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Rule 14 - Disclosure and Discovery in General

Educational Notes

How This Rule Works

Rule 14.08 maintains Nova Scotia's tradition of broad disclosure with a presumption that full disclosure is necessary for justice. Rule 14.08(2) sets out the content of the duty to make full disclosure: it means taking all reasonable steps to become knowledgeable about relevant documents and electronic information that are in a party's control, and to preserve the information for disclosure.

Within 20 days after the close of pleadings, or 2 days after a notice of contest in an application, corporate parties must appoint a designated manager for discovery. This should be an individual with a real connection to the proceeding who can inform him or herself and become the corporation's primary discovery witness (R.14.14).

Parties may make a demand for production under R.14.09 requiring disclosure or refusal with reasons within 15 days. Rule 14.11 allows for a demand for production at a trial or hearing, provided the demand is made before the finish date in an action or hearing date in an application.

Rule 14.10 allows for a demand for production or inspection of an original document or electronic information with a 15 day deadline to arrange a time and place for the inspection on reasonable terms. Rule 14.12(3) allows a judge to fix terms to protect privileged information and limit the prospect of mischief. The power to demand production under R.14.10 is now time limited: a party may not make a demand under R.14.10 until all parties have complied with R.15 and R.16 and disclosed their documents and electronic information. Under the previous R.20.04 the demand could be made at any time and the arrangements had to be made within 4 days.

Under the previous R.20.03 a party had 10 days after receiving a list of documents to object to the authenticity of a document, after which it was deemed admitted. Rule 54.05 now gives a party 25 days to object.

A judge may order production under R.14.12 or order a party to process data to produce relevant electronic information under R.14.13. Disclosure from non-parties is not addressed separately, as it was in the previous R.20.06, but it is still available, and requires a judge's order under R.14.12.

Limits on Dealing With Disclosure

Implied Undertakings - Rule 14.03 recognizes the implied undertaking rule.

Privilege - Rule 14.05 protects privileged documents and allows a judge to determine privilege claims using the procedure set out in R.85.06.

Rule 14.06(2) creates a duty to exercise care to avoid delivering privileged information. The definition of "sort" in R.14.02(1) continues the requirement to redact privileged information from a document or electronic information and disclose the remainder.

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Rule 14.01(1) confirms that inadvertent disclosure, by itself, does not extinguish privilege. Inadvertent disclosure will only extinguish privilege if there was negligence in the disclosure process resulting from:

- a. an ineffective or unreasonable records management system;
- b. inadequate security measures for protecting confidential information; or
- c. carelessness in disclosure, such as disclosing masses of documents or electronic information without taking reasonable steps to review them or making a reasonable search of the electronic information to identify privileged information.

Rule 14.06 creates a procedure for dealing with privileged documents disclosed in error. Upon realizing that another party's disclosure includes apparently privileged information, a party must immediately notify the disclosing party and refrain from dealing with the information for five days after the date of notice. Impermissible dealing with apparently privileged information is described in R.14.06(6) and (7) and includes reviewing the information and providing it to one's client.

On notification that another party has received apparently privileged information, the disclosing party has five days to require that the information be returned or destroyed. Failure to respond waives the privilege. An inadvertent failure to respond can be remedied by motion under R.2.03 to excuse compliance or 14.06(8) seeking an order that the information remains privileged.

This process is similar to the process for misdirected documents that is set out in Chapter 13 of the *Legal Ethics Handbook* :

Misdirected Information - Use of Opponent's Documents

13.2AA lawyer who has access to or comes into possession of a document which the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, has a duty to:

- a. return the document, unread and uncopied, to the party to whom it belongs, or
if the lawyer reads part or all of the document before realizing that it was not intended for him or her, cease reading the document and promptly return it, uncopied, to the party to whom it belongs, advising that party:
 - i. of the extent to which the lawyer is aware of the contents, and
 - ii. what use the lawyer intends to make of the content of the document.

Relief from the Burden of Disclosure

Counsel whose clients face an enormous disclosure burden under the Rules can find recourse in R.14.07, R.14.08 and R.14.09. Rule 14.07 continues the general rule that the party making disclosure is responsible to pay for it, but allows for cost shifting to achieve proportionality in cases where the cost does not result from an ineffective or unreasonable records management system.

Rule 14.08(3) allows a party to rebut the presumption for full disclosure by establishing that modification is necessary to make the cost, burden and delay proportionate to both the likely probative value of the evidence and the importance of the issues to the parties. It also requires the party seeking relief to come to court with the clean hands that come from fully disclosing the party's knowledge of what evidence might be found. Rule 14.08(6) allows a judge to lower the threshold in an application.

Rule 14.09(2)(c) provides for a motion to limit disproportionate production demands.

Definitions

Some definitions in this Rule bear special mention.

“computer” includes Blackberries and smartphones, even the memory in a fax machine. Counsel will need to be sure to canvass all potential sources of relevant documents and electronic information.

“document” in R.14 includes print-outs of electronic information and non-digital recordings and photos, but not the electronic information itself, which is covered under R.16. Under R.14, a printed digital photograph or e-mail is a document while same thing on a computer as a jpeg or e-mail is electronic information.

“electronic information” includes e-mail, word processing files, sound files, database files, and all associated metadata. Metadata is data about data. Often, it is not printed and may be hidden or difficult to access. Examples of metadata include blind copy recipients of an e-mail or the date a document was last modified. Metadata is discussed in more detail under Rule 16 – Disclosure of Electronic Information.

Highlights of Changes

Test is relevance throughout a proceeding - One of the primary changes to the law of discovery in Nova Scotia is that the court rejected the old “semblance of relevance” test in favour of simple relevance, as that term is understood at trial.

The Honourable Coulter A. Osborne, Q.C recommended that Ontario replace the semblance of relevance test with simple relevance, noting that the original concern of trial by ambush has been replaced with the concern of trial by avalanche. He anticipated that the change would not change practice for litigators who already use the discovery process reasonably. See, The Honourable Coulter A. Osborne, Q.C., Civil Justice Reform Project Report (November 2007), Part 8: Discovery, page 2. A summary of his findings and recommendations is available online at www.attorneygeneral.jus.gov.on.ca (click on publications).

Questions in interrogatories and on discovery now mutually exclusive - Under R.14.04 a party can demand a witness answer a question by interrogatory or on oral discovery, but not both. The Rule is limited to questions asked of the same witness. The use of the word “question” (and in particular “a” question) rather than a broader term like “subject” suggests that the Rule is intended more as a codification of the asked and answered objection than a Rule that would bar counsel from exploring an entire subject area if it was broached by interrogatory.

Practice Tips

Trial by Avalanche - Previous commentary dealt with relief from excessive disclosure requests. Counsel in the opposite situation who experience trial by avalanche can have recourse to Rule 88 – Abuse of Process. The definition of “sort” in R.14 may also provide relief. Rule 15.02 requires a party to sort documents prior to disclosing them. “Sort” is defined as physically separating relevant, non-privileged documents, separating or redacting irrelevant or privileged information, then preserving the document for disclosure.

Personal Injury Practice - It is not clear whether the discloser pays rule in R.14.07 will affect the current practice of insurers paying for plaintiffs’ medical records.

Litigation Readiness – Corporate and litigation counsel advising clients on litigation readiness will need to ensure their clients maintain reasonable records management systems and create litigation response teams. They will need to identify possible designated managers for discovery as soon as the prospect of litigation arises.

Privilege - To avoid inadvertently waiving a client's privilege, counsel will have to create and maintain effective document management systems and take care in sorting and disclosing documents. Counsel will also have to respond quickly to any notice that apparently privileged information was disclosed in error.

It is not clear whether R.14.06 prevents parties from entering into non-waiver or claw back agreements protecting privilege, such as the one rejected by the court in *Air Canada v. WestJet Airlines Ltd.* [2006] O.J. No. 1798 (Ont.S.C.J.). The court in that case suggested that non-waiver agreements can be appropriate if the parties consent and the court is satisfied that they are necessary.

Rule 14 does not deal with situations where a privileged document is inadvertently provided to an expert who then considers it in arriving at an opinion and preparing a report. It is likely that the current case law will continue to apply on this point.

14.01 - Meaning of “relevant” in Part 5

- (1) In this Part, “relevant” and “relevancy” have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
 - (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;
 - (b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.
- (2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.

Annotations

The plaintiff claimed they were promised that a certain coating product, Sternflex, would not crack when applied to their bridge's surface. It failed and the plaintiff brought this action. A subsequent product applied to the bridge (Transpo 48), also failed. The applicants (third parties) said Sternflex failed because it was not intended for surfaces with movement and the plaintiff had not properly informed the suppliers about the bridge's movement. They applied for an order under Rule 15.02(1) directing the plaintiff to disclose all documents related to the failure and repair of Transpo 48. They felt the question of whether movement caused Transpo 48 to fail was relevant to the determination of whether Sternflex failed for the same reason. The plaintiff resisted, arguing the documents were irrelevant given the narrow scope of their claim for damages (the cost of replacing Sternflex and related expenses). *Held*, the documents must be disclosed. The test under the new *Rules* (found in Rule 14.01(1)(b)) is more stringent than the old test. It establishes a threshold of relevancy at trial; however, the court must be mindful that at the pre-trial stage parties are still investigating to assess if there is a basis to defend the claim(s). Rule 15.02 requires parties to disclose all

documents that are “likely to lead to relevant evidence” (see Rule 18.13). In defining “likely to lead to relevant evidence,” Justice LeBlanc looked to the dictionary meaning of “likely” (which is “highly probable”). Looking at the pleadings, the documents could support the allegation that the failure of the Sternflex was attributable to the bridge and not the products or their installation. It is highly probable that this information would be relevant at trial.

Halifax Dartmouth Bridge Commission v. Walter Construction Corp. et al., [2009 NSSC 403](#)

14.02 - Interpretation in Part 5

(1) In Part 5,

“actually possess” means to have physical control of a thing or the ability to take physical control of the thing by one’s self, through one’s employee, or, in the case of a corporation, through an officer, without the assistance or permission of another person;

“computer” means a device that can store, read, and present electronic information, whether or not it can also process data, such as a personal computer, personal digital assistant, or fax machine with memory;

“designated manager” means a person designated by a corporate party under Rule 14.14;

“document” means a document that is not electronic information, including a print version of electronic information and a non-digital sound recording, video recording, photograph, film, plan, chart, graph, or record;

“electronic information” means a digital record that is perceived with the assistance of a computer as a text, spreadsheet, image, sound, or other intelligible thing and it includes metadata associated with the record and a record produced by a computer processing data, and all of the following are examples of electronic information:

- (i) an e-mail, including an attachment and the metadata in the header fields showing such information as the message’s history and information about a blind copy,
- (ii) a word processing file, including the metadata such as metadata showing creation date, modification date, access date, printing information, and the pre-edit data from earlier drafts,
- (iii) a sound file including the metadata, such as the date of recording,
- (iv) new information to be produced by a database capable of processing its data so as to produce the information;

“exactly copy” means to make an electronic copy of electronic information in such a way that the copy is a mirror image of the original in a computer, storage medium, or other source;

“sort” means to do all of the following:

- (i) physically separate relevant, non-privileged documents from other documents and distinguish relevant, non-privileged electronic information from other electronic information,
- (ii) separate or redact irrelevant or privileged information from a document or electronic information containing some information that is relevant and not privileged,
- (iii) place the document or electronic information where it will be preserved for disclosure;

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“storage medium” means a thing on which electronic information is stored other than a computer, such as a digital versatile disc, a backup tape, and a hard drive removed from a computer.

- (2) A Rule in Part 5 that refers to a copy of, or copying, electronic information calls for a copy that is in a readily exchangeable format, unless the Rule refers to an exact copy, a judge directs what format is to be used, or the parties agree on a format.

14.03 - Collateral use

- (1) Nothing in Part 5 diminishes the application of the implied undertaking not to use information disclosed or discovered in a proceeding for a purpose outside the proceeding, without the permission of a judge.
- (2) The implied undertaking extends to each of the following, unless a judge orders otherwise:
 - (a) documentation used in administering a test, such as test documents supplied to and completed by a psychologist;
 - (b) all notes and other records of an expert;
 - (c) anything disclosed or produced for a settlement conference.

14.04 - Relationship between discovery and interrogatories

A party may only demand an answer to a question under Rule 19 - Interrogatories not already answered by the same witness under Rule 18 - Discovery, and a party may only ask a question at discovery not already answered by the same witness in answer to a demand under Rule 19 - Interrogatories.

14.05 - Privilege

- (1) Nothing in Part 5 requires a person to waive privilege or disclose privileged information.
- (2) A provision in a Rule in Part 5 for disclosure of a relevant document, electronic information, or other thing means disclosure of a relevant document, electronic information, or other thing that is not privileged.
- (3) A provision in a Rule in Part 5 that requires an answer to a question calling for relevant evidence, or information that reasonably could lead to relevant evidence, means relevant evidence that is not privileged, or information, not itself privileged, that could lead to relevant evidence that is not privileged.
- (4) A judge may determine a claim for privilege, except the information and confidences referred to in sections 37 to 39 of the *Canada Evidence Act* are determined under that Act.
- (5) A judge who is required to determine a claim for privilege may direct a person to deliver the thing claimed to be privileged to the judge in order that it may be dealt with under Rule 85.06, of Rule 85 - Access to Court Records.

Annotations

The accused appealed his robbery conviction and the grounds of appeal contained allegations concerning his lawyer's representation. To support his allegations, he filed several pieces of correspondence that would normally be covered by privilege. The lawyer brought a motion for a declaration that the accused had waived solicitor/client privilege. *Held*, motion referred to a panel of judges under Rule 90.37(12)(d). Nothing in Rules 90 or 91 specifically authorize a judge to declare privilege has been waived. Absent specific authorization, the powers of the Court of Appeal (including those under Rule 90.48(1)(e)) are to be exercised by a panel of judges rather than a single chambers judge. In *obiter*, the court discussed Rule 14.05, which deals with privilege. The court's overall impression was that Rule 14.05 is intended to address matters arising in trials, not appeals.

R. v. West, [2009 NSCA 63](#)

14.06 - Disclosure of privileged information by mistake

- (1) Delivery by mistake of privileged information when making disclosure under Part 5 does not extinguish the privilege, unless the mistake results from one of the following:
 - (a) a system of records management that is ineffective, or otherwise unreasonable;
 - (b) inadequate security measures for protecting confidential information;
 - (c) carelessness in disclosure, such as disclosing masses of documents or electronic information without taking reasonable steps to review the documents or making a reasonable search of the electronic information in an attempt to identify privileged information.
- (2) A party who makes disclosure under Part 5 must exercise care to avoid delivering privileged information.
- (3) A party to whom disclosure is made and who discovers that the disclosure includes apparently privileged information must immediately notify the disclosing party and not do any of the things mentioned in Rule 14.06(7) until five days after the day the receiving party notifies the disclosing party.
- (4) A party who learns, by receiving a notice under Rule 14.06(3) or otherwise, that the party delivered privileged information by mistake must, no more than five days after the day the party learns of the disclosure, notify the receiving party of the claim that privileged information was disclosed by mistake, or the privilege is waived.
- (5) A party who claims privileged information was delivered by mistake may require the receiving party to do any of the following:
 - (a) return the document, if the information is in a physical document;
 - (b) delete the privileged information, if it was delivered in electronic form;
 - (c) return the storage medium, if the privileged information was delivered on a storage medium.
- (6) Counsel who receives information claimed to be privileged and to have been delivered by mistake must not provide the information to anyone, including counsel's client, unless a judge determines the information is not privileged.
- (7) A party who receives information claimed to be privileged and to have been delivered by mistake must not do any of the following, unless a judge determines the information is not privileged:
 - (a) review the information;

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- (b) keep a reproduction or record of the information;
 - (c) communicate the information to another person;
 - (d) ask a question based on the information in interrogatories, in discovery, on a hearing, or at a trial;
 - (e) repeat the information.
- (8) A judge may make an order to protect a privilege in anything disclosed by mistake under Part 5.

14.07 - Expense of disclosure

- (1) The party who makes disclosure must pay for the disclosure, unless the parties agree or a judge orders otherwise.
- (2) A judge may order another party to provide an indemnity to the disclosing party for an expense of disclosure, if all of the following apply:
 - (a) considering the disclosing party's means, the indemnity is clearly necessary to achieve proportionality within the meaning of Rule 14.08(3);
 - (b) the expense is not the result of a system of records management that is ineffective, or otherwise unreasonable;
- (3) The order may require the disclosing party to do any of the following, if it is covered by the indemnity:
 - (a) acquire more information about the disclosing party's records management system, the location of the party's documents and electronic information, or how they are accessed, and report to the indemnifying party or the court;
 - (b) perform a search for relevant documents or electronic information, report on the results to the indemnifying party or the court, and produce a copy of any relevant document or electronic information the party finds;
 - (c) acquire and produce a copy of a relevant document or electronic information;
 - (d) take other steps that may assist the indemnifying party to receive disclosure.
- (4) The provisions of an indemnity must be taken into account in the assessment of cost under Rule 14.08(3).

14.08 - Presumption for full disclosure

- (1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.
- (2) Making full disclosure of documents or electronic information includes taking all reasonable steps to become knowledgeable of what relevant documents or electronic information exist and are in the control of the party, and to preserve the documents and electronic information.
- (3) A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden, and delay proportionate to both of the following:
 - (a) the likely probative value of evidence that may be found or acquired if the obligation is not limited;

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- (b) the importance of the issues in the proceeding to the parties.
- (4) The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited.
- (5) The presumption for disclosure applies, unless it is rebutted, on a motion under Rule 14.12, Rule 15.07 of Rule 15 - Disclosure of Documents, Rules 16.03 or 16.14 of Rule 16 - Disclosure of Electronic Information, Rule 17.05 of Rule 17 - Disclosure of Other Things, or Rule 18.18 of Rule 18 - Discovery.
- (6) In an application, a judge who determines whether the presumption has been rebutted must consider the nature of the application, whether it is chosen as a flexible alternative to an action, and its potential for a speedier determination of the issues in dispute, when assessing cost, burden, and delay.

14.09 - Demand for production of undisclosed copy

- (1) After the time for making disclosure under Rule 15 - Disclosure of Documents, or Rule 16 - Disclosure of Electronic Information, a party who is satisfied another party has not disclosed a relevant document or electronic information required to be disclosed may demand that the other party deliver a copy of the document or electronic information.
- (2) A party to whom a demand for a copy of a document or electronic information is delivered must respond to the demand in one of the following ways no more than fifteen days after the day the demand is delivered:
 - (a) accept the demand, and deliver a copy of the document or electronic information;
 - (b) refuse the demand on the ground that the document or electronic information is privileged, irrelevant, or not in the control of the party;
 - (c) make a motion to limit the party's obligation to produce the document or electronic information, and seek to rebut the presumption in favour of disclosure by establishing that compliance with the demand is disproportionate under Rule 14.08.
- (3) A judge may order a party who fails to respond to a demand for production to indemnify the other party for the expenses of obtaining an order for production.

14.10 - Demand for production of, or access to, original

- (1) After the parties have complied with Rule 15 - Disclosure of Documents, and Rule 16 - Disclosure of Electronic Information, a party may deliver to another party a demand for production for inspection of the original of a relevant document in the control of the other party, or for access to relevant electronic information in the control of the other party.
- (2) The party who accepts a demand for production for inspection of an original document must do both of the following, unless a judge orders otherwise:
 - (a) not more than fifteen days after the day the demand is delivered, arrange a time, date, and place for the production;
 - (b) produce the document for inspection and permit the document to be copied at the arranged time, date, and place.
- (3) The party who accepts a demand for access to electronic information must do each of the following, unless a judge orders otherwise:

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- (a) not more than fifteen days after the day the demand is delivered, offer reasonable terms under which the other party will have access to a computer or storage medium in the control of the disclosing party or to another source of electronic information the party accesses to the exclusion of another party;
 - (b) within the same time, arrange a convenient time and way for the other party to have access;
 - (c) provide access accordingly.
- (4) The party who refuses a demand for access to electronic information must give reasons for the refusal, and the other party may make a motion for an order under Rule 14.12.

14.11 - Demand for production at trial or hearing

- (1) A party may, before the finish date in an action or the day of the hearing of an application, deliver to another party a demand that the party produce any of the following at the trial or hearing:
 - (a) the original of a relevant document, or an exact copy of relevant electronic information;
 - (b) a copy of a relevant document, or a copy of relevant electronic information accurately copied in a readily exchangeable format;
 - (c) a computer or storage medium containing relevant electronic information;
 - (d) another means for accessing a source of relevant electronic information the party accesses to the exclusion of the demanding party.
- (2) The party to whom the demand for production is delivered and who has control of the document, information, computer, medium, or source must produce it or provide access to it at the trial or hearing, unless a judge orders otherwise.

14.12 - Order for production

- (1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.
- (2) A judge may order a person to produce the original of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing.
- (3) A judge who orders a person to provide access to an original source of relevant electronic information may include in the order terms under which the access is to be exercised, including terms on any of the following:
 - (a) a requirement that a person assist the party in obtaining temporary access to the source;
 - (b) permission for a person to take temporary control of a computer, part of a computer, or a storage medium;
 - (c) appointment of an independent person to exercise the access;
 - (d) appointment of a lawyer to advise the independent person and supervise the access;
 - (e) payment of the independent person and the person's lawyer;
 - (f) protection of privileged information that may be found when the access is exercised;

Rule 14 - Disclosure and Discovery in General

- (g) protection of the privacy of irrelevant information that may be found when the access is exercised;
 - (h) identification and disclosure of relevant information, or information that could lead to relevant information;
 - (i) reporting to the other party on relevant electronic information found during the access.
- (4) A judge who is satisfied that the requirement is disproportionate under Rule 14.08 may limit a requirement to produce a copy of a document, to produce exactly copied electronic information, or to provide access to electronic information.

14.13 - Order to process data

A judge may order a party to cause data on a computer or in a storage medium actually possessed by the party, or in a database accessed by the party to the exclusion of another party, to be processed so as to produce relevant electronic information.

14.14 - Designated manager for discovery

- (1) A corporate party to a defended action must designate a manager for discovery of the corporation and notify the other parties of the name of the designated manager no more than twenty days after the day pleadings close.
- (2) A corporate party must designate a manager in a contested application no more than two days after either of the following:
 - (a) the day a notice of contest is delivered to the corporate party who is an applicant;
 - (b) the day the notice of contest is filed by the corporate party who is a respondent.
- (3) A judge may designate a manager if the corporate party fails to do so.
- (4) A judge may substitute a manager if a corporate party makes an unreasonable designation, such as designating a person who has no real connection with the party's claim, defence, or ground although such a person is available and able to act as manager.
- (5) A designated manager must, before being discovered, become informed about relevant information available to the party.

14.15 - Public archives and other public repository

Despite the provisions of Part 5, a party who controls a public archive, museum, or other place where the public has access to documents or electronic information is not obligated to search there for relevant documents or electronic information that are available to all parties.

Rule 15 - Disclosure of Documents

Educational Notes

This Rule replaces the previous R.20. Rule 15 requires counsel to carefully explain disclosure obligations under R.14-16 to clients and sign a certificate of advice that they have done so. The obligation is a significant one and counsel will need to give careful consideration on how to meet it. (Rule 17 obligations are not included, but it would be prudent to address R.17 obligations in appropriate circumstances even though the certificate does not require it.)

Rule 15 now requires that the parties exchange affidavits disclosing documents that have been sworn or affirmed by the party (not counsel) within 45 days of the close of pleadings in an action. There are two separate forms of affidavit, one for individuals (Form 15.03A), and one for corporate parties (Form 15.03B). A form for the certificate of counsel is attached to Form 15.03A. The affidavit now contains four schedules:

Schedule A listing all relevant non-privileged documents actually possessed by the party;

Schedule B setting out the date that counsel was retained, claiming privilege over communications with counsel, and providing information about all other privilege claims;

Schedule C lists documents within a party's control that have not yet been acquired and provides an undertaking to acquire them or reasons for not doing so;

Schedule D lists documents once, but no longer, in a party's control.

Note that while the schedules form part of the affidavit disclosing documents, the documents themselves do not.

Rule 15.05 provides guidance on organizing the affidavit disclosing documents and provides for scanning and delivering electronic copies only where all parties have the means to use them.

As with the previous R.20, the duty to disclose is an ongoing one. Rule 15.04(b) creates a duty to disclose further relevant documents found or acquired, which raises the question of how to treat further documents found or acquired by counsel. Generally these would fall under work product privilege.

Rule 15.06 provides a simplified process for documentary disclosure in an application. No deadline is provided, presumably because it will be set during the motion for directions.

15.01 - Scope of Rule 15

- (1) This Rule provides for making disclosure of documents, not electronic information.
- (2) A party must disclose documents in the control of the party, in accordance with this Rule.

15.02 - Duty to make disclosure of documents

- (1) A party to a defended action or a contested application must do each of the following:
 - (a) make diligent efforts to become informed about relevant documents the party has, or once had, control of;
 - (b) search for relevant documents the party actually possesses, sort the documents, and either disclose them or claim a document is privileged;
 - (c) acquire and disclose relevant documents the party controls but does not actually possess.
- (2) The party must also disclose information about all of the following:
 - (a) a relevant document the party once controlled but no longer controls, such as a lost document or a document given away;
 - (b) a claim that a document in the control of the party is subject to a privilege in favour of the party or another person, to the extent it is possible to inform another party without infringing the privilege;
 - (c) a relevant document newly created, discovered, or acquired;
 - (d) a relevant document that has ceased to be privileged.

Annotations

In a lawsuit related to product failure, the applicants (third parties) applied for an order under Rule 15.02(1) directing the plaintiff to disclose documents related to the failure of a subsequent product. They felt the question of what caused the second product to fail could aid their defense. The plaintiff resisted, arguing the documents were irrelevant given the narrow scope of their claim for damages (the cost of replacing the original product and related expenses). The second product only failed after the close of pleadings. *Held*, the documents are to be disclosed. The threshold (under Rule 14.01) is relevancy at trial; however, the court observed there are narrow limits within which a document will not be ordered disclosed. Rule 15.02(1)(c) broadly requires parties to search for, acquire and disclose all relevant documents. The object is to allow access to all information/documents that are “likely to lead to relevant evidence” (as required by Rule 18.13) at trial, while remaining mindful the pre-trial stage is used to investigate claim(s) to assess if there is a basis to defend. Here the documents sought were likely to lead to relevant evidence at trial.

Halifax Dartmouth Bridge Commission v. Walter Construction Corp. et al., [2009 NSSC 403](#)

15.03 - Disclosure in an action

- (1) A party to a defended action must deliver to each other party an affidavit that fulfills the party’s duty to make disclosure of documents no more than forty-five days after the day pleadings close.
- (2) The affidavit must contain the standard heading, be entitled “Affidavit Disclosing Documents (Individual)” or “Affidavit Disclosing Documents (Corporate)”, and be sworn or affirmed by an individual party, the litigation guardian of an individual party, or an officer or employee of a corporate party.
- (3) The person making the affidavit must swear to or affirm all of the following:
 - (a) an attached certificate of advice or understanding about disclosure duties under this Rule 15, and Rule 16 - Disclosure of Electronic Information, is true;

Rule 15 - Disclosure of Documents

- (b) the person has thoroughly searched for, or supervised a thorough search for, relevant documents that are actually possessed by the party;
 - (c) the person has become informed about relevant documents in control of, but not actually possessed by, the party and has acquired the documents, or disclosed otherwise in the affidavit;
 - (d) an attached Schedule A lists all relevant, non-privileged documents that are actually possessed by the party;
 - (e) the person has arranged for delivery of copies of the listed documents in a printed booklet, or in a readily exchangeable electronic format, that is organized in a way that corresponds to Schedule A;
 - (f) an attached Schedule B provides the date of retention of counsel, claims privilege over communications with counsel unless the party waives the privilege, and provides information on all claims that a document, other than a communication with counsel, is privileged in favour of the party or another person;
 - (g) an attached Schedule C describes each relevant document in the party's control that has not yet been acquired by the party and provides the party's undertaking to acquire the document or the reasons for not doing so;
 - (h) an attached Schedule D accurately describes any document once, but no longer, in the control of the party;
 - (i) to the best of the person's knowledge, the party has never had control of a relevant document except as disclosed in the affidavit;
 - (j) disclosure of electronic information is the subject of another affidavit, an agreement, or directions of a judge.
- (4) The certificate attached to the affidavit must be of one of the following kinds:
- (a) if the person is represented by counsel, a certificate signed by counsel stating that counsel has advised the person providing the affidavit of the duties under Rule 14 - Disclosure and Discovery in General, this Rule 15, and Rule 16 - Disclosure of Electronic Information to search for, make diligent efforts to become informed about, acquire, sort, and disclose relevant documents and electronic information, and of the kinds of documents and electronic information that may be relevant in the proceeding;
 - (b) if the party is acting on their own, a certificate of the party that they have taken any assistance they require to understand the duties under Rule 14 - Disclosure and Discovery in General, this Rule 15, and Rule 16 - Disclosure of Electronic Information to search for, make diligent efforts to become informed about, acquire, sort, and disclose relevant documents and electronic information, and the party understands the duties.
- (5) Each schedule attached to the affidavit must describe a document so it is easily identifiable from the description, and if copies of documents are to be delivered in an electronic format rather than a printed booklet, Schedule A must conform with Rule 16.09(3)(d).
- (6) The affidavit disclosing documents may be in Form 15.03A for an individual party, or Form 15.03B for a corporate party.

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Forms

Affidavit Disclosing Documents (Individual)(15.03A), Affidavit Disclosing Documents (Corporation)(15.03B).

15.04 - Supplemental affidavit disclosing documents

A party who delivers an affidavit disclosing documents must, immediately on becoming aware of any of the following, deliver to each other party a supplementary affidavit disclosing documents:

- (a) a relevant document in the actual possession of the party is not covered by the affidavit disclosing documents;
- (b) a further relevant document is found or acquired;
- (c) a relevant document claimed to be privileged is no longer claimed to be privileged.

15.05 - Book or electronic copy of documents

- (1) A party who delivers an affidavit disclosing documents, or a supplementary affidavit, must, at the same time, deliver to each other party a book of copies of all documents listed in Schedule A of the affidavit, or referred to in the supplementary affidavit.
- (2) The documents must be provided in a sequence, and with identifying numbers or letters, so that they are easily matched with the list in the Schedule.
- (3) A document that cannot be bound conveniently into a booklet, may be placed in a sleeve or delivered separately with a cross-reference in the booklet.
- (4) Instead of a booklet, a party to a proceeding in which all parties have means for reading electronic information may scan the documents and deliver copies in a readily exchangeable electronic format.
- (5) A party who delivers documents in an electronic format must comply with Rule 16.12, of Rule 16 - Disclosure of Electronic Information, as if the scanned documents were electronic information, and the party must provide in the party's affidavit of documents a Schedule "A" that conforms with Rule 16.09(3)(d).

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15.06 - Disclosure in an application

- (1) A party to a contested application must deliver to each other party copies of all documents required to be disclosed under this Rule 15 and a list by which the documents can be identified and put in order.
- (2) The copies must be delivered in a booklet, or in a readily exchangeable electronic format.
- (3) A judge may give directions for delivery of a list identifying, or an affidavit disclosing, documents in an application.

15.07 - Directions for disclosure

- (1) A judge may give directions for disclosure of documents, and the directions prevail over this Rule 15.
- (2) A judge may not give directions limiting disclosure or production of a relevant document, unless the presumption in Rule 14.08, of Rule 14 - Disclosure and Discovery in General, is rebutted.

Rule 16 - Disclosure of Electronic Information

Educational Notes

Rule 16 creates a comprehensive process for preserving, sorting, and disclosing electronic information in litigation and will effect enormous changes in the litigation process. It is the first such Rule in Canada, although British Columbia, Ontario and Alberta all have practice directions or notes governing electronic disclosure, and the United States amended their *Federal Rules of Civil Procedure* to address electronic discovery in 2006.

Before getting into the mechanics of R.16 it is useful to understand the Rule's conceptual foundation in the Sedona Principles.

Sedona Principles

Many (perhaps all) electronic disclosure Rules are based on principles first articulated by the Sedona Conference, an American think-tank founded to address cutting edge issues in complex litigation, among other legal subjects. The first Sedona Working Group was established in 2001 to consider electronic document retention and production in the litigation process. Canada established its own Sedona e-discovery Working Group in 2006. The group released *The Sedona Canada Principles* in January 2008. Nova Scotia's R.16 is based on Sedona Principles.

The twelve key Sedona Principles addressing electronic discovery are reprinted below. The full 43 page document explaining them in detail is available free at www.thesedonaconference.org and through the University of Montreal's e-discovery portal at www.lexum.umontreal.ca/e-discovery.

The Sedona Canada Principles

Addressing Electronic Discovery

Principle 1: Electronically stored information is discoverable.

Principle 2: In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

Principle 3: As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.

Principle 4: Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.

Principle 5: The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.

Principle 6: A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.

Principle 7: A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.

Principle 8: Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.

Principle 9: During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.

Principle 10: During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.

Principle 11: Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.

Principle 12: The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

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Six Key Points about Electronic Information

Navigating e-discovery requires a certain comfort level with technology that was never previously necessary to a litigation practice. Here are six key points that every lawyer needs to know about electronic information:

1. Electronic information is everywhere

The first key point to understand is that relevant electronic information can be found in a dizzying array of sources, from the obvious, such as computers, CDs, or handheld flash drives, to less obvious sources such as Blackberries and other personal digital assistants, memory in printers and fax machines, recorded voice mail messages, and home computers, all of which must now be canvassed for relevant electronic information.

2. Electronic information is nearly impossible to delete

A second key point is that the vast majority of electronic information is never truly deleted. Most people are aware that files can be retrieved from a computer's recycle bin, but even files that have been deleted remain on the system and can be recovered until they are overwritten by a new file, which may never occur. Even after it is overwritten, information may still be recoverable; it is just more difficult. Deleted information may also be available through archived backup tapes.

3. Every electronic file contains hidden information called metadata

A third key point to understand is that computers store far more information about documents, files or e-mail than is ever printed. This largely hidden information is called metadata, meaning data about data. Metadata includes information such as who created a document and on what computer, when the document was last modified, earlier versions of documents that include deleted text, a history of websites visited, blind copy recipients of e-mail messages, information about when an e-mail was opened, or forwarded. Metadata can assist in determining authenticity, such as where a witness denies sending an e-mail. In many cases, none of this information is relevant, but it can also make or break a case, providing crucial proof of a fact in issue. Understanding when metadata is relevant is one of the biggest challenges in electronic discovery.

4. While difficult to delete, some electronic information is easily destroyed

A fourth key point is that despite the near impossibility of deleting electronic information, the information itself can be fragile. Merely accessing or moving data can destroy it. Turning on a computer can alter hundreds of files stored on it. Opening a word processing document to see if it is relevant destroys metadata about when it was last accessed. The solution is to have an information technology specialist create a mirror image of the information stored on the computer in a timely way.

5. Old electronic information may be difficult or impossible to access

A fifth point relates to archived data and obsolete computer systems. Information created or stored years ago may be difficult or impossible to access, due to degradation of backup tapes, or loss of a crucial computer or software necessary to access the information.

6. The amount of available electronic information vastly exceeds information available on paper

The sixth and final point about electronic information relates to volume. Electronic documents are easily created and vastly outnumber paper documents. Many people now send far more e-mail and text messages than letters or faxes, and much of this information may never reach print. A single computer with a 400 gigabyte hard drive can hold 40 million pages of information. The sheer volume of electronic information in a case can produce many duplicate files.

These six points are only the tip of a very large electronic iceberg. The practice tips section for R.16 contains some suggestions for further reading on e-discovery issues.

How this Rule Works

Virtually every action and application will now require two affidavits from each party: one disclosing documents under R.15, and a second disclosing electronic information under R.16.

Tailoring Electronic Disclosure to each Case

A central theme running through R.16 is the ability to tailor the preservation and disclosure of electronic information to the requirements of a particular case. Rules 16.01 and 16.04 allow the parties to agree on preservation and disclosure obligations more extensive, or less extensive, than those that R.16 provides. Rule 16.05 allows this agreement to trump R.15 and R.16. Rule 16.01(2)(c) allows a judge to give directions where the parties cannot reach agreement and the default rules cannot be complied with. Under R.16.14(1) those directions also trump R.16.

Preserving Electronic Information

Rule 16.02 addresses the obligation to preserve relevant electronic information when required to do so by law. Rule 16.02 sets out the characteristics of information that must be preserved and R.16.02(4) specifies that a party must “exactly copy” the relevant information by creating a mirror image that preserves all of the associated metadata. (The term “exactly copy” is defined in R.14.02(1)). While the cost of creating an exact copy is not great, the work is technical and clients may need to engage information technology specialists to comply with R.16.02(4).

Rule 16.02(5) to (7) create an exception for rapidly changing databases or files (such as inventory), but allow for a motion to freeze this information if necessary.

Motions for all types of preservation orders are made under R.16.02(8).

Disclosing Electronic Information

Rule 16.03 sets out the disclosure obligations of parties in actions and applications:

- they must make diligent efforts to inform themselves about relevant electronic information currently or previously in their control;
- they must search for relevant information, sort it, and either disclose it or claim privilege. “Sort” is defined in R.14.02(1);
- they must acquire and disclose relevant information accessible only through a custodian;
- they must disclose details about any computer or storage medium no longer in their possession if it could contain relevant information;
- they must disclose information about any deletion or destruction of relevant information;
- they must disclose all claims of privilege.

As with documents, the obligation to disclose electronic information is ongoing under R.16.03(4) and R.16.10.

Default Disclosure Rules

A party who cannot comply with R.16 must immediately notify each other party and provide a reason (R.16.06(2)), and all parties must then negotiate in good faith with a view to reaching an agreement. If no agreement is forthcoming in a reasonable time, the defaulting party must make a motion for directions under R.16.14.

Default Rules for Actions

Rules 16.07-16.11 and R.16.13 set out default disclosure rules for actions in which the parties cannot agree on electronic disclosure. Rule 16.07 sets the same deadline for delivering both affidavits: 45 days after the close of pleadings.

Rule 16 - Disclosure of Electronic Information

Rule 16.08(1) defines a “sufficient search” for electronic information in an action: first identifying sources of electronic information in a party’s possession, and then sources they do not actually possess, performing all reasonable searches, including keyword searches, to find the relevant electronic information, identifying people who are likely to have relevant electronic information, and then taking reasonable steps to acquire it. In accordance with Sedona Principles, parties are generally not required to search free space for file fragments, attempt to restore deleted files, or search backup tapes containing only duplicate information.

Rule 16.09 sets out the required content for the affidavit disclosing electronic information, which, like the affidavit disclosing documents, is now sworn or affirmed by the party. The affidavit has four schedules that correspond to schedules A-D in the affidavit disclosing documents. The affidavit must include the same certificate required with an affidavit disclosing documents. The affidavit must be accompanied by a copy of the electronic information referred to in schedule A (R.16.11).

Default Rules for Applications

Rules 16.12-16.13 set out simplified default disclosure rules for applications where the parties cannot agree on electronic disclosure. The Rule does not require the exchange of affidavits. Instead, each party must deliver a copy of the relevant electronic information preserved under R.16.02 with a description that conforms to schedule A of the affidavit. Rule 16.12(3) then obligates the party to answer questions in writing or on discovery about any claim for privilege, measures taken to preserve or acquire relevant information, details of searches made or potential sources of new information. As with actions, in applications, the disclosure obligation is ongoing (R.16.12(5)).

No deadline for disclosure is specified in R.16, as it would likely be set in each case during the motion for directions.

Spoilation

Spoilation is the destruction, mutilation, alteration or concealment of evidence. Rule 16.13 provides that deliberate or reckless deletion, expunging, or destruction of relevant electronic information is an abuse of process dealt with under R.88. Inclusion of reckless deletion indicates that malicious intent is not always required – negligence may be sufficient.

Rule 16.15(2) elaborates that a person who loses relevant electronic information as a result of good faith routine operation of a computer does not commit an abuse of process.

Failure to comply with an order directing preservation of electronic information is dealt with under Rule 89 – Contempt. Rule 16.13 applies to both actions and applications.

Highlights of Changes

The previous Rules addressed electronic disclosure only indirectly, through the definition of “document” in the previous R.1.05(i). “Document” was defined to include “any information generated, recorded or stored by means of any device, including, but not limited to, computers and digital media.”

Practice Tips

Many lawyers will face a steep learning curve to understand enough about technology to navigate R.16 strategically and be able to explain R.16's obligations to their clients. Firms will need to develop close associations with IT professionals who can advise on the technical side of the e-discovery process.

The Rules allow counsel to tailor their clients' e-discovery obligations in a manner proportionate to issues and amount at stake in the litigation, but knowing when to agree and when to refuse compromise on the default Rules will require a deep understanding the technology involved and the role that electronic information plays in the case. Insisting on the default Rules in every case will cost clients money unnecessarily; compromising on disclosure obligations inappropriately can mean that a smoking gun goes undiscovered.

Two immediate steps counsel should take when the duty to preserve arises are first, to ensure the client is aware of this duty and determine its scope so that the client can preserve relevant electronic information and limit vulnerability to a claim of spoliation. The second step is to send a preservation letter to the opposing counsel or party setting out your client's expectations for the opposing party's preservation of relevant electronic information.

Corporate clients will need advice on implementing or updating their electronic document management protocols to ensure that they will be able to comply with R.16. Not all deletion of electronic information constitutes spoliation. Case law is clear that corporations remain free to implement routine document destruction protocols, but such protocols should provide for immediate suspension when litigation, government investigation or audit is reasonably anticipated. (See Sedona Guideline #5). Clients should be made aware that dusting off and resuming a seldom used document destruction protocol in the face of anticipated litigation is unwise and likely to result in a claim of spoliation.

Further Reading

Every lawyer dealing with e-discovery issues should review Sedona Canada's full 43-page report: The Sedona Conference Working Group 7 (WG7) Sedona Canada, The Sedona Canada Principles: Addressing Electronic Discovery (The Sedona Conference, January 2008) online: www.thesedonaconference.org or www.lexum.umontreal.ca/e-discovery.

Lexum maintains an online e-discovery portal at www.lexum.umontreal.ca/e-discovery/ that includes regularly updated digests of Canadian e-discovery cases.

PracticePRO offers an extensive e-discovery reading list at www.practicepro.ca/practice/SuppRes2eDiscov.asp.

The Ontario Bar Association maintains an e-discovery portal with downloadable model e-discovery precedents including a meet and confer agreement, preservation agreement, advice memos designed for individual and corporate clients, preservation letters suitable for opposing counsel and a self-represented litigant, and a preservation order.

The portal can be found at: http://oba.org/en/publicaffairs_en/e-discovery/e_discovery_en.aspx.

Canadian e-discovery expert Martin Felsky's e-discovery blog tracks the latest developments in the field. It is located at www.ediscoverycanada.com.

Todd J. Burke et.al., *E-Discovery in Canada* (Markham: LexisNexis, 2008) is a useful collection of essays addressing the American experience, Canadian case law, and key e-discovery issues including spoliation, privilege, and cost, along with a lawyer's IT primer. The appendices include reprints of the Ontario e-discovery Guidelines, the BC Practice Direction on electronic evidence, and the Alberta Queen's Bench Civil Practice Note 14: Guidelines for the use of Technology in any Civil Litigation Matter.

16.01 - Scope of Rule 16

- (1) This Rule prescribes duties for preservation of relevant electronic information, which may be expanded or limited by agreement or order.
- (2) This Rule also prescribes duties of disclosure of relevant electronic information and provides for fulfilling those duties in one of the following ways:
 - (a) first, an agreement made by the parties;
 - (b) second, to the extent that an agreement is not made, disclosure according to default Rules;
 - (c) third, if no agreement can be made and the default rules cannot be complied with, directions of a judge under Rule 16.14.
- (3) A party must preserve and disclose electronic information in the control of the party, in accordance with this Rule.

16.02 - Duty to preserve electronic information

- (1) This Rule 16.02 provides for preservation of relevant electronic information after a proceeding is started, and it supplements the obligations established by law to preserve evidence before or after a proceeding is started.
- (2) A party who becomes aware that a proceeding is to be defended or contested, must take measures to preserve relevant electronic information that is of one of the following kinds:
 - (a) it is readily identifiable in a computer, or on a storage medium, the party actually possesses;
 - (b) it is accessible by the party to the exclusion of another party, such as information in a database the party accesses by password on a computer the party does not actually possess.
- (3) Electronic information that is within any of the following descriptions is readily identifiable:
 - (a) it was created, or regularly accessed, by a party during events related to a claim, defence, or ground, and if the information is still accessible;
 - (b) the party finds it while doing anything in connection with the proceeding, such as preparing the party's own case or defence;
 - (c) it is stored under a relevant name;
 - (d) it is capable of being found by performing thorough keyword searches.

Rule 16 - Disclosure of Electronic Information

- (4) The party must exactly copy the relevant electronic information required to be preserved, unless the parties agree or a judge orders otherwise (see the definition of "exactly copy" in Rule 14.02, of Rule 14 - Disclosure and Discovery in General).
- (5) Rules 16.02(1) to (4) do not require a party to freeze a database or file that changes significantly and rapidly in ordinary use, such as a file for inventory control.
- (6) A party may demand that a party who controls a database preserve relevant information in the database, and the party who receives the demand must immediately do one of the following:
 - (a) preserve the information from being overwritten or otherwise altered;
 - (b) explain in writing why the party cannot comply with the demand.
- (7) A party may make a motion for an order requiring another party to preserve information in a database or a file that changes significantly and rapidly in ordinary use.
- (8) A judge may make an order for preservation of relevant electronic information, in accordance with Rule 42 - Preservation Order.

16.03 - Duty to disclose electronic information

- (1) A party to a defended action or a contested application must do each of the following:
 - (a) make diligent efforts to become informed about relevant electronic information the party controls, or once controlled;
 - (b) search for relevant electronic information the party can access to the exclusion of another party, sort the information, and either disclose it or claim it is privileged;
 - (c) acquire and disclose relevant electronic information the party controls but can access only through a custodian who is not an employee or an officer of the party.
- (2) A party must also disclose all of the following about relevant electronic information:
 - (a) a description of a computer or storage medium that the party once actually possessed but no longer actually possesses and that may contain relevant electronic information;
 - (b) information about any deletion or destruction of relevant electronic information of which the party is aware;
 - (c) a claim that electronic information is subject to a privilege in favour of the party or another person, to the extent it is possible to inform another party without infringing the privilege.
- (3) A party must disclose relevant electronic information that has ceased to be privileged or is newly created, discovered, or acquired.

16.04 - Agreement about preservation

The parties may, by agreement, and a judge may, by directions under Rule 16.14, expand or limit a party's duty to preserve electronic information.

16.05 - Agreement for disclosure

- (1) Parties may make an agreement for disclosure of relevant electronic information, and a term of the agreement prevails over an inconsistent provision of Rule 15 - Disclosure of Documents, or this Rule 16.
- (2) A judge may make an order to enforce a term in an agreement for disclosure of electronic information.
- (3) Breach of a term in an agreement for disclosure of electronic information is the same as breach of a Rule for the purpose of Rule 88 - Abuse of Process.

16.06 - Rules for disclosure in default of agreement

- (1) A party to either of the following proceedings must make disclosure of relevant electronic information in accordance with the following default Rules, to the extent there is no agreement on a subject pertaining to the default Rules:
 - (a) a defended action, in accordance with Rules 16.07 to 16.11 and Rule 16.13;
 - (b) a contested application, in accordance with Rules 16.12 and 16.13.
- (2) A party who does not have an agreement covering a subject provided for in the default Rules and determines they cannot fulfill a default duty, or cannot comply with an applicable default Rule, must immediately notify each other party of the inability and reason for it.
- (3) All parties must negotiate in good faith for an agreement under Rule 16.05 as soon as possible after being notified of an inability to fulfill a default duty or comply with a default Rule.
- (4) If agreement is not reached in a reasonable time, the party who cannot fulfill a default duty, or comply with an applicable default Rule, must apply for directions under Rule 16.14.

16.07 - Time for disclosure in an action (default provision)

A party to a defended action must disclose relevant electronic information no more than forty-five days after the day pleadings close.

16.08 - Sufficient search (default provision)

- (1) A party who does all of the following performs a sufficient search for relevant electronic information:
 - (a) identifies computers and storage media the party actually possesses that are likely to contain relevant electronic information;
 - (b) identifies other sources that are likely to contain relevant electronic information, such as a source the party accesses to the exclusion of another party on computers the party does not actually possess;
 - (c) performs all reasonable searches, including thorough keyword searches, to find relevant electronic information in the computers, storage media, or other sources;

Rule 16 - Disclosure of Electronic Information

- (d) identifies persons who hold, or are likely to hold, relevant electronic information the party controls;
 - (e) takes reasonable steps to acquire information from a person identified as holding information the party controls.
- (2) A party performs a sufficient search without searching free space for file fragments, attempting to restore and search deleted files, or searching a backup file or tape containing only duplicate information.

16.09 - Disclosure in an action (default provision)

- (1) A party to a defended action must deliver to each other party an affidavit disclosing relevant electronic information that fulfills the party's duties to make disclosure in the time allowed by Rule 16.07.
- (2) The affidavit must contain the standard heading, be entitled "Affidavit Disclosing Electronic Information (Individual)" or "Affidavit Disclosing Electronic Information (Corporation)", and be sworn or affirmed by an individual party, the litigation guardian of an individual party, or an officer or employee of a corporate party.
- (3) The person making the affidavit must swear to, or affirm, all of the following:
 - (a) the information in an attached certificate of advice or understanding about disclosure duties under this Rule 16 and Rule 15 - Disclosure of Documents, is true;
 - (b) the person has searched, or has supervised a search, for relevant electronic information in computers and storage media the party actually possesses and in sources exclusively accessed by the party;
 - (c) the person has made diligent efforts to become informed about relevant electronic information that is in the control of, but not held by, the party and the person has acquired the information except as disclosed in the affidavits;
 - (d) an attached Schedule A is provided in print and in a readily exchangeable electronic format, describing each discrete item of electronic information according to identification number or letters, date of creation, type of communication or other information, author or author and organization, and recipient;
 - (e) the person has arranged for the electronic information referred to in Schedule A to be prepared in a readily exchangeable electronic format, organized in a way that corresponds with Schedule A, and delivered to each other party;
 - (f) an attached Schedule B provides the date of retention of counsel and claims privilege over communications with counsel, unless the party waives the privilege, and provides information on all claims that a communication, other than a communication with counsel, is privileged in favour of the party or another person;
 - (g) an attached Schedule C provides information about relevant electronic information in the party's control but which the party has not yet found or acquired, and an undertaking to act diligently to find or acquire the information;
 - (h) an attached Schedule D describes relevant electronic information once, but no longer, in the control of the party and provides details about how the party ceased to have control of it;
 - (i) to the best of the person's knowledge, the party has never had control of relevant electronic information except as disclosed in the affidavit;
 - (j) disclosure of documents is the subject of another affidavit.

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- (4) The certificate of advice or understanding attached to the affidavit must be the same as the certificate attached to an affidavit of documents.
- (5) The affidavit may be in Form 16.09A for an individual party, or Form 16.09B for a corporate party.

Forms

Affidavit Disclosing Electronic Information (Corporation)(16.09B), Affidavit Disclosing Electronic Information (Individual)(16.09A).

16.10 - Supplemental affidavit of electronic information in an action (default provision)

A party who delivers an affidavit disclosing electronic information must, immediately on becoming aware of any of the following, deliver to each other party a supplementary affidavit disclosing further electronic information:

- (a) some relevant electronic information in the control of the party is not covered by the affidavit disclosing electronic information;
- (b) further relevant electronic information is found or acquired;
- (c) relevant electronic information claimed to be privileged is no longer claimed to be privileged.

16.11 - Copy of electronic information in an action (default provision)

A party who delivers an affidavit, or supplemental affidavit, disclosing electronic information must, at the same time, deliver to each other party a copy of the electronic information referred to in Schedule A of the affidavit, or in the supplementary affidavit.

16.12 - Making disclosure in an application (default provision)

- (1) A party to an application who becomes aware that the application is contested must, as soon as possible, deliver to each other party copies of electronic information required to be disclosed by Rule 16.03.
- (2) A party to an application who is requested by another party to provide a description of relevant electronic information must, as soon as possible, deliver a description to the requesting party that conforms with the requirements for Schedule A of an affidavit disclosing electronic information.
- (3) The disclosing party must answer questions asked by another party that will inform the other party about any of the following subjects:
 - (a) a claim for privilege, to the extent information can be given without infringing the privilege;
 - (b) measures the disclosing party has taken to preserve, or acquire, relevant electronic information in the control of the party;
 - (c) details of the searches made by the disclosing party;
 - (d) details about a source of electronic information that may be used to produce new, relevant information;

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- (e) any information that could reasonably lead to the location and preservation of relevant electronic information that has not been acquired.
- (4) The inquiring party may require that the questions and answers be put in writing, recorded, or asked and answered at a discovery.
- (5) A party to an application must copy relevant electronic information immediately on becoming aware that the information has ceased to be privileged, is newly created, discovered, or acquired, or was not disclosed when it should have been disclosed, and deliver a copy to each other party.

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16.13 - Deletion or destruction of electronic information

- (1) Deliberate or reckless deletion of relevant electronic information, expunging deleted information, or destruction of anything containing relevant electronic information after a proceeding is started may be dealt with under Rule 88 - Abuse of Process.
- (2) Failure to comply with an order directing preservation of electronic information may be dealt with under Rule 89 - Contempt.

16.14 - Directions for disclosure

- (1) A judge may give directions for disclosure of relevant electronic information, and the directions prevail over other provisions in this Rule 16.
- (2) The default Rules are not a guide for directions.
- (3) A judge may limit preservation or disclosure in an action only to the extent the presumption in Rule 14.08, of Rule 14 - Disclosure and Discovery in General, is rebutted.

16.15 - When loss of electronic information may be abuse

- (1) A party who deliberately or recklessly does any of the following may be dealt with under Rule 88 - Abuse of Process:
 - (a) deletes relevant electronic information;
 - (b) expunges deleted, relevant, electronic information;
 - (c) destroys a thing that contains relevant electronic information.
- (2) A party who acts in good faith and who loses relevant electronic information as a result of the routine operation of a computer or database does not commit an abuse of process.

Rule 17 - Disclosure of Other Things

Educational Notes

This Rule deals with disclosure of land, fixtures, moveables, and anything else that does not fall under R.15 or R.16. Unlike the previous R.24 it obligates a party to make disclosure no more than 45 days after the close of pleadings by delivering a description of the thing, stating how it is relevant, where it is, who controls it, and how and when it may be inspected. Rule 17.04 allows a party to make a demand for inspection giving the other party 10 days to arrange a time and place or give reasons for refusing. Rule 17.05 permits a judge to order an inspection that can involve an expert and include testing, taking of samples, or conducting experiments. Unlike R.21, R.17.06 does not address the privilege implications of involving an expert in the inspection.

Rule 17 is more comprehensive than the previous Rule both in terms of the types of items that can be inspected (everything from examining burned out buildings to collecting DNA samples) and the manner in which the inspection may take place.

17.01 - Scope of Rule 17

- (1) This Rule provides for disclosure and inspection of things other than documents and electronic information, including all of the following:
 - (a) land and fixtures, such as a building, structure, and fixed machinery;
 - (b) moveables, such as a machine, model, or sample;
 - (c) anything containing information that is not a document or electronic information.
- (2) A person must disclose all relevant things in the control of the person, and a party may inspect a relevant thing, in accordance with this Rule.

17.02 - When to disclose

A party to a defended action or contested application must make disclosure of a thing to which this Rule 17 applies at the following times, in the following circumstances:

- (a) no more than forty-five days after the day pleadings close, when the evidence is in the control of the party at the beginning of the proceeding;
- (b) immediately after the evidence comes into the control of the party, or ceases to be privileged, when either happens after the beginning of the proceeding;
- (c) immediately on the party becoming aware that the party failed to disclose a thing that should have been disclosed.

17.03 - How to make disclosure

The party must make the disclosure by delivering to the other party a written description of the thing, including all of the following:

- (a) how it is relevant;
- (b) where it is, and who has physical control of it;

Rule 17 - Disclosure of Other Things

- (c) how and when it may be inspected.

17.04 - Demand for inspection

- (1) A party may deliver to another party a demand for inspection of a relevant thing in the control of the other party.
- (2) A party to whom a demand for inspection is delivered must do either of the following no more than ten days after the day the demand is delivered:
 - (a) arrange a convenient time, date, and place for the inspection;
 - (b) refuse the demand and give grounds.

17.05 - Order for inspection

- (1) A judge may order a person to permit inspection of a thing, and the order may include terms to assist the inspection, including terms on any of the following subjects:
 - (a) permission to enter on lands and inspect the land, a fixture, or a movable;
 - (b) a time, date, and place for the inspection;
 - (c) an injunction or other order to secure the cooperation of a named or unnamed person;
 - (d) a requirement that a person deliver a thing to a person or place.
- (2) An order for inspection may permit testing, taking a sample, or conducting an experiment.
- (3) An order for inspection may include the statement, "Failure to obey this order may be punished as contempt of court."

17.06 - Expert's report

A party who inspects a thing under a demand or order, and who obtains from an expert an agreement to prepare a report under Rule 55 - Expert Opinion, may involve the expert in the inspection, including performing, taking, or making a permitted test, sample, or experiment.

Rule 18 - Discovery

Educational Notes

How This Rule Works

Rule 18.01 allows for oral discovery of parties and non-parties by agreement, under discovery subpoena (formerly a notice of examination), or by court order. Rule 18.03 reminds counsel that witness interviews and taking of sworn statements are alternatives to oral discovery.

Experts retained by a party are not subject to discovery except by consent or through written questions, as provided in Rule 55 – Expert Opinion.

Discovery Subpoenas and Orders

To obtain a discovery subpoena from the prothonotary, a party must file representations that they have disclosed their documents and electronic information, and that the discovery will promote the just, speedy, and inexpensive resolution of the proceeding. The representations must concisely state the party's grounds for this belief and explain why a discovery subpoena is required instead of, or in addition to, an agreement. Forms 18.04B and 18.05B set out the required representations.

Rule 18.24 sets out some examples of situations where discovery may be necessary, such as:

- a. a non-party witness who will not consent to be interviewed;
- b. an ill-informed designated manager;
- c. as a last resort to deal with unfulfilled undertakings; or
- d. a witness who will be too ill to attend trial where commission evidence would be inappropriate without discovery.

All of the examples suggest a relatively high threshold to meet the representations required to obtain a discovery subpoena.

If the threshold is met, the prothonotary will issue a discovery subpoena for any party, or for the designated manager and one other officer or employee of a corporate party on 10 days notice to the witness and all other parties (R.18.04(6) and (7)). (The notice period under the previous R.18.05 was 5 days.) Corporate parties are under a duty to take "all reasonable steps" to make the officer or employee available (R.18.04(8)).

Rule 18.04 allows for discovery of at least a second officer or employee is possible after discovering the designated manager and the first officer or employee, with the addition of an undertaking in R.18.04(4) to pay for the court reporter, transcript, and the witness's reasonable expenses including transportation, accommodation and meals.

Rule 18.05 allows for discovery of non-parties on providing the usual representations, plus an undertaking in R.18.05(2)(b) to pay for the court reporter, transcript, the witness's reasonable expenses including transportation, accommodation and meals, and a witness fee of \$35 per hour. The Rule provides for "immediate" expense reimbursement and payment of the fee "immediately" on conclusion of the discovery. If the witness requires his or her own counsel, the party who obtained the subpoena may also be ordered to pay counsel fees for the witness under R.18.05(3). The Rule does

not provide for cost sharing among all parties examining the witness – it appears that the party obtaining the subpoena is responsible for all of the associated costs.

Rule 18.08 allows a judge to revoke additional discovery subpoenas if further discovery would not promote the just, speedy, and inexpensive resolution of the proceeding. Normally the applicant would have the onus, but this is not specifically stated in the Rule.

Rules 18.09-18.11 allow for discovery on motion to a judge in an application, or on motion to the prothonotary, with a judge's permission (which would likely be sought at the initial motion for directions.) There is more flexibility around payment of expenses and "attendance fees" or "witness fees" and designation of a manager for discovery.

Discovery is available by order under R.18.12, including before a proceeding has been started, if evidence needs to be preserved or another court requests assistance. Rule 18.12(3) allows for discovery of a witness out of the jurisdiction by order, particularly where a discovery subpoena cannot be enforced. The Nova Scotia court may request assistance from another court under R.18.14(2).

Conduct of the Discovery

Rules 18.02 and 18.03(5) codify best practices, such as giving careful consideration to whether the discovery is necessary, cooperating to hold it quickly and conveniently, ensuring witnesses attend properly prepared and with refreshed recollection, and conducting the discovery appropriately.

The new R.18.14 is more flexible about the place for discovery and does not specify default locations as did the previous R.18.03 and R.18.04. Rule 18.15 allows for audio-visual recording on agreement or order.

The party who first requests discovery or obtains a subpoena has conduct of the discovery and may direct the order in which the parties will question a witness (R.18.16(1)). Where more than one witness is present, the order is determined by the party who requests any of the discoveries or obtains any subpoena, and whose name appears first on the heading (R.18.16(2)).

Rule 18.13 sets out the proper scope of discovery. It requires a witness to answer every question asking for relevant evidence or information likely to lead to relevant evidence, and to produce relevant documents at the discovery or later.

Rule 18.17 addresses objections. It codifies the current practice of instructing a witness not to answer a question where there has been an objection and requires the objecting counsel to state the grounds for the objection and describe any series of questions or subject to which the objection would generally apply (R.18.17(5)). In response, the questioning party may withdraw the question, reserve the question and continue the discovery, or adjourn the discovery for a motion, if there is no reasonable alternative.

Rule 18.17(5)(a) only mentions relevance and privilege as proper bases for discovery objections but is not intended to limit or change the common law relating to discovery objections.

Rule 18.18 allows for discovery undertakings for documents, electronic information and other things and permits adjournment of the discovery as of right, pending production. Rule 18.16 sets a 60 day time limit to comply with undertakings and R.18.18(4) allows

a judge to relieve the obligation to produce if a person can rebut the presumption for disclosure.

Rule 18.19 continues the ongoing duty to correct erroneous or incomplete answers. It requires immediate notification of all parties and provision of a signed written statement with the correct or complete information. The Rule imposes a duty on corporate parties to supply or correct such information at least one day before the finish date or day of hearing an application or risk exclusion of the evidence or costs consequences.

Abuses and Remedies

Under the previous R.18.15 a party who refused to attend discovery, answer questions, or produce documents stood to be found in contempt or have his or her pleadings struck, and allowed the court to make whatever other order was just. The broad range of remedies continues under R.18.22. Rule 18.22 requires a contempt finding under R.89, but once this finding is made, R.89.13 incorporates all of the remedies available for abuse of process under R.88 as well as those available for contempt of court.

Rule 18.23 allows a party who believes a discovery is being conducted abusively to adjourn it by undertaking to bring a motion under R.18.23(2) to terminate or limit the discovery. The examples of abusive conduct are found in R.18.23(3) all relate to abusive questioning. The remedy for abusive use of objections lies in a motion to determine an objection under R.18.17(7). Other types of abusive conduct by counsel for the witness may be addressed through a motion for supervision by a judge under R.18.23, or for directions governing the conduct of the discovery under R.18.17(8).

Uses of Discovery Evidence

Rule 18.20 codifies current practice on the use of discovery transcripts and R.18.21 allows for reading in or tendering excerpts at trial or hearing. Unlike the previous R.18.14(2), it does not specifically address an opposing party reading in additional portions of the transcript for context. Rule 39.07 specifically provides that affidavits filed in one proceeding may be used in another to impeach or prove a fact, including through admissible hearsay.

Highlights of Changes

The most significant change to discovery practice is the complete elimination of expert discovery, except by consent.

The nomenclature has changed slightly, in that a notice of examination is now a discovery subpoena. Discovery subpoena forms differ for parties and non-parties.

Another significant change is emphasis on alternate means to gather information, such as interviews, taking sworn or affirmed statements, or discovery by agreement, before resorting to a discovery subpoena. The Rules now require representations from counsel or a party justifying the discovery prior to obtaining a subpoena. The threshold for obtaining a discovery subpoena is higher than for a notice of examination under the previous Rules.

Parties retain the ability to discover additional corporate witnesses and non-parties, but with a much steeper price tag than in the past.

While the previous R.18.14(4) allowed for the use of discovery evidence in some subsequent proceedings, there is no provision for this in the new R.18.

Practice Tips

In order to comply with the requirement for immediate payment of expenses of non-parties, counsel will have to arrange to have cash or a cheque available at the discovery. Note that the witness fees and costs are considerably higher than those required under the *Costs and Fees Act*.

The limitation on expert discovery in R.18.13(5) applies to “an expert retained by a party.” The Rules do not appear to alter the common law relating to the limited situations where opinion evidence may be elicited from a party, corporate representative, or other witness on discovery. See John A. Olah, *The Art and Science of Advocacy* (Toronto: Carswell, 2006) at 5-38.7.

Ontario’s R.31.06(3) specifically permits a discovering party to “obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert’s name and address” except where the opposing party claims privilege over the information.

18.01 - Scope of Rule 18

- (1) This Rule allows a party to question a witness by discovery, unless the question was answered by the witness in response to interrogatories.
- (2) Provisions about discovery in Rule 55 - Expert Opinion, and in Rule 57 - Action for Damages Under \$100,000, prevail over this Rule.
- (3) A party may discover a witness by agreement, under a discovery subpoena, or by order, in accordance with this Rule.

18.02 - Duties of party in an action

- (1) After pleadings close in a defended action, a party must do all of the following:
 - (a) in deciding whether a witness needs to be discovered, consider whether the discovery would promote the just, speedy, and inexpensive resolution of the proceeding;
 - (b) cooperate with each party to organize a required discovery so it is held quickly and conveniently;
 - (c) prepare, or direct officers or employees to prepare, for discovery of the party so that questions are answered with a refreshed memory;
 - (d) become informed before the discovery of all discoverable information reasonably accessible by the party so questions may be answered without delay;
 - (e) make best efforts to conduct discovery so as to further the just, speedy, and inexpensive resolution of the proceeding.
- (2) A party may consider Rule 18.24(1) when determining whether a discovery would promote the just, speedy, and inexpensive resolution of a proceeding for the purpose of Rule 18.02(1)(a), 18.04(2)(b), and 18.05(2)(a)(ii).

18.03 - Interview or discovery by agreement

- (1) Nothing in these Rules prevents a party from interviewing a witness with the agreement of the witness and, if the witness is known to be represented on the subject of the interview, the permission of the witness' lawyer.
- (2) A party may interview a witness who is not a party, or an employee or officer of a party, under oath or affirmation and record the interview or take a sworn or affirmed statement without affecting the admissibility of the witnesses' evidence.
- (3) A party may discover an individual party or an employee or officer of a corporate party by agreement of the party seeking discovery and the party to be discovered.
- (4) A party may discover a witness who is not a party with the agreement of the witness.
- (5) A party who wishes to discover anyone under an agreement must make best efforts to schedule the discovery at a time and place convenient for each party.

18.04 - Discovery subpoena in an action (party)

- (1) A party to an action who provides required representations may obtain a discovery subpoena (party) to discover any of the following witnesses:
 - (a) an individual party;
 - (b) the designated manager and one other officer or employee of a corporate party;
 - (c) further officers and employees, if the party also provides required undertakings to pay expenses.
- (2) A party requesting a discovery subpoena (party) directed to an individual party must provide both of the following representations to the court:
 - (a) that the party is in compliance with Rule 15 - Disclosure of Documents, and Rule 16 - Disclosure of Electronic Information;
 - (b) that the party believes the discovery would promote the just, speedy, and inexpensive resolution of the proceeding, including a concise statement of the grounds for the belief and an explanation of why a discovery subpoena is required instead of, or in addition to, an agreement.
- (3) A party requesting a discovery subpoena (party) directed to a designated manager, or one other officer or employee of a corporate party, must provide all representations required for a subpoena directed to an individual party and a representation that the designated manager, or the other officer or employee, has not yet been discovered in the proceeding.
- (4) A party requesting a discovery subpoena (party) directed to a further officer or employee must provide all of the following representations to the court and file the following undertaking:
 - (a) all representations required for a subpoena directed to an individual party;
 - (b) a representation that the designated manager and one other officer or employee have been discovered;
 - (c) an undertaking to pay the charges of the reporter to record and transcribe the discovery and the reasonable expenses of the witness to attend the discovery, including transportation, accommodation, and meals.
- (5) The subpoena must contain the standard heading, be entitled "Discovery Subpoena (Party)", be issued by the prothonotary, and include all of the following:

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- (a) the name of the witness;
 - (b) if the witness is an individual party, the address for delivery designated by the witness, and, if the witness is an officer or employee of a corporate party, the address for delivery designated by the corporate party;
 - (c) requirements that the witness attend the discovery, answer questions properly asked by a party and bring, or provide access to, described documents, electronic information, or other things;
 - (d) the time, date, and place of the discovery;
 - (e) a warning that failure to obey the subpoena may be punished as contempt of court.
- (6) A party who obtains a discovery subpoena (party) must deliver the original subpoena to the address for delivery of the individual party to be discovered or the party whose officer or employee is to be discovered no less than ten days before the day the discovery is to be held.
- (7) The party who obtains the subpoena must notify each other party by delivering a copy of the subpoena to the other party no less than ten days before the day the discovery is to be held.
- (8) A corporate party whose officer or employee is to be discovered under subpoena must do both of the following:
- (a) deliver a copy of the discovery subpoena (party) to the officer or employee;
 - (b) take all reasonable steps to have the officer or employee attend the discovery.
- (9) The subpoena may be in Form 18.04A.
- (10) The undertakings and representations may be attached to, or printed on the back of, the subpoena and they may be in Form 18.04B.

Forms

Representations and undertaking (party)(18.04B), Discovery Subpoena (Party) (18.04A).

18.05 - Discovery subpoena in an action (non-party)

- (1) A party to an action who provides required representations and undertakings may obtain a discovery subpoena directed to a witness who is not a party, an officer of a party, or an employee of a party.
- (2) A party requesting a discovery subpoena directed to a non-party witness must provide both of the following representations to the court and file all of the following undertakings:
- (a) representations that
 - (i) the party is in compliance with Rule 15 - Disclosure of Documents, and Rule 16 - Disclosure of Electronic Information,
 - (ii) the party believes the discovery would promote the just, speedy, and inexpensive resolution of the proceeding, including a concise statement of the grounds for the belief and an explanation of why a discovery subpoena is required instead of, or in addition to, an interview or a discovery by agreement;
 - (b) undertakings to pay
 - (i) all charges of the reporter to record and transcribe the discovery,

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- (ii) immediately on presentation of receipts or other evidence, the reasonable expenses of the witness to attend the discovery, including transportation, accommodation, and meals,
 - (iii) immediately on conclusion of the discovery, an attendance fee for the witness of thirty-five dollars per hour.
- (3) A judge who is satisfied that it is necessary for a non-party witness to be represented by counsel at a discovery held under subpoena may order a party who obtains the discovery subpoena to pay for the attendance at the discovery of the witness' counsel.
- (4) The subpoena must contain the standard heading, be entitled "Discovery Subpoena (Non-party)", be issued by the prothonotary, and include all of the following:
 - (a) the name of the witness and the community in which the witness resides;
 - (b) requirements that the witness attend the discovery, answer questions properly asked by a party, and bring, or provide access to, described documents, electronic information or other things;
 - (c) the time, date, and place of the discovery;
 - (d) a warning that failure to obey the subpoena may be punished as a contempt of court;
 - (e) notice that the witness may make a motion to revoke the subpoena no less than two days before the day the discovery is to be held;
 - (f) a statement of the witness' rights to be reimbursed expenses, be paid a witness fee, and have counsel present.
- (5) The discovery subpoena (non-party) may be in Form 18.05A.
- (6) The undertakings and representations may be attached to, or printed on the back of, the subpoena and they may be in Form 18.05B.

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Forms

Representations and undertaking (non-party)(18.05B), Discovery Subpoena (Non-party)(18.05A).

18.06 - Notice of discovery of non-party in an action

A party entitled by agreement or subpoena to discover a non-party must do each of the following no less than ten days before the day the discovery is to be held:

- (a) if the discovery is by subpoena, deliver the original of the discovery subpoena (non-party) to the witness personally;
- (b) if the discovery is by agreement, deliver written confirmation of the agreement to the residence or business address of the witness, which confirmation must include the time, date, and place of the discovery, the names of the parties entitled to question the witness, the names of each counsel, and a record of the arrangements for reimbursing the witness' expenses and attendance fee;
- (c) notify each other party by delivering a copy of the confirmation or subpoena.

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18.07 - Waiving a discovery subpoena in an action

A party who obtains a discovery subpoena in an action may waive compliance with the subpoena by delivering a notice to all parties, and to a non-party witness under subpoena to the discovery, immediately on deciding to waive the discovery.

18.08 - Revoking a discovery subpoena in an action

- (1) A judge may revoke a discovery subpoena that results from, or would lead to, an abuse of process in an action.
- (2) A judge may revoke a discovery subpoena (party) issued in an action to an officer or employee of a corporate party, if both of the following apply:
 - (a) two of the corporate party's employees or officers have already been discovered;
 - (b) the further discovery would not promote the just, speedy, and inexpensive resolution of the proceeding.
- (3) A judge may revoke a discovery subpoena (non-party) that would lead to a discovery that does not promote the just, speedy, and inexpensive resolution of an action.

18.09 - Discovery in an application

A party to an application may discover another party, an officer or employee of another party, or a non-party witness by agreement of all parties and any non-party witness, or under a discovery subpoena (application).

18.10 - Approval and directions

- (1) A party may make a motion for an order approving the issuance of a discovery subpoena (application) after the notice of application is filed.
- (2) An order approving the issuance of a discovery subpoena (application) may provide for any of the following:
 - (a) a method for delivery of the subpoena to the witness and any respondent who is within time for filing a notice of contest but has not yet designated an address for delivery of documents;
 - (b) payment of the expenses of recording and transcribing the examination;
 - (c) reimbursement of a non-party witness' transportation, accommodation, and meals and payment of an attendance fee;
 - (d) the obligation of a corporate party to produce a witness who is an officer or employee of a corporate party;
 - (e) a right to make a motion to revoke the subpoena;
 - (f) any other terms governing the discovery.
- (3) A judge who approves the issuing of a discovery subpoena in an application may require the party who obtains the subpoena to file an undertaking to indemnify the witness for the expenses of attending the discovery and to pay witness fees.
- (4) A judge may impose on parties to an application duties to cooperate in the organization of discovery, prepare for discovery, or become informed before discovery.

- (5) A judge may require a corporate party to designate a manager who must become informed for the purpose of discovery in an application.

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18.11 - Discovery subpoena for discovery approved in application

- (1) The prothonotary may only issue a discovery subpoena in an application with the permission of a judge.
- (2) The subpoena must contain the standard heading, be entitled "Discovery Subpoena (Application)", be issued by the prothonotary, and include all of the following:
- (a) the name of the witness and the designated address of a party witness or the name of the community in which a non-party witness resides;
 - (b) requirements that the witness attend the discovery, answer questions properly asked by a party, and bring, or provide access to, described documents, electronic information, or other things;
 - (c) the time, date, and place of the discovery;
 - (d) a warning that failure to obey the subpoena may be punished as a contempt of court.
- (3) The discovery subpoena (application) may be in Form 18.11.

Forms

Discovery Subpoena (Application)(18.11).

18.12 - Discovery by order

- (1) A judge may order a witness or a custodian of a document, electronic information, or other thing to submit to discovery.
- (2) A judge may order discovery before a proceeding has started in one of the following circumstances:
- (a) the party who moves for the discovery wishes to start a proceeding but is prevented from doing so immediately, and evidence needs to be preserved;
 - (b) a proceeding is likely to be started against the party who moves for the discovery, and evidence needs to be preserved;
 - (c) a court outside Nova Scotia requests assistance.
- (3) A judge may order a discovery during a proceeding if both of the following apply:
- (a) the person to be discovered is in a place outside Nova Scotia, and a discovery subpoena cannot be enforced, but an order would be enforced or obeyed;
 - (b) the proceeding cannot be determined justly without the discovery.
- (4) Discovery may be held after a proceeding has concluded in accordance with Rule 79 - Enforcement by Execution Order.

18.13 - Scope of discovery

- (1) A witness at a discovery must answer every question that asks for relevant evidence or information that is likely to lead to relevant evidence.
- (2) A witness at a discovery must produce, or provide access to, a document, electronic information, or other thing in the witness' control that is relevant or provides information that is likely to lead to relevant evidence.
- (3) A witness who cannot comply with Rule 18.13(2) may be required to make production, or provide access, after the discovery or at a time, date, and place to which the discovery is adjourned under Rule 18.18.
- (4) A party who withholds privileged information but decides to waive the privilege must disclose the information to each party and submit to discovery if required by another party.
- (5) An expert retained by a party is not subject to discovery, except as permitted under Rule 55 - Expert Opinion.

N.S. Gaz. Pt. 1, 12/10/08

Annotations

The plaintiff claimed they were promised that a certain coating product, Sternflex, would not crack when applied to their bridge's surface. It failed and the plaintiff brought this action. A subsequent product applied to the bridge (Transpo 48), also failed. The applicants (third parties) said Sternflex failed because it was not intended for surfaces with movement and the plaintiff had not properly informed the suppliers about the bridge's movement. They applied for an order under Rule 15.02(1) directing the plaintiff to disclose all documents related to the failure and repair of Transpo 48. They felt the question of whether movement caused Transpo 48 to fail was relevant to the determination of whether Sternflex failed for the same reason. The plaintiff resisted, arguing the documents were irrelevant given the narrow scope of their claim for damages (the cost of replacing Sternflex and related expenses). *Held*, the documents must be disclosed. The test under the new *Rules* (found in Rule 14.01(1)(b)) is more stringent than the old test. It establishes a threshold of relevancy at trial; however, the court must be mindful that at the pre-trial stage parties are still investigating to assess if there is a basis to defend the claim(s). Rule 15.02 requires parties to disclose all documents that are "likely to lead to relevant evidence" (see Rule 18.13). In defining "likely to lead to relevant evidence," Justice LeBlanc looked to the dictionary meaning of "likely" (which is "highly probable"). Looking at the pleadings, the documents could support the allegation that the failure of the Sternflex was attributable to the bridge and not the products or their installation. It is highly probable that this information would be relevant at trial.

Halifax Dartmouth Bridge Commission v. Walter Construction Corp. et al., [2009 NSSC 403](#)

18.14 - Place of discovery

- (1) A discovery may be held at any place in or outside the province.
- (2) A judge may request the assistance of a court or another authority outside the province for holding a discovery and securing the attendance of a witness at a discovery.
- (3) A party proposing to examine a non-party witness must endeavor to agree with the witness and the other parties on a place for discovery.

Rule 18 - Discovery

- (4) A judge may designate a place for a discovery to be held.
- (5) A discovery subpoena must name either the agreed place, the place designated by a judge, or a place that is convenient for the witness.

18.15 - Recording discovery

- (1) A discovery must be recorded in a way suitable for accurate transcription.
- (2) The parties and the witness may agree, or a judge may order, that a discovery be recorded audio-visually.

18.16 - Conduct of discovery

- (1) A party at a discovery must abide by both of the following rules for conduct of discovery, unless the parties agree or a judge directs otherwise:
 - (a) the party who obtains a discovery subpoena or who first requests a discovery held by agreement has conduct of the discovery, including directing the order in which the parties will question the witness;
 - (b) the order in which discoveries will be held when more than one witness is present for discovery at the same time may be determined by the party who requests any of the discoveries or obtains any subpoena, and whose name appears first in the heading.
- (2) Each party is entitled to attend a discovery.
- (3) A court reporter, or a person competent to log and record testimony, must accurately record the communications at the discovery, mark exhibits, and log questioning of witnesses, exhibits produced, undertakings made, adjournments, and the conclusion.
- (4) For the purpose of Section 64 of the *Evidence Act*, Section 26 of the *Interpretation Act*, and Section 49 of the *Judicature Act*, the court reporter may administer oaths and affirmations at the discovery.
- (5) Translation or interpretation must be in accordance with Rule 48 - Translation, Interpretation, and Assistance.
- (6) A party who undertakes to do anything in the course of a discovery must perform the undertaking no more than sixty days after the day the undertaking is made, unless the parties agree or a judge directs otherwise.

18.17 - Objections to questions at discovery

- (1) Making no objection to a question, or making an objection but giving an answer, at a discovery is not an admission that the subject of the question, or the answer, is admissible.
- (2) Withdrawing a question is not an admission that the subject of the question is inadmissible.
- (3) The only person who may object to a question is the person who is being questioned, a person who claims privilege over the information to be given in answer to the question, or a party whose officer or employee is being questioned.
- (4) A person who is represented by counsel must make an objection through counsel.

Rule 18 - Discovery

- (5) A party who objects to a question must do both of the following:
 - (a) state why the party contends the subject of the question is irrelevant, will not lead to relevant evidence, or is privileged;
 - (b) provide a description of any series of questions, or of any subject for examination, to which the objection would generally apply.
- (6) The party questioning must respond to an objection in one of the following ways:
 - (a) withdraw the question;
 - (b) continue with the discovery, if that is possible, and reserve the question, line of questions, or subject for ruling by a judge;
 - (c) adjourn the discovery, if there is no reasonable alternative, and bring a motion for a ruling on the objection as soon as is practical.
- (7) A judge may determine an objection to a question, or a line of questions, made at discovery.
- (8) A judge may order resumption of the discovery, and provide any directions for its further conduct.

18.18 - Production or access after discovery or at adjournment

- (1) A party may require a witness who is examined at a discovery to produce, or provide access to, a document, electronic information, or other thing referred to by the witness but not brought to, or accessible at, the discovery, unless one of the following applies:
 - (a) the document, information, or thing is not in the control of the witness;
 - (b) it is not relevant and is not likely to lead to relevant evidence;
 - (c) it is privileged.
- (2) A judge may order a witness who fails to comply with a requirement for production or access to make production or provide access, and the judge may order the witness to indemnify the party who seeks the order for the expense of obtaining the production or access.
- (3) A party who requires production or access before the party completes examination of a witness at discovery may adjourn the discovery.
- (4) A judge may relieve a party or a non-party witness from a requirement to produce, or provide access, at discovery examination if the party or witness rebuts the presumption for disclosure in accordance with Rule 14.08, of Rule 14 - Disclosure and Discovery in General.

18.19 - Error in discovery answer

- (1) A party who becomes aware that they, or their employee or officer, gave an erroneous or incomplete answer at discovery must immediately notify each other party of the error or incompleteness and, unless the parties agree or a judge orders otherwise, provide the correct and complete information in a written statement signed by the person who gave the answer.
- (2) A corporate party whose designated manager gives erroneous testimony on discovery that the party does not have relevant information, or does not control a relevant document, electronic information, or other thing may not present the evidence that

Rule 18 - Discovery

would have been disclosed at discovery if the error had not been made, unless the party does one of the following:

- (a) corrects the error no less than one day before either the finish date in an action or the day of the hearing of an application;
 - (b) obtains the agreement of each other party, or the permission of the presiding judge, to present the evidence.
- (3) A judge who gives permission to present evidence must consider ordering the corporate party to indemnify another party for expenses resulting from the error.

18.20 - Use of discovery

- (1) Answers given by a witness at discovery may be used to impeach the witness at trial, or on the hearing of an application or motion.
- (2) Evidence given by an individual party, or a designated manager, at discovery may be used for any purpose by an adverse party.
- (3) Evidence given by an officer or employee of a corporate party who is not a designated manager may be used for any purpose by an adverse party, except answers outside the witnesses' scope of authority are not admissions by the corporate party.
- (4) Evidence given by a witness at a discovery may be used by any party against any party who had notice of the discovery, if it is necessary to provide the evidence through the discovery transcript.
- (5) The following are examples of cases in which it is necessary to provide evidence through a discovery transcript:
 - (a) the witness cannot testify;
 - (b) the witness is too ill or infirm to attend court, and commission evidence is not available or is inappropriate;
 - (c) the court cannot compel the witness to attend the trial or hearing, and commission evidence is not available or is inappropriate.
- (6) A party who establishes all of the following may use evidence given by a witness at discovery against a party who did not have notice of the discovery:
 - (a) it is necessary to provide the evidence through the discovery transcript;
 - (b) the answers are sufficiently reliable, although the party against whom they are offered had no opportunity to cross-examine the witness;
 - (c) it was through no fault of the party offering the evidence that the party against whom it is offered did not receive notice of the discovery.
- (7) A party who uses evidence given at discovery makes the person who gave the evidence a witness for that party only when the evidence is used as provided in Rules 18.20(4) and (6).

18.21 - Proof of discovery questions and answers

A transcript with the certificate and purported signature of a certified court transcriber is presumed to have been certified by a certified court transcriber and to be an accurate record of the discovery, unless the contrary is proved.

A party may tender an excerpt from a discovery transcript by agreement or by showing the judge the transcript and satisfying the judge that the proposed excerpt is covered by the certified court transcriber's certificate.

After authenticity is agreed or established, excerpted questions and answers may be made part of the record by reading questions and answers into the record, tendering excerpts from the transcript as an exhibit, or any means directed by the judge.

The judge may permit a party to use excerpts from an audio recording or an audio-visual recording of a discovery if the corresponding excerpts from the discovery transcript are made part of the record.

18.22 - Failure to attend or refusal to answer

A witness who fails to attend under a discovery subpoena or order, refuses to answer a question properly put at a discovery, or refuses to produce or provide access to a document, electronic information, or other thing required by a subpoena or order may be punished under Rule 89 - Contempt.

18.23 - Supervision of discovery by judge

- (1) A party who believes that a discovery is being conducted abusively may undertake to bring a motion to terminate or limit the discovery as soon as is practical, and adjourn the discovery to do so.
- (2) A judge may terminate or limit a discovery that is conducted abusively.
- (3) The following are examples of conduct that may be abusive:
 - (a) asking a question or demanding production for a purpose ulterior to the preparation or advancement of a case;
 - (b) questioning a witness in a manner calculated to annoy, embarrass or oppress the witness;
 - (c) asking the same question repeatedly although it has been fully answered;
 - (d) persistently asking questions that are clearly not relevant;
 - (e) continuing to seek an answer to a question to which a party has clearly objected.

18.24 - Examples of just, speedy, and inexpensive discovery

- (1) The following are examples of circumstances in which, depending on the circumstances as a whole, holding a discovery would promote the just, speedy and inexpensive resolution of a proceeding:
 - (a) a non-party witness has information properly obtained by discovery and there are no other reasonable means for obtaining the information, such as conducting an interview;
 - (b) a designated manager was ill-informed on discovery and discovery of other corporate officers or employees is necessary to obtain information the designated manager should have provided;
 - (c) a party gave undertakings at a previous discovery that have not been fulfilled as promised and, as a last resort, the information is sought through further discovery;

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- (d) because of illness, the court will not be able to compel a witness to attend trial or to answer questions, and commission evidence is inappropriate without discovery.
- (2) The examples in Rule 18.24(1) are to assist both of the following:
 - (a) a party who determines whether a discovery would promote the just, speedy and inexpensive resolution of a proceeding, for the purpose of Rules 18.02(1)(a), 18.04(2)(b), or 18.05(2)(a)(ii);
 - (b) a judge who hears a motion to revoke a discovery subpoena under Rules 18.08(2) or 18.08(3).

Rule 19 - Interrogatories

Educational Notes

How This Rule Works

This Rule allows for a party to deliver a demand for answers to simple, concise, numbered interrogatories to “any person” if satisfied that it will promote the just, speedy and inexpensive resolution of the proceeding.

The demand may be delivered to a party or designated manager any time after pleadings close in an action or a notice of contest is filed in an application. Answers may be demanded of officers, employees, and non-parties only after the demanding party has finished discovering the other parties (R.19.04(2)).

The person receiving the interrogatories must respond in writing to all parties within 20 days (R.19.07) by either answering each question or giving reasons for refusing. That party has an ongoing duty under R.19.09 to correct any erroneous or incomplete response. Rule 19.06 allows a litigation guardian, parent, or guardian to respond for a child or person under a disability, and a designated manager to respond for an officer or employee.

A judge may order enforcement or excuse compliance under R.19.08, including if the question(s) are expressed with too much “complexity or elaboration” (R.19.07(2)(d)). Rule 19.08(2) allows for an order of costs against a person who fails to respond or unreasonably refuses to respond.

Responses may be used in the same manner as a discovery transcript (R.19.10).

Highlights of Changes

Rule 19 is not substantially different than its predecessor. One change is that while discovery and interrogatories are still cumulative rights, questions in interrogatories and on discovery are mutually exclusive: once answered, the same question cannot be asked of the same witness again.

The previous R.19.02(4) allowed for interrogatories to be served on two or more persons; R.19 now contemplates only one person answering the demand.

The previous R.19.04 allowed a judge to order that a person submit to discovery; the new Rule does not contain a similar provision.

Practice Tip

Non-parties, officers, and employees may not realize that they are not obligated to answer the same question asked on discovery, or in the case of officers or employees, that their designated manager may answer instead (R.19.06(c)).

19.01 - Scope of Rule 19

- (1) This Rule allows a party to question a person in writing, unless the question was answered by the witness on discovery.

Rule 19 - Interrogatories

- (2) A party may demand answers in writing from any person and the person must provide the answers, in accordance with this Rule.

19.02 - Demand for answers

- (1) A party may deliver a demand for answers if the party is satisfied that obtaining the answers in that manner will promote the just, speedy, and inexpensive resolution of the proceeding.
- (2) A party who decides to deliver a demand for answers must make best efforts to prepare clearly and plainly stated questions in a number and manner that promotes the just, speedy, and inexpensive resolution of the proceeding.

N.S. Gaz. Pt. 1, [12/16/2009](#)

19.03 - Questions that may be asked

A demand for answers must demand answers that are not privileged and are relevant or provide information that is likely to lead to relevant information.

19.04 - Time for demand

- (1) A demand for answers from an individual party or designated manager may be delivered anytime after the day pleadings close in an action or the day a notice of contest is filed in an application.
- (2) A demand for answers from an officer or employee of a corporate party other than the designated manager, or from a non-party, may only be made after the party making the demand has finished discovery of parties.

19.05 - Contents of demand

- (1) The demand for answers must contain the standard heading, be entitled "Interrogatories", be dated and signed, and include all of the following:
 - (a) a statement that the party making the demand is satisfied that obtaining the answers in that manner will promote the just, speedy, and inexpensive resolution of the proceeding;
 - (b) the name of the person required to answer the questions;
 - (c) a demand that the person provide a response no more than twenty days after the day the demand is delivered;
 - (d) questions listed by number, each one of which asks only one question, simply and concisely;
 - (e) a statement that the person must not fail to respond to the demand;
 - (f) a statement that the person may refuse to answer a question that calls for privileged information, or information that is irrelevant and will not lead to relevant information;
 - (g) a statement that the person may make a motion to a judge to excuse the person from answering a question;

Rule 19 - Interrogatories

- (h) a warning that a judge may award costs against the person, if the judge orders the person to answer a question;
 - (i) a requirement that the person deliver the response to the party making the demand and deliver copies to each other party, at the party's address for delivery.
- (2) The demand for answers may be in Form 19.05.

Forms

Interrogatories(19.05).

19.06 - Who must respond

A person whose answers are demanded must answer the questions, except any of the following persons may answer for another person if the answering person first obtains all information that is known by or available to the other person:

- (a) a litigation guardian, for a party who is a child or person with a disability;
- (b) a parent or guardian, for a child who is not a party or a person who is unable to manage their affairs and is not a party;
- (c) a designated manager, for an officer or employee of a corporate party.

19.07 - Response

- (1) A person to whom a demand for answers is delivered must deliver a response to each party no more than twenty days after the day the demand is delivered.
- (2) The person must answer each question, unless the question is of one of the following kinds:
 - (a) the question calls for information that is irrelevant and will not lead to relevant evidence;
 - (b) it calls for privileged information;
 - (c) the question was fully answered on discovery;
 - (d) taken alone, or in combination with related questions, it is expressed with such complexity or elaboration that the person should not have to answer it.
- (3) The response must contain the standard heading, be entitled "Response to Interrogatories", be sworn or affirmed by the person answering the questions, and provide a reference to each question and either of the following:
 - (a) the answer to the question;
 - (b) a refusal to answer the question and the reason for the refusal.
- (4) The response may be in Form 19.07.

Forms

Response to Interrogatories (19.07).

19.08 - Enforcement and discretion to excuse

- (1) A judge may order a person to answer a question in a demand, or excuse a person from answering a question, absolutely or on conditions.
- (2) A judge may order a person who fails to respond to a demand or unreasonably refuses to answer a question to indemnify the party who made the demand for the expense of obtaining an answer.

19.09 - Error in answer to interrogatory

A party who discovers that they, or their employee or officer, gave an erroneous or incomplete response to a demand for answers must immediately notify each other party of the error or incompleteness and, unless the parties agree or a judge orders otherwise, provide the correct and complete information in a new response to interrogatories.

19.10 - Use of answer

A response may be used at trial, on an application, or on a motion, in the same way evidence given at discovery may be used under Rule 18.20, of Rule 18 - Discovery.

Rule 20 - Admission

Educational Notes

This Rule sets out the process for obtaining an admission from a party. It replaces the previous R.21. Under R.20.03, at any time before the finish date, a party may deliver a Request for Admission (formerly a Notice to Admit) to another party, who then has 15 days (previously 10 days) to admit the facts, or give reasons for refusing. As with the previous Rule, failure to respond is taken as an admission, though parties may agree, or a judge may order, an admission withdrawn under R.20.02. Unreasonable refusals to admit can still attract costs sanctions.

Rule 20 specifically contemplates admissions made orally, or at a discovery, while the previous R.21 spoke only of admissions in pleadings “or otherwise in writing.” The previous R.21 used the term “relevant fact” while the new Rule uses the term “material fact” in R.20.02 and “relevant fact” in R.20.03.

20.01 - Scope of Rule 20

- (1) This Rule provides a process for obtaining an admission during a proceeding.
- (2) This Rule does not affect the rules of evidence concerning admissions.

20.02 - Making admission

- (1) A party may admit to any material fact.
- (2) The admission may be made in pleadings, by other writing, orally, at a discovery, or by formal admission under this Rule.
- (3) A party may withdraw an admission made during a proceeding, if the parties agree or a judge permits.

20.03 - Requesting admission

- (1) A party may, at anytime before the finish date in an action or the day of the hearing of an application, request another party to admit a relevant fact, in accordance with this Rule 20, and do one of the following:
 - (a) rely on the admission, if it is expressly given;
 - (b) obtain the admission under Rule 20.05, if it is not expressly denied;
 - (c) take advantage of the cost consequences in Rule 20.06, if the admission is unreasonably denied.
- (2) The request for an admission must contain the standard heading, be entitled “Request for Admission”, be dated and signed, and include all of the following information:
 - (a) the name of the party requested to make an admission;
 - (b) a statement that the party requests an admission, followed by a statement of the fact requested to be admitted;

Rule 20 - Admission

- (c) a statement that the party to whom the request is addressed must respond to the request no more than fifteen days after the day the request is delivered to the party or the admission will be taken to have been made.
- (3) A request for admission may be made in Form 20.03.

Forms

Request for Admission(20.03).

Annotations

The respondent, Carvery, retained the appellant lawyer to bring a personal injury action against the other two respondents. She moved. The appellant was unable to contact her for several years. His application to be removed as solicitor of record was dismissed and he filed for leave to appeal the dismissal. Since he was unable to locate any of the respondents, he asked the court to dispense with notice of the leave application/ appeal. *Held*, notice dispensed with. Further efforts at service would be highly artificial and without any real purpose. Rule 20.03(1)(a) allows an *ex-parte* motion to be made “where the order sought does not affect the interests of another person.” Here Carvery had an interest in the proceeding, but had shown no interest in pursuing it since 2004. A registered letter sent to her last known address was not returned, but she did not contact the lawyer about it. The other respondents were not even aware of the proceeding since they had not been served. They have no interest in the proceeding, or the issues on appeal.

Wagner v. Carvery et al. , [2009 NSCA 102](#)

20.04 - Response to request for admission

- (1) A party to whom a request for admission is delivered must provide a response no more than fifteen days after the day the request is delivered.
- (2) The response must contain the standard heading, be entitled “Response to Request for Admission”, be signed by the party requested to make an admission or their counsel, and include both of the following:
 - (a) the facts the party admits as requested;
 - (b) requested admissions the party does not admit, and the reasons for the refusal.
- (3) A response to request for admission may be in Form 20.04.

Forms

Response to Request for Admission(20.04).

20.05 - Presumed admission

A party who does not expressly admit or deny a requested admission by delivering a response no more than fifteen days after the day the request is delivered is taken to have made the admission.

20.06 - Costs on unreasonable refusal

A judge may order a party who unreasonably refuses to admit a requested admission to indemnify the party who made the request for the expense of proving the material fact.

20.07 - Judgment on admission of fact

An admission may be proved at trial or hearing, and on a motion to which the admission is relevant.

Rule 21 - Medical Examination and Testing

Educational Notes

This Rule replaces the previous R.22 and codifies the previous case law. A party who puts his or her physical or mental condition at issue must show why s/he should not be examined. An opposing party seeking to put a party's condition at issue must provide evidence in support of the claim and show how an examination would result in relevant evidence. The requirements for an order for medical examination and testing are quite specific and are set out in R.21.02 and R.21.06.

Changes from the previous Rule – Consistent with the broad interpretation of the previous R.22 as to the types of medical practitioners covered, R.21 refers only to a “medical practitioner” rather than a “qualified medical practitioner,” except that R.21.04 requires any medical practitioner accompanying a party to an examination to be “qualified.”

Remedy for refusal – The previous R.22.06 specifically provided that a party's claim or defence could be struck if s/he refused to submit to examination. Rule 21 is silent on the point, leaving the matter to be dealt with under Rule 89 – Contempt.

Consent – Unlike the previous Rule, R.21 allows the court to order medical testing without the consent of the party being tested, if it is likely to lead to relevant evidence and the value of the evidence outweighs the inconvenience or embarrassment caused.

The previous R.22 allowed the prothonotary to issue the order on consent; R.21.01 only contemplates the order being issued by a judge (though it could be done by consent in a motion by correspondence – R.27.01(1)(e)).

21.01 - Scope of Rule 21

A judge may order a medical examination or test, in accordance with this Rule.

21.02 - Medical examination

- (1) A party who, by a claim, defence, or ground, puts in issue the party's own physical or mental condition may be ordered to submit to a physical or mental examination by a medical practitioner.
- (2) The party who puts their own physical or mental condition in issue has the burden to satisfy the judge that the party should not be examined.
- (3) A party who puts in issue the physical or mental condition of another party may make a motion for an order that the other party submit to a physical or mental examination by a medical practitioner, and the party must satisfy the judge on all of the following:
 - (a) the party has, by a claim, defence, or ground, put in issue the other party's physical or mental condition;
 - (b) the claim, defence, or ground putting the other party's condition in issue is supported by evidence;
 - (c) the examination may result in evidence that proves or disproves the claim, defence, or ground.

Rule 21 - Medical Examination and Testing

- (4) A party being examined under an order must co-operate in the examination, including giving answers to questions asked by the practitioner as part of the examination.
- (5) An order for a medical examination must include a description of the purpose of the examination and a requirement that the party to be examined attend for the examination, including the name of the practitioner and either the time, date, and place of the appointment or a method to determine a time, date, and place for the examination.
- (6) The order may contain any other necessary provisions, including any of the following requirements:
 - (a) the party to be examined undergo a test and deliver evidence of the results to the practitioner before the examination;
 - (b) a person deliver relevant documents to the practitioner before the examination;
 - (c) the practitioner, by a deadline, deliver an expert's report to the party who obtains the order;
 - (d) the party receiving the report, by a deadline, deliver a copy to each other party.

Annotations

The defendant disability insurer denied the plaintiff benefits and he sued. Two months before trial, they filed a motion under Rule 21.02 for an order requiring the plaintiff to submit to a psychiatric assessment. His claim concerned symptoms of chronic pain/fatigue. The defendant argued the plaintiff put his mental health in issue, and related treatment options were relevant. *Held*, motion dismissed, with costs of \$1,000 to the plaintiff. The old case law continues to apply to the new Rule (with modifications). Here, the plaintiff did not put his mental health in issue simply by claiming the defendant's conduct caused him anxiety; the onus is not on him to show he should not be examined (Rule 21.02(2)). Although the defendant has put his mental health in issue (Rule 21.02(3)), they have not proven a psychiatric assessment will enhance the opinions already available. The timing of the motion and the potential impact on the impending trial dates is also a concern. The filing of any such report would be well beyond the applicable deadline. Although leave could be sought to allow for late filing, the deadline serves as a strong indicator that (if possible) expert opinions should be sought in a timely manner and not at a stage that may result in prejudice.

MacIntyre v. RBC Life Insurance Co., [2010 NSSC 152](#)

21.03 - Number of medical examinations

A judge may order more than one examination of the same party if different physical or mental conditions in issue pertain to different medical specialities, the same condition clearly calls for opinions from different specialists, or justice will be served by permitting an additional examination.

21.04 - Who may attend an examination

Only the party, the examining practitioner, the practitioner's medical assistants, and one qualified medical practitioner appointed by the party as an observer may attend the examination, unless the parties agree or a judge orders otherwise.

21.05 - Medical report

- (1) A practitioner who completes an examination must deliver an expert's report, conforming with Rule 55 - Expert Opinion, to the party who obtains the order.
- (2) The party who obtains the order must immediately deliver the report to all other parties.

21.06 - Medical test

- (1) A judge who is satisfied on both of the following may order a party to undergo a test recognized by medical science, to provide a sample or permit a sample to be taken from the party's body for use in a test recognized by medical science, or to both undergo a test and provide a sample:
 - (a) compliance with the order will likely lead to relevant evidence;
 - (b) the value of the evidence outweighs the inconvenience or embarrassment that would be caused to the person giving the sample or undergoing the test.
- (2) An order for a medical test must include a requirement that the party undergo the test, provide the sample, or permit the sample to be taken, and include all of the following information:
 - (a) the name and address of the person to whom, or the address of the place at which, the party must report;
 - (b) a method by which the time and place for taking or providing the sample, or administering the test, is to be determined.
- (3) The party is entitled to have one person accompany the party, as an observer, when the sample is provided or taken, or the test is administered.
- (4) The order may contain any other provisions, including any of the following requirements:
 - (a) a person deliver relevant documents for the use of the person testing a sample or administering a test;
 - (b) a person administering a test, or taking a sample, exclude persons except as permitted in the order;
 - (c) by a deadline, the person administering the test or taking the sample, or another person involved with the testing, deliver a report of the results of the test to the party who obtained the order;
 - (d) the party receiving the report, by a deadline, deliver a copy to each other party.
- (5) A party who intends to prove the results of a test as an expert opinion must deliver an expert's report in compliance with Rule 55 - Expert Opinion.

21.07 - Information and reports

A party may provide any information, including information disclosed in the proceeding, to a medical practitioner examining a party, or a person testing a party or taking a sample.

21.08 - Cost of medical examination and test

- (1) The party who obtains an order for an examination or test must pay all of the following expenses:
 - (a) professional and technical charges, except the charges of a person attending as an observer for the party being examined;
 - (b) reasonable costs of the party being examined or tested to attend the examination or test, or to provide a sample;
 - (c) wages lost by the party as a result of attending an examination or test, or providing a sample.