

RULE 25 – DISCOVERY OF DOCUMENTS

Interpretation

- (1) “Document” includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form.
- (2) A document shall be deemed to be in a party’s power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.

Disclosure

- (3) Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in this rule whether or not privilege is claimed in respect of the document.

Production for inspection

- (4) Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in this rule unless privilege is claimed in respect of the document.

Insurance policies

- (5) Subject to the *Insurance Act*, a party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable

(a) to satisfy all or part of a judgment in the action, or

(b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment,

but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

Affidavit of documents

- (6) A party to an action shall, within 30 days after the close of pleadings under Rule 23(5), deliver to every other party an affidavit of documents in Form 110 or 111 disclosing to the full extent of the party’s knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party’s possession, control or power.

(a) The affidavit shall list and describe, in separate schedules, all documents relating to any matter in issue in the action

(i) that are in the party's possession, control or power and that the party does not object to producing;

(ii) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

(iii) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.

(b) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relating to any matter in issue in the action other than those listed in the affidavit.

Lawyer's certificate

(7) Where a party is represented by a lawyer, the lawyer shall certify on the affidavit of documents that he or she has explained to the deponent

(a) the necessity of making full disclosure of all documents relating to any matter in issue in the action; and

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.

Affidavit not to be filed

(8) An affidavit of documents shall not be filed, unless it is relevant to an issue on a pending application or at trial.

Inspection of documents

(9) A party who delivers to another party a request to inspect documents in Form 112 is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power.

(10) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit delivered by the other party.

(11) A party to whom a request to inspect documents is delivered shall promptly inform the party making the request of a date, within 7 days after the delivery of the request to inspect documents, and a time, between 9:30 a.m. and 4:30 p.m., when the documents may be inspected at the office of the lawyer of the party receiving delivery, or at some other convenient place, and shall at the time and place named make the documents available for inspection.

- (12) Unless the court otherwise orders, or by consent, inspection of documents shall take place in Whitehorse.

Documents to be taken to examination and trial

- (13) Unless the parties agree otherwise, all documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be taken to and produced at
- (a) the examination for discovery of the party, or of a person on behalf or in place of or in addition to the party, and
 - (b) the trial of the action.

Court may order production

- (14) The court may at any time, on the application of a party, order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.

Court may inspect to determine claim of privilege

- (15) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim.

Court may excuse performance

- (16) The court may, on application, order that a party be excused from compliance with this rule, either generally or in respect of one or more documents or classes of documents.

Copying of documents

- (17) Where a party is entitled to inspect documents in the possession or control of another party, the other party shall, on request, deliver copies of any of the documents, if reproducible, on payment in advance of the cost of reproduction and delivery.

E-Discovery

- (18) (a) The parties may agree to produce documents in electronic form and any party may apply to the court for an order to produce documents in electronic form.
- (b) If a document is in electronic form, the party inspecting it should be entitled, upon request, to receive a copy in that form.

Delayed disclosure or production

- (19) Where a document may become relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the court, on application, may grant leave to withhold disclosure or production until after the issue has been determined.

Disclosure or production not admission of relevance

- (20) The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility.

Where affidavit incomplete or privilege improperly claimed

- (21) Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may
- (a) order cross-examination on the affidavit of documents,
 - (b) order service of a further and better affidavit of documents,
 - (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged, and
 - (d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

Documents or errors subsequently discovered

- (22) Where a party, after serving an affidavit of documents,
- (a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged, or
 - (b) discovers that the affidavit is inaccurate or incomplete,
- the party shall promptly deliver a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents.

Party may not use document

- (23) Unless the court otherwise orders, where a party claims privilege in respect of a document, or 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.

Failure to deliver affidavit or produce document

- (24) Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under this rule the court may
- (a) revoke or suspend the party's right, if any, to initiate or continue an examination for discovery,
 - (b) dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant, and
 - (c) make such other order as is just.

Production from non-parties with leave

- (25) The court may, on the application of a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged, where the court is satisfied that
- (a) the document is relevant to a material issue in the action, and
 - (b) it would be unfair to require the applicant to proceed to trial without having discovery of the document.
- (26) An application for an order under subrule (25) shall be made on notice
- (a) to every other party, and
 - (b) to the person not a party, served personally or substitutionally.
- (27) Where privilege is claimed for a document referred to in subrule (25), or where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue.
- (28) The court may give directions respecting the preparation of a certified copy of a document referred to in subrule (25) and the certified copy may be used for all purposes in place of the original.

Document deposited for safe keeping

- (29) The court may order that a relevant document be deposited for safe keeping with the clerk and thereafter the document shall not be inspected by any person except with leave of the court.