Crown officials, the defendant was clearly entitled, on the basis of the pleadings, to discover the plaintiff within the parameters of the *Proceedings Against the Crown Act*. The idea of Crown immunity in civil litigation should now be considered totally anachronistic.

PRACTICE - Discovery - depositions as evidence at trial *Horne v. Industrial Estates Ltd. et al*, S.H. 73885, Goodfellow, J., 26 July 1996. S397/27 ■ This was an application by the plaintiff to tender discovery evidence on the basis that the witness, the doctor who had examined the alleged injuries which formed the basis of the action, was living in Colorado and was unavailable to testify due to the limited financial resources of the plaintiff. *Held*, denying the application, that there was no evidence that the doctor would not return to the province for trial, and in any event, he was available for further discovery by consent or alternatively on commission in Colorado. This rendered him "available in the trial". Furthermore, the defendant's right to cross-examine the plaintiff's expert witness is essential.

PRACTICE - Discovery of documents - expense of producing documents *Traverse v. Turnbull et al*, S.H. 94-109485, Nathanson, J., 31 October 1995. **S387/4** ■ This was an application by the defendants pursuant to Rule 20 for the discovery and inspection of documents. The documents in question were medical records at three Newfoundland hospitals. Those hospitals required payment of approximately $900 to make copies. The solicitor for the plaintiff indicated a willingness to provide copies to the defendants, provided they help bear the burden of the cost by paying a proportion of it. *Held*, granting the application without costs, that the burden for payment must rest upon the plaintiff as the party who is required by Rule 20 to provide the list of documents and true copies of documents, pending taxation of costs.

PRACTICE - Discovery of documents - implied undertaking not to use matter for ulterior or collateral purposes *Sezerman v. Youle*, C.A. 123780, Chipman, J.A., 26 April 1996. **S394/11** ■ This was an appeal from the decision of a Chambers judge to stay a defamation action on the basis of the implied undertaking rule. The appellant had commenced the defamation action based upon documents he requested and obtained from the respondent in discovery for a separate proceeding in which the appellant was the plaintiff. *Held*, dismissing the appeal, that the appellant failed to demonstrate with any degree of probability that he could have obtained the information

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DISCOVERY AND THE FORMULATION OF THE IMPLIED UNDERTAKING RULE IN NOVA SCOTIA

*by Kandace Terris**

Introduction

In their article "Disclosure of Discovery Information and the Principle of Implied Undertaking in Nova Scotia", (Vol. 18, No. 3, June 1992), Thomas P. Donovan and Marc J. Belliveau discussed the then recent case of *Thompson v. Byrne et al* (S.H. No. 67729; unreported decision; February 3 and 4, 1992). That case confirmed that there is an implied undertaking preventing participants in a discovery from using information obtained through that process for any purpose other than litigation of the action in which it is disclosed. However, the implied undertaking on discovery remained seldom discussed.

The implied undertaking rule has now come to the fore in Nova Scotia due to the Court of Appeal Decision of *Sezerman v. Youle* (C.A. No. 123780; April 26, 1996), which was written by Justice Chipman and concurred in by Justices Freeman and Bateman. The Court was asked to formulate the implied undertaking rule that should prevail in Nova Scotia.

In the course of his reasons, Justice Chipman did not rule on all aspects of the implied undertaking rule and commented that, "we should do no more than

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DISCOVERY AND THE FORMULATION OF THE IMPLIED UNDERTAKING RULE IN NOVA SCOTIA

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formulate the rule in terms adequate to deal with the case before us." He indicated the rule should be developed on a case by case basis. However, Justice Chipman conducted a review of Canadian and English case law on the topic and provided insight into the scope and limitations of the rule, the duration of the rule, as well as possible relief from the rule.

Background

The respondent/defendant Youle was a plaintiff in an action against Oz Optics Limited, a company of which the appellant/plaintiff, Sezerman, was the principal shareholder, officer and director. In that action, Youle alleged that Oz Optics had breached a loan agreement which provided Youle with the option of converting a loan to the company into shares. During the course of discovery examination in that action, Youle undertook to provide copies of correspondence he had with other shareholders of Oz Optics and also transcripts of telephone conversations he had with other shareholders. As a result, Youle produced a copy of a letter and a transcript of a telephone conversation between himself and another investor in Oz Optics.

As a result of production of the letter and transcript, Sezerman commenced a defamation action against Youle. After a defence had been filed and discovery examinations completed, the Ontario Court of Appeal case of *Goodman v. Rossi* (1995), 125 D.L.R. (4th) 613, was decided. In that case the plaintiff was terminated from her job and sued her employer for wrongful dismissal. The defendant produced a report on discovery and as a result the plaintiff commenced a separate defamation action. The defendant made a motion to have the action dismissed. The motion reached the Ontario Court of Appeal, where the action was stayed.

The *Goodman* case came to the attention of Youle's counsel and Youle applied to a Chambers Judge to stay the defamation action on the ground that its commencement constituted a breach of the implied undertaking rule. The Chambers Judge granted the stay. The Nova Scotia Court of Appeal upheld that decision.

The Rule

The appellant in *Sezerman v. Youle* acknowledged that an implied obligation to the Court regarding confidentiality of documents and materials produced by a party during the discovery process exists in Nova Scotia. Justice Chipman accepted that the implied undertaking rule as stated by Mr. John Laskin (as he then was) in an article entitled "The Implied Undertaking in Ontario" (1989-90), 11 The Advocates' Quarterly, applies in Nova Scotia. At p.298, Laskin stated:

In any event, recent decisions in Ontario appear to have made it clear that the following two propositions form part of Ontario law:

(1) . . .

There is an implied undertaking by a party to whom documents are produced that he or she will not use them for collateral or ulterior purposes; any such use of the documents is a contempt of court.

(2) There is an implied undertaking by a party conducting an oral examination for discovery that the information so obtained will not be used for collateral or ulterior purposes; any such use is a contempt of court.

Justice Chipman also discussed one of the leading English authorities on implied undertaking, *Riddick v. Thames Board Mills Limited*, [1977] 3 All E.R. 677 (C.A.). In that case, during discovery in a wrongful dismissal, arrest and false imprisonment action, a memorandum was produced on discovery and a defamation action resulted. Denning, M.R. stated that confidential information enjoyed no privilege from disclosure, the reason being public interest in discovering the truth so that justice could be done between the parties. Justice Chipman, at p.5 of his decision, quoted Lord Denning from p.687 of the *Riddick* case where he said:

The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party, or anyone else, to use the documents for any ulterior or alien purpose ... In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are

disclosed. They are not to be made a ground for comments in the newspapers, nor for bringing a libel action, or for any other alien purpose . . .

In discussing the *Goodman* case, *supra*, Justice Chipman made the following comments about the recognition of the implied undertaking rule and its basis:

It is based on recognition of the general right of privacy of a person respecting his or her documents. Intrusion resulting from discovery should not be allowed for any purpose other than that of securing justice in the proceeding in which the discovery takes place. (p.10)

Further, at p.13 Justice Chipman discussed the rationales for the implied undertaking rule:

The primary rationale for the implied undertaking rule is the protection of privacy and confidential information and the secondary rationale for it is that collateral use would inhibit full and frank disclosure. In considering limits or any exceptions to the rule, there must be balanced against these, the public interest in the full disclosure of and use of the truth. In any given case, the injustice resulting from the application of the rule must be balanced against that which would result from not applying it.

Scope and Limits of the Rule

At p.7, Justice Chipman considered the question of scope of the rule and again quoted Laskin at p.309 of his article where he states:

It is important to note that the implied undertaking prohibits much more than the actual use of the documents or transcripts themselves. It also protects against the use of their contents. In *Sybron*, it was held that the implied undertaking prohibits the use of any "information derived from the discovered documents whether it be information embodied in a copy or stored in the mind", unless it can be established that the information was obtained from a source independent of the documents.

In further discussing scope, Justice Chipman considered the *Goodman* case, *supra*, and quoted Morden, A.C.J.O. at p.11:

Moldaver, J. incorporated into his rule two other features that should be considered by the rules-makers: (1) the rule would cover only information that the receiving party could not otherwise have obtained by legitimate means independent of the litigation process, and (2) that the obligation would be in favour of the producing party only, not third parties.

After considering the *Goodman* case, Justice Chipman considered whether there should be such a limitation to the rule and whether the information in the case at hand fell within it. In so doing, Justice Chipman stated that:

Consideration should be given to introducing the concept of probability in formulating any exception to the rule based on non-confidentiality of the information obtained. I would view this as a feature for consideration by the rule makers, or by judges as the rule is developed on a case by case basis. (p.19)

Justice Chipman declined to use a "possibility" approach to decide whether information could be obtained by means independent of the litigation process, as such an approach would create too many exceptions to the rule and basically undermine it. He preferred a more common sense approach based on the "probability" of otherwise obtaining the information, based on the facts of the case. Justice Chipman went on to find that the appellant had failed to show that he could have otherwise obtained the information by legitimate means independent of the litigation process with any degree of reasonable probability.

The information in the *Sezerman* case, the transcript of a telephone conversation and copy of a letter, related to concerns expressed by one investor in a private company to another. In *Goodman v. Rossi* (1994), 21 O.R. (3d) 112, Moldaver, J. of the Ontario Divisional Court stated:

. . . not all information obtained through production or discovery is entitled to protection but only information which the receiving party could not otherwise have obtained by legitimate means independent of the litigation process. Such information, which I have labelled "private information", would include inherently confidential material such as sensitive financial data, customer lists and the like but it would not be restricted to that. (p.126)

In *Sezerman*, Justice Chipman found that the concerns expressed by Youle were not unlike sensitive financial data, customer lists and the like. The information was private.

The decision indicates that a party wishing to use information obtained on discovery, should analyse the situation to decide whether the information is outside the scope of the rule. This should be done by scrutinizing the facts of the case to determine how reasonably probable it would be for that party to find out the information by other legitimate means.

Duration of the Undertaking

With regard to the duration of the rule, Justice Chipman again cited the Laskin article which states that the party obtaining production remains subject to the terms of the undertaking. In England, in the case of *Home Office v. Harman* [1982] 1 All E.R. 532 (H.L.), the Court found that the undertaking continues to apply after the documents disclosed have been read in open court. This decision was subsequently reversed by an amendment to the Rules of the Supreme Court. There has been no such amendment in any Canadian province. In discussing the *Harman* case, Justice Chipman stated at p.9 of his decision:

The duty did not terminate when the document was read out in open court in the course of litigation in which it was produced because if that were so, full and frank discovery of documents before trial would be discouraged and the proper administration of justice would be impeded by the parties attempting to ensure that particular documents were or were not read out in court.

Justice Chipman was not prepared to follow the rule makers in England who had overruled the *Harman* decision. He found:

. . . the rationale of the rule as stated by Lord Keith in *Harman*, *supra*, and Denning, MR in *Riddick*, *supra*, to be so compelling as to generate a reluctance to impose qualifications and limitations upon it. (p.21)

He went on to say that the Court's inherent jurisdiction would allow lifting of a stay should circumstances make it unjust that it continue. A stay is always capable of being removed as a stayed action still subsists. Justice Chipman found that the stay was in place by virtue of a Chambers Judge's order and would remain so unless or until removed by an order of the Court.

This indicates that information subject to the rule may later qualify for relief from the rule, depending on the circumstances.

Relief from the Rule

In *Sezerman*, the appellant argued that relief should be granted from the implied undertaking because the respondent had consented to the collateral use of the disclosed materials, and because there were special circumstances under which the Court should grant leave to use the materials.

With regard to the issue of consent to collateral use of the disclosed material, the Court found that agreement between the parties that the two actions would be tried together and that documents produced in each action would be available for the purposes of the other, was made to expedite the two proceedings and could not be taken to be an informed consent on the issue. This was especially so because counsel did not recognise the existence of the implied undertaking rule until the decision in *Goodman* came to their attention.

Further, Justice Chipman found that:

Moreover, the undertaking being given to the court, it is anything but clear that a party could consent to it being dispensed with in the absence of leave of the court. (p.24)

Therefore, it is clear, that even when the discovered party consents to collateral use, the party making collateral use of the information may be subject to sanction by the court. However, if consent clearly exists, there may be no practical consequences.

Counsel may also seek leave of the Court to grant relief from the application of the implied undertaking rule if special circumstances exist. On this issue Justice Chipman quotes Morden, A.C.J.O. in *Goodman*, *supra*, where he states at p.632:

. . . the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery. (p.25)

The special circumstance argued in *Sezerman* was the late stage in the proceeding. The Court found that prejudice to the appellant, due to the late stage, was not shown. The Court also found that the trial of the original Oz Optics matter would probably resolve the issue underlying the defamation action. The apparent objective of the defamation action was to clear the appellant's name with the shareholder with whom Youle had been in contact. The Court found that the outcome of the Oz Optics action should settle that and that the merits of the defamation action would most likely be subsumed in the outcome. Therefore, the Court found that there were no special circumstances to give rise to any relief from the implied undertaking rule.

Another important factor which was pointed out in *Riddick, supra*, is that the Court should not appear to be an instrument of the initiation of litigation not otherwise contemplated. The Court in that case stated that it would be contrary to public interest and an abuse of the process of the Court.

Laskin suggests that in seeking leave other important factors are the extent to which those proceedings are connected with the proceedings in which the disclosure was made and use to which the material will be put.

Where leave is sought to use the material in other proceedings, an important factor is the extent to which those proceedings are connected with the proceedings in which disclosure was made. Where the two sets of proceedings involve the same or similar parties and the same or similar issues, leave will most readily be granted. That was the case, for example, in *Lac Minerals Ltd. v. New Cinch Uranium Ltd.*, where Mr. Justice Craig pointed out that the Ontario and the British Columbia actions both arose out of the same series of transactions and that all of the parties to the British Columbia action could have been parties to the Ontario proceedings but for the inability of the Ontario court to compel the submission of non-residents to its jurisdiction . . .

Also important is the use to which the party seeking leave wishes to put the material. Use for the purpose of related proceedings is regarded as a proper use consistent with the purposes for which discovery was made available and with the public interest in the administration of justice. Use to found an independent cause of action is however regarded with disfavour, and use for commercial or other purposes unconnected with litigation would presumably be even less likely to justify the granting of leave. (p.314)

Practice Advice

In their article, Donovan and Belliveau cite the recommendations from the Laskin article. These recommendations are worth repeating.

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 of the restrictions and penalties which it imposes.

In addition, before counsel or their client uses information obtained on discovery for any purpose other than litigation of the case from which the information came, it would be wise apply to a Judge in Chambers for permission to do so. Such application can be made either on the basis that the information probably could have been obtained through legitimate means independent of the litigation process (and is therefore outside the scope of the rule), or on the basis that the rule does apply and circumstances exist which justify granting relief from it. If such application is not made, counsel or their client may not only be subject to contempt proceedings, but also may be wasting time and money if such collateral use causes a subsequent action to be stayed.

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