

Part 13

Division 1 Discovery of Records

Definition of record

186 In this Part, “record” includes the physical representation or record of any information, data or other thing that is or is capable of being represented or reproduced visually or by sound, or both.

AR 390/68 s186;172/99

When a record or question is relevant and material

186.1 For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected

- (a) to significantly help determine one or more of the issues raised in the pleadings, or
- (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

AR 277/95 s11;172/99

Affidavit of records must be filed

187(1) Every party to proceedings must, in accordance with this Rule, file and serve on all other parties an affidavit of records, unless the Court grants an order under Rule 188.1 permitting a late filing or service of the affidavit.

(2) A third party and a party served under Rule 69 who has filed a statement of defence must, within 90 days of that filing, file and serve on all other parties an affidavit of records, unless the Court grants an order under Rule 188.1 permitting a late filing of the affidavit.

(3) A person for whose benefit an action is prosecuted or defended, or the assignor of a chose in action upon which the action is brought, is to be considered as a party to the proceedings for the purposes of discovery of records.

(4) Rule 548 does not apply to a time limit specified in this Rule.

(5) The time limit for filing and serving an affidavit of records in divorce, parentage and maintenance, matrimonial property and domestic relations actions is

- (a) 90 days after a written notice is served by a party on the other party or parties requiring that this Rule be complied with,
- (b) in the case of the party serving the notice, within 90 days after

service of that notice, or service of the first notice if more than one party is served, or

- (c) if no written notice is served under clause (a), before the later of
 - (i) the filing of a Certificate of Readiness, or
 - (ii) 90 days before the trial date.

(6) The time limit for filing and serving an affidavit of records in actions other than divorce, parentage and maintenance, matrimonial property and domestic relations actions is

- (a) for the plaintiff, within 90 days of service of the first statement of defence and within 90 days of service of any subsequent statement of defence that raises new issues, and
- (b) for each defendant, within 90 days of service of the statement of defence by that defendant.

(7) Despite anything in this Rule, the Court may, on application, order a party to provide any further information to any other party that the Court may direct.

(8) Subject to subrule (9), this Rule applies to an action in respect of which a defence is served on or after November 1, 1999.

(9) A party to an action in respect of which a statement of defence was served before November 1, 1999 may serve a notice on the other parties requiring that this Rule be complied with by every party to the proceeding within 90 days after the notice is served and

- (a) the parties served must comply with the notice, and
- (b) the party serving the notice must also comply with the notice within 90 days after service of the notice or the service of the first notice if more than one party is served.

AR 172/99 s3;68/2000;109/2001

Contents of affidavit of records

187.1(1) The affidavit of records must be made by the party to the proceedings or, in the case of a corporation, by an officer of the corporation, or by any other person directed by the Court.

(2) The affidavit of records must disclose relevant and material records and must also specify

- (a) which of those records are in the possession, custody or power of the party making the affidavit,

- (b) which of those records, if any, the party objects to produce and the grounds for the objection,
- (c) with respect to the records,
 - (i) which records the party has had in their possession, custody or power,
 - (ii) the time when, and the manner in which, they ceased to be in their possession, custody or power, and
 - (iii) the present whereabouts of the records,so far as the party making the affidavit can so state, either from personal knowledge or on information or belief, and
- (d) that the party has not and has never had any other relevant and material records in their possession, custody or power, so far as the party knows or believes.

(3) If a party has not and has never had any relevant and material records in their possession, custody or power, so far as the party knows or believes, the affidavit must state that fact.

AR 172/99 s3

Records for inspection

188(1) In respect of those records to which there is no objection to production, there must be endorsed on the affidavit of records a notice stating

- (a) the time when the record may be inspected, being no later than 10 days after the day the affidavit is served, and
- (b) the place at which the record may be inspected, which, unless otherwise ordered, is to be the address for service of the party making the affidavit.

(2) Despite subrule (1), a record in constant use may be produced for inspection at the place at which it is usually kept.

(3) A record may be inspected again from time to time, on reasonable notice to the party producing it.

AR 390/68 s188;172/99 s3

Late filing of affidavit of records

188.1(1) On application, the Court may grant an order under subrule (2) if it is satisfied that

- (a) a case is complex,

- (b) the volume or location of records requires it, or
 - (c) other sufficient reason exists.
- (2) The Court may grant
- (a) an order permitting late, or requiring early, filing or service of an affidavit of records, and
 - (b) if necessary, an order permitting commencement of examinations for discovery without the filing of an affidavit of records.

AR 172/99 s3

Affidavit of records must precede discoveries

189 A party is not entitled to conduct an examination for discovery until that party has filed and served an affidavit of records, or is otherwise permitted to commence examination by order of the Court under Rule 188.1(2)(b).

AR 390/68 s189;172/99 s3

Very long trial actions

189.1 In a very long trial action, the case management judge may establish a mechanism for the production or description of the records in the affidavit of records when the number, nature or location of the records makes production or description in the normal course unduly expensive or cumbersome.

AR 172/99 s3

Costs for failing to file affidavit of records

190(1) A party who, without sufficient cause,

- (a) fails to serve an affidavit of records in accordance with Rule 187,
- (b) fails to serve an affidavit of records in accordance with an order of the Court made under Rule 188.1, or
- (c) applies under Rule 188.1 after the time for filing an affidavit of records expires

is liable to pay a penalty in costs to the party adverse in interest of 2 times item 3(1) of Schedule C, or such larger amount as the Court may determine, irrespective of the final outcome of the proceeding.

(2) If there is more than one party adverse in interest, the Court may determine the share of costs to be paid to each.

(3) Costs imposed under this Rule are taxable and payable forthwith.

AR 390/68 s190;172/99 s3;68/2000

Sanctions for failure to file affidavit of records

190.1 If a party fails to serve an affidavit of records in accordance with Rule 187 or in accordance with an order of the Court made under Rule 188.1, the Court may on application by any other party

- (a) strike out all or any of the pleadings of the party in default, or
- (b) impose any other sanction, including an order under Rule 599.1.

AR 172/99 s3

Failure to produce a record

191 If a party does not produce a record specified in an affidavit of records, the party wishing to inspect it may apply to the Court for an order for inspection.

AR 390/68 s191;172/99 s3

Admission of records in evidence

192(1) A party on whose behalf an affidavit of records is made under this Division, and a party on whom an affidavit of records is served under this Division, are both deemed to admit that

- (a) the records specified or referred to in the affidavit are authentic, and
- (b) if a copy of a letter, memorandum or other message purports or appears to have been sent, the original was sent and received by the addressee.

(2) Subrule (1)

- (a) does not apply if the court otherwise orders;
- (b) does not apply if the recipient of the affidavit objects in accordance with subrule (3);
- (c) is without prejudice to the right of any party to object to the admission in evidence of a record.

(3) The recipient of an affidavit of records is not deemed to make the admission referred to in subrule (1) if, within 30 days of receipt of the affidavit, the recipient serves notice on the party serving the affidavit that the fact in question is disputed and that it must be proven at trial.

(4) A party on whose behalf an affidavit of records is served under this Division must produce at the examination for discovery, the pre-trial conference, and at trial, those records that are stated in the affidavit to be in that party's possession, custody or power.

(5) If a party denies the authenticity or receipt or dispatch of a record, and the authenticity, receipt or dispatch, as the case may be, is proven, the Court

must take into account the denial in exercising its discretion as to costs.

(6) This Rule does not apply to a record the authenticity or receipt or dispatch of which the party has denied in their pleadings.

AR 390/68 s192;172/99 s3

Inspection of records

193(1) A party is entitled to

- (a) inspect any record referred to in the pleadings, particulars or affidavits of any other party and in that party's possession, custody or power, by making a demand for production, and
- (b) take copies of the record when so produced.

(2) Subrule (1) does not apply to a record referred to in an affidavit of records, the production of which is objected to in the affidavit.

AR 390/68 s193;172/99 s3

Time and place for inspection

194 The party upon whom the demand for production is made must, within three days of receiving it, deliver to the party making the demand a notice stating a reasonable time, within 3 days from the delivery of that notice, at which the records may be inspected at their lawyer's office, or, in the case of records in constant use referred to in Rule 188(2), at the place they are usually kept.

AR 390/68 s194;172/99 s3

Order of inspection

195 If the party served with the demand for production omits to give notice of a time for inspection or omits or objects to give the inspection, the party desiring it may apply to the Court for an order of inspection.

AR 390/68 s195;172/99 s3

Order for further and better affidavit

196(1) On application, if the Court is satisfied that

- (a) a relevant and material record in the possession, custody or power of a party has been omitted from an affidavit of records, or
- (b) a claim of privilege has been improperly made in respect of the record,

the Court may order a further and better affidavit and impose other sanctions, including an order under Rule 599.1.

(2) If on the application a claim of privilege is made for a record, the Court may inspect the record for the purpose of deciding the validity of the claim, and consider all evidence which may be adduced tending to establish or

destroy the claim of privilege.

(3) On an application under this Rule, the Court may permit cross-examination on the original and on any subsequent affidavit of records.

AR 390/68 s196;172/99 s3

Use of omitted records

197(1) A party omitting to mention any record in their affidavit of records, or a party not producing any record in compliance with a valid demand made under this Part, may not afterwards use the record in evidence, unless the Court is satisfied that the party had sufficient cause for the omission or nonproduction.

(2) If, after a party has filed an affidavit of records, the party discovers, creates or comes into possession, custody or power of a relevant and material record not previously disclosed, the party must immediately give notice of it to all other parties, and must, on request, supply the other parties with a copy of it, but in any case the Court may permit the record to be given in evidence upon such terms as to costs or otherwise as may be just.

AR 390/68 s197;172/99 s3

Production does not acknowledge admissibility of a record

198 The disclosure or production of a record under this Part alone is not to be considered as an agreement or acknowledgment that the record is relevant and material, or admissible.

AR 390/68 s198;172/99 s3;68/2000

Impounding records

199 A record produced to a Court may be ordered to be impounded, and after impoundment it may not be inspected, except by leave of the Court.

AR 390/68 s199;172/99 s3

Division 2 Examination for Discovery

Officers or employees of corporation

200(1) Before trial, a party to proceedings may orally examine under oath, without an order of the Court,

- (a) any other party to the proceedings who is adverse in interest,
- (b) if the other adverse party is a corporation, one or more officers of the corporation, and
- (c) one or more other persons who
 - (i) are or were employed by the other party, and
 - (ii) have or appear to have knowledge of a matter raised in the pleadings that was acquired by virtue of that employment.

(1.1) Subrule (1) applies whether the person sought to be examined is inside or outside the jurisdiction of the Court.

(1.2) During the oral examination under subrule (1), a person is required to answer only relevant and material questions.

(2) The court may on application limit the number of employees, or former employees, of any party who may be examined and may set aside any appointment for the examination of any employee which it regards as unnecessary, improper or vexatious.

(3) The costs of examining more than one employee shall, unless the court otherwise orders, be borne by the party examining.

(4) In these Rules an auditor who is or has been engaged by a party shall be deemed to be an employee employed by the party, but an auditor engaged solely for the purposes of the action shall not be deemed to be an employee in respect of that engagement.

(5) Where the examination of a person who is a resident outside of Alberta is required, the court may order the issue of a commission for the examination of the person.

AR 390/68 s200;160/93;166/94;172/99

Selection of corporate representative

200.1(1) A party to an action may require a corporation that is an opposite party to the action to select a representative for the purposes of Rule 214(1).

(2) The selection must be made by the corporation within 5 days after a demand for the making of the selection has been served on it or its lawyer, or by the Court if the corporation refuses or fails to select any or what the Court considers to be the proper representative or representatives, having regard to the question that is involved.

AR 68/2000 s6

Member of firm

201 A member of a firm which is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination.

AR 390/68 s201

Chose in action or bill of exchange

202 Where an action is brought by or against an assignee of a chose in action or by or against an endorsee or holder of a bill of exchange, the court, upon notice to the party to be examined, may order to be examined for discovery

- (a) any assignor of the chose in action,
- (b) any prior endorser or holder or maker of the bill of exchange, and

- (c) any employee or former employee and, in the case of a corporation, any officer or former officer, of any assignor of the chose in action or of any prior endorser or holder or maker of the bill of exchange,

who appears to have some knowledge that is relevant and material to the question in issue.

AR 390/68 s202;68/2000

Examination

203(1) Unless an order of the Court under Rule 188.1 otherwise provides, the examination of a party, employee or assignor may take place as the case requires, at any time after the following:

- (a) in the case of the examination on behalf of the plaintiff,
 - (i) the statement of defence of the party, employer or assignee has been delivered,
 - (ii) the time for delivering the statement of defence has expired, or
 - (iii) the party has been noted in default;
- (b) in the case of the examination on behalf of a defendant, the statement of defence of the defendant, employer or assignee has been delivered;
- (c) in the case of the examination of a party to any issue, a trial of the issue has been directed by the Court.

(2) Subrule (1) is subject to Rule 189.

(3) The examination shall take place before an examiner

- (a) who shall be the clerk in whose office the proceedings are being carried on, or
- (b) some person designated by the clerk for that purpose, or
- (c) such other person as a court may appoint,

but with the consent of the person to be examined the examination may be held before any other clerk.

(4) Subject to Rule 213, the clerk may rule on or make directions respecting the conduct of the examination.

AR 390/68 s203;172/99

Appointment for examination

204(1) The party or person entitled to examine another party or person may procure an appointment for the examination from the clerk in whose office the proceedings are being carried on or from such other person as the court may appoint.

(2) The party or person to be examined upon being served with a copy of the appointment and upon payment of the proper conduct money shall attend thereon and submit to examination.

(3) The party examining shall serve a copy of the appointment upon the solicitor in the cause, at least 48 hours before the examination.

(4) Unless the court otherwise directs, service of an appointment upon the solicitor of the party to be examined is sufficient, in lieu of personal service of appointment upon the party, if made 20 days before the day appointed for the examination.

(5) No party or person to be examined pursuant to an appointment served upon his solicitor is required to attend for examination pursuant to the appointment unless payment of the proper conduct money is made or tendered to the solicitor at the time of service.

(6) The conduct money to be paid or tendered shall not exceed the allowance to be made under Part 3 of Schedule E of these Rules when the party or person required to attend is served at his ordinary place of residence.

(7) When an appointment has been served upon a solicitor pursuant to subrule (4), he

- (a) shall promptly communicate the appointment to the person required to attend,
- (b) shall not apply the conduct money to any debt due to the solicitor or any other person, and
- (c) shall not pay it other than for the actual travel expenses of his client or to his client upon his actual attendance at the examination,

and, in the event that the client does not attend his examination, the conduct money shall, unless the court otherwise orders, be repaid by the solicitor receiving it to the person from whom it was received.

AR 390/68 s204;137/87

Production of records at discovery

205 Unless otherwise ordered, the party or person to be examined must produce at the examination all records which that party or person could be required to produce at trial.

AR 390/68 s205;172/99

Exhibits

206 The examiner may direct that any exhibit marked on an examination need not be filed with him, but all such exhibits shall be produced at the trial of the action without notice, or the examiner shall, at the request of the examining solicitor, cause copies thereof or extracts therefrom to be made by the shorthand writer and attached to the depositions and the copies or extracts may be used in every way as the originals.

AR 390/68 s206

Further examination

207 Any person examined for discovery may be further examined on his own behalf, or on behalf of the party whose officer or servant he is or has been, in relation to any matter respecting which he has been so examined and may then be re-examined, and the explanatory examination and re-examination shall be proceeded with immediately after his examination by the other party.

AR 390/68 s207

Further production of records

208 A person who admits, on examination, that they have in their possession, custody or power a record that is not privileged or protected from production must produce it for the inspection of the examining party in accordance with an order of the Court or the direction of the examiner.

AR 390/68 s208;172/99

Production of document

209(1) On application, the Court may, with or without conditions, direct the production of a record at a date, time and place specified when

- (a) the record is in the possession, custody or power of a person who is not a party to the action,
- (b) a party to the action has reason to believe that the record is relevant and material, and
- (c) the person in possession, custody or power of the record might be compelled to produce it at the trial.

(1.1) The Court may also give directions respecting the preparation of a certified copy of the record, which may be used for all appropriate purposes in place of the original.

(2) A person producing a record is entitled to receive such conduct money as the person would receive if examined for discovery.

(3) The costs of the application shall in the first instance be borne by the party making the application but if it thereafter appears to the Court that by reason of the production there has been a saving of expense the Court may award the whole or part of the costs to the party making the application.

AR 390/68 s209;172/99

Appeal from examiner

210 Any ruling or direction of the examiner is subject to appeal to the Court and the examiner shall upon request certify under his hand the question raised and the ruling or direction made thereon.

AR 390/68 s210

Signing of deposition; objections

211(1) Unless taken in shorthand the deposition on an oral examination may be taken down in writing by the examiner in the form of a narrative expressed in the first person and when completed shall be read over to the person examined and shall be signed by him in the presence of the parties or those of them that attend and shall be certified by the examiner.

(2) When anyone examined refuses or is unable to sign the depositions, the examiner shall so certify.

(3) The examiner may, upon any examination under this Rule, in his discretion take down any particular question or answer and he shall upon request note upon the depositions any questions objected to and the ground of the objection.

AR 390/68 s211

Reporter

212(1) The examination (unless otherwise ordered or agreed) shall be taken in shorthand by an official court reporter, if available, otherwise by a shorthand writer approved by the parties and sworn and shall be taken down by questions and answers in which case it is not necessary for the depositions to be read over to or signed by the person examined.

(2) If the examination is taken by an official court reporter it is not necessary for the examiner to be present at the examination.

(3) The depositions so taken, when extended and certified by the person taking them as correct, shall be deemed to be the original depositions.

(4) The transcript of the examination shall not be placed on the Court file and shall not be put before the Court except during an application or when used at trial.

AR 390/68 s212;313/81;16/2002

Court to decide validity

213(1) The validity of any objection to any question or any ruling or direction and the appeal from a ruling or direction shall be decided by the Court; and the costs of and occasioned by the objection are in the discretion of the Court and may be ordered to be paid by the person under examination.

(2) No objection to any question is valid if made solely upon the ground that the answer thereto will disclose the name of a witness.

AR 390/68 s213

Use at trial

214(1) Any party to an action or issue may at the trial or on motion use in evidence as against any opposite party any part of the examination of that opposite party, or in case the opposite party is a corporation, of the examination of any representative thereof selected to submit to an examination to be so used.

(2) Repealed AR 68/2000 s8.

(3) If it is made to appear at or before the trial that any party has been unable after due diligence to obtain the attendance at the trial of any person examined by him for discovery, or if for any other reason it appears to be just and convenient, the Court may permit the party to use in evidence the whole or any part of the examination of that person.

(4) If part only of an examination is used, the Court may at the request of any party against whom it is so used direct that any other part of the examination be also used, if it is so connected with the part so used that the first mentioned part ought not be used without the other part.

AR 390/68 s214;172/99;68/2000

Repealed

215 Repealed AR 313/81 s9.

Special report by examiner

216 The person taking an examination may and, if need be, shall make a special report to the Court, in which proceedings are pending, touching the examination and the conduct or absence of any person, and the Court make such order as may be requisite.

AR 390/68 s216

Modification by the Court

216.1(1) The Court may modify or waive any right or power under this Part, on terms or otherwise, or may impose terms on any party, where

- (a) any party acts or threatens to act in a manner that is vexatious, evasive, abusive, oppressive, improper or prolix, or
- (b) the expense, delay, danger or difficulty in complying fully would be grossly disproportionate to the likely benefit.

(2) Terms imposed under subrule (1) may, without limiting the generality of subrule (1), be made in respect of the following:

- (a) costs, whether on a solicitor-client or other basis;
- (b) security for costs;
- (c) an advance payment against costs;

- (d) increased or decreased interest entitlement;
- (e) production of or access to documents, whether or not they are referred to in any pleading, particular or affidavit;
- (f) whether the production or access to documents should be stayed or otherwise;
- (g) modification of conduct money;
- (h) different venue, inside or outside Alberta, for any examination to be held or for any act to be done;
- (i) schedules or time limits;
- (j) written interrogatories;
- (k) notices to admit facts or documents or to adopt answers by other witnesses;
- (l) inspection or production of documents held by non-parties where permitted by law or with the consent of the non-parties;
- (m) disclosure of the aims of proposed further discovery;
- (n) supervision of further discovery by a judge, master, commissioner, clerk or referee;
- (o) a confidentiality order.

AR 277/95 s12

Part 14 Medical Examination

Order for examination

217(1) In any action brought to recover damages or other compensation for or in respect of personal injury sustained by any person, the court may order that the person in respect of whose injuries, damages or compensation are or is sought shall submit to be examined by a duly qualified medical practitioner.

(2) An examination under subrule (1) or (10) is to be at the expense of the party seeking it.

(3) The court may order a second examination or further examinations upon such terms as to costs as may be deemed proper.

(4) The medical practitioner conducting the examination may ask the person being examined questions relating to his medical condition and medical history and the person being examined shall answer the questions but subject to the foregoing the medical practitioner shall not interrogate the person being examined.

(5) The person to be examined may nominate a medical practitioner to be present during the examination.

(6) If the person to be examined consents in writing, or failing this consent, if the court so directs, the examining medical practitioner may in a proper case take, and have analyses made of, samples of blood or body fluids of the person being examined and have other tests made recognized by medical science including, without restricting the generality of the foregoing, X-ray pictures, electro-cardiograms and electro-encephalograms.

(7) The party causing the examination to be made

- (a) shall, upon request, deliver promptly to the party examined or his solicitor a copy of a detailed written report of the examining medical practitioner setting out his findings and conclusions, and
- (b) is, upon request, entitled to receive promptly from the party examined a like report of every examination previously or thereafter made of the physical or mental condition of that party resulting from the injuries sustained.

(8) If a party refuses to deliver a report, the court may order delivery, and if the medical practitioner refuses to make the report in writing the court may make such order as it considers proper, one of the provisions of which may be the exclusion of the evidence of the medical practitioner if his testimony is offered at trial.

(9) On application, the Court may make any order or give any direction it considers necessary to limit or curtail an examination that the Court considers excessive.

(10) If the plaintiff has been examined or assessed by a health care professional of the plaintiff's choice who will or may be proffered as an expert, the Court may order that the plaintiff be examined or assessed by one or more health care professionals of the defendant's choice.

(11) In subrule (10), "health care professional" means

- (a) a duly qualified medical practitioner;
- (b) a person licensed, certified, registered or regulated in Alberta, whose practice includes the assessment, diagnosis or treatment of a person's physical or mental condition or capacity;
- (c) a person licensed, certified, registered or regulated in a jurisdiction outside Alberta
 - (i) whose practice includes the assessment, diagnosis or treatment of a person's physical or mental condition, and
 - (ii) who is given leave by the Court to conduct the examination or make the assessment sought under subrule (10).

AR 390/68 s217;160/93;101/99