Production of Section B IME Reports

By Dave Yanko, Rosalia Nastasi and Bottom Line Research

Personal injury claimants usually are entitled to Section B benefits from their insurer for their medical needs after an accident. In some cases, the insurer will require the claimant to submit to an Independent Medical Examination (IME) in order to continue to receive benefits. As the IME reports are done for the insurer they are often negative towards the claimant. What is the ability of the defence to access Section B IMEs?

There are a number of cases that have considered issues related to the production of a Section B file (or its equivalent), and in some cases the specific issue of an IME Report within a Section B file. There are a variety of approaches that have been used by plaintiffs to resist production of a Section B file, including claims of privilege, privacy concerns and lack of control over the documents.

There are a few cases where the plaintiff has been successful resisting production of the Section B file on the basis that they do not have a legal right to the file and therefore cannot be compelled to request or produce it. This argument is only successful if the plaintiff and/or his or her counsel is not in possession of the file or report. However, there are a number of other cases that have found a Section B file or IME must be produced if it is in the plaintiff's possession, and rejected arguments relating to privilege, privacy or the implied undertaking rule.

Overall, the courts have generally taken the position that medical records and reports from a Section B file are relevant and producible and are not keen on arguments that supress production of these documents. However, at the same time, there is a recognition that a plaintiff cannot be forced to request and produce this documentation from the Section B insurer, as the documentation is not in their control and they do not have a legal right to compel it from their insurer.

The cases that successfully resisted production of a Section B file did so on the basis that the file was not within the power or control of the plaintiff. An Alberta case that came to this conclusion was ***Brown v. Nguyen***, 2006 ABQB 783, 405 A.R. 373. Master Waller was presented with an issue of the interpretation of then Rule 208 relating to the production of records at discovery. The Rule required a person who had a record "in their possession, custody or power" that was not privileged or protected from production to produce it. It was noted that a practice had developed whereby a litigant was asked in discovery to request documents from third parties that might be relevant to the litigation. The plaintiff in this case had refused to request his Section B file from his insurer and took the position he did not have to unless the information could be compelled under a rule 209 application (where a court orders a third party to produce relevant and material records).

Master Waller reviewed the basic principles of the discovery process, noting that a balance has been struck between speed and economy by limiting discovery to a worthwhile category of persons. He also considered the meaning of the phrase "possession and power", noting case law has held that a party being examined must inform himself reasonably of documents relating to the matter and that it is reasonable to require a plaintiff to request treatment notes from medical doctors, at paras. 12 – 14.

Master Waller identified an issue with the current law is that it was unclear whether there are limits on what must be requested by an injured plaintiff. He found the test should be whether there is a legal obligation for the third party to provide the information to the plaintiff, at para. 20:

> The test of reasonableness simpliciter is not enough. The nature of the relationship between the examined party and the third party needs be explored to determine if it would give rise to a legal obligation to provide the requested information. …

Master Waller was of the opinion that whether a legal obligation existed or not could be tested by whether a rule 209 application would be successful against the third party for the record, at para. 20.

On the issue of the Section B file, Master Waller agreed with the plaintiff's position that the file is not producible. The file is an insurer's assessment of their insured's claim and is not the plaintiff's property, at para. 26:

> **The plaintiffs section "B" disability file is not produceable.** I agree completely with Mr. Boyle's submissions on this point. **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.** … [Emphasis added]

In coming to this decision, Master Waller quoted from a short decision by Justice Veit that had made a similar finding. In ***Nagtegaal v. Stad*** (1997), 215 A.R. 216, [1997] A.J. No. 1122, Justice Veit held that a plaintiff was not required to undertake to request a disability file from an insurer or the Canada Disability Pension Plan, as it was not reasonable to require him to do so. The files potentially contained privileged or confidential material, or material which he was not entitled to possess, at para. 21.

Master Waller agreed on the basis of ***Nagtegaal*** that Section B files are different from physician files, as the plaintiff has a right to their file as a patient, but has no such right with respect to the file of a disability insurer, at para. 27:

> … In Nagtegaal v. Stad, [1997] A.J. No. 1122 (Alta. Q.B.), 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 the case of physicians files, the patient, had at least a right to the information. No such right exists with respect to the files of a disability insurer.

One important note to make about this case, however, is that the plaintiff had been provided with an IME Report that was conducted as a part of the Section B process, and had produced it

to the defence. This was considered proper as the report was then clearly in the power of the plaintiff, at para. 27:

> 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 clients power. …

Master Waller's decision was appealed to Justice LoVecchio, who affirmed the decision: ***Brown v. Nguyen***, 2007 ABQB 270, 405 A.R. 382. Justice LoVecchio did alter the interpretation given to the meaning of "power" over a record, expanding its meaning slightly. He agreed with Master Waller that the plaintiff must have a "legal right" to obtain a record in order to be required to request the record from a third party. Where they differed was on the interpretation of "legal right", with Justice LoVecchio stating that it should not be limited through reference to Rule 209 only. Instead, in addition to Rule 209 a right to a record can also be established by statute, contract, common law, equity or constitutional law, at para. 27. He therefore proposed the following three categories for assessing whether a record is in the litigant's power, at para. 32:

> Very generally, there a three sources of records with which we may be concerned:
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> 1) Records which are in the possession, custody or power of the examinee and not in the possession, custody or power of any third party over which the Court has jurisdiction. In such cases, Rule 209 would not apply, although Rule 208 might. This category is important in the context of these Applications because this Court does not have jurisdiction over the extra-provincial third parties in possession of certain of the records so this Court could not order their production under Rule 209. Whether this Court might nonetheless order an examinee to produce them under Rule 208 depends on the meaning given to the word power.
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> 2) Records which are in the possession, custody or power of either the examinee or a third party and this Court has jurisdiction over both of them. When this happens, either of the Rules might apply depending on the particular circumstances.
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> 3) Records which are in the possession, custody or power of a third party over which this Court has jurisdiction, but those records cannot be seen as in the possession, custody or power of the examinee. In such cases, Rule 208 could

> not apply and in order to be successful, the party seeking production must apply directly to the Court under Rule 209 and must meet the legal test established by Rule 209 and the jurisprudence interpreting that rule. Rule 209 is seen as a rule of last resort. It attempts to establish a balance between the confidentiality of strangers to an action and the parties' ability to access to all relevant documents in preparing their case. As explained in Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.5, "rule [209] should not be used against a non-party unless it can be shown that the document is in existence and not available...through a party."

In terms of the Section B file, the only comments made were that it had come to light the plaintiff was in possession of portions of the file and had provided the relevant portions to the defendant, and the issue was therefore now moot.

The decisions in ***Brown*** are still considered good law under the new *Rules of Court*. In ***McAllister v. Calgary (City)***, 2012 ABCA 346, 539 A.R. 124, the Alberta Court of Appeal considered the language in Rule 5.6 relating to Affidavits of Records, and the requirement to disclose relevant and material records that "are or have been under the party's control". This is slightly different than the wording in the previous Rules that referred to records in a party's "possession, custody or power". The Court held that the test from ***Brown***, of whether a party has a legal right to access the record or to get copies of it from the non-party, remains the test for disclosure, at paras. 6-7:

> …**Under the old rules, Alberta courts have held that for a party to have power over a record being held by a non-party, the party had to have a legal right to access the record or to get copies of it from the non-party**: see Brown v. Nguyen, 2006 ABQB 783 (Alta. Master), aff'd 2007 ABQB 270 (Alta. Q.B.). The right to access records in the hands of a non-party might arise in a number of ways, including by contract, by statute, at common law or at equity.
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> **In my view, this remains the test for disclosure in Alberta. The simplification of the language to "control" in the current Rules of Court does not alter the test.** There is no substantive difference in meaning between the two phrases. … [Emphasis added]

The Court also clarified that a claimant must have a right to enforce compliance with the request for a record in order to be considered as having "control" over the record. The mere ability to bring an application under the Rules of Court for the record to be produced is not enough. Nor is it enough that the claimant can request the record due to an existing relationship with the third-party, at para. 7:

> In my view, this remains the test for disclosure in Alberta. The simplification of the language to "control" in the current Rules of Court does not alter the test. There is no substantive difference in meaning between the two phrases**. I would add that the right to access the record must be specific to the party from whom disclosure is sought; merely having the ability to bring an application for third party disclosure under the Rules of Court, an application equally available to any party to the litigation, is not sufficient to indicate control. Nor is it enough, as the respondent suggests, that the party may be able to request the record from the non-party because of an existing relationship between them. If the requesting party does not have a corresponding ability to enforce compliance with the request, he or she does not have "control" over the record. [Emphasis added]**

There is authority from the New Brunswick Court of Appeal to the same effect, holding that an insured did not have a right to her Section B file and could not be ordered to produce it. In ***Reilly v. Paul***, 2006 NBCA 84, 2006 CarswellNB 507, the Court held that the claimant was not required to request from her insurer a copy of all accident-related rehabilitation and medical documentation in her Section B file. The Court held that the Rules (which are similar to Alberta's) do not authorize the courts to make an order requiring a party to <u>request</u> documentation from a stranger to the action (though such orders are often done on consent). The Court does have the power to order a documents production, but only if it is in the party's possession or control, at para. 40.

As in Alberta, the New Brunswick Court of Appeal held that in order for a person to have control of a document, it is not enough that the person may request a copy of the document from the third party, but there must be an enforceable right to its production, at para. 41:

> In any event, there is another answer to the appellants' motion for production. A document is not "in the power" or "control" of a party just because he or she might, upon request, obtain a copy from the person who has possession: Wright v. Allstate Insurance Co. of Canada, [1983] A.J. No. 611 (Alta. Q.B. [In Chambers]). In Joseph A. Likely Ltd. v. Peter Kiewit & Sons Co. (1977), 19 N.B.R. (2d) 294 (N.B. C.A.)at paras. 10-17, the Court held that a document was "in the power" of a party within the meaning of Rule 31.04(4)'s predecessor, Order 31, Rule 14, if, though not in the possession of that party, he or she had an enforceable right to its production for inspection.

In this case there was nothing to support the argument that the plaintiff had an enforceable right to produce the Section B file, so the Court did not order her to produce it, at para. 41:

> In Joseph A. Likely Ltd. v. Peter Kiewit & Sons Co. (1977), 19 N.B.R. (2d) 294 (N.B. C.A.) at paras. 10-17, **the Court held that a document was "in the power" of a party within the meaning of Rule 31.04(4)'s predecessor, Order 31, Rule 14, if, though not in the possession of that party, he or she had an enforceable right to its production for inspection. There is nothing in the record to support the conclusion that the respondent had, at the time of the hearing in the court below, an enforceable right to production for inspection of any part of her no-fault insurer's accident-related file. [Emphasis added]**

The Court concluded that as the Section B file was not in the plaintiff's control, she could not be ordered to produce it. Its conclusion provides a helpful summary of the law on this point, at para. 43:

> Under Rule 31.04(4), the court may order a party to produce relevant non-privileged documents in his or her possession or control. Pursuant to Rule 31.11, the court may also make a production order against a person not a party to the action if that person is in possession or control of any such documents. However, no Rule allows the court to order a party to request copies of any such documents from a third party and, absent the consent of the parties, it lacks jurisdiction to make any such order. The motion judge rightly abstained from ordering the respondent to request from her Section B insurer a copy of its file. In any event, the respondent has not been shown to be in control of the documents in her Section B insurer's possession. That being the case, production may not be ordered under Rule 31.04(4).

These cases did not go the further step of considering whether to order the records be produced from the third party directly.

Reilly was reviewed and applied in ***Michaud c. Cormier***, 2009 NBQB 156, a decision of L.A. LaVigne J of the Court of Queen's Bench of New Brunswick. The plaintiff filed an Affidavit of Records but, on discovery, it became apparent some documents, including medical records, had not been produced. The plaintiff refused to undertake to provide the documents and she refused to ask the Section B insurers to provide a full copy of their file. The defendant brought a motion for an order that the plaintiff deliver a further and better affidavit of documents. The motion was granted in part, and the plaintiff was obliged to produce documents that were in her control. Applying ***Reilly***, however, it was held that the plaintiff did not have to request documents from third parties and she did not have the right to production of documents in the possession of the Section B insurers.

The following cases required a Section B file or IME Report to be produced to the defence.

In ***Rosario-Paquet v. Hudec***, 2000 ABQB 415, 272 A.R. 345, Master Funduk considered whether an IME done for the purposes of a Section B file had to be produced to the defendant in the action. The plaintiff had a copy of the report, but took the position that the IME Report did not have to be produced until the defendant did its own examination of the plaintiff (then under Rule 217). The plaintiff did not contest that the report was relevant and material, and did not assert privilege over the Report, but relied solely on the position that the defendant must conduct its own examination first.

Master Funduk indicated that a problem with the plaintiff's position was that the defendant may choose not to do a Rule 217 medical examination, and approached the issue from this viewpoint. He rejected the plaintiff's position. He noted that the insurer's no-fault claims file was producible, and that the insurer should not have to resort to Rule 209 to obtain the Report when it was in the plaintiff's possession, at paras. 9 – 11:

> **Here the medical reports are in fact documents belonging to and in the possession of a "third person not a party to the action" which the Plaintiff just happens to have copies of. Without more, the Defendant could apply to get the medical reports from the insurer: Rule 209. The insurers "no-fault claims file" is producible: Stevenson & Côté, Civil Procedure Guide 1996, v. 1, p. 898.**
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> Mr. Berndt does not dispute the existence of the medical reports obtained by the insurer. He does not dispute that they are relevant and material. He does not say that they are privileged from production. His single position is that they need not be produced until after the Defendant does a Rule 217 medical examination of the Plaintiff.
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> **Here the Defendant should not have to make a Rule 209 application because the medical reports are available through other means, being the Plaintiff**: Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1990), 108 A.R. 161 (Alta. C.A.).

The decision was appealed to Justice Gallant at the Court of Queen's Bench: ***Rosario-Paquet v. Hudec***, 2000 ABQB 762, 279 A.R. 319. Justice Gallant noted that the plaintiff had undergone two medical examinations pursuant to her Section B benefits and that a copy of the reports had been sent to the plaintiff's counsel by the insurer. The plaintiff did not disclose the Section B medical reports in her Affidavit of Records, leading Justice Gallant to conclude that the plaintiff took the position the reports were privileged. However, Justice Gallant noted that in the current application, it was "common ground" that the reports were not privileged as they were not prepared at the request of the plaintiff or the plaintiff's counsel for the tort claim, but were instead obtained by the insurer for its purposes under the Section B benefits, at para. 6.

Justice Gallant noted the plaintiff's position that the reports did not have to be provided until the defendant had provided its medical reports pursuant to Rule 217. As in the earlier decision, this position was rejected.

The issue of bias in Section B IME reports was considered to some degree, with Justice Gallant noting that a trial judge "would understand that the medical report prepared by medical

practitioners for the Section B insurers are from a party opposite to the plaintiff", at para. 23. However, this concern is addressed by the fact that bias can be tested for through cross-examination, at para. 24.

Justice Gallant held that the reports were material and relevant to the plaintiff's claim against the defendant. He also held that Rules 187 and 191 (Affidavit of Records) relate to all non-privileged records of the party. He agreed with Master Funduk that the defendant should not be required to resort to an application under Rule 209 for the reports, at para. 28:

> On the plain wording of Rule 187, it relates to all records of the party. On the plain wording of Rule 191, which provides for an order for production, it must be intended to relate to all non-privileged documents. The defendant should not be required to resort to making an application under Rule 209 to obtain the reports.

The reports were therefore ordered to be produced.

Therefore, it appears that once a Section B file or IME Report is in the hands of the plaintiff, it must be produced.

Another Alberta decision has held that a Section B file and IME Report is not privileged and would be relevant and producible. In ***Khanna v. Rakhee***, 2005 ABQB 124, 2005 CarswellAlta 245, Justice Binder was faced with a case where a Section B insurer had commissioned a medical examination and a meeting had taken place between a physician and the plaintiff, but a report was never written. It had also come to light that the physician's notes and records relating the examination were destroyed for unknown reasons. The insurance company had correspondence in relation to what had occurred, but refused to produce the materials without the plaintiff's consent, which was not forthcoming.

Justice Binder noted that the *Rules of Court* and litigation privilege are meant to assist, rather than obscure, the administration of justice, stating the "cornerstone of the Rules is to ensure

full disclosure, avoid surprise and attain the truth", at para. 6. With this in mind, Justice Binder found there were suspicious circumstances that demanded an explanation. As a result, the Defendant was entitled to know the explanation of events.

Justice Binder went on to discuss whether privilege would extend to an IME Report in a Section B file, holding that it would not, at paras. 9 and 12.

In terms of the plaintiff's responsibility in the lawsuit, Justice Binder held the plaintiff had a duty to inform herself of all relevant and material information relating to the issues in the law suit for oral discovery and to produce all relevant and material information under her control. On the control issue, it was noted that the insurer was willing to provide the information with the plaintiff's consent. Based on the insurer's position, Justice Binder held the information was therefore within the control of the plaintiff and must be produced, at para. 11 (which may add a twist to the test in ***Brown***):

> In this case Mutual Liberty has indicated that it will produce such information in its possession with the consent of the Plaintiff. In this circumstance I find that such information is within the control of the Plaintiff and must therefore be produced provided such information meets the test of relevant and material significance under Rule 186.1.

Justice Binder ordered the information regarding the report be provided to the court for review in case portions of the information were privileged or not relevant and material.

In a follow-up decision after review of the materials, Justice Binder found that a portion of the documents were protected by solicitor-client privilege and did not need to be disclosed. However, the majority of the documentation was found to be relevant and material, and had to be produced to the defence: ***Khanna v. Rakhee***, 2005 ABQB 171, 2005 CarswellAlta 300. Justice Binder noted the plaintiff had argued lack of control, privilege, and irrelevance at the application, but such arguments were not supported beyond bare assertions and were rejected, at para. 8:

> In my view in a disclosure dispute such as this one, once a party has established a basis beyond speculation for possible disclosure as distinguished from a so-called "fishing expedition", the onus shifts to the other party to provide a basis for non-disclosure beyond a bare assertion that the material is not relevant and material, is beyond the party's control, or is privileged. In this application the Respondent/Plaintiff failed to do so, with the exception of two minor items.

A final Alberta case with some relevance is ***Burton v. Brice***, 2006 ABQB 523, 2006 CarswellAlta 2049. The plaintiff was in a motor vehicle accident and commenced a tort action against the defendant. As a part of his production, the plaintiff produced documentation in relation to his disability insurance with RBC Insurance. Certain of the pages had been omitted on the basis of relevance. The defendant took the position that the entire long-term disability insurance file should be produced, including payouts and medical documents relating to his condition.

The Court held that a plaintiff who puts his medical condition in issue waives confidentiality with respect to medical records. Therefore, the portions of the disability file pertaining to his medical condition were relevant and must be disclosed. The entire file did not have to be produced however, as some of the materials related to the minutiae of the disability claim and were not relevant to the current action.

Finally, cases outside of Alberta have also generally held that a Section B file, and related IME Reports, are producible.

In ***Lavers v. Weeks Estate*** (1997)***,*** Nfld. & P.E.I.R. 339, 471 A.P.R. 339 (Newf. S.C.), the plaintiff argued that once an IME Report was put into plaintiff's counsel's hands, it became a privileged document in contemplation of litigation of the tort action, however this argument failed.

A New Brunswick court also rejected arguments related to litigation privilege or common-interest privilege in ***Clark v. Collicott***,2013 NBQB 53, 1038 A.P.R. 279, and ordered the plaintiff to produce the Section B file documents in her or her counsel's possession. (The same court

followed the ***Reilly*** decision that the court had no jurisdiction to order the plaintiff to request her Section B file, however this was not a major issue as the plaintiff had possession of a number of documents).

Similar arguments also failed in the Nova Scotia decision of ***Brown v. MacKeen***, 1999 CarswellNS 471 (NSSC). The Nova Scotia court also rejected an argument that discovery of the Section B file was a collateral attack to get at private documents and analogous to a breach of the implied undertaking rule, at paras. 11-16. This case is also interesting in that it involved a defence application for the insurer to produce the Section B file, as opposed to the plaintiff producing it, and was successful on that basis. It was the plaintiff who defended the application and the insurer was merely present for the application. The Court ordered the insurer to review the Section B file and disclose only relevant facts as opposed to irrelevant material such as opinions and commentary, reserves, strategies and the like, at para. 18. The production did have to include surveillance. Notably, medical reports from the file had already been produced.

In ***Reimer v. Christmas***, 2001 CarswellOnt. 919 (ONSC) the plaintiff argued that production of the report would contradict the deemed undertaking rule that prevents the results of discovery in one action to be used in a subsequent action. The argument had traction at the trial level, where the Court held that the plaintiff's privacy interests should be protected and that IME Report should not be produced, noting the defendant had the ability to obtain its own independent medical examination, at para. 23:

> **More than likely there is evidence within Dr. Clifford's report that the defendant would find useful in advancing her position in this action and, as I earlier noted, there is really no issue that Dr. Clifford's report is relevant. However, the report came into existence as a result of Jenny Lynn Reimer being obliged to submit to such an assessment within the proceeding related to the accident benefit insurer. The policy principles which are the foundation for rule 30.1.01(3) ought to extend to these circumstances. In protecting the privacy interests of Jenny Lynn Reimer, evidence obtained in relation to her accident benefit claim need not be produced to the defendant in this action. The defendant is not in any way prejudiced from an inability to obtain Dr. Clifford's report. The defendant can and has availed**

> **itself of the right to have Jenny Lynn Reimer assessed independently by medical examiners it choses. In other words, it cannot be said that production of Dr. Clifford's report is in any way necessary to the defendant and there is no prejudice to the defendant if production is refused. [Emphasis added]**

However the trial judge's decision, which was based on extending the implied undertaking rule to this situation, was overturned on appeal: ***Tanner v. Clark*** (2002), 60 O.R. (3d) 304, 2002 CarswellOnt 2126 (ONSC, Div. Ct). The Court found that the IME report was clearly relevant, was in possession of the plaintiff, and was not privileged. The deemed undertaking rule had no application as it could not be said the tort action was a subsequent action, and the IMEs were not the result of a discovery in an earlier proceeding. The plaintiffs had put their medical conditions in issue in the tort actions and the plaintiff was in possession of the IME Report which was relevant and not protected by privilege, it therefore needed to be produced. The argument relating to privacy interests was also considered and rejected, with the Court finding that although medical records are private and confidential, once damages are sought for personal injuries the medical condition of the plaintiff is relevant and the confidentiality is lost. The decision was affirmed by the Ontario Court of Appeal, ***Tanner v. Clark*** (2003), 224 D.L.R. (4th) 635, 63 O.R. (3d) 508.

Based on the foregoing, courts have generally taken the position that medical records and reports from a Section B file are relevant and producible and are not keen on arguments that supress production of these documents. However, at the same time, there is a recognition that a plaintiff cannot be forced to request and produce this documentation from the Section B insurer, as the documentation is not in their control and they do not have a legal right to compel it from their insurer.

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