in a proceeding.

The rule is drafted broadly in terms of outlining what the court may do when ordering inspection. It stipulates that the court may authorize the entry into, or the taking of temporary possession of any property, and may also permit the measuring, surveying or photographing of the property, or the taking of samples, the making of observations, or the conducting of tests on the property.

The order can also permit the doing of any other act that seems practical in the circumstances.

The order of inspection may be made with respect to property that is in either the possession of a party or a non-party. Where the property is in possession of a non-party, no order of inspection is to be made without notice to that non-party.

Where the person in possession of the property is a party, notice must generally be given, but an order can be made without notice if the applying party can show that service of the notice, or the delay necessary to serve notice, will entail serious consequences.

Inasmuch as the rule is drafted broadly, it is likely that it will receive a liberal construction from the court, permitting inspections in a wide variety of circumstances.

For example, in *McGarel v. Camp Manitou* (15 October 1990), CI 89-01-38922 (Man.Q.B.) [unreported], Master Bolton granted the plaintiffs' motion to inspect an accident site at a summer camp, even though the site had been repaired. A first-hand inspection of the premises would allow a better understanding of the site by the plaintiffs' experts. It would be for the trial judge to determine whether or not the expert's evidence is relevant and admissible at trial.

Note that regardless of how liberally the rule is interpreted, it has no application when production is not necessary to determine an issue at trial: *Diamond v. Ranger Unicity Insurance Brokers Ltd. et al., 1996 CanLII 18129 (MB CA)*

In *Beson v. Watts,* 2004 MBQB 187, Master Cooper held that a person's body or anatomy cannot be regarded as real or personal property within the meaning of *Rule 32* (but see *Rule 33* below).

According to the rule, an order for inspection can be applied for and obtained either before or after discovery. If an order is applied for before discovery, a court would likely inquire as to whether or not the information sought on the inspection is better obtained on discovery.

The former Queen's Bench Rules also provided for a similar type of order. Construction litigation, products' liability litigation, and sale of goods litigation will often exhibit facts justifying the granting of such an order.

F. PHYSICAL AND MENTAL EXAMINATION OF PARTIES (RULE 33)

Rule 33 is to be read in conjunction with *section 63* of *The Queen's Bench Act*.

The combined effect of *section 63* and *Rule 33* is to considerably broaden the circumstances in which individuals may be medically examined, and to compel the exchange of medical information following such examinations.

An order for the physical or mental examination of a party may now be made with respect to any party whose physical or mental condition is in question in a proceeding. It is important to note that the court's power is not limited to plaintiffs in personal injury cases. The leading Manitoba case on medical examinations pursuant to *section 63* of *The Court of Queen's Bench Act* and *Queen's Bench Rule 33* is that of *Jobes v. Zolinski,* 1999 CanLII 18757 (MB CA), In that decision, the court expressed the principle that the rule governing medical examinations is intended to level the playing field for the parties and to ensure that one party is not caught by surprise at trial. Therefore, the order requested would normally not be refused unless there is good reason to be concerned that pursuit of the further opinion would be irrelevant, unnecessarily risky to the plaintiff's health, intrusive, or an abuse of the court process.

Section 63(3) of the *Act*, however, makes it clear that no order shall be made unless there has been an allegation made by a party which calls the mental or physical condition of another party into question, and which is relevant to a material issue in the action, and where there is good reason to believe there is substance to the allegation.

Undoubtedly, this cautionary section was included to remind presiding judges to carefully examine the reasons for seeking such an order, particularly where the party seeking the order is the party who has raised the allegation giving rise to the "need" for the examination.

For example, if a defendant in a motor vehicle action has pled contributory negligence against the plaintiff, and alleges that the plaintiff's eyesight was defective, the defendant will presumably have to put material before the court, in support of the application for an examination, to show that the allegations have substance.

In order that any examinations ordered are effective examinations, the rule stipulates that the party to be examined shall provide to the party obtaining the order, at least seven days before the examination, the results of tests or other data previously obtained relating to the physical or mental condition which is the subject matter of the examination.

The rule is specific in indicating that such test results include x-rays and any analysis of bodily fluids.

The rule also provides that after the examination has been conducted, the examining practitioner is to prepare a written report setting forth the results of the examinations and any tests and the conclusions of the practitioner. The party who obtains the order shall then serve the report on every other party.

Such examinations can be carried out by a "health care practitioner" which is defined in *section.63(1)* of the *Act* as a person licensed to practise in the health sciences field, whether in Manitoba or elsewhere. The definition was designed so as to include professionals such as psychologists, dentists, chiropractors and others, as well as physicians.

The costs of the examination are initially paid by the party obtaining the order requiring the examination, although those expenses may ultimately be included in fixing costs awarded to that party, if successful in the action.

A party's choice of examiner may be challenged; however, as long as the chosen practitioner is sufficiently qualified in a given field, the challenge will likely not be successful. See *Manning v. Nassar*, 1999 CanLII 32265 (MB QB)

The rule is not limited to one examination. In other words, a second examination by the same health care practitioner who conducted the first examination is possible; several examinations by different health practitioners with different specialties are also possible.

By way of example, an examination by a psychologist may be necessary after a neurological examination has been conducted by a physician.

It is expected, however, that where a second examination or multiple examinations are sought, the party seeking those examinations will be required to demonstrate that they are necessary given the contentious issues in the lawsuit and, in the case of second examinations, that the information was not obtainable on the first examination.

In *Boileau* v. *Shuvera* (6 September 1989), 84-01-04233 (Man.Q.B.) [unreported] the plaintiff had been examined by an orthopedic specialist six years previously at the defendant's request. The defendant now sought to have the plaintiff re-examined by another doctor. Master Bolton held that, while the defendant should have the right to choose the examining physician, it had already exercised that right, and to require the plaintiff to see a different doctor would be an invasion of privacy. Therefore, it appears that a second examination will not be allowed without good cause. See also the decisions of the Manitoba Court of Queen's Bench in *Pollen v. Royal Bank of Canada, 2001 MBQB 347 (CanLII),*.

In *Beson v. Watts,, supra*, Master Cooper held that *Rule 33* provides sufficient authority to the court to order the taking of photographs as part of a physical examination in an appropriate case.

See, as well, *Best v. Paul Revere Life Insurance, 2000 CanLII 21137 (MB QB),* for a discussion of the court's inherent jurisdiction to order a party to undergo a physical examination where the proposed examination falls outside the scope of *section 63* of *The Court of Queen's Bench Act*.

G. PRECEDENTS

Note: These precedents will have to be modified for use in an action brought under the new Rule 20A).

1. Affidavit of Documents (Plaintiff)

File No. CI 00-01-54454

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

AFFIDAVIT OF DOCUMENTS OF THE PLAINTIFF,
ANN ANDREWS
Sworn the day of , 2___

DOWNING & ASSOCIATES
Barristers & Solicitors
500 Edmonton Street
Winnipeg, Manitoba
R3C 3R8

DOREEN DOWNING (666-4949)

File No. CI 00-01-54454

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

AFFIDAVIT OF DOCUMENTS

I, ANN ANDREWS, of the City of Winnipeg, in the Province of Manitoba,

MAKE OATH AND SAY:

1. I have conducted a diligent search of my records and have made appropriate inquiries of others to inform myself in order to make this affidavit. This affidavit discloses, to the full extent of my knowledge, information and belief, all documents relating to any matter in issue in this action that are or have been in my possession, control or power.

2. I have listed in Schedule A those documents that are in my possession, control or power and that I do not object to producing for inspection.

3. I have listed in Schedule B those documents that are or were in my possession, control or power and that I object to producing because I claim they are privileged, and I have stated in Schedule B the grounds for each such claim.

4. I have listed in Schedule C those documents that were formerly in my possession, control or power but are no longer in my possession, control or power, and I have stated in Schedule C when and how I lost possession and control of or power over them and their present location.

5. I have never had in my possession, control or power any document relating to any matter in issue in this action other than those listed in Schedules A, B and C.

SWORN before me at the City)
of Winnipeg, in the Province of)
Manitoba, this day of ,)
2___.)
)

_____
ANN ANDREWS

_____
A Barrister and Solicitor entitled to
Practise in and for the Province of Manitoba

CERTIFICATE OF LAWYER

I CERTIFY that I have explained to the deponent that necessity of making full disclosure of all relevant documents.

_____, 2___ _____

DOREEN DOWNING

SCHEDULE A

Documents in my possession, control or power that I do not object to producing for inspection.

1. Copy of letter from Doreen Downing of Downing & Associates to Brown & Sons Groceries Limited, dated November 9, 2___;

2. Copy of letter from Doreen Downing of Downing & Associates to Brown & Sons Groceries Limited, dated January 5, 2___;

3. Speedy memo, dated January 10, 2___, from D'Alliards to Doreen Downing of Downing & Associates;

4. Copies of plaintiff's income tax returns for the following years:

    (a) 2___;
    (b) 2___; and
    (c) 2___;

5. Medical report dated September 21, 2___, from Dr. H. D. West;

6. Medical report dated September 3, 2___, from Dr. H. D. West;

7. Medical report dated December 16, 2___, from Dr. S.B. Hunt;

8. Medical report dated December 20, 2___, from Dr. H. D. West;

9. Medical report dated January 14, 2___, from Dr. W. R. Rhodes;

10. Medical report dated July 7, 2___, from Dr. S. B. Hunt;

11. All correspondence between Downing & Associates and Green & Company since the commencement of the proceedings herein.

SCHEDULE B

Documents that are or were in my possession, control or power that I object to producing on the following grounds of privilege.

Documents which are privileged, being memoranda, letters and other confidential communication which came into existence after this litigation was under contemplation and/or in anticipation of such litigation for the purpose of obtaining information for the use of the plaintiff's solicitors to enable them to conduct this action and/or advise the plaintiff thereon, including:

1. Medical report dated June 5, 2___.

All communications between solicitor and client which are of a confidential nature.

Without prejudice correspondence between counsel for the parties.

SCHEDULE C

Documents that were formerly in my possession, control or power but are no longer in my possession, control or power.

1. Originals of documents listed as numbers 1 and 2 of Schedule "A" which were sent to the addressee on the date stated and which are believed to be in the addressee's possession.

2. Affidavit of Documents (Corporate Defendant)

File No. CI 00-01-54454

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

AFFIDAVIT OF DOCUMENTS OF HARRY OWEN for the Defendant,
BROWN & SONS GROCERIES LIMITED,
Sworn the day of , 2___

_____

GREEN & COMPANY
Barristers & Solicitors
600 Howe Street
Winnipeg, Manitoba
R3C 3R6

GREGORY GREEN (532-2898)

File No. CI 00-01-54454

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

AFFIDAVIT OF DOCUMENTS

I, HARRY OWEN, of the City of Winnipeg, in the Province of Manitoba, Manager,

MAKE OATH AND SAY:

1. I am the General Manager of the defendant, Brown & Sons Groceries Limited, which is a corporation.

2. I have conducted a diligent search of the corporation's records and have made appropriate enquiries of others to inform myself in order to make this affidavit. This affidavit discloses, to the full extent of my knowledge, information and belief, all documents relating to any matter in issue in this action that are, or have been, in the possession, control or power of the corporation.

3. I have listed in Schedule A those documents that are in the possession, control or power of the corporation and that it does not object to producing for inspection.

4. I have listed in Schedule B those documents that are or were in the possession, control or power of the corporation and that it objects to producing because it claims they are privileged, and I have stated in Schedule B the grounds for each such claim.

5. I have listed in Schedule C those documents that were formerly in the possession, control or power of the corporation but are no longer in its possession, control or power, and I have stated in Schedule C when and how I lost possession and control of or power over them and their present location.

6. The corporation has never had in its possession, control or power any document relating to any matter in issue in this action other than those listed in Schedules A, B and C.

SWORN before me at the City of Winnipeg, in the Province of Manitoba, this day of , 2___.

_____
A Barrister and Solicitor entitled to
Practise in and for the Province of Manitoba

_____
HARRY OWEN

CERTIFICATE OF LAWYER

I CERTIFY that I have explained to the deponent that necessity of making full disclosure of all relevant documents.

_____, 2___ _____

GREGORY GREEN

SCHEDULE A

Documents in the corporation's possession, control or power that it does not object to producing for inspection.

1. Floor Sweeping/Produce Floor Sweeping log for week ending April 21, 2___;

2. Correspondence from Doreen Downing of Downing & Associates to Brown & Sons Groceries Limited, dated November 9, 2___;

3. Correspondence from Doreen Downing of Downing & Associates to Manager of Brown & Sons Groceries Limited, dated January 5, 2___;

4. Copy of correspondence from D'Allairds to Doreen Downing of Downing & Associates, dated January 10, 2___;

5. Correspondence from Doreen Downing of Downing & Associates to Brenda Haywood of Underwriters Adjustment Bureau Ltd., dated February 11, 2___;

6. Copy of correspondence from Brenda Haywood to Doreen Downing of Downing & Associates, dated February 15, 2___;

7. Correspondence from Doreen Downing of Downing & Associates to Brenda Haywood, dated March 7, 2___;

8. Correspondence from Doreen Downing of Downing & Associates to Brenda Haywood, dated April 12, 2___;

9. Copy of correspondence from Brenda Haywood to Doreen Downing of Downing & Associates, dated April 13, 2___;

10. Correspondence from Doreen Downing of Downing & Associates to Brenda Haywood, dated June 19, 2___;

11. Copy of correspondence from Brenda Haywood to Doreen Downing of Downing & Associates, dated June 19, 2___;

12. Correspondence from Doreen Downing of Downing & Associates to Brenda Haywood, dated June 22, 2___;

13. Correspondence from Doreen Downing of Downing & Associates to Brenda Haywood, dated July 13, 2___;

14. Copy of correspondence from Brenda Haywood to Doreen Downing of Downing & Associates, dated July 14, 2___;

15. Correspondence between Downing & Associates and Green & Company since commencement of the within action.

SCHEDULE B

Documents that are or were in the corporation's possession, control or power that it objects to producing on the following grounds of privilege.

Documents which are privileged, being memoranda, letters and other confidential communication which came into existence after this litigation was under contemplation and/or in anticipation of such litigation for the purpose of obtaining information for the use of the defendant's solicitors to enable them to conduct the defence in this action and/or advise the defendant thereon, including:

1. Customer inquiry or Property Damage Report by Ann Andrews dated April 16, 2___;

2. Written statement of Mr. John Singe, assistant manager of Brown & Sons Groceries Limited, dated April 18, 2___;

3. Report of Harry Owen, general manager of Brown & Sons Groceries Limited, to Loss Adjustment Limited, dated June 30, 2___;

4. Reports by Brenda Haywood of Underwriters Adjustment Bureau Ltd. dated:

   (a) November 18, 2___;
   (b) February 4, 2___;
   (c) August 12, 2___; and
   (d) January 15, 2___.

5. Photograph of Brown & Sons Groceries Limited taken on April 16, 2___;

6. Private Investigator's report dated January 12, 2___.

All communications between solicitor and client which are of a confidential nature.

Without prejudice correspondence between counsel for the parties.

SCHEDULE C

Documents that were formerly in the corporation's possession, control or power that are no longer in its possession, control or power.

1. Originals of documents numbered 6, 9, 11 and 14 in Schedule "A" to this affidavit which are believed to be in the possession of the addressee.