

Citation: 2025 NBKB 239

Docket: FC-76-2017

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

JOSHUA TROWSSE-FREEMAN,

Plaintiff

– and –

MATTHEW MACGREGOR

Defendant

Date of Hearing: October 14, 2025
Date of Decision: October 28, 2025
Subject Matter: Motion for Production
Before: Justice Terrence J. Morrison
At: Burton, New Brunswick
Appearances: Brent J. Melanson, Counsel for the Plaintiff,
Monika M. Zauhar and Stephanie M. Charlton, Counsel for
Defendant.

DECISION

Morrison, J. (*Orally*)

I. INTRODUCTION

[1] This is a motion under Rule 31.06 by the Defendant seeking first party disclosure and production of certain documents from the Plaintiff and a motion requesting a further and better affidavit of documents.

[2] The relief sought in the Amended Notice of Motion (Further Supplemental Record on Motion, p.6) also included production of further income tax returns and complete files of expert witnesses to be called by the Plaintiff including CVs. These latter requests were not pursued by the Defendant and do not require adjudication.

[3] Finally, the Defendant has also requested further oral discovery based on the significant additional document production since the initial Examination for Discovery and the anticipated success of this motion and thus even further document production. I indicated in earlier proceedings in this matter that further oral discovery by the Defendant is warranted. I confirm that finding.

[4] Generally speaking, all documents which relate to a matter in issue, in the possession and control of the party against whom the order is sought, are required to both be disclosed and produced for inspection. The question of what relates to a matter in issue – relevance - has been

given a very broad interpretation. The general principles which govern discovery, including document discovery, are well-established and can be summarized succinctly as follows:

1. Rules regarding document discovery are to be broadly construed.
2. The purpose of [Rule 31](#) is to discover and reveal, not cover, not conceal;
3. There is a low threshold test for determining whether a document is relevant. If the document could reasonably contain information which may enable the party seeking production to advance that party's case, then it is relevant;
4. A wide latitude is permitted at the discovery stage. If the documents sought have a semblance of relevancy, then they must be produced. This is not a blanket licence to require production of each and every document that might have a glimmer of relevancy.
5. A party to a litigation does not have the right to unilaterally decide on its own that some documents relating to a matter in issue in the action are relevant;

(*Clark v. Collicott*, 2013 NBQB 53 at paras. 14-16; *Babineau et al v. Crossman et al*, 2025 NBCA 71 at paras. 18-20).

[5] When addressing a motion for production, the court must address three issues:

- (1) Are the documents relevant (bearing in mind the broad scope of relevance);
- (2) Does the party against whom the order is sought have possession or control of the documents; and
- (3) Are the documents subject to a claim of privilege.

[6] In the present case, no claim of privilege is asserted with respect to any of the documents sought.

Letters of Request from Plaintiff's Counsel to Various Entities

[7] The Defendant is seeking production of various letters sent by Plaintiff's counsel to various parties requesting documents and covering letters received with respect to the documents provided.

[8] The Defendant submits that without the letters, it is difficult, if not impossible, to ascertain whether the documents produced by the Plaintiff are in fact those requested by the Plaintiff and if they are all of the relevant records. For example, the evidence of Nicholas Nassuai points to confusion over the disclosure of documents from Dr. Segers where it appears pages are omitted from the disclosure and there appears to be uncertainty as to the date range of the documents requested and provided (Further Supplementary Record on Motion, pp. 60-61).

[9] Counsel for the Plaintiff advances two primary grounds in opposition to the production of the letters:

- (1) They are not relevant as they do not relate to a matter in issue; and
- (2) The order sought is overly broad – requesting all letters of requests and covering letters thus amounting to an impermissible fishing expedition.

[10] With respect to relevance, Plaintiff's Counsel submits that the letters do not contain any factual details about the case and consist solely of generic or administrative correspondence requesting documents. As such, they do not contain information that will enable the Defendant to advance his case and therefore are not relevant.

[11] I disagree. In *Vespar County Estates Ltd. v. Pine Hill Estates*, 2012 ONSC 6174 the court was asked to determine whether certain discovery undertakings had been satisfied. The court

determined that the formats in which the documents were produced did not permit the court to determine with confidence that the undertaking was satisfied. While the responding party provided a bundle of documents that purported to answer the undertaking, the court could not determine the issue. In ordering the party to provide the documents in an organized fashion with an explanatory covering letter, the court stated at paragraph 17:

[17] Mr. Daffern referred the Court to a series of documents that he says answer this undertaking. He might be right. But I do not know enough about the action, nor the nature or particulars of the works done to be able to satisfy myself on the review of a bundle of documents, whether they satisfy this undertaking. While the documents may indeed have been provided in answer to the undertaking, I am going to order Mr. Hassey to reproduce them, but in an organized form and with a cover letter that allows a party reviewing the documents to understand what they are meant to be.

[12] The Defendant also referred to *Davis v. MacKenzie*, 2008 NBCA 85. That case dealt with whether instructing letters from counsel to expert witnesses it intends to call as witnesses are produceable under Rule 52.01(4). The court ruled that they are. Given that the case dealt with production of instructing letters under Rule 52, not as here, production of requesting letters under Rule 31, *Davis* is clearly distinguishable from the case at bar. However, in the course of its decision, the Court of Appeal made comments which, in my view, speak to the issue of production of counsel letters generally, beyond just expert instructing letters. In that case, counsel claimed litigation privilege over the letters sent to the Plaintiff's healthcare providers. In discussing the privilege issue, the court stated at paragraph 43:

[43] The claim of litigation privilege over routine letters from the respondent's counsel to her health care providers is bereft of merit. Insulating those letters from production would, in no way, serve the need for counsel to have a litigation-related zone of privacy...

[13] On document discovery generally, the court had this to say at paragraph 37:

[37] As noted, Rule 1.03(2) calls for a liberal construction of each and every procedural rule, the objective being to secure the just, least expensive and most expeditious determination of every proceeding on its merits. It is unarguably in society's best interest that all relevant evidence be available to the trial court, which, after all, is charged with ascertaining the truth, the central objective of judicial fact-finding. **Pointless games of documentary "hide and seek" have no place in Rules-compliant litigation, which requires the fullest disclosure and production possible.** Moreover, as Lord Hewart C.J. stated in *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259, justice must not only be done: it must be seen to be done. When documents relating to matters in issue in the action are hidden from the other parties, they can never be sure that full disclosure of their contents was provided through oral discovery or on cross-examination at trial. There lingers, throughout the litigation and the trial and, indeed, well after judgment, the suspicion that the court's disposition might not be fully informed... [Emphasis added]

[14] The above-mentioned comments are in keeping with the broad approach to document discovery which I outlined at the outset of these reasons.

[15] In the present case, I accept that the requesting letters from the Plaintiff's counsel are necessary to provide context for the documents produced. In other words, the letters are critical to assuring the Defendant's counsel that what was requested and produced is the complete range of relevant documents.

[16] The letters are relevant, and they are in the possession and control of the Plaintiff and there is no claim for privilege.

[17] I will turn now to the Plaintiff's argument that the order sought is too broad thereby amounting to an impermissible fishing expedition. In support of its position, the Plaintiff refers to *Boxer v. Reesor*, [1983], 35 CPC 68. *Boxer* dealt with a dispute concerning an alleged agreement for the purchase of shares in a mining company. The Plaintiffs sought production of

two categories of documents: (1) All documents relating to any previous transactions between the parties; and (2) Documents concerning the transaction which was the subject of the litigation.

[18] The court concluded that the first request was obviously too broad and asking too much. In my view, the impugned request in *Boxer* is much broader than the Defendant's request in the present case.

[19] *Boxer* was referred to in *Agnew v. New Brunswick Telephone Company*, 2002 NBQB 179, wherein the court provided a useful summary of the law of relevance of documents in the context of discovery. The Plaintiff relies upon *Agnew* for the proposition that discovery is not a general fishing expedition, and a semblance of relevancy is not a blanket license to require production of each in every document that might possibly have a glimmer of relevancy.

[20] While the court reiterated the last principle, it also generally endorsed the broad approach to discovery, which I set out earlier, including that if a document could reasonably contain information which would enable the seeking party to advance its case, then it is relevant and producible. The Plaintiff's physical health is a central issue in this case. The requests generally relate to the production of the Plaintiff's medical records. As mentioned earlier, the requesting letters are necessary to provide context for the document production made by the Plaintiff and to provide assurance that all the relevant documents have (or have not) been produced. In my view, the order sought by the defendant is not overly broad and cannot be characterized as a fishing expedition. The requesting letters are subject to production.

Instructing Letters to Experts

[21] There does not appear to be any significant controversy over the question of production of instructing letters sent by the Plaintiff or his counsel to witnesses to be called as experts. The

Court of Appeal made it very clear in *Davis v. Mackenzie*, that such letters are to be produced. I so order.

ICBC File

[22] The Plaintiff was involved in a motor vehicle accident in British Columbia on March 1, 2019, which is subsequent to the accident which is the subject of the present case. In the British Columbia accident, the Plaintiff was the owner and driver of one of the vehicles involved in the collision. The Plaintiff alleges that he suffered injuries in the British Columbia accident, causing permanent physical disability (Record on Motion, pg. 110 to 113).

[23] Counsel for the Plaintiff acknowledges that British Columbia operates under a public insurance model with the Insurance Corporation of British Columbia (“ICBC”) providing mandatory basic insurance for all vehicles registered in British Columbia. It is a no-fault model, meaning that regardless of who is at fault in an accident, injured individuals can access medical care and benefits, and vehicle damage will be covered up to a specified amount (Plaintiff’s Pre-Hearing Brief dated October 9, 2025, p. 20).

[24] The Defendant requests an order that the Plaintiff produce the complete file of ICBC relating to the Plaintiff’s British Columbia collision, specifically the medical files from all healthcare providers, hospitals, medical professionals, etc., including files related to accident benefits and property damage.

[25] The Plaintiff does not dispute that the ICBC file is relevant, nor does he advance a claim of privilege. Instead, the Plaintiff resists production on three grounds:

(1) The production request is not formulated properly because it does not refer to section 12 of British Columbia's Freedom of Information and Protection of Privacy Act, RSBC 1996,c.165) (“FIPPA”).

(2) The request is overly broad in that it is requesting the complete file; and

(3) The court lacks jurisdiction to issue a production order to entities outside New Brunswick.

[26] I will deal first with the last ground regarding the jurisdiction to issue an order against an extra provincial entity. This is not relevant to the present motion. The Defendant is not seeking a third party production order against ICBC under Rule 31.11. Rather, the Defendant seeks an order against a party, the Plaintiff, pursuant to Rule 31.06(c).

[27] That brings into play the question of whether the Plaintiff has possession or control of the documents in question. A document is within the control of a party, if that party has an enforceable right to its possession (*Riley v. Paul*, 2006 NBCA 84; *Clark v. Collicott*, 2013 NBQB 53). The Defendant relies primarily on section 4(1) of *FIPPA* which provides as follows:

4 (1) Subject to subsections (2) and (3), **an applicant who makes a request under section 5 has a right of access to a record in the custody or under the control of a public body**, including a record containing personal information about the applicant. [Emphasis added]

[28] The Plaintiff does not dispute that *FIPPA* applies to documents in the possession of ICBC. However, the Plaintiff points out that section 12(1) of *FIPPA* creates an exception for documents that would reveal deliberations or advice to Cabinet. The Plaintiff argues that because some of the documents in the ICBC file may be exempt from production then the Plaintiff does not have an enforceable right to the “complete file”. The Plaintiff argues that since the Defendant’s

request is for the “complete file” and the Plaintiff does not have control of the “complete file”, the court cannot issue the order sought.

[29] I reject this argument for several reasons. First, there is no evidence that the ICBC file contains any documents that would fall under the Cabinet/public body confidence set out in s. 12(1). It is highly unlikely that such documents would be found in an insurance claim file for a motor vehicle accident. Second, in *Rumble v. Sobeys Inc*, 2014 NBCA 397, the court acknowledged that an order to provide “the documents” of a pharmacy was too broad because the pharmacy may have to exclude some information exempted under the applicable privacy legislation. Accordingly, the Court of Appeal varied the production order to limit it to all documents released by the pharmacy “in accordance with the privacy legislation”. The order was limited somewhat but not denied.

[30] At this juncture, I will address the Plaintiff’s argument that the Defendant’s request for the ICBC file is improperly plead. The Plaintiff says that Rule 37.03(b) requires that a Notice of Motion include reference to any statutory provision the moving party intends to rely on. The Plaintiff argues that the pleading is deficient because the Defendant did not reference the exemptions set out in section 12(1) of *FIPPA*. I reject this argument. The Defendant does not rely on section 12(1) - the Plaintiff does. In fact, the Defendant says that s. 12 has no application to its motion. In my view, the Defendant had no obligation to reference s. 12(1) of *FIPPA* as it places no reliance on that provision.

[31] In my view, the Plaintiff has an enforceable right to possession of the ICBC file pursuant to *FIPPA* subject only to any restrictions on production imposed by the *Act* (such as section 12(1)). The order sought is not overly broad. Further, the Amended Notice of Motion makes specific

reference to the medical files from healthcare providers, hospitals etc. which is clearly the focus of this motion. Finally, any concerns regarding possible exceptions can be addressed by limiting language in the production order.

[32] Although not necessary to my decision, I also conclude that, in addition to the statutory right of access provided by *FIPPA*, the Plaintiff also has a common law right to the ICBC file. In *Tower v. Foulkes*, 2015 NBCA 29, the court declined production of a Section B file because the statutory right to the file was not properly set out. It should be noted that, in that case, the Plaintiff was a passenger in the owner's vehicle and not the named insured in the policy under which he claimed Section B benefits. This was cited as a distinguishing feature in *MacGlashing v. Fernley and City of Moncton*, 2022 NBQB 129, where the court found that the Plaintiff, as a named insured, had an enforceable right to her own Section B file.

[33] While the ICBC coverage is a mandatory, no-fault regime and not a private insurance contract, it seems to me that the Plaintiff (as all registered motorists in British Columbia) is a named insured under the coverage regime. The evidence is that he pursued a claim for accident benefits which, in my view, is akin to a Section B claim. The Plaintiff is in a position analogous to the Plaintiff in *MacGlashing*. In my view, the Plaintiff has at common law, an enforceable right to possession of the ICBC file.

II. CONCLUSION

[34] The Plaintiff is hereby ordered to, within 20 days of today's date:

- (1) Deliver to the Defendant a further and better Affidavit of Documents disclosing all documents produced since delivery of his last previous Affidavit of Documents and all documents ordered to be produced pursuant to this order;

(2) Deliver to the Defendant, the letters from the Plaintiff's counsel to various entities requesting production of documents as set out in the relief sought in paragraph (B) of the Defendant's and Amended Notice of Motion;

(3) Deliver to the Defendant all instructing letters sent by Plaintiff's Counsel to the individuals whom the Plaintiff intends to call as an expert witness pursuant to Rule 52.01 of the *Rules of Court*.

(4) With respect to the ICBC file, the Plaintiff shall within 40 days deliver to the Plaintiff the ICBC file as set out in the relief sought in paragraph (C) of the Defendant's Amended Notice of Motion;

(5) The Plaintiff shall submit to further oral examination for discovery with respect to matters and issues which arise in connection with the documents produced by the Plaintiff since the conclusion of the last oral examination including the documents ordered for to be produced in this decision. Such oral examination shall be arranged among counsel and, given that the trial of this matter begins on February 9, 2026, must be completed no later than January 16, 2026; and

(6) The Defendant is entitled to costs on the motion which I fix at \$1,500.00.

DATED at Burton, New Brunswick, this 28th day of October, 2025.

Terrence J. Morrison,
J.C.Q.B.