



Federal Court Cour fédérale

MEMORANDUM

Comments

TO: Chief Justice Lutfy

FROM: Adam Zanna, Law Clerk (947-3100)

DATE: November 28, 2006

RE: Purpose and Scope of Rule 222(2) of the *Federal Courts Rules*

Nature of Mandate

In our meeting on November 27, you asked me to identify the purpose for which Rule 222(2) of the *Federal Courts Rules*, SOR/98-106 (the “*Rules*”) was introduced in 1998.

You were interested to know whether the drafters of Rule 222(2) intended to adopt a more narrow interpretation of the appropriate scope of the term “relevant” than that established pursuant to the relevancy test set out by Brett LJ in *Compagnie Financière du Pacifique v. Peruvian Guano Company* (1882) 11 QBD 55 (“*Peruvian Guano*”).

In particular, you wanted to ascertain whether, in adopting this interpretive provision defining the term “relevant” for the purposes of documentary discovery at the Federal Court, the Rules Committee sought to codify the changes to the Civil Procedure Rules proposed by Lord Woolf in his Interim and Final Reports on the civil justice system in England and Wales.

Significantly, on the basis of Lord Woolf’s recommendations, the test for relevance was narrowed to exclude indirectly relevant materials as a means of reducing both the cost and delay associated with the discovery process in the conduct of complex litigation.

Issue

1. What was the purpose of introducing Rule 222(2) of the *Rules* in 1998?

Brief Answer

The definition of “relevant” set out in Rule 222(2) arguably narrows the scope of documents that ought to be included in the discovery process. Indeed, on

its face, this interpretive provision closely resembles the definition of “standard disclosure” set out by Lord Woolf in the context of his Interim and Final Reports on Access to Justice in the United Kingdom (UK). In this connection, it is significant that both Rule 222(2) and Rule 31.6 of the current UK Civil Procedure Rules require the parties to disclose documents on which they intend to rely and documents which either undermine their own case or support that of the adverse party.

Although the Rules Committee acknowledged the need to curtail the scope of documentary discovery during its deliberations in February and April of 1996, it appears to have rejected the procedural approach to accomplishing this objective recommended by Lord Woolf and embodied in the reforms made to the Civil Procedure Rules in the UK. Specifically, whereas Lord Woolf advocated a limited standard of discovery, allowing for more expansive disclosure only upon judicial authorization, the Rules Committee appears to have preferred to retain the existing broad standard of disclosure except insofar as a party could demonstrate prejudice to its interests.

In any event, recent Federal Court of Appeal jurisprudence, rendered after the 1998 amendments to the *Rules*, affirmed that the broad test of relevance established in the *Peruvian Guano* case continues to apply in determining the appropriate scope of documentary discovery.

Methodology

The various materials to which this memorandum refers have been compiled in a tabbed binder. For ease of reference, the first time each document is referred to the applicable Tab will be noted.

Analysis

a) Lord Woolf’s Interim and Final Reports

In his Interim and Final Reports, Lord Woolf advocates in favour of a “controlled approach” (Interim Report [“IR”], Tab 1, at para. 33) to documentary discovery as a means of curbing the excess costs and delays associated with the conduct of complex civil litigation (IR at paras. 6, 9).

Lord Woolf identifies the broad test of relevance set out in *Peruvian Guano* and, in particular, the inclusion of indirectly relevant materials (i.e., those documents which may reasonably lead a party to a train of inquiry serving to either advance its case or damage that of its adversary) as the cause of “monumental inefficiencies” in the discovery process (IR at para. 17).

In particular, Lord Woolf concludes that the inclusion of indirectly relevant “train of inquiry” documents in the test for relevance guarantees that a “virtually unlimited” number of documents are both listed and reviewed as part of the discovery process despite the fact that only a small percentage of such materials are ultimately adduced at trial.

On the basis of this diagnosis, Lord Woolf proposed to modify the procedure governing documentary discovery. In particular, although he advocated in favour of retaining the positive obligation on the parties to disclose relevant documents, Lord Woolf proposed to limit the scope of discovery in the first instance and to subject requests for more extensive documentary disclosure to judicial control.

Lord Woolf's proposed solution depends on distinguishing four categories of documents (IR at para. 22):

1. The **parties' own documents**: these are documents which a party relies upon in support of his contentions in the proceedings.
2. **Adverse documents**: these are documents of which a party is aware and which to a material extent adversely affect his own case or support another party's case.
3. **The relevant documents**: these are documents which are relevant to the issues in the proceedings, but which do not fall into categories 1 or 2 because they do not obviously support or undermine either side's case. They are part of the "story" or background. The category includes documents which, though relevant, may not be necessary for the fair disposal of the case. It is fair to say that this category produces proportionately the greatest number of documents disclosed and to least effect.
4. **Train of inquiry documents**: these are the documents referred to by Brett LJ in the *Peruvian Guano* case.

In distinguishing these categories of documents, Lord Woolf sought to narrow the scope of the parties' disclosure obligations by limiting documentary discovery to what he defined as "standard disclosure" (IR at para. 23), which corresponds to categories (1) and (2) above. It is worth noting that "standard disclosure" explicitly excludes indirectly relevant, train-of-inquiry documents.

The Rules of Civil Procedure in England and Wales distinguish between "fast" and "multi-track" proceedings¹ and Lord Woolf's proposals in respect of documentary disclosure vary accordingly. In particular, whereas "fast track" proceedings are limited, absent exceptional circumstances, to standard disclosure, "multi-track" proceedings adopt standard disclosure as a starting premise and permit extended disclosure subject to judicial authorization. More specifically, in the event that parties to multi-track proceedings wish to extend the scope of documentary discovery beyond what is otherwise provided for under standard disclosure, they are obliged to apply to the court for an order authorizing a more expansive discovery process. According to Lord Woolf's recommendations, a wider ambit of documentary discovery, on a scale akin to that prevailing at the time of his two reports, would only be possible on the basis of a court order rendered by the presiding case management judge, setting out the appropriate scope of any additional disclosure as well as the applicable timing.

¹ The "fast track" appears to be analogous to the "simplified procedure" provided for in the *Federal Courts Rules*.

In his Final Report (Tab 2), Lord Woolf affirmed this solution and recommended that the term “disclosure” be used to refer to discovery and inspection.

Lord Woolf’s recommendations were ultimately adopted in Part 31 of the Civil Procedure Rules (Disclosure and Inspection of Documents), which are set out in Tab 4.

b) Rules Committee Recommendations

As stated in the Discussion Paper published on July 21, 1995 as part of the Federal Court of Canada’s Rules Revision Project, the Rules Committee was guided by the following animating principles in recommending changes to the rules of procedure (Introductory Working Paper [WP], TAB 6, at p. 22):

- to make the Federal Court more accessible to parties;
- to ensure that effect is given to the rights of parties to proceedings;
- to ensure respect for the fundamental procedural rights of the parties and third party interveners;
- to unify or, failing that, harmonize or simplify certain procedures;
- to facilitate and accelerate proceedings;
- to place more responsibility on the parties by involving them in the manner in which their cases proceed or in the process of settling or adjudicating their cases; and
- to maximize the efficiency of the judicial system, in terms of delays and the cost of the administration of justice.

Interestingly, in summarizing the philosophy guiding its approach to revising the rules, the Rules Committee, through Professor Denis Ferland who authored the working paper, explicitly invoked the development of rules relating to documentary discovery as an example where the principles listed above might conflict and where, therefore, reconciliation between competing goals would be required. According to Professor Ferland (WP at p. 21):

Before listing the specific goals of the comprehensive review of the *Federal Court Rules*, it is important to recall that harmony among these goals has in no way been achieved and that the challenge of mapping out specific procedural rules will no doubt lie in the reconciliation of legitimate but conflicting values and interests: for example, the development of rules relating to disclosure of evidence or discovery could raise conflicts between a concern for efficiency on the one hand, and on the other, the requirement of production of probative evidence.²

In the context of revising the rules governing documentary discovery, more specifically, the Rules Committee appears to have considered two basic recommendations to curtail the scope of discovery.

² In my view, the rules relating to documentary discovery require a balance between all of the goals listed above. Use items raised and reconciled by Ferland in presenting reconciliation in more neutral terms.

According to “Recommendation A,” the prevailing standard of discovery would be retained as the status quo, to be narrowed only to the extent that a party could demonstrate, to the satisfaction of the Court, that the conventional scope of discovery is oppressive or prejudicial. In determining whether the production of any documents would be oppressive or unnecessary, the Court would take into consideration all relevant factors including the usefulness of documents to the party seeking their production weighed against the time, expense, and difficulty to the party against whom production is sought.

By contrast, according to “Recommendation B,” which was modelled on Lord Woolf’s recommendations, the parties would be initially required to list in their affidavit of documents all relevant documents on which they rely or which to a material extent either undermine their case or support that of the adverse party. Any party may seek to make further documentary discovery by way of motion to the Court, which would consider all relevant circumstances in deciding whether to order additional discovery. Such circumstances include:

- 1) the issues in the case and the order in which they are likely to be resolved;
- 2) the resources of the parties; and
- 3) the cost of additional production of documents weighed against the benefit.

The basic difference between these two recommendations is that whereas the first option would retain the existing broad scope of documentary discovery subject to the ability of a moving party to demonstrate unfairness and/or prejudice, the second option would serve to automatically narrow the scope of discovery subject to judicial authorization to expand disclosure where necessary and/or justified.

In summarizing his recommendations regarding “Documents to be Produced on Discovery” tendered at the meeting of the Rules Revision Project held in February 1996, Professor Ferland stated his preference for Recommendation A over Recommendation B in the following terms:

En accord avec la recommandation A. L’objectif du procès civil étant la recherche de la vérité, la découverte la plus complète de la preuve avant le procès doit en principe être favorisée, à moins d’abus de procédure, qui doit être démontré par la partie qui désire empêcher un tel abus. La Règle devrait être rédigée de manière à conférer la discrétion judiciaire la plus large possible en cette matière, pour prendre en considération tous les facteurs pertinents et les circonstances particulières de chaque instance.

La recommandation B., avec le plus grand respect et en toute déférence pour les auteurs du rapport *Access to Justice* (Woolf Report), est de nature à favoriser de multiples interventions judiciaires, qui devraient être limitées à l’essentiel, selon les objectifs de la réforme globale.

Professor Ferland appears to have rejected Lord Woolf's proposed procedural approach to curtailing the scope of documentary discovery on the basis that it would require a heightened level of judicial intervention which, in his opinion, would run counter to the global aims of the procedural reform.

That said, however, it is significant that the text of Rule 222(2) of the *Rules*, which defines the term "relevant" for the purposes of the rules governing documentary disclosure, closely corresponds to Lord Woolf's definition of "standard disclosure" and the first two of the four categories of documents listed above:

222(2) For the purposes of rules 223 to 232 and 295, a document is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case.

Significantly, the language invoked in Rule 222(2) mirrors the limitation on the scope of discovery set out in Recommendation B, above, namely that parties list in their affidavit of documents: 1) documents on which they rely; 2) documents which to a material extent undermine their case; or 3) documents which to a material extent support the case of the adverse party.

The language of Rule 222(2) is also entirely consistent with that of its English counterpart, Rule 31.6 of the Civil Procedure Rules, which reads as follows:

- 31.6** Standard disclosure requires a party to disclose only –
- (a) the documents on which he relies; and
 - (b) the documents which –
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case; and
 - (c) the documents which he is required to disclose by a relevant practice direction.

Although Rule 31.6 does not refer to the concept of "relevance" in setting out what documents are subject to the parties' disclosure obligations, its effect to impose a similar limit on the scope of documents to be disclosed during the discovery process. Please refer to Tab 4 for the complete contents of Part 31 of the Civil Procedure Rules.

Taken together, it appears that although Professor Ferland may have rejected the procedure governing the disclosure of documents proposed by Lord Woolf, the definition of "relevance" set out in Rule 222(2) incorporates the substance of the limitations on discovery embodied in Lord Woolf's recommendations.

c) Documentary Discovery Under the Federal Court(s) Rules

It is worth underlining the changes to the *Federal Court Rules* by Sguyias et al. that were prompted by the 1998 amendments.

Prior to the reform of the *Rules* in 1998, Rules 447 to 453 governed the discovery of documents at the Federal Court (please refer to Tab 5). Most importantly, for our purposes, Rule 448 constituted the fundamental rule governing documentary discovery and served as the basis for establishing the operant test for relevance.

Although Rule 448 did not explicitly mention relevance, it served as the basis for the operant judicial test. As set out in the 1998 volume of *Federal Court Rules*, which reflects the pre-reform state of the law governing documentary discovery, Sgayias et al. characterized Rule 448 in the following terms (Tab 10 at p. 448):

Rule 448 sets forth the fundamental rule on discovery of documents that every party to an action shall file an affidavit of documents listing all documents that are relevant to any matter in issue. The test of relevancy is that which has been adopted in other jurisdictions, namely documents which are evidence upon any issue or which might directly or indirectly enable a party to advance its own case or damage its opponent's.

[Emphasis added].

Significantly, although the precursor rules do not define “relevant” for the purposes of documentary discovery, the scope of disclosure is broad, encompassing documents both directly and indirectly relevant to any matter in issue. It is worth noting that this test provides for a much wider scope of discovery than standards which confine discovery to documents upon which the parties intend to rely.

Rules 447 to 453 under the precursor rules correspond to Rules 222 to 233 under the amended rules. Sgayias et al. issued a supplement to the 1998 version of the *Federal Court Rules* which, among other things, summarized the salient changes to documentary discovery inaugurated by the amendments to the *Rules* (Tab 11 at p. 79):

In many respects, the new Rules are a reiteration of the former Rules. There are differences, the most notable of which is rule 222(2). The former Rules did not contain a definition of relevance, leaving its elucidation to the case law. The rationale for a definition of relevance is unclear. It is unlikely to resolve any dispute over the scope or application of the case law, and the new definition is arguably more narrow than the test which prevailed under the former Rules. Under the jurisprudence, a document was relevant where it either directly or indirectly advanced the case of one party or damaged that of its adversary, or the document could fairly be said to lead to a train of inquiry which might have either of these two consequences. The impact of the new definition and the application of existing jurisprudence will require judicial consideration.

The 1999 version of the *Federal Court Rules* recapitulates the exact quote cited above. In addition, under annotations specifically dealing with “Relevance,” Sgayias et al. cite *Peruvian Guano* as the first case.

It is also worth noting that, in keeping with Professor Ferland's emphasis on incorporating a mechanism to protect against unfair or prejudicial discovery practices, Rule 230 allows parties to apply to the Court to obtain relief from oppressive or vexatious discovery:

Sgayias et al. note that subsequent jurisprudence would be required to clarify what, if any, changes were prompted by the amendments to the *Rules* and, in particular, the import of the interpretive provision contained in Rule 222(2). Significantly, relevant case law on this question has been issued since the reform in 1998. In particular, the Federal Court of Appeal has effectively held that the broad test of relevance established under *Peruvian Guano* and affirmed in pre-amended Federal Court jurisprudence applies with equal force under the new rules. As such, indirectly relevant materials and so-called "train of inquiry" documents continue to be considered relevant for the purposes of conducting documentary discovery.

d) Relevant Case Law

It is worth noting that the first annotation under Rule 222 in Sgayias et al. is a reference to the *Peruvian Guano* decision.

The classic statement of the test of relevance set out by Brett LJ in *Peruvian Guano* case (*Compagnie Financiere du Pacifique v. Peruvian Guano Company* (1882) 11 QBD 55) is as follows (Interim Report, Tab 1 at para. 15):

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* - not which *must* - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences In order to determine whether certain documents are within that description, it is necessary to consider what are the questions in the action: the Court must look, not only at the statement of claim and the plaintiff's case, but also at the statement of defence and the defendant's case.

[Emphasis added]

More importantly for the purposes of this memorandum, two recent decisions of the Federal Court of Appeal, rendered subsequent to the amendment to the *Rules* in 1998, appear to explicitly approve the broad test of relevance set out by Brett LJ in *Peruvian Guano*: *Apotex v. Canada*, 2005 FCA 217 at paras. 15-16 (*per* Nadon, J.A., Rothstein and Sharlow, J.J.A. concurring); and *SmithKline Beecham Animal Health Inc. v. Canada*, 2002 FCA 229 at paras. 22, 24-31 (*per* Sharlow, J.A., Stone and Malone J.J.A. concurring).

The relevant excerpts of these two decisions are set out in full below. The full judgments are included as Tabs 13 and 14 in the accompanying binder of materials.

***Apotex v. Canada*, 2005 FCA 217 at paras. 15-16.**
(*per* Nadon, J.A., Rothstein and Sharlow, JJ.A. concurring)

¶ 15 As the issue before the learned Prothonotary was one of relevancy, I should indicate that the correct approach to that issue at the stage of discovery was enunciated by this Court in *Everest & Jennings Canadian Ltd. v. Invacare Corp.*, [1984] 1 F.C. 856, where Urie J.A., writing for the Court at page 2 of the decision, stated:

[...] The correct test of relevancy for purposes of discovery was, in our opinion, propounded by McEachern C.J. in the case of *Boxer and Boxer Holdings Ltd. v. Reesor, et al.* (1983), 43 B.C.L.R. 352 (B.C.S.C.) When, at page 359, he said:

It seems to me that the clear right of the plaintiffs to have access to documents which may fairly lead them to a train of inquiry which may directly or indirectly advance their case or damage the defendant's case particularly on the crucial question of one party's version of the agreement being more probably correct than the other, entitles the plaintiffs to succeed on some parts of this application.

¶ 16 We recently reaffirmed that test in *SmithKline Beecham Animal Health Inc. v. Canada*, [2002] F.C.J. No. 837, 2002 FCA 229. At paragraphs 24 and 25 of her Reasons for the Court, Madam Justice Sharlow wrote in the following terms:

[24] The scope and application of the rules quoted above depend upon the meaning of the phrases "relating to any matter in question between ... them in the appeal" and "relating to any matter in issue in the proceeding". In *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 (C.A.), Brett, L.J. said this about the meaning of the phrase "a document relating to any matter in question in the action" (at page 63):

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit

either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

[25] The "train of inquiry" test for documentary discovery was expressly approved by this Court in *Everest & Jennings Canadian Ltd. v. Invacare Corp.*, [1984] 1 F.C. 856, 55 N.R. 73, 79 C.P.R. (2d) 138 (F.C.A.), adopting the test from *Boxer v. Reesor* (1983), 43 B.C.L.R. 352, 35 C.P.C. 68 (B.C.S.C.). See also *Ikea Ltd. v. Idea Design Ltd.*, [1987] 3 F.C. 317, 13 F.T.R. 306, 16 C.P.R. (3d) 65 (F.C.T.D.) and *Oro Del Norte, S.A. v. The Queen* (1990), 35 F.T.R. 107, [1990] 2 C.T.C. 67, 90 D.T.C. 6373 (F.C.T.D.).

***SmithKline Beecham Animal Health Inc. v. Canada*, 2002 FCA 229 at paras. 22, 24-31.**

(*per* Sharlow, J.A., Stone and Malone JJ.A. concurring)

[...]

¶ 22 The Tax Court of Canada Rules (General Procedure) contain extensive and detailed rules for pre-trial disclosure of documents and oral examinations for discovery. The main provisions relating to the issues in this appeal read as follows (emphasis added):

DISCOVERY OF DOCUMENTS

List of Documents (Full Disclosure)

82. (1) The parties may agree or, in the absence of agreement, either party may apply to the Court for a judgment directing that each party shall file and serve on each other party a list of all the documents which are or have been in that party's possession, control or power relating to any matter in question between or among them in the appeal.

EXAMINATION FOR DISCOVERY

General

92. An examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not

entitled to subject a person to both forms of examination except with leave of the Court.

[...]

Scope of Examination

95.(1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relating to any matter in issue in the proceeding ...

[...]

¶ 24 The scope and application of the rules quoted above depend upon the meaning of the phrases "relating to any matter in question between ... them in the appeal" and "relating to any matter in issue in the proceeding". In *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 (C.A.), Brett, L.J. said this about the meaning of the phrase "a document relating to any matter in question in the action" (at page 63):

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may -- not which must -- either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

¶ 25 The "train of inquiry" test for documentary discovery was expressly approved by this Court in *Everest & Jennings Canadian Ltd. v. Invacare Corp.*, [1984] 1 F.C. 856, 55 N.R. 73, 79 C.P.R. (2d) 138 (F.C.A.), adopting the test from *Boxer v. Reesor* (1983), 43 B.C.L.R. 352, 35 C.P.C. 68 (B.C.S.C.). See also *Ikea Ltd. v. Idea Design Ltd.*, [1987] 3 F.C. 317, 13 F.T.R. 306, 16 C.P.R. (3d) 65 (F.C.T.D.) and *Oro Del Norte, S.A. v. The Queen* (1990), 35 F.T.R. 107, [1990] 2 C.T.C. 67, 90 D.T.C. 6373 (F.C.T.D).

¶ 26 The Tax Court has consistently applied the same test; see, for example, *Ouellet v. Canada*, [1994] 1 C.T.C. 2645, 94 D.T.C. 1315 (T.C.C.). In *Owen Holdings Ltd. v. Canada*, [1997] 3 C.T.C. 2286, 97 D.T.C. 380 (T.C.C.), the test was stated as follows at paragraph 29:

The party demanding a document must demonstrate that the information in the document may advance his own case or damage his or her adversary's case.

¶ 27 The judgment in Owen Holdings was varied on appeal to this Court, but the statement of the test was approved: Owen Holdings Ltd. v. Canada (1997), 216 N.R. 381, [1997] 3 C.T.C. 351, 97 D.T.C. 5401 (F.C.A.). Marceau J.A., for the majority, said this at paragraph 6:

... It is our opinion, therefore, that the learned Tax Court judge adopted the proper approach and his findings with respect to the documents in categories (i), (ii), (v) and (vi) should not be disturbed. His assessment that those documents, which did not tend to establish "legislative facts" but rather set forth the "opinions of writers," were so remotely related to the issues in controversy that they could not lead to a line of inquiry that could be of any use to the appellant, appears to us to be perfectly sound.

¶ 28 Isaac C.J., as he then was, dissented in part in the result, but he approved the "train of inquiry" test.

¶ 29 The cases cited above also establish that the question of whether a document or question "relates to" an issue in the case depends upon a reasonable interpretation of the pleadings, see particularly: Compagnie Financiere, supra; Boxer v. Reesor, supra; and The Queen v. Special Risks Holdings Inc., [1983] 2 F.C. 743, 46 N.R. 361, [1983] C.T.C. 36, 83 D.T.C. 5046 (F.C.A.).

¶ 30 In this case, the Tax Court Judge cited R. v. Stinchcombe, [1991] 3 S.C.R. 326 as the basis of his understanding of the test of relevance at the pre-trial discovery stage. This appears at paragraph 10 of his reasons:

On discovery the examining party may seek information and admissions which will assist it not only to defeat its opponent's case but also to advance the case which it seeks to put forward.

¶ 31 In my view, this statement of the test is substantially the same as the "train of inquiry" test and thus is correct. It remains only to consider the argument of SmithKline that the test has not been correctly applied in this case.

[Emphasis added].

Conclusion

There is an argument to be made that the purpose and effect of Rule 222(2) is to narrow the appropriate construction to be placed on the term "relevant" for the purposes of documentary discovery. In light of principles of statutory

construction, for example, the principle of effectivity prompts questions as to why the Rules Committee sought to introduce an interpretive provision if it only wanted to preserve the status quo. Moreover, relevant documents under Rule 222(2) are limited to those upon which a party relies, a narrower category of documents than those relevant to “any matter in issue” as per former Rule 448. There is an argument to be made that in narrowing the scope of relevant documents in this way, the Rules Committee effectively precluded indirect, train-of-inquiry documents from being included. However, it bears repeating that such interpretations of Rule 222(2) run counter to consistent Federal Court of Appeal jurisprudence carrying forward the pre-amendment approach to the determination of relevance into post-reform practice.