DISCOVERY OF DOCUMENTS UNDER
SUPREME COURT CIVIL RULE 7-1:
Technical and Evidentiary Conundrums

by

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1. **Introduction**

One of the key features of the new July 1, 2010 Rules was the concept of “proportionality”; the stated object of the Rules is to secure “just, speedy and inexpensive determination of every proceeding on its merits having regard to the amount involved, the importance of the issues, and the complexity of the proceeding.”

A second key feature of the new Rules was the imposition of limits on discovery. Examinations for discovery are limited to seven hours unless the Court orders otherwise and the scope of document production has been reduced. According to the introduction to the new Rules, “*Peruvian Guano is mortally wounded if not already dead*”.

The purpose of this short paper is to review the new process of discovery of documents in civil law suits in British Columbia. There have been some significant changes.

2. **The Old Rule**

Discovery of documents was governed under Rule 26 of the former Supreme Court Rules. It contemplated the delivery for an actual Demand for Discovery of Documents in a specified form. It required each party who received such a demand to deliver within 21 days a “list of documents that are or have been in the party's possession or control relating to every matter in question in the action”.

The old Rule was broadly interpreted in accordance with the test described in the famous case *Compagnie Financière et Commerciale du Pacifique v. The Peruvian Guano Company* (1882) 11 QBD 55(CA) in which the Court of Appeal stated:

“I think it obvious from the use of these terms that the documents produced are not confined to those, which would be evidence either to prove or disprove any matter in question in the action; and the practice with regard to insurance cases shows, that the Court never thought that the person making the Affidavit would satisfy the duty imposed upon him by merely setting out such documents, as would be evidence to support or defeat any issue in the cause.

The doctrine seems to me to go further than that to go as far as the principle which I am about to lay down. It seems to me that every document relates to the matter in question in the action, which not only would be evidence upon any issue, but also which, if it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit to either advance his own case or to damage the case of his adversary. I have put in the word “either directly or indirectly”, because, as it seems to me, a document can probably be said to contain information which may enable the party requiring the affidavit
either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry, which may have either of these two consequences…”

[emphasis in original].

As applied in BC, this obliged the parties to make discovery of often a very substantial number of documents, many of which were subsequently determined to be largely irrelevant to the issues in dispute.

3. **The New Rule**

The new SCCR 7-1 has dramatically modified, and limited, the document discovery process. The complete rule is attached as Appendix A to this paper. It contemplates:

- production within 35 days of the end of the pleading period,
- of a list of documents that are or have been in the party’s possession or control,
- which could, if available, be used by any party of record at trial to prove or disprove a material fact (emphasis added), including
- all other documents to which the party intends to refer at trial,
- mandatory ongoing discovery of additional documents initially omitted through inaccuracy / incompleteness or arising through subsequent possession/control, by way of “prompt amendment” of the list of documents,
- the ability of a party to make demand for discovery of additional documents not set out on the list which “relate to any or all matters in question in the action” (the “old” test) provided justification is supplied; and
- prohibition of the use at trial of any document of which discovery has not been made.

In short, BC now has a two-tier document discovery process involving:

i) initial discovery that may be relatively narrow; and

ii) further discovery on demand of broader classes of documents.

3.1 **The New Form**

SCCR 7-1 specifies Form 22 as the form for a List of Documents being produced under the Rule. A copy of Form 22 is attached as Appendix B to this paper. It is helpful inasmuch as it contains useful instructions for completion i.e. what type of documents to include under which Part of the List. The Form specifies four parts listing four separate categories of documents as follows:
Part 1- documents that are or have been in the listing party’s possession or control that could be used by any party at trial to prove or disprove any material fact;

Part 2- other documents to which the listing party intends to refer at trial

Part 3- documents that relate to a matter in question in the action

Part 4- documents for which privilege from production is claimed

In the past 18 months it has become apparent that most counsel/paralegals are not paying close attention to the new disclosure requirements. Rather, what seems to be happening with considerable frequency is that:

- many parties continue to make an “old fashioned” discovery (listing) of documents under Part 1 of the new form, much broader than the narrow “probative of a material fact” test;
- Parts 2 and 3 of the List, and often times Part 4 as well, are simply marked “nil”; and
- If discovery of privileged documents is made, often times it is simply a listing of general categories of privileged documents without more specific identification of each document within that category.

At the end of the day, there may be little harm in the lax Part 1 practices referred to above since the initial discovery of documents is actually broader than might otherwise be required by the new rule. The practice may not pay strict attention to the concept of “proportionatilty” but in the vast majority of cases little injury is done. Perhaps that is why few complaints are made. Nonetheless, it would be wise for both counsel and professional staff to pay closer attention to the technical document discovery process and to be alert to (possibly cynical) strategic non-disclosure tactics that some parties may choose to employ.

3.2 Penalty for Non-Disclosure

Apart from strategic discovery considerations, it should be borne in mind that there is a significant penalty for non-disclosure;

SCCR 7-1(21) prohibits admission into evidence in the proceeding of any non-disclosed document or its use for the purpose of examination or cross-examination. This latter proscription includes examination for discovery as well as trial. While the court has a discretion to lift the prohibition, it may not be exercised if there is an inadequate excuse for non-disclosure.

As well, of course, non-disclosure in accordance with the Rule may also carry cost consequences in certain situations. It is by no means inconceivable that special costs might be assessed against a party, or its counsel, who has engaged in cynical or otherwise inappropriate non-disclosure.
3.3 The “Probative of Material Facts” Test

As the excerpt from the *Peruvian Guano* case states, the “probative of material facts” test is much more narrow than any “direct/indirect, relating to matters in question/train of enquiry possibility” test.

The concept of “material facts” requires a careful analysis and understanding of the causes of action/defence in each case. Every cause of action, whether it’s negligence, breach of contract, conspiracy, or simple debt, is broken down into constituent elements i.e. the components that must be established on the evidence in order to make out the cause of action/defence. The factual underpinnings of these elements are the “material facts” and to the extent that they can be proved/disproved by way of documents, the latter are the documents that must be initially disclosed under Rule 7-1(1).

It should be recalled that under the new Rules, it is also an express requirement that Plaintiffs and Defendants plead the “material facts” in their Notice of Civil Claim and Response to Civil Claim. Part 1 of the Notice of Civil Claim requires the Plaintiff to “set out a concise statement of the material facts giving rise to the Plaintiff’s claim”. A Defendant’s Response to Civil Claim must admit, deny or disclaim knowledge of those facts, must set out the Defendants own version of the facts including any additional “material facts relevant to the matters raised”.

Hence, reference to the facts that have been specifically pleaded in the pleadings can assist in determining what are the “material facts” in relation to which document discovery must occur. If the pleadings are poorly drafted or otherwise inadequate, careful analysis of the material elements of the cause of action sought to be pleaded will be required to “inform” the proper document discovery process.

3.4 Privileged Documents

The governing principle remains that privileged documents must be listed but need not be produced as part of the discovery process.

Part 4 of Form 22 requires each party to list documents that would be probative of a material fact/relating to a matter in question in the action but which are “privileged from production”. The Form requires each document to be identified individually by way of date, description and for the ground on which privilege is claimed to be specified. Sub-Rule 7-1(6) and (7) also require a “statement of the grounds of the privilege” and for the “nature of any (privileged) document to be described in a matter that, without revealing information that is privileged, which enable other parties to assess the validity of the claim of privilege”. In short, the requirement with respect to privileged documents is,

- each document be listed;
- each document be adequately described so as to permit an assessment of the validity of privilege claimed; and
- the grounds of the claimed privilege must be stated.
It is therefore clear that aggregation of unnumbered documents using general descriptions of categories of privileged documents, does not comply with the Rules. The practice will probably continue, particularly with respect to the contents of counsel’s litigation brief. Still, some particularization of the more important contents of that brief is well advised.

For example, the following would likely suffice,

“4.1/February 16 2012/Engineering report respecting the cause of equipment failure/Litigation Brief: Expert Opinion”

Many documents formerly listed as privileged documents under the old Rules may no longer meet the “probative of a material fact” criterion and may no longer be required to be listed under Rule 7-1. For example, settlement communications between counsel for the parties may be probative of nothing at all except perhaps a desire to terminate the litigation and hence may not be required to be listed. It is unlikely, however, that Part 4 of a properly prepared List of Documents will be properly completed with a “nil” notation.

3.5 Ongoing Discovery Obligation

As with the old Rules, new Rule 7-1(9) requires the provision of a “promptly amended” list of documents to list any documents missed through earlier inaccuracies and incompleteness and/or subsequently received in the party’s possession or control.

3.6 Demand for Additional Documents

This is the “second-tier” of the new document discovery process under Rule 7-1. Subsections R7-1 (10) and (11) allow a party to make a demand for the listing/production of additional documents or classes of documents beyond what has already been disclosed. But there is a major difference between the two subsections, namely,

- a demand under R7-1(10) is for additional documents that should have been disclosed under Subrule (1) i.e. documents that are probative of a material fact or any other document to which the party intends to refer at trial, whereas
- the additional documents that may be demanded under subrule 7-1(11) are for such additional documents within the listing party’s, “possession, power or control” and which “relate to any or all matters in question in the action” (i.e. the Peruvian Guano discovery under the former rules and note the addition of the word “power”).

There are, however, two important qualifications accompanying the demand for broader discovery of documents under Rule 7-1 (11) including,

- a written demand identifying the additional documents or classes of documents with reasonable specificity and
- an indication of the reason why such additional documents or classes of documents should be disclosed in the case.
The party who receives the above demands then has 35 days to either comply with same or explain why the additionally demanded documents are not going to be listed or made available.

This “two-tiered” process of initial narrow discovery of documents followed by broader discovery of documents upon justifiable demand, requires intellectual rigour to be brought to the assessment of the adequacy of any party’s discovery of documents. The initial production must be carefully reviewed for adequacy and any short comings must be addressed through additional demands under either subrules 7-1 (10) or (11). Justification for the additional demands will be required so a casual, pro-forma approach must be avoided. Much of the case law to date (referred to below) respecting new Rule 7-1 relates to the adequacy of disclosure and the propriety of subsequent demands for additional documents.

3.7 Other Documents to Which the Party Intends to Refer at Trial

As indicated, Rule 7-1 (1)(a)(ii) and Part 2 of Form 22 of the Form 22 list of documents requires a party to list “all other documents to which the party intends to refer at trial”. The Form makes it clear that this particular sub-listing does not include documents already listed under Parts 1, 3 or 4 of the List of Documents.

So what, then, are the sorts of documents that might appear in Part 2? The answer is not obvious and there does not appear to be any case law addressing the subject to date. Conceivably it includes all documents not already listed which a party intends to enter as exhibits at trial.

Privileged documents forming part of counsel’s litigation brief will not likely see any waiver of privilege until the trial itself. Until that point, they will be listed in Part 4 of the List of Documents in any event (hopefully with an adequate description).

It is possible that parties will intend to subpoena documents from third party sources and require such third parties to attend at trial with documents. If so, then the documents, or at least the category of documents, intended to be produced in that regard should probably be listed in Part 2 of the List of Documents. The purpose, after all, is to alert the other side to the documents intended to be relied upon at trial.

It remains to be seen how the discovery of documents under Part 2 of the List will develop as time goes by. What is clear, however, is that revisiting Part 2 of the List is a prudent part of trial preparation and is a step that should be added to any pre-trial procedural checklist that counsel may employ.

4. Case Law Respecting Rule 7-1

Attached as an Appendix C to this paper is a list of various cases considering the provisions of new Rule 7-1 mostly in the context of applications to compel production of additional documents. Reference to this list will provide examples of the types of additional document disclosure that has been required in different cases. Most applications have been granted, at least in part, in most of the cases but some applications have been refused on grounds of privacy, the proverbial unjustifiable “fishing expedition” and the like.
Four cases are worthy of detailed comment.

*Biehl v. Strang*, 2010 BCSC 1391, involved a breach of contract claim based on an agreement that was partly written, partly oral and partly by conduct. As a result, the Plaintiff’s evidence respecting the contract was crucial to the case. During a portion of the relevant time the events in dispute took place, the Plaintiff consumed a variety of drugs including heroin and crack cocaine. The Defendants brought an application for production of the Plaintiff’s prescription history as well as his diary extracts. The court held that the Plaintiff’s ability to remember events was relevant to proof of a material fact, namely existence of a contract based on oral terms. The application for additional document production was granted.

The case is useful, and is frequently cited, for its discussion of what constitutes a “material fact”. The court notes that Rule 7-1 does not restrict production to documents that in themselves prove material facts but it also includes documentary evidence that can assist in approving or disproving material facts. Costs were granted to the successful applicants “in any event of the cause”.

In *Edwards v. Ganzer*, 2012 BCSC 138, the court dealt with an application in a personal injury case. An order was being sought requiring the Plaintiff to produce her medical services plan and medication profile in advance of an independent medical examination that had been scheduled on the file. The case refers to *Biehl v. Strang*, supra, as a “seminal decision” addressing the primary obligation of document disclosure under the new Rule and goes on to recite the applicable principles as follows,

a. The initial production obligation under Rule 7-1(1)(a)(i) is limited to what is required to prove or disprove a material fact;

b. Rule 7-1(10) allows the opposing party to issue a written demand requiring the listing party to amend the original list and produce documents that should have been disclosed under Rule 7-1(1)(a)(i);

c. In addition, Rule 7-1(11) allows the opposing party to issue a written demand requiring the listing party to amend the List and produce documents which ought to be disclosed under a test “close to” that set out in *Peruvian Guano*;

d. The distinction between the two types of disclosure provided for under Rule 7-1 is stated as follows:

   The question is whether a document can properly be said to contain information which may enable the party requiring the document either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry, or if it may have either of those two consequences. Therefore it is acknowledged that the initial disclosure under Rule 7-1(1) relates to a materiality requirement, that a party can apply to the court, as the Defendant did here, for broader disclosure pursuant to Rule 7-1(14).

e. Both the demand by the requesting party and the response of the opposing party should be set out in writing addressing the terms and criteria used in Rule 7-1. Whether the
demand and response provides sufficient particularity is a matter of the court’s discretion;

f. If an application is brought under Rule 7-1(13) for the listing or production of documents, the court may either order compliance with the demand, excuse full compliance, or order partial compliance: Rule 7-1(14);

g. The objectives of the SCCR, including proportionality, may be taken into account by the court when exercising its discretion under Rule 7-1(14). The proportionality rule can be applied to either expand or restrict the required production of documents”.

The court held that the MSP and medical profile records sought to be disclosed could properly be said to contain information which may enable the Defendant to advance his case or damage the case of the Plaintiff and that it was a document which may fairly lead to a train of enquiry. It therefore applied the broader test for disclosure under Rule 7-1(11) and ordered production.

In Przybysz v. Crowe, 2011 BCSC 731, the Defendant made an application in a personal injury action pursuant to subsection 7-1(11) (the Peruvian Guano subsection) for production of the MSP print out, her complete employment records for many years, and for certain unedited clinical records. The application was refused on the grounds that the request for production was basically just a “fishing expedition”, an exercise that “the court must still be wary of condoning or authorising”. The court made several interesting observations,

- Rule 7-1 contemplates at “two-tier process of disclosure’ [which] “reflects the SSCR’s objective of proportionality”.

- In order to meet that objective, the party of first instance must put some thought into what documents falls within the definition of Rule 7-1(1)(a)(i) but is not obliged to make an exhaustive list of documents which in turn assists in the “train of enquiry” promoted in Peruvian Guano;

- Only after a demand is made under Rule 7-1 (11) for documents that relate to any or all matters in question in the action and the demand for production is resisted can a court order production under Rule 7-1(14);

- There is a higher duty on a party requesting documents under Rule 7-1(11)...they must satisfy either the party being demanded or the court with an explanation “with reasonable specificity that indicates the reason why such additional documents or classes of documents should be disclosed”;

- A similar higher duty or burden rests with the party rejecting the request under Rule 7-1(12)...the burden is not met by stating that the documents will not be produced simply because of the introduction of the SCCR;

- The objective of proportionality might also influence the timing of the request for broader document disclosure. However neither the court nor the Rules require that an Examination for Discovery precede such an application. Depending on the case,
proportionality and the existing evidence might support pre-examination document disclosure so that the examination can be conducted in an efficient and effective manner.

In *Tran v. Kim Le Holdings Ltd.*, 2011, BCSC 1463, the court addressed the issue in the course of trial whether Plaintiff’s counsel should be permitted to use an unlisted prior inconsistent statement for the purposes of cross-examination. This incident arose during the cross-examination of a defence witness. That witness had given Plaintiff’s counsel a statement which was apparently inconsistent with the statement provided in her examination in chief at the trial. Defence counsel objected to the use of the statement on the basis that it had not been listed in the List of Documents and invoked Rule 7-1(21) in that regard.

The Plaintiff agreed that the statement had not been properly listed under Part 3 (privileged documents) under the old Rules. Under the new Rules, however, counsel argued that the document did not require listing because a statement of this sort did not “prove or disprove a material fact”. Rather, it was a document relevant only to credibility and not required to be listed. Further, counsel had no intention of using the document at trial and its use only became necessary because of the surprise and contradictory evidence that had been given in chief.

The court ultimately decided not to make a ruling on the issue, concluding that it would exercise its discretion to allow the document to be used for cross-examination in any event. However, it commented as follows,

“I must say that I am sceptical that the Plaintiff’s argument is correct. It is common ground that the document here is covered by litigation privilege, which necessarily ties it into relevant issues in the litigation. Rule 7-1(6) governs the listing of privileged documents. It is not obvious to me from the wording of the rule that the scope of the obligation set out in Rule 7-1(6) is qualified or limited by Rule 7-1(1).

More importantly, however, prior inconsistent statements can be used, in my view, to prove or disprove material facts. Depending on how a witness responds to the statement when put to the witness, the effect of the use of the statement may well go beyond merely affecting credibility. The witness may adopt the content of the statement insofar as it relates to material facts; in that sense, at least, statements can facilitate the proof of material facts. Statements can facilitate the proof of material facts even if the witness does not adopt them, because findings on material facts may be affected by findings on credibility. But if a witness does adopt a prior inconsistent statement and accepts the truth of it, that statement may be used as proof of the truth of its contents, and thereby be used to prove or disprove material facts.

A fine parsing of the obligation to list documents is, in my view, contrary to the policy of disclosure which is exemplified by the *Stone* decision in the Court of Appeal”.

5. **A Cautionary Word About Ethics**

Our system of justice is adversarial in nature and one which gives rise to often conflicting loyalties and duties to the profession, the Court, the client and opposing counsel. Counsel are governed by Canons of Legal Ethics which demand utmost personal integrity and good faith in all dealings.

The ethics of advocacy require resolute prosecution of the client’s interests but, as an officer of the Court, counsel has an overriding duty to the Court and to the profession to act with scrupulous integrity and to avoid all sharp practice. These duties come to the fore in the context of the discovery of documents, where counsel are required to assess what must be produced and what need not be produced.

Competent counsel can reasonably disagree in any given case on the materiality of certain facts or the relevance of documents related to such facts. Indeed, Rule 7-1 expressly contemplates such disputes being brought before and resolved by the Court. But proper professional conduct does not permit deliberate non-disclosure of documents which are required to be disclosed, nor knowing disregard of the Rules based on cynical assumptions respecting strategy or cost. The discovery of documents under the new Rule remains a process that demands good judgment and utmost integrity perhaps even more so than in the past.
APPENDIX C – A LIST OF VARIOUS CASES CONSIDERING THE PROVISIONS OF NEW RULE 7-1
Part 7 — Procedures For Ascertaining Facts

Rule 7-1 — Discovery and Inspection of Documents

List of documents

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists
   (i) all documents that are or have been in the party’s possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
   (ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

Documents to be enumerated

(2) Subject to subrules (6) and (7), each party’s list of documents must include a brief description of each listed document.

Insurance policy

(3) A party must include in the party’s list of documents any insurance policy under which an insurer may be liable

(a) to satisfy the whole or any part of a judgment granted in the action, or

(b) to indemnify or reimburse any party for any money paid by that party in satisfaction of the whole or any part of such a judgment.

Information not to be disclosed

(4) Despite subrule (3), information concerning the insurance policy must not be disclosed to the court at trial unless it is relevant to an issue in the action.
Insurance policy

(5) For the purposes of subrules (3) and (4), "insurance policy" does not include an application for insurance.

Claim for privilege

(6) If it is claimed that a document is privileged from production, the claim must be made in the list of documents with a statement of the grounds of the privilege.

Nature of privileged documents to be described

(7) The nature of any document for which privilege from production is claimed must be described in a manner that, without revealing information that is privileged, will enable other parties to assess the validity of the claim of privilege.

Affidavit verifying list of documents

(8) The court may order a party of record to serve an affidavit verifying a list of documents.

Amending the list of documents

(9) If, after a list of documents has been served under this rule,

(a) it comes to the attention of the party serving it that the list is inaccurate or incomplete, or

(b) there comes into the party's possession or control a document that could be used by any party of record at trial to prove or disprove a material fact or any other document to which the party intends to refer at trial,

the party must promptly amend the list of documents and serve the amended list of documents on the other parties of record.

[am. B.C. Reg. 119/2010, Sch. A, s. 14 (a).]

Party may demand documents required under this rule

(10) If a party who has received a list of documents believes that the list omits documents or a class of documents that should have been disclosed under subrule (1) (a) or (9), the party may, by written demand, require the party who prepared the list to

(a) amend the list of documents,
(b) serve on the demanding party the amended list of documents, and
(c) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

[am. B.C. Reg. 119/2010, Sch. A, s. 14 (b) and (c).]

Party may demand additional documents

(11) If a party who has received a list of documents believes that the list should include documents or classes of documents that

(a) are within the listing party's possession, power or control,
(b) relate to any or all matters in question in the action, and
(c) are additional to the documents or classes of documents required under subrule (1) (a) or (9),

the party, by written demand that identifies the additional documents or classes of documents with reasonable specificity and that indicates the reason why such additional documents or classes of documents should be disclosed, may require the listing party to

(d) amend the list of documents,
(e) serve on the demanding party the amended list of documents, and
(f) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

[en. B.C. Reg. 119/2010, Sch. A, s. 14 (d).]

Response to demand for documents

(12) A party who receives a demand under subrule (10) or (11) must, within 35 days after receipt, do one of the following:

(a) comply with the demand in relation to the demanded documents;
(b) comply with the demand in relation to those of the demanded documents that the party is prepared to list and indicate, in relation to the balance of the demanded documents,

(i) why an amended list of documents that includes those documents is not being prepared and served, and
(ii) why those documents are not being made available;

(c) indicate, in relation to the demanded documents,

(i) why an amended list of documents that includes those documents is not being prepared and served, and

(ii) why those documents are not being made available.

[am. B.C. Reg. 119/2010, Sch. A, s. 14 (e).]

Application for production of documents

(13) If a party who receives a demand under subrule (10) or (11) does not, within 35 days after receipt, comply with the demand in relation to the demanded documents, the demanding party may apply for an order requiring the listing party to comply with the demand.

Court may alter requirements

(14) On an application under subrule (13) or otherwise, the court may

(a) order that a party be excused from compliance with subrule (1), (3), (6), (15) or (16) or with a demand under subrule (10) or (11), either generally or in respect of one or more documents or classes of documents, or

(b) order a party to

(i) amend the list of documents to list additional documents that are or have been in the party's possession, power or control relating to any or all matters in question in the action,

(ii) serve the amended list of documents on all parties of record, and

(iii) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

[am. B.C. Reg. 119/2010, Sch. A, s. 14 (b), (c) and (f).]

Inspection of documents

(15) A party who has served a list of documents on any other party must allow the other party to inspect and copy, during normal business hours and at the location specified in the list of documents, the listed documents except those documents that the listing party objects to producing.

[am. B.C. Reg. 119/2010, Sch. A, s. 14 (g).]
Copies of documents

(16) If a party is entitled to inspect listed documents under subrule (15), the listing party must, on the request of the party entitled to inspection and on receiving payment in advance of the cost of reproduction and service, serve on the requesting party copies of the documents, if reproducible, for which a request has been made.

[am. B.C. Reg. 119/2010, Sch. A, s. 14 (h).]

Order to produce document

(17) The court may order the production of a document for inspection and copying by any party or by the court at a time and place and in the manner it considers appropriate.

Documents not in possession of party

(18) If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties of record, may make an order for one or both of the following:

(a) production, inspection and copying of the document;
(b) preparation of a certified copy that may be used instead of the original.

Order by consent

(19) An order under subrule (18) may be made by consent if that order is endorsed with an acknowledgment by the person in possession or control of the document that the person has no objection to the terms of the proposed order.

Inspection of document by court

(20) If, on an application for production of a document, production is objected to on the grounds of privilege, the court may inspect the document for the purpose of deciding the validity of the objection.

Party may not use document

(21) Unless the court otherwise orders, if a party fails to make discovery of or produce for inspection or copying a document as required by this rule, the party may not put the document in evidence in the proceeding or use it for the purpose of examination or cross-examination.
Determinations of issue before discovery

(22) If the party from whom discovery, inspection or copying of a document is sought objects to that discovery, inspection or copying, the court may, if satisfied that for any reason it is desirable that an issue or question in dispute should be determined before deciding on the right to discovery, inspection or copying, order that the issue or question be determined first and reserve the question of discovery, inspection or copying.
FORM 22
(RULE 7-1(1))

In the Supreme Court of British Columbia

Between

Plaintiff(s)

and

Defendant(s)

LIST OF DOCUMENTS

Prepared by: ___________________________ (the "listing party")

Part 1: DOCUMENTS THAT ARE OR HAVE BEEN IN THE LISTING PARTY’S POSSESSION OR CONTROL AND THAT COULD BE USED BY ANY PARTY AT TRIAL TO PROVE OR DISPROVE A MATERIAL FACT

[Do not include documents listed under Part 2, 3 or 4.]

<table>
<thead>
<tr>
<th>No</th>
<th>Date of document [dd/mm/yyyy]</th>
<th>Description of document</th>
<th>Indicate by a check mark if the document is no longer in the listing party’s possession or control</th>
<th>Indicate, for each document listed in this Part by way of an amendment to this List of Documents under Rule 7-1(9), (12) or (14), the date on which the document was listed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1</td>
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07/2010 Page 1 of 3
Part 2: OTHER DOCUMENTS TO WHICH THE LISTING PARTY INTENDS TO REFER AT TRIAL

[Do not include documents listed under Part 1, 3 or 4.]

<table>
<thead>
<tr>
<th>No</th>
<th>Date of document (dd/mmm/yyyy)</th>
<th>Description of document</th>
<th>Indicate by a check mark if the document is no longer in the listing party's possession or control</th>
<th>Indicate, for each document listed in this Part by way of an amendment to this List of Documents under Rule 7-1 (9), (12) or (14), the date on which the document was listed</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1</td>
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</table>

Part 3: DOCUMENTS THAT RELATE TO A MATTER IN QUESTIONS IN THE ACTION

[List here all documents that are listed in response to a demand under Rule 7-1 (11) of the Supreme Court Civil Rules, and all documents that are listed in response to a court order under Rule 7-1 (14) of the Supreme Court Civil Rules, that have not been listed under Part 1 or 2. Do not include documents listed under Part 1, 2 or 4.]

<table>
<thead>
<tr>
<th>No</th>
<th>Date of document (dd/mmm/yyyy)</th>
<th>Description of document</th>
<th>Indicate by a check mark if the document is no longer in the listing party's possession or control</th>
<th>Indicate, for each document listed in this Part by way of an amendment to this List of Documents under Rule 7-1 (9), (12) or (14), the date on which the document was listed</th>
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<tr>
<td>3.1</td>
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Part 4: DOCUMENTS FOR WHICH PRIVILEGE FROM PRODUCTION ISCLAIMED
<table>
<thead>
<tr>
<th>No</th>
<th>Date of document</th>
<th>Description of document</th>
<th>Grounds on which privilege is claimed</th>
<th>Indicate, for each document listed in this Part by way of an amendment to this List of Documents under Rule 7-1 (9), (12) or (14), the date on which the document was listed</th>
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<tr>
<td>4.1</td>
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TAKE NOTICE that the documents listed in Parts 1, 2 or 3 of this List of Documents that are not shown as no longer being in the listing party’s possession or control may be inspected and copied, during normal business hours, at

__________________________________________________________

Date:

__________________________________________________________

Signature of
☐ listing party    ☐ lawyer for listing party
APPENDIX C – A LIST OF VARIOUS CASES CONSIDERING THE PROVISIONS OF NEW RULE 7-1
CASELAW RE: SCCR 7-1

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Application / Rule Cited</th>
<th>Type of Documents</th>
<th>Ruling</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Abougoush v. Sauve, 2011 BCSC 885</td>
<td>By Defendant – production of documents / 7-1(1), (11), (12), (13) and (14)</td>
<td>Pictures taken during two vacation post MVA injury Metadata from the pictures (digital camera)</td>
<td>Application Granted</td>
<td>The Plaintiff did disclose two pictures from one vacation and a number from the other vacation. She swore an affidavit that they were the only pictures relevant to possible physical activity. Plaintiff’s counsel brought a binder with all the pictures of the vacations and the Court reviewed the pictures, not because that is required under the rules, but because of an accommodation of the parties. The photographs in question depict the Plaintiff in various indoor and outdoor tropical settings. The Plaintiff is depicted engaging in various activities including swimming, walking on a beach, going on a catamaran power boat, and visiting the Grand Canyon. The photographs clearly establish that the plaintiff did not spend the majority of her time curled up in her parent's motorhome or resting poolside in a chaise lounge. In the Court held that the Plaintiff's pleadings and affidavit evidence make the entire photographic record of her trips relevant to matters in question in this suit.</td>
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<tr>
<td>2. Arch Windoor Ltd. v. Aragon (Quayside) Properties Ltd., 2011 BCSC 330</td>
<td>By Plaintiff – production of documents / 7-1(10)</td>
<td>All financial records, pro forma, budgets (actual or estimate), schedules regarding the construction project in issue Complete file of Engineering firm</td>
<td>Application granted in part. Most of the documents are ordered to be</td>
<td>This decision cannot be summarized well. It is short and deals with 18 different categories of documents and makes 10 different decisions.</td>
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<td>3. <em>Avro Capital Corp. v. Biosign Technologies Inc.</em>, 2011 BCSC 1332</td>
<td>By Defendant – production of documents / 7-1, 7-1(10) and 7-1(11)</td>
<td>Long list of document descriptions. Mostly, the documents included, correspondence regarding draft agreement between specified parties; correspondence between specific investors and Plaintiff; records regarding purchase of Defendants share’s by Plaintiff; calendar of specified employees of the Plaintiff; and the Plaintiff’s telephone records.</td>
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<td>Application Granted in part.</td>
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<td>Documents which were created after July Agreement were to be disclosed</td>
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<td>Upon review of Notice of Civil Claim, the Court will have to decide two major issues. First, whether a misrepresentation was made. Second, pursuant to July Agreement how much damages are entitled? What Avro says it did that entitles it to compensation and to assess the quality of that performance are material facts in issue between the parties.</td>
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<td>4. <em>Balderston v. Aspin</em>, 2011 BCSC 730</td>
<td>By Defendant – production of documents / 7-1(1)</td>
<td>MSP printout, including diagnostic codes; All records in the hands of Service Canada (especially Employment Insurance); Catch all list of all documents in Plaintiff’s power and control relating to MVA; and Authorization for ICBC to search their files and list all documents relating to MVA.</td>
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<td>Application granted in part.</td>
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<td>MSP 2 years before accident</td>
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<td>Service Canada request denied</td>
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<td>ICBC and MVA records denied (Plaintiff consented to some disclosure)</td>
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<td>The Plaintiff had produced a number of pre-existing medical condition documents (specific treating doctor files) already and employment histories for specific periods. Furthermore, the Plaintiff’s WCB file was disclosed from an injury at work that occurred before MVA.</td>
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<td>In the specific circumstances of this case, the Defendant should be given a reasonable opportunity to explore the Plaintiff’s pre-accident health. Given the disclosure that has been made to date, that reasonable opportunity amounts to the Plaintiff obtaining her MSP history for the two-year period preceding the accident date.</td>
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<td>The difficulty for the Defendant with respect to the MVA injury aspect of the application is that the Plaintiff has said she is willing to produce the examination for discovery transcripts and</td>
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<td>5. Benning v. Trustees of the IWA, 2010 BCSC 1422</td>
<td>Appeal by Plaintiff from a Master’s order dismissing application for document production / 7-1(7)</td>
<td>Defendant engaged an investigator to gather information regarding the Plaintiff for the sole purpose of defending this litigation and this engagement happened after services of the writ of summons.</td>
<td>Appeal dismissed (application dismissed)</td>
<td>The documents which predated the engagement came into the hands of Defendants because of the services of investigator. The documents were adequately described for a claim of privilege. They included the date of the document and the number of pages. The Defendant’s solicitor’s affidavit states that the documents came into her hand after the commencement of the litigation as a result of investigations performed and for the sole purpose of the litigation.</td>
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<td>6. Biehl v. Strang, 2010 BCSC 1391</td>
<td>By Defendant – production of documents / 7-1(1) and 7-1(14)</td>
<td>Plaintiff’s prescription history for prescription drugs. Plaintiff’s diary entries regarding illegal drug usage.</td>
<td>Application Granted</td>
<td>Breach of Contract, unjust enrichment and <em>quantum meruit</em> – evidence regarding agreement is crucial to the case. The Plaintiff used many drugs during the time that the alleged contract was formed. The Court held that the ability of the Plaintiff to remember is relevant to proof of a material fact, namely the existence of a contract based on oral terms.</td>
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<td>7. British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation &amp; Festival Property Ltd., 2011 BCSC 198</td>
<td>By Plaintiff – production of documents / 7-1(18)</td>
<td>Report to Crown Counsel from a joint task force (RCMP) regarding illegal conduct of a Chapter of the Hells Angels.</td>
<td>Application Granted</td>
<td>The RCMP did not object to the production pursuant to an order of the Court. The action regarded the forfeiture of the club house of the Hells Angel Chapter because of its alleged use in the commission of crimes.</td>
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<td><strong>Brunette v. Bryce, 2010</strong>&lt;br&gt;BCSC 1681</td>
<td><strong>By Petitioner – production of documents and appointment as committees as person and estate of her Aunt. / 7-1</strong></td>
<td><strong>Copies of all financial records of the Aunt.</strong></td>
<td><strong>Application dismissed.</strong></td>
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<td>8.</td>
<td><strong>Burgess v. Buell Distribution Corp., 2011</strong>&lt;br&gt;BCSC 1740</td>
<td><strong>By Defendant – production of documents / 7-1(1) and 7-1(14) Court states could have been under 7-1(18)</strong></td>
<td><strong>WCB records for specific time period.</strong></td>
<td><strong>Application granted</strong></td>
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<td>9.</td>
<td><strong>Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority, 2011 BCSC 88</strong></td>
<td><strong>By Plaintiff – production of documents / Rule 7-1(20)</strong></td>
<td><strong>Documents in the possession of Defendant’s counsel regarding the decision, purpose, instructions from the appraiser and valuation of expropriated lands.</strong></td>
<td><strong>Application dismissed.</strong></td>
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<td>standard of relevancy or material has been affected by the new rules.</td>
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<td><strong>11. Dosanjh v. Leblanc</strong>, 2011 BCSC 1660</td>
<td>By Defendant – production of documents / 7-1(11)</td>
<td>Documents from the Plaintiff's hard drive, social media accounts, iPhone and digital camera that relate to matters in question in this litigation, including the Plaintiff's health, mental state and employability.</td>
<td>Application dismissed. Rather, the Defendant merely says that health, enjoyment of life and employability are in issue. The Court held more should be required to meet the test of Rule 7-1(1)(a)(i) than just saying a particular matter is in issue in order to infringe on a litigant's privacy. The Court held there was not any rational justification for breaching the privacy rights of an individual in civil proceedings simply because it is alleged that the individual's general health, enjoyment of life and employability are directly at issue. Merely because a record may be made of the communication shouldn't make it any different than a private telephone conversation. If not, surely applications in civil proceedings for recordings of private communications can't be far behind.</td>
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<td><strong>12. Edwards v. Ganzer</strong>, 2012 BCSC 138</td>
<td>By Defendant – production of documents / 7-1(11), 7-1(13) and 7-1(14)</td>
<td>MSP Profile Medication Profile</td>
<td>Application granted in part. MSP granted Medication granted for a more restricted period of time. Decisions where the production of these kinds of records have been denied will likely have little or no precedential value to the Plaintiff here as the facts are bound to differ from those in the case at bar. (THIS HAS NOT CHANGED BY NEW RULES) The Defendant submits that once the demand is shown to be properly made, the Court may look to decisions rendered under Rule 26(11) of the former Rules of Court with respect to production of documents. That is because the test under that Rule is analogous, or even equivalent, to the test for production under Rule 7-1(11) (i.e. the Guano test). On this point, I reiterate that the authorities cited only go so far as to say that the broader disclosure test under Rules 7-1(11)(b) and (14) is &quot;close to&quot; the Guano test.</td>
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<td>13. <strong>Fern Castle Holdings Corp. v. Stonebridge Village Residence Ltd.</strong>, 2010 BCSC 1611</td>
<td>By Petitioner – production of documents / 7-1 and 7-1(1)</td>
<td>All documents relating to the listing, offers, sale of specific lands including correspondence between the Respondent's and their solicitor.</td>
<td>Application dismissed.</td>
<td>Rule 7-1 only applies to actions, not petitions.</td>
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<td>14. <strong>Global Pacific Concepts Inc. v. Strata Plan NW 141</strong>, 2011 BCSC 1752</td>
<td>Appeal by the Defendant of decision not to produce documents / 7-1(1) and 7-1(14)</td>
<td>The Plaintiff's records of their own employees that related to the employees' wages or hourly rates paid that were invoiced to the Defendant.</td>
<td>Appeal allowed (documents to be produced)</td>
<td>The Master considered that the request was very broad. On Appeal, the Court held that the documents were not as they only show wage or hourly rates paid by the Plaintiff to its own employees and not others. The learned Master concluded that the issues do not require further detailed disclosure, but in so concluding appears not to have applied the broader Peruvian Guyano test, which is applicable here.</td>
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<td>16. <strong>Przychus v. Crowe</strong>, 2011 BCSC 731</td>
<td>By Defendants – production of documents / 7-1 (and a number of subrules)</td>
<td>MSP printout, including diagnostic codes from a specific date. Complete employment records from employer specific date. unedited copy of clinical records from massage therapy clinic.</td>
<td>Application dismissed.</td>
<td>The Plaintiff had disclosed medical records post accident and employment record post accident. The Court found that the defence has not met the evidentiary burden required by Rule 7-1(11). The plea of a pre-existing injury appears to be in forma. The Defendants must demonstrate a connection between the Plaintiff's pre-existing and accident-related complaints beyond a &quot;mere possibility&quot; In these circumstances, the application for production of the unedited massage therapy records was adjourned generally to allow the Plaintiff to prepare an affidavit deposing to the</td>
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By Plaintiff – production of documents / 7-1(11) and 7-1(13)

All documents between two Defendants that relate to the expansion joints (that failed causing damage) that show: relationship of Defendants, pricing, delivery, receipt, communications regarding the joints, quality control and contracts.

Application granted.

The SCCR rules are crafted to require full relevant disclosure. If such full relevant disclosure is not made the responses or defences can be struck.

The Court was not impressed regarding the breach of the agreement that the documents were to be produced 10 months ago is really inexcusable.


By Plaintiff – production of documents / 7-1(11)

Any document that relates the to work at issue. (failure to prepare property (what the Court called “work” pursuant to purchase and sale agreement)

Application granted

The question of what work, if any, was done to fulfill the covenants is not only specifically put in issue by the pleadings, it is the central issue. No fact could be more material to this litigation and, as said above, it is surprising that the Defendants, who specifically plead that the covenants were fulfilled, have produced so few documents going to that issue.

The Court held that there were plain and obvious gaps in the disclosure, suggesting at least that the search for them may have been less diligent than required. The Court ordered that the Defendant’s swear an affidavit verifying their list of documents, or verifying any further or amended list they may now consider appropriate to produce pursuant to Rule 7-1(1).


Trial objection / 7-1(21)

Prior inconsistent statement

Document could be used

The Court held that the Defendants could readily have determined whether or not the witness had given a statement. The fact of the existence of the statement was within the knowledge of the Defendants. This was not a situation quite like Stone where there would simply be an assumption by counsel that a pain journal had likely been kept and that the fact of the existence
<table>
<thead>
<tr>
<th>Case</th>
<th>Parties</th>
<th>Issue</th>
<th>Decision</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>20. <em>Wang v. British Columbia Medical Assn.</em>, 2011 BCSC 1658</td>
<td>By Plaintiff – production of documents / 7-1(14)</td>
<td>Defendant’s minutes and agendas of annual general meetings, post litigation audio records (of meetings), notes and electronic communications, President’s draft letters.</td>
<td>Application denied</td>
<td>In house counsel of the Defendant swore an affidavit that anytime the Plaintiff was mentioned in a meeting it came up in the context of the litigation. Privilege should attach.</td>
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<td>Defamation action</td>
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<td>Further agenda and minutes denied. Audio recordings denied President draft letters were privileged</td>
<td>The Plaintiff can ask during examination for discovery if there were any communications with or among the individual Defendants in which the Plaintiff was discussed. At that time, it can be determined whether there were any documents that arise, relating to that communication. If there are, the Court concluded that they should have been referred to in the list of documents. The Plaintiff can then demand that those documents be disclosed.</td>
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<tr>
<td>21. <em>Whitcombe v. Avec Insurance Managers Inc.</em>, 2011 BCSC 204</td>
<td>By both parties – production of documents</td>
<td>Does not say… wrongful dismissal claim with counter claim for damages caused by employees conduct.</td>
<td>Application granted to both parties.</td>
<td>The Court found that serious allegations of misfeasance that can affect employability should affect the consideration of proportionality as directed in Rule 1-3(2) when interpreting and applying Rule 7-1. The Court stated, where the issues go beyond negligence and involve opposing allegations of misfeasance, proportionality must be interpreted to allow the parties a wider, more Peruvian Guano type disclosure in order to defend and protect their respective professional reputations and abilities to carry on in the business community.</td>
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<td>22. <em>Zecher v. Josh</em>, 2011 BCSC 311</td>
<td>By Defendant – production of documents.</td>
<td>MVA injuries – PharmaNet records</td>
<td>Application dismissed</td>
<td>The Defendant did not meet their obligation to satisfy that the PharmaNet records are relevant. On the application records, the Judge could not</td>
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<td>School line of credit documents.</td>
<td>determine whether pre-existing injury was alleged (the Court only knew causation was in issue). Line of credit documents were held to be a fishing expedition to make an attack on credibility.</td>
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