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Disclosure of Discovery Information and the Principle of Implied Undertaking in Nova Scotia

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Introduction

In a recent unreported decision, the Supreme Court of Nova Scotia, Trial Division has confirmed that there is an implied undertaking of confidentiality which prevents participants in a discovery from using documents or information obtained through discovery for any purpose other than the proceeding in which the discovery took place. A breach of the implied undertaking by either counsel or client may result in being in contempt of court.

Background

In *Thompson v. Byrne et al* (S.H. No. 67729; unreported decision; February 3&4, 1992, digested at page 104 *infra*), a snow storm had caused the delay of witnesses arriving at the beginning of the trial and all counsel were waiting. A newspaper reporter approached one of the barristers and asked what the case was about. The barrister provided the reporter with his pre-trial memorandum which contained, among other things, summaries of the discovery evidence which had been elicited. This disclosure to the print media was brought to the court's attention and Mr. Justice Hilroy Nathanson held that the principle of implied undertaking exists in the Province of Nova Scotia. He granted an injunction restraining and enjoining any person having acquired information regarding the proceedings by reading the pre-trial memorandum from making any use of the material, either by way of publication or otherwise, until such time as the defence commenced its case on the theory that the defendants would then have an opportunity to correct any misconceptions contained in the pre-trial memorandum.

Mr. Justice Nathanson expressed his opinion as follows:

"I am persuaded by the material that has been placed before me that there is a principle of implied undertaking. The material is not binding upon me, but I am persuaded that such a principle has existed for some time in England and is now firmly established in the Province of Ontario and, probably, in other provinces of Canada. Nevertheless, I point out that there is an opposite view in the Province of British Columbia, and I am not without sympathy to the opinions that have been expressed in the British Columbia case or cases. The purpose of the implied

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on refrigeration equipment at a pickled herring plant (whose product was to be supplied on contract overseas) on the ground the equipment was used in the "manufacture or production of goods for sale." The contract stipulated that most of the processing occur at controlled cold temperatures. The defendant apportioned tax based on the time the equipment was used in the actual "transformation or conversion" of the product. *Held*, for the plaintiff, that (1) the tax exemption did not depend on the *extent* to which the equipment was used in the manufacturing process; and (2) since the contract required most of the process to occur under refrigeration, the use of a cold room was part of the "manufacture or production" of the product.

WILLS AND ESTATES

WILLS AND ESTATES - Interpretation - meaning of "survivors of my brothers and sisters" *Carter Estate (Re)*, S.T. 04014, Davison, J., 15 November 1991. **S326/11** ■ This was an application for the interpretation of a will. *Held*, that (a) "my home and farm property" included all the lands the testator owned at his death, except those which were the subject of other specific devises and (b) "the survivors of my brothers and sisters" meant those siblings of the testator alive at his death, not the heirs of a deceased sibling.

Disclosure of Discovery Information ... *Continued*

undertaking is to protect the litigant's privacy to the extent [consistent] with achieving the functions of discovery."

Balancing of Interests

The opposing interests which give rise to the principle of an implied undertaking are, on the one hand, the litigants' privacy interests and, on the other hand, the litigants' interest in full and frank disclosure on discovery. In British Columbia, the balancing of those interests has been resolved by requiring the party seeking protection to obtain an express undertaking of confidentiality at the beginning of or during the discovery, or to apply to the court for such protection (see *Kyuquot Logging Ltd. v. B.C. Forest Products* (1986), 30 D.L.R. (4th) 65 (B.C.C.A.)).

In Ontario, the balancing of those conflicting interests requires no such express undertaking or court application. The implied undertaking is an automatic, blanket protection on all discovery, whether documentary or oral, examination (see *Reichmann v. Toronto Life Publishing Co.* (1988), 28 C.P.C. (2d) 11 (Ont. H.C.)).

The two factors giving rise to the implied undertaking are the confidential nature of the document or information obtained during the discovery and the compulsion used in obtaining it. The scope of the implied undertaking has been expressed to preclude the use of evidence obtained in discovery for a "collateral or ulterior purpose". This appears to include any purpose other than use in the existing litigation. The implied undertaking binds the parties and their counsel for an indefinite duration.

Two English appellate decisions have entrenched the principle of implied undertaking in that jurisdiction (see *Riddick v. Thames Board Mills Ltd.*, [1977] 3 All E.R. 677 (C.A.); *Home Office v. Harman*, [1983] 1 A.C. 280, [1982] 1 All E.R. 532 (H.L.)). The American position however does not restrict the use of discovery by an implied undertaking of confidentiality but rather by order obtained upon the application of the person seeking the restriction. This is similar to the position taken by the British Columbia Court of Appeal.

Impact on Practice

In his article, *The Implied Undertaking in Ontario* (1990), 11 Adv. Q. 298, John B. Laskin reviews the origins and development of the implied undertaking as well as its potential application in settings other than discovery. At page 317 of his article, he makes a number of recommendations to members of the Bar to deal with the serious consequences of breaching the implied undertaking:

1. Clients should be advised of the restrictions on the use to which confidential and compelled information

may be put, and of the related sanctions if the restrictions are breached;

2. The advice should be written;

3. The advice should be provided both at the beginning and at the conclusion of the proceeding;

4. Opposing counsel should be contacted in writing to confirm the existence of an implied undertaking and that its scope is agreed to, as well as requesting for specific confirmation that counsel has made the client aware of the existence of the implied undertaking and the restrictions and penalties which it imposes.

Given that the principle of implied undertaking is now officially enshrined in this province, it may be prudent for members of the Bar to follow Mr. Laskin's recommendations or, at a minimum, agree with counsel at discovery to either refrain from any disclosure or permit disclosure subject to specific express undertakings for especially sensitive or confidential material. Otherwise, when participating in discoveries, you and your client are bound by the implied undertaking of confidentiality and disclosure of any of the information obtained for any purpose other than the litigation giving rise to the discoveries will expose you to contempt of court proceedings. ♦

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