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DISCOVERY PRACTICE 2010
SECTION 2

Update on Recent Case Law

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INDEX

I. **INTRODUCTION**

II. **IMPLIED UNDERTAKING OF CONFIDENTIALITY**
- A. *Chonn v. DCVS Canada Corp. (c.o.b. Mercedes-Benz Credit Canada)*, 2009 BCSC 1474, Voith J.
- B. *International Brotherhood of Electrical Workers, Local 213 v. Hochstein*, 2009 BCCA 355, per Newbury J.A. (Low and Smith JJ.A. concurring).
- C. *Other Cases*

III. **POLICE RECORDS**
- A. *Wong v. Antunes*, 2008 BCSC 1739, Pitfield J.

IV. **E-DISCOVERY**
- A. *Bishop v. Minichiello,* 2009 BCSC 358, Melnick J.
- B. *Leduc v. Roman,* 2009 O.J. No. 681 (Ont. S.C.), Brown J.
- C. *Schuster v. Royal & Sun Alliance Co. of Canada*, [2009] O.J. No. 4518 (Ont. S.C.), Price J.
- D. *Chadwick v. Canada (Attorney General)*, 2008 BCSC 851, Meyers, J.

V. **LISTING DOCUMENTS**
- A. *Duncan v. Mazurek,* 2008 BCSC 1842, Silverman J.
- B. *Stone v. Ellerman,* 2009 BCCA 294, per Finch C.J.B.C., Frankel J.A. concurring, Smith J.A. dissenting.

VI. **PRODUCTION OF DOCUMENTS**
- A. *Stephen v. McGillivray,* 2008 BCCA 472, per Smith JA (Donald and Levine JJA concurring)
- B. *Lee v. Schenoni,* 2008 BCSC 1881, Groves J.
- C. *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and festival Property Ltd,* 2009 BCCA 124, per Hall JA (Saunders and Low, JJA, concurring)
- D. *Clironomos v. Malamas*, 2008 BCSC 1622, Master Baker
- E. *McLeod v. Van Doorn*, 2009 BCSC 172, Master Caldwell

VII. **NEUROPSYCHOLOGIST'S RAW DATA**
- A. *Scott v. Erickson,* 2009 BCSC 489, Master McCallum

VIII. **EXAMINATIONS FOR DISCOVERY**
- A. *Movassaghi v. Aghtal*, 2009 BCCA 184, Lowry, JA.
- B. *Day v. Hume*, 2009 BCSC 587, Smith, J.

IX. **USE OF DISCOVERY EVIDENCE AT TRIAL**
- A. *MacEachern (Committee of) v. Rennie*, 2009 BCSC 795, Ehrcke, J.

X. **RULE 28 EXAMINATIONS**
- A. *Horton v. Lincoln*, 2009 BCSC 1023, Master Caldwell
- B. *Cheema v. Kalkat*, 2009 BCSC 736, Master Keighley

XI. CLASS ACTION DOCUMENT DISCLOSURE

A. *Richard v. British Columbia*, 2009 BCCA 77, per Neilson J.A., Finch C.J.B.C. and Groberman JJ.A. concurring)

DISCOVERY PRACTICE 2010
UPDATE ON RECENT CASE LAW

I. INTRODUCTION

This paper is intended to be a brief review of recent cases that affect discovery, oral and documentary, practice. The authors express their appreciation to Karen O'Byrne as some of the case summaries are from a paper previously prepared by Ms. O'Byrne in conjunction with Alison Murray, QC, for the Continuing Legal Education 2009 Personal Injury Conference.

II. IMPLIED UNDERTAKING OF CONFIDENTIALITY

A. *Chonn v. DCVS Canada Corp. (c.o.b. Mercedes-Benz Credit Canada)*, 2009 BCSC 1474, Voith J.

This case is the most recent authority to address the implied undertaking rule.

The Plaintiff, Chonn, had been injured in a motor vehicle accident in January 2006. She had previously been involved in three personal injury actions arising from three motor vehicle accidents that occurred between 1999 and 2003. Those actions were resolved in 2005. The Plaintiff alleged similar injuries in all four actions. The Defendants in the current action were represented by the same counsel that had defended the three earlier actions.

The Defendants sought an order requiring the Plaintiff to deliver a list of documents which would include all records in her possession that were disclosed in the earlier actions. The Plaintiff acknowledged that the records were relevant but explained that she had failed to list and produce the earlier records because of her concern around the Defendants' conduct and document production. The Plaintiff sought "the direction of the court as to the use by Counsel for the Defendants of certain documents in this action, such documents having been previously obtained by Counsel for the Defendants through the discovery process in a previous litigation involving the Plaintiff". The question being whether ICBC, by operation of statute, had conduct of the defence of each of the actions and could list the documents it obtained from the Plaintiff in the earlier actions without first obtaining the Plaintiff's consent or leave of the court. The Plaintiff also sought to have Defence counsel removed from the record.

The Defendants argued that the implied undertaking of confidentiality was not engaged because:

1. it was ICBC rather than the named Defendants that was the "party" to the current action for the purpose of Rule 26 and otherwise;

2. Rule 26 overrides the common law implied undertaking of confidentiality; and

3. merely generating and issuing a list of documents under Rule 26 does not constitute "use" of the documents obtained in the previous litigation and so does not engage the implied undertaking rule.

The court rejected each of the Defendants' arguments.

In addressing the first point (that ICBC was not the party to the action), the court commented:

> [21] Before turning to the merits of the defendants' assertion, I believe that the issue it raises fundamentally misses the central question. The question is not how ICBC came to be in possession of the documents from the Earlier Actions or whether it is a "party" for the purposes of Rule 26. Rather, the point is that no defendant can make use of evidence, oral or documentary, that was compelled and produced by reason of pre-trial discovery in earlier litigation. Had the named defendants in the Current Action been, by some remarkable circumstance, the named defendants in the Earlier Actions, the evidence would not have been available to them (subject to the other arguments advanced by the defendants to make use of such information) without either the accedence of the plaintiff or an order of the court. Thus, for example, if a party makes disclosure in litigation against the Provincial or Federal Crown, it is not open to either of those parties to look to or make use of such disclosure in subsequent litigation involving those same parties. The implied undertaking rule extends to subsequent or consecutive litigation between the same parties."
>
> ...
>
> [25] A party who has documents from earlier litigation that are impressed with the implied undertaking simply cannot make use of those records without the concurrence of the party from whom they were obtained or leave of the court. The implied undertaking protects documents or oral discovery in earlier litigation from being used for any purpose "collateral" to that litigation. Thus, the documents cannot be used for internal strategic review in subsequent litigation. They cannot be used for the purpose of drafting pleadings. They cannot be sent to counsel for the purposes of obtaining an opinion in new litigation. All of these obligations bound the named defendants in the Current Action as well as ICBC in its conduct of that litigation.

> [26] The practical consequences of these restrictions, it will be seen, are in most cases minimal. In most cases where ICBC or its counsel is aware, through the pleadings or their direct involvement in earlier litigation, of relevant documents or other pretrial discovery from that litigation, they need only contact plaintiff's counsel to obtain his or her concurrence to the use of the materials in question. Overwhelmingly, having regard to the authorities to which I will refer, that concurrence should be forthcoming.

In respect of the Defendants' second point, the court held that the requirement under Rule 26 to make disclosure did not override the implied undertaking rule. However, a party who had not yet obtained consent or leave to use the documents, would be both required and entitled to list such documents on Part 3 of any list of documents generated.

Lastly, the court held that listing a document under Part I constitutes "use". Once a list is delivered, the party receiving the list is entitled to use any document listed in Part 1 on discovery or at trial. The creation of the list created the right to access, inspect and obtain copies of all documents enumerated under Part 1.

The Defendants' application was allowed and Chonn was required to list all relevant documentation in her possession or control. The fact that Chon considered the Defendants acted improperly in using documents arising from earlier actions did not justify her obligation to disclose being held in abeyance. Leave was granted to the Defendants to make use of documents and other materials obtained from the Plaintiff in the earlier actions. The Plaintiff's application to have Defendants' counsel removed from the record was dismissed. Such a severe remedy was not warranted in the circumstances.

Leave to appeal is being sought.

B. *International Brotherhood of Electrical Workers, Local 213 v. Hochstein*, 2009 BCCA 355, per Newbury J.A. (Low and Smith JJ.A. concurring).

This was an appeal from the dismissal of a motion for a declaration that the Appellants were no longer bound by an undertaking to preserve the confidentiality of documents produced by the Respondents during a discovery.

The action was a defamation action. The Defendants had published an article about the Plaintiff union's "market recovery" program. In the course of the action, the Defendants undertook to maintain the confidentiality of certain information and documentation produced by the union as part of the discovery process. The union introduced some of that documentation into evidence at the trial. The Chambers Judge noted that no mention was made of the implied undertaking of

confidentiality at trial, nor had the Defendants applied to be released from their undertaking, or suggest that upon the documents being marked as exhibits at trial, the undertaking would somehow expire or cease to have effect.

A few weeks after the trial, the Defendants advised Plaintiffs' counsel they intended to publicize information contained in the exhibits filed at trial. The union objected and, thus, the application.

Appeal allowed. Once the material was filed as evidence in a trial it was a matter of public record and the Appellants were no longer bound by an undertaking of confidentially given during the discovery. That would be true even if it had been the Defendants who had entered the documents into evidence at trial.

C. *Other Cases*

For recent cases that address the implied undertaking rule in the context of applications to compel production of discovery transcripts/reports from one action in a different action see: ***Joubarne v. Sandes***, 2009 BCSC 1413, in which Mr. Justice Williams reversed a Master's refusal to order production; ***Biehl v. Strang***, 2009 BCSC 793(Master Scarth dismissed the application because the applicant failed to demonstrate relevance); and, ***Young v. Perrreault***, 2009 BCSC 816 (Master McCallum dismissed an application in the context of a two separate motor vehicle actions – the subject discovery was conducted in an action already resolved arising from an accident that had occurred four years earlier).

III. POLICE RECORDS

A. *Wong v. Antunes*, 2008 BCSC 1739, Pitfield J.

This case raises interesting issues with respect to the application of Rule 26(11) to a case involving criminal charges on the very subject matter of the civil action and the treatment of police investigation results in civil proceedings while criminal charges are outstanding.

The plaintiff brought a *Family Compensation Act* action on his and other family member's behalf with respect to the death of his son in a motor vehicle accident. The identity of the driver of the other vehicle in the accident was initially unknown, but police subsequently laid a charge of criminal negligence causing death against the defendant. The Crown, pursuant to its disclosure obligations, provided the defendant with documents from the police file. The defendant refused to produce the documents to the plaintiff. ICBC entered the action as a Third Party under section 76 of the *Insurance (Vehicle) Act* and denied that the defendant was the driver of the vehicle that caused the accident. The civil trial was scheduled to proceed prior to the criminal trial.

The plaintiff sought an order for production of the police documents in the possession of the Vancouver Police Department. The Crown objected to the application, citing litigation privilege and public interest immunity.

Pitfield J. concluded initially that the plaintiff's application under Rule 26(11) for production of documents in the possession of a third party was appropriate, despite the fact that the documents were also in the possession of a party. The difficulty the plaintiff experienced in attempting to force production from the defendant supported the use of Rule 26(11).

Pitfield J. further held that the documents created by the police during the course of their investigation may have been subject to litigation privilege, but that the privilege was waived when the documents were disclosed to the defendant.

The documents were subject to an implied undertaking not to use them for any purpose other than making full answer and defence in the criminal proceedings. Pitfield J. found that there was sufficient reason to modify the undertaking so as to allow their disclosure to the plaintiff in the civil action. The documents were relevant and material and the plaintiff was unable to obtain the evidence contained in the documents from any other source.

Finally, on a balancing of the public and private interests involved in the issue, Pitfield J. was not persuaded that production of the documents in the civil action would jeopardize the criminal proceeding.

He ordered production of the documents in the police file that were disclosed to the defendant and relating to the identity of the driver or the manner of operation of the vehicle, subject to an undertaking on the plaintiff and his counsel not to use the documents for any purpose other than the conduct of the civil action.

The Attorney General appealed because of concern that the form of order could lead to the accidental disclosure of documents which may impair the criminal proceedings. The Appeal was allowed in respect of the mechanism of the disclosure (2009 BCCA 278 – per Kirkpatrick J.A., Hall and Baumann JJ.A. concurring). The practical problems created by the order could be addressed by the form of a desk order which recognized the public interest in maintaining the confidentiality of police and crown communications as a class, and leaving the parties with liberty to apply as to whether particular documents, or the whole class could be disclosed in a particular case. The form of order endorsed by the BCCA is set out in the Reasons.

IV. E-DISCOVERY

A. *Bishop v. Minichiello,* 2009 BCSC 358, Melnick J.

In this case, the defendant was successful in obtaining an order for production of the plaintiff's hard drive for the sole purpose of retrieving metadata showing the plaintiff's pattern of log-ins and log-outs of his Facebook account between specified hours during the night. The court underwent an exhaustive review of the jurisprudence and granted the order for the following reasons:

(a) the scope of the defendant's request was narrow and did not amount to an "fishing expedition" trawl through the plaintiff's computer for documents that may be relevant to the plaintiff's claims

(b) the defence provided the evidentiary groundwork necessary to show that the plaintiff's late night usage of his computer was relevant to his claims for past and future wage loss: the plaintiff alleged that fatigue was preventing him from maintaining employment

(c) issues of privacy were overcome by the evidence of the plaintiff's mother that the plaintiff would be the only family member to access the computer during night time hours.

Much of the preceding case law on this issue has been concerned with whether a computer hard drive was merely a repository of documents (akin to a filing cabinet) or whether it was a document. While Melnick J. held that in this case the hard drive was a repository, he agreed with the decision in *Chadwick v. Canada (Attorney General)*, 2008 BCSC 851 that such a distinction was not determinative of the issue:

> [55] It is true the Bishop family computer is more akin to a filing cabinet than a document; however, it is a filing cabinet from which the plaintiff is obligated to produce relevant documents. This sentiment was approved in ***Chadwick***. Simply because the hard drive contains irrelevant information to the lawsuit does not alter a plaintiff's duty to disclose that which is relevant. If there are relevant documents in existence they should be listed and produced (or simply listed if they are privileged).

He directed that the parties agree on an independent expert to review the hard drive of the plaintiff's family computer and isolate and produce to counsel for the defendant and counsel for the plaintiff the information sought or a report saying that the information sought is not retrievable, in whole or in part, if that is the case.

The Defendant sought leave to appeal the order limiting the disclosure of the computer records to those of Facebook usage. Leave was refused, 2009 BCCA 555, Garson J.A.

B. *Leduc v. Roman,* 2009 O.J. No. 681 (Ont. S.C.), Brown J.

The plaintiff in a motor vehicle accident claim, advised doctors that he could no longer engage in the same physical activities that he had prior to the accident and that he "did not have friends in his current area, although he had a lot of friends on Facebook". The plaintiff had not been questioned at discovery about his Facebook profile because the disclosure did not take place until after the discovery. Counsel for the defendant conducted a search and found that the plaintiff's Facebook profile showed only his name and restricted access to his site. The defendant moved for an order for production of all of the information on the site. The master refused to order production on the basis that the defendant had failed to demonstrate relevance, noting no such questions had been asked at discovery. The Master also noted that the plaintiff should list any lifestyle information on his Facebook profile as part of his supplementary affidavit of documents. On the appeal from the Master's order, Judge Brown said that it was reasonable to infer that a social networking site contained content relevant to the issues. Accordingly, the defendant was not on a "fishing expedition". Trial fairness dictated that the defendant should be entitled to cross-examine the plaintiff on the affidavit filed in the application to ascertain the relevance of the content posted by the plaintiff on his site.

Madam Justice Brown commented:

> Given the pervasive use of Facebook and the large volume of photographs typically posted on Facebook sites it is now incumbent on counsel to explain to clients, in appropriate cases, that documents posted on the party's Facebook profile may be relevant to allegations made in the pleadings."

Leduc was recently applied in *Wice v. Dominion of Canada General Insurance Co.*, [2009] O.J. No. 2946.

C. *Schuster v. Royal & Sun Alliance Co. of Canada*, [2009] O.J. No. 4518 (Ont. S.C.), Price J.

The court declined to grant an *ex parte* application by the defendant for an interim order preserving documents contained in the Plaintiff's Facebook webpage.

The Plaintiff was not required to produce her username and password.

The court commented:

> The plaintiff has set her Facebook privacy settings to private and has restricted its content to 67 "Friends". She has not created her profile for the purpose of sharing it with the general public. Unless the Defendant establishes a legal entitlement to such information, the Plaintiff's privacy interest in the information in her profile should be respected.

D. *Chadwick v. Canada (Attorney General)*, 2008 BCSC 851, Meyers, J.

A computer hard drive was ordered to be produced for analysis by a computer forensic expert in the context of a family compensation claim. The Plaintiffs were the wives of the pilot and a passenger who died in a helicopter crash. They had provided the defendants with the results of the search of the deceased pilots' hard drive. The hard drive was found to contain relevant documents, some of which had been deleted or overwritten and so production was ordered. Mr. Justice Meyers reviews the law addressing the analogy of a hard drive to a filing cabinet (i.e., a file repository and not a document).

Leave to Appeal dismissed, 2008 BCCA 346, Bauman, J.A.

V. LISTING DOCUMENTS

A. *Duncan v. Mazurek,* 2008 BCSC 1842, Silverman J.

A witness statement listed in Part III of the Defendant's list of documents and not previously disclosed to the Plaintiff could not be used to cross-examine the witness at trial because the description of the statement was not sufficient to comply with subrule 26(2.1.).

The witness statement was described in the list of documents as "Document marked P12 – grounds, B, C, E, F, G and H."

Silverman J. concluded that it was not open to the defendant to argue that the plaintiff could have sought a better description of the document. The description was deficient in that it did not disclose the type of document, its date or the specific ground for the claim of privilege in respect of it. He declined to exercise his discretion under Rule 26(14) to allow the defendant to use the statement. If the disclosure of the document had been properly described and made, the plaintiff's tactics may have been different and to allow its use would create an injustice.

B. *Stone v. Ellerman*, 2009 BCCA 294, per Finch C.J.B.C., Frankel J.A. concurring, Smith J.A. dissenting.

Partway through the Plaintiff's evidence in chief, and over the objection of the Defence, the Plaintiff was allowed to refer to a previously undisclosed pain journal to refresh her memory. Defence counsel, having been taken by surprise, sought an opportunity to research and consider the law before making submissions on whether it was appropriate to allow the Plaintiff to rely upon the journal. The trial judge declined Defence counsel's request and exercised his discretion under Rule 26(14) to allow the use of the pain diary despite it not having been properly identified on a List of Documents.

The Court of Appeal ordered a new trial.

The use of the pain diary resulted in a miscarriage of justice. Although the trial judge retained the discretion to permit the use of the journal, he failed to consider whether there was any reasonable explanation for the failure to disclose the journal in accordance with Rule 26(2.1). There was significant prejudice to the defence in being refused the opportunity to make a full and reasoned objection to the late production of the document. Had the document been properly listed, the defence could have considered whether there was a valid claim of privilege over the document and contemplated a Rule 26 application to compel production. Even if it was the proper subject of privilege, knowing its existence could have affected settlement negotiations or led to defence counsel anticipating the document's possible presentation during the trial.

In the absence of a reasonable explanation for the late disclosure, and without an adequate consideration of the prejudice to the defence, the trial judge should not have permitted the use of the diary.

Application for leave to appeal refused, [2009] S.C.C.A. No. 364.

VI. PRODUCTION OF DOCUMENTS

A. *Stephen v. McGillivray,* 2008 BCCA 472, per Smith JA (Donald and Levine JJA concurring)

The defendants listed video-surveillance, conducted prior to the start of the action, in Part I of their list of documents and sought an order to postpone its production based on Rule 26(1.2). Their application was dismissed by a master, and an appeal of the master's decision was dismissed by a judge in chambers. The Court of Appeal dismissed the appeal. It distinguished the cases on which the appellants relied (*Daruwalla v. Shigeoka* (1992), 72 B.C.L.R. (2d) 344 (S.C.) and cases following it) and, resorting to what it called "the modern approach to statutory interpretation", concluded that the purposes of Rule 26(1.2) were to

place limits on the broad scope of discovery allowed by *Peruvian Guano* and to exempt parties from producing documents based on issues of time, cost, efficiency and marginal relevance. To read into the rule language importing a temporal factor (postponing rather than exempting the production of a document) is not in keeping with the modern approach to statutory interpretation.

The Court also rejected the defendants' argument that the key issue in this case was the plaintiff's credibility and the defendants would be prejudiced if she was allowed to tailor her evidence after viewing the video:

> [47] With respect, I do not accept this argument as representing a valid purpose for an application of R. 26(1.2). In this case, there has been no factual determination regarding the respondent's truthfulness, or lack thereof. This is the appellants' theory of liability, and it is for them to establish in the course of the trial. Nor am I persuaded that the *Rules of Court* were intended to be used in a manner that would displace a right of a party granted under them, in favour of creating an opportunity for an adverse party to advance their theory of a fact in issue.

B. *Lee v. Schenoni,* 2008 BCSC 1881, Groves J.

Groves J. held that defendants who have chosen to plead pre-existing injuries are entitled to production of pre-motor vehicle accident MSP and Pharmanet records, even absent any evidence to support a pre-existing injury. According to the court, such records are somewhat "generic" and do not constitute an obtrusive level of inquiry. He explicitly overruled previous rulings at the masters' level in this regard.

C. *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and festival Property Ltd,* 2009 BCCA 124, per Hall JA (Saunders and Low, JJA, concurring)

The Court of Appeal confirmed that subrule 26(11) is a complete code as it relates to production of relevant material in the possession or control of a third party. Its provisions for service on non-parties has primacy over the general provisions for service contained in subrule 44(5).

The plaintiff, in an action brought under the *Civil Forfeiture Act*, sought production of records in the possession of the RCMP relating to private communications intercepted under wiretap authorizations. None of the subjects of the wiretap interceptions were parties to the action. The chambers judge, relying on subrule 44(5), adjourned the application until the plaintiff served the application on each person who was a subject of a wiretap interception and hence may be affected by the order sought.

In allowing the plaintiff's appeal, the Court of Appeal concluded that recourse to Rule 44(5) was unnecessary and inappropriate and would result in unnecessary expense and complications. The chambers judge had other options available to him to protect the privacy interests of the non-parties identified in the documents sought. These included the ability to allow the defendant to apply for an order relieving it from disclosure or permitting deletions, as well as the implied undertaking of confidentiality which precludes the use of documents other than that which is necessary for the conduct of the action in which their disclosure was compelled.

D. *Clironomos v. Malamas*, 2008 BCSC 1622, Master Baker

Notice of an application under Rule 26(11) to compel production of a bank account held jointly between a party and a non-party should be given to the non-party.

E. *McLeod v. Van Doorn*, 2009 BCSC 172, Master Caldwell

Even where a plaintiff has attended an IME by agreement, rather than by court order, he or she is entitled to disclosure of the doctor's notes that record her history, their observations or findings on examination and raw data of any tests conducted.

This case has been followed in ***Gulamani v. Chandra***, 2009 BCSC 1393, Arnold-Bailey, J.

VII. NEUROPSYCHOLOGIST'S RAW DATA

A. *Scott v. Erickson,* 2009 BCSC 489, Master McCallum

The plaintiff produced a neuropsychologist's report to the defendants who sought two orders:

- production of the neuropsychologist's raw test data
- permission to interview the neuropsychologist in accordance with *Swirski v. Hachey*, [1995] B.C.J. No. 2686.

The neuropsychologist, who treated the plaintiff, contended that the raw test data should be disclosed only to another professional qualified to interpret the data. His report was not provided to the defendant in accordance with Rule 40A and there was no confirmation by the plaintiff that the neuropsychologist would be called to give evidence in the upcoming trial. Nevertheless, Master McCallum concluded that the defendant ought to be able to test the expert's opinions in defence of the claim.

He employed the same mechanism used by Master Horn in Davies v. Milne, [1999] B.C.J. No. 550, and ordered that the raw test data be delivered to plaintiff's counsel who would immediately provide the data to defence counsel. The raw test data was not to be copied or disclosed to or discussed other than with members of the defendant's law firm and any instructing adjuster. The data may be disclosed to and discussed with any person who, in the opinion of the neuropsychologist, is competent to use the data. In the event of a dispute, the College of Psychologists of British Columbia would determine whether such person is competent.

With respect to the second application, Master McCallum confirmed that no order was required to interview the plaintiff's neuropsychologist. Rule 28 was available to the defendant to compel an interview in the event the neuropsychologist refused to be interviewed.

VIII. EXAMINATIONS FOR DISCOVERY

A. *Movassaghi v. Aghtal*, 2009 BCCA 184, Lowry, JA.

Leave to Appeal was allowed in respect of an order made by a pre-trial judge granting liberty to a plaintiff to conduct an examination for discovery after a trial certificate had been filed (i.e., in which the party certifies that all examinations for discovery have been completed pursuant to R. 39(20)(c)).

B. *Day v. Hume*, 2009 BCSC 587, Smith, J.

In the first 50 minutes of a discovery, Plaintiff's counsel made many objections to questions posed of his client and then following a break walked out, with his client, because he had learned that counsel for the other defendants would not agree to adopt the transcript from the examining defendant.

Counsel was not entitled to terminate the discovery. He was prepared to make his client available to continue the discovery and so it would not be just for the court to strike the Plaintiff's claim.

The case is a good review of when counsel can intervene in the cross-examination of their client and how to make proper objections. It is appropriate for counsel to remind a client not to guess or speculate during the course of a discovery. Counsel should not suggest possible answers to questions. Counsel should not interfere with the cross-examination except where it is necessary to resolve ambiguity in a question or to prevent injustice. When objecting, counsel should state the basis for the objection but it is not proper to make unnecessary comments, suggestions or criticism.

IX. USE OF DISCOVERY EVIDENCE AT TRIAL

A. *MacEachern (Committee of) v. Rennie*, 2009 BCSC 795, Ehrcke, J.

Plaintiff counsel sought to read in certain discovery evidence from one of the Defendants, Rennie. Rennie sought to have further answers and questions read in to provide context. Plaintiff's counsel agreed that the additional questions and answers could be read in but submitted that when additional evidence is read in under Rule 40(27)(d) it becomes evidence that can be used not only against the party who was examined, but also against all other defendants. That argument was rejected. The supplemental evidence was not direct evidence against any other Defendant.

X. RULE 28 EXAMINATIONS

A. *Horton v. Lincoln*, 2009 BCSC 1023, Master Caldwell

This decision addresses two applications in the context of a personal injury claim arising from a car accident.

The Defendant sought authorization from the Plaintiff to interview representatives of her employer in respect of the alleged income loss claim. The employers had refused to answer questions. The application was dismissed because the proper course is to proceed with a Rule 28 application.

The Defendant's second application sought to compel the Plaintiff to produce all materials relating to criminal proceedings commenced against the Plaintiff arising out of the subject accident. That was also dismissed on the basis that the court was bound by the BCCA decision in *Wong v. Antunes*, and the Defendant would have to seek disclosure directly from the police.

B. *Cheema v. Kalkat*, 2009 BCSC 736, Master Keighley

Recent case confirming that notice of a Rule 28 application must be served on all parties of record, but the other parties do not have standing to oppose the application.

XI. CLASS ACTION DOCUMENT DISCLOSURE

A. *Richard v. British Columbia*, 2009 BCCA 77, per Neilson J.A., Finch C.J.B.C. and Groberman JJ.A. concurring)

In the context of the Woodlands class action, the Province (the Defendant) was ordered to produce all class members' resident files to class counsel. The Province appealed raising concerns regarding the private nature of the

information contained in the files. The Court of Appeal observed that the "privacy rights of third parties are not an absolute bar to their production, but are one of several interests to be considered and balanced in determining the proper ambit of document discovery, once relevance has been established." The Chambers Judge had correctly found that there were adequate safeguards in place to ensure confidentiality: the notice informs class members that if they do not wish class counsel to have access to their files, they can opt-out; class counsel are bound by the implied undertaking to keep discovery evidence confidential and to use it only for the purpose of the litigation; and, class counsel, their staff and anyone else who may access the files must sign a confidentiality agreement.