

EXAMINATIONS FOR DISCOVERY

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I. INTRODUCTION

The goal of this paper is to provide the practitioner with practical advice on conducting Examinations for Discovery effectively and efficiently.

Conducting effective Examinations for Discovery is a skill requiring thorough preparation and continuous practice. Examinations for Discovery are meant to achieve several objectives. Some of these objectives include:

- To prevent surprise at trial
- To obtain admissions for use at trial
- To get the witness to agree to a suggested answer, in the same way cross examination does¹
- To size up the person examined

In Alberta, the rules in relation to discovery are found in Part 13 of Alberta's *Rules of Court*² at Rules 186-216.1. These Rules have been extensively interpreted by case law which may be found relatively easily in classic reference texts.³

Lawyers need to be alerted to the fact that, in Alberta, the Rules as they concern discoveries were substantially amended in 1999. This has implications as to the applicability of cases interpreting these Rules which were decided before these amendments.

II. PREPARATION FOR DISCOVERY

Rarely will you maximize your effectiveness by taking a deposition without preparation, merely on the hope that you will learn something

¹ *Hollands v. Winfield Power Co.* 2004 ABQB 929, 366 A.R. 59

² Alta Reg. 390/68.

³ Allan A. Fradsham, *Alberta Rules of Court Annotated 2009* (Toronto: Thomson Carswell, 2008) [hereinafter *Fradsham*] and W.A. Stevenson & J.A. Cote, *Civil Procedure Guide*, (Edmonton: Juriliber, 2009) [hereinafter *Stevenson & Cote*].

interesting. To the contrary, the most interesting information gained from an [examination] usually comes as a result of hard work.⁴

A. General

The importance of being prepared for discovery cannot be overstated. More cases proceed through to discovery than they do to the end of trial, suggesting that effective preparation for discovery is vital.⁵ Preparation helps the lawyer achieve two important goals. First, it helps the lawyer to choose who should be examined. Second, it helps the lawyer to determine which subject areas should be explored during examination.

It is imperative that the lawyer who is preparing to conduct a discovery prepare a thorough analysis of the case. The lawyer must therefore do the following:

- Review the file and know the paper
- Know the legal elements of the case
- Know what testimony to be expected from your own witnesses
- Know the relevant documents which prove or disprove your case

Building a written chronology of facts, parties, and important documents is recommended. This chronology will aid in analysis and will assist the lawyer with organization. Schedule A provides a sample chronology that may be modified for different cases.

B. Review the file, and know the paper

Being thoroughly prepared for discovery can avoid the need to proceed to trial, which is why “...the factual investigation and review with the witness must be as intense and complete as possible⁶”:

At a minimum, this must include review of the pleadings, the productions and any other available documentation. The witness’ narrative should be reviewed for completeness, consistency with the other known facts and inherent probability. Rough spots should be reviewed.

⁴ Daniel P. Dain, *How to Prepare For, Use, and Take a Deposition* (Costa Mesa: James Publishing, 1990) (looseleaf) at para. 410 [hereinafter *Dain*]. The section on Preparation for Discoveries is based primarily on the recommendations found in Dain.

⁵ Bryan Finlay, Q.C. and T.A. Cromwell, *Witness Preparation Manual* (Aurora: Canada Law Book Inc., 1991) at 65 [hereinafter *Finlay*].

⁶ Finlay at 67.

Clearly there are differences between Examinations for Discovery and trial that need to be born in mind. Most of the differences flow from the different scope of discovery examination, different rules of evidence and its admissibility (for example hearsay) and the different tactical purposes for which discovery is conducted.⁷

C. Determine the Law and the Legal Elements of the Claim, including the Burdens of Proof

It is important to review the underlying law relating to your particular matter, including textbooks and leading cases. A thorough review serves to assist the lawyer in creating a checklist of what needs to be accomplished during discoveries. Failing to thoroughly understand the law, and what must be proven or disproven can only lead to disastrous consequences.

One insiders tip is to consult with *Benders Forms of Discovery*⁸, available at the courthouse. Although this is a U.S. publication, it provides checklists for almost every topic ever litigated and is an excellent guideline for starting with your preparations for Discoveries. A similar source is *Bullen & Leake & Jacob's Precedents of Pleadings*⁹

Another insiders tip is to read transcripts from analogous matters, especially transcripts where a seasoned and well-respected litigator is examining or defending her client.

⁷ Finlay at 67.

⁸ 1963-date. 33 looseleaf volumes, also available on LexisNexis. (Matthew Bender & Co., New York, NY, 1963).

⁹ 15th ed. by Lord Brennan Q.C., William Blair Q.C. with Advisory Editors and Specialist Contributors (London: Sweet & Maxwell, 2004). This is a British publication. Although perhaps it is more helpful in the context of drafting one's pleadings this publication also contains information concerning what elements needs to be proven in a variety of legal claims.

D. The Examination Notebook

A helpful tool, especially for new lawyers, is to create an Examination Notebook that is taken to every Examination taken or defended. If properly prepared and organized an Examination Notebook provides the practitioner with an excellent resource and a ready source of reassurance. Dain suggests including an index to facilitate the Notebook's ease of use and to insert tabs for easy access to materials that need to be readily available. Dain also suggests keeping the size of one's Notebook down to one inch thick (if it is too thick it is more likely to be left behind at the office).

Dain suggest that an Examination Notebook should contain the following:

1. Key rules of civil procedure relating to discovery.

Photocopy the key discovery rules and highlight those parts you will need to refer to readily, for example Rules concerning the following:

- deposing an organization
- the manner of making objections
- when it is appropriate to instruct your witness not to answer
- terminating a deposition for the purpose of seeking court intervention
- ensuring the preservation of objections

This section of the Examination Notebook can be tailored to reflect those rules which relate to the forum(s) in which the lawyer is most often engaged.

2. Key cases to show opposing counsel in appropriate circumstances.

It is advisable to keep copies of the leading cases on issues that tend to repeatedly arise in the context of Examinations for Discovery.

In Alberta, Rule 200 concerns who may be examined on behalf of a corporation. The following cases provide a sense of jurisprudence on this area of the law which frequently arises in the context of Examinations for Discovery.¹⁰

¹⁰ Many of these cases were cited in a former LESA paper/seminar. Alan S. Rudakoff, "Common and Uncommon Issues in Discovery" (Paper prepared for and presented to Legal Education Society of Alberta at the Banff Refresher Course, Civil Litigation, April 24-28, 2004) prepared by: Kyla D. Sandwith.

*Corbett v. Samsports.Com Inc.*¹¹ is an important case in that the unanimous Court of Appeal (per Fruman J.A.) concluded that Rule 200 of Alberta's *Rules of Court* applied to the Federal Crown (Canada Revenue Agency), which in this case was a defendant in the action. The appeal was allowed and Halvertson, a party to the proceeding, was entitled as of right to have a certain employee of the Crown be subjected to Examination for Discoveries. This was in addition to his right to have a representative of the Crown examined.

In *Devon Canada Corp. v. PE-Pittsfield, LLC (c.o.b. Pittsfield Generating Co., LP)*¹² Paperny J.A. delivered the unanimous judgment of the Court in an appeal concerning whether certain limited partners could be examined in Examinations for Discovery in a case where there had been non-registration of the Limited Partnership under the *Partnership Act*. It was held that the non-registration did not convert an otherwise properly constituted foreign limited partnership into a general partnership when it carried on business in Alberta. Therefore, the limited partners were not proper parties to the action nor were they subject to examination.

*Trimay Wear Plate Ltd. v. Way*¹³ is a recent decision of the Court of Appeal on the issue of "who is an officer: for purposes of R. 200(1)(b). The Court determined that the object of the rules is to discover the truth relating to the matters in question in the action, and the examination ought to be of such "officer" of a defendant company as is best informed as to such matters.

*Petro-Canada Products Inc. v. Dresser-Rand Canada Inc.*¹⁴ which considered the issue as to whether "near employees" could properly be examined, was recently reaffirmed in *Harcap Investments Inc. v. Alberta Permit Pro Inc.*¹⁵ *Petro-Canada* involved lawsuit involving allegations of negligent design following the failure of a piece of equipment.

¹¹ [2007] A.J. No. 482, 2007 ABCA 151, 73 Alta. L.R. (4th) 5, 417 A.R. 15, 39 C.P.C. (6th) 309, 158 A.C.W.S. (3d) 31, 2007 CarswellAlta 558 (Alta. C.A.) [hereinafter *Corbett*].

¹² [2008] A.J. No. 1263, 2008 ABCA 393 (Alta. C.A.) [hereinafter *Devon*].

¹³ 2008 CarswellAlta 149, 2008 ABCA 48, 429 A.R. 39 (Alta. C.A.) [hereinafter *Trimay*].

¹⁴ [2004] A.J. No. 488, 2004 ABCA 144 (Alta. C.A.) [hereafter *Petro-Canada*].

¹⁵ [2007] A.J. No. 1094, 2007 ABQB 590, 47 C.P.C. (6th) 99, 438 A.R. 202, 162 A.C.W.S. (3d) 215 (Alta. Q.B.) [hereinafter *Harcap*].

The two persons sought to be examined were employees of a sister company of the Defendant. The sister company performed services for the Defendant. The chambers judge found that the individuals were "akin to employees who had acquired relevant knowledge by virtue of that relationship".

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2 At para. 14 (A.J.) of *Harcap* the Court recited with approval, the following part of the decision in *Petro-Canada* relating to the issue of who may be examined during discoveries:

...Several common threads can be gleaned from the authorities [with respect to who can be properly examined as a near employee]. They are as follows:

1. 1 Whether a person fits through the "narrow gateway" must be determined on a case-by-case basis;
2. 1 The burden rests on the party seeking to examine to establish a relationship akin to employment;
3. 1 The person must have relevant knowledge acquired by virtue of that relationship;
4. 1 The Rule should be given a wide and purposive interpretation as pre-trial disclosure of relevant and material evidence is beneficial to the litigation process, facilitating settlement or narrowing the real issues in dispute;
5. 1 The court should consider the nature of the functions performed by the person in question and whether they are broadly equivalent to those performed by traditional officers and employees.

24 The list is not exhaustive. Other factors to be considered include whether the cause of action arose prior to the individual becoming involved, how the corporation held the individual out to others, the nature of the relationship between the party and the person sought to be examined, the purpose of the relationship, any remuneration for the service, the individual's responsibilities to the party, and the individual's role or responsibility to the job, project, product or work related subject in question.

25 In other words, the limiting factor to determining the "who" requires two things:

1. 2 a relationship based on certain indicia akin to employment, and
 2. relevant knowledge by virtue of that employment.

There is no requirement to establish that the person is "the best informed", a relative and largely meaningless term in this context.

3 It is not easy to reconcile the reasoning in *Petro-Canada* as reaffirmed more recently by *Harcap*, with the reasoning in *Trimay*. *Trimay* states examination ought to be of the best informed "officer" as to the matter in issue.

4 *Harcap* refines somewhat the law in relation to examining persons who are "near employees" favoring a functional analytical approach over a technical approach. In *Harcap*, an application was made to have the wives of two parties in the action examined on the basis that the wives were akin to employees. The Court in *Harcap* noted, after examining the current state of the case law on this issue, that:

5

16 [in those] cases and other cases considering whether or not someone is an "employee" within the meaning of Rule 200 use a functional approach rather than a technical approach. Persons who are technically not employees (i.e. not receiving wages, having no formal connection with the corporate body, etc.) who nonetheless perform services for the entity in some capacity (such as a volunteer or contractor, or for a related entity) may still be considered to be employees if they have gained relevant and material knowledge as a result of their relationship with the entity.

6 *Cana Construction Co. v. Calgary Centre for Performing Arts*¹⁶ considered whether an unpaid volunteer who performed key and relevant executive responsibilities for the corporate defendant could be examined under Rule 200 and found that the volunteer could be examined.

7 In *Mikisew Cree First Nations v. Canada*¹⁷ the court was asked to consider whether a consultant to the Band could be examined under Rule 200. In its decision the court held that the test is not whether a

¹⁶ (1986), 71 A.R. 158 (A.B. C.A.) [hereinafter *Cana*].

¹⁷ (2000), 267 A.R. 338 (A.B. Q.B.) [hereinafter *Mikisew*].

person *is* an officer or employee, but whether that person is *akin* to an officer or employee.

8 With respect to selecting a representative for the corporation, the matter was dealt with in *Leeds v. Alberta (Minister of the Environment)*¹⁸ where it was found that the corporation's discretion to choose the person who speaks for it should not be lightly interfered with unless the selection is not made honestly and bona fide or where he officer cannot provide the required information. This principle was more recently reiterated in *Olds (Town) v. McDonald*.¹⁹

9 In *Western Canadian Place v. Con-Force Products*²⁰ it was determined that there existed the ability of a corporation to change its officer before examinations are concluded, assuming there is a good and honest reason to do so. In *Western*, there was a request by Western Canadian to change its officer as the result of assignment. *Western* cites *McDougall & Secord, Limited v. Merchants Bank of Canada*²¹ for the proposition that the corporation's selection should not be interfered with if made honestly and reasonably.

Harcap, supra is also a useful case because it provides counsel with some modern guidance as to how to properly apply for and set aside proposed appointments under Rule 200:

20 I am not aware as to whether formal appointments have been taken out for the examinations of Mrs. Kerscher and Mrs. Pearce [wives of one of the parties who the court concluded could not be examined as employees]. The application before me is for an order requiring Mrs. Kerscher and Mrs. Pearce to attend for examinations for discovery. Alberta Permit Pro Inc. resists the application, although in a strict sense it should be Alberta Permit Pro Inc. applying under Rule 200(2)¹ to set aside

¹⁸ (1989), 68 Alta. L.R. (2d) 322 (Alta. C.A.) [hereinafter *Leeds*].

¹⁹ (2003), 333 A.R. 393 (Alta. Q.B.) [hereinafter *Olds*].

²⁰ (1998), 224 A.R. 1 (Alta. Q.B.) [hereinafter *Western*].

²¹ [1919] 1 W.W.R. 830 (Alta. S.C.).

the appointments as being unnecessary, improper or vexatious. Once an appointment is taken out, it is up to the person on whom the appointment is served, or the corporate party, to move to set aside the appointment. It is not generally up to the party serving the appointment to first establish that the person sought to be examined is indeed an employee, past employee or someone else who is subject to being examined for discovery. If a person sought to be examined challenges the appointment, as noted in *Petro-Canada*, the burden rests on the party seeking to examine to establish that the appointment has been properly taken out.

It is important to be aware that, contrary to the situation in the United States, “mere witnesses” have never been subject to examination for discovery.²²

3. Lists to review periodically as a quick refresher.

It is useful if the Examination Notebook contains a section of lists to be reviewed regularly. Some suggested lists include the following:

- List of Guidelines for preparing a witness
- List of common objectives of Examinations for Discovery
- List of the types of privilege

Dain’s book contains several lists that can be adopted to one’s individual practice.

III. CREATING A CHECKLIST AND GETTING ORGANIZED

A. General

Once the lawyer has reviewed the pleadings, reviewed the applicable law, reviewed any prior discovery (formal and informal) and been in discussions with his or her client and cooperative witnesses, the lawyer is ready to prepare an inquiry. This next stage of preparation involves creating notes and developing checklists.

By this stage, the lawyer should be aware of the facts he or she needs to know and/or needs to have admitted. “The sooner that counsel has a full appreciation of his case, the

²² *Wilbur v. Miller*, [2005] A.J. No. 750, 2005 ABCA 220 (Alta. C.A.).

sooner he may recognize the desirability of a settlement and be able to effect a good settlement to the advantage of his client.²³”

Notes are crucial to the beginning examiner if not for all examiners²⁴ and they are meant to serve two primary purposes: to help organize one’s thoughts and to provide a checklist for questions.

Organization is important for two primary reasons. First, organization will aid in the creation of a clear examination in the event the transcript needs to be used in a trial. Second, organization will ensure that everything needing to be covered is in fact, covered.

The important thing to remember about organization is that it is an aid only. During the examination, the lawyer’s method or order of organization may need to be refined and reorganized as the examination proceeds.

How should the lawyer organize vast quantities of information and material? Dain suggests several methods:

Potential Organization Methods

- By chronology (order of events or occurrences)
- By subject matter
- By the allegation (order of allegations of the complaint) – may be particularly useful for defendant’s counsel
- By the document or document type (themselves organized chronologically, by the plaintiff, defendant or witness file or by subject matter)

Choate recommends that examining counsel give considered thought to the uses that may be made of examination in each separate case and also recommends that considered

²³ Cudmore, *Choate on Discovery*, 2nd ed., looseleaf (Toronto: Thomson Carswell, 2008 Release 5) at para. 2-1 [hereinafter *Choate*].

²⁴ Dain, *supra* at para. 471.

thought be given to the best course to pursue in order to make the examination serve the desired purpose.²⁵

B. Building a Checklist

When building a checklist, the lawyer may want to start with writing down every question, and later to reduce the checklist to include key questions only.

Particular attention should be paid to the essential facts, and the documents that need to be proven. The lawyer must determine which facts and documents can be covered by admissions during examinations.²⁶

Dain recommends that a checklist follow these guidelines, and that it be used by the lawyer in the following manner:

- Unless the wording of the answer or the question is critical for some reason do not write out the question.
- Do not become tied to your notes (you risk failing to hear what your witness says, and you risk asking appropriate follow-up questions to a response)
- Use notes as a form of additional security, allowing you to be free to take detours as new possibilities arise during your examination. Knowing you have this security allows you focus your attention on the witness and take advantage of unexpected testimony. Return to your notes as a backup to ensure you have covered what you need to cover, only once you have exhausted an avenue of questioning...

Careful preparation will indicate which headings or points need to be dealt with during examination. A memorandum containing these heading or points should be prepared.²⁷

C. Preparing Your Client and Defending an Examination

It is equally important for lawyer to be prepared to defend his or her client that is being examined for the reason that the transcript may be admissible as evidence at trial, and may ultimately affect the witness' credibility. Therefore "...conducting a thorough interview before testimony is not only proper but essential to fulfilling the duty of

²⁵ Choate, *supra* at para. 2-1.

²⁶ Choate, *supra* at 2-2.

²⁷ Choate, *supra* at 2-1.

presenting the case in the most persuasive fashion.²⁸ In preparation for one's witness being examined the following "phases" are recommended:²⁹

1. Obtain the facts of the client's case, even cross-examine him or her, explaining that the purpose of this mode of inquiry is to develop the case as much as possible.
2. Advise the client of the nature of the case and the potential pitfalls. Stress to the client the importance of the following words of advice:
 - maintaining an attitude of conviction and fairness
 - telling the truth at all times
 - avoiding arguments with examining counsel
 - avoiding long answers
 - volunteering information not asked about in the question
 - being prepared to be incited/intentionally angered by opposing counsel in the hope of obtaining a thoughtless answer in anger
 - avoiding answering every question with certainty where there is no certainty and the matter is not within the client's own knowledge
 - avoiding negative comments directed at the adverse party even where it is obvious that the adverse party is lying – let the evidence speak for itself
 - leaving all objections to counsel
3. Your client should also be instructed on the following matters:
 - how to conduct herself in the event of cross examination
 - the importance of informing himself of the facts of the case, as required, and that such information may need to be found through his agents or servants³⁰
 - ensure your client's memory is refreshed with respect to important documents and have those documents available
 - that a rehearsal may be advisable if it will serve to put the client at ease. (Choate at 2-2, 2-3)

²⁸ Choate, *supra* at 2-2.

²⁹ Choate, *supra* at 2-2, 2-3.

³⁰ On the obligation to inform oneself see *Turkawski v. 738675 Alberta Ltd. at* [2005] A.J. No. 691, 2005 ABQB 423, 49 Alta. L.R. (4th) 22, 372 A.R. 7, 141 A.C.W.S. (3d) 181, 2005 CarswellAlta 793 at para. 22 A.J, indicating the following jurisprudence: *Wright v Schultz* [1992] A.J. No. 1206 (C.A.); *Canadian Western Bank v Alberta* [2003] A.J. No. 360 (M.); *Aujla v Przywrzej* [2003] A.J. No. 438 (M.); *Stevenson & Cote, Alberta Civil Procedure Handbook, 2004*, (Juriliber: Edmonton, Alberta 2004).

(This checklist might be useful to include in the Examination Notebook.)

It is notable that in *Bains v. Bains* 2007 ABQB 668 that the family bar was criticized for “largely abandoning discovery of records in favour of a Notice to disclose, and going to trial with little discovery.”³¹

An important point is raised by Stevenson & Cote concerning one’s professional obligations during Examinations for Discovery. When a witness is not a party, a question arises as to who is the lawyer for the non-party. The authors note that if the lawyer is not acting for the witness, then the lawyer has no right to instruct or advise the witness. Nor may non-lawyers intrude into the answers of such a witness.³²

To reiterate an important principle: organizational tools are an aid for preparation – notes and checklists should not be an inflexible road map to be adhered to strictly. Preparation will ensure that legal counsel will conduct herself in the manner described by Chrumka J. in *Haslam v. Summers*³³

30 On an examination for discovery, the questions may be direct or leading but they must never become abusive or misleading. Unnecessary repetition is expected to be avoided but it cannot completely be eliminated. There are instances where a relevant area is being revisited and a certain amount of repetition is necessary. This is particularly the situation in areas where the subject, though explored to an extent, has not been fully explored. The repetition focuses the witness on the area being further discovered (A.J.).

³¹ Stevenson & Cote discussing Rule 187.

³² Stevenson and Cote at 255, making reference to *Austec Electron. Sys. V. Mark IV Ind.* 2002 ABQB 349, 325 A.R. 1.

³³ [2005] A.J. No. 481, 2005 ABQB 306 (Alta. Q.B.).

IV. CONDUCT AND DECORUM

Beware the “friendly” examiner. Perhaps the most dangerous examiner is the one who makes his witness relax and become conversational. The witness must be told that the enemy sits across the table and that he or she must answer only the question. Nothing is to be volunteered. The silence at the end of the answer is golden and not to be filled with further words.³⁴

A. General

Review your objectives before you defend your client’s examination. There may be several objectives you need to achieve; certainly one is to minimize the quantum of damaging testimony your client gives. To achieve this end, preparation of your client is essential, so long as it is within the bounds of ethics. Tips on preparing your client for examination are provided later on this section.

Additional objectives may include the following:

- Ensuring your witness is comfortable with the process and therefore better able to give truthful and accurate answers
- Minimizing the risk of that the witness may inadvertently give misleading or incorrect testimony
- Preventing improper conduct of the examining solicitor, especially where such conduct may adversely affect the truthfulness and accuracy of the testimony
- Preventing the witness from answering improper or prejudicial questions that have no basis
- Preventing your witness from testifying as to privileged information.
- Ascertaining the examining solicitor’s knowledge and theories of the case³⁵

It is also important to review any plans you may have to cross-examine the witness, or to make sure various points are covered and placed on the record. You can use the opportunity to educate your opponent about your evidence in the hope of fostering

³⁴ Finlay, *supra* at 70.

³⁵ Dain, *supra* at para 811.

favorable settlement. It is also in your interest to preserve relevant testimony in the case the witness cannot attend at trial.³⁶

Several key points relating to the proper conduct of counsel during discoveries were provided to this author (i.e. Craig Gillespie) by The Honourable Justice Martin (Court of Appeal) when the author was articling at the court. These three points relate primarily to demeanour:

1. Keep the proceedings formal – don't chum around with opposing counsel even if they are your friends.
2. Keep your cool and take the high road when there are disputes.
3. Don't argue on the record, make your point and move on.

Dain also stresses the importance of demeanour, both the lawyer's and the examinee's. The lawyer's demeanour should be nothing less than what is expected at trial in terms of projecting confidence, attentiveness, alertness, and professionalism. This energy will transfer to the witness and will aid in making him or her feel more comfortable. It is particularly important to protect your client from any harassing or embarrassing examination. Pay particular attention to avoiding disclosing any of your weaknesses, through facial expression or body language. Be cognizant of the non-verbal messaging your face and body is communicating.³⁷

Remember to pay attention to the signals your client may be giving. If your client is fatigued it will affect the quality of the testimony. Displays of anger or confusion may ultimately result in your client making unintended statements – accordingly, “nip it in the bud” earlier rather than later and request a recess.

³⁶ Dain, *ibid.* at para. 811

³⁷ Dain, *supra* at para. 832.1/

B. Style of Questioning

Whether to ask open ended questions versus cross examination style questions depends on your purpose. If you want to know the information ask open ended questions. Only use cross examine style to nail down an admission.

C. A Clear Record

It is important to be reminded that it is not counsel who is being discovered:

It is highly improper to for counsel for the witness to interrupt examination questions with comments, cues, his or her own answers or anything but a legally proper objection to the question.... It is unethical ³⁸

Dain emphasizes the overwhelming importance of maintaining a clear record.³⁹ The following chart is an adaptation of the advice of Dain as to how to achieve a clear record.

AVOID THESE PITFALLS	ESTABLISH THESE GOOD HABITS
Saying "...this document"	X is indicating he is referring to "Exhibit "
Ignoring body language (head nods "yes" or "no") ("this big")	Translate nonverbal communication into a verbal equivalent "Witness nod indicating yes" "Witness indicating dimensions of __" or have witness verbalize the dimensions herself.
Ignoring what is going on off the record i.e. Witness consulting with lawyer or	Translate what is happening off the record with a visual description that is recorded on the record "Let the record reflect that prior to

³⁸ Stevenson & Cote, *supra* at 266 with reference to *Allison v. Traff*(M) 2003 ABQB 17.

³⁹ Dain, *supra* at paras. 548 and 549 and 835.5.

document before answering question	answering the last question the witness had a confidential conference with his lawyer lasting approximately one minute”
Allowing multiple persons to talk at the same time	<p>Take turns speaking – it is essential to a clean record</p> <p>Allow examiner to finish posing the question before objecting to it.</p> <p>Allow the examiner to finish posing the question before answering it.</p> <p>Make your objection before the answer starts to be given</p>
Creating confusion when a witness is instructed by their lawyer not to answer a question.	<p>As the lawyer defending the witness: state clearly “I instruct/request the witness not to answer the question on the ground that.....(state ground)”.</p> <p>As the lawyer examining the witness ask: “Do you refuse to answer the question?”</p> <p>If objections are frequent elicit from the witness that every time he or she is instructed or requested not to answer that he or she in fact will not answer.</p>

Two cases relating to the conduct of counsel at Discoveries are provided here as a reminder that one’s conduct should at all times remain professional and courteous. In

*Pfeifer v. Westfair Foods Ltd.*⁴⁰ Pfeifer sought costs on Column 4, alleging misconduct of the defendant (lawyer) during Examinations for Discovery regarding the production of certain videotape and photographs.

The court was not satisfied that Westfair's failure to disclose was malicious. Pfeifer was therefore awarded costs on Column 3 instead. (If the misconduct had been determined to be malicious the court indicated that the consequences would have been far more severe.)

In *Roque v. Bane*⁴¹ the main claim was dismissed. The defendant Bane sought payment of costs against the solicitor for the plaintiff on the basis that he had caused undue delay as a result of his questionable conduct during Examinations for Discovery. The evidence in the discovery transcripts revealed the existence of considerable acrimony as between the solicitors on the two sides. Wilkins J. found that there was no evidence of bad faith. However:

44 The conclusion I have reached should in no way be considered to be an approval of the conduct of Mr. Moodie as recorded in examinations for discovery. The transcripts make it very clear Mr. Moodie was irritated with counsel for Mr. Bane. I am satisfied that Mr. Moodie acted with less control and professionalism than this Court would expect from a person of his experience. It is clear from his recorded statements that a personal animosity existed between him and counsel for Bane. That animosity was reflected in his conduct of the examination. However, objectively assessing the actions of Mr. Moodie as reflected in those transcripts and the correspondence between counsel, I cannot reach the conclusion that the allegation he acted in bad faith has been made out. Moodie was entitled to pursue his client's interest with determination to complete the discovery of all relevant documents and evidence.

While the acrimony between counsel increased the costs to the parties, it did not merit an award of costs against the solicitor personally.

V. COMMON OBJECTIONS DURING DISCOVERY

⁴⁰ [2003] A.J. No. 1222, 2003 ABQB 829, 347 A.R. 236 (Alta. Q.B.)

⁴¹ [2003] A.J. No. 1550, 2003 ABQB 1005, 128 A.C.W.S. (3d) 19 (Alta. Q.B.)

Rule 213.(1) The validity of any objection to any question or any ruling or direction and the appeal from a ruling or direction shall be decided by the court; and the costs of and occasioned by the objection are in the discretion of the court and may be ordered to be paid by the person under examination.

(2) No objection to any question is valid if made solely upon the ground that the answer thereto will disclose the name of a witness.

A. To Object or Not to Object, That is the Question

In Dain's view, the decision as to whether to object must be based on a specific strategy.⁴² At trial, one is unlikely to object to technicalities but will definitely object when the objection will accomplish a purpose. In an Examination for Discovery, whether you object or not should be based on what is best for you and your case, and whether the objection will accomplish your goal. Some factors Dain suggests are worth considering when making a decision as to whether to object or not include the following:

- Objecting might serve to keep you alert and attentive in a boring circumstance
- Objecting will show the examinee that you support her
- Making an objection in Examinations for Discovery is easier than during the heat of trial
- Objecting might serve to interrupt the examiner's flow – provided that you have an otherwise good and ethical primary reason to object
- A proper objection can serve to keep the record clean and clear
- An objection may be necessary to keep out harmful evidence
- Consider the examinee's reaction to objections – whether they cause disruptions or provide the examinee with a break.
- Ask yourself what the objection would accomplish.

In addition to these tactical reasons for objecting (or not) there exists substantive and more classical reasons for objecting (or not).

1. When not to object:

⁴² Dain, *supra* at para. 831.1

- It is not a valid objection, that to answer the question would be too expensive or too much trouble (*Dene Tha' F.N. v. A.E.U.B.*)⁴³
- Do not object to hearsay. The rule against hearsay does not apply to Examinations for Discovery (*Lastiwka v. T.D. Waterhouse Inv. Serv.(Can.)* (#1)⁴⁴
- It is no objection to state that the witness likely does not know the answer, or that the examiner already knows the answer.
- Questions may be asked to learn names of people with knowledge who might be examined (R. 213) though this is not so if one is trying to identify Crown informers (*Leipert v. R.*)⁴⁵ [

2. When to object⁴⁶

Counsel can object to questions being put to her client, so long as the objections relate to the normal rules of exclusionary evidence. The following is one list of acceptable reasons to voice objections to questions.

- Evidence that is privileged
- Opinion Evidence⁴⁷
- Answering Hypothetical Questions⁴⁸
- Questions going only to credibility or credit
- Questions of law
- Questions of Proof – (one may only ask questions of fact)⁴⁹
- Questions concerning the facts a party relies upon for part of his pleading
- Unfair questions (for example a question which misstates a previous answer)
- Whether one can ask about previous similar incidents and precautions taken later see *Can. S. Petr. v. Amoco Can. Petr.*⁵⁰

⁴³2003 ABCA 250, 330 A.R. 387, 21 Alta. L.R. (4th) 286 (Alta. C.A.).

⁴⁴2005 ABQB 44 (Alta. Q.B.)

⁴⁵ [1977] 1 SCR 281, aff'g (1996) 74 BCAC 271.

⁴⁶ This section is taken primarily from Stevenson Cote, *supra*.

⁴⁷*Inland Cement v. Stantec Consulting* (M) 2002 ABQB 7, 308 A.R. 180 and *Allison v. Traff* (M) 2003 ABQB 17, [2003] AR Uned 34 and *S.D.M. v. R.* (#1) 2002 ABQB 1132, 329 A.R.

⁴⁸ *Stone Sapphire v. Transglobal Comm'ns. Grp.* (#2) 2007 ABQB 238, 416 A.R. 306 (Alta. Q.B.)

⁴⁹ *Millot Est. v. Reinhard* (2000) 265 AR 350, 84 Alta. L.R. (3d) 387 (Alta. L.R.)

⁵⁰ [1995] 5 WWR 270, 168 A.R. 132, 28 Alta. L.R. 93d) 79

Schedule B contains a similar list to the above.

The recent decision of the unanimous Court of Appeal in *Briggs Bros. Student Transportation Ltd. v. Collacutt*⁵¹ highlights the importance of determining whether a party is in actual fact adverse in interest to the party which seeks to compel answers in an Examination for Discovery. In *Briggs*, the defendant sought contribution from the mother for injuries sustained to her child in a bus accident when that child was nine years old. The defendant bus company third-partied the mother and was asking the Court to compel the mother to answer certain questions that were objected to during discoveries. The bus company claimed the mother had failed to properly instruct her child as to how to safely cross the road.

11 Since the defendants and the third parties have a dispute over the right to contribution and indemnity, questions on those topics are obviously "relevant". With respect to the validity and quantum of the plaintiff's claim there is no issue between them. The third parties have chosen not to directly challenge the plaintiff's claim against the defendants. They are prepared to abide by and suffer any judgment that the plaintiff may obtain against the defendants. Whether one assumes that they have admitted the validity of the plaintiff's claim against the defendants, or they are merely content to rely on the defendants to defend the claim, **the third parties have failed by their pleadings to demonstrate any adversity between themselves and the defendants. It follows that the third-party mother, in her capacity as a third party, was entitled to refuse to answer the questions put to her (A.J.).**

...

13 The primary purpose of examinations is to avoid surprise and to obtain admissions that can be read in at trial. It is significant that any examination of the third parties on the damages suffered by the plaintiff could not be read in a trial as against the plaintiff. It is true that those transcripts could be used to impeach the third party should she testify at the trial. But that is something that could be done with a transcript of the evidence of any witness, and as has been mentioned mere witnesses are not examinable for discovery. In this case, the happenstance that the third party is the mother of the plaintiff should not be allowed to extend the scope of discovery beyond what is "relevant and material" in terms of the pleadings.

⁵¹ [2009] A.J. No. 17, 2009 ABCA 17 (Alta.C.A.) [hereinafter *Briggs*].

Accordingly the mother was determined as being **not adverse in interest** to the defendant, therefore questions on examination of the mother relating to the child plaintiff's injuries and damages not permitted.

*Common Wealth Credit Union Ltd. v. Waylan Mechanical Ltd.*⁵² is a lengthy case considering *inter alia* whether one of the parties in Examinations for Discovery could be compelled to answer certain questions which it had objected to answering. Chrumka J. held that the question at issue did not need to be answered as the answer required the examinee to **interpret a document, answer a question of mixed fact and law, or to give a legal interpretation.**

Common Wealth remarks on the present state of the law with respect to **objecting to questions calling for conclusive answers** (at para. 24- 25 A.J.), finding consistency with two earlier decisions of *Alberta (Provincial Treasurer) v. National Bank of Canada et al.*⁵³ and *Can-Air Services Ltd. v. British Aviation Insurance Co. Ltd.*⁵⁴

Paragraphs 24-61 of *Alberta* (A.J.) provide concrete examples where objections to certain specific questions were held by the court to have been proper objections, on the basis that the question being asked of the examinee **amounted to interpreting documents or to answering questions of law.** In *Alberta*, Master Funduk individually recites 10 questions to which objections to answer were given and he provides clear reasons as to why the objections were proper in the circumstances (A.J. at para.'s 24-48).

The decision of Cote J.A. in *Can-Air* is recalled in para.'s 49-61 of *Common Wealth* in which emphasis is placed on Cote's analysis as to the difference between asking questions to elicit facts (allowed), asking questions to elicit opinions(not allowed), and

⁵² [2008] A.J. No. 164, 2008 ABQB 96 (Alta. Q.B.) [hereinafter *Common Wealth*].

⁵³ (1995), 172 A.R. 282 (Funduk, Master in Chambers) [hereinafter *Alberta*].

⁵⁴ (1988) 91 A.R. 258 (Alta. C.A.) [hereinafter *Can-Air*].

asking questions as to what facts the examinee relies on (not allowed.) A lawyer having a working knowledge of the principles set forth in *Common Wealth* will be well equipped to manage objections.

Stevenson and Cote, in their discussion regarding Rule 189 of Alberta's *Rules of Court*, provide a checklist for possible types of privilege. Their checklist is conveniently divided into categories (for example criminal, contracts, legal, counsel etc.) This list is also a good list to include in one's Examination Notebook.

The next section will consider in somewhat greater detail the matter of hospital privilege.

3. Statutory Privilege of Hospital Records⁵⁵

Section 9 of the *Alberta Evidence Act*⁵⁶ creates an absolute prohibition against the disclosure records of the Quality Assurance Committee of a hospital. For convenience, that section of the *Act* is set out in Schedule C.

A Quality Assurance Committee is a committee that has as its primary purpose the carrying out of quality assurance activities. Quality assurance activities are defined as planned or systematic activities the purpose of which is to study, assess or evaluate the provision of health services with a view to the continual improvement of the quality of health care or health services.

Records specifically included in the privilege are records relating to the investigation and review of hospital incidents. According to case law interpreting s. 9, the investigation and review of hospital incidents falls within the mandate of quality assurance committees. Thus the protection and privilege afforded by section 9 extends to all records resulting from investigations or reviews which may follow in the wake of an incident.

⁵⁵ This section is adapted from the paper *Discovery of the Health Region*, prepared by Craig Gillespie and Bottom Line Research Inc., and is available at www.bottomlineresearch.ca

⁵⁶R.S.A. 2000, c. A-18.

In *Goad (Guardian ad litem of) v. Cavanaugh*⁵⁷ the plaintiffs sought production of the minutes of the Medical Advisory Committee to which the defendant doctor had provided a summary of events. Trussler J. refused disclosure, concluding that s. 9(1)(b) of the *Alberta Evidence Act* provides for an outright prohibition against the production of such documents:

“...[s.9] may be restrictive in an age of fuller disclosure, but the section does exist and it is up to the legislature to make any amendments to it. The object of the **section** is obviously to promote full discussion by the groups mentioned therein with the purpose of creating an atmosphere in which matters can be investigated and improvements can be made.

...Section 9(1)(b) creates a prohibition against the production of those documents. It is, therefore, not a question of whether or not there is a privilege with respect to these documents, it is a question of an outright prohibition.

As a result the hospital and the doctors are prohibited by legislation from producing the documents in question.” (at para. 7-9 A.J.)

In *Sinclair v. March*⁵⁸ the B.C. Court of Appeal considered the extent of protection afforded by s. 51 of the B.C. *Evidence Act* which relates to the disclosure of evidence produced by hospital committees. It found that the purpose of the protection is “to protect efforts made by hospitals to ensure that high standards of patient care and professional competency and ethics are maintained, by ensuring confidentiality for documents and proceedings of committees entrusted with this task.⁵⁹” Furthermore, “[r]ather than striking a balance of interest, the Legislature made a clear choice in favour of one interest, hospital confidentiality.⁶⁰” The appellate court concluded therefore that the clear prohibition against disclosure provided by the legislation extended to an investigation of the practice and procedure of a particular doctor as the investigation ultimately related to a quality of care issue protected by the legislation.

⁵⁷ (1992), 3 Alta. L.R. (3d) 18, 1992 CarswellAlta 72 (Q.B.)

⁵⁸ (2000), 78 B.C.L.R. (3d) 218, 2000 CarswellBC 1677, 2000 BCCA 459 [hereinafter *Sinclair*].

⁵⁹ *Sinclair*, *ibid.* at para. 23.

⁶⁰ *Sinclair*, *ibid.* at para 26.

*Lancaster v. Minnaar*⁶¹ considered a similar provision in the Saskatchewan *Evidence Act*. And in *Steep (Litigation Guardian of) v. Scott*⁶², Master Egan noted that while Ontario was the only jurisdiction in which quality assurance records did not enjoy legislative protection, common law privilege applied to records, on the basis that such records satisfied the four Wigmore criteria.

Quality Assurance Committee Regulation, Alta. Reg. 294/2003 designates the Physicians Performance Committee established by the College of Physicians and Surgeons of Alberta as a quality assurance committee for the purpose of section 9 of the *Evidence Act*. Thus, the statutory privilege that is made available to a hospital's Quality Assurance Committee applies equally to the records of the Physicians Performance Committee of the College.

Some hospital committee records are excluded from the s. 9 privilege. A quality assurance committee **does not include** a committee "whose purpose, under legislation governing the profession or occupation, is to review the practice of or to deal with complaints respecting the conduct of a person practising a profession or occupation." Thus it appears that whether the investigations of the College are covered by the prohibition against disclosure depends on which College committee undertook the investigation.

Discussions in medical rounds or with colleagues do not fall under this quality assurance exemption either; this statutory exemption is very specific to the function and operation of the quality assurance committee.

Notwithstanding the explicit exemption of quality assurance records from disclosure under section 9 of the Alberta *Evidence Act*, Courts have found that remedial measures taken by a hospital after the fact [of an investigation] **are** relevant on examination for discovery. Thus in *Algoma Central Railway v. Herb Fraser & Assoc.*⁶³ the court held

⁶¹ (2006), 288 Sask. R. 31, 2006 CarswellSask 557, 2006 SKQB 380.

⁶² 2002 CarswellOnt 4061 (Master).

⁶³ (1988), 66 O.R. (2d) 330, 1988 CarswellOnt 535 (Ont. Div. Ct.)

that the defendant must answer questions about fire safety practices and procedures adopted and enforced after the incident leading to the action. And in *Lucko v. Unruh*⁶⁴ the same conclusion was reached in a medical malpractice case.

4. Manner of objection:

The manner of objecting is by way of motion over a specific dispute. The court will rarely make advance blanket rulings about questions not yet asked.

The court should not order that irrelevant questions be answered simply because they are brief and will do little harm (*Cominco v. Worthington Compressor* [1997] AR Uned 305).

It is preferable for objecting counsel to object during the examination stating clearly on the record all grounds of objection at that time. being that it may be possible to avoid the objections by rephrasing the question.⁶⁵

VI. RELEVANCE AND MATERIALITY

Amendments made to the discovery rules (Alberta) in 1999 have narrowed the scope of relevance during discoveries. It is therefore important to exercise caution when applying cases relating to relevance prior to this date.

Stevenson & Cote state that the effect of the amendments was to move away from the broad scope of relevance described in the case of *Czuy v. Mitchell*⁶⁶ which those authors state is no longer the law. Greater emphasis is now placed on the issues stated in the pleadings.

In *Weatherill (Estate) v. Weatherill*⁶⁷ it was observed that:

⁶⁴ (1995), 104 Man. R. (2d) 1, 1995 CarswellMan 535 (Q.B.).

⁶⁵ Stevenson & Cote, *supra* discussing Rule 213

⁶⁶ [1976] 2 W.W.R. 676, 1 A.R. 434

⁶⁷ 2003 ABQB 69, 11 Alta. L.R. (4th) 183

16 In determining whether a document [or a discovery question] is relevant and material, the starting point is the pleadings. The pleadings define the issues, and relevance must be determined with respect to the issues. The pleadings are also relevant with respect to the issue of materiality. However, with respect to materiality one must also have regard to the issue in question. ...

17 That relevance is determined by the pleadings, while materiality is more a matter of proof can be seen by the wording of the Rule. The Rule talks about records that can "help determine" an issue, or that can "ascertain evidence" that will determine an issue. These are words of proof, and materiality must be determined with that in mind.

In *Stone Sapphire Ltd. v. Transglobal Communications Group Inc.*⁶⁸ Lee J. was asked to consider whether it was appropriate to compel the party to provide answers to various undertakings and to compel answers to certain questions to which various objections were given. Lee J. canvassed the general legal principles that were applicable. Both Fradsham and Stevenson & Cote canvass the issue of relevance and materiality thoroughly in their discussions relating to Rule 186. The question of relevancy is dealt with in greater detail below in the context of determining what sort of records are producible during Examinations for Discovery.

VII. DOCUMENT REQUESTS⁶⁹

It is important for counsel to know how to deal with common requests for records during Discovery. This section provides an overview of what types of records need to be produced, and what types do not, with a particular focus on personal injury claims.

A. General Principles

Rule 186.1 of Alberta's *Rules of Court* limits the scope of discovery of records to what is relevant and material:

⁶⁸[2007] A.J. No. 414, 2007 ABQB 238, 416 A.R. 306 (Alta. Q.B.) [hereinafter *Stone Sapphire*].

⁶⁹The majority of this section is an adaptation of a previous paper prepared by Craig Gillespie and Bottom Line Research and Communications, and is available at www.bottomlineresearch.ca.

186.1 For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

Rule 186 defines “record” expansively. It includes the “physical representation or record of any information, data or other thing that is or is capable of being represented or reproduced visually or by sound”. If the record is in one’s possession, custody or power⁷⁰ that record is producible whether or not that material is privileged.⁷¹ So long as the record is relevant and material, the parties have an obligation to disclose them by way of an affidavit of records.⁷²

*Pinnacle Arabians v. Warren Bentley*⁷³ & *NAC Constructors v. Cap. Region Wastewater Comm.*⁷⁴ are cited by Stevenson and Cote as being leading cases reviewing the newest jurisprudence in this area in Alberta.

The matter in *NAC* arose out of a tendering process for which the plaintiff was seeking damages. In discoveries, counsel for NAC questioned the Commission’s representative concerning three matters related to communications between a consultant and the Commission. Each question was objected to and taken under advisement. The Commission later declined to disclose the information requested.

The Chambers judge ordered the Commission to disclose the disputed evidence. The order was reversed on appeal.

⁷⁰*Price v. Labossiere* (1985), 64 A.R. 74 (Q.B.) [hereinafter *Price*].

⁷¹ The issue of disclosure must be distinguished from the issue of production see *Caskey v. Guardian* (1994), 148 A.R. 251 (Q.B.M.).

⁷² For the way that the documents should be described in an affidavit of records see *Dorchak v. Krupka* (1997), 196 A.R. 81 (C.A.).

⁷³ (M) 2004 ABQB 90, 351 A.R. 363 (Master) [hereinafter *Pinnacle* cited to A.J.].

⁷⁴ 2006 ABCA 246, 63 Alta LR (4th) 19 [hereinafter *NAC* cited to A.J.].

17 The disputed evidence may comprise opinions and advice that relates to compliance of the Maple and NAC bids, the fundamental and determinative issues raised by the pleadings, and that evidence may be relevant to those issues in a broad sense. But it is not material to them within the *Rules* fixing the scope of examination for discovery. Resolution of the issues of compliance of the tenders does not depend in any way on the opinions and advice communicated by Earth Tech to the Commission. The disputed evidence cannot reasonably be expected to significantly assist in proving or disproving the issues of compliance (A.J.).

The Court of Appeal based its decision having regard to the effect of the amendments to the Rules:

12 Oral examination for discovery is now confined to eliciting facts of primary relevance, that is, facts that are directly in issue, or of secondary relevance, that is, facts from which the existence of the primary facts may be directly inferred. Both primary and secondary relevance are determined by reference to the issues raised by the pleadings. Questions seeking information that could reasonably be expected to lead to facts or records of secondary relevance (that is, questions asking for information that is only of tertiary relevance) need no longer be answered.

13 In addition to being relevant within the meaning of Rule 186.1, information sought on discovery must be material, that is, be reasonably expected to "*significantly*" help determine one or more of the issues raised in the pleadings. The materiality of evidence refers to its pertinency or weight in relation to the issue it is adduced to prove: *Black's Law Dictionary*, (6th ed. 1990). Facts or documents may be relevant within Rule 186.1, but, either alone or in combination with other evidence, be of no significant help to the examining party in proving or disproving a fact in issue. As Slatter J. observed in *Weatherill Estate v. Weatherill*, (2003) 337 A.R. 180 (Q.B.), 2003 ABQB 69 at para. 17, "... relevance is determined by the pleadings while materiality is more a matter of proof ...". See also *Tolko Industries Ltd. v. Railink Ltd.* (2003), 14 Alta. L.R. (4th) 388, 2003 ABQB 349 at para. 6.

In *Pinnacle*, Master Breitkreuz had occasion to express his frustration with the 1999 Rule amendments when asked to determine whether certain questions objected to during Examinations for Discovery would elicit evidence that was relevant and material.

2 It is apparent to me that everyone who has written about the new rule (Rule 186.1), and the amendment of Rule 200 to provide that the questions must be "relevant and material" agrees that the scope of discovery has

been narrowed, but there still appears to be a reluctance to narrow the scope of discovery to any significant degree from what it was prior to the new rule.

After reviewing the jurisprudence that has been developing post 1999, and remarking upon the difficulty of distinguishing primary, secondary and tertiary evidence, the Master concluded that “...the application of the new Rule to particular fact situations must be primarily pragmatic.”⁷⁵ In the result, an Order was issued directing that all 35 questions be answered.

In *Tolko Industries Ltd v. Raillink Ltd*.⁷⁶ the relevant and material requirement was raised in the context of the scope of questions that are permissible during examination for discovery:

[7] Counsel also referred to the decision of Master Funduk in *Franco v. Hackett* [...] at para. 34:

34. But the test is relevant and material. That now cuts out the old fishing expeditions. There is no fishing without first evidence that there are fish in the pond and a reasonable amount of fish. Defendant has not satisfied me of that. Conjecture is not sufficient.

This statement has caused counsel in subsequent cases to embark on all sorts of piscatorial analogies. The metaphor is helpful if one remembers that with respect to the scope of discovery of the parties the question of “whether there are fish” is determined by the pleadings. If one of the parties pleads that there are or are not fish, then that is determinative of the issue as far as discovery goes. As to whether there are “a reasonable amount of fish”, that relates to materiality. Rule 186 says that there are a reasonable amount of fish if there are enough to significantly help determine one or more issues, or to ascertain evidence that can significantly help determine an issue. Under the new Rule fishing expeditions are still permitted if they fall within that test. [Reference omitted]

⁷⁵ *Pinnacle*, *supra* at para. 9 A.J.

⁷⁶ (2003), 333 A.R. 270 (Q.B.) *aff’d* (2003), 346 A.R. 78 (C.A.) [hereinafter *Tolko*].

The concepts of relevancy and materiality are distinct. Materiality relates to the degree to which a fact is related to the issues of the lawsuit. Relevancy relates to whether a document assists in proving or disproving that particular fact.⁷⁷

As stated by Sean F. J. Curran, “[c]learly, then, it is through **the careful crafting of pleadings** that one ‘stocks the pond’ with fish, and sets the framework for a broad examination for discovery.”⁷⁸

It is worth noting that the rules provide that there is a continuing duty to disclose documents. This means that once the affidavit of records is prepared, if relevant and material records are discovered, they must also be disclosed.

The next several sections will consider the production of specific classes of records, specifically the production of medical and hospital records, WCB records, Disability records, and Employment Insurance Statutory Files and Employment files.

B. Medical and Hospital Records

As indicated earlier, all documents that are in the party’s possession, custody or power must be listed in the affidavit of records.

In *Price v. Labossiere, supra*, the plaintiff sued the defendant for damages caused by the defendant’s negligent operation of a motor vehicle. During the plaintiff’s examination for discovery she stated that she had been examined by her doctor on a number of occasions, however she did not provide the defendant with copies of her physician’s notes, nor had she asked the physician for them. The defendant requested that the plaintiff file a further and better affidavit that would include those notes.

⁷⁷ S.F.J. Curran, “Relevance and materiality: Setting the Scope of Discovery” in *Rediscovering Discoveries* (Edmonton: Alberta Civil Trial Association, 2005) Supplementary paper G at 7. (“*Rediscovering Discoveries*”); A.A. Fradsham, *Alberta Rules of Court Annotated 2006*, (Toronto: Carswell, 2005) at 477.

⁷⁸ Curran, *supra*, *Rediscovering Discoveries* at 6.

Sinclair J. concluded that the documents requested were in the “power” of the plaintiff because it was reasonable for her to request the notes and records from the physician:

In the result, I have come to the conclusion that the notes and records in question are in the "power" of the plaintiff in the sense that it would be reasonable for her to request them from her physician. If the notes and records are not produced following such a request then an application would have to be made by the defendant pursuant to R. 209.

Similar considerations apply to the notes and records in the possession of the physiotherapists.

In light of *Price v. Labossiere*, where the medical or mental condition of a party is at issue in the lawsuit, the related medical and hospital records, including clinical notes and records obtainable by a party, ought to be listed in the affidavit of records.⁷⁹ One need only list and produce what is relevant to the medical condition at issue or what is related to the matter disputed. If the whole medical and emotional history is at issue, then everything must be produced.⁸⁰

The fact that medical reports are produced does not render clinical notes irrelevant—they also need to be produced when relevant to the dispute:

The plaintiff has put in issue his entire medical and emotional health and it seems to me that there can be no doubt that all medical records must be subject to production. I am in agreement with the submission that once clinical notes and records are relevant, they remain relevant, whether or not there has been a medical report. The obligation of the plaintiff to make reasonable efforts to obtain these documents is not affected by the production of a medical report.⁸¹

⁷⁹ See T.L. Archibald & J.C. Morton, *Discovery: Principles in Practice* (Toronto: CCH, 2004) at 17, 41-42; Master Quinn in *Murphy v. Bouilly* (1987), 77 A.R. 276(Q.B.M.) held that the principles in *Price v. Labossiere* only applied where there has been an independent medical examination for the defendant.

⁸⁰ *Gibbs v. Sabourin* (2001), 304 A.R. 125 (Q.B.M.).

⁸¹ *Loneragan v. Morrisette* (1993), 109 D.L.R. (4th) 758 (Ont. Gen. Div.). Justice Macdonald was guided by *Cook v. Ip* (1985), 22 D.L.R. (4th) 1 (Ont. C.A.). See *Guitierrez v. Jeske*, 2005 ABQB 953.

If only a part of the medical records are relevant, the entirety of the records need not be produced. In *Micheli v. Sheppard*⁸² the plaintiff sustained a serious injury to his eye and claimed general and special damages. The defendant sought production of several sets of clinical notes and records of professionals who appeared to have seen the plaintiff since the accident.

The Court held that the request was beyond the limits of relevance and that the records in question did not need to be produced. The fact that the pleadings were broad did not make all the clinical notes and records relevant, considering that the claim was narrowed down to the eye injury.

Similarly, in *Feraco v. Rasul*⁸³ in the context of a motor vehicle accident there was no claim relating to the obstetrical or gynecological condition of the plaintiff. Justice Read held that the gynecologist and obstetrician's charts, as well as the treatment received at a fertility clinic that post dated the accident, were irrelevant and immaterial.

In the same case, the plaintiff's counsel also provided a substantial quantity of edited doctor's notes. The defendant requested the charts without editing. Justice Read reviewed the unedited record and concluded that none of the portions of records that were not produced were relevant. This appears to be an acceptable practice in cases where some irrelevant records are mixed with relevant ones - the court may review the records in order to assess their relevancy to ensure that no relevant material has been left out in the discovery process.

The same principles of relevance apply to pre-existing medical conditions. If there is an issue regarding pre-existing conditions, records and documents that pre-date the injury must be disclosed if relevant. Where no pre-existing conditions are in issue, such

⁸² (1994), 30 C.P.C. (3d) 297 (Ont. Gen. Div.). See also *Vu v. Garcia*, 2005 ABQB 308 where Master Wacowich refused to order that records concerning treatment to the plaintiff's personal area be produced, because they were unrelated to the personal injury action 17 2003 ABQB 951.

⁸³ 2003 ABQB 951.

records are likely to be considered irrelevant and need not be listed in the affidavit of records.⁸⁴

In *Aujla v. Przywrzej*⁸⁵, the plaintiff refused to provide an undertaking to disclose her hospital records for 14 years prior to the accident. Master Funduk denied the defendant's request for production of these documents, finding that the request constituted a fishing expedition.

In general, courts have refused to compel psychiatrists to give evidence. *G. (D.M.) v. G. (S.D.)*⁸⁶ arose in a family law context in which the production of psychiatric records was judged to be harmful for the health of the party and therefore no production was ordered.

In *Guitierrez v. Jeske*⁸⁷, the psychological health of the plaintiff was also at stake. Despite the fact that pre-existing conditions may have been present, Moen J. denied production of counseling records from the Institute of Psychology and Law. The counseling records involved not only the plaintiff, but also her children. The plaintiff had requested the records from the Institute, but it refused to provide them because of the childrens' interests.

Given the reality of a partial privilege in the case of psychiatric records, it appears that in certain situations there will be times where disclosure is appropriate and there will be disclosure of a limited number of records, disclosure of edited records or the imposition of conditions to the disclosure.⁸⁸ For instance, in an action where damages are claimed, not ordering certain records would be unfair in that it would prevent the defendant from properly evaluating the nature and quantum of the claim for damages. It would also

⁸⁴ *Johnston v. Bryant*. See also *Karkanias v. Thomas* (1986), 19 C.P.C. (2d) 303 (Ont. Dist. Ct.); *Furlano v. Calarco* (1987) 20 C.P.C. (2d) 279 (Ont. H.C.J.).

⁸⁵ 2003 ABQB 310. See also *Turkawski v. 738675 Alberta Ltd.* [2005] A.J. No. 691, 2005 ABQB 423, 49 Alta. L.R. (4th) 22, 372 A.R. 7, 141 A.C.W.S. (3d) 181, 2005 CarswellAlta 793

⁸⁶ (1990), 72 O.R. (2d) 774 (S.C.M.).

⁸⁷ 2005 ABQB 953.

⁸⁸ In the context where a child welfare file was ordered to be disclosed under some conditions see *Swamy v. Schell* (2003), 333 A.R. 366 (Q.B.).

prevent the Court from properly conducting an assessment of damages. The Court may, in these situations allow disclosure upon certain conditions.⁸⁹

This was the case in *Gibbs v. Sabourin*⁹⁰, in which all of the plaintiff's state of health (physical and psychological) was placed at issue. It was held that the plaintiff's allegation that the accident caused mental problems made the doctors' records about her depression relevant. The plaintiff submitted that the depression she suffered as the result of the accident was separate than the depression she suffered because of her boyfriend's death. Master Funduk did not attach any conditions to the disclosure, because there was nothing to sustain the necessity of conditions. Moreover, he was not convinced that the "depressions" could be so conceptually distinct.

C. Records from the WCB

Section 148 of the *Workers' Compensation Act*⁹¹ governs the disclosure of the Workers' Compensation Board documents in a civil lawsuit:

148(1)

The books, records, documents and files of the Board and all reports, statements and other documents filed with the Board or provided to it are privileged and are not admissible in evidence in any action or proceeding without the consent of the Board. [...]

When a party requests a file, upon provision of a duly executed release from the worker and payment of the required fees, the practice of the Worker's Compensation Board is to produce the whole file to the requesting party.⁹² In *Lund v. Lauzon*⁹³ Madame Justice stated what sorts of records should be produced from the WCB claim file:

⁸⁹ *L.M.P. v. Fielding*, [1994] O.J. No. 2775 (Gen. Div.).

⁹⁰ (2001), 304 A.R. 125 (Q.B.M.).

⁹¹ R.S.A. 2000, c. W-15.

⁹² D.R. Mah, *Workers' Compensation Practice in Alberta*, 2d ed., looseleaf (Toronto: Carswell, 2005) at 5-42. ("*Workers' Compensation Practice in Alberta*") This practice was a response to *Jahnke v. Wylie* (1994) 162 A.R. 131 (C.A.) where the Court of Appeal held that s. [148] "forbids a Court from ordering access in any case where the Board is not a party. It instead imposes upon the Board a duty to decide whether to permit disclosure, a duty that must be exercised fairly." It also held that where the WCB is a party to an action despite the wording of s. 148, the Court may order production of documents.

⁹³ [1996] A.J. No. 980 (Q.B.) [hereinafter *Lund*]. See also *Burton v. Brice* (c.o.b. F.B. Services) [2006] A.J. No. 873, 2006 ABQB 523, 47 C.P.C. (6th) 173; 151 A.C.W.C. (3d) 29 which reaffirms the approach taken by Veit J. in *Lund*, *supra*.

[4] In reviewing the documents, I have not ordered the production of memos written to file or to another person in which a WCB employee ruminates about Ms. Lund's situation; I consider those documents to be irrelevant.

[5] I have ordered the production of documents in which WCB staff or consultants report on Ms. Lund's physical condition or report to Ms. Lund on WCB decisions about her physical assessment.

[6] I have not ordered the production of documents relating to Ms. Lund's WCB benefits; however, I have ordered documents that relate to programs offered by the WCB to Ms. Lund and her compliance with those offers.

...

[13] Much of the material on the WCB file relates to the minutiae of Ms. Lund's earlier WCB claims: the specific amount of money claimed, the specific disability allowed, the specific programs offered to her. I could not find any relevance to most of this material. Here again, the file is, naturally enough, concerned with the disposition of Ms. Lund's claim within the WCB structure; that is irrelevant to these proceedings. That material does not need to be disclosed to the defendants.

[14] Nevertheless, where a benefit has been offered to Ms. Lund, and she has not taken advantage of it, or a program offered to her and she has rejected it, or exercises recommended to her and she appears not to have done them, that information is potentially relevant to these proceedings. I have ordered that it be provided.

Following this judgment, the WCB developed, as a guideline, a list of documents that are producible and non-producible in subrogated litigation. The producible category includes physician's progress reports, workers' as well as employers' reports of accidents, notification of physical therapy, physical therapists' reports, physical therapy progress reports and requests for extension, any medical report from a treating physician or treating facility, any consultation medical report provided at the request of a case manager, memos from medical advisors to case managers (but not memos from the latter to the former), and physician practitioner charts.

Some of the non-producible documents include all handwritten notes to file and any typed memos to file authored by case managers, letters from case managers and entitlement decisions.⁹⁴

D. Records of Disability Pension

In *Nagtegaal v. Stad*⁹⁵, the plaintiff was asked by the defendant to request the file from Canada Life and also to request the file from the department in charge of the Canada Disability Pension. The plaintiff refused both requests.

Justice Veit held that the reasoning in *Price v. Labossiere* applied to the situation before her and she concluded that the files requested were not in the plaintiff's power, nor was it reasonable for the party to request its production:

[6] The reasoning in *Price* applies to situations other than physician's notes and files. For example, a party is required to request copies of their income tax filings if they have made filings but have not retained personal copies of the filings. Similarly, a party is required to request bank statements if they have bank accounts but have not retained personal copies of the statements relating to those accounts.

[7] However, *Price* is not authority for the proposition advanced by the defendant here. In *Price*, it was determined by the court that the patient at least had the right to the information on the physician's files even though the files remained the property, and ethical responsibility, of the physician. There is no evidence to that effect in this case.

[8] Moreover, as noted by the plaintiff, the defendant has requested "the file" from each of Canada Life and Canada Disability Pension Plan. There is no reason to believe that it is reasonable for the plaintiff to order those two separate entities, which are not parties to these proceedings, to deliver up their files to him. Their files may well contain material that is privileged or otherwise confidential or to which Mr. Nagtegaal has no colour of right.

A similar reasoning was recently stated in *Brown v. Nguyen*⁹⁶

⁹⁴ For the complete list see *Workers' Compensation Practice in Alberta, supra* at 5-43-5-44.

⁹⁵ [1997] A.J. No. 1122 (Q.B.).

⁹⁶ 2006 ABQB 783 (Q.B.M.).

[24] The plaintiff's section "B" Disability file is not producible. [...] The disability file represents an insurers assessment of their insured's claim. It is not the property of the plaintiff and he has no colour of right to possess it. The defendants acknowledge that their request for the entire disability file was perhaps overreaching but ask me to order the production of more discreet portions of the file.

[25] Mr. Boyle has indicated that an independent medical assessment often forms part of a section "B" disability file and as his client received a copy of that report he has produced it because it is clearly in his client's power. In *Nagtegaal v. Stad* 1997 A.J. 1122, Madame Justice Veit refused the production of the files of a disability insurer on the very basis that they were not in the power of plaintiff. In doing so, she pointed out that in case of physician's files, the patient had at least a right to the information. No such right exists with respect to the files of disability insurer.

Thus, it appears that determining who controls or possess the documents and who has a right to the information requested are key elements that are considered by the courts when they decide whether a document should be produced.

E. Employment Insurance Statutory Files and Employment Files

It appears that unless the documents requested are in the power of a party there is no need to list documents regarding employment insurance files, employers' files or social assistance files in the affidavit of records. Contrary to what appears to be the general practice for medical records, in light of the case law, it appears that with respect to these types of files there is no duty to request production.

This was the case in *Wright v. Schultz*⁹⁷ where the court held that the requirement to inform oneself was limited to the matters within the knowledge of his employees and agents. When no control exists, no duty arises:

[29] I express no opinion as to the nature of the relationship of control referred to above. It is sufficient in this case to say that an individual has no control over his employer, someone who has performed medical services for him, or employees at a school that he attends or has attended.

⁹⁷ (1992), 135 A.R. 58 (C.A.).

In *Proprietary Industries Inc. v. Workum*⁹⁸, Kent J. was asked to consider the matter of a refusal by a party to undertake to obtain information regarding Ms. Workum's employer and brokerage firm. Justice Kent held that in light of *Wright v. Schultz*, *supra* the undertakings requested were to be denied since there was no obligation on a party to inform himself from those people over whom he had no control:

[20] I have been provided with competing authority with respect to a litigant's obligation to request documents from others. In *Price v. Labossière* [1985] A.J. No. 1067 (Q.B.), Sinclair, J. found that a person's medical records were within the plaintiff's power so that he ordered her to request the documents. He acknowledged that a Rule 209 application might be required if the doctor did not provide the documents.

[21] In *Wright v. Schultz* (1992), 135 A.R. 58 (Alta C.A.), the plaintiff who had no independent memory of an accident was asked to inform himself about what others knew of the accident. The Court of Appeal said there was no obligation on the plaintiff to inform himself from those people over whom he had no control. That would include his employer, someone who performed medical services or employees at a school he attended. This case was preferred by *Kachowski v. Vost* [1997] A.J. No. 249 (Q.B.), where the plaintiff had been asked to request his complete personnel file from his employer.

[22] I am bound by the decision in *Wright* so that the undertakings requested regarding Ms. Workum's employer and brokerage firm are denied. I would say that it is common practice, particularly in personal injury litigation, to have the plaintiff request certain information relevant to his or her medical condition or employment history. This makes sense given the increased expense in requiring the defendant to make a Rule 209 application for documents that are usually relevant. However, for now, the decision in *Wright* is binding on me.

Applying similar logic to UIC and EI statutory files, one should not be required to produce such files, although what is in a party's power needs be produced if it is relevant:

[26] The UIC and EI statutory files need not be produced. The information was sought by the defendants for the stated purpose of establishing a pattern of income. It is apparent from a review of the transcript that tax returns have been furnished which would show the plaintiff's pattern of

⁹⁸ 2005 ABQB 610.

income. Even assuming these records would be in some way relevant a review of the statutory regime satisfies me that no individual has a right to compel production of his UIC or EI file. By way of example, section 96 of the *Unemployment Insurance Act* contains a protection from production of the information except to those individuals charged with administering the program. A request for a UIC payment stub might be appropriate, but to request the UIC or EI statutory file is not. It is not the habit of this court to direct a litigant to shout into the wind where there is no hope of a response.⁹⁹

In *Johnston v. Bryant*¹⁰⁰, where it was alleged that a motor accident seriously injured the respondents and caused continued pain and suffering as well as income loss, Hunt J.A. held that the chambers judge had appropriately narrowed the scope of what had to be produced in the social assistance file. Only the records of the Department of Social Services in relation only to income assistance had to be provided.

In summary, a party must list all of the relevant and material documents in the affidavit of records. Whether or not a record is relevant is a matter that is linked to the pleadings. Once again, the importance of the **crafting of the pleadings is essential** as they will have an important bearing on the litigation process at the discovery level.

Determining who controls or possesses the documents, and who has a right to the information requested are key elements that are considered by the courts when they decide whether a document should be produced. Generally, unless the context is one of medical records¹⁰¹ or when legislation includes a right of the party to the information, there will be no *de facto* duty for a party to disclose or to attempt to obtain information that is within the power of a third party.

VIII. UNDERTAKINGS

⁹⁹ 2006 ABQB 783 (Q.B.M.).

¹⁰⁰ (2003), 327 A.R. 378.

¹⁰¹ The answer to the fact that the medical records have a special status may lie in the *Health Information Act*, R.S.A. 2000, c. H-5 which provides a statutory right to the patients to access their own health information.

A. Common Law Implied Undertaking

In common law, there is an implied undertaking on litigants not to use information obtained during the discovery process for purposes unrelated to the proceeding. This implied undertaking rule applies to parties, their counsel and all persons.¹⁰²

This implied undertaking continues, even where a case is settled and the discovery evidence is not used. “The fact that the settlement has rendered the discovery moot does not mean the appellant's privacy interest is also moot. The undertaking continues to bind. Only when “...an adverse party incorporates the answers or documents obtained on discovery as part of the court record at trial is the undertaking spent, but not otherwise, except by consent or court order.”¹⁰³

Recently the Supreme Court of Canada had occasion to consider the application of this rule in detail in *Doucette, supra*. The matter initially arose in British Columbia. A civil action was brought against a childcare worker by the parents of a child who was injured while under that worker's care. A criminal investigation against the same childcare worker relating to charges of child abuse was pending.

The Attorney General of B.C. and the Vancouver Police sought to obtain the discovery transcripts from the civil action, to be used in support of their criminal investigation. Their application in Chambers was not successful. On appeal, the decision was reversed and the court allowed the transcript to be released. The unanimous Supreme Court of Canada reversed the decision of the B.C. Court of Appeal. Per Binnie J.

20 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.

¹⁰² Choate, *supra* at 2-6.4

¹⁰³ *Doucette (Litigation Guardian of) v. Wee Watch Day care Systems Inc.*, 2008 CarswellBC 411, 2008 SCC 8, [2008] 1 S.C.R. 157, [2008] S.C.J. No. 8 at para. 51 [hereinafter *Doucette*, cited to S.C.J.).

Binnie J. went on to discuss at length the rationale of the rule. The first rationale he considers relates to privacy interests:

24 ...pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. Thus, rule 27(22) of the B.C. *Rules of Court* compels a litigant to answer all relevant questions posed on an examination for discovery. Failure to do so can result in punishment by way of imprisonment or fine.... [thus by] issuing a statement of claim or other process, the gate is swung open to investigate the private information and perhaps highly confidential documents of the examinee in pursuit of allegations that might in the end be found to be without any merit at all.

25 The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. **The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.**

Binnie J. provides a second rationale for the rule – that it exists for the purpose of ensuring a more complete and candid discovery:

26 A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. This is of particular interest in an era where documentary production is of a magnitude ("litigation by avalanche") as often to preclude careful pre-screening by the individuals or corporations making production....

27 For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature.

Binnie J. cites a plethora of cases considering the application of the rule.¹⁰⁴

Notwithstanding that the general rule that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order, the Supreme Court in *Doucette* notes that exceptional circumstances can trump the implied undertaking. Binnie J. goes on to provide some guidance as to how the rule can be circumvented:

30 The undertaking is imposed in recognition of the examinee's privacy interest, and the public interest in the efficient conduct of civil litigation, but those values are not, of course, absolute. They may, in turn, be trumped by a more compelling public interest. Thus, where the party being discovered does not consent, a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action, as described in *Lac d'Amiante*, at para. 77:

Before using information, however, the party in question will have to apply for leave, specifying the purposes of using the information and the reasons why it is justified, and both sides will have to be heard on the application.

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In such an application the judge would have access to the documents or transcripts at issue (S.C.J.).

Binnie J. cautioned that “...delay will defeat the purpose of the application. It is important that [applicants] proceed expeditiously¹⁰⁵” Furthermore, when making such an application it is incumbent on the applicant “...to demonstrate to the court **on a balance of probabilities** the existence of a public interest of greater weight than the

¹⁰⁴ Binnie J. also cites with approval “...other decisions which are helpfully referenced in W. A. Stevenson and J. E. Côté, *Civil Procedure Encyclopedia* (2003), Vol. 2, at pp. 42-36 *et seq.*; and C. Papile, “The Implied Undertaking Revisited” (2006), 32 *Adv. Q.* 190, at pp. 194-96.” Also cited with approval is J. B. Laskin, “The Implied Undertaking” (a paper presented to the CBA-Ontario, CLE Conference on *Privilege and Confidential Information in Litigation - Current Developments and Future Trends*, October 19, 1991), at pp. 36-40 (*Doucette* at para. 28 S.C.J.).

¹⁰⁵ *Doucette*, *supra* para. 31.

values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation.¹⁰⁶”

Reiterating this test later on in the judgment, Binnie J. emphasized that it was the Court’s intention to retain some degree of flexibility in assessing such applications:

38 ...the onus in each case will be on the applicant to demonstrate a superior public interest in disclosure, and the court will be mindful that an undertaking should only be set aside in exceptional circumstances. In what follows **I do not mean to suggest that the categories of superior public interest are fixed**. My purpose is illustrative rather than exhaustive. However, to repeat, an undertaking designed in part to encourage open and generous discovery by assuring parties being discovered of confidentiality will not achieve its objective if the confidentiality is seen by reluctant litigants to be too readily set aside.

Applying the aforesaid principles to the particular case at bar, Binnie J. stressed the importance of balancing the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself - “...in this case that factor was decisive” although in “..other cases the mix of competing values may be different”. The key in each case, he said “...is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the [implied] undertaking will not achieve its intended purpose.¹⁰⁷”

Binnie J. expressly distinguished the Canadian approach from the English approach. The approach taken by the House of Lords as enunciated in *Crest Homes plc v. Marks*¹⁰⁸ found that there was:

...no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery (p. 1083) (para. 33 S.C.J.).

¹⁰⁶ *Doucette, ibid.* at para. 32.

¹⁰⁷ *Doucette, ibid.* at para. 32.

¹⁰⁸ [1987] 2 All E.R. 1074 referred to at para. 33 *Doucette, infra.*

As to the Canadian approach, Binnie J. speaking for the Supreme Court preferred instead:

...to rest the discretion on a careful weighing of the public interest asserted by the applicant (here the prosecution of a serious crime) against the public interest in protecting the right against self-incrimination as well as upholding a litigant's privacy and promoting an efficient civil justice process. What is important is the identification of the competing values, and the weighing of one in the light of the others, rather than setting up an absolute barrier to occasioning any "injustice to the person giving discovery". Prejudice, possibly amounting to injustice, to a particular litigant may exceptionally be held justified by a higher public interest, as in the case of the accused whose solicitor-client confidences were handed over to the police in *Smith v. Jones*, [1999] 1 S.C.R. 455, a case referred to in the courts below, and discussed hereafter. Of course any perceived prejudice to the examinee is a factor that will always weigh heavily in the balance. It may be argued that disclosure to the police of the evil secrets of the psychopath at issue in *Smith v. Jones* may have been prejudicial to him but was not an "injustice" in the overall scheme of things, but such a gloss would have given cold comfort to an accused who made his disclosures in the expectation of confidentiality. If public safety trumps solicitor-client privilege despite a measure of injustice to the (unsympathetic) accused in *Smith v. Jones*, it can hardly be disputed in this jurisdiction that the implied undertaking rule would yield to such a higher public interest as well.¹⁰⁹

Binnie J. next provided guidance as to how courts ought to exercise their discretion when considering an application to release discovery documents. Where "...discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted."¹¹⁰

An Alberta case in which the same result was reached is *Schreiber v. Canada (Attorney General)*¹¹¹. More recently in *Engel v. Dehid*¹¹² Moen J. applied Binnie J.'s reasoning to a case in which there was a civil action by the plaintiff against a police officer, and

¹⁰⁹ *Doucette, infra.* at para. 33.

¹¹⁰ *Doucette, infra.* at para. 35 citing for support *Lac Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 50 O.R. (2d) 260 (H.C.J.), at pp. 265-66; *Crest Homes*, at p. 1083; *Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.); *Harris v. Sweet*, [2005] B.C.J. No. 1520 (QL), 2005 BCSC 998; *Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd.* (1998), 27 C.P.C. (4th) 252 (B.C.S.C.).

¹¹¹ (2000), 83 Alta. L.R. (3d) 346, [2001] 1 W.W.R. 739 (Q.B.) [hereinafter *Schreiber*].

¹¹² [2008] A.J. No. 1357, 2008 ABQB 608 (Alta. Q.B.)

related disciplinary proceedings against the same police officer. The lawyer acting for the police officer in the disciplinary proceedings applied to the Court for an Order directing release of the discovery transcripts and materials arising from the civil action, to be used for a variety of purposes as set out in the application. The plaintiff objected on the basis of his privacy interests being violated. Moen J. held that the disciplinary proceedings involved the same or similar parties and the same or similar issues. Therefore, the prejudice to the examinee was virtually non-existent. In reaching this conclusion Moen J. relied squarely on the reasoning of Binnie J. in *Doucette*. Moen J. took additional steps to protect the privacy interests of the plaintiff by restricting the use to which the discovery evidence could be put, and by requiring that in specific instances, the evidence would need to be given *in camera*. In the event that such evidence could not be given *in camera* such evidence was not to be disclosed.

A similar result was reached in a case where a physician sought to use evidence obtained from an Examination for Discovery in a civil action (brought against him by the plaintiff), in a separate matter involving the physician's defense against complaints which was brought to the College of Physicians and Surgeons.¹¹³

I have no difficulty in concluding that this is one of those situations where an exception should be granted.... I believe that the plaintiff, having instituted the complaints to the College and having instituted this action, both against the same two physicians and both relating to the same issues, cannot now reasonably complain if information in this action is used by the same parties to answer those complaints. ... I do not see that any injustice will be visited on the plaintiff by granting such an order (and none was suggested by her) but, if some injustice could be discerned, it would, in my view, be greatly outweighed by the prejudice to the defendant physicians if an exception was not granted.

*Harcap Investments Inc. v. Alberta Permit Pro Inc.*¹¹⁴, cited earlier in this paper, considers at length, the common law rule with respect to the implied undertaking. In *Harcap*, the court was asked to determine whether evidence from a discovery transcript

¹¹³ *Browne v. McNeilly*, [1999] O.J. No. 1919, 99 O.T.C. 326, 41 C.P.C. (4th) 330, 88 A.C.W.S. (3d) 781, aff'd [2000] O.J. No. 1805, 99 A.C.W.S. (3d) 51 (Ont. C.A.).

¹¹⁴ (cited here for convenience) [2007] A.J. No. 1094, 2007 ABQB 590, 47 C.P.C. (6th) 99, 438 A.R. 202, 162 A.C.W.S. (3d) 215 (Alta. Q.B.) [hereinafter *Harcap*].

from related proceedings could be used in the *Harcap* action. The application was allowed and the transcripts from discovery could be used in another proceeding to refresh the memory of one of the parties. *Harcap* was decided before *Doucette* though arguably the result would likely have been the same had the *Doucette* decision already been rendered.

Conversely, courts generally will not favour “...attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest.”¹¹⁵

The focus of the Court in *Doucette* then shifted to consider cases in which the implied undertaking rule at common law (and in those jurisdictions which have enacted rules, more or less codifying the common law) would be subject to various sorts of exceptions such as legislative override¹¹⁶, or in cases where there is a public safety concern¹¹⁷ or in cases where it becomes necessary to impeach inconsistent testimony.¹¹⁸

The “crimes” exception is discussed at length by Binnie J.¹¹⁹ Of note is the distinction Binnie J. draws between implied undertakings and privilege, and the distinction between having a right to access records and the right to use them for a particular purpose:

56 The appellant's discovery transcript and documents, while protected by an implied undertaking of the parties to the court, are not themselves privileged, and are not exempt from seizure: *R. v. Serendip Physiotherapy Clinic* (2004), 189 C.C.C. (3d) 417 (Ont. C.A.), at para. 35. A search warrant, where available [and which the court suggest is the proper way to access discovery evidence having criminal implications or alternatively through a subpoena *duces tecum*], only gives the police access to the material. It does not authorize its use of the material in any proceedings that may be initiated.

¹¹⁵ *Doucette*, *supra* at para. 36.

¹¹⁶ *Doucette*, *ibid.* at para. 39.

¹¹⁷ *Doucette*, *ibid.* at para. 40.

¹¹⁸ *Doucette*, *ibid.* at para. 41.

¹¹⁹ *Doucette*, *ibid.* at paras. 42-50.

The reasoning of the Supreme Court was in line with earlier ruling of the Alberta courts in *Schreiber v. Canada (Attorney General)*¹²⁰ (2000), 83 Alta. L.R. (3d) 346, [2001] 1 W.W.R. 739 (Q.B.) [hereinafter *Schreiber*]. Schrieber was seeking to use information obtained during discoveries that were related to proceedings to have him extradited to Ontario, in a different set of proceedings.

Schrieber's argument was that he intended to use evidence obtained during discoveries for certain specific limited purposes. (Those purposes included providing the evidence to Swiss Authorities so they could determine whether the RCMP should be prosecuted, and to use the evidence in support of Schreiber's separate, but inter-related legal challenges. These challenges included a challenge to the constitutional validity of parts of the *Extradition Act*, and a challenge as to the impartiality of Canada's Minister of Justice to assess the extradition request, given what had been disclosed at the discoveries.)

The court concluded that Schreiber's interest in using the discovery information outweighed the interests that the implied undertaking was meant to address. These interests related to the privacy interests of the parties and were meant to provide a counterbalance to the intrusiveness of the discovery process. The information Schreiber was seeking to utilize was not related to a privacy interest "in the usual sense". Here, the information concerned the conduct of public officials in the exercise of their public duties, and this did not engage anyone's privilege against self incrimination. Furthermore, Schreiber intended to use the information only in proceedings to which the Department of Justice would be a party.

In *Moore v. RFID Systems Corp.*¹²¹ several distinct causes of action arose out of a series of inter-related dealings between an assortment of plaintiffs and defendants. An Order was obtained directing that each party be examined once and that the transcript generated would be used as evidence in each separate case.

¹²⁰ (2000), 83 Alta. L.R. (3d) 346, [2001] 1 W.W.R. 739 (Q.B.) [hereinafter *Schreiber*].

¹²¹ (February 19, 1998), Doc. Nelson 6857 (B.C.S.C)

A breach of the undertaking amounts to contempt of court and does not give rise to damages.¹²² More recently, the unanimous Supreme Court of Canada in *Doucette, supra* indicated (though in *obiter*)

29 Breach of the undertaking may be remedied by a variety of means including a stay or dismissal of the proceeding, or striking a defence, or, in the absence of a less drastic remedy, contempt proceedings for breach of the undertaking owed to the court. See *Lac d'Amiante*, at para. 64, and *Goodman v. Rossi* (1995), 125 D.L.R. (4th) 613 (Ont. C.A.), at p. 624.

B. Undertakings given during Examinations for Discovery

In *Stone Sapphire Ltd. v. Transglobal Communications Group Inc*¹²³ mentioned earlier in this paper, Lee J. reviewed the current state of the law in Alberta regarding the matter of compelling answers to undertakings and questions objected to at Examination for Discovery.

As a primary proposition, “[i]t is necessary to look at all of the pleadings when deciding discovery issues: *Hepworth v. Canadian Equestrian Federation* (2000) 277 A.R. 138 (ABCA) at paragraph 7.¹²⁴”

The purpose of discovery must also be remembered when determining whether an undertaking must be compelled, which is “...to help parties establish what will be in issue at trial: *Hepworth v. Canadian Equestrian Federation* at paragraph 10.¹²⁵

The primary limiting factor as to the generally broad scope of examination for discovery is relevance or irrelevance: *Hepworth v. Canadian Equestrian Federation* at paragraph 11.¹²⁶

¹²² *Casavant v. Alberta Co-Op Taxi Line Ltd.* (1996), 49 C.P.C. (3d) 115, 41 Alta. L.R. (3d) 425, 188 A.R. 381 (Alta. Master).

¹²³ [2007] A.J. No. 414, 2007 ABQB 238, 416 A.R. 306 [hereinafter *Stone Sapphire* cited to A.J.].

¹²⁴ *Stone Sapphire, ibid.* at para. 63.

¹²⁵ *Stone Sapphire, ibid.* at para. 64.

¹²⁶ *Stone Sapphire, ibid.* at para. 65.

Lee J. continues on, considering the legal meaning of “relevant and material” through paras. 66-68. Lee J. then examines each undertaking and objectionable question and concluded that they were “...not relevant to the issues raised in the pleadings and need not be answered.”¹²⁷

In *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*¹²⁸ Master Prowse considered the different aspects of undertakings in two different contexts: undertakings given in the context of cross-examination on an affidavit, and undertakings given in the context of examinations for discovery. In *Dow*, Shell's application to compel answers to the undertakings requested in a cross-examination was dismissed.

5 After a review of the relevant case law, I have come to the conclusion that the court should be reluctant to direct that undertakings be provided by a party proffering a deponent who is unable to answer all questions put to the deponent during a cross-examination. It should be more difficult to have undertakings directed on a cross-examination than at examinations for discovery.

As to whether providing answers to undertakings materially advance an action see *Ravvin Holdings Ltd. v. Ghitter*.¹²⁹ [2008] A.J. No. 1006, 2008 ABCA 208, 437 A.R. 66, 96 Alta. L.R. (4th) 1, 2008 CarswellAlta 1270

IX. EVALUATING YOUR PERFORMANCE

You can learn more from yourself than you can from anyone else.¹³⁰

At the conclusion of each Examination for Discovery it is worthwhile to conduct a systematic assessment of the process. Some elements to include in the assessment are set forth below.

¹²⁷ *Stone Sapphire*, *ibid.* at para. 94.

¹²⁸ [2008] A.J. No. 1195, 2008 ABQB 671 (Master) [hereinafter *Dow*].

¹²⁹ [2008] A.J. No. 1006, 2008 ABCA 208, 437 A.R. 66, 96 Alta. L.R. (4th) 1, 2008 CarswellAlta 1270

¹³⁰ *The Art Spirit*, Philadelphia, J.P. Lipincott Co., 1923), p. 108 cited in Bryan Finlay, Q.C. and T.A. Cromwell, *Witness Preparation Manual* (Aurora: Canada Law Book Inc., 1991)

- review the transcripts and look for bad habits
- are there areas where you could have probed further?
- did you fully commit the witness on admissions?
- is the record clear?
- get peers or senior lawyers to review

It is important that you know your own limits:

- if you are not comfortable talk to a more senior member of your firm
- sit in on as many discoveries as you can
- if you are on your own or a small firm, get a litigation partner
- pay a senior lawyer to assist with discovery or work out an alternate plan
- do your client a service and be better prepared for next time

Your final task is to prepare a summary memo including some or all of the following points:¹³¹

- Evaluate the examinees performance. A year later you will be glad to have this record documenting your evaluation of the examinee's credibility and potential impact.
- Note your critiques of the examinee that can be coached and remedied for in the event of trial, for example if he or she talks too fast, too slow, too much, or fidgets.
- Make a note of further factual investigations that need to be done, based on the examiner's questions and the examinee's answers.
- Make note of any legal or factual theories opposing counsel appeared to be driving at, that you had not yet considered.
- Make a note of points needing to be covered in later Examinations, of the same examinee or another one.
- Note your thoughts on your instructions to the examinee not to answer a particular question, especially if you predict opposing counsel will make a motion to compel an answer. Unless you write it down, the reasons you objected may not be so obvious to you three weeks down the road when you are served with the motion.

¹³¹ Dain, *infra.* at para. 870.

- When the transcript is received, review it for errors in the testimony. Discuss any errors you may see with the examinee and determine whether he or she should make corrections.

Dain recommends keeping a separate Examination Notebook in which you keep track of what did and did not work in each particular Examination you attend. In theory at least, periodic review of the notes will prevent you from repeating the same mistake or bad habit.¹³²

END

¹³² Dain, *ibid.* at para. 880.

Schedule A

Sample Chronology in Preparation for Examinations for Discovery

SCHEDULE A - Examination for Discovery Chronology				
Date	Time	Event	Follow Up or Comment	Reference <small>(Note: all reference to Doc # without Tab refer to main Hospital Chart. Number in parenthesis refer to hospital handwritten #)</small>
01/25/1996	Various	Dr. Y: threaten to quit if John Doe won't follow medical advice – not checking blood viscosity	Family: canvass and prep for ED	Tab 6: Doc 5
12/29/1999 to 01/13/2000		Admitted to Hospital for Valve surgery; was admitted immediately and investigated for infection and endocarditis amongst other things	Dr. X: Was he aware that on previous visit to Hospital in 2000 admitted immediately; Dr. X: Did he review any of old chart prior to March 2, 2005 (Event).	Doc 26 (281)
12/28/1999	23:00	Attended at Hospital for fever and cough. Admitted immediately. Emergency face Sheet. Admitted and IV Started.	Dr. X: Aware prior concern; what was the IV that was started. In that Exam, Osler's and Janeway's checked, no reference to Osler's or Janeway's in Event chart.	Tab 3 Doc 29 (278)
01/06/2000		Surgery to Redo/Replace Bentall Carbomedics Valve Conduit. Performed by Dr. Z	Procedure went well, no significant complications	Tab 3 Doc 50 (257)

Schedule B

LIST OF CLASSIC OBJECTIONS

(Source – Craig Gillespie obtained from a posting by Walter Kubitz to the listserv
lists.trialsmith.com)

- 1. The question is irrelevant.**
- 2. The question is hypothetical.**
- 3. The question asks a witness to express an opinion.**
- 4. The question asks the witness to draw a conclusion.**
- 5. The question asks the witness to interpret a document (and the document speaks for itself).**
- 6. The question involves a matter of law.**
- 7. The question goes to credibility only.**
- 8. The question is argumentative, abusive or rhetorical (rather than intended to elicit facts).**
- 9. The question asks the witness to comment on other evidence.**
- 10. The question is a pure “fishing expedition”.**
- 11. The question calls for the witness to disclose evidence rather than facts.**

(These objections are in addition to objections relating to grounds of privilege.)

Schedule C

Examinations for Discovery of Health Regions

STATUTORY PRIVILEGE RESPECTING PRODUCTION OF DOCUMENTS CREATED BY QUALITY ASSURANCE COMMITTEES.

Section 9 of the *Alberta Evidence Act* R.S.A. 2000, c. A-21 explicitly exempts quality assurance records from disclosure.

The section reads as follows: (

Quality assurance records

9(1) In this section,

(a) “quality assurance activity” means a planned or systematic activity the purpose of which is to study, assess or evaluate the provision of health services with a view to the continual improvement of

(i) the quality of health care or health services, or

(ii) the level of skill, knowledge and competence of health service providers;

(b) “quality assurance committee” means a committee, commission, council or other body that has as its primary purpose the carrying out of quality assurance activities and that is

(i) appointed by

(A) a regional health authority,

(B) the Alberta Cancer Board,

(C) the Alberta Mental Health Board,

- (D) the board of an approved hospital under the *Hospitals Act*, or
- (E) the operator of a nursing home,
- (ii) established by or under another enactment of Alberta, or
- (iii) designated by an order of the Minister of Health and Wellness as a quality assurance committee for the purposes of this section,

but does not include a committee whose purpose, under legislation governing a profession or occupation, is to review the practice of or to deal with complaints respecting the conduct of a person practising a profession or occupation;

(c) “quality assurance record” means a record of information in any form that is created or received by or for a quality assurance committee in the course of or for the purpose of its carrying out quality assurance activities, and includes books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records.

- (2) A witness in an action, whether a party to it or not,
 - (a) is not liable to be asked, and shall not be permitted to answer, any question as to any proceedings before a quality assurance committee, and
 - (b) is not liable to be asked to produce and shall not be permitted to produce any quality assurance record in that person’s or the committee’s possession or under that person’s or the committee’s control.
- (3) Subsection (2) does not apply to original medical and hospital records pertaining to a patient.
- (4) Notwithstanding that a witness in an action

- (a) is or has been a member of,
- (b) has participated in the activities of,
- (c) has made a report, statement, memorandum or recommendation to, or
- (d) has provided information to,

a quality assurance committee, the witness is not, subject to subsection (2), excused from answering any question or producing any document that the witness is otherwise bound to answer or produce.

(5) Neither

- (a) the disclosure of any information or of any document or anything contained in a document, or the submission of any report, statement, memorandum or recommendation, to a quality assurance committee for the purpose of its quality assurance activities,

nor

- (b) the disclosure of any information, or of any document or anything contained in a document, that arises out of the quality assurance activities of a quality assurance committee,

creates any liability on the part of the person making the disclosure or submission.

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LIST OF ADDITIONAL RESOURCES

Campion (Dec. '06) 82 *The Barrister* 17 (Alta. Civil Trial Lawyers Assn.) is an article about examination for discovery read-ins, including putting them in during opening statement. The article is recommended by Stevenson & Cote.

L.G. Harris, "Discovery Practice in British Columbia" (looseleaf), Cont. Legal Ed. Socy. of B.C. (Also recommended by Stevenson & Cote in their Alberta Civil Procedure Handbook.)