

RULE 30.1 AND THE APPLICATION OF THE DEEMED UNDERTAKING RULE

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Recently I faced a situation that led me to research the applicability of Rule 30.1 of the *Rules of Civil Procedure*, commonly known as the "Deemed Undertaking Rule". Specifically, the question turned on whether the use of an expert medical assessor's conclusions from a previous case could be used to impeach that expert at trial in a separate, unrelated action. His conclusions in the prior unrelated action were at complete odds with his conclusions in our action.

I started with the rule itself:

RULE 30.1 DEEMED UNDERTAKING

Application

30.1.01 (1) This Rule applies to,

- (a) evidence obtained under,
 - (i) Rule 30 (documentary discovery),
 - (ii) Rule 31 (examination for discovery),
 - (iii) Rule 32 (inspection of property),
 - (iv) Rule 33 (medical examination),
 - (v) Rule 35 (examination for discovery by written questions), and
 - (vi) Revoked.
- (b) information obtained from evidence referred to in clause (a).

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1).

Deemed Undertaking

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

Exceptions

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.

(5) Subrule (3) does not prohibit the use, for any purpose, of,

(a) evidence that is filed with the court;

(b) evidence that is given or referred to during a hearing;

(c) information obtained from evidence referred to in clause (a) or (b).

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11 (8) (subsequent action).

Order that Undertaking does not Apply

(8) If 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.

Emphasis added.

The most thorough treatment of Rule 30.1 and its history comes from master MacLeod in his August 12, 2004 decision in *Logan v. Harper*, a class-action proceeding. Plaintiffs' counsel was seeking relief from Rule 30.1 to permit sharing of documents between 41 parties in various actions. Master MacLeod reviewed the history of Rule 30.1 as follows:

The Deemed Undertaking and the Scheduled Actions

[9] Fundamental to an understanding of Rule 30.1 and the obligation of production and discovery confidentiality in Ontario is the decision of the Court of Appeal in *Goodman v. Rossi* (1995), 24 O.R. (3d) 359, 12 D.L.R. (4th) 613 (C.A.). In that decision Morden A.C.J.O. confirmed that the common law in Ontario recognized a **duty of confidentiality in documents produced under compulsion and confirmed that a deemed undertaking to the court supported the duty**. He went on to propose what the Rules committee might consider in drafting a specific rule in relation to both

production and discovery. Not surprisingly, given the position of the Associate Chief Justice as chair of the Rules Committee and the central role of the "Morden Committee" in drafting the modern rules of civil procedure, the views expressed in that decision carried much weight. Rule 30.1 was enacted in 1998 and it adopted much of the obiter in *Goodman v. Rossi*. In fact Rule 30.1 is a virtual codification of that decision.

...

[11] It is worth observing that codification in Rule 30.1 does not necessarily limit or define the only obligations of confidentiality that may exist at common law and certainly does not relieve parties from obligations they have voluntarily incurred. **The rule is concerned with circumstances in which parties to civil litigation will be deemed to have given an undertaking to the court.** Because it is an undertaking to the court and not merely to the other party, breach of that undertaking may constitute contempt of court and may also subject the party in breach to other remedies. There may be obligations of confidentiality that are not breaches of Rule 30.1 and for that matter there may remain other circumstances in which an undertaking to the court arises. There is for example a body of case law that suggests there may be a deemed undertaking in criminal litigation. See *Lang v. Crowe*, [1997] O.J. No. 1477, 10 C.P.C. (4th) 377 (Gen. Div.), *P. (D.) v. Wagg* (2002), 61 O.R. (3d) 746, [2002] O.J. No. 3808 (Div. Ct.) as varied (2004), 71 O.R. (3d) 229, [2004] O.J. No. 2053 (C.A.).

[12] The court in *Goodman* also addressed circumstances in which relief ought to be granted from the deemed undertaking. Morden A.C.J.O. did not favour automatic relief from the undertaking but he also recognized that such relief might frequently be necessary. **The power to relieve from the undertaking is now contained in rule 30.1.01(8) and it incorporates the balancing approach proposed in *Goodman*. If the interests of justice outweigh the prejudice to the disclosing party, the court may order that the deemed undertaking does not apply and may impose terms.**

[13] The court in *Goodman* favoured the proposition in *Carbone v. De La Rocha* (1993), 13 O.R. (3d) 355, [1993] O.J. No. 1113 (Gen. Div.) that the "process of this court cannot be or appear to be an instrument of the initiation of litigation not otherwise contemplated or part of the cause of action which disclosed the potentially new claim". The court also concluded that in many some injustice to the discovered party might have to be tolerated weighed against the greater injustice to the discovering party if he or she could not make use of the discovered documents [at p. 351 O.R.].

Emphasis added.

At first glance, Rule 30.1.01(3) appears to prohibit the use of unrelated medical examinations, as per Rule 30.1.01(1)(a)(iv). However, it was still open to us to argue that our fact scenario fell within the exception set out at Rule 30.1.01(6):

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.

Failing the application of the exception set out at Rule 30.1.01(6) above, we could still request an order that the Deemed Undertaking Rule does not apply, as per Rule 30.1.01(8):

(8) If 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.

Most of the case law interpreting the exception at Subrule (6) applied to discovery evidence from one action being used to impeach a witness in another action, as per the following cases:

1. *Antongiovanni v. Phung*, [2001] O.J. No. 4659 – Master Dash
2. *Hallstone Products Ltd. V. Canada (Customs and Revenue Agency)*, [2006] O.J. No. 78 – Master Dash
3. *Walker v. Baskin Robbins*, [2004] O.J. No. 1930 – Master Dash

All of the above cases allowed for an exception to the Deemed Undertaking Rule with respect to previous discovery evidence.

In one case, it was found that production of medical documentation from previous cases could be used to impeach a witness' credibility:

Kitchenham v. Axa Insurance, [2005] O.J. No. 1973 – Justice T.A. Heeney:

“Indeed, the structure of Rule 30.1.01 implies that disclosure must be made. As already noted, sub-rule 30.1.01(6) permits the use of such evidence to impeach the testimony of a witness in the present proceeding. Obviously, it would be impossible to make use of the evidence in that manner without having it disclosed in the first place.

“It is, therefore, ordered that the plaintiff shall produce a copy of the IME report of Dr. Clifford that originated in the tort proceeding.”

In *Wilson v. Quinn*, [2001] O.J. No. 4516 (Justice Festeryga), it was found that information in the accident benefits carrier's file was producible in the tort action pursuant to Rule 30.1.01(6).

In the February 12, 2003 Court of Appeal decision of *Tanner v. Clark*, [2003] O.J. No. 677 (Carthy, Abella and Gillese JJ.A.) it was found that evidence in a FSCO arbitration proceeding was not covered by the prohibition set out at Rule 30.1.01(3) and thus, was allowed into evidence.

Although the matter is not without some doubt, I concluded that Rule 30.1 was not designed to protect non-parties. In *Kitchenham v. Axa*, and *S.K. v. Lee* [2000] O.J. No. 3423 it was stated that the purpose of the Deemed Undertaking Rule is protection of privacy – an individual's privacy to keep his or her own documents to him or herself.

There was still one potential problem with utilizing *Kitchenham*: The judge in that case phrased 30.1.01(4) as suggesting that if the disclosed party has not consented to the use of the document they should perhaps be given notice of the application for leave so that they may assert. However, *Kitchenham* differed from our facts in that the disclosed party was a party to the actions.

In addition to the notion from *Kitchenham* that Rule 30.1 is designed to protect privacy, not information, *Tanner v. Clark* states that the Deemed Undertaking Rule is to protect the recipient of information, not the information itself. In *Tanner*, documents were allowed to be utilized because it was felt that administrative bodies cannot operate without any supervision.

After all this, the case ended up settling before this became an issue. Such is the life of the civil litigator!