Civil Procedure
Winter Term 2025

LECTURE NOTES NO. 11

VIII. DISCOVERY (cont'd)

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:**
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> - **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);**
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> - **there must be good reason to believe that the non-party has information relevant to a material issue;**
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> - **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,**
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> - **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.
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> **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.**
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> 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.
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> [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.
> ...
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> [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.**
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> (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.

IX. MOTIONS AND INJUNCTIONS

1. SIMPLE MOTIONS

Please familiarize yourself with **Rule 37** (procedure) and **Rule 39** (evidence) in respect of pre-trial motions, particularly: jurisdiction, service, motion records, and cross-examination on affidavits. The rules are straight-forward but please read the various provisions carefully.

The procedure on motions mimics that of Applications; the originating process is a Notice, evidence is in the form of affidavits and out of court cross-examinations, and the hearing is without oral evidence (unless the Motion Judge directs otherwise – rare except for Rule 20 motions).

***Some* common motions:**	**Rule**
Extend or abridge time.	3.02
Joinder of claims.	5.02
Add parties	5.03
Correct a party's name	5.04
Consolidation	6.01
Appoint Litigation Guardian	7.02(1.1)
Appoint representative for unascertained party	10
Leave to intervene as a party	13.01
Extend time for service of pleadings	3.02
Validate service	16.08
Remove lawyer as solicitor of record	15.04(1)
Set aside order noting party in default	19.03
Set aside default judgment	19.08
Exempt the action from mandatory mediation	24.1.05
Provide particulars	25.10
Strike out all or part of pleadings	25.11
Amend pleadings	26.01
Summary judgment	20.01
Determine question of law	21
Inspection of documents	30.04(5)
Production of documents from non-party	30.10(1)
Inspection of property	32.01
Notice of examination	31.02
Compel Answers	34.10
Medical Examination of a party	33.03
Directions for oral examination of a party	34.14
Taking evidence before trial	35.06
Grant Certificate of Pending Litigation	42.01