DISCOVERY

RULE 30

DISCOVERY OF DOCUMENTS

INTERPRETATION

30.01 (1) In Rules 30.02 to 30.11,

(a) "document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and data and information in electronic form; and

(b) a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.

(2) In subrule 30.02(4),

(a) a corporation is a subsidiary of another corporation where it is controlled directly or indirectly by the other corporation; and

(b) a corporation is affiliated with another corporation where,

(i) one corporation is the subsidiary of the other,

(ii) both corporations are subsidiaries of the same corporation, or

(iii) both corporations are controlled directly or indirectly by the same person or persons.

SCOPE OF DOCUMENTARY DISCOVERY

Disclosure

30.02 (1) Every document relating to any matter in issue 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 Rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

Production for Inspection

(2) Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in Rules 30.03 to 30.10, unless privilege is claimed in respect of the document.

Insurance Policy

(3) 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.

Subsidiary and Affiliated Corporations and Corporations Controlled by Party

(4) 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.

AFFIDAVIT OF DOCUMENTS

Party to Serve Affidavit

30.03 (1) A party to an action shall, within ten days after the close of pleadings, serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power.

Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relating to any matter in issue in the action,

(a) that are in the party's possession, control or power and that the party does not object to producing;

(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control of or power, whether or not privilege is claimed for them, together with a statement of when and how the

party lost possession or control of or power over them and their present location.

(3) The affidavit shall also contain a statement that the party has never had in his or her possession, control or power any document relating to any matter in issue in the action other than those listed in the affidavit.

Copies of Documents

(4) True copies of all documents which are not privileged and are listed in a party's affidavit of documents shall be annexed to the affidavit of documents, unless another party has previously produced or agreed to produce a true copy of the document in the party's affidavit of documents.

Lawyer's Certificate

(5) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she explained to the deponent,

(a) the necessity of making full disclosure of all documents relating to any matter in issue in the action; and

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.

Affidavit not to be Filed

(6) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial.

INSPECTION OF DOCUMENTS

Request to Inspect

30.04 (1) A party who serves on another party a request to inspect documents (Form 30 C) is entitled to inspect any original document that is not privileged and that is referred to in the other party's affidavit of documents as being in his or her possession, control or power.

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party.

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection.

Documents to be Taken to Examination and Trial

(4) All documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be taken to and produced at,

(a) the examination for discovery of the party or of a person on behalf or in place of or in addition to the party; and

(b) the trial of the action,

unless the parties agree otherwise.

Court may Order Production

(5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.

Court may Inspect to Determine Claim of Privilege

(6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim.

Copying of Documents

(7) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy of it at his or her own expense, if it can be reproduced, unless the person having possession or control of

or power over the document agrees to make a copy, in which case the person shall be reimbursed for the cost of making the copy.

Divided Disclosure or Production

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

DISCLOSURE OR PRODUCTION NOT ADMISSION OF RELEVANCE

30.05 The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility.

WHERE AFFIDAVIT INCOMPLETE OR PRIVILEGE IMPROPERLY CLAIMED

30.06 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 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.

DOCUMENTS OR ERRORS SUBSEQUENTLY DISCOVERED

30.07 Where a party, after serving an affidavit of documents,

(a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or

(b) discovers that the affidavit is inaccurate or incomplete,

the party shall forthwith serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents.

EFFECT OF FAILURE TO DISCLOSE OR PRODUCE FOR INSPECTION

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, an order of the court or an undertaking,

(a) if the document is favourable to his or her 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 his or her case, the court may make such order as is just.

Failure to Serve Affidavit or Produce Document

(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 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 within 30 days after the issuance of a notice of trial pursuant to Rule 48.05(2), the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.

PRODUCTION FROM NON-PARTIES WITH LEAVE

Order for Inspection

30.10 (1) The Prothonotary or the court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

(a) the document is relevant to a material issue in the action; and

(b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

Notice of Motion

(2) A motion for an order under subrule (1) shall be made on notice,

(a) to every other party; and

(b) to the person not a party, served personally or by an alternative to personal service under Rule 16.03.

Court may Inspect Document

(3) Where privilege is claimed for a document referred to in subrule (1), or where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue.

Preparation of Certified Copy

(4) The court may give directions respecting the preparation of a certified copy of a document referred to in subrule (1) and the certified copy may be used for all purposes in place of the original.

Cost of Producing Document

(5) The moving party is responsible for the reasonable cost incurred or to be incurred by the person not a party to produce a document referred to in subrule (1), unless the court orders otherwise.

DOCUMENT DEPOSITED FOR SAFE KEEPING

30.11 The court may order that a relevant document be deposited for safe keeping with the Prothonotary and thereafter the document shall not be inspected by any person except with leave of the court.

Williams v. Rashed, 2022 PESC 8

The non-party employer objected to producing the plaintiff's complete employee file. The court concluded that Rule 30.10 requires only a general description of the type of document sought, as here. Further, as damages for loss of employment income is a material issue, the documents are relevant. The court ordered production with costs against the non-party.

Doyle v. Murray, 2020 PESC 10

On a motion by the defendant pursuant to Rule 30.10 for production of documents from a third party (the plaintiff's psychologist), the court determined the reasonable costs of producing the document pursuant to Rule 30.10(5). The court reviewed the applicability of the *Health Information Act* in regards to requests for production of documents.

MacDonald v. E. Robinson Inc. & S. Dawson, 2018 PESC 4

Where the plaintiff claimed for lost earnings, but provided evidence of a joint venture with his son, the plaintiff's son was ordered to provide his financial records for inspection by the defendant's counsel.

Creighan v. MacPhee, 2018 PECA 1

A decision of a court to order production of documents for inspection that are in the possession, control or power of a person who is not a party involves the exercise of discretion.

The Court found the motions judge properly exercised his discretion in ordering a non-party to produce documents.

McCabe v. Wawanesa Mutual Insurance Company, 2017 PECA 12

The court may order production for inspection of a document that is in the possession, control, or power of a person who is not a party provided that the document is not privileged and the court is satisfied that (a) the document is relevant to a material issue; and (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

What is material is determined by the governing substantive and procedural law and the

pleadings. Evidence is material if what it is offered to prove is in issue according to the governing substantive and procedural law and the pleadings in the proceeding.

Lauer v. Attorney General of Canada, 2015 PESC 15

The Court declined to make an order for further production based on the Defendant's motion to strike. If that motion succeeded, there would be no further production of documents.

Havenlee Farms v. HZPC Americas, 2013 PESC 14

A party must disclose all documents which have a semblance of relevance and which are in the possession of the party or which the party has the ability to obtain. A party must also identify and disclose all the documents over which privilege is claimed and all documents over which the party no longer has control (Schedules "B" & "C" to the affidavit of documents).

Jay v. DHL Express (Canada) Ltd., 2009 PECA 2

The Court of Appeal allowed an appeal from the decision of the motions judge striking out a statement of defence for the failure of the defendant to produce documents. The court considered the principles that are applicable when a motion is brought pursuant to Rule 30.08(2) to strike pleadings because of the failure of one of the parties to produce documents.

Llewellyn v. Carter, 2008 PESCAD 12

The court addressed the issue as to what is required for an affidavit of documents to comply with the rule.

Johnston v. CADC, 2004 PESCTD 73

The right to have the production of relevant documents does not take priority over an established lawyer-client privilege.

Imperial Oil v. Noonan Fuels, 2004 PESCTD 75

Business documents were found to be relevant for purposes of discovery. Disclosure was ordered subject to exceptions. A counter-motion for divided discovery/disclosure was denied as there were no exceptional or unusual circumstances to warrant such relief. Confirmed on appeal except for the disclosure of some business documents. See: *Noonan Fuels et al v. Imperial Oil,* 2006 PESCAD 15.

Campbell v. Gardiner & Ors., 2001 PESCTD 62

The plaintiffs sought the pre-trial production of an "External Review" of the medical practice of one of the defendants. Based on the wide scope of the relevancy test with respect to the production of documents at the discovery stage of the proceeding, the court found the report must be produced.

Mullin v. PriceWaterhouseCoopers, 2004 PESCTD 23

The court ordered the production of documents relating to facts arising prior to those that gave rise to the cause of action. There was a possibility the documents could be relevant to issues arising in the action.

MacDougall v. Mutual Life & Lambe, 2004 PESCTD 61

The plaintiff failed to produce documents for discovery as required by Rule 30.02. Her action was dismissed pursuant to Rule 30.08.

Johnston v. CADC, 2004 PESCTD 24

To obtain production of a document from a non party to the action, notice of such an application must be given to the person from whom the production is sought.

Aluma Systems v. Strait Crossing, 2002 PESCTD 19

The plaintiff sought the production of minutes of the meetings of the executive committee of the Confederation Bridge Building Project as well as all documents relating to the claim of the defendants against the Government of Canada. The court ordered production because the documents were necessary to the defence of the counterclaim and on the basis that the documents met the broad relevancy test applicable to the disclosure of documents at the discovery stage of the proceedings.

MacLeod v. MacLeod (1999), 173 Nfld. & P.E.I. R. 229 (P.E.I.S.C.-T.D.)

The respondent failed to disclose, pursuant to Rule 30.02, a document which related to the establishment of the value of his pre-marital assets. Applying Rule 30.08, the court refused to consider or give any weight to the document in deciding whether the respondent had discharged the onus of proving the asset should be deducted from the value of net family property.

Canadian Imperial Bank of Commerce v. Bonnell et al., [1998] P.E.I.J. No. 18 (Q.L.) (P.E.I.S.C.-T.D.)

A liberal interpretation is to be given to the discoverability rules. Relevance is broader at discovery of documents' stage than it is at trial. The threshold at the discovery stage for the production of a document is that the Chambers' judge must be satisfied upon a hard look there is an arguable case that the document will be relevant to an issue arising in the proceeding.

Breau v. Naddy (1995), 133 Nfld. & P.E.I.R. 196 (P.E.I.S.C.-T.D.)

Surveillance videotapes obtained on instructions from counsel attract litigation privilege while a statement given by a party to his or her insurance adjuster only days after an accident is not privileged.

The court also held that the party making the disclosure is required to provide a description of each document sufficient to identify it and to enable an order for production to be enforced.

Gallinger v. Kurylyk (1995), 129 Nfld. & P.E.I.R. 306 (P.E.I.S.C.-A.D.)

To meet the objectives of securing a just, most expeditious, and least expensive determination of every civil proceeding on the merits, the discovery rules are entitled to a liberal interpretation.

A party asserting a claim of litigation privilege must establish the document is protected from disclosure by that privilege.

Cormier et al. v. Compton (1995), 129 Nfld. & P.E.I.R. 224 (P.E.I.S.C.-T.D.)

Rule 30.02 requires the disclosure of every document relating to a matter in issue in the action. If a party wishes to claim privilege over a document, the basis of the privilege shall be cited in the appropriate schedule to the affidavit.