Civil Procedure
Winter Term 2025

LECTURE NOTES NO. 10

VIII. DISCOVERY (cont'd)

2. DOCUMENTARY DISCOVERY

Warman v. Wilkins-Fournier
2011 ONSC 3023 (Ont. S.C.J.)

This is an interesting illustration of the discovery rules in relation to production of e-records necessary for the plaintiff to identify and serve Statements of Claim on two anonymous parties that allegedly libelled him through comments made on a political web-site. Please read for the context.

Frangione v. Vandongen
2010 ONSC 2823 (Ont. S.C.J.)

Here the defendant sued by the plaintiff who allegedly received catastrophic injuries rendering him unemployable was successful in obtaining e-discovery of a number of computer records, including his Facebook account.

Master Pope:

> **[34] It is now beyond controversy that a person's Facebook profile may contain documents relevant to the issues in an action. Brown J. in *Leduc*, *supra*, at paragraph 23, cited numerous cases in which photographs of parties posted to their Facebook profiles were admitted as evidence relevant to demonstrating a party's ability to engage in sports and other recreational activities where the plaintiff put enjoyment of life or ability to work in issue.**
>
> **[35] It is also good law that a court can infer from the nature of the Facebook service the likely existence of relevant documents on a limited-access Facebook profile. (*Murphy*, *supra*; *Leduc*, *supra* at para. 36)**
>
> [36] The Facebook productions made to date by the plaintiff are admittedly relevant to the issues in this action. Thus I can safely infer having reviewed the photographs of the plaintiff interacting with presumably friends at a wedding and other public places, as well as

his communications with friends, that it is likely his privately-accessed Facebook site contains similar relevant documents. Although it is possible that the contents of his Facebook site may be used by the defendant to impeach the plaintiff's credibility, I am satisfied based on my review of the plaintiff's productions to date that its primary use will be to assess his damages for loss of enjoyment of life and his ability to work.

…

[40] The plaintiff argues that from a proportionality standpoint, given the abundance of medical evidence regarding the plaintiff's injuries, the plaintiff's computer documents are unnecessary and irrelevant. I would be extremely hesitant to exclude a body of evidence such as computer documents including photographs and communications such as are typically found on a person's Facebook site merely because there is another more credible body of evidence such as medical reports that will be called into evidence at trial on the same issue. Firstly, this motion is not brought at the trial stage – it is still in the discovery stage. Secondly, despite a production order made at the discovery stage, a trial judge will ultimately decide the relevancy of a document at a time when all of the evidence is before the court.

[41] For the reasons above, the plaintiff shall preserve all material on his Facebook website until further order of this court and produce all material contained on his Facebook website including any postings, correspondence and photographs up to and including the date this order is made.

3. EXAMINATION FOR DISCOVERY

29.2.03 (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;

(b) the expense associated with answering the question or producing the document would be unjustified;

(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;

(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

(e) the information or the document is readily available to the party requesting it from another source.

…

31.06 (1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, **any proper question relevant** to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,

(a) the information sought is evidence;

(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or

(c) the question constitutes cross-examination on the affidavit of documents of the party being examined.

Ontario v. Rothmans Inc.
2011 ONSC 2504 (Ont. S.C.J.)
("Proportionality')

Here Justice Perrell reviewed the law on examinations for discovery and cross-examinations generally and held:

> [120] In J.W. Morden and P.M. Perell, *The Law of Civil Procedure in Ontario* (1st ed.) (Toronto: NexisLexis, 2010), at p. 487 I describe the purposes of an examination for discovery as follows:
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> > The examinations for discovery provide an opportunity to define the issues that are contested and uncontested and to move forward in the proof or disproof of contested facts. In *Modriski v. Arnold*, [1947] O.J. No. 132 (C.A.), the Court of Appeal stated that the purposes of production and discovery are: (1) to enable the examining party to know the case he or she has to meet; (2) to enable the examining party to obtain admissions that will dispense with formal proof of his or her case; and (3) to obtain admissions that will undermine the opponent's case.
> >
> > In *Ontario Bean Producers Marketing Bd. v. W.G. Thompson & Sons* (1982), 1982 CanLII 2084 (ON SC), 35 O.R. (2d) 711 (Div. Ct.), the Divisional Court elaborated and extended the various aims of discovery. The Court noted the following purposes for examinations for discovery: (1) to enable the examining party to know the case he or she has to meet; (2) to procure admissions to enable a party to dispense with formal proof; (3) to procure admissions which may destroy an opponent's case; (4) to facilitate settlement, pre-trial procedure, and trials; (5) to eliminate or narrow issues; and (6) to avoid surprise at trial.
>
> …
>
> **[129] The case law has developed the following principles about the scope of the questioning on an examination for discovery:**
>
> **• The scope of the discovery is defined by the pleadings; discovery questions must be relevant to the issues as defined by the pleadings: Playfair v. Cormack (1913), 4 O.W.N. 817 (H.C.J.).**
>
> **• The examining party may not go beyond the pleadings in an effort to find a claim or defence that has not been pleaded. Overbroad or speculative discovery is known colloquially as a "fishing expedition" and it is not permitted. See Cominco Ltd. v.**

Westinghouse Can. Ltd. (1979), 1979 CanLII 489 (BC CA), 11 B.C.L.R. 142 (C.A.); Allarco Broadcasting Ltd. v. Duke (1981), 1981 CanLII 723 (BC SC), 26 C.P.C. 13 (B.C.S.C.).

- **Under the former case law, where the rules provided for questions "relating to any matter in issue," the scope of discovery was defined with wide latitude and a question would be proper if there is a semblance of relevancy… The recently amended rule changes "relating to any matter in issue" to "relevant to any matter in issue," which suggests a modest narrowing of the scope of examinations for discovery.**

- **The extent of discovery is not unlimited, and in controlling its process and to avoid discovery from being oppressive and uncontrollable, the court may keep discovery within reasonable and efficient bounds: Graydon v. Graydon (1921), 67 D.L.R. 116 (Ont. S.C.) at pp. 118 and 119 per Justice Middleton ("Discovery is intended to be an engine to be prudently used for the extraction of truth, but it must not be made an instrument of torture …"); Kay v. Posluns (1989), 1989 CanLII 4297 (ON SC), 71 O.R. (2d) 238 (H.C.J.) at p. 246; Ontario (Attorney General) v. Ballard Estate (1995), 1995 CanLII 3509 (ON CA), 26 O.R. (3d) 39 (C.A.) at p. 48 ("The discovery process must also be kept within reasonable bounds."); 671122 Ontario Ltd. v. Canadian Tire Corp., [1996] O.J. No. 2539 (Gen. Div.) at paras. 8-9; Caputo v. Imperial Tobacco Ltd., [2003] O.J. No. 2269 (S.C.J.). The court has the power to restrict an examination for discovery that is onerous or abusive: Andersen v. St. Jude Medical Inc., [2007] O.J. No. 5383 (Master).**

- **The witness on an examination for discovery may be questioned for hearsay evidence because an examination for discovery requires the witness to give not only his or her knowledge but his or her information and belief about the matters in issue: Van Horn v. Verrall (1911), 3 O.W.N. 439 (H.C.J.); Rubinoff v. Newton, 1966 CanLII 198 (ON SC), [1967] 1 O.R. 402 (H.C.J.); Kay v. Posluns (1989), 1989 CanLII 4297 (ON SC), 71 O.R. (2d) 238 (H.C.J.).**

- **The witness on an examination for discovery may be questioned about the party's position on questions of law: Six Nations of the Grand River Indian Band v. Canada (Attorney General) (2000), 2000 CanLII 26988 (ON SCDC), 48 O.R. (3d) 377 (S.C.J.).**

…

[159] The proportionality principle is a manifestation of the policy of frugality that led to the introduction of the simplified procedure to the Rules of Civil Procedure. To use a metaphor, the normal Rules of Civil Procedure are the Cadillac of procedure, an expensive vehicle with all the accessories. However, not all actions or applications require such an expensive vehicle, and a Chevrolet, a serviceable, no frills vehicle, will do just fine for many cases, and it will provide access to justice and judicial economy.

[160] Proportionality is a parsimonious principle. In Javitz v. BMO Nesbityt Burns Inc., 2011 ONSC 1322 at para. 28, Justice Pepall noted that the proportionality principle was introduced because the system of justice was under severe strain because cases were taking too long and costing too much for litigants. In the passage quoted by the Master from Chapter 5 of Lord Woolf's report, Lord Woolf said that his overall aim was to "improve access to justice by reducing the inequities, cost, delay, and complexity of civil litigation." In Abrams v. Abrams, 2010 ONSC 1928 at para. 70, Justice D.M. Brown, stated: "Proportionality signals that the old ways of litigating must give way to new ways which better achieve the general principle of securing the "just, most expeditious and least expensive determination of every proceeding on its merits."

Noble v. York University Foundation
2010 ONSC 399 (Ont. S.C.J.)
('relevance')

Master Muir:

14 **In deciding the issues on this motion I have applied the relevance test set out in Rule 31.06(1), as amended effective January 1, 2010. This test replaces the "semblance of relevance" test previously applicable to motions such as this.** While the examinations of Marsden and Marcus took place in May, 2008 and this motion was scheduled in December, 2009, it was not heard until January 15, 2010 after the Rules amendments came into force. The January 1, 2010 Rules amendments do not contain any transition provisions relating to the change from "semblance of relevance" to "relevance". Consequently, it is my view that the "relevance" test is applicable to this motion. This is also the view taken by Justice Belobaba in *Onex Corp. v. American Home*, [2009] O.J. No. 5526 (Ont. S.C.J.) in relation to the Rules amendments dealing with summary judgment.

15 In applying the relevance test I am mindful of the comments found in the *Summary of Findings and Recommendations of the Civil Justice Reform Project* led by the Honourable Coulter A. Osborne, upon which the January 1, 2010 Rules amendments are based. In particular I note the comments at part 8 of the Report dealing with discovery:

I agree with these views. The "semblance of relevance" test ought to be replaced with a stricter test of "relevance." This step is needed to provide a clear signal to the profession that restraint should be exercised in the discovery process and, as the Discovery Task Force put it, to "strengthen the objective that discovery be conducted with due regard to cost and efficiency." In keeping with the principle of proportionality, the time has come for this change to be made, which I hope in turn will inform the culture of litigation in the province, particularly in larger cities.

This reform is not targeted at lawyers who make reasonable discovery requests, but rather at those who make excessive requests or otherwise abuse the discovery process. Therefore, a change from "relating to" to "relevant" would likely have little or no impact on those lawyers who already act reasonably during the discovery process. Its effects will be felt by those who abuse discovery or engage in areas of inquiry that could not reasonably be considered necessary, even though they currently survive "semblance of relevance" analysis.

Ornstein v. Starr
2011 ONSC 4220 (Ont. S.C.J.)
('evidence', proportionality)

A child (plaintiff) needed surgery on a finger; a surgeon operated on the wrong finger. Shortly before the scheduled oral examination of the surgeon, counsel for the surgeon and hospital (defendants) admitted that the standard of care was breached by the surgeon and that this caused a second surgery. The defendants refused to put forward its witnesses for discovery on the question of damages. The surgeon appeared but would not answer questions.

Master Short:

Seven Words of Discovery

1. Q: Please state your full name for the record
   A: Joseph Auby Starr.

2. Q: And you are a doctor?
   A: I am.

3. Q: And do you have a specialty?
   A: Plastic surgery.

4. Q. And how long have you been carrying on as a plastic surgeon?

   Counsel: Don't answer that.

23 In my years in practice I do not believe I ever encountered an outright refusal to produce *any* witness for discovery. In this case counsel for North York sent a letter by facsimile on January 20, 2011, in response to an email confirming that he intended to proceed with the scheduled discovery of a representative of the Hospital:

Given the admissions contained in Ms. Findlay's letter dated January 19, we are unable to conceive any questions relevant to the remaining issues in this action that necessitate the discovery of the Hospital Representative.

Unless you are able to provide us specific, relevant issues that the Hospital Representative can reasonably be expected to have

knowledge of, we will not be producing the Hospital Representative for discovery on January 24, 2011.

24 In response, by email sent at 4:54 PM the same afternoon, Mr. Linden advised that the Plaintiffs required questions to be answered with respect to causation and damages alone. In the plaintiff's factum the following position is asserted:

6. The Plaintiffs are under no obligation to provide the defendants with a list of questions to be asked at discovery nor is the Plaintiff required to convince the Defendant of the relevance of any line of questioning prior to an examination for discovery. Simply because counsel for the Defendant could not "conceive any questions relevant to the remaining issues in this action" does not mean that such questions do not exist.

25 This seems a reasonable position in the circumstances of this case. I see no reason to refuse discovery while elements of causation and damages remain at large.

…

35 I accept the view of plaintiff's counsel set out in the written submissions before me:

16. It would be prejudicial to the Plaintiffs' to be forced to put all of their questions on the record when it is clear that they would all be objected to as the Defendant could then prepare answers to those questions with counsel in advance of the discovery.

17. The Plaintiffs' should not be barred from asking questions relating to the issue of damages simply because that same question could be interpreted to also go to the issue of liability/the standard of care.

18. In this case, Dr. Starr's observations and the observations of the attendant nurse relating to the condition of Sophie's hand might simultaneously go to damages and liability but this does not mean the Defendants can refuse to answer the questions. Some overlap is unavoidable and the same overlap will not prejudice the Defendants as they have already admitted a breach in the standard of care.

36 It is difficult to understand why both defendants have taken such a resistant position in a case where there appears to be no cogent reason for not admitting the liability apparently already acknowledged *ab initio* in the physician's dictated Day Surgery

Report.

…

70 When all is said and done my goal is to promote a fair and just system. If patients are proven to have been harmed as a result of negligent medical care (or it is admitted that this is the case) fairness must dictate that timely arrangements be made to compensate those patients in an appropriate and timely manner. I cannot imagine that any defendant would attempt to rag the puck in an attempt to exhaust the injured party's finances or spirit. Certainly such an approach would not accord in any way with my view of fairness.

71 Fairness and justice dictate the clear need for timely resolution of medico-legal matters. Regardless of the circumstances, medico-legal matters are stressful for all involved: physicians, other health care providers, patients and their families. I fail to see how the apparent tactics and strategy adopted in this case, "actively promote measures that respect the right to procedural fairness and encourage the timely resolution of such matters."

72 It has not been demonstrated to me that this approach could possibly "improve accessibility to justice and reduce the stress experienced by physicians and their patients."

73 After warning the defendant that the examination would be aborted and resort to a motion if the Doctor did not answer proper questions, his counsel continued to refuse to allow him to answer proper questions. The following exchange occurred between questions 14 and 19:

14. Q. In any event, Dr. Starr, when did you first meet the plaintiff, Sophie Ornstein?

Mr. Sutton: Don't answer that. Anything relating to care has been admitted.

15. Mr. Linden: Well, I haven't asked about care yet. I am going to ask about his observations of the condition of her hand before he performed the surgery.

Mr. Sutton: Don't answer that.

16. Okay. Let's just go off the record.

17. Mr. Linden: I am going to ask three more if you object to all of them, we are just going to stop, just go to court, and we will have a court order your client to answer questions he is supposed to.

Mr. Sutton: No. You can put the questions on the record and establish the relevance ...

18. Mr. Linden: No. I am going to ask three more questions.

Mr. Sutton: No. You can establish the relevance of your questions. If your question is relevant, I will allow him to answer. You haven't established the relevance of your question.

19. Mr. Linden: we are going to try three more and then we will call it a day.

Mr. Sutton: That is your choice.

20. Q. Sir, when did you first meet Sophie Ornstein?

Mr. Sutton: Don't answer that.

21. Q. Did you examine her hands at the time when you met her?

Mr. Sutton: Don't answer that

22. Q. Did you made any observations of the condition of her fingers when you first examined her?

Mr. Sutton: Don't answer that

Mr. Linden: Okay. That is enough.

74 In my view it is indeed enough. Enough to justify making the order sought with costs on a substantial indemnity basis, payable forthwith.

3. DISCOVERY OF NON-PARTIES

Hopkins v. Robert Green Equipment Sales Ltd.
2018 ONSC 998 (Ont. S.C.J. - Master)

Master Muir:

> [after reviewing a number of decisions respecting third party examination for discovery]
>
> **[6] The principles set out in these decisions can be summarized as follows:**
>
> - **the requirements of Rule 31.10 are cumulative and a party seeking such relief must satisfy both Rule 31.10(1) as well as each of the requirements in Rule 31.10(2);**
>
> - **there must be good reason to believe that the non-party has information relevant to a material issue;**
>
> - **before being entitled to an examination of a non-party, the moving party must establish that he has been unable to obtain the information he seeks from the other parties to the action as well as from the non-party he wishes to examine;**
>
> - **there must be a refusal, actual or constructive, to obtain the information from the other parties to the action, and the non-party, before the moving party will be able to meet the onus under Rule 31.10(2)(a); and,**
>
> - **if that onus is met the court may then look to Rule 1.04 to determine whether the court's discretion, as set out in Rule 31.10(1), should be exercised on the facts of each particular case.**

Ontario (Attorney General) v. Ballard Estate
(1995), 1995 CanLII 3509 (Ont. C.A.)

This is a case involving a demand by beneficiaries for documents from the estate trustees; the trustees resisted.

Per Curiam:

> In making the fairness assessment required by rule 30.10(1) (b), the motion judge must be guided by the policy underlying the discovery régime presently operating in Ontario. That régime provides for full discovery of, and production from parties to the litigation. It also imposes ongoing disclosure obligations on those parties. Save in the circumstances specifically addressed by the Rules, non-parties are immune from the potentially intrusive, costly and time-consuming process of discovery and production. By its terms, rule 30.10 assumes that requiring a party to go to trial without the forced production of relevant documents in the hands of non- parties is not per se unfair.
>
> **The discovery process must also be kept within reasonable bounds. Lengthy, some might say interminable, discoveries are far from rare in the present litigation environment. We are told that discovery of these defendants has already occupied some 18 days and is not yet complete. Unless production from and discovery of non-parties is subject to firm controls and recognized as the exception rather than the rule, the discovery process, like Topsy, will just grow and grow. The effective and efficient resolution of civil lawsuits is not served if the discovery process takes on dimensions more akin to a public inquiry than a specific lawsuit.**
>
> The motion judge was properly concerned about the ramifications of a production order in this case. Many litigants, especially those involved in complex commercial cases, find themselves in the position where non-party financial institutions are in possession of documents which are relevant to material issues in the litigation, and which those institutions cannot, or will not, voluntarily produce prior to trial. If this situation alone is enough to compel production during the discovery stage of the process, then production from and discovery of non-parties would become a routine part of the discovery process in complex commercial cases. It may be that it should be part of that process, but that is not the policy reflected in the rules as presently drafted.

In deciding whether to order production in the circumstances of this case, the factors to be considered by the motion judge should include:

-- the importance of the documents in the litigation;

-- whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the appellant;

-- whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;

-- the position of the non-parties with respect to production;

-- the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;

-- the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have an interest in the subject-matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation.

In addressing these and any other relevant factors (some of which were identified by the motion judge in his reasons), the motion judge will bear in mind that the appellants bear the burden of showing that it would be unfair to make them proceed to trial without production of the documents.

In our opinion, a consideration of some of these factors will require an examination of the documents as contemplated by rule 30.10(3). That rule provides in part:

30.10(3) . . . 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.

For example, in considering whether it would be unfair to require the appellants to wait until trial to obtain the documents, the number, content and authorship of the documents may be very important. Those facts could be ascertained only from an examination of the documents or perhaps from an examination of an appropriate summary prepared by those in possession of

> **the documents. Similarly, the importance or unimportance of the documents in the litigation may best be determined by an examination of them.**
>
> **We recognize that this process will be time consuming and will place an additional burden on the motion judge. We are satisfied, however, that in the circumstances of this case and considering the material filed on the motions, that an informed decision requires an examination of the documents. A decision made without reference to the documents runs the very real risk of being either over- or under-inclusive. No doubt, as the case management judge, the motion judge will have a familiarity with the case which will facilitate his review of the documents.**
>
> In the result, the appeal is allowed, the order made by the motion judge is set aside, and the matter is remitted to the motion judge for further consideration in accordance with the principles outlined above. The costs of this appeal and of the motion below are left to the motion judge.

5. THE DEEMED UNDERTAKING RULE

Unless information obtained on discovery is made public in a hearing, or subject of consent, or where the Court so allows, it cannot be used for any other purpose:

> 30.1.01.(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

Kitchenham v. AXA Insurance Canada
2008 ONCA 877 (Ont. C.A.)

The plaintiff was injured in a car accident. She sued (i) the other driver in tort, and (ii) her insurer who refused her disability benefits arising from injuries sustained in the accident. In the course of the tort action, the plaintiff was required to undergo a medical examination. She was provided a copy of that report as part of disclosure. Also, the defendant in the tort action filmed the plaintiff surreptitiously. The plaintiff was provided with a copy of the tape as part of disclosure.

The defendant in the second action sought production of the report and the tape as part of discovery. The plaintiff refused arguing that the deemed undertaking

rule prevented her from producing the report and the videotape. Ultimately the Court of Appeal held that the deemed undertaking rule applied to bar the production of the items but allowed the proceedings to continue in respect of R.30.01(8) ['f satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.'.]

Doherty J.A.:

(i) Who is Subject to the Deemed Undertaking?

...

26 An undertaking is a promise given by one party to another party to the lawsuit in exchange for obtaining something from that party. Thus**, in the discovery process, one party receives information from another party, and in exchange promises the other party that the information will not be used for any purpose other than the litigation at hand. The disclosed information flows in one direction, from the discovered party to the discovering party. The undertaking flows in the opposite direction, from the party obtaining the disclosure to the party giving the disclosure. That undertaking does not limit what the discovered party can do in the future with its own information. There is no reason for imposing an undertaking limiting future use of the information on the party who has suffered the burden of producing the information through compelled disclosure.** It is equally at odds with the accepted meaning of an undertaking to hold that parties who had no connection with the process in which the undertaking arose should, at some later time in some other litigation, find themselves bound by that promise or undertaking.

27 ... the rationale underlying the Rule, the language used in the Rule, and the jurisprudence of this court interpreting the Rule, all support an interpretation that is consistent with the way in which undertakings customarily work.

(a) Rationale underlying the Rule

28 Rule 30.1 came into force on April 1, 1996: O. Reg. 61/96, s. 2. It is a direct descendant of the common law implied undertaking doctrine recognized by this court in Goodman v. Rossi. The implied undertaking was recently described in these terms:

One such safeguard is the implied undertaking of confidentiality, which circumscribes the use that a party receiving discovery may make of the information it obtains. *Where the implied undertaking exists, the party in receipt of information is deemed to give an undertaking to the court that it will not use that information for any collateral or ulterior purpose unrelated to the litigation at hand.* [Emphasis added.]

Cristiano Papile, "The Implied Undertaking Revisited" (2006) 32 Advocates' Q. 190, at p. 190.

29 The common law implied undertaking, as developed in Canada and England, limits the use that the recipient of the compelled disclosure could make of information obtained by that disclosure. The implied undertaking did not bind either the party who provided the disclosure or strangers to the litigation in which the disclosure was made...

30 The implied undertaking promotes the due administration of justice in the conduct of civil litigation in two ways. First, it encourages full and frank disclosure on discovery by the parties. It does so by interdicting, except with the court's permission, the subsequent use of the disclosed material by the party obtaining that disclosure for any purpose outside of the litigation in which the disclosure was made. Second, the implied undertaking accepts that the privacy interests of litigants must, subject to legitimate privilege claims, yield to the disclosure obligation within the litigation, but that those interests should be protected in respect of matters other than the litigation: Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc., at paras. 23-27; Richard B. Swan, "The Deemed Undertaking: A Fixture of Civil Litigation in Ontario" (Winter 2008) 27 Advocates' Soc. J., No. 3, p. 16.

...

37 Two other features of the Rule demonstrate that it applies exclusively to the party or parties who obtain the evidence on discovery. Subrule (4) excludes from the deemed undertaking provision in subrule (3) a use "to which the person who disclosed the evidence consents". An outright exclusion from the deemed undertaking rule based on the unilateral consent of the disclosing party makes sense only if the Rule exists exclusively to protect the residual privacy interest of that party in the information it revealed on discovery. An exclusion from the deemed undertaking based on the disclosing party's consent is inconsistent with an interpretation of the

Rule that makes the disclosing party subject to the undertaking. On that reading, one subrule would make the disclosing party subject to the deemed undertaking, while another subrule would allow the disclosing party to escape the deemed undertaking, simply by consenting to the subsequent use. One can hardly be said to be bound by an undertaking if one's own consent can negate that undertaking.

38 Subrule (8) also assists in identifying the nature of the deemed undertaking rule. It provides that the court may order that the deemed undertaking in subrule (3) does not apply to evidence, or information obtained from it, "if satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence". Subrule (8) makes it clear that the party who disclosed the evidence through the compelled discovery process is the exclusive beneficiary of the protection afforded by the deemed undertaking. It is that party's privacy interests that can justify restriction on the use of information obtained through discovery outside of the litigation in which that information was obtained: see B.E. Chandler Co. v. Mor-Flo Industries Inc. (1996), 30 O.R. (3d) 139 (Ont. Gen. Div.), at p. 142.

...

(ii) Did the Plaintiff Obtain a Copy of the Videotape and the IME Through the Discovery Process?

47 The tort defendant conducted surveillance of the plaintiff and recorded that surveillance by way of videotape. A copy of that videotape was produced to the plaintiff on discovery. The plaintiff clearly obtained a copy of the videotape during discovery. The fact that she is the subject of that videotape is irrelevant. The plaintiff is bound by the deemed undertaking not to use the videotape except as permitted by the Rule. The tort defendant, and not the plaintiff, is the beneficiary of that deemed undertaking. The deemed undertaking protects any privacy interest the tort defendant may have in the use of a copy of the videotape outside of the tort action.

48 Similarly, the plaintiff obtained the IME during discovery in that it was produced to her by the tort defendant pursuant to Rule 33. As with the copy of the videotape, the plaintiff is bound by the deemed undertaking not to use the IME in another proceeding and the tort defendant is the beneficiary of that undertaking.

...

(iii) Does the Deemed Undertaking Prohibit Production of

Evidence on Discovery in a Subsequent Proceeding?

52 Subrule (3) proscribes use of evidence or information covered by the Rule "for any purposes other than those of the proceeding in which the evidence was obtained." The prohibition is drawn in very wide terms. Those terms are consistent with the scope of the common law implied undertaking that prohibited use for any purpose other than the conduct of the litigation in which the compelled disclosure occurred: Goodman v. Rossi, at pp. 374-75. The privacy rationale underlying the Rule also warrants extending the protection of the Rule to requests for disclosure of the information covered by the Rule in the course of discoveries in subsequent proceedings. Disclosure on discovery compromises the residual privacy interest of the party from whom the material was obtained by compelled disclosure in the earlier proceeding.

(iv) The Operation of Subrule (8).

56 Having concluded that the copy of the videotape and the IME were obtained by the plaintiff in the course of discovery in the tort action, and that their disclosure on discovery by the plaintiff in the subsequent benefits action would constitute a use of that evidence, it follows that the material is

subject to the deemed undertaking created by the Rule. None of the exceptions enumerated in subrules (4) to (7) apply. AXA can obtain the material either by getting the consent of the tort defendant to the plaintiff giving the material to AXA, or by obtaining an order under subrule (8) lifting the deemed undertaking as it applies to the copy of the videotape and the IME.

57 Subrule (8) identifies the two competing interests which must be considered on a motion under that subrule. On the one side stands the "interest of justice". On the other side stands "prejudice" to the "party who disclosed evidence". The former interest must "outweigh" the latter before the deemed undertaking will be held not to apply to the information in issue. In the context of subrule (8), the "interest of justice" refers to factors that favour permitting the subsequent use of the information. Where the motion arises in the context of a party who seeks to use the information in subsequent litigation, the more valuable the information to the just and accurate resolution of the subsequent litigation, the more the interest of justice will be served by permitting the use of that information.

> **58 The interests of the party who was compelled to disclose the information are the only interests that can justify maintaining the undertaking. My reading of subrule (8) is consistent with an interpretation of the Rule that recognizes the party who gave up the information as the sole beneficiary of the protection afforded by the Rule. It is also consistent with subrule (4), which provides that the deemed undertaking has no application if the party who disclosed the evidence consents to its use.**

Martin v Toronto Police Services Board
2023 ONSC 6191 (Ont. S.C.J.)

Associate Justice L. La Horey:

> [1] The plaintiffs and defendants bring competing motions with respect to the deemed undertaking rule. The plaintiffs David Martin and his mother Nancy Martin bring this action against the Toronto police in connection with Mr. Martin's arrest for break and enter. The criminal charges against Mr. Martin were dismissed after a preliminary hearing. The plaintiffs allege various wrongdoing against the police officers involved including negligent investigation, malicious prosecution and an unlawful search of the plaintiffs' residence.
>
> [2] The plaintiffs brought a motion for an order that the deemed undertaking rule does not apply and that the plaintiffs can utilize certain discovery evidence to pursue their existing complaint to the Office of the Independent Police Director ("OIPRD") and a contemplated criminal proceeding – a private criminal prosecution against two police officers who are not named defendants.
> ...
>
> [61] In my opinion, this is one of those exceptional circumstances in which the interest of justice, in this case police accountability, outweighs the prejudice to the defendants such that I exercise my discretion to grant leave to the plaintiffs to use the Show Cause Brief (in its redacted form) in the OIPRD complaint and the prospective private prosecution.
>
> [62] The defendants rely on the Longo case, where Justice Lococo decided that the interest of justice in the investigation into potential criminal conduct by the security guards and police did not outweigh the interests protected by the deemed undertaking rule.

> Longo is distinguishable from the case at bar in respect of the nature of the evidence in issue. In Longo the evidence was a private security video. In this case the evidence is a document that was prepared by a police officer in the course of his public duties, that was subject to potential disclosure by the Crown to Mr. Martin and is also available to the plaintiffs pursuant to an FOI request.
>
> [63] The nature of the evidence in this case, in respect of which leave is sought, is such that the prejudice to the defendants is diminished.
>
> [64] The defendants submit that in this balancing exercise, I should take into account that the plaintiffs have already breached the deemed undertaking rule. In my view, this does not tip the scales in the defendants' favour but remains part of the consideration on costs.

6. MEDICAL EXAMINATION

Obviously a court-ordered medical examination is a very intrusive investigatory obligation. Usually the medical examination if of the plaintiff in tort actions on the question of damages; sometimes the examination may relate to cause of injuries or even the need for a litigation guardian if a party lacks mental capacity. In most cases the arrangements are made on consent. Where a subsequent examination is sought, often there is a dispute requiring the party seeking discovery to bring a motion.

> **Courts of Justice Act**
>
> 105.(2) Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.
>
> **(3) Where the question of a party's physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.**
>
> (4) The court may, on motion, order further physical or mental examinations.

(5) Where an order is made under this section, the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence.

Rule 33

33.01 A motion by an adverse party for an order under section 105 of the Courts of Justice Act for the physical or mental examination of a party whose physical or mental condition is in question in a proceeding shall be made on notice to every other party.

33.02 (1) An order under section 105 of the Courts of Justice Act may specify the time, place and purpose of the examination and shall name the health practitioner or practitioners by whom it is to be conducted.
...

33.04 (2) The party to be examined shall, unless the court orders otherwise, provide to the party obtaining the order, at least seven days before the examination, a copy of,

(a) any report made by a health practitioner who has treated or examined the party to be examined in respect of the mental or physical condition in question, other than a practitioner whose report was made in preparation for contemplated or pending litigation and for no other purpose, and whom the party to be examined undertakes not to call as a witness at the hearing; and

(b) any hospital record or other medical document relating to the mental or physical condition in question that is in the possession, control or power of the party other than a document made in preparation for contemplated or pending litigation and for no other purpose, and in respect of which the party to be examined undertakes not to call evidence at the hearing.

...

33.06 (1) After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order.

...

Lovegrove v Rosenthal
[1997] O.J. No. 5408 (Ont. Gen. Div.)

The plaintiff sued for damages arising from a car accident. The nature of the harm was, inter alia, to her gastrointestinal system. The defendants sought an extremely intrusive independent medical examination of the plaintiff (seemingly to put pressure on the plaintiff to settle):

> (1) **Documentation of the frequency and volume of diarrhea under controlled conditions.** The confounding effects of prescribed drugs, non prescribed substances such as laxatives, food and drink which may induce or worsen diarrhea in this patient need to be eliminated by observation and laboratory testing. It is also important **to observe the stool output while the patient is fasted for 24 hours**, which can provide causes to the cause of the diarrhea. **These observations must be done with the patient's consent in an in-hospital, supervised setting.**
>
> (2) **Tests to determine the cause of the diarrhea. As described above, biochemical testing of stool to rule out laxative use is mandatory. The patient would also require a SeCHAT test, which involves the ingestion of a radiolabelled bile salt analog, and measurement of its retention by the body three days afterwards.** A normal study would rule out significant bile malabsorption as a cause of the diarrhea. If preliminary tests on the stool shows evidence of stool fact, a 72 hour quantitative stool collection for fat content with a test meal would be done to rule out fat malabsorption. These would also be done in a supervised setting, over 3-5 days. A possible structural lesion such as a small bowel stricture would mandate a barium X ray (small bowel follow through) for detection. The patient would also require a colonoscopy to rule out mucosal disease (structuring or inflammation). These are best done as an outpatient, as the requisite bowel preparation would interfere with the other inpatient studies described above.
>
> (3) **An assessment of the anorectal region for incontinence with a manometry study. If abnormal, further studies could be done to rule out structural damage to the anal sphincter.** This could be done as an outpatient or inpatient without disrupting the testing described above.

Kennedy J.:

25 The uses for which the purported IME in Hamilton postulated by the defendants in this case in my view are suspect.

26 I have some difficulty accepting the position that the defendants would like to assist the plaintiff in providing her with the benefit of definitive investigation.

27 The tests themselves are duplicitous in nature. A colonoscopy has already been performed and the results are available to the defendants.

28 Dr. Bovell's conclusion is that he suggested investigations which include the anorectal motility study are not vital to making the diagnosis.

29 The problem that the plaintiff is having with respect to bile re-absorption relates to the loss of the last two feet of the ileum which was removed with surgery following the accident. There is no doubt that the plaintiff is having a problem with re-absorption. The SECHAT test involves the ingestior of a radioactive material to which the plaintiff protests. The results of the tests can only establish the obvious. There is no good reason to expose the plaintiff to this procedure. The test is inappropriate in the circumstances. This case is distinguishable on the facts from the ruling in Carroll v. Wagg (1996), 6 C.P.C. (4th) 351 (Ont. Master), released August 16, 1996.

30 The court should not permit invasive tests to confirm what is obvious as part of an IME.

31 The hospital confinement would appear to be a form of forced confinement also in the guise of cross-examination. I cannot understand why the defence medical experts would not be satisfied with the plaintiff's report on the frequency of her bowel movement along with the reports to others offered in the extensive medical brief and future care reports which have been served by the plaintiff on the defendants. In my view the concerns of the plaintiff offered in opposition to the defendants' proposal are real and genuine. The proposed tests are indeed humiliating, painful and embarrassing. Travel and confinement associated with such an endeavour is tremendously inconvenient, unnecessary and unlikely to reveal any relevant information to the defence which is not already available.