documents sought dealt with events that had occurred since the start of the proceedings and the delay was justified. See also *Rattan v. Harrison*, 2024 BCSC 257 (Associate Judge), *Dhillon v. Grewal*, 2025 BCSC 626 (Associate Judge), and *Truly Social Games, LLC v. East Side Games Group Ltd.*, 2025 BCSC 1871 (Associate Judge).

Counsel should not make serial demands for documents and then if those requests go unanswered, bring an application for production of those records shortly before trial (*Lamont-Caputo v. Hay*, 2021 BCSC 1713 (Master)).

2. PROCEDURE TO MAKE AN APPLICATION FOR PRODUCTION OF DOCUMENTS [§4.19]

On an application for production of a document in the possession of a non-party, notice must be given to the person or entity from whom production is sought and to all other parties (Rule 7-1(18)). Mailing or delivering a letter and the draft order to the non-party constitutes "notice" under Rule 7-1(18).

See the Forms and Precedents section for:

- Notice of Application (Production of Clinical and Employment Records in Possession of Non-Parties) in a Motor Vehicle Accident Action
- Affidavit (Production of Clinical and Employment Records in Possession of Non-Parties) in a Motor Vehicle Accident Action
- Order (Production of Clinical and Employment Records in Possession of Non-Parties) in a Motor Vehicle Accident Action

3. DEFENDING AN APPLICATION FOR PRODUCTION OF DOCUMENTS [§4.20]

There are three main grounds on which to defend against an application brought by another party under Rule 7-1(18) for production of documents in the possession or control of a non-party:

(1) **Privilege**. The basis for arguing against production under this ground is the reasoning of the Supreme Court of Canada in *M. (A.) v. Ryan*, 1997 CanLII 403 (SCC). The argument should be structured to meet the four-branch Wigmore test. See "The "Privilege" Test" in this chapter for further discussion of these cases.

(2) **Confidentiality**. This argument is based on the discretion test. The argument is that the documents are so private and confidential to the party affected (the client) that the court ought to exercise its discretion in favour of non-production.

(3) **Relevance**. The standard of relevance is set out in Rule 7-1(1) and discussed in *Biehl v. Strang*, 2010 BCSC 1391 and *Jones v. Donaghey*, 2011 BCCA 6. Relevant facts are facts capable of proving the fact in issue, which in turn form the case's material facts. See "The Scope of Document Disclosure" in this chapter for further discussion.

4. SCOPE OF NON-PARTY DOCUMENT PRODUCTION [§4.21]

Rule 7-1(18) is a complete code for the production of documents in the possession of persons who are not parties to the action. The Rule requires an application brought on notice to the person in possession or control of the documents and the parties of record (*British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2011 BCSC 198).

The principles relevant to the production of party documents under Rules 7-1(1) and 7-1(10) to (14) are equally applicable to the interpretation and application of Rule 7-1(18). The concept of proportionality, and the need for a party to satisfy the court that additional disclosure beyond a party's initial obligation under Rule 7-1(1) is necessary, must inform interpretations of Rule 7-1(18). The production of records in the possession of third parties is not subject to a pleadings-only *Peruvian Guano* test, and the cases decided under former Rule 26(11) are of limited assistance in interpreting and applying Rule 7-1(18) in motor vehicle cases (*Kaladjian v. Jose*, 2012 BCSC 357 (Chambers)).

a. Threshold Test for Production [§4.22]

Under Rule 7-1(1), a party must establish that the documents sought could be used to prove or disprove a material fact at trial, or to otherwise show how production of the document is in the spirit of proportionality enshrined in Rule 1-3(2).

Applicants will generally have to produce some evidence to support an application for additional documents under Rule 7-1(18), as it would in an application based on a demand under 7-1(11) (*Kaladjian v. Jose*, 2012 BCSC 357 (Chambers); *Zecher v. Josh*, 2011 BCSC 311 (Master);

Sonepar Canada Inc. v. Thompson, 2016 BCSC 1195 (Chambers); *Royal Bank of Canada v. British Columbia*, 2016 BCSC 2195; and see the discussion of *Jones v. Donaghey*, 2011 BCCA 6 at "The Scope of Document Disclosure" in this chapter, noting in particular the Court of Appeal's narrow interpretation of "in issue" and "material fact").

Although it has been suggested that the phrase "fishing expedition" be put to rest (*College of Opticians of British Columbia v. Moss*, 2000 BCSC 1343, leave to appeal refused 2002 BCCA 602), the phrase continues to be used (*Ogonoski (Committee of) v. British Columbia*, 2016 BCSC 2127 (Master); *Harbob Western Developments Ltd. v. Kaler*, 2017 BCSC 307 (Master); and *J.A. Brink Investments Inc. v. B.C.R. Properties Ltd.*, 2017 BCSC 1545 (Chambers)).

b. The "Discretion" Test [§4.23]

Many applications for production of documents in the possession of non-parties are met with resistance, from the other parties or the person or entity from whom disclosure is sought. Issues of privacy, confidentiality, relevance, and privilege all come into play.

In ascertaining the limits of what documents will be produced from non-parties, the courts have evolved two separate tests: the "discretion" test and the "privilege" test.

The "discretion" test was articulated by the British Columbia Court of Appeal in *M. (A.) v. Ryan*, 1994 CanLII 6417 (BC CA), affirmed 1997 CanLII 403 (SCC). In that case, the plaintiff alleged that the defendant psychiatrist sexually abused her while she was a patient. Following the alleged incident, the plaintiff received treatment from psychiatrist P. in relation to problems allegedly caused by the abuse. P. kept three different types of notes during her relationship with the plaintiff: notes recording discussions with the plaintiff, "notes to myself" made by the psychiatrist in an attempt to make sense of what the patient was telling her, and reporting letters to the family doctor. P. gave evidence that the confidentiality of the notes was of great concern to the plaintiff and a great consequence to the manner in which P. conducted her psychiatric practice. The defendant applied for production of all of P.'s records relating to the plaintiff.

The court in *M. (A.) v. Ryan* concluded at para. 48: "There is no perfect balance to be struck between these competing considerations in this or any other case". It made an order for partial production of those parts of P.'s notes that recorded discussions between her and the