Discovery of Records
in the Context of Personal Injury Claims

By Craig Gillespie and Bottom Line Research & Communications[1]

General Principles

In Alberta, the rules that govern the discovery of records are RR. 186 ff. of the *Rules of Court*. 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 they are in their possession, custody or power[2], whether or not they are privileged[3], when the records are relevant and material, the parties have an obligation to disclose them by way of an affidavit of records.[4]

The wording of R. 186.1 limits the scope of discovery of records to what is relevant and material[5] as defined in that rule:

> 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.

In *Tolko Industries Ltd* v. *Raillink Ltd*[6] 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]

Even though the concepts of relevancy and materiality are often used together, they are distinct. On one hand, materiality is the degree to which a fact is related to the issues of the lawsuit. On the other hand, a document will be relevant if it assists in proving or disproving that particular fact.[7] The pleadings will play an essential role when determining whether a document is relevant and material.[8] 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".[9]

Moreover, it is worth noting that the rules provide that there is a continuing duty to disclose documents. In other words, once the affidavit of records is prepared, if relevant and material records are discovered, they must be disclosed.

Medical and Hospital Records

All documents that are in the party's possession, custody or power must be listed in the affidavit of records. In *Price* v. *Labossiere*[10], the plaintiff sued the defendant for damages caused by the defendant's negligent operation of a motor vehicle. In the plaintiff's examination for discovery she stated that she had been examined by her doctor on a number of occasions, but she did not provide the defendant with copies of notes made by her physician, nor had she asked for them. The defendant requested that the plaintiff file a further and better affidavit that would include those notes. Sinclair J.

concluded that the documents requested were in the “power” [11] 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 medical and hospital records, including clinical notes and records obtainable by a party, ought to be listed in the affidavit of records.[12] It is important to note, however, that 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, everything must be produced.[13]

It is interesting to note that the fact that medical reports are produced do 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.[14]

If only a part of the medical records are relevant, the entirety of the records will not be produced. For instance, in *Micheli* v. *Sheppard*[15] 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 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.[16]

Similarly, in *Feraco v. Rasul* [17], in the context of a motor vehicle accident where there was no claim relating to the obstetrical or gynaecological condition of the plaintiff, Justice Read held that the gynaecologist and obstetrician's charts, as well as the treatment received at a fertility clinic that post dated the accident, were irrelevant and immaterial. 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. It thus appears that such a practice is acceptable where some irrelevant records are mixed with relevant ones. The Court may review them in order to assess that no relevant material has been left out in the process.

The same principle of relevance applies to pre-existing conditions. If there is an issue regarding pre-existing conditions, records and documents that pre-date the injury must be disclosed if relevant, but where no pre-existing conditions are in issue, it is likely irrelevant and need not be listed.[18]

In *Aujla* v. *Przywrzej*[19], the plaintiff refused to provide an undertaking to disclose her hospital records for 14 years prior to the accident. Master Funduk denied the request for production and held that it constituted a fishing expedition.

Generally, some courts have refused to compel psychiatrists to give evidence. [20] In *G. (D.M.)* v. *G. (S.D.)*[21], in a family law context, where the production of the psychiatric records was judged to be harmful for the health of the party, no production was ordered. In *Guitierrez* v. *Jeske*[22], despite the fact that the psychological health of the plaintiff was at stake and despite the fact that pre-existing conditions may have been present, Moen J. denied production of counselling records from the Institute of Psychology and Law that involved not only the plaintiff, but also her children. The plaintiff had requested the records, but the Institute refused because of the childrens' interests.

Given that there is a partial privilege in the case of psychiatric records, it appears that in certain situations disclosure of a limited number of records, disclosure of edited records or the imposition of conditions to the disclosure are most appropriate.[23] For instance, in an action where damages are claimed, not ordering certain records would be unfair, that is, it could prevent the defendant from properly evaluating the nature and quantum of the claim for damages and it would prevent the Court from properly conducting an assessment of damages. The Court may, in those types of situations allow certain conditions to the disclosure.[24]

In *Gibbs* v. *Sabourin*[25], all of the plaintiff's state of health (physical and psychological) was in 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 from because of the accident was separate than the one 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.

Records from the WCB

Section 148 of the *Workers' Compensation Act*[26] govern 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.[27]

In *Lund* v. *Lauzon*[28] Veit J. stated what should be produced from the WCB claim file:

> [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.[29]

Records of Disability Pension

In *Nagtegaal* v. *Stad*[30], 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*[31]:

> [24] The plaintiffs 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.

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 neither is there a duty to request production.

In *Wright* v. *Schultz*[32] 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.

In *Proprietary Industries Inc.* v. *Workum*[33], Kent J. had to deal with the refusal of 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*, the undertakings requested were 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 this logic, UIC and EI statutory files should not be produced, although what is in a party's power need be produced if 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 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.[34]

In *Johnston* v. *Bryant*[35], 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.

Conclusion

A party must list all of the relevant and material documents in the affidavit of records. The relevance is linked to the pleadings. The crafting of the pleadings is thus essential and may have an important bearing on the litigation process at the discovery level. 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. Generally, unless the context is one of medical records[36] 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.

---

[1] With thanks to Julie Laliberté of Bottom Line Research & Communications for preparing the research which gave rise to this article.
[2] *Price* v. *Labossiere* (1985), 64 A.R. 74 (Q.B.) ("*Price* v. *Labossiere*").
[3] The issue of disclosure must be distinguished from the issue of production see *Caskey* v. *Guardian* (1994), 148 A.R. 251 (Q.B.M.).
[4] 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.).
[5] *Johnston* v. *Bryant* (2003), 327 A.R. 378 (C.A.) ("*Johnston* v. *Bryant"*); *NAC Constructors Ltd.* v. *Alberta (Capital Region Wastewater Commission)*, 2006 ABCA 246. ("*NAC Constructors*")
[6](2003), 333 A.R. 270 (Q.B.) aff'd (2003), 346 A.R. 78 (C.A.).
[7] 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.
[8] *NAC Constructors* at para. 13.
[9] *Rediscovering Discoveries* at 6.
[10] (1985), 64 A.R. 74.

[11] Similarly, see *Kap* v. *Sands* (1980), 22 C.P.C. 32 (Ont. H.C.J.). There is authority to the contrary-see for instance *Zilberg* v. *Kinsella* (1985), 6 C.P.C. (2d) 124 (Ont. Dist. Ct.).
[12] *Price* v. *Labossiere*. See also T.L. Archibald & J.C. Morton, *Discovery: Principles in Practice* (Toronto: CCH, 2004) at 17, 41-42; Master Quinn in *Murphy v. Boully* (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.
[13] *Gibbs* v. *Sabourin* (2001), 304 A.R. 125 (Q.B.M.).
[14] *Lonergan* v. *Morrissette* (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.). Recenlty, see *Guitierrez* v. *Jeske*, 2005 ABQB 953 where it was ordered that the plaintiff provides all written material, in paper or electronic form in the possession of any expert where an expert report has been provided to the Defendant. Moreover, the plaintiff had to provide the notes of the attending physician at the IME.
[15] (1994), 30 C.P.C. (3d) 297 (Ont. Gen. Div.).
[16] 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.
[18] *Johnston* v. *Bryant* . See also *Karkanas* 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.).
[19] 2003 ABQB 310.
[20] E. I. Picard & G.B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3d ed. (Toronto: Carswell, 1996) at 20-21.
[21] (1990), 72 O.R. (2d) 774 (S.C.M.).
[22] 2005 ABQB 953.
[23] 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.).
[24] *L.M.P*. v. *Fielding*, [1994] O.J. No. 2775 (Gen. Div.).
[25] (2001), 304 A.R. 125 (Q.B.M.).
[26] R.S.A. 2000, c. W-15.
[27] 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.
[28] [1996] A.J. No. 980 (Q.B.).
[29] For the complete list see *Workers' Compensation Practice in Alberta* at 5-43-5-44.
[30] [1997] A.J. No. 1122 (Q.B.).
[31] 2006 ABQB 783 (Q.B.M.).
[32] (1992), 135 A.R. 58 (C.A.).
[33] 2005 ABQB 610.
[34] 2006 ABQB 783 (Q.B.M.).
[35] (2003), 327 A.R. 378.
[36] 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.