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An Order for Directions is Not the Place to Exclude the Application of the Deemed Undertaking Rule

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In many estate litigation proceedings, the parties obtain an Order for Directions near the outset of the application. It is common in such Orders, particularly Orders obtained in Will challenges, to seek: production of documents in the hands of, and examinations for discovery of, non-parties (a "Third Party Evidence Order"). The most common types of evidence sought are: the file of the lawyer who drafted the Will and an examination of that lawyer; medical records respecting the testator; and the testator's banking records.

It is also common for an applicant to seek a provision in the Order for Directions that the 'deemed undertaking' not apply to the Third Party Evidence Order. The purpose of this note is to argue that the Order For Directions is not the place for the Court to order a 'waiver' of the deemed undertaking.

Rule 30.10 authorizes the Court to order production of documents from a third party, and *Rule* 31.10 provides for the examination for discovery of non-parties. However, *Rule* 30.1.01 (1)(a) provides that evidence obtained under *Rules* 30 or 31 is subject to the deemed undertaking. *Rule* 30.1.01(3) says that:

> 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.

Rule 30.1.01 does not:

(a) apply:

(i) if the person who disclosed the evidence consents to the further use of the evidence;[1]

(ii) to evidence that is:

(A) filed with the Court; or

[1] *Rule* 30.1.01(4).

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

(C) or to information obtained from evidence obtained through (A) or (B);[2]

(b) prohibit the use of evidence obtained to impeach the testimony of a witness in a separate proceeding.[3]

In 2008, Richard Swan surveyed the cases respecting the deemed undertaking rule and said that:

> Breach of the deemed undertaking may attract a variety of remedies, including a sanction for contempt, stay or dismissal of a proceeding, or an order refusing to permit amendments to pleadings. The remedy imposed by the court tends to be specific to the facts of the case and to be tailored to fit the particular circumstance of the breach in question.[4]

Giammanco v. *Zahoruk*[5] is a rare example of a case where the Court was asked to impose sanctions on an applicant to a Will challenge who breached the deemed undertaking rule. In that case, the Will challenger examined the lawyer who drafted the Will, and then sued him on the basis of the evidence he gave during his examination. The lawyer sought a stay of the negligence action. Mme. Justice Mossip did not grant the stay, but as a consequence of the breach of the deemed undertaking: (i) rejected the Will challenger's request to consolidate the Will challenge with the lawyer's negligence action, (ii) awarded the lawyer his costs of the motion, and (iii) invited the lawyer to bring a separate motion to stay the negligence action.

The Ontario Court of Appeal has set out the rationale for the deemed undertaking rule:

> The primary rationale for the imposition of the implied undertaking is the protection of privacy. Discovery is an invasion of the right of the individual to keep his own documents to himself. It is a matter of public interest to safeguard that right. The purpose of the undertaking is to protect, so far as is consistent with the proper conduct of the action, the confidentiality of the party's documents. It is in general wrong that one who is compelled by law to

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[2] *Rule* 30.1.01(5).

[3] *Rule* 30.1.01(6).

[4] R.B. Swan, *The Deemed Undertaking: A Fixture of Civil Litigation in Ontario* (Winter 2008) 28 Advocates' J. No. 3, [hereinafter "*Swan*"] at pgs.16-22.

[5] (unreported, April 2, 1998, Ont.Ct. (Gen.Div.) [hereinafter "*Giammanco*"]. Described in I. M. Hull, *The Deemed Undertaking Rule and Estate Litigation*, 18 E. T & P J 253.

> produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings…[6]

The Supreme Court of Canada has said:

> The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone…The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by the judicial order.[7]

A stranger to an estate's proceeding and who is asked to produce records will be concerned that the applicant not use those records to base a claim against him. This is felt keenly by lawyers who draft Wills and who may be faced with the type of claim that was made in *Giammanco*.

Third Party Evidence Orders may also expose the person producing the evidence to a claim that would have otherwise gone undiscovered. For instance, a lawyer's Will notes produced in a Will challenge may reveal that the testator instructed the lawyer to include a provision in the Will, which the lawyer omitted, directing a change in RRSP designations. The Supreme Court of Canada has recognized the "private right to be left alone with [one's] thoughts and papers, however embarrassing, defamatory and scandalous."[8] The purpose of the deemed undertaking rule, as set out by the *Kitchenham* and *Juman* decisions is to protect the third parties from exactly these sorts of incriminating disclosures.

An applicant may obtain relief from the deemed undertaking rule. *Rule* 30.1.01(8) provides that:

> If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed

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[6] *Kitchenham* v *AXA Insurance Canada* (2008), 94 OR (3rd) 276 at para. 31.

[7] *Juman* v *Doucette*, [2008] S.C.J. No. 8 at paras. 25-26. The Supreme Court of Canada continued that a secondary rationale for the deemed undertaking rule is that a third party who is security in his privacy will be more inclined to candidly produce documents when requested.

[8] *Juman* at para. 24.

> evidence, the Court may order [that the deemed undertaking rule] does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

How the Courts have exercised their discretion to relieve a party from the deemed undertaking rule depends on the circumstances of the case. In *Juman* the Supreme Court of Canada held that, "where discovery material in one action is sought to be used in another action with the same or similar parties, and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted."[9]

However, where the produced evidence is sought for an "extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained" then the Courts generally do not authorize production "in the absence of some compelling public interest."[10] The Courts have found there to be a strong public interest in cases where a doctor obtained a plaintiff's health records and sought to use them in a related professional disciplinary proceeding.[11] More recently, the Court gave relief from the deemed undertaking where the sought-after documents would be used to facilitate the possible settlement of claims involving losses suffered by "hundreds of individuals and corporations."[12] In those cases, the public interest outweighed the privacy interest of the entities from whom production was sought.

The time to bring a motion, under *Rule* 30.1.01(8) for relief from the deemed undertaking rule is after the documents have been produced, and not at the time the Order for Directions is made (ie: at the outset of the litigation). It will be difficult for an applicant to persuade the Court of the public interest in waiving the deemed undertaking rule before the applicant even knows what will be learned from the third party evidence: which documents or statements does the applicant want to use? For what purpose? What conditions, if any, should be put on the use of those documents? These issues can only be answered after production.

From the perspective of someone who represents lawyers who are the target of a Third Party Evidence Order, the deemed undertaking rule levels the playing field. In most types of litigation, the plaintiff usually does not see the defendant's documents before the commencement of the litigation. Generally, the plaintiff must first start the law suit, and take the risk that the defendant's documents or oral evidence will undermine his case and that he will face an adverse cost consequence. Without the deemed undertaking rule, Third Party Evidence Orders obtained at the outset of the litigation deprive lawyers of this procedural protection: the potential plaintiff can get the lawyer's

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[9] *Juman* at para. 35 . See also *Bluewater Health* v *Kaila*, [2012] O.J. No. 4387 (C.A.) at para. 11

[10] *Juman* at para. 36.

[11] *S.K.* v *Lee* (2000), 2.C.P.C. (5th) 325 (Ont. S.C.J.). See also *Swan* at para. 19.

[12] *Ontario Securities Commission* v. *Norshield Asset Management (Canada) Ltd.*, (2010), 100 O.R. (3rd) 410 (S.C.J)

file, decide whether to sue the lawyer for in relation to the existing dispute, and even scour the lawyer's file for unrelated claims. That would be an unjustified exception to the "private right to be left alone with [one's] thoughts and papers, however embarrassing, defamatory and scandalous." A prospective plaintiff to a lawyer's negligence claim arising out of a Will challenge should face the same risk as a plaintiff in any other type of litigation.

Third Party Evidence Orders are often necessary in estate litigation because the 'main' witness has died. In such cases the search for truth requires some infringement on the privacy rights of third parties in possession of relevant evidence. However, the legislature and the Courts created the deemed undertaking rule to ensure the minimum possible privacy violation. An early waiver of the protection of the deemed undertaking rule in an Order for Directions at the outset of an estates proceeding is not justified by the case law and can give rise to an unfair 'leg up' to prospective claimants against those third parties. If further use is sought of evidence obtained through a Third Party Evidence Order, the party wanting to do so should seek relief, under *Rule* 30.1.01(8), only after the evidence has been produced.

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