

## ***Delta Electric Co. Ltd. v. Aetna Casualty Company of Canada Ltd., et al.*<sup>1</sup>: Practice — Affidavits of Documents.**

Delta Electric Co. Ltd.<sup>2</sup> as Plaintiff, applied to the New Brunswick Court of Queen's Bench pursuant to Rule 31.06<sup>3</sup> asking that two separate motions be heard, ordering the defendants Aetna Casualty Company of Canada<sup>4</sup> and Morden and Helwig Ltd.<sup>5</sup> to produce documents for which privilege had been claimed in an Affidavit of Documents.

Delta had previously served both Aetna and Morden with Notice Requiring Affidavit of Documents which, in the eyes of the Plaintiff, had been responded to in an inappropriate manner. Aetna's Affidavit of Documents began with Schedule "A" which listed 69 documents which they did not object to producing. Schedule "B" of the same Affidavit listed 147 items, the production of which Aetna did object to.

The first four entries in Schedule "B" consisted of general categories of privilege under which all subsequently enumerated items were intended to fall. Upon a query by Aetna's counsel as to whether these four categories were all inclusive of any type of document subsequently enumerated as numbers 5 - 147 of Schedule "B", Stevenson J. unequivocally responded that they were not.

### **THE PROBLEM**

Stevenson J. called to the attention of counsel the facts that: (i) for many documents alleged to have been privileged, no grounds for such a claim had been tendered; (ii) many of the documents numbered 5 - 147 were not to be found in the "general" descriptions tendered in items 1 - 4 of Schedule "B"; and (iii) no *specific* documents were referred to in items 1 - 4 of Schedule "B" (emphasis added). In order to more fully appreciate the technicalities of Mr. Justice Steven's criticisms, rule 31<sup>6</sup> has been reproduced in full as Appendix #1, for the sake of convenience.

### **THE PRACTICE OF CLAIMING PRIVILEGE**

After pointing out patent errors within Aetna's affidavit, Steven J. then, in detail and using examples, began to disassemble the document.

Starting with Rule 31.03(4)(b), His Lordship pointed out that an affidavit of documents must contain a list and description of all relevant documents possessed by or in the control of that party, for which privilege is being claimed. The grounds for such a claim must also be set out.

<sup>1</sup>(1984) 53 N.B.R. (2d.) 406; 138 A.P.R. 406 (N.B.Q.B.T.D.)

<sup>2</sup>Hereinafter referred to as "Delta".

<sup>3</sup>New Brunswick, Rules of Court.

<sup>4</sup>Hereinafter referred to as "Aetna".

<sup>5</sup>Hereinafter referred to as "Morden".

<sup>6</sup>*Supra*, footnote 3, at 82.

Further criticism was levied for use of the wrong form. Stevenson J. prevailed upon all concerned to recall that swearing to a "form" is not equivalent to swearing to the validity of reasons or grounds for objecting, or to any facts supporting those reasons or grounds. He went on to say that the "forms" (as prescribed in the appendix of forms) must be: used with caution, only where applicable, and with such variations as circumstances require as per Rule 1.06(1). It is not correct to assume that a given form will always be sufficient. Individual consideration of each document must be an integral part of the preparation of an affidavit of documents so as to ensure it fits the case at hand. As a consequence, when claiming privilege, in many cases it may still be prudent for "solicitors to refer to precedents of long standing found in such works as the *Encyclopedia of Court Forms, Chitty and Jacobs Queens Bench Forms* and *Daniel's Chancery Forms*" ...and the like. A caveat still exists however, to the effect that such sources must be not expressly relied upon "where inconsistent with modern rules of privilege",<sup>8</sup> but rather, are to be relied upon where modern rules are inappropriate or deficient.

An example of how the use of forms may be modified in some circumstances is where a party claims privilege on the ground that the document was prepared for the dominant purpose of determining a legal opinion, or for use in litigation. *Such an affidavit should disclose facts upon which the court can conclude that that was the dominant purpose behind its preparation.* Merely tracking the language of the relevant rule or test will not be sufficient. In situations where the individual compiling the affidavit of documents does not have personal knowledge of facts supporting the claim of privilege, affidavits of persons who do have personal knowledge should be appended. It was in this context that Stevenson J. indicated that where an affidavit of documents is properly prepared, validity of the privilege claimed is less likely to be in question and, by corollary, less vulnerable to an order for production and inspection.

Mr. Justice Stevenson then turned his attention to the draftmanship of the documents submitted. Criticism was directed at the plaintiff for improper and deficient affidavits,<sup>9</sup> which consisted primarily of legal arguments rather than assertions of fact directed to raising grounds for going behind the affidavit of documents. An affidavit is not to serve as subterfuge for submitting a legal argument. His Lordship made it clear that the proper place for this is in the brief.

Further, where an affidavit does not validate the claim of privilege on its face, the opposing party need only attack the insufficiency of the affidavit upon argument of the motion. Here, Stevenson J. refused to examine documents to determine whether they were privileged because careless preparation was evident. He stated that "this is not the function of the court".<sup>10</sup> It might be noted here, that a party may not attempt to circumvent validation of a claim to privilege by deliberately submitting a poorly drafted

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<sup>7</sup> *Supra*, footnote 1, at 410.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

document. The result would be the court's refusal to comment on the privilege altogether, and to subsequently order the production of all documents. This is precisely what happened here.

### THE TWO-FOLD DUTY OF THE DRAFTSMAN

Mr. Justice Stevenson then went on to delineate what he termed a two-fold duty resting upon the drafting solicitor. First, counsel had a duty to advise his client with respect to what is involved in a discovery, and to ensure disclosure of all documents. Second, counsel has a responsibility to both the opposing party and the court to ensure that the affidavit is confined to documents which have a bearing on the case. Such documents must be adequately and accurately described, and the grounds for privilege for each document, or group of documents, should be clearly and precisely set forth. For example, in the four general categories of privilege enumerated by Aetna in Schedule "B", a specific claim of privilege was not directed to any one of the items enumerated as numbers 5 - 147 in Schedule "B". As a consequence, an order to produce 92 of the 147 documents ensued. Furthermore, 14 of the documents were letters which had been sent to Delta; to which no claim of privilege was required. Not one of the documents enumerated 5 - 147 fit the category under which it had been listed (namely #4 of Schedule "B"). In his scathing criticism, Stevenson J. went on to point out that 13 of the documents for which privilege was claimed, were totally unrelated to issues in the action. The net result was that responsibilities outlined in both aspects of Stevenson J.'s two-fold duty had all but been neglected by counsel for Aetna.

Notwithstanding that Stevenson J. was nearing the conclusion of his judgment, the desire to reinforce his point with respect to prudent draftsmanship was now reiterated in an examination of documents tendered by Morden. Once again, the improper use of forms was called to the fore. Morden unnecessarily used paragraphs 3 and 4 of Form 31B.<sup>11</sup> Although a Schedule "C" was totally unnecessary in these circumstances, one was included which simply read "nil". Both paragraphs and Schedules should have been totally omitted. Paragraph 5 of Form 31B<sup>12</sup> would have sufficed in these circumstances.

Further errors in Morden's affidavit of documents are illustrative of many of the points discussed above in relation to Aetna's affidavit, however, a brief discussion of some of these errors will be instructive.

Morden divided its Schedule "B" into six parts. Each part was intended to be representative of a particular group of documents. A general description of the type of documents in each individual group was appended to each of the six file folders in which the six respective groups were submitted. Stevenson J. again did not mince words, saying that "careless preparation was evident".<sup>12</sup> For example, Morden's Part I of Schedule B was marked so as to indicate that it contained documents dated after the action had been commenced. The first five documents of this somewhat nebulous category were dated prior to the commencement of the action. In Part II, production of many of the documents listed had already been ordered by Aetna. Five of the documents

<sup>11</sup>See Appendix Two.

<sup>12</sup>See Appendix Two.

were totally unrelated to the action. Of the remaining documents in Part II which did relate to the action, three had not been prepared for the dominant purpose of being submitted to a legal advisor for advice or for use in litigation. In the absence of other grounds justifying a claim of privilege, production was ordered. In Part III none of the documents justified a claim of privilege. The production of all was ordered. In Part IV, six of the documents had nothing to do with Morden's defence. One was not even related to the issues before the Court. In Part V, two of the documents were held not to have been prepared for the dominant purpose of use in contemplated litigation. In Part VI, 15 of the 20 documents listed did not relate to the issues in the action. Clearly, the two-fold duty of counsel was similarly lacking in the preparation of Morden's affidavit of documents.

### CONCLUSION

It would seem evident, in view of the rules examined, that the criticisms levied against the somewhat less than diligent drafting were in order. It would also seem prudent to heed these rather strongly worded caveats, since the explication of these affidavits have an air of "public example" about them. An introspective analysis by the parties concerned or a careful reading-between-the-lines by bystanders ought therefore to reveal that Stevenson J's words smack resoundingly of the fact that the oft-quoted "new rules" can be considered "new" for only so long, and there comes a point when the practicing bar will be held, sometimes painfully, responsible for strict adherence thereto.

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**APPENDIX ONE<sup>13</sup>**

## RULE 31

## DISCOVERY OF DOCUMENTS

## 31.01 Definition

In this rule,

*affiliated corporation* or *affiliate* means one of two bodies corporate where one of them is the subsidiary of the other or both are subsidiaries of the same corporate body or each of them is controlled by the same person or persons;

*document* includes a film photograph, video tape, chart, graph, map, plan, survey, book of account, recording of sound, and information recorded or stored by means of any device;

*subsidiary corporation* or *subsidiary* means a body corporate that is controlled directly or indirectly by one or more bodies corporate.

## 31.02 Scope of Documentary Discovery

*Disclosure*

(1) Every document which relates to a matter in issue in an action and which is or has been in the possession or control of a party or which the party believes to be in the possession, custody or control of some person not a party, shall be disclosed as provided in this rule, whether or not privilege is claimed in respect of that document.

*Production for Inspection*

(2) Every document which relates to a matter in issue in an action and which is in the possession or control 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 that document.

*Insurance Policy*

(3) Within 10 days after the close of pleadings, each party shall disclose by letter to all parties adverse in interest and shall produce for inspection, if requested, any insurance policy under which an insurer may be liable to satisfy part or all of any judgment which may be obtained in the action, or to indemnify or reimburse any party for money paid by him in satisfaction of the judgment, but information concerning such insurance policy shall not be admissible in evidence at the trial unless it is relevant to an issue in the action.

## 31.03 Affidavit of Documents

(1) A party may serve on any other party a Notice Requiring Affidavit of Documents (Form 31A).

(2) Within 10 days after receipt of a Notice Requiring Affidavit of Documents a party shall file and serve on every other party an Affidavit of Documents (Form 31B).

(3) The Affidavit of Documents shall be made by the party or, in the case of a corporation, by an officer, director or employee.

(4) The Affidavit of Documents shall contain

(a) a list and description of all documents which relate to a matter in issue in the action and which are in the possession or control of the party and for which he claims no privilege.

(b) a list and description of all documents which relate to a matter in issue in the action and which are in the possession or control of the party and for which he claims privilege and the grounds for such claim, [emphasis added]

(c) a list and description of all documents which relate to a matter in issue in the action, which the party has had, but no longer has, in his possession or control, giving their present whereabouts so far as he can say from his own knowledge, information or belief.

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<sup>13</sup>New Brunswick, Rules of Court, Rule 31.

(d) a list and description of all documents which relate to a matter in issue in the action which the deponent believes to be in the possession or control of a person not a party to the action and a description sufficient to identify the person.

(e) a statement by the deponent that he is not aware of any other document relating to a matter in issue in the action.

(5) The Affidavit of Documents shall provide a description sufficient for identification of each document, or, in the case of bundles of documents of the same nature, of each bundle.

(6) The solicitor for a party making an Affidavit of Documents shall endorse it with a certificate that he has explained to the deponent the necessity of making a full disclosure of all relevant documents and that he has no knowledge of any other document which should have been disclosed.

#### 31.04 Inspection of Documents

(1) A party is entitled, at any time, to request inspection of any document in the possession or control of any other party which

(a) is referred to in the originating process, a pleading or an affidavit filed by such other party, or

(b) is listed in the other party's Affidavit of Documents and is not privileged.

(2) A party who wishes to inspect a document shall serve on the other party a Request to Inspect Documents (Form 31C).

(3) A party upon whom a Request to Inspect Documents is served shall forthwith serve on the party making such request, a notice stating a time between 9:30 a.m. and 4:30 p.m. and a date within 5 days from the service of the Request to Inspect Documents on which the documents may be inspected at the office of his solicitor or some other convenient place, and shall make the documents available for inspection at that time and place.

(4) A court may, at any time, order production for inspection of documents generally or of any particular documents in the possession or control of a party for which no privilege is claimed. Where privilege is claimed for a document, the court may inspect the document to determine the validity of such claim.

(5) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy at his own expense unless the person having possession or control of the document agrees to make a copy for the party inspecting the document, in which case he shall be reimbursed for the cost of so doing.

(6) Where a document may become relevant only after the determination of one or more of the issues in the action and the production of such document for inspection prior to that determination would result in a serious prejudice to a party, he may apply to the court for leave to withhold the production until after such determination.

#### 31.05 Effect of Disclosure or Production for Inspection

(1) The disclosure, or the production for inspection, of a document is not an admission of its admissibility.

(2) Unless the parties agree otherwise, a document listed in an Affidavit of Documents or produced for inspection by a party shall, without notice, summons or order, be taken by him to his examination for discovery and to the trial of the action and shall there be produced upon demand by any party.

#### 31.06 Where Affidavit Incomplete or Privilege Improperly Claimed

Where the court is satisfied that a document has been omitted from or inadequately described in an Affidavit of Documents, or a claim of privilege may have been improperly made therein, the court may

(a) order cross-examination upon the Affidavit of Documents,

(b) order delivery of a further and better Affidavit of Documents,

- (c) order the disclosure or production for inspection of any document, or any part of any document, which is not privileged, and
- (d) inspect any document for the purpose of determining the validity of a claim of privilege.

31.07 Documents or Errors Subsequently Discovered

Where, after filing and serving his Affidavit of Documents, a party acquires possession or control of a document relating to a matter in issue in the action, or he discover that his Affidavit of Documents is inaccurate or incomplete, he shall forthwith disclose the additional documents and specify the extent to which his Affidavit of Documents requires qualification.

31.05 Effect of Failure to Disclose or Produce for Inspection

(1) Where a party fails to disclose a document in his Affidavit of Documents or fails to produce a document for inspection in compliance with this rule, or fails to comply with an order made under this rule, then court may

(2) Where a party fails to file and serve an Affidavit of Documents or disclose a document or produce a document for inspection in compliance with this rule, or fails to comply with an order made under this rule, the court may

- (a) revoke or suspend his right, if any, to initiate or continue an examination for discovery.
- (b) dismiss his action if he is a plaintiff, or strike out his Statement of Defence if he is a defendant, and
- (c) impose such terms as to costs or otherwise, as may be just.

**APPENDIX TWO<sup>14</sup>**

**APPENDIX OF FORMS  
FORM 31B**

**AFFIDAVIT OF DOCUMENTS**

*(Court, Court File Number, Style of Proceeding)*

**AFFIDAVIT OF DOCUMENTS  
(FORM 31B)**

I, ..... *(full name)* ....., of the .....  
of ....., if the Province of New Brunswick

**MAKE OATH AND SAY:**

- (1) Of the documents in my possession or control relating to matters in issue in this action, I do not object to producing those listed in Schedule A hereto.
- (2) Of the documents in my possession or control relating to matter in issue in this action, I object to producing those listed in Schedule B hereto for the reasons therein set forth.
- (3) I once had, but no longer have, in my possession or control the documents relating to matters in issue in this action listed in Schedule C hereto.
- (4) I believe that the documents relating to matters in issue in this action which are listed in Schedule D hereto are in the possession or control of those persons whose names and addresses are therein set forth.
- (5) I have never had in my possession or control, nor do I know of, any documents which relate to matters in issue in this action other than other listed in clauses (1), (2) and (3) above.

.....  
deponent

*SWORN, etc.*

*The following certificate shall be endorsed upon the affidavit at its foot:*

**CERTIFICATE OF SOLICITOR**

I CERTIFY that I have explained to the deponent the necessity of making full disclosure of all relevant documents. I have no knowledge of any document not disclosed in the foregoing affidavit which should have been disclosed.

.....  
(signature of solicitor)

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<sup>14</sup>New Brunswick, Rules of Court, Forms, vol. II, Form 31B.